No. 05-70785

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRIENDS OF PINTO CREEK, GRAND CANYON CHAPTER OF THE SIERRA CLUB, MARICOPA AUDUBON SOCIETY, AND CITIZENS FOR THE PRESERVATION OF POWERS GULCH AND PINTO CREEK,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*

Respondents.

ON PETITION FOR REVIEW OF THE ENVIRONMENTAL PROTECTION AGENCY'S ISSUANCE OF A NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM PERMIT AND THE ENVIRONMENTAL APPEALS BOARD FINAL ORDER DENYING REVIEW

PETITIONERS' RESPONSE IN OPPOSITION TO CARLOTA'S PETITION FOR REHEARING *EN BANC*

Roger Flynn, Colo. Atty #21078
Jeffrey C. Parsons, Colo. Atty #30210
WESTERN MINING ACTION PROJECT
P.O. Box 349
440 Main St., #2
Lyons, CO 80540
(303) 823-5738
Fax (303) 823-5732
wmap@igc.org

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INTRODUCTION

Petitioners Friends of Pinto Creek, *et al*., submit this Response to the Petition for Rehearing *En Banc* ("Petition") filed by the Carlota Copper Company ("Carlota"). Notably, the permitting agency, the U.S. Environmental Protection Agency ("EPA") did **not** seek such review and thus has accepted the Panel's decision. Carlota's attempt to create controversies within the Panel's decision where none exists should be rejected. Overall, Carlota's Petition is largely a re-hashing of its brief to the Panel based on the company's incorrect reading of the Clean Water Act's ("CWA's") protections for impaired waters as implemented by 40 CFR §122.4(i).[1] The 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.

[1] Carlota does not seek review of the remaining portions of the Panel's decision. The Panel found that EPA violated other requirements of the CWA including EPA's failure to regulate additional sources of copper into Pinto Creek, Slip Op. at 13521-13523, as well as the National Environmental Policy Act. Slip Op. at 13524-13525. Thus, because the Panel based its ruling and vacation of the challenged permit on these additional grounds, *en banc* review will not resurrect the invalid permit.

Carlota argues that its reduction of copper discharges from the Gibson Mine on a tributary of Pinto Creek will "offset" the copper discharged from its new Carlota Mine into Pinto Creek itself so that its new copper loadings will not "cause or contribute" to any water quality violations at the new Mine site. However, Carlota fails to mention that the pollution reductions from the "offset" located five miles upstream will not even affect the water quality at the Carlota site.

In Carlota's view, as long as there is a reduction of pollution somewhere in the entire watershed, it is free to contribute to existing violations of the copper standard far downstream – even when that "offset" will not reduce pollution at the new Carlota Mine site and will still cause or contribute to violations of the copper standard at the point of discharge. Outside of generalized assertions of deference to EPA's position, Carlota offers no statutory or controlling caselaw support for its argument.

Carlota relies on the Supreme Court's decision in Arkansas v. Oklahoma, yet downplays the fact that that case did not involve new discharges and never even mentioned the regulation at issue here, 40 CFR §122.4(i). Further, as discussed below, the facts of that case are markedly different from this case and thus Arkansas is not determinative – and certainly does not "conflict" with the Panel's decision.

Having failed to show that it will not "contribute" to a violation of the copper standard at its new Mine site under 40 CFR §122.4(i), Carlota also argues that its permit complied with the other requirements of the regulation: that there is "sufficient remaining pollutant load allocations to allow for the discharge," and that there are "compliance schedules" in place to bring the stream back to health. Here, Carlota largely just re-hashes its unsuccessful arguments to the Panel, ignores the Record, and misconstrues the Panel's decision and the law.

Carlota attempts to confuse the issues by manufacturing an "internal inconsistency" in the Panel's decision by splitting the two sentences of §122.4(i)(2) into separate and independent requirements. Carlota argues that because its so-called "offset" ensures that it will not "cause or contribute" to a violation of the copper standard, it never has to comply with the second sentence of the regulation. However, this second sentence is directly related to the first and establishes procedural requirements that, if met, will ensure that a new discharge does not "cause or contribute" to violations of standards in impaired waters (i.e. waters that already violate the applicable standard).

