No. _____

In The

Supreme Court of the United States

CARLOTA COPPER COMPANY,

Petitioner,

v.

FRIENDS OF THE RIVER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Ninth Circuit erred in holding – contrary to this Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), a recent Minnesota Supreme Court decision, and the Environmental Protection Agency's interpretation and practice – that the Clean Water Act, 33 U.S.C. § 1251 *et seq*., and an implementing regulation, 40 C.F.R. § 122.4(i), prohibit the Environmental Protection Agency and the states from issuing permits for discharges from "new" sources into "impaired" waters, even though conditions are imposed that reduce net pollution of such waters and improve overall water quality.

PARTIES TO THE PROCEEDINGS

Carlota Copper Company is the petitioner in this Court and was an intervenor in the court of appeals.

The United States Environmental Protection was the respondent in the court of appeals.

The following parties are respondents in this Court and were petitioners in the court of appeals: 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.

CORPORATE DISCLOSURE STATEMENT

Petitioner Carlota Copper Company's parent companies are Carlota Holdings Company (formerly known as Cambior USA, Inc.), a Delaware corporation; Robinson Holdings (USA) Ltd., a Nevada corporation; Robinson Holdings (Canada) Ltd., a British Columbia, Canada, corporation; and Quadra Mining, Ltd., a British Columbia, Canada, corporation. Quadra Mining, Ltd., is a publicly traded company listed on the Toronto Stock Exchange. Carlota Copper Company, Carlota Holdings Company, Robinson Holdings (USA) Ltd., and Robinson Holdings (Canada) Ltd., do not issue any shares of stock to the public.

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MISCELLANEOUS

OPINIONS BELOW

The Ninth Circuit's opinion (App. 1) is reported at 504 F.3d 1007. The opinion of the U.S. Environmental Protection Agency Environmental Appeals Board (App. 25) is reported at 11 E.A.D. 692 (EAB 2004).

JURISDICTION

The Ninth Circuit issued its judgment on October 4, 2007. App. 1. The Ninth Circuit denied Carlota Copper Company's timely petition for rehearing *en banc* on March 7, 2008. App. 221. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The relevant provisions of sections 301, 306 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311, 1316, 1342, and 40 C.F.R. § 122.4(i), are set forth in the Appendix. App. 222-226.

STATEMENT OF THE CASE

1. Statutory and Regulatory Background

The Clean Water Act ("Act"), 33 U.S.C. § 1251 *et seq*., prohibits the discharge of pollutants except as

authorized by specific provisions of the Act. 33 U.S.C. §§ 1311(a). One such provision, section 402, establishes the National Pollutant Discharge Elimination System (NPDES); the NPDES authorizes the Environmental Protection Agency (EPA) to issue permits for discharges of effluent from point sources, such as pipes and conduits, into water.[1] 33 U.S.C. §§ 1342(a), 1362(14); App. 223. The permits must establish effluent limits for the discharges based on technologically-based standards. *Id.* at § 1311(b)(1)(A).

The EPA is required to delegate its NPDES permit authority to a state, if the state submits a program that meets statutory criteria. 33 U.S.C. § 1342(b); *National Ass'n of Home Builders v. Defenders of Wildlife,* 127 S.Ct. 2518, 2525 (2007). These statutory criteria establish requirements similar to those applicable to the EPA-administered program. 33 U.S.C. § 1342(b)(1)(A); 40 C.F.R. § 123.25. The EPA program must, in turn, meet the "same terms, conditions, and requirements" applicable to the state programs. 33 U.S.C. § 1342(a)(3). Thus, the same statutory requirements apply to both the EPA and state programs. To date, forty-five states have been delegated authority to administer their NPDES permit programs. U.S. Environmental Protection Agency, National Pollutant Discharge Elimination

[1] More precisely, the NPDES applies to discharges into "navigable waters," 33 U.S.C. § 1362(12), which is defined as "waters of the United States," *id.* at § 1362(7). *See South Florida Water Management Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004).

System, http://cfpub.epa.gov/npdes/statestats.cfm (last accessed Mar. 27, 2008).[2]

Although the NPDES focuses on the discharge of pollutants from point sources, the Act also establishes controls for the quality of the receiving waters. Section 303 requires the states to adopt "water quality standards" for bodies of water, such as rivers and lakes. 33 U.S.C. § 1313(a). If a water body fails to meet the water quality standards, the state must adopt a "Total Maximum Daily Load" (TMDL) for the water body. *Id*. at § 1313(d). A TMDL establishes the maximum "load" of pollutants that a water body can receive from all sources, including both point sources and non-point sources, without violating state water quality standards. 40 C.F.R. §§ 130.2(g)-(i), 130.7(c)(1). Under section 301(b)(1)(C), an NPDES permit must require that the permitted discharges comply with applicable state water quality standards. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122(d).

Another provision, section 306, requires the EPA to adopt "national standards of performance" for "new sources," that is, sources constructed after adoption of the national performance standards. 33 U.S.C. § 1316(a)(1), -(a)(2); App. 223. The national performance standards must reflect "the greatest degree of effluent reduction" that can be achieved through the

[2] The only states that have not been delegated such authority are Alaska, Idaho, Massachusetts, New Hampshire and New Mexico. *Id.*

best available technology. 33 U.S.C. § 1316(a)(1). The EPA has promulgated national standards of performance for several categories of point sources, including copper-producing mines, which include Carlota Copper Company's mining project. 40 C.F.R. §§ 440.100 *et seq*., 440.100(a)(1).

Pursuant to section 306, the EPA has adopted a regulation authorizing the issuance of NPDES permits for discharges by a "new source" or "new discharger" into waters that do not meet state water quality standards. 40 C.F.R. § 122.4(i); App. 224.[3] The first sentence of the regulation prohibits the issuance of a permit if the discharge will "cause or contribute to the violation of water quality standards." *Id*. The second sentence provides that – if a TMDL has been

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[3] 40 C.F.R. section 122.4(i) provides in relevant part:

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

adopted that establishes load allocations for the waters – the discharger must demonstrate that (1) there are "sufficient remaining pollutant load allocations" for its discharge, and (2) "existing dischargers" are subject to "compliance schedules" designed to achieve compliance with water quality standards. *Id*.

