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

PETITIONER'S REPLY TO BRIEF FOR FEDERAL RESPONDENT

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INTRODUCTION

The Federal Respondent argues that the Ninth Circuit "erred in concluding that the issuance of an NPDES permit to petitioner was inconsistent with 40 C.F.R. 122.4(i)." Res. Br. 12. The respondent nonetheless opposes the petition on two fundamental grounds. First, the respondent argues that the Ninth Circuit did not decide the meaning of the first sentence of the regulation, which involves the offset issue, and that its analysis contained only a "passing statement" and is "dictum." Res. Br. 14, 20. Second, the respondent argues that the Ninth Circuit, in construing the second sentence, which involves Total Maximum Daily Load (TMDL) allocations, did not categorically prohibit but instead conditionally allowed new source discharges into impaired waters. Based on these arguments, the respondent concludes that the Ninth Circuit decision does not conflict with the Minnesota Supreme Court's decision in *In re Cities of Annandale, et al.,* 731 N.W.2d 502 (Minn. 2007) or this Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992); does not, except in certain respects, conflict with the EPA's interpretation; and does not raise an issue of national importance.

On the contrary, the Federal Respondent misinterprets both the Ninth Circuit decision and its effect.

I. THE NINTH CIRCUIT'S INTERPRETATION OF THE FIRST SENTENCE CONSTITUTES A HOLDING AND IS NOT DICTUM.

Contrary to the Federal Respondent's argument, the Ninth Circuit held that the first sentence of the regulation prohibits discharges subject to offset conditions, and its analysis, although terse, was a holding and not dictum. Indeed, the non-federal environmental parties who initiated the action stated, in response to the petition for rehearing *en banc* below, that "[t]he Panel *held* that Carlota's discharge violates *both sentences* [of the regulation]." Petitioners' Response In Opposition To Carlota's Petition for Rehearing *En Banc*, 9 (emphasis added).[1] Presumably these environmental plaintiffs, and others, will view the Ninth Circuit decision the same way in any future litigation.

Similarly, the six *amici* briefs supporting the petition for writ of certiorari, submitted by major industry and water quality organizations, view the Ninth Circuit decision the same way. Amici Briefs of National Ass'n of Clean Water Agencies, *et al.*, 7-26;

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[1] The non-federal respondents also stated in their opposition to the petition for rehearing *en banc* that "[t]he Panel's decision correctly interpreted the plain meaning of this regulation to hold that, absent a plan to achieve water quality standards, a new discharge will not be allowed that will add more of a pollutant to a stream that already is in violation of the standard for that pollutant" (p. 1), and that "regardless of the Gibson 'offset,' the record demonstrates that Carlota's new discharges will still 'cause or contribute to the violation of water quality standards' at the location of Carlota's discharge" (p. 6).

National Ass'n of Home Builders, *et al.*, 12-15; Federal Water Quality Coalition, 20-24; Pacific Legal Foundation, *et al.*, 12-14; Mountain States Legal Foundation, 12-14; Arizona Mining Ass'n, *et al.*, 7-13.

Closer scrutiny of the Ninth Circuit decision yields no other conclusion. As their lead argument, the EPA and Carlota contended that the first sentence of the regulation did not prohibit Carlota's discharge because of the offset condition, as the EPA's Appeals Board had held. Pet. App. 164-170. Rejecting the argument, the court stated that the first sentence is "very clear" that a permit cannot be issued for a discharge that will "contribute to" water quality violations; that "EPA contends" that remediation of the Gibson Mine discharge will "offset the pollution"; and 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 impaired water." Pet. App. 10-11. Thus, the court plainly rejected the EPA's "conten[tion]" that Carlota's discharge does not "contribute to" violations because of the "offset" condition, stating that the first sentence contains no "exception" for an offset.[2]

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[2] The Federal Respondent argues that the Ninth Circuit "appeared to contemplate" that an offset could be taken into account because the court also stated that the amount of pollutants from Carlota's diversion channels "would be important in determining the extent of the pollutants contributed by Carlota that would be offset by the Gibson Mine remediation." Res. Br.