In any event, however, whether the two sentences create related or independent requirements does not warrant *en banc* review because Carlota's discharge violates all requirements of §122.4(i).

ARGUMENT

I. Reducing Copper Levels Far Upstream Does Not Mean That Carlota's New Copper Discharges Will Not "Cause or Contribute" To A Violation of the Copper Standard At The Mine Site

Carlota uses a novel "offset" theory to argue that its new pollution discharges do not "cause or contribute" to a violation of established water quality standards ("WQS"). In Carlota's view, the company's proposal to reduce some of the copper loadings to Pinto Creek from the Gibson Mine allows EPA to overlook the undisputed fact that Carlota's new discharges will exceed the allowable amount of copper in the stream at the point of discharge.

Because Pinto Creek currently exceeds the WQS for copper, EPA established a Total Maximum Daily Load ("TMDL") to restore water quality. "A TMDL defines the specified maximum amount of a pollutant which can be discharged or 'loaded' into the waters at issue from all combined sources." Pronsolino v. Nastri, 291 F.3d 1123, 1127-28 (9th Cir. 2002). "The basic purpose for which … TMDLs are compiled [is] the eventual attainment of state-defined water quality standards." Pronsolino, at 1137.

Carlota argues that it can exceed the "maximum amount" of copper specified in the TMDL so long as it reduces copper loadings into Pinto Creek far upstream. However, even with this "offset," Pinto Creek will **still** exceed the maximum amount of copper at the point of discharge and thereby **still** be in violation of water

quality standards. "EPA does not contend that WQS will be achieved before Carlota begins operations…." EPA Response Brief to the Panel at 31.

Carlota disregards the TMDL's conclusions that the stream standards will not be achieved until **all** of the copper sources are reduced to meet the TMDL's pollutant load allocations – not just the Gibson site. Carlota asks this Court to effectively eliminate the TMDL provision of the CWA, as well as the fundamental requirement that stream standards be achieved.

It is undisputed that, at the critical time when Carlota proposes to discharge new copper loadings into Pinto Creek, the stream will still exceed standards for copper. This is true **regardless** of the success achieved by the Gibson partial remediation. "The TMDL analysis shows that **upon implementation of the wasteload and load allocations**, Pinto Creek will meet water quality standards and will not experience further degradation." TMDL at 16. ER 186.

Carlota ignores the TMDL's determination that there are a number of sources, in addition to Gibson, also discharging significant copper into Pinto Creek that must be remediated. ER 255 (showing discharges and needed load reductions for the Henderson Ranch Mines); ER 257 (same, for the "Collective Undesignated Mine Sources"). The TMDL sets new limits for these and other sources as well as Carlota's new discharges into Pinto Creek and Powers Gulch. ER 177, 255, 257.

There is, however, no plan in place for the remediation of any sources other than Gibson.[2]

Carlota also ignores the fact that copper reductions from the far upstream Gibson remediation, even if they are successful, would not result in any reduction in the copper levels at the downstream Carlota site. "It is important to note that this [TMDL] calculation assumes that the Gibson property did not contribute copper to Pinto Creek at those times when samples were collected …." TMDL at 30. ER 200.

As a result, the Gibson copper reductions may only result in the lowering of copper levels near the Gibson site – not at the Carlota site. However, §122.4(i) applies to the new discharge at the Carlota site. Thus, 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.

Such a scheme violates the CWA and its implementing regulations. Overall, the key focus is at the point of the new discharge – will the discharge cause or contribute to a violation of WQS? Here, the undisputed answer is Yes.

[2] The copper loadings from these unremediated sources are in addition to the additional copper loadings from Carlota's Mine which EPA failed to consider. These include the additional copper contained in the outfalls from the diversion channels. Slip Op. at 13521-13523. This, as the Panel noted, is another reason to question whether there will be any "offset" at all. Slip Op. at 13515, n. 1.

