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

CARLOTA'S REPLY BRIEF TO PETITIONERS' OPPOSITION TO 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

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ARGUMENT

I. THE PETITIONERS INCORRECTLY ALLEGE THAT CARLOTA'S DISCHARGES WILL VIOLATE WATER QUALITY STANDARDS.

In their response to Carlota's petition, the petitioners allege in several places that Carlota's permitted discharges "will violate water quality standards." Petitioners' Response In Opposition to Petition for Rehearing *En Banc* (hereinafter "Pet. Response"), 7; *see also id.* at 4,6.

These allegations are incorrect. Carlota's permit specifically requires that Carlota's discharges comply with water quality standards. PER 131; Carlota's Pet. for Rehearing *En Banc* (hereinafter "Carlota Pet."), 6 n. 2. The State of Arizona has certified that Carlota's discharges will comply with Arizona's water quality standards. RER 178; IER 50; PER 408; Carlota Pet. 7. The Environmental Protection Agency (EPA), quoting from the Arizona certification, stated that the permit "is 'protective of the water quality requirements of the State of Arizona.'" PER 457. The question in this case is not whether Carlota can discharge copper into impaired waters in violation of water quality standards—Carlota's permit prohibits such discharges—but instead whether Carlota can discharge storm water containing detectable amounts of copper into impaired waters, where the discharges meet water quality standards and are subject to offset conditions that reduce net pollution.

II. THE PETITIONERS INCORRECTLY ARGUE THAT CARLOTA'S PERMIT WILL BE INVALID REGARDLESS OF WHETHER *EN BANC* REVIEW IS GRANTED.

The petitioners argue that Carlota's permit will be invalid regardless of whether *en banc* review is granted, because Carlota's petition does not seek review of parts of the panel decision. Pet. Response 1 n. 1. This argument is incorrect. This court has stated:

> A court's decision to rehear a case *en banc* effectively means that the original three-judge panel never existed. . . . The *en banc* court does not review the original panel decision, nor does it overrule the original panel decision. Rather, the *en banc* court acts as if it were hearing the case on appeal for the first time. This makes sense because the purpose of *en banc* review is to correct any errors that the original panel may have committed.

Socop-Gonzalez v. Immigration and Naturalization Service, 272 F.3d 1176, 1186 n. 8 (9th Cir. 2001). Therefore, if this court grants *en banc* review, it reviews all issues properly raised on appeal, not just the issues raised in the petition for rehearing *en banc*.

III. THE PETITIONERS' ARGUMENTS THAT WERE NOT ADDRESSED IN THE PANEL DECISION ARE WITHOUT MERIT.

A. The Petitioners' Distinction Between Offsets at the "Point of Discharge" and Elsewhere Diverges from the Panel Decision, and Is Incorrect.

The petitioners argue that the offset condition in Carlota's permit may reduce pollution "far upstream" from Carlota's discharge site or "somewhere else in the watershed," but does not reduce pollution at the "point of discharge" itself. Pet. Response 4, 7. Therefore, they argue, Carlota's discharges "cause or contribute" to water quality violations and are prohibited by the Clean Water Act (CWA) and the EPA regulation, 40 C.F.R. § 122.4(i). *Id.*

The petitioners' argument—that the validity of offsets depends on whether they reduce pollution at the "point of discharge"—diverges from the panel decision. The panel held that "nothing in the Clean Water Act or the regulation . . . 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. Thus, the panel held that offsets for discharges into impaired waters are invalid, and did not suggest that the validity of an offset depends on its location.

Nothing in the CWA or the regulation suggests that the validity of offsets depends on whether they reduce pollution at the "point of discharge" or at other locations in the stream or watershed. The goal of the CWA, which is to "restore

and maintain" water quality, 33 U.S.C. § 1251(a), is effectuated by an offset that reduces pollution of impaired waters, regardless of where the reduction occurs in such waters. *In re Cities of Annandale and Maple Lake*, 731 N.W.2d 502, 522, 524 (Minn. 2007) (offset condition is valid if it reduces pollution in the "watershed").

