

Appeal No. 05-70785

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRIENDS OF PINTO CREEK, et al.,

Petitioners,

vs.

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

PETITION FOR REHEARING *EN BANC*

RODERICK E. WALSTON, Bar No. 32675
BEST BEST & KRIEGER LLP
2001 North Main Street, Suite 390
Walnut Creek, California 94596
Telephone: (925) 977-3300
Facsimile: (925) 977-1870

AMY R. PORTER
RICHARD W. TOBIN II
ALBERT H. ACKEN
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, Arizona 85004

Attorneys for Intervenor
CARLOTA COPPER COMPANY

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Carlota Copper Company submits that its parent companies are Cambior USA, Inc. and Cambior, Inc. Carlota Copper Company and Cambior USA, Inc. do not issue any shares of stock to the public.

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF EXCEPTIONAL IMPORTANCE AND CONFLICT.....	1
INTRODUCTION.....	2
STATEMENT OF THE CASE.....	3
1. Statutory and Regulatory Background	3
2. Procedural Background	5
3. Panel Decision.....	7
ARGUMENT.....	8
I. THE CLEAN WATER ACT AND THE REGULATION DO NOT PROHIBIT DISCHARGES SUBJECT TO OFFSET THAT IMPROVE WATER QUALITY	8
A. Regulatory and Statutory Language.....	8
B. Administrative Interpretation	9
C. Supreme Court Decision in <i>Arkansas v. Oklahoma</i>	11
D. Minnesota Supreme Court Decision... ..	13
II. THE PANEL DECISION IS INTERNALLY INCONSISTENT CONCERNING WHETHER THE SECOND SENTENCE OF THE REGULATION IS AN “EXCEPTION” TO THE FIRST SENTENCE OR INSTEAD IMPOSES ADDITIONAL REQUIREMENTS	13

TABLE OF CONTENTS (CONT.)

	<u>Page</u>
III. THE CARLOTTA DISCHARGE MEETS THE REQUIREMENTS OF THE SECOND SENTENCE OF THE REGULATION.....	16
A. “Sufficient Remaining Pollutant Load Allocations”	16
B. “Compliance Schedules” For “Existing Dischargers”	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>Arkansas v. Oklahoma</i> 503 U.S. 91 (1992)	<i>Passim</i>
<i>Auer v. Robbins</i> 519 U.S. 452 (1997)	10
<i>Baltimore Gas & Elec. Co.</i> 462 U.S. 87 (1983)	10
<i>Forest Guardians v. U.S. Forest Service</i> 329 U.S. 1089 (9 th Cir. 2003)	10
<i>Friends of Pinto Creek v. EPA</i> 504 F.3d 1007 (9 th Cir. 2007)	7
<i>In re Cities of Annandale and Maple Lake</i> 731 N.W.2d 502 (Minn. 2007)	1, 13
<i>Janakes v. United States Postal Service</i> 768 F.2d 1091 (9 th Cir. 1985)	14
<i>Sierra Club v. Babbitt</i> 65 F.3d 1502 (9 th Cir. 1995)	10
<i>Sierra Club v. Meiburg</i> 296 F.3d 1021 (11 th Cir. 2002)	19
<i>Thomas Jefferson Univ. v. Shalala</i> 512 U.S. 504 (1994)	10, 17, 19

STATUTES

	<u>Page</u>
Clean Water Act § 303(d)	1, 10
33 U.S.C § 1251	3
33 U.S.C § 1251(a).....	3, 9
33 U.S.C. § 1311(b)(1)(A)	4
33 U.S.C. § 1313	4
33 U.S.C. § 1313(d).....	4
33 U.S.C. § 1316	3, 9
33 U.S.C. § 1342(a).....	19
33 U.S.C. § 1362(12)	19

REGULATIONS

40 C.F.R. § 122.2	18, 19
40 C.F.R. § 122.4(i), (l), (2)	<i>Passim</i>
40 C.F.R. § 130.2(g)-(i).....	4
40 C.F.R. § 130.7(c)(l)	4
40 C.F.R. § 440.100	9

STATEMENT OF EXCEPTIONAL IMPORTANCE AND CONFLICT

This case presents a question of exceptional importance: whether the Clean Water Act (CWA) and an implementing regulation prohibit the Environmental Protection Agency (EPA) and the states from authorizing the discharge of pollutants into already-polluted waters, if the discharge is subject to an offset condition that improves water quality by requiring the discharger to remove more pollutants from another source than are added from its own source. The panel decision holds that the statute and regulation prohibit discharges into impaired waters even if they are subject to such offset conditions. The panel decision effectively prevents the EPA and the states from approving new development projects that may affect impaired waters, even if projects result in an overall improvement of water quality.

The panel decision conflicts with a U. S. Supreme Court decision holding that the CWA does *not* prohibit discharges into impaired waters if they improve existing conditions. *Arkansas v. Oklahoma*, 503 U.S. 91, 108 (1992). The panel decision also conflicts with a recent Minnesota Supreme Court decision interpreting the CWA and the regulation. *In re Cities of Annandale and Maple Lake*, 731 N.W.2d 502 (Minn. 2007).

INTRODUCTION

The EPA issued a CWA permit authorizing Carlota Copper Company (“Carlota”) to discharge storm water from its mine into a polluted creek. The permit contains an offset condition requiring Carlota to remove more copper discharged from an abandoned mine than is discharged from Carlota’s own mine. An EPA regulation prohibits discharges of pollutants into impaired waters if they “cause or contribute to” a violation of water quality standards. The EPA determined that Carlota’s discharge will not “cause or contribute to” such violations because the offset condition will reduce net pollution and improve water quality.

The panel decision invalidated the permit, holding that the CWA and the regulation prohibit discharges into impaired waters and make no exception for offset conditions that reduce net pollution.

The panel decision is inconsistent with the plain language of the EPA regulation. A discharge subject to an offset condition that reduces net pollution does not “cause or contribute to” water quality violations, and instead causes a *reduction* of such violations. The regulation prohibits discharges that impair water quality, not improve it.

The panel decision is also inconsistent with the statutory language and goals. The CWA—whose goal is to “restore and maintain” water quality, 33 U.S.C. § 1251(a)—requires the EPA to adopt regulations that achieve “the greatest degree of effluent reduction.” *Id.* at § 1316. A permit containing an offset condition that reduces net effluent pollution achieves “the greatest degree of effluent reduction” and helps to “restore and maintain” water quality.

