No. 11-347

IN THE

Supreme Court of the United States

GEORGIA-PACIFIC WEST, INC., *et al.*,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FARM BUREAU FEDERATION, THE NATIONAL PORK PRODUCERS COUNCIL, AND THE NATIONAL COUNCIL OF FARMER COOPERATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The American Farm Bureau Federation (Farm Bureau), the National Pork Producers Council (NPPC), and the National Council of Farmer Cooper-

[1] No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than *amici* or their members or counsel made a monetary contribution to the brief. All parties have filed blanket *amicus* consent letters.

atives (NCFC) respectfully submit this brief as *amici curiae* in support of Petitioners.

The Farm Bureau was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing more than 6.2 million member facilities in all 50 states and Puerto Rico, the Farm Bureau maintains a membership that produces every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers. To that end, the Farm Bureau has regularly participated as *amicus curiae* in this Court in cases involving the proper scope of the permitting schemes established by the Clean Water Act. *See*, *e.g.*, *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012); *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644 (2007); *Rapanos* v. *United States*, 547 U.S. 715 (2006); *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

NPPC is a non-profit trade association representing the interests of pork producers throughout the United States. It serves as an advocate for reasonable legislation and regulations, develops revenue and market opportunities, and protects the livelihood of the nation's 67,000 pork producers, which it represents through 43 affiliated state associations. NPPC's mission includes representing pork producers in administrative and judicial proceedings involving national regulations and other government actions that affect the production of pork in the United States.

NCFC has been the voice of America's farmer cooperatives since 1929. NCFC members include 58 national, regional, and federated farmer cooperatives, which in turn comprise more than 2,500 local cooperatives across the United States whose member-owners include a majority of our nation's more than two million farmers and ranchers. NCFC members also include 22 state and regional councils of cooperatives. Farmer cooperatives handle, process, and market almost every type of agricultural commodity, furnish farm supplies, and provide credit and associated financial services to their farmer members. NCFC advocates on behalf of its members at the federal level to encourage a healthy public-policy environment in which farmer-owned cooperative businesses operate and thrive, and provides leadership in cooperative education. In particular, NCFC supports science-based, achievable, and affordable environmental policies and initiatives, and actively works to ensure environmental laws like the Clean Water Act are implemented accordingly. It has thus appeared before this Court as *amicus curiae* in several cases involving the Act. *See*, *e.g.*, *Sackett*, 132 S. Ct. 1367; *PPL Montana LLC* v. *Montana*, 132 S. Ct. 1215 (2012); *Rapanos*, 547 U.S. 715.

All *amici* have an important interest in this case because the Ninth Circuit's decision fundamentally misunderstands how farmers, ranchers, and forest landowners deal with a common problem: how to channel rainwater from their land so that crops and livestock housing do not flood and roads do not wash out. Until the panel decision below invalidating the Environmental Protection Agency's Silviculture Rule, it had been well settled that runoff from agriculture *and* silviculture was to be addressed by the

States as nonpoint sources. That makes sense. Agriculture and silviculture cover more than 1.7 *billion* acres of land in this country. To require every farmer, rancher, or forest landowner to get a federally enforceable permit simply to channel rainwater from such expanses would be virtually impossible and hopelessly ineffective. So, for nearly 40 years, all stakeholders—legislators, regulators, industry, and even environmental groups—have consistently recognized that stormwater runoff from agriculture and silviculture is a nonpoint-source form of water pollution and should be left to the expertise of State and local officials. EPA recognized as much for silviculture through rulemaking back in 1976. And Congress remedied the lack of any such regulatory interpretation for agriculture in 1987, when it expressly amended the statute to provide that a "point source * * * does not include agricultural stormwater * * *." 33 U.S.C. § 1362(14). Because the decision below conflicts with Congress's intent—as well as decades-long practices and expectations of farmers, ranchers, and forest landowners—this Court should reverse.

