No. 07-1524

IN THE

Supreme Court of the United States

CARLOTA COPPER COMPANY,
Petitioner,

v.

FRIENDS OF PINTO CREEK, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NON-FEDERAL RESPONDENTS IN OPPOSITION

ROGER FLYNN*
WESTERN MINING ACTION PROJECT
P.O. Box 349
440 Main Street, #2
Lyons, CO 80540
(303) 823-5738

DEEPAK GUPTA
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Respondents

November 21, 2008

**Counsel of Record*

QUESTION PRESENTED

Whether the issuance of a permit for an open-pit mine that would discharge copper into Pinto Creek—a river already severely impaired from excessive copper pollution—was inconsistent with 40 C.F.R. § 122.4(i), an EPA regulation under the Clean Water Act.

DISCLOSURE STATEMENT

The non-federal respondents—Friends of Pinto Creek, Grand Canyon Chapter of the Sierra Club, Maricopa Audobon Society, and Citizens for the Preservation of Powers Gulch and Pinto Creek—have no parent corporations and no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS, AND RULES

MISCELLANEOUS

Blank Page

INTRODUCTION

Carlota Copper asks this Court to grant review of the court of appeals' interpretation of a particular EPA regulation. That regulation, 40 C.F.R. § 122.4(i), concerns whether, and under what circumstances, EPA may issue permits allowing the discharge of pollutants into already impaired waters, in the absence of schedules for bringing the waters into compliance with water-quality standards.

According to Carlota, the most significant reason to grant certiorari is that the court of appeals' interpretation of the relevant regulation conflicts with a single ruling from Minnesota's highest court. But the Minnesota case focused on a different part of the relevant regulation, under materially different facts, and so there is no conflict over the question presented among the state or federal courts. Carlota also attempts to create a conflict with one of this Court's cases, but that case did not even mention the regulation or the issue at hand.

If there is any lingering doubt about the petition's lack of certworthiness, it should be dispelled by this fact: Even EPA, the agency whose decision was overturned by the court of appeals, does not believe further review is warranted. EPA continues to agree with Carlota on the underlying dispute—concerning Carlota's proposal to construct a large open-pit mine that would discharge copper into a river already seriously impaired by copper pollution, without a schedule to bring the river into compliance with water-quality standards. Even so, EPA rejects the key premises of Carlota's petition, recognizing that Carlota's characterization of both the decision below and its practical consequences is greatly exaggerated. Contrary to what Carlota says, the decision below erects no per se barrier to new permits, and Carlota's specula-

tion about the decision's ramifications is premature at best.

EPA points out that this Court's intervention is unnecessary for another significant reason: If and when the agency believes it is necessary, EPA itself can amend the regulation to clarify its intentions. Indeed, court intervention at this point might well be counterproductive and could hamper agency deliberation. Absent a conflict among the lower courts, or some broader or more compelling legal issue, such matters are best left in the hands of the expert agency, which is in a better position to assess predictions as to the practical effects of its own regulations.

STATEMENT

A. Facts

This case concerns Carlota Copper's proposal to construct a new open-pit copper mine that would discharge dissolved copper, extracted using sulfuric acid, into Pinto Creek—a free-flowing desert river in Arizona that is already seriously polluted. As a result of historic mining activities, Pinto Creek suffers from excessive copper contamination and has been listed as "one of the nation's most endangered rivers due to threats from proposed mining operations." Pet. App. 3. Carlota's proposed mine would be located in the middle of Pinto Creek and would cover more than 3,000 acres, nearly half of which would be within the boundaries of the Tonto National Forest. *Id.* That area, including Pinto Creek and its riparian environments, is home to a wide variety of fish, migratory birds, and other wildlife, some of which are specifically protected. *Id.*

Carlota's proposed mine would involve constructing groundwater cut-off walls to attempt to block the flow of groundwater into the mine, as well as diversion channels

to route the stream around the mine, *id.*—a step that would itself create "significant" levels of additional pollution that have not yet been fully taken into account. *Id.* at 18-19. Carlota further proposes to "offset" the copper pollution that it concedes will result from its mining operations by reducing copper discharges from the abandoned Gibson Mine, located five miles upstream on a tributary of Pinto Creek. *Id.* at 10. However, as explained below, it is highly doubtful that such pollution reductions, even if successful, would affect water quality at the Carlota site, and there is no plan to reduce pollution sources immediately upstream from the site. *Id.* at 11 n.1, 18-20.