Most significantly, the panel decision is inconsistent with the EPA’s interpretation of its regulation. The EPA has interpreted its regulation as authorizing discharges subject to offset conditions that reduce net pollution. The Supreme Court and Ninth Circuit have held that the courts should defer to an agency’s reasonable interpretation of its regulations, particularly involving technical matters within the agency’s expertise. The panel decision accords no deference to the EPA’s interpretation of its regulation, and makes no mention of the ample case authority requiring such deference.

STATEMENT OF THE CASE

1. Statutory and Regulatory Background

The CWA, 33 U.S.C. § 1251 *et seq.*, authorizes the EPA to issue permits authorizing discharges of pollutants from point sources into water, and establishing

effluent limits for the discharges. *Id.* at §§ 1311(b)(1)(A), 1342. The permit program is part of the National Pollutant Discharge Elimination System (NPDES).

The CWA also authorizes the states to establish “water quality standards” for water bodies. *Id.* at § 1313. The states or the EPA must establish a “total maximum daily load” (TMDL) for waters that fail to meet state water quality standards. *Id.* at § 1313(d). A TMDL is the maximum “load” of pollutants that a water body can receive from all sources, including point sources and non-point sources, without violating water quality standards. 40 C.F.R. §§ 130.2(g)-(i), 130.7(c)(1).

The EPA has adopted a regulation authorizing the issuance of NPDES permits for a “new source” or “new discharger” that discharges pollutants into waters failing to meet water quality standards. 40 C.F.R. § 122.4(i).¹ The first

¹ Section 122.4(i) provides:

No permit may be issued . . . [¶] [t]o a new source or a new discharger, if the discharge from its construction or operation 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 . . . 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, that:

(1) There are sufficient remaining pollutant load allocations to allow for the discharge; and

sentence of the regulation prohibits the issuance of such permits if the discharge will “cause or contribute to the violation of water quality standards.” *Id.* The second sentence provides that—if the waters are subject to a TMDL establishing pollutant load allocations—the discharger must demonstrate that (1) there are “sufficient remaining pollutant load allocations” for the discharge, and (2) “existing dischargers” are subject to “compliance schedules” designed to achieve water quality standards. *Id.*

2. Procedural Background

Carlota plans to operate a copper mine in Arizona that will discharge excess storm water, containing some copper, during extreme storms into Pinto Creek. The creek does not meet water quality standards for copper. The EPA has adopted a TMDL establishing load allocations for the creek. Petitioners’ Excerpts of Record (“PER”) 165.

The EPA issued a NPDES permit authorizing Carlota’s storm water discharges, subject to an offset condition designed to improve the creek’s water

(2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

quality.² The offset condition requires Carlota to remove more copper discharged to the creek from an abandoned mine, the Gibson Mine, than will be discharged from Carlota's own mine.³ The EPA determined that the offset condition will result in a "significant improvement" of the creek's water quality; "the copper loadings into Pinto Creek attributable to the Gibson Mine exceed Carlota's projected loadings and . . . the partial remediation of the Gibson Mine will offset any discharges from Carlota's facilities." PER 458, 461.⁴ The EPA concluded that since the offset condition will reduce net pollution, Carlota's discharge will not "cause or contribute to" a violation of water quality standards and is not prohibited by the EPA regulation. PER 492, 305.

The EPA also determined that Carlota's discharge complies with the second sentence of the regulation, because (1) there are "sufficient remaining pollutant

² The permit also contains a condition requiring the discharges to meet water quality standards for copper. PER 131.

³ The condition provides in part:

Prior to discharging into Pinto Creek, Permittee must perform reclamation work which will result in a reduction in copper loadings into Pinto Creek from upstream sources equal to or greater than the projected copper loadings expected through discharges.

PER 130.

⁴ The EPA's Environmental Appeals Board determined that the *addition* of copper pollutants from Carlota's mine would be .094 kilograms per day (kg/day) for a 10-year, 24-hour storm event, compared with the *reduction* of copper pollutants from the Gibson mine of between 49,652 kg/day (worst-case scenario) and 1.71 kg/day (best-case scenario). PER 261, 305, 459-460.

load allocations” for the discharge, and (2) “existing dischargers” are subject to “compliance schedules.” PER 129-159, 408.

The State of Arizona certified that the permit complies with Arizona’s water quality standards. PER 408. The EPA’s Environmental Appeals Board (“Appeals Board”) upheld the permit. PER 391.

3. Panel Decision

The panel decision holds that the permit violates the CWA and the EPA regulation. *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007) (Slip Op. attached). First, the decision holds that the CWA and regulation prohibit discharges into impaired waters, and make no exception for discharges subject to offset conditions that reduce net pollution. Slip Op. 13515. Second, the decision holds that the discharge does not meet the requirements of the second sentence of the EPA regulation, because (1) there are not “sufficient remaining pollutant load allocations” for the discharge, and (2) “existing dischargers” are not subject to “compliance schedules.” *Id.* at 13516.

ARGUMENT

I. THE CLEAN WATER ACT AND THE REGULATION DO NOT PROHIBIT DISCHARGES SUBJECT TO OFFSET CONDITIONS THAT IMPROVE WATER QUALITY.

The EPA regulation prohibits new source discharges into impaired waters that will “cause or contribute to” a violation of water quality standards. 40 C.F.R. § 122.4(i). The panel decision, in holding that the regulation prohibits Carlota’s discharge, stated simply 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.” Slip Op. 13515.

A. Regulatory and Statutory Language

The panel decision is inconsistent with the plain language of the regulation. A discharge subject to an offset condition that improves water quality—by requiring the discharger to remove more pollutants from another source than are added from its own source—does not “cause or contribute to” a violation of water quality standards. Instead, the offset condition *reduces* such violations. The EPA regulation prohibits discharges that impair water quality, not improve it.

The panel’s observation that the CWA and the regulation provide no “exception” for an offset is beside the point. A discharge subject to an offset

condition that improves water quality does not fall within the scope of the prohibition, because it does not “cause or contribute to” water quality violations. A prohibition that does not apply by its own terms does not require an “exception” to render it non-applicable.

The panel decision is also inconsistent with the statutory language and goals. The CWA requires the EPA to establish national performance standards for different pollution sources that achieve “the greatest degree of effluent reduction.” 33 U.S.C. § 1316.⁵ An offset condition that produces a net *decrease* of effluent pollution meets the statutory requirement of “effluent reduction.” Similarly, the CWA’s declared goal of “restor[ing] and maintain[ing]” water quality, 33 U.S.C. § 1251(a), is furthered by an offset condition that improves overall water quality.