B. Neither The Clean Water Act Nor the EPA Regulation Requires That The EPA Adopt a "Plan" Before Approving Discharges Into Impaired Waters.

Addressing Clause (1) of the second sentence of the EPA regulation, the petitioners argue that—even though the EPA or a state may have adopted a "total maximum daily load" (TMDL) for impaired waters—the EPA must still adopt a "plan for achieving compliance with the WQS [water quality standard]," apart from the TMDL itself. Pet. Response 10.[1] The "plan," according to petitioners, is different from and in addition to the "paper" load allocations themselves. *Id.* at 12.

Neither the CWA nor the regulation requires the EPA or the state to adopt a "plan" before approving discharges into impaired waters, or makes any reference to such a "plan." Instead, the statute requires the state to adopt a TMDL establishing load allocations for impaired waters, 33 U.S.C. § 1313(d)(1)(C), and the regulation provides that—if load allocations have been established—the

[1] Petitioners use the word "plan" at least twelve times in describing the requirements of Clause (1) of the second sentence of the EPA regulation. Pet. Response 1, 6, 8, 10 (twice), 13 (five times), 14, 15.

discharger must demonstrate that there are "sufficient remaining pollutant load allocations" for the discharge. 40 C.F.R. § 122.4(i)(1). The regulation does not require the adoption of a "plan" in addition to the load allocations of the TMDL. The petitioners have added a requirement that does not appear in the statute or the regulation.[2]

C. The Petitioners' Argument Concerning the "Compliance Schedules" Requirement is not Supported by the Regulatory Language.

Regarding Clause (2) of the second sentence of the EPA regulation, the petitioners do not respond to Carlota's argument that the term "compliance schedules," as used in that clause, must be interpreted in accordance with the definition of a "schedule of compliance" in another EPA regulation, 40 C.F.R. § 122.2, which defines the term as "a schedule of remedial measures included in a 'permit.'" Carlota Pet. 18-19. Instead, the petitioners make the policy argument that this interpretation "reward[s]" the EPA and Carlota for the EPA's "failure" to issue permits and adopt compliance schedules for some dischargers. Pet. Response 14-15. Contrary to the petitioners' argument, there is no evidence in the record indicating that the EPA has inappropriately failed to issue permits or compliance

[2] Although the petitioners allege that the EPA has adopted a "plan" for the upstream Gibson mine, Pet. Response 13, the TMDL reveals instead that the EPA adopted "load allocations" for the mine, as required by the CWA. PER 198-199. As the TMDL notes, "[a]n implementation plan is not a required element of a TMDL at this time." *Id.* at 204.

schedules for dischargers.[3] The petitioners' policy argument is inconsistent with the plain language of the EPA regulation defining a "schedule of compliance."

The petitioners also argue that the panel's conclusion that compliance schedules must be adopted for *non-point source* dischargers is "not relevant to the Panel's holding" because it involves "possible future cases involving nonpoint sources." Pet. Response 15. The petitioners pointedly do not defend the panel's erroneous conclusion on its merits. Carlota Pet. 19.[4]

IV. THE MINNESOTA SUPREME COURT DECISION IS NOT DISTINGUISHABLE.

The petitioners argue that the Minnesota Supreme Court's decision in *In re Cities of Annandale and Maple Lake,* 731 N.W.2d 502 (Minn. 2007), is distinguishable because (1) no TMDL had been completed in that case, and (2) the offset in this case is in a different location than the discharge site. Pet. Response 18. Since the panel did not discuss the Minnesota decision, the panel did not

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[3] The petitioners claim that the EPA "failed" to require compliance schedules for other dischargers on Pinto Creek, principally BHP Copper Mine. Pet. Response 15. In fact, the TMDL states that compliance schedules were not adopted for these dischargers because "these sources are not significant contributors of dissolved copper in Pinto Creek and discharges consistently meet water quality standards." PER 203.

[4] Although the petitioners also argue that the panel decision is not "internally inconsistent" in describing the relationship between the first and second sentences of the EPA regulation, Pet. Response 8-12, they do not address or mention the specific panel statements cited in Carlota's petition that demonstrate this internal inconsistency. Carlota Pet. 13-15.

consider whether the decision is distinguishable on these or other grounds. In fact, the decision is not distinguishable.