B. Regulatory Background

Designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), the Clean Water Act establishes distinct roles for the state and federal governments to reach those objectives. EPA must establish effluent limitations on individual discharges from point sources into navigable waters of the United States. 33 U.S.C. §§ 1311, 1314. Each state, subject to federal approval, must institute water-quality standards establishing water-quality goals for all intrastate waters. 33 U.S.C. §§ 1311(b)(1)(C), 1313. Through the National Pollutant Discharge Elimination System (NPDES), both EPA and the states may issue permits allowing point sources to discharge pollutants into water bodies, but they are prohibited from issuing an NPDES permit "when the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA," or "when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states." 40 C.F.R. §§ 122.4(a), 122.4(d).

The Act further requires states to identify polluted water bodies within their borders for which effluent limitations are not sufficiently stringent and to establish a systematic process to restore those water bodies. States must periodically submit to the EPA for approval a list of water bodies that do not meet water quality standards. 33 U.S.C. § 1313(d). The designated water bodies are known as "impaired" or "water quality limited," 40 C.F.R. § 130.10(b)(2), which means that they fail to meet water quality criteria for one or more parameters, including particular pollutants (such as copper).

Pinto Creek is on Arizona's list of impaired water bodies for copper. For impaired water bodies like Pinto Creek, the state or EPA must develop and implement a "total maximum daily load" (TMDL) to restore water quality. *See* 33 U.S.C. § 1313(d)(1)(C) (explaining TMDLs). The TMDL sets forth the total amount of a pollutant that an impaired water body can tolerate from all combined sources without violating water quality standards. 40 C.F.R. § 130.2(i).

The particular NPDES permitting regulation at issue in this case is 40 C.F.R. § 122.4(i). The first sentence of that regulation provides that "[n]o permit may be issued ... to a new source or a new discharger if the discharge ... will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i). The second sentence permits discharges into impaired waters that are already in violation of water quality standards only if two conditions are met: (1) the stream can handle the new discharge and still satisfy the TMDL (*i.e.*, there are sufficient remaining pollutant load allocations) and (2) specific plans or schedules are in place to ensure that the

stream will be brought back to health by achieving the applicable water-quality standard.[1]

C. Proceedings and Decision Below

After EPA issued an NPDES permit to Carlota, allowing discharges of copper into Pinto Creek, several environmental organizations, including the non-federal respondents here (Friends of Pinto Creek, Grand Canyon Chapter of the Sierra Club, Maricopa Audobon Society, and Citizens for the Preservation of Powers Gulch and Pinto Creek) filed a petition for review in the court of appeals, challenging the permit.

The court of appeals unanimously vacated Carlota's permit (Pet. App. 2) and concluded that it was invalid because there are no plans or schedules designed to bring Pinto Creek "into compliance with applicable water quality standards," as required by 40 C.F.R. § 122.4(i)(2). Pet. App. 12-16.

The court's analysis focused on the text of 40 C.F.R. § 122.4(i). Although the court devoted comparatively little attention to the first sentence of the regulation, it observed that the first sentence's "plain language" states "very clearly" that no permit may be issued to a new dis-

---

[1] The second sentence of the regulation provides:

> The owner or operator of a new source or new discharger proposing to discharge into a water segment that does not meet applicable water quality standards ... and for which the State ... has performed a pollutants load allocation [or TMDL] for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:
>
> (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
>
> (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

40 C.F.R. § 122.4(i).

charger if the discharge will contribute to the violation of water-quality standards. Pet. App. 10.

As to the argument that Carlota could "offset" its discharges by cleaning up the abandoned Gibson Mine, the court stated that "there is nothing in the Clean Water Act or the regulation that provides an exception for an offset when the waters remain impaired and the new source is discharging pollution into that water." *Id.* at 10. Moreover, the court found it "questionable whether there really is an offset" as an empirical matter (*id.* 11 n.1) because EPA had failed entirely to take into account the "significant" amounts of dissolved copper that would enter Pinto Creek from the diversion channels and cutoff walls—facts that "would be important in determining the extent of the pollutants contributed by Carlota that would be offset by the Gibson Mine remediation." *Id.* at 20-21.

