No. 11-347

In the Supreme Court of the United States

GEORGIA-PACIFIC WEST, INC., HAMPTON TREE FARMS, INC., STIMSON LUMBER CO., SWANSON GROUP, INC., AMERICAN FOREST & PAPER ASSOCIATION, OREGON FOREST INDUSTRIES COUNCIL, & TILLAMOOK COUNTY,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Respondent.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Ninth Circuit should have deferred to EPA's long-standing position that channeled run-off from forest roads does not require a permit, and erred when it mandated that EPA regulate such run-off as industrial stormwater subject to NPDES.

RULES 24.1 AND 29.6 STATEMENT

Defendants-appellees below and petitioners here are Georgia-Pacific West LLC, Hampton Tree Farms, Inc., Stimson Lumber Company, and Swanson Group, Inc. Intervenor defendants-appellees below and petitioners here are American Forest & Paper Association, Oregon Forest Industries Council, and Tillamook County, Oregon.

Additional defendants-appellees below, petitioners in No. 11-338, are the Oregon State Forester and members of the Oregon Board of Forestry, in their official capacities.

Petitioner Georgia-Pacific West LLC (formerly Georgia-Pacific West, Inc.) is a privately held Oregon limited liability company, the sole member of which is Georgia-Pacific LLC, a privately held Delaware limited liability company. The ultimate, indirect parent of Georgia-Pacific LLC is Koch Industries, Inc. No publicly held company owns 10 percent or more of the membership interests or stock of Georgia-Pacific LLC or Koch Industries, Inc., respectively.

Petitioner Hampton Tree Farms, Inc. is a family owned corporation, the parent of which is Hampton Resources, Inc., a family held Oregon corporation. No publicly held company owns 10 percent or more of the stock of Hampton Resources, Inc.

Petitioner Stimson Lumber Company is a family owned corporation organized under the laws of Oregon. It has no parent company, and no publicly held company owns 10 percent or more of its stock.

Petitioner Swanson Group, Inc. is a family owned corporation organized under the laws of Oregon. No publicly held company owns 10 percent or more of its stock.

Petitioner American Forest & Paper Association is the national trade association of the forest products industry, representing pulp, paper, packaging and wood products manufacturers, and forest landowners. No parent corporation or publicly held company has a 10 percent or greater ownership interest in American Forest & Paper Association.

Petitioner Oregon Forest Industries Council is a mutual benefit corporation organized under the laws of Oregon and Section 501(c)(6) of the Internal Revenue Code. It has no parent corporation and no publicly held company owns a 10 percent or greater interest in Oregon Forest Industries Council.

Petitioner Tillamook County is a governmental unit of the State of Oregon, with a population of approximately 25,000 persons. About 44 percent of the land within the county's borders is State owned, most as part of Tillamook State Forest, and 93 percent of the County is classified as forest land.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 640 F.3d 1063. The opinion of the district court (Pet. App. 48a-68a) is reported at 476 F. Supp. 2d 1188.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2010. After the time to file was extended, petitioners filed a timely petition for rehearing and rehearing en banc on October 5, 2010. The court issued an amended opinion and denied the petitions for panel and en banc rehearing on May 17, 2011. Pet. App. 1a. This Court granted a timely petition for certiorari on June 25, 2012. Jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced at 1 Joint Appendix ("1JA") 62-125.

STATEMENT

For more than 35 years, EPA's Silvicultural Rule has specified that precipitation runoff from forest "road construction and maintenance"—which includes the ditch-and-culvert drainage systems that are an integral part of nearly all forest roads—is "non-point source silvicultural activity" that does not require a Clean Water Act Section 402 permit. Instead, forest road runoff, whether or not collected in ditches, has been addressed through state best management practices adapted to local conditions.

When Congress in 1987 established a new two-phase process for regulating stormwater point source discharges, EPA confirmed that forest road runoff is not subject to Section 402 permitting. In promulgating Phase I regulations identifying discharges that are "associated with industrial activity"—for which Congress required permits—EPA provided that these "do not include" activities covered by the Silvicultural Rule. Then, when EPA considered under Phase II whether permits should be required for additional stormwater discharges not covered by the mandatory Phase I program, it did not designate runoff from forest roads in that category. Consistent with these rules, EPA has never required CWA permits for channeled forest road runoff.

The Ninth Circuit impermissibly rejected EPA's long-held position. It acknowledged that EPA *intended* the Silvicultural Rule to define precipitation runoff collected in ditches and culverts as nonpoint source, but refused to defer to EPA because it incorrectly believed that the CWA inflexibly defines this runoff as point source in nature.

That error by itself would not have been enough to impose a permitting requirement. The 1987 CWA Amendments require permits only for certain categories of point source stormwater discharges—as relevant here, those "associated with industrial activity." But the Ninth Circuit contorted EPA's stormwater regulations beyond recognition, reading them to define forest road discharges as "associated with industrial activities" despite EPA's plain intent to the contrary.

This Court should reverse. EPA's reasoned and consistent position is entitled to deference. EPA's interpretation of the CWA in its silvicultural and

stormwater rules was entitled to *Chevron* deference. EPA's interpretation of its own rules was entitled to *Auer* deference. The Ninth Circuit was not entitled to substitute its own views of appropriate environmental regulation for those of Congress and EPA.

Alternatively, this Court should order this suit dismissed for lack of subject matter jurisdiction. Though this case masquerades as a citizen enforcement suit, plaintiff sought and obtained invalidation of key aspects of EPA's rules. But rule challenges must be brought against EPA in a court of appeals within 120 days following promulgation of the rule. 33 U.S.C. § 1369(b). This is an out-of-time, filed-in-the-wrong-court and against-the-wrong-defendant rule challenge for which jurisdiction is lacking.

A. NEDC's Suit.

Plaintiff NEDC brought this purported citizen suit under CWA § 505, 33 U.S.C. § 1365, in September 2006. Defendants are forest products companies, petitioners here, and the Oregon State Forester and members of the Oregon Board of Forestry, petitioners in No. 11-338. American Forest & Paper Association, Oregon Forest Industries Council, and Tillamook County, also petitioners here, intervened in support of defendants.

NEDC's complaint (2JA 1-25) alleges that "ditches, channels, culverts, [and] pipes" along the Trask and Sam Downs Roads and at "hundreds of other locations" throughout Oregon State Forests discharge precipitation runoff into navigable waters without a National Pollutant Discharge Elimination System ("NPDES") permit. First Am. Cmplt. ¶¶ 1-6. NEDC alleges that petitioner companies use State-owned roads for hauling timber and maintain those

roads pursuant to timber sale contracts with Oregon's Department of Forestry. Petitioners' use of these public roads allegedly creates sediment and other pollutants that are carried by rain through roadside ditches into navigable waters. *Id.* ¶ 5. Plaintiff argues that these are point source discharges associated with industrial activity for which petitioners were required to obtain permits from Oregon's Department of Environmental Quality, to which EPA has delegated administration of the NPDES program. *Id.* ¶¶ 32, 77. NEDC seeks injunctive and declaratory relief, civil penalties, and attorneys' fees. *Id.* ¶ 1.

B. The Federal Statutory Context.

In enacting the CWA, Congress created a federal-state "partnership" "animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992). Congress gave EPA defined powers over the Sections 402 and 404 permit schemes, but also chose "to recognize, preserve, and protect the primary responsibilities and rights of States" to address pollution and "plan the development and use" of "land and water resources." 33 U.S.C. § 1251(b); see *SWANCC* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 166-167 (2001); *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006).

Section 402 requires permits for "point sources" that discharge pollutants into U.S. waters. 33 U.S.C. § 1342(a); see CWA § 301(a), 33 U.S.C. § 1311(a). A "point source" is "any discernible, confined and discrete conveyance," including a "ditch, channel, tunnel [or] conduit," from which pollutants are discharged. CWA § 502(14), 33 U.S.C. § 1362(14). But the term

expressly "does not include agricultural stormwater discharges." *Ibid.* Nor does it include "[n]onpoint sources of pollutants," such as "agricultural and silvicultural activities" like "runoff from fields and crop and forest lands." CWA § 304(f)(1) & (2)(A), 33 U.S.C. § 1314(f)(1) & (2)(A). Congress expected EPA to further flesh out which discharges fall into the point and nonpoint source categories. As explained by Senator Muskie—the "leading Congressional sponsor" of the Act (*NRDC* v. *Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977))—"[g]uidance with respect to the identification of 'point sources' and 'nonpoint sources'" will "be provided in regulations and guidelines of the Administrator." 117 Cong. Rec. 38816 (1971).

The CWA initially did not expressly differentiate stormwater from other potential sources of pollution. But in 1987 Congress "fundamentally redesigned the CWA's approach" by creating a two-phase regime to address stormwater discharged from point sources. Pet. App. 35a. In Phase I, Congress required permits for the "most significant sources of stormwater pollution" (Pet. App. 36a), including "discharge[s] associated with industrial activity." CWA § 402(p)(2)(B), 33 U.S.C. § 1342(p)(2)(B). In Phase II, Congress required EPA to study whether additional types of stormwater discharge should be subject to permitting or other regulation. CWA § 402(p)(5)-(6), 33 U.S.C. § 1342(p)(5)-(6). Point source stormwater discharges not designated as requiring permits under Phase I or II were excluded from the NPDES program.