2. Factual Background

In 1996, Carlota Copper Company ("Carlota") applied to the EPA for an NPDES permit authorizing discharges from a copper mine that Carlota planned to build and operate in Arizona. The discharges will consist of storm water runoff, containing detectable amounts of copper, during extreme storms. The discharges will reach Pinto Creek, which does not meet Arizona's water quality standards for copper. The EPA has adopted a TMDL establishing copper load allocations for Pinto Creek, including specific load allocations for Carlota's storm water runoff. App. 44, 172.

In 2000, four years after Carlota's application, the EPA issued an NPDES permit to Carlota authorizing the storm water discharges into Pinto Creek.[4] The permit contained an offset condition designed to

[4] Although Arizona, where Carlota's mine is located, received approval to administer its NPDES program as a result of this Court's decision in *National Ass'n of Home Builders v. Defenders of Wildlife,* 127 S.Ct. 2518 (2007), the EPA issued the permit before Arizona received such approval, and has continued to exercise jurisdiction over the permit since then.

improve the creek's water quality and ensure compliance with Arizona's water quality standards. App. 42. The condition requires Carlota to offset the storm water discharges by remediating – that is, removing – copper pollution at an abandoned upstream mine, the Gibson Mine, located on the same creek. App. 42.[5] The EPA's Environmental Appeals Board determined that the copper loadings that will be remediated at the abandoned mine "far exceed Carlota's projected copper loadings" from the storm water runoff, and thus the offset condition will result in a "significant improvement" of the creek's water quality. App. 122, 124.[6]

The permit also requires that Carlota's discharges comply with Arizona's water quality standards. App. 42 n. 19. The State of Arizona has certified, pursuant to section 401(a) of the Act, 33 U.S.C. § 1341(a), that, in light of the offset condition,

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[5] Carlota has largely completed construction of its mine pursuant to the EPA permit, and has already remediated pollution at the Gibson Mine. Carlota does not have any ownership or operational interest in the Gibson Mine.

[6] The permit authorizes Carlota to discharge from Outfall no. 005 – the outfall involved in this case – only the amount of storm water runoff that exceeds a 100-year, 24-hour storm event, *i.e.*, 6.2 inches of rainfall. App. 119. The EPA determined that the amount of copper pollutants *added* to Pinto Creek from Carlota's storm water discharges would be 2.01 kilograms per day (kg/day), compared with the *reduction* of copper pollutants resulting from remediation of the abandoned Gibson Mine of 83,138 kg/day, App. 122 – a reduction of more than 40,000 times the pollution caused by Carlota's storm water discharges.

Carlota's discharges will meet Arizona's water quality standards. App. 42, 44 n. 21.

The EPA concluded that Carlota's discharges will not "cause or contribute" to a violation of water quality standards and are not prohibited by the Act or the regulation, because the offset condition will reduce net pollution in Pinto Creek and Arizona has certified that the discharges will meet its water quality standards. App. 170. Based on these findings, the EPA issued the permit. *Id*.

3. Procedural Background

Friends of Pinto Creek, *et al*. ("Friends"), filed a petition for review with the EPA's Environmental Appeals Board, challenging the EPA's issuance of the permit. The Appeals Board, in a 136-page opinion, concluded that the permit had been properly issued under the Act and the regulation, and denied review. *In re Carlota Copper Company*, 11 E.A.D. 692 (EAB 2004); App. 25.[7]

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[7] The EPA's Regional Office IX had concluded that the second sentence of the regulation – which establishes load allocations and compliance schedules requirements – does not apply to discharges, such as Carlota's, that do not "cause or contribute" to water quality violations and are not prohibited by the first sentence of the regulation. App. 163 n. 101. The EPA Appeals Board "assume[d], without deciding," that both sentences apply, *id.*, and concluded that Carlota's discharges comply with both sentences. App. 163 n. 101, 164-176.

Friends filed a petition for review in the Ninth Circuit pursuant to section 509(b)(1)(F) of the Act, 33 U.S.C. § 1369(b)(1)(F), again challenging the EPA's issuance of the permit. The EPA was the respondent and Carlota was granted intervention.

The Ninth Circuit held that the permit violates the Act and the regulation, 40 C.F.R. § 122.4(i). *Friends of Pinto Creek, et al. v. Environmental Protection Agency, et al.,* 504 F.3d 1007 (9th Cir. 2007); App. 1. The court held that the Act and regulation prohibit new source discharges into "impaired waters" – *i.e.*, waters that do not meet state water quality standards – and that "there is nothing in the Clean Water Act or the regulation that provides an exception for an offset when the waters remain impaired and the new source is discharging pollution into that impaired water." App. 10-11. The court concluded, without any citation to authority, that Carlota's discharges "cause or contribute" to water quality violations, as prohibited by the regulation. *Id*. The court also held that Carlota's discharges do not comply with the second sentence of the regulation, which authorizes new source discharges if (1) there are "sufficient remaining pollutant load allocations" and (2) "existing dischargers" are subject to "compliance schedules." App. 11-12. The court vacated and remanded the permit to the EPA. App. 24.

REASONS FOR GRANTING THE WRIT

This petition raises the question whether the Clean Water Act ("Act") and an implementing EPA regulation, 40 C.F.R. § 122.4(i), prohibit the EPA and the states from issuing permits for discharges from "new" sources into "impaired" waters – that is, waters that do not meet state water quality standards – if conditions are imposed that reduce net pollution of such waters and improve overall water quality. The Act authorizes the EPA to issue NPDES permits for point source discharges into water, including new sources of discharge, and requires that the discharges comply with state-established water quality standards. The Act also requires the EPA to delegate its NPDES permit authority to a state, if the proposed state program meets the statutory criteria. The question presented is whether the EPA – and states that have NPDES-delegated authority – may properly issue NPDES permits for new source discharges into impaired waters subject to conditions that reduce net pollution and improve water quality.