Turning to the second sentence of section 122.4(i), the court observed that the regulation allows new-source discharges into impaired waters where a TMDL has been established and the proposed new discharger demonstrates that the requirements of *both* section 122.4(i)(1) and section 122.4(i)(2) are met. Pet. App. 11. Clause (2) of the regulation requires a permit applicant to demonstrate that existing discharges are subject to "compliance schedules" designed to bring the segment of the water body "into compliance with applicable water quality standards." *Id.* at 12-13. Rejecting contrary arguments by EPA and Carlota, the court held that "under the plain language of the regulation, compliance schedules are not confined only to 'permitted' point source dischargers, but are applicable to 'any' point source." *Id.* at 12.

Because the point-source dischargers into Pinto Creek were not subject to schedules to bring Pinto Creek into compliance with water-quality standards, the court held that the plain requirements of section 122.4(i)(2) had been violated and that the permit was invalid. *Id.* at 13. The court concluded that the regulation required a showing as to "how the water quality standard will be met if Carlota is allowed to discharge pollutants into the impaired waters," and that the showing had not been made. *Id.* at 16.

Carlota filed a petition for rehearing en banc. No judge requested a vote on whether to rehear the case en banc, and Carlota's petition was denied. *Id.* at 221.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Implicate A Conflict Over Interpretation of the Applicable EPA Regulation or Any Other Question of Law.

1. Carlota does not argue that this case implicates a conflict among any of the lower federal courts concerning the EPA regulation at hand, much less a circuit split on any broader issue of national significance. Rather, on Carlota's own account, the "[m]ost significant[]" reason for review (Pet. 14) is an alleged conflict over the interpretation of the applicable EPA regulation between the decision below and a single ruling from Minnesota, *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502 (Minn. 2007).

As EPA has already explained at length, there is no such conflict: *Annandale* "involved a different factual scenario and focused on a different part of the applicable regulation." EPA Br. 13. In *Annandale*, unlike here, the water body did not have a TMDL—a critical distinction. As a result, the court had no occasion to apply the second

sentence of section 122.4(i), the part of the regulation that was key to the decision below. Instead, *Annandale* focused extensively on interpretation of the phrase "cause or contribute to the violation of water quality standards" in the first sentence of the regulation, and never reached the second sentence. Although Carlota spends several pages of its reply brief parsing a paragraph of the decision below to divine whether it constitutes a holding or dictum concerning the first sentence of the regulation (Reply to EPA 1-6), it does not deny these fundamental differences between *Annandale* and the decision below.[2]

Nor does *Annandale* reveal any broader conflict over principles of agency deference. As EPA has pointed out, *Annandale* involved a *state* court's review of action by a *state* agency; in deferring to the Minnesota Pollution Control Agency, the Minnesota court relied on state case law and an applicable state statute. *See* Mehmet K. Konar-Steenberg, *In re Annandale and the Disconnections Between Minnesota and Federal Agency Deference Doctrine*, 34 Wm. Mitchell L. Rev. 1375, 1376 (2008) (explaining that "*Annandale*'s analysis differs from federal agency deference doctrine in at least three significant ways," each of which were potentially outcome-determinative). Carlota offers no response to this point, except to assert, without explanation, that Minnesota law on deference is "largely" the same as federal law. Reply to EPA 5. In any event, as explained below (at 10-12),

---

[2] Carlota also relies on an intermediate state-court decision from Virginia, *Crutchfield v. State Water Control Bd.*, 612 S.E.2d 249 (Va. Ct. App. 2005). That case, like *Annandale* and unlike the decision below, addressed only the first sentence of section 122.4(i) and held that the second sentence of the regulation was inapplicable to the facts because there was no TMDL. *Crutchfield*, 612 S.E.2d at 255.

this case presents no significant legal issues concerning agency deference.

2. Faced with the absence of any genuine conflict among the lower courts, Carlota conjures up a conflict between the decision below and this Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). But, as Carlota admits, *Arkansas* did not consider the issue of offset conditions and did not even mention, much less interpret, the EPA regulation applicable here, 40 C.F.R. § 122.4(i). Pet. 13, 20-22. That fact alone is sufficient to dispose of Carlota's claim of conflict.