The fact that upstream copper levels may decrease somewhat – a very laudable goal – does not mean that the new discharge complies with the CWA.

Carlota repeatedly faults the Panel for not deferring to EPA's interpretation of its regulations in allowing for an "offset." Carlota relies on EPA's "interpretation" found at IER 34-41. Petition at 9-10. However, a review of that citation shows that this "interpretation" is merely a quote from a response brief submitted by EPA to a district court in Louisiana. This legal brief is certainly not a regulation nor even a preamble to any regulation.

Carlota cannot point to a single EPA regulation that allows a new discharger to violate water quality standards in impaired waters merely by pledging to create an "offset" for that new pollution somewhere else in the watershed.

Even if such an "interpretation" could be found, federal courts do not blindly defer to agency interpretations that are inconsistent with the plain meaning of the regulation or would frustrate congressional direction. "[A]n agency's interpretation 'does not control, where … it is plainly inconsistent with the regulation at issue.'" Oregon Natural Resources Council v. Brong, 492 F.3d 1120, 1125 (9th Cir. 2007). *See also* Southeast Alaska Conservation Council v. U.S. Army Corp of Engineers, 486 F.3d 638, 648 (9th Cir. 2007)("an agency's interpretation of a regulation is not entitled to deference where it is plainly erroneous or inconsistent with the regulation").

Allowing an "offset" that does nothing to prevent Carlota from "causing or contributing" to violating the copper standard in Pinto Creek also violates Congress' command to EPA that it not only maintain but "restore" water quality in Pinto Creek. 33 U.S.C. §1251. Slip Op. at 13513. The Panel correctly found that allowing Carlota's new discharges, without having any plan to restore Pinto Creek back to standards, essentially condemns the stream to a perpetually impaired condition – the exact opposite from Congress' mandate to "restore" the stream back to health.

II. There Is No "Internal Inconsistency" Within the Panel's Decision Regarding the First and Second Sentences of §122.4(i).

Carlota attempts to confuse the issues by manufacturing an "internal inconsistency" in the Panel's decision by splitting the two sentences of §122.4(i)(2) into separate and independent requirements. Petition at 13-15. The regulation provides:

> No permit may be issued:
>
> (i) To a new source or a new discharger, if the discharge … will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards … and for which the State or interstate agency has performed a pollutants load allocation 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 CFR §122.4(i).

Carlota's claimed "inconsistency" is largely a manufactured game of semantics. The Panel held that Carlota's discharge violates both sentences. Regarding the fist sentence, the Record shows that Carlota's new discharge of copper into a stream that already has too much copper certainly "causes or contributes" to a violation of the copper standard. Nevertheless, Carlota argues that because of its so-called upstream "offset," it will not "cause or contribute" to a violation of the copper standard, and thus never has to comply with the rest of the regulation. However, the second sentence is directly related to the first and establishes procedural requirements that, if met, will ensure that a new discharge does not "cause or contribute" to violations of standards in impaired waters.

The two sentences in the regulation cannot reasonably be read in isolation or as independent requirements.[3] The first sentence says that a new discharger cannot

[3] Reading the two sentences as entirely separate also ignores other EPA regulations that already prohibit discharges that would violate a water quality standard. *See* 40 CFR §§122.4(a) and (d), and §122.44 (requiring discharges to comply with all state and federal water quality requirements, including water quality standards). Under Carlota's interpretation, the first sentence (i.e., the prohibition against "causing or contributing" to standards violations) is simply duplicative of the already-existing

"cause or contribute" to a WQS violation. The plain meaning of "cause" is to create a new violation. The plain meaning of "contribute" is to add to an existing violation.

The second sentence relates back to those terms. A new violation is when the stream "is not expected to meet" a WQS. An existing violation is when the stream "does not meet" a WQS. Thus, the second sentence says that if you cause or contribute, and the stream is impaired, you have to demonstrate compliance with the two procedural requirements. One of those procedural requirements is that there must be a plan to bring existing dischargers into compliance with the WQS.