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After having rejected EPA's and Carlota's argument that the first sentence did not prohibit the discharge, the court then interpreted the second sentence, which the court stated is an "exception" to the first sentence's prohibition. Pet. App. 11. Obviously the second sentence's "exception" would be relevant only if the first sentence's prohibition applies.

The court explained why it was interpreting the second sentence's "exception" even though it had decided that the first sentence's prohibition applied. The court stated that the EPA had asked the Appeals Board "to assume, for purposes of this decision, that clauses (1) and (2) [of the second sentence] do apply"; therefore, the court stated, "we are concerned in this case with whether the EPA required Carlota to fulfill *all* the requirements of § 122.4(i), including clauses (1) and (2), in order to issue a permit to it as a new discharger." Pet. App. 13 (emphasis added). The court thus indicated that it was deciding whether Carlota's discharge met "all the requirements" of the regulation – both the first and second sentences – because the EPA had asked the Appeals Board to do so.

Thus, the Ninth Circuit decision clearly holds that the first sentence prohibits discharges subject to

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15 n. 4; Pet. App. 20-21. This passage indicates only that this information would be relevant in determining whether there actually is an offset, as the court made clear in stating that "[i]t is questionable whether there really is an offset." Pet. App. 11 n. 1.

offset conditions. The decision squarely conflicts with the Minnesota Supreme Court decision in *Annandale*, as well as the Virginia Court of Appeal's decision in *Crutchfield v. State Water Control Board*, 612 S.E.2d 249 (Va. Ct. App. 2005), which had held that the first sentence does *not* prohibit offset conditions or other conditions that protect water quality. Pet. 16-19. Although the Federal Respondent argues that *Annandale* can be distinguished because it deferred to agency interpretations under state law rather than federal law, Res. Br. 15, these deference principles are largely the same. More importantly, *Annandale* placed its decision on broader grounds; the Minnesota Court stated that the opposite view – later adopted by the Ninth Circuit – would "perpetuate the very outcome the Supreme Court sought to avoid with its decision in *Arkansas v. Oklahoma* – namely, the adoption of such a rigid approach that construction of new facilities that would improve existing conditions would be thwarted." 731 N.W.2d at 525.[3]

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[3] The Federal Respondent also argues that *Annandale* and *Crutchfield* are distinguishable because no TMDL had been adopted in those cases. Res. Br. 13-14, & n. 2. The *Annandale* Court, however, rejected any such distinction, stating that "the first sentence of 40 C.F.R. § 122.4(i) applies regardless of whether a TMDL has been completed. Even when a TMDL has been established, a permitting authority must still determine that the new discharge will not cause or contribute to a violation of water quality standards." 731 N.W.2d at 520-521.

The Federal Respondent's distinction of *Annandale* and *Crutchfield* is also inconsistent with the position of the EPA's regional office below, although the Federal Respondent does not mention or explain the inconsistency. The Federal Respondent's

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For the same reason, the Ninth Circuit decision conflicts with the EPA's interpretation that the first sentence does not prohibit discharges subject to offset conditions. Pet. 29-35. The Federal Respondent agrees that the Ninth Circuit failed to defer to the EPA's interpretation, but argues that the Ninth Circuit analysis is "dictum" and that any reviewing court "would need to consider and defer to the EPA's own reasonable interpretation." Res. Br. 20. The Ninth Circuit did not "defer," however, and its analysis is not "dictum."

Although the Federal Respondent argues that this Court's decision in *Arkansas v. Oklahoma* is distinguishable because the Court did not consider the regulation, Res. Br. 17, the Ninth Circuit decision nonetheless conflicts with *Arkansas* by holding that permitting agencies have narrow rather than broad discretion in deciding whether to approve new source discharges. Pet. 22, 28.

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distinction assumes that the second sentence prohibits discharges that do not contribute to pollution and are not prohibited by the first sentence. The EPA's regional office rejected this assumption, stating that if the discharge does not contribute to pollution and is not prohibited by the first sentence, the second sentence "exception" does not apply. Pet. 7 n. 7; Pet. App. 163 n. 101. The question whether the second sentence applies if the discharge is not prohibited by the first sentence is encompassed within the issues presented for review. Pet. 23 n. 10.