Beyond Section 402 and the separate Section 404 permit scheme for dredged-and-fill material, Congress largely left the task of addressing water pollution to the States, with federal assistance and over-

sight. See *The Clean Water Act Handbook* 191-220 (Mark A. Ryan ed., 2d ed. 2003). Consistent with its purpose to preserve the "primary responsibility and rights of States" in this area, Congress left States responsible for establishing water quality standards and developing programs to manage nonpoint sources of pollution. 33 U.S.C. §§ 1288, 1313(a), (d), 1329. In doing so, Congress recognized that "[b]est management practices" ("BMPs")—"including careful road placement [and] culverting"—would "reduc[e] runoff" from "silvicultural areas" and other nonpoint sources like "streets, roads, [and] highways." 132 Cong. Rec. 32396-32397 (1986) (statement of co-sponsor Sen. Durenberger); see also S. Rep. No. 99-50, at 35-36 (1985).

C. EPA's Silvicultural Rule.

Ever since passage of the CWA—as the Ninth Circuit acknowledged—EPA has "treat[ed] all natural runoff" from forest roads "as nonpoint pollution, even if channeled and discharged through a discernible, confined and discrete conveyance" like a roadside ditch or culvert. Pet. App. 22a.

1. EPA promulgated a rule in 1973 providing that "[d]ischarges of pollutants from agricultural and silvicultural activities" generally do not require NPDES permits. 40 C.F.R. § 125.4(j) (1975), 1JA 85. EPA explained that "the Act and the legislative history indicate clearly that Congress regarded" such discharges "as problems to be dealt with primarily through the exercise of authorities concerning nonpoint sources." 38 Fed. Reg. 10960, 10961 (May 3, 1973). As EPA later summarized, permitting "was not appropriate" for these sources because they "present runoff-related problems not susceptible to

the conventional NPDES permit program including effluent limitations":

> EPA's position was and continues to be that most rainfall runoff is more properly regulated under section 208 of the [CWA], whether or not the rainfall happens to collect before flowing into navigable waters. Agricultural and silvicultural runoff, as well as runoff from city streets, frequently flows into ditches or is collected in pipes before discharging into streams. EPA contends that most of these sources are nonpoint in nature and should not be covered by the NPDES permit program.

40 Fed. Reg. 56932 (Dec. 5, 1975).

A district court held EPA's 1973 rule too broad and suggested EPA use its authority to better define nonpoint source activities that do not require permits. *NRDC* v. *Train*, 396 F. Supp. 1393, 1401-1402 (D.D.C. 1975) ("Congress intended for [EPA] to determine, at least in the agricultural and silvicultural areas, which activities constitute point and nonpoint sources"), aff'd *sub nom*. *NRDC* v. *Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977) ("power to define point and nonpoint sources is vested in EPA").

2. EPA promulgated the Silvicultural Rule in 1976. The rule identified four discharges—those "related to rock crushing, gravel washing, log sorting or log storage facilities"—as "silvicultural point source[s]." 40 C.F.R. § 124.85 (1976), 1JA 86-87. The rule stated in a "comment" that "silvicultural point source" does "not include nonpoint source activities inherent to silviculture" such as "harvesting operations," "surface drainage," and "road construction

and maintenance from which runoff results from precipitation events." *Ibid.* "[R]unoff from road construction and maintenance for the purposes of forest management" and "surface drainage" that "channel[s] diffuse runoff from precipitation events," EPA explained, "should be considered nonpoint in nature." 41 Fed. Reg. 24709, 24711 (June 18, 1976).

In promulgating the Silvicultural Rule, EPA "carefully examined the relationship between the NPDES permit program" and "water pollution from silvicultural activities" and "carefully considered" numerous comments. 41 Fed. Reg. 6281, 6282 (Feb. 12, 1976); 41 Fed. Reg. 24709-24710. It concluded "that most water pollution related to silvicultural activities is nonpoint in nature." *Id.* at 6282. In explanation, EPA observed that those discharges are "induced by natural processes, including precipitation," are "not traceable to any discrete or identifiable facility," and are "better controlled through the utilization of [BMPs]." *Id.* at 24710. EPA agreed with commentators that "geographical, meteorological and topographical variations" made "State and local regulation of water pollution from silvicultural activities * * * more appropriate than Federal regulation," concluding that "the [Section] 208 process incorporating BMPs should effectively prevent and abate" such pollution. *Ibid.*

Accordingly, under the Silvicultural Rule, "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," but are regulated under Section 208 by the States as "nonpoint in nature." 41 Fed. Reg. 6282.

3. EPA re-promulgated the Silvicultural Rule in 1980 with "[m]inor wording changes." 45 Fed. Reg.

33290, 33372 (May 19, 1980); 40 C.F.R. § 122.27(b), 1JA 103-104. The rule retained the four "silvicultural point sources." It moved the definition of "non-point source silvicultural activities" from a comment to the text, slightly modifying the language to provide that nonpoint source activities include "surface drainage, or road construction and maintenance from which there is natural runoff." 45 Fed. Reg. 33446-33447.

Substituting "from which there is natural runoff" for "from which runoff results from precipitation events" was not a substantive change. Following that change, EPA restated its "longstanding view" that runoff from forest roads, "*although sometimes channeled*," remains "non-point source in nature" because it is "caused solely by natural processes, including precipitation and drainage," is "not otherwise traceable to any single identifiable source," and is "best treated by non-point source controls." 55 Fed. Reg. 20521, 20522 (May 17, 1990) (emphasis added).

D. EPA's Stormwater Regulations.

1. In 1990 regulations implementing Phase I of Congress's stormwater amendments, EPA defined "discharge associated with industrial activity" to "not include discharges from facilities or activities excluded from the NPDES program under this part 122." 40 C.F.R. § 122.26(b)(14). The Silvicultural Rule, at 40 C.F.R. § 122.27, fell within the scope of this reference. And EPA explained that it did "not intend to change the scope of 40 CFR 122.27 in this rulemaking." 55 Fed. Reg. 47990, 48011 (Nov. 16, 1990).

The Phase I regulation otherwise defined "discharge associated with industrial activity" to mean discharges "directly related to manufacturing,

processing or raw materials storage areas at an industrial plant," including "immediate access roads." 40 C.F.R. § 122.26(b)(14). "[I]mmediate access roads" are roads "exclusively or primarily dedicated for use by the industrial facility," not "public access roads such as state, county, or federal roads" that "happen to be used by the facility." 55 Fed. Reg. 48009.

EPA's rule also listed "categories of facilities" engaged in industrial activity, using as shorthand the federal government's Standard Industrial Classifications, and including facilities "classified as Standard Industrial Classification 24." 40 C.F.R. § 122.26(b)(14)(ii). SIC 2411 is titled "logging" and refers to "[e]stablishments primarily engaged in cutting timber" and producing "primary forest or wood raw materials" "in the field." Pet. App. 39a-40a; see 2JA 64. But as EPA contemporaneously explained, the regulation "does not include sources that may be included under SIC 24, but which are excluded under [the Silvicultural Rule]" (55 Fed. Reg. 48011)—and therefore does not include "harvesting operations."

Environmental groups challenged aspects of EPA's Phase I regulations, but not those concerning forest roads or silviculture. See *NRDC* v. *EPA*, 966 F.2d 1292 (9th Cir. 1992); *id.* at 1312-1314 (O'Scannlain, J., dissenting in part).

2. In developing Phase II regulations, EPA reiterated that its Phase I regulation excluded "runoff from agricultural and silvicultural activities." EPA, *Storm Water Discharges Potentially Addressed by Phase II of the NPDES Storm Water Program* 2-23 n.8 (Mar. 1995), 2JA 47. And in listing "Timber Products Facilities" that are "associated with industrial activity," EPA specifically identified cutting, planing, loading, sorting and storing logs, and manu-

facturing, assembling, and preserving wood products, but not logging. *Id.*, Appendix E, at E-2-3, 2JA 50-51.

EPA's Phase II rules designated two additional categories of stormwater discharge for NPDES permitting: small municipal storm sewer systems and some construction sites. 64 Fed. Reg. 68722, 68734 (Dec. 8, 1999). This approach reflected studies that showed urban storm sewers and construction were a much more serious source of pollution than silviculture. *Id.* at 68726-68727. See EPA, *Stormwater Phase II Final Rule, Construction Site Runoff Control, Minimum Control Measures* 1 (revised Dec. 2005) ("Sediment runoff rates from construction sites" are "1,000 to 2,000 times greater than those of forest lands").

An environmental group challenged EPA's decision not to require Phase II permitting for runoff from forest roads. The Ninth Circuit remanded the rule to EPA to explain its decision, but did not strike down the rule. *Envtl. Def. Ctr.* v. *EPA*, 344 F.3d 832, 861 (9th Cir. 2003). EPA took no public action on that remand until its recent Notice of Intent. 77 Fed. Reg. 30473, 30474 (May 23, 2012).

3. In 1999, EPA proposed modifying the Silvicultural Rule. EPA explained that "runoff" from "surface drainage [and] road construction and maintenance" is "[c]urrently" "categorically excluded from the NPDES program." 64 Fed. Reg. 46058, 46077 (Aug. 23, 1999). EPA proposed that this stormwater still "would not be considered 'stormwater discharges associated with industrial activity' under 40 CFR 122.26(b)(14)." But it suggested replacing categorical treatment with case-by-case consideration of permitting. 64 Fed. Reg. 46077-46078, 46088. Following

public comment, EPA decided not to pursue this proposal. 65 Fed. Reg. 43586, 43652 (July 13, 2000).

4. In a 2003 brief urging dismissal of a suit alleging that discharges from forest roads collected in "ditches, channels, pipes [and] culverts" must be permitted, EPA told the court that the phrase "discharge associated with industrial activity" "does not include discharges from facilities or activities excluded from the NPDES program under" Part 122.27, and that "[c]onsequently, EPA did not incorporate silvicultural storm water discharges into the definition of 'stormwater discharges associated with industrial activity.'" Pet. App. 86a-87a. And in its amicus brief to the district court supporting dismissal of this suit, the United States called for "[e]levated deference" because EPA "has 'consistently followed' the same interpretation of its regulations." Pet. App. 115a.

