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 OF NON-FEDERAL RESPONDENTS

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INTRODUCTION

Although the briefs of the two respondents, the Environmental Protection Agency (EPA) and Friends of Pinto Creek, *et al.* (FOPC), oppose the petition,[1] the briefs diverge in two fundamental respects. First, the EPA argued that the Ninth Circuit *incorrectly* interpreted the EPA regulation, 40 C.F.R. § 122.4(i), and FOPC argues that the Ninth Circuit *correctly* interpreted the regulation. EPA Br. 12; FOPC Br. 10-12. Second, the EPA argued that the Ninth Circuit did not decide the validity of offset conditions, and therefore the decision does not conflict with the decisions of the Minnesota and Virginia courts. EPA Br. 13-14, 20. FOPC pointedly does not agree that the Ninth Circuit did not decide the offset issue, and argues instead that the state court decisions are distinguishable on other grounds.

In fact, the Ninth Circuit decided the offset issue, as FOPC tacitly acknowledges, and therefore its decision conflicts with the Minnesota and Virginia decisions, contrary to the EPA's argument. FOPC's argument that the decisions do not conflict for other reasons, and FOPC's other arguments in opposition to the petition, are misplaced for reasons explained below.

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[1] As used herein, the federal respondents' brief shall be referred to as "EPA Br.," the non-federal respondents' brief as "FOPC Br.," and the petitioner's reply to the federal respondents' brief as "Pet. Rep."

I. THE NINTH CIRCUIT DECISION CONFLICTS WITH THE MINNESOTA AND VIRGINIA DECISIONS, AND WITH THIS COURT'S DECISION IN *ARKANSAS v. OKLAHOMA*.

The EPA argued 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), and the Virginia Court of Appeals' decision in *Crutchfield v. State Water Control Board*, 612 S.E.2d 249 (Va. Ct. App. 2005), primarily because *Annandale* and *Crutchfield* decided only the meaning of the first sentence of the EPA regulation – which relates to the offset issue – and the Ninth Circuit did not decide the meaning of the first sentence; its analysis, the EPA argued, was "dictum." EPA Br. 13-14, 20.[2] Thus, the EPA's argument that the decisions do not conflict was primarily based on its argument that the Ninth Circuit did not decide the offset issue. We argued in our reply that the Ninth Circuit decided the offset issue and therefore its decision conflicts with the state court decisions. Pet. Rep. 2-6.

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[2] The first sentence of the regulation prohibits discharges that "cause or contribute" to water quality violations, and the second sentence – which applies where a Total Maximum Daily Load (TMDL) has been adopted – prohibits discharges into impaired waters unless certain conditions are met. 40 C.F.R. § 122.4(i); Pet. 4-5.

FOPC does *not* argue that the Ninth Circuit did not decide the offset issue, and makes no mention of the EPA's argument that the court's analysis of the issue was "dictum." Indeed, FOPC made the opposite argument in the post-decision phase below, stating that the Ninth Circuit "held" that offset conditions are invalid. Pet. Rep. 2. Thus, FOPC disagrees with the premise of the EPA's argument that no conflict exists. None of the briefs filed in this proceeding – by the petitioner, the amici, or FOPC – argues or suggests that the Ninth Circuit did not decide the offset issue, other than the EPA's own brief. Presumably FOPC, and others, may argue in future cases that the Ninth Circuit prohibited offset conditions, contrary to the EPA's view. Since the Ninth Circuit ruled that offset conditions are invalid, its decision conflicts with the Minnesota and Virginia decisions, which held that such conditions are valid.