B. Administrative Interpretation

The panel decision is inconsistent with the EPA’s interpretation of its regulation. The EPA has interpreted its regulation as not prohibiting discharges subject to offset conditions that improve water quality. According to the EPA:

[I]t is possible for a discharger to be issued a permit where it is demonstrated that other pollutant source reductions (such as nonpoint source reductions implemented by the discharger) will offset the discharge in a manner consistent with water quality standards. The

⁵ The EPA has adopted national performance standards for copper mining. 40 C.F.R. § 440.100.

ultimate result of this type of “offset” or “trade” may be a net decrease in the loadings of the pollutant of concern in the CWA § 303(d) listed water, and, therefore, EPA, by practice has considered a discharge which has been offset in accordance with permit requirements not to “cause or contribute to a violation of water quality standards.”

Intervenor Excerpts of Record (“IER”) 34-41. According to the EPA, whether a discharge will “cause or contribute to” a violation of water quality standards must be determined on a “case-by-case basis” and not by application of “*per se*” or “categorical” standards. IER 37-38. The EPA’s Appeals Board, applying the “case-by-case” analysis, determined that “rather than ‘causing or contributing’ a degradation, Carlota will be improving Pinto Creek’s water quality, or at the very least maintaining water quality.” PER 492.

The Supreme Court and the Ninth Circuit have held that substantial deference should be accorded to an agency’s interpretation of its own regulations. *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992); *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Forest Guardians v. U. S. Forest Service*, 329 U.S. 1089 (9th Cir. 2003). The agency’s interpretation must be given “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1507 (9th Cir. 1995). The agency’s interpretation is given particular weight if it involves technical or scientific matters within the agency’s expertise. *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983). Therefore, the EPA’s interpretation

is entitled to substantial deference here. The panel decision grants no deference to the EPA's interpretation of its regulation, and does not even mention or attempt to distinguish the abundant case authority requiring such deference.

C. Supreme Court Decision in *Arkansas v. Oklahoma*

The panel decision conflicts with the U. S. Supreme Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). There, the EPA issued a NPDES permit authorizing discharges in Arkansas that reached "degraded" waters in Oklahoma. The Tenth Circuit invalidated the permit on grounds that the CWA categorically prohibits discharges into impaired waters. The Supreme Court reversed, stating:

The Court of Appeals construed the Clean Water Act to prohibit any discharge of effluent that would reach waters already in violation of existing water quality standards. We find nothing in the Act to support this reading. . . . [¶] [R]ather than establishing the categorical ban announced by the Court of Appeals—which might frustrate the construction of new plants that would *improve existing conditions*—the Clean Water Act vests in the EPA and the States broad authority to develop long-range, areawide programs to alleviate and eliminate existing pollution.

503 U.S. at 107, 108 (emphasis added).

Although the Supreme Court did not consider the regulation involved here, the Court indicated that the EPA and the states can—in exercising their "broad

authority” to develop programs to “alleviate and eliminate water pollution”—authorize discharges into impaired waters by “new plants that would improve existing conditions,” *id.*—as would occur if the discharges are subject to offset conditions that improve water quality. Thus, the Court held that the EPA and the states can make the necessary environmental tradeoffs to accommodate new source development if the overall condition of water is improved.

The panel decision distinguished *Arkansas* on grounds that the panel’s interpretation of the EPA regulation avoids a “categorical ban” on discharges to impaired waters, by authorizing discharges that comply with the second sentence of the EPA regulation, relating to load allocations and compliance schedules. Slip Op. 13518-13521. The panel’s distinction misses the point of the Supreme Court’s decision. The Supreme Court did not suggest that discharges into impaired waters are permissible if they meet other requirements, such as load allocations and compliance schedules. Rather, the Court stated that the discharges are permissible if they “improve existing conditions”—as would occur if the discharges are subject to offset conditions that improve water quality. The panel’s conclusion that water quality improvement is irrelevant conflicts with the Supreme Court’s conclusion that it is crucial.

D. Minnesota Supreme Court Decision

The panel decision conflicts with a recent Minnesota Supreme Court decision interpreting the EPA regulation as allowing offsets. *In re Cities of Annandale and Maple Lake*, 731 N.W.2d 502 (Minn. 2007). There, the Minnesota Supreme Court held that the regulation is unclear and susceptible to different interpretations, and therefore deference should be accorded to the agency's interpretation. The Court concluded:

[W]e conclude that the MPCA's [the state agency that administers the NPDES program] interpretation of 40 C.F.R. § 122.4(i) as allowing offsets from another source in determining whether a new source will cause or contribute to the violation of water quality standards is reasonable and is consistent with the purposes of the CWA.

Id. at 524. The panel decision does not mention the Minnesota Supreme Court decision in *Annandale*.

II. THE PANEL DECISION IS INTERNALLY INCONSISTENT CONCERNING WHETHER THE SECOND SENTENCE OF THE REGULATION IS AN "EXCEPTION" TO THE FIRST SENTENCE OR INSTEAD IMPOSES ADDITIONAL REQUIREMENTS.

The panel decision is internally inconsistent concerning whether the second sentence of the EPA regulation (which establishes load allocation and compliance schedule requirements) is an *exception* to the first sentence of the regulation (which prohibits discharges that "cause or contribute to" a violation of water

quality standards), or instead whether the second sentence imposes *additional* requirements. If the second sentence is an exception, it applies only if the discharge is otherwise prohibited by the first sentence; an otherwise-prohibited discharge is permissible if it meets the requirements of the second sentence. If, instead, the second sentence imposes additional requirements, the discharge must meet the requirements of both sentences.

The panel decision states in some passages that the second sentence is an “exception” to the prohibition in the first sentence. Slip Op. 13516, 13520. Elsewhere, however, the decision states that Carlota—although “[i]nitially” contending otherwise—“conceded” that its discharge must meet the requirements of both sentences. *Id.* at 13517, 13522. Thus, the decision is internally inconsistent.⁶

Contrary to the panel decision, Carlota did not “concede” that its discharge must meet the requirements of both sentences. Carlota argued *alternatively* that

⁶ In another passage, the panel stated that it would consider whether the Carlota discharge met the requirements of both sentences because the EPA had asked its Appeals Board to “assume, without deciding,” that both sentences apply, as the Appeals Board did. Slip Op. 13517-13518; PER 487 n. 101. Carlota argued, however, that both sentences do not apply to its discharge, Intervenor Br. 15, and therefore the panel could not have properly assumed that sentences apply. If the panel interpreted the meaning of both sentences without deciding whether both apply, the panel issued an advisory opinion, which is beyond the judicial power under Article III of the Constitution. *E.g.*, *Janakes v. United States Postal Service*, 768 F.2d 1091, 1093 (9th Cir. 1985).