II. THE NINTH CIRCUIT'S INTERPRETATION OF THE SECOND SENTENCE SIGNIFICANTLY OBSTRUCTS THE ISSUANCE OF PERMITS TO NEW SOURCES FOR DEVELOPMENT OF THE NATIONAL INFRASTRUCTURE.

The Federal Respondent agrees that the Ninth Circuit erred in holding that the second sentence of the regulation requires that compliance schedules be adopted for non-permitted dischargers, Res. Br. 19, but argues that the decision does not categorically prohibit new source discharges because it allows such discharges "as long as there are compliance schedules." Res. Br. 17.

In fact, the Ninth Circuit decision requires new sources to meet several conditions – none of which appear in the regulation – that, in their practical effect, will prevent new sources from acquiring permits in all but exceptional circumstances. The *amici* briefs supporting the petition – representing some of the nation's largest industry groups, municipal entities, and water quality organizations – describe in substantial detail how the Ninth Circuit decision will obstruct the issuance of permits to new sources for development of the national infrastructure.

First, the Ninth Circuit decision prohibits new source discharges unless the permitting agency has issued *permits* for all point source dischargers. Pet. App. 12. The EPA's Appeals Board, however, stated the EPA has discretion in deciding whether to issue permits, and "does not have a mandatory duty to

track each unpermitted source and require its owner or operator to apply for a permit." Pet. App. 175. This Court has held that agencies have discretion in deciding whether to pursue enforcement actions, taking into account "whether agency resources are best spent on this violation or another," whether enforcement "best fits the agency's overall policies," and "indeed whether the agency has enough resources to undertake the action at all." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *see also Sierra Club v. Whitman*, 268 F.3d 898, 902-903 (9th Cir. 2001). The Ninth Circuit decision, however, *requires* the permitting agency to locate other dischargers and issue permits to them before approving new source discharges, rather than allowing the agency to exercise *discretion* in deciding whether to do so. Although the Federal Respondent argues that the Ninth Circuit merely imposed a *condition* on new source discharges rather than categorically *prohibited* them, Res. Br. 17, the practical effect of the condition is to make it substantially more difficult for new sources to acquire permits.

Second, the Ninth Circuit decision also prohibits new source discharges unless the permitting agency has adopted *compliance schedules* for dischargers not meeting water quality standards. Pet. App. 12. Since an impaired water body by definition does not meet water quality standards, the permitting agency would be required to adopt compliance schedules for most if not all dischargers. The agency would be required not only to "track" each unpermitted source and require

that the source apply for and acquire a permit, as the EPA's Appeals Board stated, Pet. App. 175, but also to "track" each discharger to determine whether it is meeting water quality standards, and if not, to establish a compliance schedule for the discharger. This condition makes it even more difficult for new sources to acquire permits.

Third, the Ninth Circuit held that if compliance schedules for point source dischargers are not sufficient, a "schedule to limit pollution" must be established for *nonpoint* sources of pollution. Pet. App. 16. As several *amici* have explained, this would require regulation of nonpoint sources of pollution that are not subject to NPDES regulation. *See, e.g.*, Amicus Br. of Federal Water Quality Coalition, 12-20. As the Eleventh Circuit has stated, nonpoint sources of pollution – "such as runoff from farmlands, mining activity, housing construction projects, roads, and so on" – "cannot be regulated by permits because there is no way to trace the pollution to a particular point, measure it, and then set an acceptable level for that point." *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). The Ninth Circuit decision thus requires regulation of nonpoint source pollution that cannot be easily traced, measured or regulated.[4]

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[4] The Federal Respondent argues that the Ninth Circuit merely required a "schedule," and not a "compliance schedule" *per se*, for nonpoint source discharges. Res. Br. 17 n. 5. Regardless of whether this is a practical distinction, the Ninth Circuit, in requiring "schedules" for nonpoint sources, was construing

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Finally, the Ninth Circuit held that the permitting agency cannot issue the permit unless it has adopted a "plan that will effectuate these [TMDL] load allocations." Pet. App. 11. The regulation on its face contains no such requirement.[5]

By imposing these far-reaching conditions, none of which appear in the regulation, the Ninth Circuit decision creates significant obstacles for new sources desiring to acquire NPDES permits. As the *amicus* brief of the National Association of Clean Water Agencies, *et al.* – a trade organization representing more than 300 of the nation's publicly-owned treatment works – argues (p. 7), the Ninth Circuit decision "will obstruct critical infrastructure projects that

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the "compliance schedule" requirement of the regulation. Pet. App. 16.