SUMMARY OF ARGUMENT

In 1987, Congress amended the Clean Water Act in two significant ways: First, it substantially reformulated how the Act treated stormwater runoff, 33 U.S.C. § 1342(p); second, it enacted the most robust statutory program yet for state control of unregulated nonpoint sources of stormwater: the Nonpoint Source Management Program, 33 U.S.C. § 1329. These two actions represented the culmination of a decades-long effort by Congress to establish a defined process for addressing water pollution, both inside

and outside, the Act's permitting regime. The result was that, at least with respect to stormwater, Congress drew a clear line between municipal and industrial discharges, subject to mandatory permitting requirements, and everything else (largely rural stormwater) which, absent specific EPA regulations to the contrary, would be subject to state best-management practices through the Nonpoint Source Management Program. Congress in fact categorically excluded all agricultural stormwater discharges from the Act's permitting requirements. *See* 33 U.S.C. § 1362(14). And everyone involved in the legislative process leading to the 1987 amendments—legislators, agency officials, industry representatives, and environmental groups alike—recognized that agriculture and silviculture were in the same class of activity and that stormwater from both of these sources should be treated the same.

Specifically, Congress confirmed in 1987 that agricultural and silvicultural stormwater runoff are incompatible with a national, source-by-source permitting scheme, such as the National Pollutant Discharge Elimination System (NPDES), 33 U.S.C. § 1342. Requiring farmers, ranchers, and forest landowners to get a federally enforceable permit simply for channeling stormwater from their crops, fields, farmyards, and forests is both impractical and ineffective.

The Ninth Circuit concluded otherwise with respect to silviculture because, in its view, *any* channeling of water through a manmade conveyance on forestlands—even a culvert or ditch mandated by State land-use regulations—transformed otherwise nonpoint-source forest runoff into a point-source discharge. But that rule finds support in neither the

statute nor common sense. After all, even without the intervention of man, rainwater will carve rivulets, gullies, and streams into the land that will naturally channel the same stormwater and sediment into navigable bodies of water. Any time it rains, therefore, stormwater could "discharge" from an incalculably large number of points across the 1.7 billion acres of land devoted to agricultural and silvicultural uses throughout the United States. *See* Cynthia Nickerson *et al.*, U.S. Dep't of Agric., Economic Research Serv., *Major Uses of Land in the United States, 2007* at 1 (Dec. 2011). For these reasons, categorizing each and every instance of channelized silvicultural stormwater runoff as a point-source discharge that demands a federally enforceable permit is simply not a realistic regulatory option. Instead, controlling water pollution from silvicultural (and agricultural) runoff is best left to State and local authorities, who have the expert knowledge about the industry and the local topography needed to create workable area-wide solutions for a given region. The Ninth Circuit's holding to the contrary should be reversed.

ARGUMENT

CONGRESS INTENDED STORMWATER RUNOFF FROM AGRICULTURAL AND SILVICULTURAL ACTIVITIES TO BE ADDRESSED BY THE STATES AS NONPOINT SOURCES.

In 1987, Congress provided important new directions to the States in addressing water pollution. The 1987 amendments made two fundamental changes to the Clean Water Act. First, Congress created provisions requiring the regulation of storm-

water discharges from municipal and industrial sources, but left other categories of stormwater runoff to state programs (absent subsequent EPA rulemaking to require regulation). 33 U.S.C. § 1342(p). Second, Congress added the Nonpoint Source Management Program to the Act, through which each State would establish a "management program for controlling pollution added from non-point sources to the navigable waters within the State and improving the quality of such waters." 33 U.S.C. § 1329(b)(1). These two actions, executed in tandem, reaffirmed what had long been understood by Congress, EPA, and stakeholders: agricultural and silvicultural stormwater runoff falls outside the NPDES permitting program and is instead governed by state best management practices.

A. The 1987 Stormwater Amendments Confirm That Rural Stormwater Runoff Should Be Considered A Nonpoint Source.

The Stormwater Amendments to the Clean Water Act evidence Congress's understanding that requiring permits for each and every pipe, ditch, and culvert built to channel rainwater is not a feasible or desirable option. As the Ninth Circuit previously explained: "Recognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations, Congress passed the [1987 amendments to the Act], portions of which set up a new scheme for regulation of storm water runoff." *NRDC* v. *EPA*, 966 F.2d 1292, 1296 (9th Cir. 1992). This new regulatory scheme established statutory priorities: first, for industrial and large municipal stormwater discharges, and second, for other stormwater discharges that EPA determines are adversely affecting water quality. 33 U.S.C.