Arkansas, moreover, required this Court to construe not particular agency regulations, but the Clean Water Act itself, under circumstances that implicated important issues of cooperative federalism: a dispute between two states over EPA's finding that discharges from a new source in one state would not violate the downstream state's water-quality standards. The discharges at issue were *de minimis* and "would not lead to a detectable change in water quality." *Arkansas*, 503 U.S. at 112. In that context, the Court rejected the view that the Act established a "categorical ban" on any discharge that would reach waters already in violation of water-quality standards. *Id.* at 108. Rather than erect such a ban, "which might frustrate the construction of new plants that would improve existing conditions," the Court held, "the Clean Water Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution." *Id.*

Carlota argues that the decision below conflicts with *Arkansas*'s recognition of EPA's "broad authority" under the Clean Water Act to alleviate existing pollution. Pet. 20-28. The simple answer to that charge is that the decision below never addressed or questioned the scope

of EPA's broad authority under the statute; it merely applied EPA's regulation to the facts of this case. The court held that, under EPA's own regulation, the agency *may* allow permits for new discharges into impaired water bodies, so long as the discharges are "subject to compliance schedules designed to bring the [water body] into compliance with applicable water quality standards." 40 C.F.R. § 122.4; *see* Pet. App. 12-13. Quoting *Arkansas*, the court of appeals expressly disclaimed a "complete ban" or "absolute ban" on new discharges. Pet. App. 13, 17.

Under the decision below, if schedules are developed, discharges may occur. The ruling contemplates that EPA will review proposed discharges, on a case-by-case basis, focusing on existing water quality, the pollution levels in the proposed discharge, and whether there is a plan to achieve the water-quality standard in light of other pollution sources. Carlota's claim that the court of appeals erected a virtual or categorical ban on discharges into impaired waters is a fiction. *See* EPA Br. 18 ("[T]he decision below does not virtually or categorically prohibit the permitting of new sources or new discharges to impaired water bodies under the CWA, and there is no conflict with *Arkansas*.").

II. The Decision Below Did Not Depart From Settled Principles of Agency Deference.

Attempting to dress up its dissatisfaction with the outcome below as a clash over broader questions of law, Carlota next asks this Court to grant review on the ground that the court of appeals failed to apply well-settled principles of deference to EPA's interpretation of its own regulation. Pet. 29-35. The petition recites the familiar standard: A court should defer to an agency's interpretation of its regulation unless the "plain lan-

guage" dictates otherwise. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945).

Under this Court's Rule 10, however, a petition is "rarely granted" when the asserted error consists of an alleged "misapplication" of a settled rule of law. The petition here fits that bill. Nothing in the decision below even remotely called into question longstanding rules of deference. Rather, the court of appeals applied precisely the standard urged by Carlota. The court repeatedly made clear that its interpretation was based on the "plain language" of the applicable EPA regulation (Pet. App. 11) and rejected EPA's position only to the extent that it was inconsistent with that plain meaning. *Id.* 9-17. To be sure, the court did not discuss the issue of deference or cite the cases discussed in Carlota's petition. Had the panel added a citation to *Auer* or *Bowles* to its discussion of the regulation, Carlota would have had no possible basis for complaint other than its disagreement on the merits. Surely this Court has more pressing business than to take a court to task for lack of a citation.

Even if there were some need to clarify aspects of the law on deference—and Carlota has identified none—the fact that the court of appeals relied on the "plain language" of the regulatory text makes this case a particularly inapt vehicle for fixing the precise level of deference owed to an agency's interpretation of its own regulation. *Cf. Edelman v. Lynchburg College*, 535 U.S. 106, 114 & n.8 (2002) (declining to address the precise level of deference owed to an agency interpretation of a statute that reflected the best view of the statute's plain meaning).

At bottom, Carlota's deference argument is nothing more than a repackaging of its disagreement with the

court's plain-meaning interpretation of the EPA regulation. That disagreement, however, does not bespeak a fundamental divergence in the legal rules governing agencies' authority to interpret their own regulations. It is instead the byproduct of a case-specific application of a particular regulation to a particular permitting decision. *See* EPA Br. 19-20 (concluding that deference issue here is "case-specific" and presents no "important federal question" worthy of review).