This issue is one of national importance. According to the EPA, 45% of the nation's rivers and streams, and 47% of its lakes, ponds and reservoirs, are considered "impaired or not clean enough to support their designated uses, such as fishing and swimming." EPA, *National Water Quality Inventory: Report to Congress*, 2002 Reporting Cycle, at ES-2 (October 2007). If the EPA and the states cannot approve new source discharges into impaired waters, they would be unable to approve the construction and

operation of new projects and facilities that discharge into almost one-half of the nation's waters. These projects and facilities consist of the national infrastructure necessary to accommodate much of the nation's population growth and economic development – commercial and residential development projects, public waste treatment facilities, industrial projects, mining projects, agricultural operations, and others.[8] Thus, this issue has broad national significance.

In administering their NPDES permit programs, the EPA and the states do not categorically prohibit new source discharges into impaired waters. Instead, they determine on a case-by-case basis whether to approve such discharges, depending on whether the discharges will adversely affect water quality and whether conditions can be imposed that would improve water quality. This approach allows the EPA and the states to exercise discretion and flexibility in administering their NPDES programs, by approving discharges into impaired waters in individualized

[8] According to the EPA, NPDES permits are typically required for discharges from certain municipal facilities (such as publicly owned treatment works and wastewater systems, and municipal storm sewer systems), industrial and commercial facilities, some agricultural operations (such as animal feeding operations), and construction activities and other land-disturbing activities that involve one acre or more, among others. U.S. Environmental Protection Agency, National Pollutant Discharge Elimination System, http://cfpub.epa.gov/npdes (last accessed April 11, 2008).

cases subject to conditions that reduce net pollution and improve overall water quality. The most common example of such a condition is an "offset." An offset condition requires the discharger to offset its pollution by remediating more pollution from other sources than is caused by discharges from its own source – in effect, to remove more pollutants from the impaired waters than it adds. By requiring remediation of other sources of pollution, an offset condition reduces net pollution and improves overall water quality, and facilitates compliance with water quality standards. Such environmental "tradeoffs" allow the EPA and the states to approve new projects and facilities that discharge into impaired waters while still achieving the Act's goal, which is to "restore and maintain" water quality. 33 U.S.C. § 1251(a). Such tradeoffs provide a practical solution to the competing demands of developing new infrastructure projects and protecting water quality by allowing fulfillment of both within the statutory framework.

In this case, the EPA issued an NPDES permit authorizing Carlota to discharge storm water runoff during extreme, 100-year storms into an impaired creek, and imposed an offset condition requiring Carlota to remediate pollution at an abandoned upstream mine that discharges mining waste into the creek. The EPA determined that the permit and condition will greatly improve the creek's water quality, because the upstream pollution that Carlota is required to remediate greatly exceeds in amount (and occurs more frequently than) the pollution

caused by Carlota's nominal storm water runoff. The permit also requires that Carlota's storm water discharges comply with Arizona's water quality standards. Arizona has certified that the discharges will comply with its water quality standards by improving the creek's water quality.

The Ninth Circuit invalidated the permit on grounds that the Act and the EPA regulation prohibit new source discharges into impaired waters and make no exception for offset conditions that improve water quality. The decision precludes the EPA and the states from determining, on a case-by-case basis, whether specific discharges will adversely affect water quality, and if so, whether conditions can and should be imposed that reduce net pollution and improve water quality. The decision thus precludes the EPA and the states from approving infrastructure projects designed to improve water quality, if the projects discharge into impaired waters. For example, the decision would prohibit a municipal sewage agency from being allowed to replace an old, out-of-date sewage treatment facility with a modern, state-of-the-art facility that produces cleaner effluent. Under the Ninth Circuit decision, the EPA and the states have no discretion to approve discharges into impaired waters, regardless of the water quality effects of the discharges and regardless of whether conditions can be imposed to avoid these effects. No other court has held or suggested that the Act and the regulation impose such stringent restrictions on the

permitting agencies' discretion in administering their NPDES programs.

The Ninth Circuit decision conflicts with this Court's decision in *Arkansas v. Oklahoma,* 503 U.S. 91 (1992). There, this Court held that the EPA and the states have "broad authority" under the Act's NPDES provisions to develop "long-range, areawide programs" to prevent water pollution, and that they may approve new source discharges into impaired waters if this would "improve existing conditions." *Arkansas*, 503 U.S. at 108. Although the Court did not specifically consider the validity of offset conditions, its decision strongly implies that such conditions are valid, because offset conditions "improve existing conditions" by reducing net pollution. While *Arkansas* held that the permitting agencies have "broad authority" under the Act, the Ninth Circuit held that their discretion is very narrow.

The Ninth Circuit failed to apply the proper standard of review in interpreting the EPA's regulation, by not deferring to, and instead rejecting, the EPA's interpretation. The EPA has interpreted its regulation as authorizing the EPA and the states, in their discretion, to approve new source discharges into impaired waters subject to offset conditions that reduce net pollution and improve water quality, and the EPA's administrative practice has conformed to that interpretation. This Court has held that the courts should defer to an agency's interpretation of its regulation, unless the "plain language" dictates otherwise – and no such contrary "plain language"

appears in the agency regulation here. The Ninth Circuit's failure to apply the appropriate standard of review in interpreting the EPA regulation provides an additional ground for review of its decision.