1342(p)(2), (5)-(6). Notably left off the statutory list of priority stormwater discharges was traditionally unregulated rural runoff. And excluded *entirely* from the permitting scheme was agricultural stormwater discharge. 33 U.S.C. § 1362(14). This demonstrates Congress's categorical approach to stormwater pollution, which recognizes a basic dividing line: To one side are urban and industrial sources that are subject to the NPDES permitting scheme; to the other side lie non-industrial rural sources from activities such as farming and forestry, which are governed—as they always have been—by state best management practices (BMPs).

1. The Ninth Circuit's decision, which requires EPA to treat silvicultural stormwater runoff differently from agricultural stormwater runoff, runs counter to Congress's intent to treat agriculture and silviculture alike. This is first and foremost reflected in the statutory text: The Stormwater Amendments present a categorical divide between urban and industrial activities, on the one hand, and rural activities, on the other. *See* 33 U.S.C. § 1342(p) ("Municipal and industrial stormwater discharges"). These amendments confirmed EPA's longstanding view that "Congress intended the NPDES permit program to apply primarily to industrial and municipal dischargers whose effluent is relatively constant and for which the pollution reduction attainable by particular technologies may be predicted with relative accuracy." Separate Storm Sewers, 40 Fed. Reg. 56,932, 56,934 (proposed Dec. 5, 1975). In contrast, "Congress intended to regulate all rural runoff through the same mechanism, the section 208 plan-

ning process," which is administered by the States. *Id.*[2] And by "rural runoff," EPA was speaking primarily about "agriculturally- and silviculturally-related runoff." *Id.*

Indeed, by the time the 1987 amendments were under consideration by Congress, there appears to have been universal acceptance by all involved in the debates, hearings, and reports that silvicultural stormwater runoff was categorically *not* subject to the NPDES. As early as 1980, the House Subcommittee on Oversight and Review of the Committee on Public Works and Transportation reported that some of the major *nonpoint* sources of pollution were "logging operations," the "harvesting of timber," and "the building of roads." H. Rep. No. 96-71, at 20 (Dec. 31, 1980). These activities "disturb the earth and create conditions conducive to erosion," dislodging "millions of tons of sediment." *Id.* And although states and local authorities had adopted "sediment and erosion control measures," costs were preventing the widespread use of these BMPs. *Id.* at 22-23.

In the run up to the 1987 amendments, all stakeholders—legislators, agency officials, industry representatives, and even environmental groups—found a rare patch of common ground on one key point: that silvicultural stormwater runoff fell on the state side of the federal-state regulatory boundary. For in-

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[2] *See also* 40 Fed. Reg. at 56,934 ("It is EPA's position that the NPDES permit system should not be extended to runoff-generated pollution which is essentially nonpoint in nature in those rural areas where the distinction between agriculturally- and silviculturally-related runoff and storm water runoff, which happens to be channeled, is tenuous at best.").

stance, a Senate Committee Report identified the types of state-promulgated BMPs that had been developed for "silviculture areas" as including "careful road placement, *culverting*, [and] grassing of abandoned roads and skid trails." S. Rep. No. 99-50, at 35-36 (May 14, 1985) (emphasis added). This passage alone goes a long way toward gutting the Ninth Circuit's novel rule that a nonpoint source—like silviculture—morphs into a point source merely because landowners adopt the type of state-mandated practices Congress had in mind for taming the chaotic flow of stormwater and minimizing erosion and pollution.

Likewise, in a 1984 Report to Congress on *nonpoint* source pollution, EPA identified "road building, * * * harvesting and logging operations, [and] removal of trees from the harvesting site" as principal sources of silvicultural nonpoint source pollution. EPA, Publ'n No. 350R84001, *Report to Congress: Nonpoint Source Pollution in the U.S.* 2-14 (Jan. 1984).[3] The Agency observed that "[w]hen not properly planned, constructed, and maintained, roads, drainage ditches, and road cuts expose soil to erosion for long periods of time," *id.* at 2-15, and so "BMPs that are likely to prove effective include * * * [b]etter planned and constructed roads," *id.* at 2-17. But, "[a]s is the case with other nonpoint sources, no one mitigation approach is appropriate for controlling all the sediment and other pollutants associated with silvicultural operations." *Id.* at 2-17.