Carlota admits that it would be a "contributor" of copper pollution into Pinto Creek. Petition at 5. Thus, it would add to an existing violation of the copper WQS on an impaired stream. It also fails to demonstrate that there is a plan for achieving compliance with the WQS for copper. Therefore, the requirements of the regulation have not been satisfied.

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regulations. This violates the cardinal rule that language should be interpreted to give each word or clause an effect and not to render them inoperative. *See* Bennett v. Spear, 520 US 154, 173 (1997). It would not be a plain reading of the regulations to interpret the first sentence in §122.4(i) as completely independent from the second sentence when that requirement to comply with standards already exists elsewhere in §122. A court "should not confine itself to examining a particular … provision in isolation" but, rather must read the words "in their context and with a view to their place in the overall statutory scheme." Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000).

The regulation does not say that a contributor can avoid compliance with the second sentence if it can "offset" its pollution (even if the "offset" would actually improve the affected stream segment, which is not the case here). An "offset" is not equivalent to either of the two conditions in the second sentence. First, it is not a determination of sufficient remaining assimilative capacity (i.e. from load allocation reductions). Second, it is not a compliance schedule designed to achieve water quality standards.[4]

The regulation also does not say that a contributor can avoid compliance with the second sentence if its other actions will achieve an "improvement" in water quality somewhere else in the watershed. Petition at 6. The test in the second condition of the second sentence is a plan for achieving compliance with established water quality standards, not achieving some vague "improvement."

Carlota argues that the regulation merely sets a "goal" "to improve the quality of impaired waters." Petition at 15. However, the regulation requires

[4] Carlota also ignores caselaw linking the two sentences together as a unified regulatory requirement for discharges into impaired waters. In Sierra Club v. Hankinson, 939 F.Supp. 872, 874 (N.D. Ga. 1996), the court ordered that:

> EPA shall … comply with 40 CFR §122.4(i) regarding the prohibition on new sources or new dischargers that will cause or contribute to a violation of water quality standards, [by] requiring new permitees or new dischargers to demonstrate that there are sufficient load allocations to allow for the discharge and requiring that the existing dischargers into that segment are subject to compliance schedules designed to bring the WQLS into compliance with applicable water quality standards.

compliance with water quality standards, not mere "improvement" somewhere else. The Panel's decision is entirely correct in stating:

> The error of both EPA and Carlota is that the objective of that section [§122.4(i)] is not simply to show a lessening of pollution, but to show how the water quality standard will be met if Carlota is allowed to discharge pollutants into impaired waters.

Slip Op. at 13519.

In any event, as shown herein, whether the two sentences create related or independent requirements does not warrant *en banc* review because Carlota's discharge violates all requirements of §122.4(i).

III. Carlota's Discharges Violate the Requirements of the Second Sentence of §122.4(i).

A. Merely listing the required reductions in copper loading does not create the "sufficient remaining pollutant load allocations" required by §122.4(i)(1).

In order for Carlota to discharge more copper into a stream that is already impaired for copper, §122.4(i) requires strict assurances that (1) the stream can handle the new discharge and still meet the standard and (2) that specific plans are in place to ensure that the stream will be brought back to health – i.e., achieve the copper standard.

Carlota argues that simply because the TMDL, on paper, established load allocations for the various sources of copper pollution in Pinto Creek, nothing is

more is required. Petition at 16. However, the Panel correctly held that, standing alone, these paper reductions are meaningless without a plan to actually reduce copper loadings from these sources. Slip Op. at 13516.

Carlota does not dispute the Panel's finding that the "load allocations" in the TMDL do not represent the current conditions, but rather the future conditions needed for Pinto Creek to achieve water quality standards if Carlota's new discharge is allowed. Id. Carlota confuses the paper load allocations in the TMDL with actual on-the-ground reductions in copper loadings. As the Panel discussed, simply listing the hoped-for reduced copper loadings from these sources is not the same as actually having a plan to reduce this pollution.