(1) the discharge is not prohibited by the first sentence and therefore the second sentence does not apply, and (2) if the second sentence applies, the discharge meets the requirements of that sentence. Intervenor Br. 15. The panel improperly construed Carlota's alternative argument as a concession.

The proper construction of the regulation is that the second sentence provides an exception to the first sentence and does not impose additional requirements. If a discharge does not "cause or contribute to" water pollution—because it is limited by an offset condition that reduces net pollution—it makes no sense to require that the discharge meet additional requirements relating to load allocations and compliance schedules. The goal of the regulation is to improve the quality of impaired waters; if the discharge meets that goal because of an offset condition, the additional requirements of the second sentence are not necessary to meet the goal.

This court should review the panel decision *en banc* to resolve its internal inconsistency and determine whether the second sentence is an exception to the first sentence or instead imposes additional requirements.

III. THE CARLOTTA DISCHARGE MEETS THE REQUIREMENTS OF THE SECOND SENTENCE OF THE REGULATION.

Assuming, contrary to Carlota's argument, that the requirements of the second sentence of the regulation apply to Carlota's discharge, the discharge meets those requirements and the panel erred in concluding otherwise.

A. "Sufficient Remaining Pollutant Load Allocations"

Clause (1) of the second sentence requires the discharger to demonstrate that there are "sufficient remaining pollutant load allocations" to allow for the discharge. 40 C.F.R. § 122.4(i)(1). The EPA's Appeals Board determined that the Carlota discharge met this requirement, because "the Pinto Creek TMDL specifically provides pollutant load allocations for Carlota," which provides "strong evidence that 'there are sufficient remaining pollutant load allocations to allow for the discharge.'" PER 493.

The panel rejected the EPA's conclusion, stating that "[t]he TMDL merely provides for the manner in which Pinto Creek *could* meet the water quality standards if all of the load allocations in the TMDL were *met*, not that there are sufficient remaining pollutant load allocations under existing circumstances." Slip Op. 13516 (first emphasis original; second emphasis added). The panel thus held that the discharger must demonstrate not only that load allocations are "sufficient" to allow for the discharge, but also that they will be "met."

The panel decision is inconsistent with the plain language of the regulation. The regulation specifically requires the discharger to show that load allocations are “sufficient” to allow for the discharge, not that they will be “met.” Whether load allocations will be “met” depends on additional factors—such as whether other dischargers will comply with the load allocations—that may not be foreseeable and are beyond the discharger’s knowledge and control. Nothing in the regulation or the CWA requires the discharger to make this additional showing. Here, the TMDL established load allocations for pollutants entering Pinto Creek from all sources, PER 177, 251-254, 261-262, including Carlota’s discharges, *id.*, and these load allocations are “sufficient” to allow for Carlota’s discharge, as the EPA concluded. PER 493. The regulation requires no more.

Moreover, the panel failed to defer to the EPA’s interpretation of Clause (1) of the regulation, contrary to case authority requiring judicial deference to an agency’s interpretation of its regulation, particularly involving technical matters within the agency’s expertise. *E.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

B. “Compliance Schedules” For “Existing Dischargers”

Clause (2) of the second sentence requires the discharger to demonstrate that “existing dischargers” are subject to “compliance schedules” designed to achieve

compliance with water quality standards. 40 C.F.R. § 122.4(i)(2). The EPA concluded that this requirement was met because the EPA had adopted compliance schedules for “existing dischargers” into Pinto Creek. PER 495. The EPA defined “existing dischargers” as *point source* dischargers regulated by NPDES *permits*. *Id.* The EPA based this definition on two grounds—(1) the NPDES program applies only to point source dischargers, and (2) the EPA regulations define a “schedule of compliance” as “a schedule of remedial measures included in a ‘permit.’” 40 C.F.R. § 122.2 (emphasis added); PER 495. Thus, “existing dischargers” are NPDES permittees.

Again, the panel rejected the EPA’s interpretation of its regulation. The panel stated that the regulations define “discharge” as the discharge of a pollutant from a “point source,” and therefore “existing dischargers” refers to all point source dischargers, not just permitted ones. Slip Op. 13516-13517. Following this logic, the panel held that compliance schedules must be adopted for *all* point source dischargers, both permittees and non-permittees. Slip Op. 13520. Indeed, the panel held that such schedules must even be adopted for non-point source dischargers, if necessary to achieve water quality compliance. *Id.*

The panel decision is flatly inconsistent with the EPA regulation defining a “schedule of compliance” as a “schedule of remedial measures included in a

‘*permit.*’” 40 C.F.R. § 122.2 (emphasis added). Since the EPA regulation defines a compliance schedule as applicable only to a permittee, a compliance schedule cannot be adopted under the regulation for a non-permittee. A compliance schedule is, by definition, a “remedial measure[]” for requiring a *permittee* to comply with effluent limits established in the *permit* within specified time frames. The panel decision requires the EPA to apply NPDES permit requirements, in the form of compliance schedules, to dischargers not regulated by NPDES permits. The panel decision makes no attempt to reconcile its conclusion with the EPA regulation defining compliance schedules, and does not even mention the regulation. Again, the decision fails to defer to the EPA’s interpretation of its regulation, contrary to case authority requiring deference. *E.g., Thomas Jefferson Univ.*, 512 U.S. at 512.

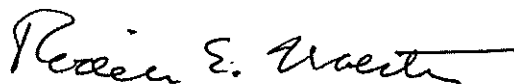
The panel decision—in holding that compliance schedules must even be adopted for non-point source dischargers under some circumstances—also conflicts with CWA provisions limiting the NPDES program to point source dischargers. 33 U.S.C. §§ 1342(a) (NPDES applies to “discharge of any pollutant”), 1362(12) (“discharge of a pollutant” defined as discharge from “point source”). Non-point source dischargers are not regulated by the NPDES program, but instead are regulated by the states. *E.g., Sierra Club v. Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002).

In sum, the panel decision has far-reaching and extreme effects. The decision categorically prohibits discharges into impaired waters—even if the discharges are subject to offset conditions that *improve* water quality—unless it is shown that (1) existing load allocations are not only sufficient but will be *met* by other dischargers, and (2) compliance schedules have been adopted for dischargers (even including non-point source dischargers) not regulated by the NPDES program. By categorically prohibiting discharges unless compliance schedules have been adopted for non-regulated dischargers, the decision prohibits virtually all discharges into impaired waters, contrary to the Supreme Court's decision in *Arkansas v. Oklahoma* that the CWA does not have this effect. The decision, by expansively interpreting the EPA regulation contrary to the EPA's own interpretation, makes it more difficult for the EPA and the states to develop water quality programs that accommodate the goals of societal growth and water quality improvement.