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[3] *Available at* http://www.epa.gov/nscep/index.html (enter title in search field).

Similarly, during hearings before the House Committee on Public Works and Transportation on a number of proposed amendments to the Clean Water Act—including the proper dividing line between point sources and nonpoint sources—the Water Pollution Control Federation (now the Water Environment Federation) identified "sediments from commercial forestry operations" as a "major source[ ] of rural nonpoint source pollution" that was "not susceptible to 'end-of-the-pipe' treatment." 4 *Legislative History of the Water Quality Act of 1987* at 1610 (Nov. 1, 1983) (4 *Legislative History*). A forest hydrologist testifying on behalf of the forestry industry on the topic of nonpoint-source pollution identified sediment from logging roads as the largest source of silvicultural pollution. *Id.* at 3050 (Nov. 16, 1983). He continued, "that's what the majority of our best management practices are directed to control. Roads are designed to reduce the amount of sediment and runoff." *Id.*

Environmental groups joined the chorus. The New England Sierra Club, for example, discussed a report "on Non-Point Source Pollution" in Massachusetts that "described the types of pollution entering each river basin in the state, and demonstrated a wide range of sources," including "agricultural runoff * * * and erosion from forest and construction sites." *Id.* at 2320 (Nov. 9, 1983). Nevertheless, the New England Sierra Club explained that it "does not at this time urge this committee to require uniform control strategies in each state." *Id.* at 2321. Instead, it "recognize[d] the wide diversity of problems in indi-

vidual states and regions and the widely different strategies needed to address them." *Id.*[4]

In sum, in our review of the entire legislative history of the 1987 amendments, we could not find a single comment suggesting that channeled silvicultural stormwater runoff was or should be controlled by the NPDES permitting program as a point-source discharge. Just the opposite. The legislative history confirms that virtually all stakeholders understood that stormwater runoff from agriculture and silviculture was, *as a category*, to be addressed as nonpoint. The Ninth Circuit's holding that forest landowners must seek a federal NPDES permit simply to direct the natural runoff of rainwater from their lands squarely conflicts with the language and structure of the statute, its legislative history, and the contemporaneous understanding of those involved in crafting the 1987 amendments. It should be reversed.

2. To be sure, when Congress added the agricultural stormwater discharge exemption to the Clean

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[4] During a three-day conference hosted by EPA on the topic of nonpoint source pollution, numerous environmental groups submitted reports. *See* EPA, Office of Water Regulations and Standards, Publ'n No. 440R85013, *Perspectives on Nonpoint Source Pollution* (1985), *available at* http://www.epa.gov/nscep/index.html (enter title in search field). These groups also recognized that both agricultural *and* silvicultural activities constituted nonpoint sources of pollution. *See id.* at 55 (Environmental Defense Fund) (describing the "siting" of "agricultural" and "forestry" activity as "central to its potential nonpoint source pollution impact on receiving surface or groundwater quality"); *id.* at 60 (National Audubon Society) (explaining that "nonpoint source polluters" such as "the farmer, the forest products company, the miner, and the rancher should all benefit from the retention of soil on their land").

Water Act in 1987, it did not expressly mention silvicultural stormwater. But there is a good reason for that: In 1987, EPA's longstanding rule already exempted silvicultural stormwater runoff from the NPDES. *See* 40 C.F.R. § 122.27. The rule specified only four discrete activities that should be deemed to be point sources even though they are related to forestry: rock crushing, gravel washing, log sorting, or storage. *See id.* § 122.27(b). The nature of these activities explains why: they all involve stand-alone industrial facilities and operations. Indeed, these facilities are no more "silviculture" than a meat-processing plant would be "agriculture." In both cases, there is an obvious distinction between the farming or forestry activity itself—harvesting timber, growing crops, or raising livestock—and the downstream processing of the product resulting from that activity. All true silvicultural activities—site preparation, planting, harvesting, and transporting, to name a few—from which stormwater runoff occurs are nonpoint sources under EPA's rule. That view faithfully follows the text, structure, and history of the Clean Water Act.