Contrary to Carlota's assertions, the Panel did not require that all of the current copper sources must be reduced down to the "load allocation" specified in the TMDL prior to the onset of Carlota's new discharge. Rather, the Panel simply stated the obvious: that in order for there to be the required "sufficient remaining pollutant load allocations" under §122.4(i), EPA must have a plan to reduce the current copper loadings and thus create the assimilative capacity in the stream to handle Carlota's new discharge.

Instead of having a plan to reduce all the copper loadings called for in the TMDL, EPA only has a plan for **one** of these sources – the upstream Gibson Mine. However, as detailed above, the TMDL established that the Gibson reductions

alone will not create the sufficient remaining pollutant load allocations to allow for the discharge. What is required to create the sufficient assimilative capacity are remediations in addition to Gibson.

Contrary to Carlota's assertions, the Panel did not create a "ban" on new discharges by requiring that all these reductions must first be completed prior to Carlota's new discharge. Rather, the Panel merely stated the plain language of the regulation – that EPA must have a plan in place in bring the stream back to health before it can allow new discharges to exacerbate the current violations.

B. The Panel correctly found that there are no "compliance schedules" for "existing dischargers" under §122.4(i)(2).

Lastly, Carlota argues that since other copper sources are not covered by existing discharge permits, EPA is excused from complying with §122.4(i)(2). However, there is no dispute that all of these existing point sources of copper must be reduced in order for Pinto Creek to achieve copper standards.

Carlota's argument renders §122.4(i) meaningless. Under Carlota's view, as long as there are no "existing permits" for these sources, it can ignore them, and the findings of the TMDL, entirely. EPA and Carlota are thus rewarded for EPA's failure to require discharge permits for the inactive mine sites – permits required under the CWA. *See* Sierra Club v. El Paso Gold Mines, 421 F.3d 1133, 1141-

1146 (10th Cir. 2005)(owners or operators of abandoned mines must obtain and comply with discharge permits).

Carlota also ignores the fact that EPA failed to require any compliance schedule even where NPDES permits do exist, such as for the nearby large BHP Copper Mine discharge. There is no plan for reducing the copper loading from this Mine. "Once the TMDL is established, EPA shall … cause the modification, revocation and reissuance, or termination of permits where appropriate as necessary to implement the TMDLs." Hankinson, 939 F.Supp.2d at 874. Here, EPA has not adjusted BHP's permit or reduced copper loadings "to the level specified by the TMDL." Id.

Lastly, Carlota's focus on the Panel's brief mention of reducing nonpoint source pollution into Pinto Creek is certainly not a cause for *en banc* review. Because the TMDL's copper loading reductions are limited to point sources, the Panel's discussion of a possible future case involving nonpoint sources is not relevant to the Panel's holding.

IV. The Panel's Decision Does Not Conflict With Arkansas v. Oklahoma.

Carlota argues that the Panel's decision conflicts with the Supreme Court's decision in Arkansas v. Oklahoma, 503 U.S. 91 (1992). Petition at 11-12. However, Arkansas can be distinguished in several ways. First and foremost, Arkansas did not involve new discharges and never mentioned §122.4(i). Carlota

admits that Arkansas "did not consider the regulation involved here." Petition at 11. Thus, the central focus of Carlota's Petition, that the Panel misconstrued §122.4(i) based on Arkansas, is entirely misplaced.

Further, restricting the issuance of new discharge permits into impaired waters pending completion of a plan to remediate excess pollution is not the type of "categorical ban" discussed in Arkansas. *See* Friends of the Wild Swan, Inc. v. U.S. EPA, 130 F. Supp.2d 1199, 1203 (D. Mont. 1999)(prohibiting EPA from issuing new discharge permits into impaired waters), *affirmed in relevant part*, 74 Fed. Appx. 718, 724: 2003 WL 21751849 (9th Cir. 2003)(discussing how the district court's prohibition did not conflict with Arkansas).