Most significantly, the Ninth Circuit decision conflicts with recent state court decisions, particularly a Minnesota Supreme Court decision. The Minnesota Supreme Court recently held that the Act and the regulation authorize Minnesota's NPDES-permitting agency to approve new source discharges into impaired waters, subject to offset conditions that prevent impairment of water quality. *In re Cities of Annandale, et al.,* 731 N.W.2d 502 (Minn. 2007). The Minnesota Supreme Court substantially relied on this Court's decision in *Arkansas*, which as noted above held that the EPA and the states may flexibly approve new source discharges into impaired waters if they "improve existing conditions." *Arkansas*, 503 U.S. at 108. Similarly, the Virginia Court of Appeals recently held that Virginia's NPDES-permitting agency can properly approve new source discharges into impaired waters subject to limitations that improve water quality. *Crutchfield v. State Water Control Board*, 45 Va.App. 546, 612 S.E.2d 249 (2005). The Minnesota and Virginia decisions allow the permitting agencies to flexibly decide on a case-by-case basis whether to approve new source discharges into impaired waters, depending on their water quality effects. The Ninth Circuit decision, by contrast, precludes the agencies from approving such discharges regardless of their water quality effects.

Since the Ninth Circuit decision conflicts with the decision of the Minnesota Supreme Court, which is Minnesota's "state court of last resort," this case is appropriate for a grant of certiorari on that ground alone under Supreme Court Rule 10(a).

As a result of the conflict between the Minnesota and Virginia decisions and the Ninth Circuit decision, the rules applicable to the states' NPDES permit programs in Minnesota and Virginia – and in other states that follow the court decisions of those two states – are different from the rules applicable to the EPA's NPDES permit program under the Ninth Circuit decision. Under the Act, however, the EPA and the state programs are governed by the same requirements and cannot properly be subject to different rules. To date, forty-five states have been authorized to administer their own NPDES programs. Thus, the Ninth Circuit decision has a potentially far-reaching effect on state water quality programs throughout the nation.

The conflict created by the Ninth Circuit decision will continue to exist regardless of whether the EPA seeks review of the decision. If, for example, the EPA decides no longer to apply offset conditions because of the Ninth Circuit decision, the states' authority to apply such conditions under the Minnesota and Virginia decisions would remain unaffected. This Court can resolve the conflict concerning the national rules governing the NPDES program, and should do so.

I. THE NINTH CIRCUIT DECISION CONFLICTS WITH A RECENT MINNESOTA SUPREME COURT DECISION.

Under Rule 10(a) of the Supreme Court Rules, one of the grounds for granting a writ of certiorari is where "a United States court of appeals . . . has decided an important federal question of law in a way that conflicts with a decision by a state court of last resort. . . ." The Ninth Circuit decision directly conflicts with the Minnesota Supreme Court's recent decision in *In re Cities of Annandale, et al.*, 731 N.W.2d 502 (Minn. 2007). Under Rule 10(a), this case is appropriate for the grant of a writ of certiorari on that ground.

In *Annandale,* the Minnesota Supreme Court held that the Act and the EPA regulation, 40 C.F.R. § 122.4(i), authorized the Minnesota Pollution Control Agency (MPCA), which administers the NPDES program in Minnesota, to issue permits for new source discharges into impaired waters, subject to offset conditions that prevent impairment of water quality. There, the permit authorized a municipal waste treatment agency to discharge a pollutant (phosphorus) from a new waste treatment facility into impaired waters, and contained an offset condition requiring the agency to remove substantially more phosphorus from an old, out-of-date treatment facility than was added by the new facility. The Court held that – because of the offset condition – the discharges did not "cause or contribute" to water quality violations in the watershed, and therefore

were not prohibited by the EPA regulation. 731 N.W.2d at 516-522. This conclusion, the Court stated, was supported by the U. S. Supreme Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), which will be discussed in the next part of this petition, and which had held that "nothing in the Act" "prohibit[s] any discharge of effluent that would reach waters in violation of existing water quality standards." 731 N.W.2d at 520, 524; *Arkansas*, 503 U.S. at 107. Citing the *Arkansas* decision, the Minnesota Supreme Court stated that its conclusion is consistent with the Act's goal of granting "flexibility and broad authority" to the EPA and the states to develop "long-range, area-wide programs" for water quality. 731 N.W.2d at 524. 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 MPCA 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. Thus, the Minnesota Supreme Court decision held that both the Act – as interpreted by this Court's decision in *Arkansas* – and the regulation authorize the EPA and the states to approve new

source discharges into impaired waters subject to offset conditions that improve water quality.

The Virginia Court of Appeals followed the same approach in *Crutchfield v. State Water Control Board*, 45 Va.App. 546, 612 S.E.2d 249 (2005). There, the court held that the Act and a Virginia regulation identical to the EPA regulation[9] authorized Virginia's State Water Control Board, which administers the NPDES program in that state, to issue a permit allowing the discharge of treated effluent from a new waste treatment plant into impaired waters. The permit contained a limitation – described as a "self-sustaining limit" – that protected water quality and required compliance with Virginia's water quality standards. The limitation required that the concentration of the pollutant (dissolved oxygen) in the discharged effluent must be lower than the concentration of the pollutant in the river – in effect, that the water quality of the discharges must be higher than the water quality of the river. The court held that since the water quality of the discharges must be higher than that of the river, the discharges will actually improve the river's water quality and reduce net pollution. The court concluded that the discharges will comply with water quality requirements and that

[9] The Virginia regulation, 9 VAC 25-31-50(C)(9), contains identical language to that found in the EPA regulation, 40 C.F.R. § 122.4(i). *See Crutchfield,* 45 Va.App. at 557-558, 612 S.W.2d at 255.

the permit did not violate the Act or the regulation. *Crutchfield*, 45 Va.App. at 557, 612 S.E.2d at 255.

The Minnesota and Virginia decisions allow the agencies administering the NPDES program to flexibly decide, on a case-by-case basis, whether specific discharges into impaired waters will meet water quality standards, and if not, whether conditions can and should be imposed that will ensure that the standards are met. Although the permit conditions in the Minnesota and Virginia cases were different – one was an offset condition and the other a "self-sustaining limit" – both conditions reduced net pollution and improved water quality, and both facilitated compliance with state water quality standards. Rather than categorically prohibiting the discharges, the Minnesota and Virginia decisions approved the discharges because, as limited by their conditions, they would improve rather than impair water quality. The Ninth Circuit decision, by contrast, prohibits discharges into impaired waters regardless of their water quality effects, and regardless of whether conditions can be imposed to protect water quality. Although the Minnesota and Virginia decisions required a case-by-case analysis of water quality effects, the Ninth Circuit adopted a blanket approach that disregards such effects.