In contrast to the approach it took with silviculture, EPA had determined that some types of agricultural-pollution discharges should be subject to the NPDES regime. *See* Application of Permit Program to Agricultural Activities, 41 Fed. Reg. 28,493 (July 12, 1976). Congress disagreed with that approach; it therefore adopted the categorical agricultural stormwater exemption in the 1987 amendments to overturn the Agency's policy. Congress's express exclusions with regard to agriculture thus have been reactive in nature, correcting interpretations of the Act that were contrary to the legislature's intent.

For instance, in 1977, Congress excluded from the definition of point source "return flows from irrigated agriculture," Pub. Law. No. 95-217, § 33(b), 91 Stat. 1566, 1577 (Dec. 27, 1977), because "[p]ermit requirements under section 402 of the act have been construed to apply to discharges of return flows from irrigated agriculture." S. Rep. No. 95-370, at 35 (July 28, 1977), 1977 U.S.C.C.A.N. 4326, 4360.

But no such legislative corrective measure was required for silvicultural activities because EPA's silviculture rule had been on the books for more than a decade by that point. Originally promulgated in 1973, and revised in 1976 and again in 1980, the rule provides that silvicultural point sources are subject to the NPDES, but the term silvicultural point source "does not include non-point source silvicultural activities such as * * * harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff." 40 C.F.R. § 122.27(b)(1). This rule reflects EPA's long-held view that management of stormwater runoff from silvicultural activities—channeled or not—is best left to the states. *See* Brief for Pets. 6-9; Pet. App. 100a-102a.

For example, in the preamble to the proposed 1976 rule, EPA explained that it had "determined that most water pollution related to silvicultural activities is nonpoint in nature. This pollution is basically runoff induced by precipitation events and is not and should not be subject to the [NPDES] permit program as it has been administered to date." Silvicultural Activities, 41 Fed. Reg. 6,281, 6,282 (proposed Feb. 12, 1976). EPA based this determination on "[t]he [Clean Water Act] and its legislative history," which "make clear that it was the intent of Congress

that most water pollution from silvicultural activities be considered nonpoint in nature." *Id.* EPA also clarified that channeled runoff from logging roads was not subject to the NPDES: The Agency included drainage from "road construction and maintenance" in its list of silvicultural *nonpoint* sources, explaining, "[i]nsofar as such drainage serves only to channel diffuse runoff from precipitation events, it should be considered nonpoint in nature and has been added to the list." Application of Permit Program to Silvicultural Activities, 41 Fed. Reg. 24,709, 24,711 (June 18, 1976). That definition of silvicultural nonpoint sources remains in the regulation to this day (although it has been tested by the decision below). *See* 40 C.F.R. § 122.27(b)(1).

Accordingly, for almost 40 years, EPA has (correctly) viewed channeled stormwater runoff from logging roads as a nonpoint source of pollution. Congress therefore has never had a reason to intervene. The Ninth Circuit overstepped its role by substituting its judgment for that of Congress and EPA.

3. Common sense confirms EPA's view and demonstrates the inherent flaws in the lower court's reasoning. Previously, the Ninth Circuit understood that Congress considered "sediment run-off from timber harvesting, for example, [to] derive[ ] from a nonpoint source." *Pronsolino* v. *Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002). Indeed, the Clean Water Act expressly acknowledges that two principal examples of "nonpoint sources of pollutants" are "agricultural and silvicultural activities, including runoff from fields and crop and forest lands." 33 U.S.C. § 1314(f)(1), (2)(A). The very nature of these activities makes regulation-by-permit an ill fit. To begin with, mandating pollution controls through permits

issued to every single farmer, rancher, or forest landowner—all of whom must channel rainwater from their land—would be virtually impossible. But more fundamentally, that scheme would be well beyond the expertise of traditional pollution-control agencies. The solutions must come—as they always have—from local and State officials with expertise in appropriate and practicable farming and forestry practices that work for unique topographies and regions.