E. Oregon's Regulation Of Forest Roads.

Under this statutory and regulatory scheme, States regulate forest roads using BMPs adapted to their own "climate, soils, topography, and aquatic biota." Erik Schilling, *Compendium of Forestry Best Management Practices for Controlling Nonpoint Source Pollution in North America* 194 (Tech. Bull. 966, Sept. 2009). As Congress required, EPA assists States in developing "land use requirements" to address "silviculturally related nonpoint sources of pollution," including BMPs for road construction, maintenance, and management. 33 U.S.C. § 1288(b)(2)(F); see, *e.g.*, EPA, *National Management Measures to Control Nonpoint Source Pollution from Forestry* Ch. 3(c), (d) (May 2005), http://tiny.cc/EPA1; Karen Solari, *Forestry Best Management Practices in Watersheds* (2008), http://tiny.cc/Solari. As 26 States ex-

plained in their brief in support of the petitions (at 14), "BMPs have become an accepted, well-understood, documented, approved and successful method of protecting water quality."

Thus, under Oregon law, the Board of Forestry "insure[s] that to the maximum extent practicable nonpoint source discharges of pollutants resulting from forest operations on forestlands do not impair" achievement of water quality standards. Or. Rev. Stat. § 527.765(1), (2), 1JA 107-109. The Board has promulgated "standards for locating, designing, constructing and maintaining efficient and beneficial forest roads" in a manner that provides "maximum practical protection" for "water quality." Or. Admin. R. § 629-625-0000(3). Roads must be located, constructed, and operated to minimize "risk of sediment delivery to waters of the state." *Id.* § 629-625-0330; see *id.* § 629-625-0200(2) & -0300(2). And to meet that goal, road operators must "provide a drainage system" that satisfies numerous criteria. *Id.* § 629-625-0330(1); see 1JA 109-125.

F. Proceedings Below.

The district court dismissed plaintiff's suit, deferring to EPA's position that, under the Silvicultural Rule, "building and maintenance of the forest roads" and "hauling of timber on the roads" are "not point sources when the natural runoff flows into the waters of the United States." Pet. App. 62a. The "road/ditch/culvert system and timber hauling on it is a traditional dispersed activity from which pollution flowing into the water cannot be traced to single discrete sources." *Ibid.* Given this holding, the court declined to address the Phase I scheme for point source stormwater discharges.

The Ninth Circuit reversed, rejecting EPA's views set forth as amicus. It first ruled that the CWA unambiguously defines "point source" to cover channeled silvicultural runoff. Pet. App. 32a. Alternatively, it held the phrase "natural runoff" in the Silvicultural Rule to be ambiguous. When read to "reflect the intent of EPA," "natural runoff" is nonpoint source even when "collected, channeled, and discharged." *Ibid.* But the court ruled that position "invalid" under the CWA's definition of point source. *Ibid.* The court imposed its own reading on the Silvicultural Rule—one that admittedly "does not reflect the intent of EPA"—that "channeled and controlled" runoff is point source activity. Pet. App. 32a-33a

The court next held that channeled forest road runoff is "associated with industrial activity." It acknowledged that EPA's Phase I regulation "purports to exempt" any "activity that is defined as a nonpoint source in the Silvicultural Rule." Pet. App. 38a. But it held that "EPA is not free" to do so if "silvicultural activity is industrial in nature." Pet. App. 39a. Ignoring the United States' argument that "EPA has not defined logging as an industrial activity" (1JA 43-44), the Ninth Circuit found it "undisputed" that logging "is an industrial activity." Pet. App. 39a, 42a. And it ruled that forest roads are "immediate access roads" "primarily dedicated for use by the logging companies," even though they "are often used for recreation." Pet. App. 40a.

On petitions for rehearing, the Ninth Circuit addressed subject matter jurisdiction. Pet. App. 5a-7a. According to the court, jurisdiction turned on whether the Silvicultural Rule is ambiguous. If the rule were *un*ambiguous, NEDC would have had to challenge it within 120 days of issuance, a window that

closed decades ago. 33 U.S.C. § 1369(b)(1). But the court held that the Silvicultural Rule is ambiguous, and that NEDC's challenge to it rests on "grounds which arose after such 120th day" because EPA set forth its interpretation of the rule for the first time in this litigation. Pet. App. 7a.

SUMMARY OF ARGUMENT

I. In requiring NPDES permits for channeled forest road runoff for the first time since passage of the CWA in 1972, the Ninth Circuit erred by failing to give deference to EPA's determinations that such permits are neither required nor appropriate.

A. The court of appeals held, first, that such runoff is a "point source" discharge under Section 502(14) of the CWA. But EPA concluded precisely the opposite when it promulgated the Silvicultural Rule, which for the last 36 years has provided that stormwater runoff, even if channeled through culverts and ditches, is not a point source discharge. That rule resolves an ambiguity in the statute's definition of "point source" and—as the product of EPA's considered, expert judgment—is entitled to substantial deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Ninth Circuit alternatively interpreted the words "natural runoff" in the Silvicultural Rule not to include channeled forest road runoff. But that holding runs squarely counter to EPA's longstanding interpretation of its own regulation, which is entitled to deference under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). EPA's rational and expert interpretation of the Silvicultural Rule has been enforced consistently for decades. It represents EPA's fair and considered judgment and is in no way a *post*

hoc rationalization advanced to defend past agency action against attack.

Giving EPA's interpretations of either the CWA or Silvicultural Rule proper deference requires reversing the judgment below.

B. The Ninth Circuit next held that channeled forest road runoff is a point source discharge "associated with industrial activity" within the meaning of the 1987 stormwater amendments to the CWA and EPA's implementing regulations, and that it therefore requires a permit. That also is incorrect.

The plain language of EPA's Phase I regulation makes clear that runoff from roads that are not "at" or "within" an industrial "facility," like those at issue here, is *not* a discharge "associated with industrial activity." In addition, EPA's regulation of stormwater associated with industrial activities explicitly excludes from its coverage activities deemed nonpoint source by the Silvicultural Rule—including "harvesting operations," *i.e.*, logging, as well as forest road construction and maintenance. Accordingly, EPA consistently has rejected the Ninth Circuit's contorted reading of the regulation, both in practice and in regulatory pronouncements and briefs submitted at all levels of this and other litigation. The Ninth Circuit misread the plain language of the regulation, and in any event should have deferred to EPA's longstanding interpretation under *Auer*. On this independent ground too, its judgment must be reversed.

C. The deference due to EPA's views concerning the CWA and its implementing regulations is a matter of more than mere legal formality. Disregarding those views and requiring permits for channeled for-

est road runoff would impose astronomical costs on both regulators and the regulated, inject pervasive confusion into forest road management, and undercut EPA's environmental protection mandate. Interpretations of statutes and regulations that undermine the achievement of an agency's ultimate mission in this way are strongly disfavored.

II. This Court should alternatively vacate and remand with instructions to dismiss the suit for lack of subject matter jurisdiction. The CWA provides limited subject matter jurisdiction (1) in the courts of appeals over suits against EPA challenging the *validity* of EPA regulations, and (2) in the district courts over suits seeking to *enforce* EPA regulations. Congress has barred district courts from entertaining attacks on the validity of EPA regulations in enforcement proceedings like this one.

Yet that is precisely what respondent has accomplished here: it sought and obtained invalidation of key aspects of the Silvicultural Rule and Phase I stormwater rule in an enforcement proceeding initiated in district court. And it did so *decades* out of time. Section 509(b)(1) provides in plain terms that challenges to the validity of a regulation must be brought "within 120 days" of the regulation's promulgation. This is not a case in which "grounds arising after the 120-day filing window" restarted the clock. That exception applies only when an event ripens a previously *unripe* claim (a rule with no application here) and has no bearing, in any case, on the status of this suit as an enforcement action brought in district court. In short, the lower courts were without power to entertain respondent's challenge to the Silvicultural Rule and stormwater rule and lacked jurisdiction to invalidate those rules.

Allowing the Ninth Circuit's invalidation of EPA's rules to stand would flout the CWA's judicial review provisions, undercutting Congress's express purpose of ensuring consistent and reliable enforcement of EPA's regulations. This Court should reverse the Ninth Circuit's jurisdictional ruling to restore Congress's orderly allocation of judicial review and citizen suit proceedings.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN SECOND-GUESSING EPA'S LONG-SETTLED INTERPRETATIONS OF THE CWA AND ITS IMPLEMENTING REGULATIONS.

The Ninth Circuit made two errors in holding that channeled forest road runoff is subject to NPDES permitting, each of which independently requires reversal.

First, the court mistakenly held that such runoff is a point source discharge as defined in the Clean Water Act and EPA's Silvicultural Rule. Appropriate deference to EPA's interpretation of the CWA in its Silvicultural Rule compels the opposite result: collected forest road runoff is not a point source, and nonpoint sources never require NPDES permits.

Second, not every point source discharge is subject to NPDES permitting—only certain categories, including those "associated with industrial activities," require a permit. The Ninth Circuit misinterpreted EPA regulations defining point source discharges "associated with industrial activity" when it brought channeled forest road runoff within their reach. EPA has expressly rejected that view. Had the court properly construed the regulations, and proper-

ly deferred to EPA, it could not have held forest road runoff to be associated with industrial activity.