FOPC argues that the Minnesota and Virginia decisions are distinguishable for two other reasons. First, FOPC argues that since the Minnesota and Virginia cases did not involve TMDLs, the Minnesota and Virginia courts did not analyze the meaning of the *second* sentence of the regulation, which involves TMDLs; therefore, the decisions are distinguishable because the EPA has adopted a TMDL here. FOPC Br. 7-8. The validity of Carlota's offset condition, however, depends on the meaning of the *first* sentence of the regulation, which prohibits discharges that "cause or contribute" to water quality violations. Since the Ninth Circuit interpreted that sentence

differently from the Minnesota and Virginia decisions, the decisions are in conflict concerning the validity of offset conditions, regardless of the existence of a TMDL. The Minnesota Supreme Court in *Annandale* clearly made this point, stating that "the first sentence of 40 C.F.R. § 122.4(i) applies regardless of whether a TMDL has been completed," and that "[e]ven when a TMDL has been established, a permitting agency must still determine that the new discharge will not cause or contribute to a violation of water quality standards." *Annandale,* 731 N.W.2d at 520-521. Thus, the decisions are in conflict concerning the validity of offset conditions.[3]

Second, FOPC argues that the Minnesota Supreme Court in *Annandale* applied state standards rather than federal standards in deferring to the agency's interpretation of the regulation, and that these standards are different. FOPC Br. 8. On the contrary, the state and federal deference standards, as spelled out in *Annandale* and by this Court, are virtually identical. *Annandale* defined the deference standard as follows:

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[3] We also argue that (1) if Carlota's discharges meet the requirements of the first sentence, the requirements of the second sentence do not apply, and (2) in any event Carlota's discharges meet the requirements of the second sentence, as the EPA's Appeals Board held below. Pet. App. 170-176; Pet. 23 n. 10; Pet. Rep. 4-6.

- The reviewing court must determine whether the regulation is "clear and unambiguous or is unclear and susceptible to different reasonable interpretations – ambiguous";
- Deference is not required if the regulation is "clear and unambiguous" but is required if the regulation is "unclear and susceptible to different reasonable interpretations";
- If the regulation is "ambiguous," the court must determine whether the agency interpretation is "reasonable"; and
- If the agency interpretation is "reasonable," deference must be accorded.

Annandale, 731 N.W.2d at 516. This Court has adopted a virtually identical deference standard under federal law. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842-843 (1984) (deference must be accorded to "reasonable" agency interpretations of "ambiguous" statutes); *Auer v. Robbins*, 519 U.S. 452, 457, 461-462 (1997) (similar standard as applied to regulations); *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (same); Pet. 29.

The *Annandale* Court also placed its decision on broader grounds, holding that an opposite interpretation of the regulation – the same as that subsequently adopted by the Ninth Circuit here – 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." *Annandale*, 731 N.W.2d at 525. Thus, *Annandale* not only deferred to the agency interpretation – unlike the Ninth Circuit – but also held, unlike the Ninth Circuit, that the agency interpretation is consistent with a proper construction of the regulation.

Turning to this Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), itself, FOPC correctly notes that the decision did not interpret the EPA regulation here. FOPC Br. 9. Nonetheless, *Arkansas* established an analytical framework for its interpretation, by holding that regulatory agencies have broad discretion in deciding whether to approve discharges into impaired waters. *See Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1375, 1382 (D.C. Cir. 1977); Pet. 20-22. As the *Annandale* Court stated, the *Arkansas* Court "sought to avoid" the "adoption of such a rigid approach that construction of new facilities that would improve existing conditions would be thwarted." *Annandale*, 731 N.W.2d at 525. Although FOPC argues that *Arkansas* simply resolved "a dispute between two states," FOPC Br. 9, *Arkansas* was more broadly concerned with determining whether discharges into impaired waters are permissible under the Clean Water Act, and held that the statute authorizes the EPA and the states to exercise "broad authority" in making these determinations. 503 U.S. at 107, 108. The *Arkansas* Court's broad construction of agency

discretion is inconsistent with the Ninth Circuit's narrow construction. Pet. 20-22.

II. THE NINTH CIRCUIT FAILED TO PROPERLY DEFER TO THE ENVIRONMENTAL PROTECTION AGENCY'S INTERPRETATION OF ITS REGULATION.

FOPC argues that the Ninth Circuit properly declined to defer to the EPA's interpretation of its regulation, because the court interpreted the "plain language" of the regulation and no deference is required under such circumstances. FOPC Br. 10-11.