The Ninth Circuit decision, which greatly circumscribes the discretion of the EPA and the states in administering their NPDES programs, directly conflicts with the Minnesota and Virginia decisions, which broadly interpret their discretion. Because of

the conflict, the rules governing the states' NPDES programs in Minnesota and Virginia are different from those governing the EPA program under the Ninth Circuit decision. Under the Act, however, the same NPDES permit requirements apply to both the EPA's program and the states' programs. 33 U.S.C. §§ 1342(a)(3), -(b)(1)(A); 40 C.F.R. § 123.25. Other states that administer their NPDES programs – forty-five states have been granted such authority to date – are apparently free to follow the Minnesota and Virginia decisions, which allow them flexibility in administering their NPDES programs, or instead to follow the Ninth Circuit decision, which precludes the exercise of flexibility. This Court should review this case to resolve the conflict concerning the national rules governing the Act's NPDES program, which is the "primary means" for achieving the Act's effluent limit goals. *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1371 (D.C. Cir. 1977).

II. THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISION IN *ARKANSAS v. OKLAHOMA*.

A. The *Arkansas* Decision

In *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), this Court held that the Act authorizes the EPA and the states, in administering their NPDES programs, to issue permits for new source discharges into impaired waters. There, the EPA issued an NPDES permit for a sewage treatment plant in Arkansas, which authorized discharges of effluent into Arkansas

waters that reached impaired waters in Oklahoma. The permit contained limitations and conditions requiring that the discharges comply with Oklahoma's water quality standards. The EPA approved the permit because it would not cause detectable violations of Oklahoma's water quality standards. The Tenth Circuit reversed the EPA's approval of the permit, holding that the Act "requires that 'where a proposed source would discharge effluents that would contribute to conditions currently constituting a violation of applicable water quality standards, such [a] proposed source may not be permitted.'" 503 U.S. at 98. This Court reversed the Tenth Circuit, 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.

The Court's above-quoted statement – that the EPA and the states have "broad authority" to develop

"long-range, areawide programs to alleviate and eliminate existing pollution" and to allow construction of "new plants" that would "improve existing conditions" – strongly suggests that the EPA and the states have broad authority to approve discharges into impaired waters subject to offset conditions, because offset conditions "improve existing conditions" by reducing net pollution. Although the Court did not specifically consider the validity of offset conditions, the Court's analysis strongly suggests that such conditions are valid. The *Arkansas* decision, unlike the Ninth Circuit decision here, held that the permitting agencies have broad rather than narrow discretion in deciding whether to approve new source discharges into impaired waters.

Indeed, the Minnesota Supreme Court in *Annandale* substantially relied on the *Arkansas* decision in upholding the validity of the offset condition in that case. *Annandale*, 731 N.W.2d at 520, 525. The Minnesota Supreme Court stated that the opposite view – that offset conditions are invalid – would "perpetuate the very outcome the Supreme Court sought to avoid with its decision in *Arkansas v. Oklahoma* – namely, the adoption of such a rigid approach that construction of new facilities that would improve existing conditions would be thwarted." *Id*. at 525.

B. The Ninth Circuit's Distinction of *Arkansas*

The Ninth Circuit distinguished *Arkansas* on the ground that *Arkansas* simply rejected a "categorical ban" on discharges into impaired waters, and the EPA regulation does not impose a categorical ban but instead allows such discharges under limited circumstances. App. 14-17. As noted earlier, the second sentence of the EPA regulation authorizes discharges into impaired waters if a TMDL establishing load allocations has been adopted for the waters, and if (1) there are "sufficient remaining pollutant load allocations" for the proposed discharge and (2) "compliance schedules" have been adopted for "existing dischargers" to achieve compliance with water quality standards. *Id.*; 40 C.F.R. § 122.4(i)(1), -(i)(2). The Ninth Circuit held that since the regulation authorizes discharges into impaired waters under limited conditions, *Arkansas* does not apply. App. 17.[10]

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[10] Carlota argued in the case below that the second sentence of the EPA regulation does not apply to discharges, such as those involved here, that are not prohibited by the first sentence, which prohibits discharges that "cause or contribute" to water quality violations. Since the purpose of the second sentence is to allow discharges into impaired waters even though they "cause or contribute" to water quality violations and are thus otherwise prohibited by the first sentence, it would be illogical to apply the second sentence to discharges that do not fall within the prohibitory scope of the first sentence. In the case below, the Ninth Circuit "assume[d], without deciding," that both sentences apply to all discharges into impaired waters, because the EPA's Appeals Board had also "assume[d], without deciding," that both

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The Ninth Circuit's distinction of *Arkansas* is misplaced for two main reasons. First, *Arkansas* did not hold simply that the Act does not impose a "categorical ban" on discharges into impaired waters, as the Ninth Circuit stated. Rather, *Arkansas* held, more broadly, that the EPA and the states have "broad authority" to develop "long-range, area-wide programs" to accommodate new sources of development in ways that will "improve existing conditions." 503 U.S. at 108. Thus, *Arkansas* held that the EPA and the states have broad discretion and flexibility in administering their permit programs, and in deciding whether and under what conditions to approve new source discharges into impaired waters. The decision does not narrowly hold, as the Ninth Circuit suggested, that their only discretion is in not categorically prohibiting such discharges. Under *Arkansas*, the agencies' discretion in administering their NPDES programs is broad and substantial, not, as the Ninth Circuit held, narrow and cramped.