CONCLUSION

The petition for rehearing *en banc* should be granted.

Respectfully submitted,



RODERICK E. WALSTON

Attorney for Intervenor Carlota Copper Company

CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rules 35-4 or 40-1, I certify that the petition for rehearing en banc is in 14-point New Times Roman font; that the petition was produced on a computer using a word processing program; and that the program calculated that the petition contains 4,166 words.

Respectfully submitted,



RODERICK E. WALSTON
Best Best & Krieger LLP
Attorney for Intervenor
Carlota Copper Company

RVADMIN\RWALSTON\740507.6

Appendix A

FOR PUBLICATION
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,

CARLOTA COPPER COMPANY,
Intervenor,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
ENVIRONMENTAL APPEALS BOARD;
STEPHEN L. JOHNSON, Acting
Administrator, United States
Environmental Protection Agency,
Respondents.

No. 05-70785
OPINION

On Petition for Review of an Order of the
Environmental Protection Agency

Argued and Submitted
November 13, 2006—San Francisco, California

Filed October 4, 2007

Before: Procter Hug, Jr., A. Wallace Tashima, and
Ronald M. Gould, Circuit Judges.

Opinion by Judge Hug

13508

FRIENDS OF PINTO CREEK v. EPA

COUNSEL

Roger Flynn, Western Mining Action Project, Lyons, Colorado, for the petitioners.

D. Judith Keith, United States Department of Justice, Environmental Defense Section, Washington, DC; John S. Most, United States Department of Justice, Natural Resources Section, Washington, DC, for the respondents.

Amy R. Porter, Lewis and Roca LLP, Phoenix, Arizona, for the intervenor.

OPINION

HUG, Circuit Judge:

In this case, we determine whether the Environmental Protection Agency ("EPA") properly issued a National Pollution Discharge Elimination System ("NPDES") permit under the Clean Water Act to Carlota Copper Company ("Carlota"). The permit allows mining-related discharges of copper into Arizona's Pinto Creek, a waterbody already in excess of water quality standards for copper. Based upon provisions of the Clean Water Act, the implementing regulations, and their applicability to the factual scenario of this case, we vacate the permit and remand.

I. FACTUAL BACKGROUND

Pinto Creek is a desert river located near Miami, Arizona, approximately 60 miles east of Phoenix. It has been listed by the American Rivers Organization as one of the country's most endangered rivers due to threats from proposed mining operations. Pinto Creek and its riparian environs are home to a variety of fish, birds, and other wildlife, some of which are specially protected. Due to excessive copper contamination from historical mining activities in the region, Pinto Creek is included on Arizona's list of impaired waters under § 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), as a water quality limited stream due to non-attainment of water quality standards for dissolved copper.

Carlota proposed to construct and operate an open-pit copper mine and processing facility approximately six miles west of Miami, Arizona, covering over 3000 acres while extracting about 100 million tons of ore. Part of the operation plan includes constructing diversion channels for Pinto Creek to route the stream around the mine, as well as groundwater cut-off walls to block the flow of groundwater into the mine.

In compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., the U.S. Forest Service prepared an Environmental Impact Statement ("EIS"), after determining the project would potentially have a significant impact on the environment, and later finalized the document as its Final EIS ("Forest Service FEIS"). The Army Corps of Engineers also prepared an Environmental Assessment ("Corps EA") covering the physical construction of proposed diversion channels redirecting water from Pinto Creek and the Powers Gulch stream around the mine and into Pinto Creek. Because the proposed action would involve the discharge of pollutants into Pinto Creek, Carlota applied to the EPA for an NPDES permit under § 402 of the Clean Water Act, 33 U.S.C. § 1342, in 1996. The EPA ultimately issued the permit, and the Environmental Appeals Board ("Appeals Board"), the internal appellate board of the EPA, denied review.

II. ISSUES

- A. Whether the issuance of the permit to discharge a pollutant, dissolved copper, into Pinto Creek, which already exceeded the amount of dissolved copper allowed under the Section 303(d) Water Quality Standard, is in violation of the Clean Water Act and the applicable regulations.
- B. Whether the EPA's failure to include and regulate all discharges from the Carlota Copper

Mine in the NPDES permit violates the Clean Water Act and the applicable regulations.

- C. Whether the EPA complied with the requirements of the National Environmental Policy Act ("NEPA").

III. PROCEDURAL BACKGROUND

The EPA published for public comment a draft NPDES permit for Carlota in 1998. To fulfill its information-gathering requirements under NEPA, 42 U.S.C. §§ 4321-4370f, the EPA adopted the Forest Service FEIS and the Corps EA. In response to comments received on its draft NPDES permit, the EPA amended the draft permit by adding two new conditions—(1) requiring additional groundwater discharges to augment the stream flow into Pinto Creek, and (2) an offset provision whereby Carlota would be required to remediate sources of copper loading from an upstream inactive mine site called the Gibson Mine.

On June 30, 2000, the Arizona Department of Environmental Quality ("Arizona DEQ") certified the final permit with the two new conditions as meeting state water quality standards under § 401 of the Clean Water Act, 33 U.S.C. § 1341, and on July 24, 2000, the EPA issued an NPDES permit to Carlota, as well as a Record of Decision formally adopting the Forest Service FEIS and the Corps EA for the current permit.

On August 24, 2000, the Petitioners filed their first Petition for Review of the NPDES permit and the NEPA documents with the Appeals Board. The Petitioners argued that: (1) because Pinto Creek is an impaired water under the Clean Water Act, the EPA should establish a Total Maximum Daily Load ("TMDL") for copper discharges into Pinto Creek before issuing Carlota's permit, (2) the EPA did not provide public notice of and a public comment period for the two new permit conditions, (3) Carlota needed an additional NPDES

permit for discharges from the Gibson Mine site, and (4) the Forest Service FEIS and Corps EA documents did not consider environmental impacts of the two new permit conditions.

The EPA did not respond and, instead, withdrew portions of the challenged NPDES permit stating that the permit was not severable from the contested conditions and that the permit should be stayed pending final agency action. The EPA then prepared a supplemental environmental assessment ("EPA's supplemental EA") analyzing only the two new conditions. In response to the Petitioners' contention of the necessity to establish a TMDL, the EPA completed a TMDL for dissolved copper in Pinto Creek. The EPA then provided a public comment period, but only for the two new permit conditions and the EPA's supplemental EA. The Arizona Department of Environmental Quality issued a second certification under § 401 of the Clean Water Act in February 2002. In accordance with its new analysis, the EPA issued a Finding of No Significant Impact on February 27, 2002, determining it would not have to prepare a new EIS, and issued the permit.