[5] The Federal Respondent argues that the Ninth Circuit merely concluded that the TMDL load allocations for Carlota's discharges were "theoretical," and that in most cases "the TMDL or permit fact sheet will provide the basis for a permitting agency's conclusion that there are sufficient remaining load allocations." Res. Br. 18 n. 5. On the contrary, the EPA's Appeals Board concluded that the TMDL for Pinto Creek "assigns waste load allocations to Carlota's outfalls" and therefore "provides strong evidence that 'there are sufficient remaining pollutant load allocations to allow for the discharge,'" Pet. App. 172-173, and the Ninth Circuit rejected the Appeals Board's conclusion because of the absence of a "plan" to implement the TMDL. Pet. App. 11-12. Thus, the EPA determined *actually* rather than "theoretically" that sufficient load allocations were available for this discharge, and the Ninth Circuit nonetheless rejected the EPA's determination because of the absence of a "plan."

improve water quality while providing wastewater services to a growing population." As the *amicus* brief of the Federal Water Quality Association argues (p. 5), the Ninth Circuit decision "will make it practically unattainable for new dischargers to obtain permits in waters subject to a TMDL, because such a discharger will now potentially be required to ensure that all sources of pollution, including nonpoint sources, must either be in compliance with water quality standards or be subject to a compliance schedule for a water segment."

III. THIS COURT SHOULD GRANT REVIEW NOTWITHSTANDING THAT THE CASE INVOLVES THE INTERPRETATION OF A REGULATION.

The Federal Respondent argues that the EPA could "amend" its regulation to overturn the Ninth Circuit decision, and that the Court "normally" does not review allegedly erroneous interpretations of regulations. Res. Br. 20. Although an agency can, in theory, always amend its regulation to overturn an erroneous judicial interpretation – just as Congress can amend a statute for the same purpose – the amendment of a regulation is not an easily performed task, and often fails simply because of the lack of consensus within the agency. There is no indication that the EPA intends to amend its regulation here. Indeed, the Federal Respondent's argument – which misinterprets the Ninth Circuit decision and its effect

– may provide a basis for the EPA *not* to amend the regulation.

The conflict between the Ninth Circuit decision and the Minnesota Supreme Court decision in *Annandale* – which the Federal Respondent declines to acknowledge – likely will cause lingering confusion and uncertainty in the law. Until the conflict is resolved, new sources – such as municipal water agencies desiring to replace old sewage facilities with new facilities, as in *Annandale* – will find it highly difficult to acquire permits for their projects. As the supporting *amici* argue, the Ninth Circuit decision makes it difficult to build the national infrastructure necessary to meet the nation's future growth needs.

This Court has reviewed cases involving the interpretation of a regulation, including cases *solely* involving such an interpretation. *E.g., Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994); *Lyng v. Payne*, 476 U.S. 926 (1986); Pet. 34-35. Indeed, this Court during the current term has granted review of environmental cases that raise issues, wholly or in large part, of the interpretation of a regulation. *Winter v. Natural Resources Defense Council*, No. 07-1239; *Alaska v. Southeast Alaska Conservation Council*, No. 07-990; *Coeur Alaska v. Southeast Alaska Conservation Council*, No. 07-984.

This Court's review is appropriate here because the Ninth Circuit decision has significant national effects by obstructing the development of infrastructure projects to accommodate future growth.

Although the Federal Respondent – based on its incorrect interpretation of the decision – takes a relatively modest view of the decision's effect, the *amici* supporting the petition, representing the regulated entities responsible for building the national infrastructure, take the more realistic view that the decision will significantly impede the nation's infrastructural development.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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