The EPA regulation does not "plainly" prohibit discharges subject to offset conditions that improve water quality. Instead, the regulation prohibits discharges that "cause or contribute" to water quality violations. 40 C.F.R. § 122.4(i). A discharge subject to an offset condition that improves water quality does not "plainly" cause or contribute to water quality violations, and instead *reduces* such violations. FOPC's "plain language" argument is belied by the Minnesota and Virginia decisions in *Annandale* and *Crutchfield*, which interpreted the same regulation as the Ninth Circuit and reached an opposite conclusion. *Annandale*, 731 N.W.2d at 516-525; *Crutchfield*, 612 S.E.2d at 553-558.

The Ninth Circuit's interpretation of other parts of the regulation is, similarly, not supported by the "plain language." Although the EPA interpreted its regulation as requiring compliance schedules only for

permitted dischargers – because they are solely subject to the "compliance schedule" requirement of the regulations – the Ninth Circuit instead held that compliance schedules are also required for *non-permitted* dischargers. Pet. App. 12; Pet. 25. The Ninth Circuit even held that compliance schedules are required for *non-point source* dischargers not subject to NPDES regulation. Pet. App. 16; Pet. 26. FOPC pointedly does not mention the latter conclusion or attempt to defend it on "plain language" or other grounds.

Although FOPC acknowledges that the Ninth Circuit did not mention or cite any decisions requiring deference to agency interpretations of regulations, FOPC argues that the Ninth Circuit might have complied with the proper deference standards simply by citing the appropriate case authority. FOPC Br. 11. This Court's deference standards, however, as spelled out in *Chevron*, *Auer*, *Thomas Jefferson University* and other cases, require *actual* deference to agency interpretations of ambiguous statutes and regulations, and not simply citations of case authority. This Court recently reversed another Ninth Circuit decision in a Clean Water Act case that failed to apply proper deference standards, and did not suggest that the outcome would have been different if the proper case authority had been cited. *National Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2534-2536 (2007). This Court's deference standards require the substance of deference, not its form.

FOPC also argues that this case involves an alleged "misapplication of a properly stated rule of law" and that this Court "rarely" reviews such cases. FOPC Br. 11. On the contrary, the Ninth Circuit decision conflicts with a decision of a "state court of last resort," Supreme Court Rule 10, as well as this Court's decision in *Arkansas v. Oklahoma*; disregards this Court's deference standards as applied to agency interpretations of statutes and regulations; and decides an issue of national importance concerning the EPA's and the states' authority to authorize discharges into impaired waters – which consist of approximately 45% of the nation's waters. Pet. 9. Therefore, this case is appropriate for review.

III. THE NINTH CIRCUIT DECISION SIGNIFICANTLY OBSTRUCTS THE ISSUANCE OF PERMITS FOR NEW SOURCE DISCHARGES INTO IMPAIRED WATERS.

FOPC argues that the petitioner has exaggerated the effect of the Ninth Circuit decision, because the decision "erects no per se barrier to new permits" and imposes "no categorical ban on permits," and in any event the EPA can amend its regulations to prevent any harmful effects. FOPC Br. 1, 12-13.

First, although the Ninth Circuit decision does not *per se* prohibit discharges into impaired waters, the decision imposes such stringent restrictions that the practical effect is to prevent such discharges in all but exceptional circumstances. The Ninth Circuit

decision (1) prohibits discharges into impaired waters that are subject to offset conditions that improve water quality; (2) prohibits such discharges unless compliance schedules have been adopted for non-permitted dischargers; (3) prohibits such discharges unless compliance schedules have also been adopted, as necessary, for non-point source dischargers; and (4) prohibits such discharges unless the permitting agency has adopted a "plan" requiring other dischargers to comply with their own TMDL allocations. Pet. App. 11, 15-16; Pet. 12-13, 25-28. Although the EPA interpreted its regulation as imposing *none* of these requirements, the Ninth Circuit held that the regulation imposes *all* of them. As the petitioner and amici have argued, the combination of these Ninth Circuit-imposed requirements – none of which appear on the face of the regulation – makes it substantially more difficult for new sources of development to acquire permits to build the infrastructural projects necessary for the nation's future growth needs. *Id.*