Second, the Ninth Circuit interpreted the EPA regulation as imposing such rigid limitations on discharges into impaired waters that the practical effect is to virtually – if not categorically – prohibit all

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sentences apply. App. 13, 163 n. 101; *see* note 7, *supra*. The question whether both sentences of the regulation apply to all new source discharges into impaired waters – even where the discharges do not "cause or contribute" to water quality violations and are not prohibited by the first sentence – is encompassed within the questions presented for review.

such discharges, contrary to the *Arkansas* decision. The Ninth Circuit rejected the EPA's position that the regulation does not impose these rigid limitations.

More specifically, the Ninth Circuit held that the regulation prohibits discharges into impaired waters unless the EPA has issued compliance schedules for both *permitted* and *non-permitted* point source dischargers. App. 12. The regulation provides that compliance schedules must be issued for "existing dischargers," 40 C.F.R. § 122.4(i)(2), and the Ninth Circuit construed "existing dischargers" as referring to *all* point source dischargers, whether permitted or not. App. 12. On the contrary, and as the EPA has concluded, "existing dischargers" refers to *permitted* point source dischargers, because a "schedule of compliance" is defined under the regulations as a "schedule of remedial measures included in a '*permit.*'" App. 174-175, & n. 108; 40 C.F.R. § 122.2 (emphasis added). In holding otherwise, the Ninth Circuit misquoted the regulation – stating that it refers to "existing *discharges*" rather than "existing *dischargers*," App. 12 (emphasis added) – and then relied on its misquotation to extend the regulatory reach to non-permitted dischargers.[11]

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[11] The Ninth Circuit stated that the regulation requires that compliance schedules must be adopted for "existing *discharges,*" App. 12 (emphasis added), although the regulation requires instead that such schedules must be adopted for "existing *dischargers*." 40 C.F.R. § 122.4(i)(2) (emphasis added). The court then stated that the misquoted word – "discharges" – refers to

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Additionally, the Ninth Circuit held that – if compliance schedules for permitted point source dischargers are insufficient to achieve water quality compliance – compliance schedules must also be adopted for *non-point source* dischargers. App. 16. Under the Act, however, non-point source dischargers are not subject to regulation under the NPDES, and instead are regulated by the states. 33 U.S.C. § 1329; *Sierra Club v. Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002); *Natural Resources Defense Council v. Environmental Protection Agency*, 915 F.2d 1314, 1316 (9th Cir. 1991). The Ninth Circuit improperly extended NPDES requirements to non-point source dischargers not subject to NPDES regulation, and imposed on EPA a permitting responsibility beyond its statutory authority.

Finally, the Ninth Circuit held that the regulation prohibits discharges into impaired waters unless the EPA determines not only that the TMDL load allocations are "sufficient" for the proposed discharge, as the regulation expressly requires, 40 C.F.R. § 122.4(i)(1), but also that TMDL load allocations will be "met . . . under existing circumstances," App. 11-12 – in other words, that other dischargers will meet their own load allocations. The latter requirement does not appear in the regulation.[12]

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the "discharge of a pollutant" and therefore the regulation applies to "any" point source discharge, not just "permitted" point source discharges. App. 12.

[12] The EPA's Appeals Board determined that the regulation requires only a showing that there are "sufficient" load allocations

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To summarize, the Ninth Circuit held that the EPA – and by extension, the states – are prohibited from approving new source discharges into impaired waters unless the following requirements are met: (1) *unpermitted* point source dischargers have been identified and contacted, and permits containing compliance schedules have been issued to them – which, as in Carlota's case, may take many years, or even be impossible because the discharge may be from an "orphan" source (such as an abandoned mine) with no solvent entity that can be subjected to permit conditions; (2) if necessary, *non-point source* dischargers who are not subject to NPDES regulation have also been identified and contacted, and compliance schedules have also been issued for them; and (3) the permitting agency has determined not only the sufficiency of TMDL load allocations for the discharger but also that *other* dischargers will *meet* their own TMDL load allocations.

None of the above italicized requirements appears in the regulation. The Ninth Circuit held,

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for the proposed discharge, as the regulation expressly requires, and that this requirement was satisfied because the Pinto Creek TMDL establishes *specific* load allocations for Carlota's proposed discharges. App. 170-174. The Appeals Board concluded that the petitioners were in effect challenging the TMDL and its implementation, and that a TMDL – which is a form of a state water quality standard – and its implementation cannot be challenged in an NPDES permit hearing and can only be challenged in a separate federal court action brought under the Administrative Procedures Act, 5 U.S.C. § 706(2). App. 172, & n. 105; *In re City of Moscow*, 10 E.A.D. 135, 161 (EAB 2001).

nonetheless, that all three requirements must be met before the permit can be issued.

By imposing these additional requirements, the Ninth Circuit has made it difficult if not virtually impossible for the EPA and the states to approve new source discharges into impaired waters under all but exceptional circumstances. The practical effect of the Ninth Circuit decision is to impose a virtual *de facto* moratorium on new source discharges into impaired waters. On the contrary, this Court in *Arkansas* held that the EPA and the states have broad flexibility and discretion in administering their NPDES programs, and in approving new projects that will "improve existing conditions." 503 U.S. at 108. As the District of Columbia Circuit has stated, where the permitting agency's authority under the Act is unclear, "we are instructed to afford the administering agency the flexibility to achieve the general objectives of the Act." *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977). The question whether the EPA and the states have such flexibility, as this Court held in *Arkansas*, or instead whether they lack flexibility, as the Ninth Circuit held, is the primary question presented in this petition.

III. THE NINTH CIRCUIT FAILED TO APPLY THE APPROPRIATE STANDARD OF REVIEW BY NOT DEFERRING TO THE ENVIRONMENTAL PROTECTION AGENCY'S INTERPRETATION OF ITS REGULATION.