a. The sheer size of agriculture and silviculture in this country confirms why runoff from these activities has never—until the decision below concerning silviculture—been deemed appropriate for federally mandated permitting. As of 2011, there were 2.2 million farms in the United States covering 917 million acres. U.S. Dep't of Agric., National Agr. Statistics Serv., *Farms, Land in Farms, and Livestock Operations: 2011 Summary* 4 (Feb. 2012) (USDA Summary).[5] The most recent report from the USDA's Economic Research Service shows that, as of 2007, "forest-use land [was] at 671 million acres (30 percent); grassland pasture and range at 614 million acres (27 percent); [and] cropland at 408 million acres (18 percent) * * * ." Cynthia Nickerson *et al.*, U.S. Dep't of Agric., Economic Research Serv., *Major Uses of Land in the United States, 2007* at 1 (Dec. 2011).[6] By contrast, only 61 million acres, or 3 percent of the total U.S. land, is urban-use. *Id.* And

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[5] *Available at* http://usda01.library.cornell.edu/usda/current/FarmLandIn/FarmLandIn-02-17-2012.pdf.

[6] *Available at* http://www.ers.usda.gov/media/177328/eib89_reportsummary.pdf.

only a fraction of the 313 million acres devoted to "special uses" is industrial in nature. *Id.* at 1, 2. Thus, while requiring point-source-by-point-source permitting is no easy task for municipal and industrial stormwater discharges, it is downright impossible for agricultural and silvicultural stormwater runoff. There are simply too many rivulets, gullies, ditches, swales, and other conveyances from which stormwater "[is] or may be discharged," 33 U.S.C. § 1362(14), from the 1.7 *billion* acres of land devoted to agricultural and silvicultural activities to allow for a point-source permitting scheme.

b. The natural phenomena that generate countless channelized stormwater outlets to streams from farms and forestlands underscore why the Ninth Circuit's rule is so troubling and unworkable. According to the court below, silvicultural stormwater should be deemed nonpoint source only when the stormwater is "allowed to run off naturally." Pet. App. 11a. The Ninth Circuit panel assumed that, absent human intervention, rural stormwater runoff would "dissipate[ ] in a natural and unimpeded manner"—i.e., as sheet flow. Pet. App. 10a. But as any farmer, rancher, or forest landowner knows, surface runoff does not work that way.

"Surface runoff occurs when water originating in precipitation (rainfall and snow) flows freely on the surface of the earth, driven by gravitational forces." American Soc'y of Civil Eng'rs, *Hydrology Handbook* 331 (2d ed. 1996). When the rain initially falls on virgin grounds its "first manifestation" is "overland sheet flow." *Id.* at 331-332. But "[g]iven the topographical irregularity of the earth's surface, overland flow soon concentrates into rill flow." *Id.* at 332. Natural erosion carries away topsoil layers, causing

narrow and shallow channels in the earth—the "rill flow." *Id.* Rill flow then "concentrates into gully and stream flow." *Id.* In sum, "[r]unoff and stream flow are continuous processes by which water is constantly flowing from higher to lower elevations by the action of gravitational forces." *Id.* at 331. All of this is to say that stormwater on rural land will *not* "dissipate[ ] in a natural and unimpeded manner" as suggested by the Ninth Circuit, but instead will, through entirely natural processes, be "collected or channeled and then discharged." *See* Pet. App. 10a. Channelized stormwater discharges are as "natural" as the laws of physics.

4. On farms and in forests, constructing culverts is one of the principal land-use tools that States have designed for controlling stormwater. When properly constructed and managed, ditches and culverts running through farms and forests, and along rural and logging roads, seek to replicate the naturally forming rill and gully flow. But there is one key difference: Unlike the random pattern of gullies and rivulets that nature carves into the land, the culverts and ditches mandated by State plans are carefully arranged to prevent erosion and minimize sediment runoff into streams and rivers.

Yet under the Ninth Circuit's view, the intervention of man's hand in creating stormwater conveyances that Mother Nature would have haphazardly created herself demands a permit for this otherwise nonpoint source runoff. That novel rule cannot be harmonized with the statutory language, conflicts with EPA's longstanding practice, and is wholly impractical to boot. Indeed, it is precisely the interpretation that one of the sponsors of the floor amendment that led to the 1987 Stormwater

Amendments, Senator Malcolm Wallop, dubbed "absurd." 131 Cong. Rec. 15616, 15657 (June 13, 1985) (statement of S. Wallop).[7]

* * *

The Clean Water Act strikes a careful balance. It summons the full regulatory authority of the federal government when dealing with urban and industrial stormwater, but it assigns responsibility over rural stormwater—and particularly agricultural and silvicultural stormwater—to the entities that have always exercised it: the States and local governments. That is because Congress recognized that only comprehensive land-use control—designed by local officials exercising their expert knowledge to address site-specific problems—will do.