A. EPA's Determination That Channeled Forest Road Runoff Is Nonpoint Source Is Entitled To Deference.

It has been settled for more than 35 years that "[s]ilvicultural point source[s]" do not include "silvicultural activities" such as "surface drainage, or road construction and maintenance from which there is natural runoff." 40 C.F.R. § 122.27(b)(1). Stormwater runoff from forest roads, "whether or not the rainfall happens to collect before flowing into navigable waters," falls within this nonpoint source category and therefore is not subject to NPDES permitting. 40 Fed. Reg. 56932 (Dec. 5, 1975); see 41 Fed. Reg. 24711 (June 18, 1976) ("runoff from road construction and maintenance for the purposes of forest management" is properly included on "the list of nonpoint sources").

This is a paradigm case warranting *Chevron* deference. The CWA's definition of "point source" is ambiguous and EPA's interpretation is reasonable. The Silvicultural Rule is the product of careful agency consideration, reflects EPA's expert judgment with respect to a complex statute, and has been applied consistently for decades. And Congress implicitly approved the Rule in its 1987 Amendments to the CWA. Proper deference to EPA requires reversal.

1. Congress left a gap for EPA to fill concerning the definition of silvicultural point source discharges.

When Congress leaves "'a gap for an agency to fill,'" the agency has authority "'to elucidate a specific provision of the statute by regulation,'" and "any en-

suing regulation is binding in the courts" unless "manifestly contrary to the statute." *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001). Such gaps may result from statutory ambiguities, which exist "when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:2, at 13 (7th ed. 2007); see also *Chickasaw Nation* v. *United States*, 534 U.S. 84, 90 (2001). To ascertain whether a statute is "ambiguous with respect to [a] specific issue addressed by [a] regulation," courts "must look" to "the particular statutory language at issue," as well as "the language and design of the statute as a whole." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988). Courts must defer to an agency determination unless the language, "purpose and structure of the statute clearly reveal a contrary intent on the part of Congress." *Chem. Mfrs. Ass'n* v. *NRDC, Inc.*, 470 U.S. 116, 125 (1985) (deferring to EPA's interpretation of the CWA).

Here, the language and design of the CWA leave room for EPA to determine, in its expert discretion, which categories of silvicultural discharges constitute point source discharges and which do not. The Act reasonably can be read (as EPA *did* read it) to exclude stormwater runoff from forest roads from the definition of "point source," regardless of whether that runoff is channeled.

a. Interpretation begins with "the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The CWA provides that point source discharges "of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). It then subjects that general rule to exception, autho-

rizing EPA to "issue a permit for the discharge of any pollutant" (§ 1342(a)(1)) from "point sources," subject to "[e]ffluent limitations" (§ 1311(e)) set by EPA. The statute defines a "point source" as "any discernible, confined and discrete conveyance," including "any pipe, ditch, channel, [or] conduit." 33 U.S.C. § 1362(14).

Every court to have considered the issue has recognized that Congress expected EPA to exercise judgment in defining point source and nonpoint source pollution. See, *e.g.*, *League of Wilderness Defenders* v. *Forsgren*, 309 F.3d 1181, 1184, 1190 (9th Cir. 2002) (recognizing that EPA "has some power to define point source and nonpoint source pollution," and identifying rain-driven "residue left on roadways" as "[t]he most common example of nonpoint source pollution"); *NRDC* v. *Costle*, 568 F.2d 1369, 1377, 1382 (D.C. Cir. 1977) ("power to define point and nonpoint sources is vested in EPA"); *Nat'l Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 167 (D.C. Cir. 1982) ("Congress expressly meant EPA to have * * * at least some power to define the specific ter[m] 'point source'"); *NRDC, Inc.* v. *Train*, 396 F. Supp. 1393, 1395, 1401-1402 (D.D.C. 1975) ("Congress intended for [EPA] to determine, at least in the agricultural and silvicultural areas, which activities constitute point and nonpoint sources"). The requirement that point sources are "discernible, confined *and* discrete" conveyances is particularly difficult to apply to stormwater runoff in a rural setting. As the D.C. Circuit observed in *Costle*, in considering "to what extent point sources are involved in agricultural [and] silvicultural" runoff, "[t]he definition of point source," including "the concept of a 'discrete conveyance,' suggests that there is room" for "exclusion by interpretation." 568 F.2d at 1377.

Thus, EPA early on determined that it could properly distinguish between, on the one hand, the four point source activities identified in the Silvicultural Rule that involve "controlled water use by a person" (41 Fed. Reg. 6282), and, on the other, allowing rainwater flowing through the forest to be channeled along the road in a customary way so as not to destroy forest roads. That is sensible in light of the statutory text. Whether a conveyance is discrete—that is, whether it is "separate," "distinct," "unconnected" (WEBSTER'S THIRD NEW INT'L DICTIONARY 647 (1971))—reasonably depends on whether its input is essentially singular, as from a confined construction site or use of the water by a person, or diffuse, as from forest runoff. Here, as EPA observed, the input is natural rainfall exposed to a forest over massive acreage or miles of road. It would be channeled naturally, and is simply being diverted from the path it otherwise would travel. See 41 Fed. Reg. 24710 (silvicultural nonpoint source discharges are "induced by natural processes" and "not traceable to any discrete or identifiable facility").

Other provisions of the CWA enacted in 1972 likewise show that regulators must draw the line between point and nonpoint sources, and that "silvicultural activities" can reasonably be understood to fall on the nonpoint source side of that line. Thus 33 U.S.C. § 1314(f) requires EPA to publish "guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants," along with information on "methods to control pollution resulting from * * * agricultural and silvicultural activities"

such as "runoff" from "forest lands."[1] Similarly, 33 U.S.C. § 1288(b)(2)(F) provides that state planning processes include "identify[ing] * * * agriculturally and silviculturally related nonpoint sources of pollution."

Indeed, the CWA can be read in such a way that forest road runoff is not a kind of pollution even *potentially* subject to permitting. The Act prohibits "the discharge of any pollutant by any person." 33 U.S.C. § 1311(a). Yet forest road runoff is "induced by natural processes" and is "not traceable to any discrete or identifiable facility," even if ultimately gathered and channeled by a drainage system (41 Fed. Reg. 24709, 24710)—it is, in short, not the result of an "application or utilization of water *by any person*." 41 Fed. Reg. 6282 (emphasis added). The CWA also applies by its terms to "owner[s] or operator[s] of * * * point source[s]." 33 U.S.C. § 1311(c), (g)(3). But forest roads routinely "pass through multiple owners and multiple properties," and "ownership of the road does not necessarily correspond to the ownership of the forest land," creating "a highly complex mosaic of overlapping responsibilities." 77 Fed. Reg. 30473, 30475 (May 23, 2012). This makes it often impossible to attribute responsibility for the runoff to any particular "owner or operator."

Congress's 1987 Amendments to the CWA confirm the reasonableness of EPA's approach. Congress

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[1] EPA has pointed out that "section 304(f) is focused primarily on addressing pollution sources outside the scope of the NPDES program." 73 Fed. Reg. 33697, 33702 (June 13, 2008) (quoting H.R. Rep. No. 92-911, at 109 (1972) ("[t]his section" on "*nonpoint sources* is among the most important in the 1972 Amendments") (emphasis added by EPA)).

in 1987 expressly provided that point source discharges "d[o] not include agricultural stormwater discharges." 33 U.S.C. § 1362(14). As reflected in the U.S. Forest Service's placement within the Department of Agriculture, silviculture is a kind of agriculture. See Kevin Belt, *Silvics & Silviculture—The Agriculture of Trees*, http://tinyurl.com/silvics ("Silviculture is the agriculture of trees"); JOHN GIFFORD, PRACTICAL FORESTRY 12 (1902) (agreeing with the "claim that silviculture is a branch of agriculture"). By specifying that "agricultural" stormwater discharges are not point source discharges, Congress confirmed EPA's authority to determine that channeled silvicultural stormwater runoff is not a point source discharge. At a minimum, Congress's "expres[s] exclu[sion]" of agricultural stormwater runoff that "otherwise" might constitute a point source discharge "casts doubt on any claim that Congress specifically intended" runoff from the silvicultural branch of agriculture to be treated as point source. *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 711 (2011).

Furthermore, Congress's exclusion of all agricultural stormwater discharges from the definition of point source—as well as its additional exclusion of "return flows from irrigated agriculture"—is on its face flatly inconsistent with the Ninth Circuit's reasoning that *any* ditch is a point source under Section 502(14). Pet. App. 30a-31a. Congress contemplated that some ditches are not.

In short, the CWA cannot be said to "speak with the precision necessary to say definitively whether" channeled forest road runoff is a point source discharge requiring a permit. *Mayo Found.*, 131 S. Ct. at 711. Because it does not "clearly reveal a contrary

intent on the part of Congress," the statutory language gave EPA room to promulgate the Silvicultural Rule. *Chem. Mfrs.*, 470 U.S. at 126.[2]

b. The propriety of EPA's interpretation is confirmed by the design and purpose of the statute. "The meaning—or ambiguity—of certain words or phrases" may "become evident when placed in context" and "with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000). Just so here.