Arkansas also involved very different facts. In that case, the new pollution was so minimal that it could not even be measured – the discharge "would not lead to a detectable change in water quality." Arkansas, 503 U.S. at 112. *See also* Arkansas at 95-96 (the proposed discharge would not affect downstream water quality standards).

Because the discharge in Arkansas would not affect water quality, the Court was reluctant to overturn the EPA permit which allowed that discharge. Thus, the Court was perfectly correct in ruling against "establishing a categorical ban" on such *de minimus* discharges. Id at 108. The Court's statement against

"frustrat[ing] the construction of new plants that would improve existing conditions," Id., also makes sense when viewed against the facts of that case.

The situation at Carlota is markedly different. Here, Carlota will discharge measurable and significant amounts of copper into Pinto Creek. Indeed, the TMDL was established to account for Carlota's new copper discharges. This is a far cry from the undetectable and un-measurable discharges in Arkansas.

The Panel correctly held that requiring a new discharger to meet the procedural requirements of §122.4(i) is not a "ban." Slip Op. at 13520-13521. The Panel merely held that without a plan to achieve water quality standards, EPA cannot allow new discharges that will exacerbate the violations. If such a plan is developed, the discharge may occur. The Panel's decision simply requires EPA to review proposed discharges on a case-by-case basis, focusing on the existing quality of the stream, the pollution levels in the proposed discharge, and whether there is a plan to achieve the WQS based on other pollution sources in the stream. Far from a "ban," the Panel's decision tracks the plain language of the regulation as well as the CWA's focus on the "restoration" of impaired waters.

V. The Minnesota Decision Is Easily Distinguished

Carlota also argues that the Panel's decision conflicts with a recent divided opinion from Minnesota, In re Cities of Annandale and Maple Lake, 731 N.W.2d 502 (Minn. 2007). Petition at 13. First and foremost, this state court decision is not

precedent in the Ninth Circuit. Further, state interpretations of the Clean Water Act cannot create exemptions contrary to the federal Act or regulation. *See* Northern Plains Resource Council v. Fidelity Exploration and Devel. Co., 325 F.3d 1155, 1165 (9th Cir. 2003). *See also* Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495-96 (9th Cir. 1997)(state interpretation of federal law reviewed *de novo* by federal courts, with no deference given to state interpretation).

Annandale is also based on very different facts and is easily distinguished. In Annandale, unlike this case, no TMDL had been completed for the waterbody that would be receiving the discharge. Also, unlike Annandale, as discussed above, the so-called "Gibson offset" will not materially affect the copper exceedence at the Carlota site and would be limited to the immediate downstream vicinity of the old Gibson Mine.

CONCLUSION

Accordingly, Carlota's Petition for *En Banc* Review should be denied.

Respectfully submitted this 13th day of February, 2008.

Roger Flynn
Jeffrey C. Parsons
WESTERN MINING ACTION PROJECT
P.O. Box 349

440 Main St., #2
Lyons, CO 80540
ph (303) 823-5738
fax (303) 823-5732
wmap@igc.org

Attorneys for Petitioners

CERTIFICATION OF COMPLIANCE

I certify that: Pursuant to Circuit Rule 35-4 and 40-1(a) the foregoing Resp`onse is: Proportionately spaced, has a typeface of 14 points or more and contains 4,187 words (Response to En Banc Petitions must not exceed 4,200 words).

_____

Roger Flynn Date

CERTIFICATE OF SERVICE

This will certify that the undersigned caused two copies of the foregoing Response to be served, First Class U.S. Mail postage prepaid, on February 13, 2008:

D. Judith Keith
U.S. Dept. of Justice
Environmental and Natural Resources Division
P.O. Box 23986
Washington, D.C. 20026-3986

Roderick Walston
Best Best & Krieger
2001 North Main St., Suite 390
Walnut Creek, CA 94596

Amy R. Porter
Lewis and Roca
40 North Central Avenue
Phoenix, AZ 85004

_____

Roger Flynn