The Ninth Circuit overlooked this basic division and the reasons Congress forged it. By its lights, only a federal permitting scheme would accomplish the principal objectives of the Clean Water Act. But that is too facile. By overlooking the deliberate balance Congress struck, the Ninth Circuit erred. Its judgment should be reversed.

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[7] The Senator called it "absurd" to "require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source." 131 Cong. Rec. at 15657. EPA's then-existing stormwater regulation (following judicial mandates) interpreted the term "point source" to include all such "devices." But, Senator Wallop explained, "[t]his is overbroad in its reach," "would be an administrative nightmare," and "would also be prohibitively expensive to administer." *Id.*

B. One Of The Primary Targets Of The Non-Point Source Management Program Was Pollution From Agricultural And Silvicultural Activities.

1. By adopting the Section 319 Nonpoint Source Management Program through the 1987 amendments, Congress supplemented and substantially expanded the area-wide waste treatment management program of Section 208. Under Section 319, States are directed to prepare "management programs" that identify BMPs for various categories of nonpoint sources. 33 U.S.C. § 1329(b). Each management program must identify "best management practices which will be undertaken to reduce pollutant loading" and explain how the program will "achieve implementation" of those practices. *Id.* § 1329(b)(2)(A), (B).

One of the principal targets of the Nonpoint Source Management Program was rural sources of pollution: agriculture and silviculture. The author of the Nonpoint Source Management Program amendment, Representative James Oberstar, in fact, singled out agricultural and silvicultural nonpoint sources, described the states' efforts to control these sources of pollution, and remarked that "[t]here is considerable interest [on the part of the states] in doing more, if funds and other encouragement from the Federal Government are forthcoming." 4 *Legislative History* at 2819 (statement of Rep. Oberstar). Representative Oberstar also clarified that these activities should be left to state regulation. He explained that his bill "recognizes first that, unlike point sources of pollution, nonpoint sources do not lend themselves to a national control program with national standards." *Id.* "Rather," he continued, "controls must be devel-

oped at the State and local levels, to address local conditions." *Id.* That is just what the Nonpoint Source Management Program did. Congress crafted a federal point-source scheme for urban and industrial sources of pollution, while reserving to the states the authority to formulate site-specific BMPs for rural sources of pollution.[8]

This makes good sense. After all, "the control of non-point source pollution was often thought impractical and not properly subject to federal direction. What was the EPA supposed to do, tell farmers how to farm?" William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 Ala. L. Rev. 537, 562 (2004) (footnote omitted). Even the Ninth Circuit previously recognized as much: "The reason for the [Clean Water Act's] focus on point sources rather than nonpoint sources is simply that '[d]ifferences in climate and geography make nationwide uniformity in controlling non-point source pollution virtually impossible.'" *Oregon Natural Desert Ass'n* v. *U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008) (quoting Marc R. Poirier, *Non-point Source Pollution*, *in* Environmental Law Practice Guide § 18.13 (2008)).

The decision below, however, unduly hamstrings the States in developing best management practices for much rural stormwater runoff. Under the Ninth Circuit's view, if a state determines that the best

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[8] Courts have recognized the same, observing that the Clean Water Act's federal regulatory scheme "generally targets industrial and municipal sources of pollutants, as is evident from a perusal of its many sections." *United States* v. *Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993).

way to manage stormwater runoff along forest roads is through channeling (in order to, for example, prevent erosion), that "best management practice" transforms a nonpoint source into a point source and requires a permit. Thus, the Ninth Circuit effectively reads into the statute a prohibition on the use of any channeling or conveyance techniques as BMPs to manage and limit stormwater pollutant runoff.[9] But nothing in the statute, its structure, or its legislative history demonstrates Congress's intent to tie the hands of the states in this manner. To the contrary, as EPA stated 36 years ago, "[i]t is evident * * * that ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff from precipitation are not meant to be subject to the § 402 permit program." 41 Fed. Reg. at 6,282. The Ninth Circuit's failure to appreciate this distinction was legal error.