NPDES permits are authorized only "upon condition that [a] discharge" meets "all applicable requirements" of the statute (§ 1342(a)(1)), including "effluent limitations" established by EPA (§ 1311(e)). Effluent limitations are performance standards that reflect specified levels of pollutants for particular categories of discharges. EPA has established standards for more than 50 different industrial categories, including metal finishing facilities, steam elec-

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[2] The Ninth Circuit emphasized legislative history in concluding that the CWA unambiguously defines point source discharges to include channeled forest road runoff. Pet. App. 12a-16a. But reliance on "murky, ambiguous, and contradictory" legislative history is a risky undertaking that invites judges to "look[] over [the] crowd and pick[] out [their] friends." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Other parts of the same legislative history suggest that members of Congress well understood that EPA would have discretion to define point source discharges (*e.g.*, 117 Cong. Rec. 38816 (1971) (Sen. Muskie) ("Guidance with respect to the identification of 'point sources' and 'nonpoint sources'" will "be provided in regulations and guidelines of the Administrator")), and that silvicultural runoff was nonpoint in nature (*e.g.*, 133 Cong. Rec. 1591 (1987) (Sen. Simpson) ("non-point source pollution" includes "timber operations" and "other sources of run-off which are not considered point sources")).

tric power plants, and iron and steel manufacturing facilities. 40 C.F.R. Parts 405-471. Establishing and enforcing effluent limitations are the principal objectives of NPDES permitting.

EPA concluded, however, that effluent limitations cannot sensibly be used to manage runoff from forest roads, whether or not channeled through ditches. That is because agriculture and silviculture "present runoff-related problems not susceptible to the conventional NPDES permit program including effluent limitations" (40 Fed. Reg. 56932 (Dec. 5, 1975)), and it is questionable whether it "is practicable, or even feasible, to address stormwater discharges from [forest] roads" under a permitting system at all (77 Fed. Reg. 30474-30475). The reason why is clear: runoff is "caused solely by natural processes," primarily "precipitation events," and is neither "traceable to any discrete or identifiable facility" of the sort Congress had in mind when it adopted the NPDES scheme, nor the result of an "application or utilization of water by any person." 41 Fed. Reg. 6282; see also 41 Fed. Reg. 24710. These features, EPA concluded, mean that runoff "is more effectively controlled by the use of planning and management techniques" than by "numerical effluent limitations in individual permits." 41 Fed. Reg. 6282.

This conclusion is reflected in "the structure of the [CWA]." 41 Fed. Reg. 6282. "On the basis of th[e] conceptual differentiation" the Act makes between "the pollution control mechanisms available for point and nonpoint sources," EPA in the Silvicultural Rule rejected a reading of the point source definition that would include every conveyance. *Ibid.* It instead considered, among other things, whether effluent limitations were a sensible means to address a particular

type of runoff. EPA thought it "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." *Ibid.* See 40 Fed. Reg. 56932 ("most rainfall runoff is more properly regulated under section 208 of the [CWA], whether or not the rainfall happens to collect before flowing into navigable waters"); 41 Fed. Reg. 24711 ("Insofar as [surface] drainage serves only to channel diffuse runoff from precipitation events, it should be considered nonpoint in nature").

c. Another important feature of the CWA is Congress's intent to "preserve" and "protect the primary responsibilities and rights of States" to address water pollution and "plan the development and use" of "land and water resources." 33 U.S.C. § 1251(b). Designation of a type of discharge as a point source directly impacts this legislative goal: point source discharges fall under federal permitting programs, while nonpoint sources are addressed primarily by the States. It is accordingly appropriate that EPA be wary of attaching the point source label and thereby moving "primary responsibilit[y]" for controlling a source to the federal government.

The Ninth Circuit's designation of forest road runoff as a point source is particularly perverse in its federalism implications, for two reasons.

First, forest roads are often state- or county-owned, and their regulation "is a quintessential state and local power." *Rapanos* v. *United States*, 547 U.S. 715, 737-738 (2006) (plurality). As the certiorari-stage brief of 26 States attests, EPA correctly discerned that control of runoff from these roads properly belongs to the States. Cf. *id.* at 777 (Kennedy, J., concurring).

Second, the basis for the Ninth Circuit's designation of forest road runoff as a point source—and thus the basis for taking it away from the States—is the ditch-and-culvert system. But that system is mandated or recommended by States as a "best management practice" to address otherwise non-channeled runoff and prevent roads from washing out (which would cause more sediment). These state BMPs accord with EPA and Forest Service recommendations to "instal[l] drainage features as part of the construction process." Solari, *supra*, at 17, 23. It would be bizarre if—as the Ninth Circuit effectively held—States must regulate non-channeled runoff as nonpoint source, but when they do so according to standard-practice BMPs, the runoff is thereby transformed into a point source subject to federal permitting. As the State defendants explained below, this circular reasoning cannot be correct. "Congress did not intend to require NPDES permits for silvicultural runoff simply because" state BMPs "happen to involve ditches and culverts." Br. of State Defs., No. 07-35266, at 19 (9th Cir. filed Nov. 5, 2007).

At a minimum, the Act's goal to preserve States' authority, which is undermined by an expansive interpretation of the point source definition in which federal regulation is triggered by commonplace state BMPs, confirms the ambiguity that gives EPA leeway in drawing the point-nonpoint source distinction.

Against this textual and structural backdrop, the term "point source" is at least ambiguous in the silvicultural context—the language, "purpose and structure of the statute" do not "clearly reveal" that Congress's "intent" is "contrary" to the Silvicultural Rule. *Chem. Mfrs.*, 470 U.S. at 126. The CWA thus "neces-

sarily requires the formulation of policy and the making of rules to fill [the] gap" with respect to silvicultural discharges—a task Congress left to EPA. *Mayo Found.*, 131 S. Ct. at 713.

2. The Silvicultural Rule is a reasonable interpretation of the CWA to which deference is warranted.

To sustain EPA's interpretation of the CWA, this Court "need not find that it is the only permissible construction," but "only that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." *Chem. Mfrs.*, 470 U.S. at 125. The Silvicultural Rule easily meets this standard.

a. As we have explained, the CWA expressly defines "point source" discharges to exclude "agricultural stormwater discharges." 33 U.S.C. § 1362(14). Congress further recognized that "agricultural and silvicultural activities, including runoff from fields and crop and forest lands," are generally "nonpoint sources of pollutants." *Id.* § 1314(f)(1) & (2)(A). EPA's interpretation of this language as permitting the designation of channeled stormwater runoff from forest roads as nonpoint source is, at minimum, "rational." *Chem. Mfrs.*, 470 U.S. at 125. Indeed, it is the most sensible understanding of the statute.

EPA concluded that "most silvicultural activities" are not "amenable to effective regulatory control" by "numerical effluent limitations" because stormwater runoff—channeled or not—is "initiated or caused solely by natural processes, including precipitation," and is "not traceable to any discrete or identifiable facility" likely to introduce specific contaminants. 41 Fed. Reg. 6282. Such diffuse, natural, and irrepress-

ible sources of discharge are "better controlled through the utilization of best management practices," and not effluent limitations unsuitable to the task. 41 Fed. Reg. 24710; see also 55 Fed. Reg. 20521, 20522. That expert determination "is reasonable in light of the statute's text and the overall statutory scheme" and therefore is "entitled to deference under *Chevron*." *Nat'l Ass'n of Homebuilders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

b. *Chevron* provides a particularly "appropriate legal lens through which to view the legality of the Agency interpretation" where that "interpretation is one of long standing," the regulation implicates the "expertise of the Agency," there is particular "complexity [to the Agency's] administration" of the statute, and the regulation is the result of "careful consideration" over "a long period of time." *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002). That describes this case exactly.

The Silvicultural Rule reflects EPA's considered, long-held view. It has been in place since 1976, applied consistently ever since, and reaffirmed on numerous occasions. See, *e.g.*, 60 Fed. Reg. 50835 (Sept. 29, 1995) (reaffirming the Silvicultural Rule); 55 Fed. Reg. 20522 (same). And it was the result of notice-and-comment rulemaking during which EPA "carefully examined the relationship between the NPDES permit program" and "water pollution from silvicultural activities" and "carefully considered" "more than ninety written statements" responding to its proposal. 41 Fed. Reg. 6282; 41 Fed. Reg. 24709-24710. Based on this careful analysis, EPA "determined that most water pollution related to silvicultural activities is nonpoint in nature," whether or not

channeled in "ditches, pipes, and drains." 41 Fed. Reg. 6282.

The rule also falls squarely within EPA's expertise. EPA has been assigned the daunting task of administering highly complex environmental laws. In doing so, EPA has developed expert knowledge about pollution, the environment, and the interaction between the two, as well as unique experience with the benefits and disadvantages of specific kinds of legal rules to address particular kinds of environmental issues. *E.g.*, *Shanty Town Assocs. Ltd. P'ship* v. *EPA*, 843 F.2d 782, 790 (4th Cir. 1988) ("Congress charged EPA" with "developing special expertise in the control of water pollution, and with using that expertise to carry out the [CWA]'s goal of improving water quality"). The Silvicultural Rule implicates both forms of expertise, which are not shared by generalist federal judges.

The treatment of forest road runoff is precisely the kind of technical issue that demands deference to expert agency judgment. As this Court has said before, the CWA is a "very complex statute," and "the agency charged with administering" it is "entitled to considerable deference." *Chem. Mfrs.*, 470 U.S. at 125; see *Shanty Town*, 843 F.2d at 790 ("EPA is entitled to special deference when it applies the general provisions of the [CWA] to the complexities of particular water pollution control problems"). There is no reason to decline deference here.

c. This Court has observed that deference "to the longstanding interpretation placed on a statute by an agency charged with its administration" is even more appropriate "where Congress has re-enacted the statute without pertinent change." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). "[C]ongres-

sional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Id.* at 275.

In 1987 Congress substantially modified the CWA's treatment of stormwater. *Supra*, pp. 5-6. Yet in the course of this far-reaching revision Congress did not disapprove EPA's prior treatment of silvicultural stormwater. Indeed, it added a provision to Section 502(14) expressly excluding agricultural runoff from point source regulation—an addition that is consistent with and arguably authorizes the Silvicultural Rule. Congress's actions in 1987 are "persuasive evidence" that EPA's long-standing exclusion of channeled forest road runoff "is the [interpretation] intended by Congress" all along. *Bell Aerospace*, 416 U.S. at 275.