On April 1, 2002, the Petitioners filed a second Petition for Review with the Appeals Board challenging the EPA's decision to issue the Carlota permit. The principal challenges were that: (1) the permit should have covered the diversion channels that discharged into Pinto Creek, (2) the EPA must regulate all project discharges, (3) the permitted discharges violated Arizona anti-degradation requirements and water quality standards, and (4) the EPA violated NEPA in several ways.

The Appeals Board entered its order denying review on September 30, 2004. The EPA issued the final NPDES permit to Carlota, and the Petitioners filed for review in this court.

IV. ANALYSIS

A. Objective of the Clean Water Act.

It is important to consider the objectives and purpose of the 1972 revisions of the Clean Water Act, which are presently applicable to the considerations involved here. 33 U.S.C. § 1251 (1987) provides:

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter — (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985. . . . (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited.

Under the 1972 revisions of the Clean Water Act, there is direct federal regulation of the discharge of pollutants from point sources. *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002). “[P]oint sources of pollution are those [where the pollutant flows] from a discrete conveyance, such as a pipe or tunnel. Nonpoint sources of pollution are non-discrete sources” and are the responsibility of the states, with certain federal oversight. *Id.* at 1125-27. An example of a non-discrete source is runoff from a farmland or timber harvesting.

Our *Pronsolino* opinion provides a detailed description of the operation of the Clean Water Act. We here summarize the provisions pertinent to this case.

Under § 303 of the Clean Water Act, 33 U.S.C. § 1313, the states are required to set water quality standards for all waters within their boundaries, regardless of the sources of the pollution entering the waters. Pursuant to § 303(d)(1), 33 U.S.C. § 1313(d)(1), each state is required to identify those waters

that do not meet the water quality standard which is frequently called the "§ 303(d)(1) list." For impaired waters identified in the § 303(d)(1) list, the states must establish a TMDL for pollutants identified by the EPA. A TMDL specifies the maximum amount of pollutant that can be discharged or loaded into the waters from all combined sources, so as to comply with the water quality standards.

Each state is required to submit its § 303(d)(1) list and its TMDL to the EPA for its approval or disapproval. If the EPA disapproves either of those documents, the EPA is responsible for preparing that document. The state then incorporates its § 303(d)(1) list and its TMDL or the EPA's approved document into its continuing planning process as required by § 303(e), 33 U.S.C. § 1313(e).

In this case, the state had prepared the § 303(d)(1) list, but it had not prepared a TMDL. Therefore, in response to the Petitioners' objection, the EPA prepared the TMDL utilized in its awarding of the permit.

B. Carlota's Discharge into an Impaired Waterway.

[1] The Petitioners contend that as a "new discharger" Carlota's discharge of dissolved copper into a waterway that is already impaired by an excess of the copper pollutant violates the intent and purpose of the Clean Water Act. Under the NPDES permitting program, 40 C.F.R. § 122.4(i) addresses the situation where a new source seeks to permit a discharge of pollutants into a stream already exceeding its water quality standards for that pollutant. Section 122.4 states in relevant part:

No permit may be issued:

....

(i) To a new source or a new discharger if the discharge from its construction or operation 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 C.F.R. § 122.4 (2000).

[2] The plain language of the first sentence of the regulation is very clear that no permit may be issued to a new discharger if the discharge will contribute to the violation of water quality standards. This corresponds to the stated objectives of the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a) (1987). And that "it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited." 33 U.S.C. § 1251(a)(3) (1987).

The EPA contends that the partial remediation of the discharge from the Gibson Mine will offset the pollution. However, 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.¹

¹It is questionable whether there really is an offset. See discussion in the next section.

The regulation does provide for an exception where a TMDL has been performed and the owner or operator demonstrates that *before the close of the comment period* two conditions are met, which will assure that the impaired waters will be brought into compliance with the applicable water quality standards. The plain language of this exception to the prohibited discharge by a new source provides that the exception does not apply unless the new source can demonstrate that, under the TMDL, the plan is designed to bring the waters into compliance with applicable water quality standards.

[3] The EPA argues that under the requirements of clause (1), there are sufficient remaining load allocations to allow for the discharge because the TMDL provides a method by which the allocations could be established to allow for the discharge. There is no contention, however, that these load allocations represent the amount of pollution that is currently discharged from the point sources and nonpoint sources, and there is no indication of any plan that will effectuate these load allocations so as to bring Pinto Creek within the water quality standards. The TMDL merely provides for the manner in which Pinto Creek *could* meet the water quality standards if all of the load allocations in the TMDL were met, not that there are sufficient remaining pollutant load allocations under existing circumstances.

With regard to the requirements of clause (2), the EPA argues that the requirement of "compliance schedules" pertains only to point sources for which there is a permit. This does not correspond to the plain language of clause (2), which provides "the existing discharges into that segment [of Pinto Creek] are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards." 40 C.F.R. § 122.4(i)(2) (2000).

[4] We examine that language utilizing the definitions provided in the regulation. The term "discharge" is defined to mean "the discharge of a pollutant." 40 C.F.R. § 122.2 (2000).

The term “discharge of a pollutant,” is defined as any addition of any “pollutant” or combination of pollutants to “waters of the United States” from “*any point source*.” *Id.* at § 122.2(a) (emphasis added). Thus, under the plain language of the regulation, compliance schedules are not confined only to “permitted” point source discharges, but are applicable to “any” point source.

The EPA contends that this would amount to a complete ban of the discharge of pollution to impaired waters. This is based on its misreading of the plain language of the regulation to state that the remediation has to be *completed* before Carlota’s discharge. The plain language of clause (2) of the regulation, instead, provides that existing discharges into that segment (of the waters) are “subject to *compliance schedules* designed to bring the segment into compliance with applicable water quality standards.” 40 C.F.R. § 122.4(i)(2) (2000) (emphasis added). This is not a complete ban but a requirement of schedules to meet the objective of the Clean Water Act.

[5] Here the existing discharges from point sources are not subject to compliance schedules designed to bring Pinto Creek into compliance with water quality standards. Thus, Carlota has not demonstrated that clause (2) of 40 C.F.R. § 122.4(i) has been met. This is the regulation upon which Carlota and the EPA rely for issuance of the permit.

Initially, Carlota and the EPA contended that the first and second sentences of § 222.4(i) could be construed to apply independently, thus not requiring compliance with clauses (1) and (2) when an offset would result in a substantial net reduction of pollution to the impaired waters. The Petitioners, on the other hand, maintained that the two sentences must be read together, not independently. However, the EPA subsequently asked the Appeals Board to assume, for purposes of this decision, that clauses (1) and (2) do apply. *See In re Carlota Copper Co.*, 11 E.A.D. 692, 766 (EAB 2004). Thus, we

are concerned in this case with whether the EPA required Carlota to fulfill all of the requirements of § 122.4(i), including clauses (1) and (2), in order to issue a permit to it as a new discharger.