2. Adding the Nonpoint Source Management Program (and the Stormwater Amendments) to the Clean Water Act culminated a long process to appropriately define the respective roles of EPA and the States with respect to stormwater runoff. When it enacted the Clean Water Act, Congress was careful

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[9] The Clean Water Act *prohibits* any regulated point source discharge absent a permit. *See* 33 U.S.C. § 1311(a). Even where landowners seek a permit, permits for stormwater conveyances may often be unavailable in areas with already impaired water quality. Permits for channeled stormwater discharges might be unavailable because those discharges might "contribute" to further water-quality impairment within the meaning of EPA's permitting regulations, 40 C.F.R. § 122.44(d), and yet the same discharges in the form of uncontrolled "natural" runoff could potentially carry larger loads of sediment and remain unregulated.

to "to recognize, preserve, and protect the primary responsibilities and rights of the States in controlling water pollution." Pub. L. No. 80-845, § 1, 62 Stat. 1155, 1155 (June 30, 1948). To this day, the Act maintains that same policy. 33 U.S.C. § 1251(b). And from 1972 to 1987, Congress's actions reflect its determination to place greater responsibility on the States—not to transfer responsibility to EPA—for addressing rural stormwater runoff.

First, the 1972 Clean Water Act established a state area-wide waste treatment management program (Section 208), through which states were encouraged to "identify, if appropriate, agriculturally and silviculturally related nonpoint sources pollution, * * * and * * * set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." Pub. L. No. 92-500, § 208(b)(2)(F), 86 Stat. 816, 841 (Oct. 18, 1972). Even then, Congress recognized that the States, not the federal government, should take the lead in addressing most stormwater runoff through land-use regulation. As one of the Act's sponsors emphasized, "[t]here is no effective way as yet, other than land use control, by which you can intercept * * * runoff and control it in the way you do a point source." 117 Cong. Rec. 38825 (Nov. 2, 1971) (statement of Sen. Muskie). But this program was largely ineffective due to lack of funding.

So, in 1977, Congress amended the Act to provide financial incentives to rural landowners to encourage them to comply with state programs. *See* Pub. L. No. 95-217, § 35, 91 Stat. at 1579-81. It created a mechanism whereby the Secretary of Agriculture could enter contracts with these landowners to share in the costs of implementing state BMPs. *See* 33

U.S.C. § 1288(j) ("agricultural cost sharing"). Legislators viewed this as a step toward increasing the responsibilities of the States in regulating water pollution: "The Congress expects the States to assume more and more of the responsibilities of the water pollution program. It has therefore fashioned a program which increases Federal resources available as responsibilities increase." 123 Cong. Rec. 39170, 39178 (Dec. 15, 1977) (remarks of S. Muskie). Congress understood that nonpoint sources of pollution were best controlled at the local level: "Between requiring regulatory authority for nonpoint sources, or continuing the section 208 experiment, the committee chose the latter course, judging that these matters were appropriately left to the level of government closest to the sources of the problem." S. Rep. No. 95-370, at 9, 1977 U.S.C.C.A.N. at 4335.

In 1987, Congress went further still. At the same time it created the stormwater discharge control provisions at issue in this case, Congress added the Nonpoint Source Management Program, discussed above. That regime reaffirms that nonpoint sources—including agricultural and silvicultural stormwater runoff recognized as nonpoint sources under longstanding EPA regulation and the 1987 statutory exclusion for agricultural stormwater—remain a matter of land-use control for which the States, not the federal government, assume primary responsibility. *See* 33 U.S.C. § 1329.

In focusing almost exclusively on the 1972 "point source" definition, the Ninth Circuit all but ignored this critical 1987 milestone, as well as the overall design of Congress reflected in the larger statutory context. The result was a novel rule that betrays more than three decades of congressional initiatives

to address water pollution through distinct programs designed not only to preserve, but to enhance, States' authority over agricultural and silvicultural storm-water runoff.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

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