That is especially so because the 1987 Amendments left EPA with wide latitude to determine when and under what circumstances point source stormwater runoff must be permitted. As explained more fully below, the regulations EPA promulgated pursuant to the 1987 Amendments independently require reversal here because they exclude channeled forest road runoff from permitting, even if it were a point source. But they also suggest that lawmakers—in comprehensively revisiting the regulation of stormwater and leaving EPA with considerable discretion in that area—were well aware of the Silvicultural Rule and intended to approve it as a legitimate interpretation of the CWA.[3]

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[3] The Ninth Circuit's suggestion that "there is no indication that Congress was aware of the Silvicultural Rule when it adopted the 1987 amendments" is bewildering. Pet. App. 34a. It blinks reality to think that lawmakers, in enacting a law "to

3. EPA's interpretation of the Silvicultural Rule also is entitled to deference.

In addition to ruling that the Silvicultural Rule as understood by EPA is "invalid" under the CWA, the Ninth Circuit offered another basis for holding the rule inapplicable: that the words "natural runoff" in the rule mean runoff that is *not* "channeled and controlled." Pet. App. 32a. But EPA has consistently interpreted the rule to mean the opposite, and its interpretation is entitled to deference.

a. The Silvicultural Rule provides that "natural runoff" from "surface drainage, or road construction and maintenance" related to "silvicultural activities" is "non-point source." 40 C.F.R. § 122.27(b). As EPA explained to the district court, "[t]hroughout the history of its silvicultural point source rule," EPA has used "natural runoff," runoff "from precipitation events," and runoff "induced by natural processes" "as interchangeable terms" that apply without regard for whether the runoff is channeled. Pet. App. 113a-114a.

That reading is rational. The words "natural runoff" readily can be understood to encompass *all* pre-

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deal specifically with stormwater discharges" (*id.* 35a), were not aware of EPA's approach to silvicultural stormwater discharges. In fact, there *is* evidence that Congress considered the Silvicultural Rule. In an obvious reference to the Rule, Senator Durenberger observed that EPA, rather than requiring permits for stormwater runoff from forest roads, had identified "[b]est management practices" for "reducing runoff" from "silviculture areas including careful road placement, culverting, [and] grassing of abandoned roads." 132 Cong. Rec. 32380, 32381, 32397 (Oct. 16, 1986). The same observation is reflected in the Senate Report accompanying S. 1128, an early version of the 1987 Amendments. S. Rep. 99-50, at 35-36 (May 14, 1985).

cipitation runoff, regardless whether it is collected in ditches. The phrase stands in obvious contrast to the non-natural activities that EPA designated as silvicultural point sources: "rock crushing, gravel washing," holding wood in water bodies, or applying water intentionally to stored logs. 40 C.F.R. § 122.27(b).[4]

By contrast, the Ninth Circuit's reading is irrational. It renders meaningless the rule's reference to runoff from "road construction and maintenance." As a practical matter, forest roads cannot be built or maintained without stormwater drainage systems: without them, the roads would wash out. Indeed, state BMPs typically *require* them. Because stormwater drainage systems are an integral element of forest roads themselves, the rule's reference to "natural runoff" must be read to include *channeled* runoff, or else the words "road construction and main-

[4] EPA has long made this distinction. For example, in *Newton County Wildlife Association* v. *Rogers*, 141 F.3d 803 (8th Cir. 1998), the court of appeals rejected an environmental group's claim that the U.S. Forest Service was required to obtain Section 402 permits for "discharges of pollutants that will accompany logging and road construction" (*id.* at 810) because "culverts" and "road-side drainage ditches" were "point sources subject to NPDES." Reply Br. of Appellants, No. 97-1852 (8th Cir. filed Oct. 14, 1997); see Pet. 25-26. The United States told the Eighth Circuit that it is "crystal clear" from the "plain language" of the regulation and "the preamble to the final rule" that "'*only* discharges from the four activities related to silvicultural enterprises'" identified in the rule—an "exclusive list"—"'are considered point sources'"; that "EPA considers all other silvicultural activities to be nonpoint sources"; and that "EPA has consistently adhered to that interpretation." Br. of the Federal Appellees, No. 97-1852 (8th Cir. filed Sept. 8, 1997) (emphasis in original).

tenance" would be rendered totally ineffective, as the United States has explained. See Pet. App. 114a.

b. EPA's interpretation accordingly is entitled to deference under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). An agency's interpretation of its own regulation is "controlling" unless it is "plainly erroneous or inconsistent with the regulation." *Ibid.*; see *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). This Court has applied this settled doctrine in several recent, unanimous opinions. See *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 131 S. Ct. 2254 (2011); *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871 (2011); *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285 (2009); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158 (2007).

EPA's interpretation of the Silvicultural Rule is not "plainly erroneous or inconsistent with the regulation." Even assuming there were "other ways to interpret the regulatio[n]," EPA's reading is a permissible one, representing its "fair and considered judgment" on the meaning of "natural runoff." *Pliva, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2575 (2011).

Although *Auer* deference "does not apply in all cases" (*Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012)), it does apply here. "[B]road deference" is warranted because "the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). And there is no cause to question whether EPA's views reflect its "fair and considered judgment." *Long Island Care*, 551 U.S. at 171. EPA's views have been repeatedly

and consistently expressed over several decades. Cf. *Kennedy*, 129 S. Ct. at 872 n.7 (deferring to agency interpretation of its regulation even when "the Government's position" had "fluctuated").

That EPA most recently presented its views in a legal brief does not affect the deference due. In *Auer*, this Court deferred to agency views presented in a brief after observing that those views were "in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack," 519 U.S. at 462. It did so for the same reasons in *Chase Bank* and *Talk America* and should do the same here.

None of the other factors that might weigh against *Auer* deference is present here. EPA has not "promulgate[d] vague and open-ended regulations" that fail to give fair warning to regulated entities or invite "later interpret[ations] as [EPA] see[s] fit." *Christopher*, 132 S. Ct. at 2168; see also John F. Manning, *Constitutional Structure & Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 655-668 (1996). On the contrary, EPA has explained and applied the Silvicultural Rule consistently since adopting it. Thus what threatens to upset settled expectations in *this* case is not an agency's shifting interpretation of ambiguous regulations, but the Ninth Circuit's upending of EPA's long-standing approach.

In sum, the Court should defer to the Silvicultural Rule as a rational interpretation of the CWA, and to EPA's reading of the rule as a rational interpretation of the regulation. When such deference is afforded, the Silvicultural Rule marks the beginning and the end of this case. Because stormwater runoff from forest roads is not "related to rock crushing,

gravel washing, log sorting, or log storage facilities" but instead to the "non-point source silvicultural activities" of "surface drainage" and "road construction and maintenance from which there is natural runoff" (40 C.F.R. § 122.27(b)(1)), petitioners here need not obtain NPDES permits. And because EPA's stormwater regulations do not apply to nonpoint-source discharges, the Court need proceed no further in its analysis; the judgment below should be reversed on this basis alone.

B. The Ninth Circuit Erred In Holding That Channeled Silvicultural Runoff Is "Associated With Industrial Activities" Within The Meaning Of EPA's Stormwater Regulation.

The Ninth Circuit independently erred by misreading EPA's regulations implementing the 1987 Amendments to the CWA and failing to defer to EPA's interpretation of those regulations.

1. Discharges "associated with industrial activities" do not include runoff from forest roads.

a. In 1987, Congress established a two-phase approach to "discharges composed entirely of stormwater." CWA § 402(p)(1), 33 U.S.C. § 1342(p)(1). In Phase I, Congress required EPA to issue NPDES permits for five categories of stormwater point source discharges, including (as relevant here) those "associated with industrial activity"—a phrase that Congress did not define. *Id*. § 1342(p)(3)(A).

In Phase II, Congress tasked EPA with studying stormwater discharges not covered by Phase I and, "based on the results of the studies," with regulating such discharges "as appropriate," including by set-

ting "performance standards, guidelines, guidance, and management practices and treatment requirements." 33 U.S.C. § 1342(p)(5)-(6); see Pet. App. 37a. Discharges not designated in Phases I or II "shall not require a permit." *Id.* § 1342(p)(1); see *id.* § 1342-(p)(2), (5)-(6).

EPA undertook its Phase I mandate to regulate stormwater "associated with industrial activity" in 1990. 55 Fed. Reg. 47990 (Nov. 16, 1990); 40 C.F.R. § 122.26. Two elements of EPA's Phase I regulation are determinative here. First, the regulation provides that a "discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is *directly related to manufacturing, processing or raw materials storage areas at an industrial plant*." 40 C.F.R. § 122.26(b)(14) (emphasis added). Second, the regulation expressly provides that stormwater associated with industrial activity "does not include discharges from facilities or activities excluded from the NPDES program under [the Silvicultural Rule]." *Id.* § 122.26(b)(14). The Silvicultural Rule in turn defines "*harvesting operations*"—*i.e.*, logging—as "non-point source silvicultural activities" outside the NPDES program. *Id.* § 122.27(b) (emphasis added); see also 55 Fed. Reg. 48011 ("the definition of 'storm water discharge associated with industrial activity' does not include sources" which "are excluded under [the Silvicultural Rule]").