The Respondents and Carlota rely on *Arkansas v. Oklahoma*, 503 U.S. 91 (1992) in support of their contentions. That case involved the issuance of a permit for a city in Arkansas to discharge effluent into a stream in Arkansas that entered a river that eventually flowed into Oklahoma. Oklahoma challenged the permit before the EPA, alleging that the discharge violated Oklahoma Water Quality Standards. In that case, the EPA found that the discharge would not lead to a "detectable change in water quality," which the Supreme Court held was supported by substantial evidence. *Arkansas*, 503 U.S. at 112. In the opinion, the Court stated that "the parties have pointed to nothing that mandates a complete ban on discharges into a waterway that is in violation of those standards. The statute does, however, contain provisions designed to remedy existing water quality violations and to allocate the burden of reducing undesirable discharges between existing sources and new sources. *See, e.g.* § 1313(d)." *Id.* at 108. Section 1313(d) of the Clean Water Act, referred to by the Court, is the one that provides for the establishment of water quality standards and TMDLs.

The Supreme Court in *Arkansas v. Oklahoma* also referred to § 1288(b)(2), which provides for the development of area-wide programs to eliminate existing pollution in the context of area-wide waste treatment management. *Id.* That section provides details required of any plan to eliminate the pollution, including schedules, time lines, identification of agencies, and identification of measures necessary to carry out the plan.

The Appeals Board stated that prior Agency pronouncements "confirm our position that, rather than completely banning new source discharges, § 122.4(i) provides new sources

with the opportunity to obtain a permit if the requirements specified in that section are met.” *In re Carlota Copper Co.*, 11 E.A.D. 692, 765 (EAB 2004). The prior Agency position quoted states:

A new source or new discharger may, however, obtain a permit for discharge into a water segment which does not meet applicable water quality standards by submitting information demonstrating that there is sufficient loading capacity remaining in waste load allocations (WLAs) for the stream segment to accommodate the new discharge and that existing dischargers to that segment are subject to *compliance schedules* designed to bring the segment into compliance with the applicable water quality standards.

Id. (emphasis added). The language quoted by the Appeals Board from the prior agency action requires compliance schedules designed to bring the water segment into compliance with the applicable water quality standards.

[6] In Carlota’s case, there are no plans or compliance schedules to bring the Pinto Creek segment “into compliance with applicable water quality standards,” as required by § 122.4(i)(2), which Carlota and the EPA both acknowledge is the applicable section with which Carlota must comply. The error of both the EPA and Carlota is that the objective of that section 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 the impaired waters.²

²The only step the EPA or Carlota has taken to meet the requirements of § 122.4(i)(2) is the partial remediation of the Gibson Mine discharge. The following statement illustrates the Appeals Board’s erroneous view of the objective of § 122.4(i)(2):

The goal of the proposal is not, as Petitioners and other commenters seemed to believe, the restoration of the entirety of Pinto Creek to water quality standards. While desirable, this is not the intent of the proposed action.

In re Carlota Copper Co., 11 E.A.D. 692, 784 (EAB 2004).

[7] The EPA has the responsibility to regulate discharges from point sources and the states have the responsibility to limit pollution coming into the waters from non-point sources. If point sources, other than the permitted point source, are necessary to be scheduled in order to achieve the water quality standard, then the EPA must locate any such point sources and establish compliance schedules to meet the water quality standard before issuing a permit. If there are not adequate point sources to do so, then a permit cannot be issued unless the state or Carlota agrees to establish a schedule to limit pollution from a nonpoint source or sources sufficient to achieve water quality standards.

The EPA contends that it cannot be judicially compelled to act against point sources that are illegally discharging into Pinto Creek. The EPA notes that while it has the authority to act against violators, its decision to do so in ordering its priorities is a matter that is typically committed to its absolute discretion, citing *Sierra Club v. Whitman*, 268 F.3d 898, 903 (9th Cir. 2001) and *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

In Carlota's case, there is nothing in § 122.4(i) that compels the EPA to act against point sources that are violating the Clean Water Act by their discharges into Pinto Creek or requiring judicial review of the EPA's ordering of priorities in any failure to act. The requirement of § 122.4(i)(2) is simply a condition that must be met before a permit can be issued to a new discharger into impaired waters. There is no compulsion on the EPA to act against point source violators, as in *Sierra Club* or *Heckler*. The EPA remains free to establish its priorities; it just cannot issue a permit to a new discharger until it has complied with § 122.4(i)(2).

In this case, the Petitioners do not argue for an absolute ban on discharges into a waterway that is in violation of the water quality standards. Rather, the Petitioners point to the § 122.4(i) exception by which a new discharger can comply

with the Clean Water Act requirements. Those requirements simply were not met. Thus, no conflict exists with the Supreme Court's opinion in *Arkansas v. Oklahoma*.

C. Pollution From the Diversion Channels.

Carlota proposed to construct two diversion channels that would divert surface and groundwater around the mine facilities. The Pinto Creek diversion channel would extend approximately 5250 feet and then into Pinto Creek. The Powers Gulch stream diversion channel would extend approximately 7900 feet into the Powers Gulch stream, which eventually connects to Pinto Creek. Both channels will eventually add pollutants, including copper, into Pinto Creek especially from the groundwater that Carlota will be directing into the channels for discharge into Pinto Creek.

In order to block groundwater from entering the main Carlota Mine pit, Carlota will construct a cutoff wall down to bedrock that will divert the groundwater to the surface and into the Pinto Creek diversion channel. The Forest Service FEIS stated: "The cutoff wall would be an impermeable barrier extending from the surface down through the alluvium and into the bedrock. The cutoff wall would be designed to prevent water from moving toward the pit and would encourage the alluvial flow to surface into the diversion channel to be routed around the pit." *Fed. Envtl. Impact Statement for Carlota Copper Project*, Vol. 1, Ch. 2, p. 16 (1997). The Forest Service FEIS also noted that the alluvial groundwater that will enter the diversion channel contains dozens of pollutants, including copper, that will be added to Pinto Creek. According to the Forest Service FEIS, the amount of dissolved copper in this groundwater would be significant. In addition to the groundwater directed into Pinto Creek via the Pinto Creek diversion channel, a similar cutoff wall is proposed to direct groundwater into the Powers Gulch stream diversion channel and ultimately into Pinto Creek. Like the groundwater added to the Pinto Creek via the Pinto Creek diversion channel, the

groundwater added to the Powers Gulch stream contains elevated levels of copper and other pollutants. The EPA did not consider the copper contributions from the use of the proposed diversion channels and groundwater cutoffs. The Appeals Board refused to consider these additional sources of copper pollution because it was not raised in the first comment period for the permit.