Second, an agency can always amend its regulation to avoid the harmful effects of a judicial interpretation – just as Congress can amend its statutes for the same purpose – but the availability of this amendatory process should not prevent this Court from reviewing a lower court decision that incorrectly interprets a regulation, where, as here, the lower court's interpretation conflicts with state court decisions and the agency's own interpretation, and concerns an issue of national importance. Moreover, the amendment of a regulation is a complicated and

uncertain process, and agencies do not always amend their regulations even when there are justifiable reasons for doing so. Chief Justice Roberts observed in another recent Clean Water Act case that the federal regulatory agency failed to amend its regulations to conform to this Court's interpretation of its authority, and instead "chose to adhere to its essentially boundless view of the scope of its power." *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring). Indeed, the EPA's argument here – that the Ninth Circuit did not decide the offset issue and therefore its decision has relatively modest effects – indicates that the EPA may *not* amend its regulation. The national industries that plan discharges into impaired waters – the mining industry, the home building industry, municipal waste dischargers, and others – are entitled to certainty concerning the national rules governing their discharges. Since the Ninth Circuit decision creates uncertainty and the EPA apparently does not plan to provide clarity, this Court should review this case notwithstanding the availability of the amendatory process.

IV. THIS CASE IS A PROPER VEHICLE FOR REVIEW.

Finally, FOPC argues that this case is a "particularly bad vehicle" to address the issues presented for review, because Carlota's discharges will not improve water quality and instead will "make a bad situation

worse" and will "condemn the stream to a perpetually impaired condition." FOPC Br. 14.

FOPC's argument is both wrong and inexplicable. The EPA's Appeals Board determined that the offset condition requiring Carlota to remediate pollution at an upstream abandoned mine would result in a "significant improvement" of the creek's water quality, because the amount of the remediated upstream pollution "far exceed[s]" the amount of Carlota's own pollution. Pet. App. 122, 124; Pet. 6. Indeed, the EPA permit *requires* Carlota to remediate pollution at the upstream mine "equal to or greater than" its own pollution,"[4] and thus Carlota would violate its permit if the offset condition did not improve, or at least prevent impairment of, water quality; hence, the Ninth Circuit's unsupported conjecture that "[i]t is questionable whether there really is an offset," Pet. App. 11 n. 1; FOPC Br. 14, is not only wrong but also irrelevant. Further, the State of Arizona has certified that Carlota's discharges will meet Arizona's water quality standards. Pet. App. 42, 44 n. 21; Pet. 6-7. Since Carlota's discharges will improve water quality and meet Arizona's water quality standards, FOPC's argument that the discharges will make matters "worse" and "condemn the stream to a perpetually

[4] The EPA permit requires that Carlota "must perform reclamation work which will result in a reduction of copper loadings into Pinto Creek from upstream sources equal to or greater than the projected copper loadings expected through discharges." Petitioner FOPC's Excerpts of Record, p. 130.

impaired condition" is manifestly incorrect. These effects would be more likely to occur if the permit were denied and the remediation did not take place. Carlota's permit requires it to mitigate and remediate the impacts of its operations on the environment, as the Clean Water Act intended.[5] Therefore, this case is an appropriate vehicle for this Court's review.

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[5] FOPC incorrectly states that Carlota's mine "would discharge dissolved copper" after extraction "into Pinto Creek," and that Carlota's remediation of the Gibson Mine "would reduce *one* source of excess copper discharges into Pinto Creek" but ignore "other sources of excess copper." FOPC Br. 2, 14 (original emphasis). On the contrary, the EPA's Appeals Board determined that Carlota plans to construct diversion channels and cutoff walls that reroute Pinto Creek around Carlota's mine and prevent the discharge of mining waste from Carlota's mining operations into the creek. Pet. App. 38. The Appeals Board also determined that Carlota plans to build an outfall that will prevent mining debris from reaching the creek during storm periods, except during once-a-century storms lasting 24 hours. *Id.* at 38-40, 119-126. To offset the highly infrequent pollution caused by discharges during these once-a-century storms, the EPA imposed the offset condition requiring Carlota to remediate pollution from the Gibson Mine, which is historically the main source of pollution of Pinto Creek. *Id.* at 120. The Appeals Board determined that the "partial remediation of the Gibson Mine will offset any discharges from Carlota's facilities," *id.*, and will result in a "significant improvement" of the creek's water quality. *Id.* at 124.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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