The standard of review applicable in interpreting an administrative regulation is that deference should be accorded to an agency's interpretation of its own regulation, unless the "plain language" dictates otherwise. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150 (1991); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *United States v. Larionoff, et al.,* 431 U.S. 864, 872 (1977); *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410, 413-414 (1945); *see Christensen v. Harris County*, 529 U.S. 576, 588 (2000). "[T]he agency's interpretation of its own regulation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson University*, 512 U.S. at 512, quoting from *Bowles*, 325 U.S. at 414. Such deference is particularly appropriate where the regulation involves technical or scientific matters within the agency's expertise. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 103 (1983). "When the construction of an administrative regulation rather than a statute is in issue,

deference is even more clearly in order." *Udall*, 380 U.S. at 16.[13]

The EPA regulation prohibits the issuance of NPDES permits for new source discharges into impaired waters if the discharges "cause or contribute" to violations of water quality standards. 40 C.F.R. § 122.4(i). The EPA has interpreted this language as not prohibiting new source discharges into impaired waters subject to conditions that improve water quality, and the EPA's administrative practice has conformed to this interpretation. The EPA's Appeals Board adopted that interpretation in this case, App. 164-170, and stated that this interpretation is "consistent with prior Agency interpretation of that section." App. 165. In earlier proceedings, the EPA has taken the position that new source discharges into impaired waters may be approved if (1) the discharges do not contain the pollutant causing the impairment, (2) the effluent limits for the discharge meet water quality standards, or (3) the discharges are subject to offset conditions that prevent water

[13] Under the principle established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), deference should be accorded to an agency's interpretation of a *statute* that it is responsible for enforcing, if the statute is ambiguous and the agency interpretation reasonable. *Chevron*, 467 U.S. at 842-843; *National Ass'n of Home Builders v. Defenders of Wildlife,* 127 S.Ct. 2518, 2534 (2007); *Auer*, 519 U.S. at 457; *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995); *Pauley v. Director, Office of Workers' Compensation Programs,* 501 U.S. 680, 696 (1991).

quality impairment.[14] Describing the third category – involving offset conditions – the EPA stated:

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

In re Cities of Annandale, et al., 731 N.W.2d 502, 521 (Minn. 2007). 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*"

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[14] This EPA interpretation was set forth in the EPA's Response Memorandum in *Sierra Club, et al. v. Clifford*, at 50-54, Civ. No. 96-0527 (E.D. La. 1999), which was referred to by the EPA's Appeals Board below. App. 165. This Court has deferred to an agency's interpretation of a regulation expressed in litigation – even the instant litigation – if the interpretation was not a "*post hoc* rationalization" advanced to defend a past position and reflects the agency's "fair and considered judgment." *Auer v. Robbins,* 519 U.S. 452, 462 (1997); *see Gardebring v. Jenkins,* 485 U.S. 415, 430 (1988).

or "categorical" standards.[15] Applying the "case-by-case" analysis here, the EPA's Appeals Board 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." App. 170.

The EPA's interpretation of its regulation is consistent with its Water Quality Trading Policy, which states:

> Finding solutions to these complex water quality problems requires innovative approaches that are aligned with core water programs. Water quality trading is an approach that offers greater efficiency in achieving water quality goals on a watershed basis. It allows one source to meet its regulatory obligations by using pollutant reductions created by another source that has lower pollution control costs. Trading capitalizes on economies of scale and the control cost differentials among and between sources. [¶] The United States Environmental Protection Agency (EPA) believes that market-based approaches such as water quality trading provide greater flexibility and have potential to achieve water quality and environmental benefits greater than would otherwise be achieved under more traditional regulatory approaches.

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[15] *See* EPA brief filed in *Sierra Club, et al. v. Clifford*, at 52, note 14, *supra*.

68 Fed. Reg. 1608, 1609 (Jan. 13, 2003); *see In re Cities of Annandale, et al.,* 731 N.W.2d 502, 522 (Minn. 2007). The trading policy establishes several objectives, one of which to encourage water quality trading where trading "[o]ffsets new or increased discharges resulting from growth in order to maintain levels of water quality that support all designated uses." 68 Fed. Reg. at 1609-1610.

The EPA's interpretation of the regulation does not contravene its "plain language" and is entitled to deference. As the EPA's Appeals Board concluded, discharges subject to offset conditions do not "cause or contribute" to water quality violations because they improve rather than impair water quality. App. 164-170. The EPA's interpretation is also consistent with the Minnesota Supreme Court's decision in the *Annandale* case, which held that the EPA regulation does not prohibit discharges into impaired waters subject to offset conditions that improve water quality. *In re Cities of Annandale, et al.,* 731 N.W.2d 502, 521 (Minn. 2007); *see also Crutchfield v. State Water Control Board*, 45 Va.App. 546, 612 S.E.2d 249, 557-558 (2005). The Minnesota Supreme Court stated that the regulation is, at a minimum, "ambiguous," and therefore deference should be accorded to the Minnesota water quality agency's interpretation, which was the same as the EPA interpretation. *Annandale*, 731 N.W.2d at 519.

The Ninth Circuit did not defer to the EPA's interpretation of its regulation, nor even mention this Court's decisions requiring such deference. The Ninth

Circuit instead adopted the opposite interpretation, holding that offset conditions are invalid regardless of their water quality effects. App. 10-11. The Ninth Circuit failed to apply the appropriate standard of review in construing the regulation, which requires deference to the agency's interpretation unless the "plain language" dictates otherwise – and no such contrary "plain language" appears in the EPA regulation here. The Ninth Circuit's failure to apply the appropriate review standard provides an additional ground for review of its decision.

Although this case raises questions concerning the interpretation of both a statute and a regulation, this Court has reviewed cases involving solely the interpretation of a regulation.[16] In one such case, *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994), this Court resolved a conflict between two federal circuit courts in interpreting a regulation. In

[16] As stated earlier, this Court has held in several cases that deference should be accorded to an agency's interpretation of its regulation unless the "plain language" dictates otherwise. *See, e.g., Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994); *see* page 29, *supra*. Although some of the cited cases involved interpretations of both a statute and a regulation, such as *Auer*, others involved solely the interpretation of a regulation, such as *Thomas Jefferson University*. Other cases involving solely the interpretation of a regulation are *Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144 (1991), *Lyng v. Payne*, 476 U.S. 926 (1986), *Udall v. Tallman*, 380 U.S. 1 (1965), and *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410 (1945).

the same vein, this case involves a conflict between a federal circuit court (Ninth Circuit) and a state's highest court (Minnesota Supreme Court) in interpreting a regulation. Additionally, the case presents issues of national importance; the Ninth Circuit's interpretation restricts the EPA's and the states' discretion in administering their NPDES programs, and conflicts with this Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). Because of the conflicts and the nationally-important issue, this case would be worthy of review even if the sole question concerned the interpretation of the regulation.