In the Petitioners' first Petition for Review of the NPDES permit and the NEPA documents before the Appeals Board, the Petitioners contended, among other things, that the EPA had not allowed a comment period on the two new conditions added to the permit and that the EPA should establish a TMDL for copper discharges into Pinto Creek before issuing Carlota's permit. The EPA did not respond and, instead, withdrew portions of the challenged NPDES permit stating that the permit was not severable from the contested conditions and that the permit should be stayed until pending final agency action.

[9] After establishing a TMDL for copper in Pinto Creek, Carlota then pursued a renewal of the permit based upon 40 C.F.R. § 122.4(i). Carlota has conceded that for the purpose of this decision § 122.4(i), including clauses (1) and (2), is applicable. Carlota was thus proceeding on the basis that a TMDL had been issued and that it was required to comply with clauses (1) and (2). Section 122.4(i) requires that a new discharger into impaired waters for which a pollutant's load allocation for the pollutant to be discharged "must demonstrate, before the *close of the comment period*," the compliance with clauses (1) and (2). 40 C.F.R. § 122.4(i) (2000) (emphasis added). The comment period referred to could not have been the initial comment period before a TMDL was sought or established. The comment period had to relate to the new basis for Carlota's permit under § 122.4(i).

[10] All of the claims that the Petitioners now rely upon were raised during the comment period after the TMDL was

performed. They could not have been raised in the first comment period. These claims were made known to the EPA not only in the second comment period but also at the time of the preparation of the TMDL by a letter that raised the point, a copy of which was furnished directly to the EPA. Thus, the claim with regard to the copper discharge from the diversion channels and the cutoff walls was timely raised and should not have been deemed forfeited, but it should have been considered by the Appeals Board. This would be important in determining whether the requirement for compliance schedules set out in § 122.4(i)(2) had been met and also it would be important in determining the extent of the pollutants contributed by Carlota that would be offset by the Gibson Mine remediation.

D. The State of Arizona's Requirements.

In addition to violating 40 C.F.R. § 122.4(i), the Petitioners contend that the permit also violates the provisions of 40 C.F.R. § 122.4(d), which provides that no permit may be issued "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." 40 C.F.R. § 122.4(d) (2000). This must be considered in connection with § 122.4(a), which states that no permit may be issued "when the conditions of the permit do not provide for compliance with the applicable requirements of the Clean Water Act or regulations promulgated under the Clean Water Act." *Id.* at § 122.4(a). Thus, the requirements of § 122.4(d) are in addition to complying with all of the requirements of the Clean Water Act and the regulations promulgated under the Clean Water Act.

[11] Since we here hold that the permit does not comply with § 122.4(i), the additional requirement of § 122.4(d) need not be considered at this time. It would be appropriate to consider the requirements of § 122.4(d) if a permit is properly issued under § 122.4(i).

E. Compliance With the Requirements of NEPA.

NEPA requires agencies to examine potential environmental effects of any proposed action, and to inform the public of its studies and resulting concerns. If any agency determines that its action may have a significant impact on the environment, the agency is required to prepare an EIS describing the impacts of the action and possible alternatives. 42 U.S.C. § 4332(2)(C) (1975). To determine if the action will require an EIS, the agency may first prepare an environmental assessment ("EA"). 40 C.F.R. § 1508.9 (1998). If the EA indicates that there will not be a significant impact on the environment, the agency may issue a Finding of No Significant Impact, in which case an EIS is not required. 40 C.F.R. § 1508.13 (1998).

[12] In the first appellate review before the Appeals Board, the Petitioners challenged the EPA's failure to allow comments on the two new permit conditions and also the failure to conduct a TMDL prior to issuing the permit. The supplemental EA issued by the EPA addressed only the environmental effect of the two new conditions, not the effect of a permit issued to a new discharger under § 122.4(i), including clauses (1) and (2). There is nothing wrong with incorporating and relying upon the Forest Service FEIS because it had discussed the effect on waters by the proposed Carlota Mine. However, the EA produced by the EPA should have discussed the revised permit issued under § 122.4(i), including clauses (1) and (2).

[13] The Petitioners argued that the EPA failed to take a "hard look" at its failure to consider the discharges from the two diversion channels, including the walls to be established to prevent groundwater from reaching the mine facilities, which would contribute alluvial water, including copper pollution, to Pinto Creek. The Appeals Board refused to consider this argument because it contended that it had not been raised during the first comment period. As we have previously

explained, it was not possible to comment upon the request for a permit based upon the TMDL and the requirements of § 122.4(i) until after the TMDL had been issued. Thus, for the reasons we expressed in the prior section, it was error for the Appeals Board not to consider additional discharges from the diversion channels.

[14] The Petitioners also raised other questions concerning the compliance with NEPA, such as reasonable alternatives to the proposed action. Because we have held that the permit was improperly issued under the provisions of § 122.4(i), including clauses (1) and (2), these NEPA issues need not be considered at this time.

V. CONCLUSION

Because the issuance of the NPDES Permit to Carlota Copper Mine was based on errors of law under the Clean Water Act, 40 C.F.R. § 122.4(i), and the NEPA, we vacate and remand the permit to the EPA for further proceedings consistent with this opinion.

VACATED and REMANDED.

PROOF OF SERVICE

I am a citizen of the United States of America; I am over the age of 18 years and not a party to the within entitled action. My business address is 2001 N. Main Street, Suite 390 Walnut Creek, California 94596. On January 18, 2008, I served a true copy of the foregoing

PETITION FOR REHEARING *EN BANC*

in the above-captioned matter on each of the persons listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in the United States mail at Walnut Creek, California, addressed as follows:

D. Judith Keith
Environmental & Natural
Resources Division
Environmental Defense Section
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

John S. Most
Environmental & Natural
Resources Division
Environmental Defense Section
U.S. Department of Justice
P.O. Box 663
Washington, D.C. 20044-0663

Roger Flynn
Jeffrey C. Parsons
Western Mining Action Project
P.O. Box 349
440 Main Street, Suite 2
Lyons, CO 80540

Amy R. Porter
Richard W. Tobin
Albert H. Acken
40 North Central Avenue
Phoenix, Arizona 85004-4429

I certify under penalty of perjury, that the foregoing is true and correct. Executed on January 18, 2008, at Walnut Creek, California.



Monica Brozowski