The meaning of this language is clear. Stormwater runoff from forest roads is *not* directly related to manufacturing, processing, or raw materials storage at an industrial plant. And logging is explicitly deemed not to be "industrial activity." Accordingly, EPA's stormwater regulation cannot plausibly be

read to define stormwater runoff from forest roads as associated with an "industrial activity" subject to Phase I permitting.

b. The Ninth Circuit nevertheless concluded that forest road runoff *is* a stormwater discharge "associated with industrial activity." Pet. App. 39a-42a. The court thought logging "industrial" because "[f]acilities classified as Standard Industrial Classifications 24" (which includes logging) are among facilities "considered to be engaging in 'industrial activity.'" 40 C.F.R. § 122.26(b)(14) & (b)(14)(ii); see SIC 24, 2JA 65-71. The court believed forest roads to be "associated" with this industrial activity because they are "immediate access roads," the "primary use" of which, the court speculated, is logging. *Id.* § 122.26(b)(14); Pet. App. 40a.

This convoluted reasoning—the product of a myopic focus on isolated snippets of regulatory language—is wrong in every respect. First, the regulation does not encompass *all* "industrial activity" (Pet. App. 39a), but only activities of "*facilities*" that are "considered to be engaging in 'industrial activity,'" including "*facilities*" classified as SIC 24. 40 C.F.R. § 122.26(b)(14), (b)(14)(ii) (emphasis added); see 2JA 98-103. Logging itself is not the activity of a *facility*, which is something "that is built, constructed, installed, or established to perform some particular function." WEBSTER'S THIRD NEW INT'L DICTIONARY 812-813 (1971). According to EPA, logging-related facilities covered by the regulation include only those "[e]stablishments" engaged in "operating sawmills, planing mills and other mills engaged in producing lumber and wood basic materials." 55 Fed. Reg. 48008. They do not include timber harvesting sites, which are not "built," "constructed," or "installed."

Second, the Ninth Circuit's reading cannot be squared with the regulation's clear provision that stormwater associated with industrial activity "does not include discharges from facilities or activities [covered by the Silvicultural Rule]" (40 C.F.R. § 122.26(b)(14))—including "harvesting operations" and "surface drainage, or road construction and maintenance from which there is natural runoff." *Id.*, § 122.27(b)(1). This carve out is particularly striking because it was included in paragraph (b)(14) in direct response to commentary that the Phase I regulations should not apply to "transitory [logging harvest] operation[s]." 55 Fed. Reg. 48011. EPA "agree[d]" with this commentary and, to "clarif[y]" that agreement, explained that "[t]he definition of discharge associated with industrial activity does not include activities" covered by the Silvicultural Rule. *Ibid*. Because "harvesting operations" are not an industrial activity, forest roads cannot be "immediate access roads" for an industrial activity. And the rule's explicit exclusion of drainage from roads confirms that Phase I permitting is inapplicable.[5]

Finally, forest roads are not associated with industrial activity because they are not "immediate access roads" within the meaning of the regulation. EPA explained that this provision covers only

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[5] It would make no difference to this analysis if the Silvicultural Rule were invalid with respect to forest roads. What counts for purposes of interpreting EPA's Phase I regulations is what EPA understood the Silvicultural Rule to mean in 1990, when it specified that stormwater associated with industrial activity "does not include discharges" covered by that Rule. And in 1990 EPA reiterated its "longstanding view" that runoff from forest roads, "although sometimes channeled," is "non-point source in nature." 55 Fed. Reg. 20521, 20522 (May 17, 1990).

"[a]ccess roads" that are "within" or "at facilities." 55 Fed. Reg. 48009. General forest roads are not "within" or "at" a logging facility. They are used for "a wide range of activities, including timber operations, recreation, fire protection, [and] transportation," "often serv[ing] multiple purposes by multiple users at the same time." 77 Fed. Reg. 30475. And many are "public access roads such as state, county, or federal roads * * * which happen to be used by the facility." 55 Fed. Reg. 48009. That logging may have been the impetus for the initial construction of some roads (Pet. App. 40a) is irrelevant.

The Ninth Circuit did not try to harmonize its reading of the regulation with any of the language discussed above. A plain reading of the words of the Phase I regulation, including its reference to the Silvicultural Rule, shows that discharges "associated with industrial activity" do not include channeled forest road runoff. EPA "sa[id] * * * what it mean[t] and mean[t] * * * what it sa[id]." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

2. EPA's interpretation of its own regulation is entitled to substantial deference.

a. The Court need not take our word for it. EPA itself has repeatedly affirmed that, in its view, channeled stormwater runoff from forest roads is *not* a discharge "associated with industrial activity" subject to the CWA's Phase I permit requirement.

In 1995, for example, when it promulgated the first "multi-sector general permit" for certain Phase I discharges of stormwater runoff, EPA detailed which "storm water discharges associated with industrial activity from timber products facilities" it believed to be covered by the regulation. 60 Fed. Reg. 50834,

50835 (Sept. 29, 1995). It concluded that "[d]ischarges from nonpoint source silvicultural activities, including harvesting operations" are "not required to be covered" by a Phase I permit and that "harvesting activities include * * * initial transport of forest products from an active harvest site." *Ibid*.

EPA has consistently expressed the same view in briefs. In a 2003 brief urging dismissal of a suit alleging that runoff from forest roads collected in "ditches, channels, pipes, [and] culverts" requires a permit, EPA told the court that "discharge associated with an industrial activity" "'does not include discharges from facilities or activities excluded from the NPDES program under this part 122'"; that Part 122.27 "excluded runoff from certain silvicultural activities from the NPDES program"; and that, "[c]onsequently, EPA did not incorporate silvicultural storm water discharges into the definition of 'storm water discharges associated with industrial activities.'" Pet. App. 86a-87a. Accordingly, "storm water discharges from forest roads are not currently subject to NPDES permit requirements." Pet. App. 91a.

In its brief before the Ninth Circuit here, EPA reaffirmed its interpretation of the "plain language of the rule" as expressing a "clear intent" to "exclud[e] runoff from forest roads from" Phase I permitting. 1JA 42. The Solicitor General's invitation brief reflects the same view, explaining that timber harvesting does not fall within the category of "traditional industrial activities" covered by the regulation, and that forest roads are not "immediate access roads" to industrial facilities in any event. U.S. Cert. Br. 13.

b. We believe the language of EPA's stormwater regulation is clear, but even if it were not, this Court

should defer under *Auer* to EPA's reasonable interpretation of its regulation. The Phase I regulation concerns a complex, highly technical regulatory program requiring "significant expertise" and "the exercise of judgment grounded in policy concerns." *Thomas Jefferson Univ.*, 512 U.S. at 512. The views set forth in EPA's and the Solicitor General's briefs follow from, and are consistent with, those that EPA had repeatedly expressed over the course of decades in rulemaking proceedings.

The Ninth Circuit failed to give EPA's interpretation of its regulation proper deference. Although recognizing early in its opinion that courts must "defer to an agency's interpretation of its own regulations" (Pet. App. 8a (quoting *Auer*)), the court made no effort to evaluate EPA's interpretation within the *Auer* framework. Instead, it proceeded straight to second-guessing EPA's expert judgment concerning its own regulation. That is not the law: Congress delegated rulemaking authority under Phase I of the CWA's stormwater permitting program to EPA, not the Ninth Circuit. The Court should defer to EPA's interpretation of Section 122.26(b)(14) and, on this independent basis, should reverse.

C. As EPA Determined, Forest Road Runoff Is Better Addressed With Best Management Practices Than NPDES Permits.

The reasonableness of EPA's interpretation of the CWA and its own regulations is apparent when viewed in light of the practical consequences of the Ninth Circuit's ruling. Requiring permits for channeled forest road runoff would impose staggering costs on regulators and regulated alike, and inject massive confusion into forest road management, without achieving gains in environmental protection.

An interpretation that "undermine[s]" the "regulatory scheme of [an] Act" and frustrates "administrative action imperative for the achievement of an agency's ultimate purposes" is strongly disfavored. *Weinberger* v. *Bentex Pharm., Inc.*, 412 U.S. 645, 653 (1973).

1. Requiring permits for every discharge of channeled forest road runoff into "the waters of the United States"—a concept of "notoriously unclear" scope, *Sackett* v. *EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring)—would be immensely costly and burdensome. Over 750 million acres of forests cover one-third of the continental United States. 77 Fed. Reg. 30475-30476. The U.S. Forest Service estimated that the Ninth Circuit's ruling would require it alone to obtain up to 400,000 permits for its 378,000 miles of forest roads—a process that it estimates would take more than 10 years. U.S. Forest Service, *Implications of Decision in* NEDC v. Brown *to Silvicultural Activities on National Forest System Land*, Doc. 1570-1, at 3 (Sept. 17, 2010). For their part, Oregon counties estimated that it would cost them $56 million to obtain permits for the 20,000 cross culverts along their 4800 miles of forest roads. Am. Br. Nat'l Ass'n of Counties 15-18. Extrapolating those figures across all forests leaves no doubt of the enormity of the burden that permitting would impose on regulators who must process and enforce permits and forest road owners and operators who must obtain, maintain, and comply with them.

An individual NPDES permit involves a labyrinthine application process with public hearings and comments, and imposes requirements of water sampling, effluent limitations, technological standards, monitoring, and treatment of pollutants. EPA, *NPDES Permit Writers' Manual*, www.epa.gov/npdes

/pubs/pwm_2010.pdf. This Court has observed that the "average applicant" for individual dredged-and-fill permits spends "788 days and $271,596 in completing the process." *Rapanos*, 547 U.S. at 721. There is no reason to believe that the costs of obtaining individual Section 402 permits are lower. And opportunities abound for litigation over the propriety of a permit and whether the permittee is in compliance. See 40 C.F.R. § 124.19 (administrative appeal of decision to issue NPDES permit); 33 U.S.C. § 1369(b)(1)(F) (judicial review of same); *id.* § 1365 (citizen suits to enforce permits).