III. Carlota's Predictions About the Implications of the Decision Below Are Overblown and, In Any Event, Are Best Assessed By the Agency In the First Instance.

Lacking a conflict or a significant legal issue, Carlota and its *amici* resort to sweeping and unsupported predictions about the practical effects of the decision below. According to Carlota, the decision "imposes a virtual *de facto* moratorium on the issuance of NPDES permits for new source discharges into impaired waters," which will, in turn, reduce the incentives on dischargers to clean up polluted waters and limit the agency's discretion to offer such incentives. Pet. 37. The petition goes so far as to claim that the decision below will "make[] it difficult for the EPA and the states to approve new development projects" and thereby impede "the nation's demographic and economic growth." Pet. 39.

As discussed above, the premise underlying these predictions is itself wrong: The court of appeals imposed no categorical ban on permits for discharges into impaired waters and expressly disclaimed any such ban; it simply held that the relevant EPA regulation requires compliance schedules under certain circumstances. Indeed, the agency whose regulation is at issue does not agree with Carlota's "de facto ban" theory or the predic-

tions based on that theory. *See* EPA Br. 16 (stating that Carlota "exaggerates" by claiming that the decision's practical effect is a virtual, if not categorical, ban).

In any event, the speculation of Carlota and its *amici* is just that: speculation. It has been more than a full year since the court of appeals' decision in this case was handed down and no court, state or federal, has adopted or rejected the regulatory interpretation of the decision below, let alone the specter of a "categorical ban" that Carlota raises. There is no evidence that any of Carlota's predictions have come true.

Given that lack of evidence, this Court is not the institution best equipped to assess such speculation. In the absence of a conflict among the courts or an issue of broader legal significance, predictive judgments about the practical effect of an agency's regulations, and decisions about whether it is necessary to modify or clarify those regulations, are best left to the expertise of those agencies in the first instance, not to the courts. *Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A]genc[ies] must be given ample latitude to adapt their rules and policies to the demands of changing circumstances.").

As EPA points out, "to the extent that the Ninth Circuit's decision creates confusion, EPA may amend the regulation to clarify its intention." EPA Br. 20. That, in itself, is sufficient reason to deny Carlota's petition, or at the very least cause this Court to be "restrained and circumspect in using [its] certiorari power." *Braxton v. United States*, 500 U.S. 344, 348 (1991) (declining to decide issue that could be decided by agency with authority to "periodically review the work of the courts" and "make whatever clarifying revisions conflicting judicial decisions might suggest").

Finally, even if the question were otherwise worthy of review, this case is a particularly bad vehicle to explore the circumstances under which permits may be granted with "offset conditions" that purportedly "reduce net pollution" and "improve overall water quality." Pet. i, 35, 37. As the court of appeals recognized, it is "questionable whether there really is an offset" in this case at all. Pet. App. 11 n.1. At best, the Gibson Mine cleanup would reduce *one* source of excess copper discharges into Pinto Creek. But the court of appeals found that EPA had improperly ignored the other sources of excess copper and never developed any plan or schedule to reduce that pollution (Pet. App. 18-20)—in direct contradiction of the TMDL, which sets limits for those sources. In other words, even with the Gibson "offset," due to the lack of any plan or schedule to deal with the other sources, Pinto Creek will *still* be in violation of water-quality standards and the new Carlota mine discharges would make a bad situation worse. *See* EPA C.A. Br. 31 ("EPA does not contend that [water-quality standards] will be achieved before Carlota begins operations."). Far from reducing net pollution or improving water quality at the site, allowing Carlota's new copper discharges, without any plan to meet water-quality standards in Pinto Creek, would condemn the stream to a perpetually impaired condition. Thus, the factual premise of Carlota's question presented—that the "offset" conditions in this case would "improve overall water quality"—is demonstrably false.

* * *

In short, there is no need for this Court to exercise its certiorari jurisdiction to address an issue of regulatory interpretation that implicates no broader legal issues, has created no conflict among the lower courts, and

that can, if necessary, be addressed directly by the relevant regulatory body itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DEEPAK GUPTA
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

ROGER FLYNN
(Counsel of Record)
WESTERN MINING ACTION PROJECT
P.O. Box 349
440 Main Street, #2
Lyons, CO 80540
(303) 823-5738

Counsel for Respondents

November 21, 2008