First, the Minnesota Supreme Court held that it is irrelevant whether a TMDL has been completed if the permitted discharge does not "cause or contribute" to water quality violations because of an offset condition. The Court stated:

> [T]he first sentence of 40 C.F.R. § 122.4(i) applies regardless of whether a TMDL has been completed. [Citation omitted.] Even when a TMDL has been established, a permitting authority must still determine that the new discharge will not cause or contribute to a violation of water quality standards.

731 N.W.2d at 520-521. The Court then held that the NPDES permit did not "cause or contribute" to water quality violations because the offset condition reduced pollution. *Id.* at 520-525. Thus, the Court held that offsets are valid regardless of whether a TMDL has been completed. The petitioners' argument that the Court might have decided the case differently if a TMDL had been completed is demonstrably wrong.

Second, the offset in the Minnesota case was in a different location than the discharge site—but within the same watershed—and the question was whether the agency could "consider offsets from another source within the watershed." 731 N.W.2d at 522. The Minnesota Supreme Court concluded that the offset was valid

because it would not impair water quality in the "watershed." 731 N.W.2d at 506.[5] Similarly, Carlota's offset—the Gibson mine remediation—is at a different location on Pinto Creek than Carlota's discharge site, and would not impair—and would improve—water quality in the creek. Thus, the Minnesota case is similar to, rather than distinguishable from, the instant case. The panel decision directly conflicts with the Minnesota Supreme Court's decision.[6]

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[5] In *Annandale*, the Cities of Annandale and Maple Lake—which discharged phosphorus from an old waste treatment plant into a river that was part of the Lake Pepin watershed—were granted a NPDES permit authorizing discharges of phosphorus from a new waste treatment plant at another location in the same watershed, subject to an offset condition requiring the removal of more phosphorus from the old plant than would be added by the new plant. 731 N.W.2d at 506. The Minnesota Supreme Court held that, because of the offset condition, "this increase [in pollution at the discharge site] would not contribute to a violation of water quality standards in the Lake Pepin *watershed*." *Id.* at 506 (emphasis added). The Court stated:

> [W]e conclude that, when dealing with a situation like the one presented in this case—two aging wastewater treatment facilities with expired NPDES permits, which are at or near capacity in a region of the state that is experiencing significant growth—it was not unreasonable for the MCPA to allow a 2,200-pound per year (at capacity) increase in phosphorus discharge from a new wastewater treatment facility to be offset by a contemporaneous 53,500-pound per year decrease in a nearby facility that is located in the same watershed.

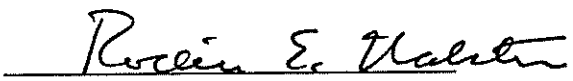
Id. at 524.

[6] Although the petitioners argue that that the Supreme Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), is distinguishable here, Pet. Response 15-17, the Minnesota Supreme Court relied heavily on the *Arkansas* decision in reaching its decision. The Minnesota Supreme Court's majority opinion stated that the

CONCLUSION

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

Respectfully submitted,



RODERICK E. WALSTON
Attorney for Carlota Copper Company

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dissenting opinion's "narrow interpretation" of the EPA regulation—which is the same interpretation adopted by the panel here—"will perpetuate the very outcome the Supreme Court sought to avoid with its decision in *Arkansas v. Oklahoma*—namely, the adoption of such a rigid approach that construction of new facilities that would improve existing conditions would be frustrated." 731 N.W.2d at 525.

CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rules 35-4 and 40-1, I certify that the Carlota Copper Company's reply brief is in 14-point New Times Roman font; that the brief was produced on a computer using a word processing program; and that the program calculated that the brief contains 2,020 words.

Respectfully submitted,

Roderick E. Walston

RODERICK E. WALSTON
Attorney for Carlota Copper Company

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 February 25, 2008, I served a true copy of the foregoing

CARLOTA'S REPLY BRIEF TO PETITIONERS' OPPOSITION TO 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 February 25, 2008, at Walnut Creek, California.

Monica Brozowski