IV. THE CLEAN WATER ACT AND THE REGULATION AUTHORIZE – AND DO NOT PROHIBIT – THE ISSUANCE OF PERMITS FOR DISCHARGES INTO IMPAIRED WATERS, SUBJECT TO CONDITIONS THAT REDUCE NET POLLUTION AND IMPROVE WATER QUALITY.

On the merits, the Act and the EPA regulation authorize – and do not prohibit – the issuance of NPDES permits for discharges into impaired waters subject to conditions, such as offset conditions, that reduce net pollution and improve water quality.

A. The Statute

The Act grants "broad authority" to the EPA and the states to develop NPDES programs "to alleviate and eliminate existing pollution" and "improve existing

conditions," as this Court held in *Arkansas v. Oklahoma*, 503 U.S. 91, 102 (1992). This "broad authority" allows the NPDES permitting agencies to flexibly decide, on a case-by-case basis, whether discharges into impaired waters will violate water quality standards, and whether conditions can and should be imposed to prevent such violations. Nothing in the statute precludes the permitting agencies from exercising such broad authority.

The conclusion that the Act grants such broad authority is supported by the statutory language. Section 402(a)(1) authorizes the EPA to issue NPDES permits for point source discharges subject to "such conditions as the Administrator [of the EPA] determines necessary to carry out the provisions of this chapter." 33 U.S.C. § 1342(a)(1); App. 224. Section 301(b)(1)(C) provides that NPDES permits must include effluent limitations necessary to "implement any applicable water quality standard" established by a state under section 303. 33 U.S.C. § 1311(b)(1)(C); App. 222-223. Thus, the statute specifically requires that NPDES permits implement state "water quality standard[s]," and specifically authorizes "conditions" to achieve such standards. Accordingly, the statute by its terms authorizes offset conditions, because offset conditions are intended to achieve compliance with water quality standards. *Cf. Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1375 (D.C. Cir. 1977) (Under section 402, "the [EPA] Administrator has discretion either to issue a permit or to leave

the discharges subject to the total proscription of [section] 301.").

Section 306 of the Act requires the EPA to adopt "national standards of performance" for new sources that "reflect[ ] the greatest degree of effluent reduction" achievable through available technology. 33 U.S.C. § 1316(a)(1); App. 223. An offset condition necessarily achieves "the greatest degree of effluent reduction," as required by the statute, because it reduces net pollution caused by discharges of effluents.

Section 101(a) declares that the Act's goal is to "restore and maintain" the nation's water quality. 33 U.S.C. § 1251(a). An offset condition that reduces net pollution and improves water quality necessarily furthers the statutory goal of "restor[ing] and maintain[ing]" water quality. By contrast, the Ninth Circuit's all-or-nothing approach to the attainment of water quality standards obstructs the statutory goal. The Ninth Circuit decision imposes a virtual *de facto* moratorium on the issuance of NPDES permits for new source discharges into impaired waters, thus reducing incentives for dischargers to clean up such waters through the NPDES permit process – and limiting the discretion of permitting agencies to offer such incentives. The decision, for example, would make it difficult for permitting agencies to authorize municipal sewage agencies to replace out-of-date sewage facilities with modern ones that produce cleaner effluent, as the municipal agency did in the *Annandale* case decided by the Minnesota Supreme

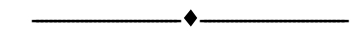
Court. *In re Cities of Annandale, et al.,* 731 N.W.2d 502, 524 (Minn. 2007). The Ninth Circuit decision impedes the development of infrastructure projects that would further the statutory goal of improving the nation's water quality.

B. The Regulation

The EPA regulation prohibits the issuance of NPDES permits for new source discharges into impaired waters that will "cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i); App. 224. The regulation, on its face, does not prohibit *all* discharges into impaired waters, regardless of their effects on water quality. Instead, the regulation facially prohibits only discharges that will "cause or contribute" to water quality violations. A discharge subject to an offset condition requiring remediation of other sources of pollution does not, by definition, "cause or contribute" to water quality violations; although the permit authorizes the discharge of pollutants, the condition requires the removal of more pollutants than are discharged, and thus improves overall water quality. Rather than "caus[ing] or contribut[ing]" to water quality violations, an offset condition causes a *reduction* of such violations. The EPA regulation prohibits discharges that impair water quality, not improve it. The regulation plainly does not prohibit offset conditions.

The Ninth Circuit's observation that the Act and the regulation make no "exception" for offset conditions, App. 10-11, is beside the point. A discharge subject to an offset condition that reduces net pollution does not "cause or contribute" to water quality violations and thus does not fall within the scope of the regulatory prohibition. A prohibition that does not apply by its own terms does not require an "exception" to render it non-applicable.

In sum, the Act and the regulation grant broad authority to the EPA and the states to adopt measures to protect and improve water quality, and to impose conditions in NPDES permits that further this goal. This grant of authority includes the discretion to impose offset conditions that improve the quality of impaired water bodies. Nothing in the Act or the regulation *prohibits* the EPA and the states from imposing such conditions. The Ninth Circuit decision, by reading requirements into the statute and the regulation that do not appear on their face, greatly restricts the EPA's and the states' discretion in administering their NPDES programs. The decision makes it difficult for the EPA and the states to approve new development projects necessary to accommodate the nation's demographic and economic growth, even though conditions are imposed that achieve the Act's goal of improving water quality. This Court should grant review and reverse.



CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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