EPA already faces a backlog of permits, which must be renewed every five years. 33 U.S.C. § 1342(b)(1)(B). Recently, only 80% of major and 84% of minor facilities held current permits, because of delays in processing. See http://tiny.cc/EPA2. Adding a new permit requirement for millions of ditches and culverts on forest roads would overwhelm the NPDES program at a time of tight constraints on agency spending. As EPA stated in 1975, and is no less true now, "it would be administratively difficult if not impossible, given Federal and State resource levels, to issue individual permits" for every ditch and culvert. 40 Fed. Reg. 56932.

Heavy penalties for failing to obtain or comply with NPDES permits exacerbate the burden of the Ninth Circuit's decision. Violations of the CWA carry fines of up to $100,000 *per day* and six years' imprisonment. 33 U.S.C. § 1319(c)(2). Even a negligent violation can bring heavy fines and two years in prison. *Id.* § 1319(c)(1). And the citizen suit mechanism ensures endless lawsuits seeking penalties of up to $37,500 per violation per day. *Id.* §§ 1319(d), 1365(a). Environmental groups have used citizen suits to ex-

tract significant penalties. For example, New York City was penalized $5.7 million for bringing drinking water to its residents through a creek without a Section 402 permit. *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003), aff'd in relevant part, 451 F.3d 77 (2d Cir. 2006).

2. The Ninth Circuit conjectured that "general permits" may be available. Pet. App. 43a. But general permits have their own problems. EPA's Multi-Sector General Permit (MSGP) for discharges associated with industrial activity (http://tiny.cc/EPA3) was not designed to address millions of discharges of channeled forest road runoff—for the obvious reason that EPA considers that such runoff is *not* associated with industrial activity. The MSGP requires, for example, that permittees map all "impervious surfaces," "ditches, pipes, and swales," and "inlets and outfalls." MSGP § 5.1.2. That would be a daunting task —far more so for a remote ribbon of forest road than a confined industrial site. And even if owners and operators of forest roads could comply, the costs of doing so would be astronomical and out of all proportion to any benefit given the effectiveness of BMPs.

The MSGP also requires frequent inspections of every discharge and annual inspection "when a stormwater discharge is occurring." MSGP § 4.1.1. Permittees must "collect a stormwater sample from each outfall" "within the first 30 minutes" of a discharge or "as soon as practicable" thereafter. *Id.* §§ 4.2.1, 4.2.3. These requirements, tailored for industrial sites, are unworkable for forest roads. Noncompliance violates the CWA. *Id.* §§ 1.2, 3.1.

Enormous costs and uncertainties would remain even if general permits were revamped to cover for-

est road runoff. General permits impose effluent limitations, technological standards, costly treatment, monitoring, and sampling. See EPA Office of Water, *General Permit Program Guidance* 4 (1988). Yet the basis of EPA's Silvicultural Rule is that such requirements are inappropriate for forest road runoff, channeled or not. The sheer number and variety of discharges over a linear road that may stretch many miles, over varied topography, with a multiplicity of ownership and use, and only intermittent logging use, make the most basic requirements of any NPDES general permit inapt.

General permits also are frequent targets of challenge: the propriety of virtually every new general permit is litigated. See, *e.g.*, *Waterkeeper Alliance, Inc.* v. *EPA*, 399 F.3d 486, 498-506 (2d Cir. 2005) (sustaining challenges to general permit for concentrated animal feeding operations); Jeffrey M. Gaba, *Generally Illegal: NPDES General Permits Under the Clean Water Act*, 31 HARV. ENVTL. L. REV. 409, 461 & n.254 (2007). Environmental groups appear skeptical of the legality of the general permit program in general, making challenge likely. See *id.* at 412 ("The EPA general permit program is now essentially incoherent, and existing federal and state issued general permits violate many fundamental requirements" of the CWA; "In a series of recent cases, fundamental aspects of the general permit program have been called into question").

Litigation over compliance with any general permit that survives challenge is also common. See, *e.g.*, *WaterKeepers N. Cal.* v. *AG Indus. Mfg., Inc.*, 375 F.3d 913 (9th Cir. 2004); *S.F. BayKeeper, Inc.* v. *Tosco Corp.*, 309 F.3d 1153 (9th Cir. 2002); *NRDC* v. *Sw. Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000); *Eco-*

logical Rights Found. v. *Pac. Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000). The damages sought in these citizen suits have been astronomical. See, *e.g.*, *Humane Soc. of United States* v. *HVFG, LLC*, 2010 WL 3322512, at *2 (S.D.N.Y. Aug. 19, 2010) (seeking "between $550,000 to over $600 million in civil penalties, depending on how they were calculated"); *WaterKeepers N. Cal.* v. *AG Indus. Mfg., Inc.*, 2005 WL 2001037, at *6 (E.D. Cal. Aug. 19, 2005) (seeking $5 million penalty against company worth $907,000).

3. The Ninth Circuit's decision overturns decades of practice in which state BMPs have governed forest roads—allowing the States to address "the numerous geographical, meteorological and topographical variations incidental to forest management." 41 Fed. Reg. 24710. Amici States explained in their brief urging review (at 1, 12, 15) that they have established "the most comprehensive program of BMPs of any land use activity in the nation"; have "expended thousands of hours and millions of dollars developing and implementing their respective BMP programs" created by "certified silviculturalists"; have "followed Congressional and EPA's directives"; and have "worked to ensure" that owners and operators of forest roads implement BMPs "to protect water quality and wildlife." Florida, for example, has published a 116-page manual of forestry BMPs. See http://tiny.cc/Flaman. Minnesota offers hundreds of pages of BMPs, including 49 pages devoted specifically to forest roads. See http://tinyurl.com/Minnman1.

The Ninth Circuit's ruling would "jettiso[n]" these established programs. Am. Br. of Arkansas 15. In their place would be "yet another unfunded mandate" and a "blizzard" of permit applications that would create a "tumult" "far outstripping" States' re-

sources. *Id.* at 15-16. Yet, as EPA concluded 36 years ago, stormwater runoff from forest roads is best addressed through BMPs, not permits. *E.g.*, 41 Fed. Reg. 24710 ("numerous forest practices acts, State environmental programs, and local ordinances are excellent sources of effective regulation," which EPA "does not intend to disrupt or supplant").

"Forestry BMPs have been highly successful in controlling non-point pollution from forest operations and roads for decades." Am. Br. of Arkansas 16. BMPs can reduce around 90% of water quality impacts. George Ice, *History of Innovative Best Management Practice Development and Its Role in Addressing Water Quality Limited Waterbodies*, 130 J. ENVTL. ENG'G 684, 688 (2004); 77 Fed. Reg. 30474 (with "appropriate" BMPs, "receiving waters can be protected and impacts can be minimized"). BMP implementation rates are "generally high and increasing." George Ice, *et al.*, *Trends for Forestry Best Management Practices Implementation*, J. FORESTRY, Sept. 2010, at 267, 267-271. And BMPs can quickly reflect scientific advances, with "[n]ew BMPs [being] considered as new issues arise." *Id.* at 268-269.

In response to the Ninth Circuit's decision, EPA reiterated that "one-size-fits-all approaches may not be appropriate for addressing the multiplicity of issues and situations within and across states." 77 Fed. Reg. 30477. It was not the Ninth Circuit's place to jettison State programs in disregard of EPA's longstanding view that BMPs more effectively address forest road runoff than would NPDES permits.

4. The "highly complex mosaic of overlapping responsibilities" for forest roads, EPA has explained, would make application of the NPDES program cumbersome and confusing. 77 Fed. Reg. 30475. For-

est roads support multiple "recreational, administrative, fire protection, and mineral and silvicultural activities" and "often serve multiple purposes by multiple users at the same time." *Ibid.* A single forest road "may pass through multiple owners and multiple properties," and "ownership of the road does not necessarily correspond to the ownership of the forest land." *Ibid.* A road may be used for timber "harvesting once every 20 years or so." *Ibid.* Ranching families and businesses use the same roads to access their grazing leases. See Am. Br. American Forest Res. Council 14. See also, *e.g.*, 43 C.F.R. § 2812.0-6 (BLM land's "intermingled character" presents "problems of management," particularly "with respect to timber roads"); Am. Br. Nat'l Ass'n of Counties 19 (NPDES permitting does not fit the "checkerboard of intermingled private and public" forestland).

The Ninth Circuit's decision, in short, would wreak havoc with all who rely on forest roads. And much of that unjustifiable burden would fall on the forestry industry, which employs more than 1 million people, indirectly supports 2.9 million jobs, creates $87 billion in wages, and sustains industries with annual sales of nearly $263 billion. See FOREST2MARKET, INC., THE ECONOMIC IMPACT OF PRIVATELY-OWNED FORESTS 7-9 (2009).

II. THE COURTS LACK SUBJECT MATTER JURISDICTION OVER THIS SUIT.

A. Courts Have No Authority To Invalidate The Silvicultural Rule Unless CWA Jurisdictional Requirements Are Satisfied.

The Court alternatively should vacate and remand because the courts lack jurisdiction over this long-belated challenge to the Silvicultural Rule. The

Administrative Procedure Act provides that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute." 5 U.S.C. § 703. The CWA requires challenges to specified EPA actions—including promulgating any "effluent" or "other limitation under section 1311," "issuing or denying any permit under section 1342," or promulgating regulations governing permit issuance—to be filed in a court of appeals "within 120 days" unless the grounds for the challenge arose later. CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1).[6] The CWA elsewhere provides that "district courts shall have jurisdiction" to "enforce" EPA's regulations. CWA § 505, 33 U.S.C. § 1365.

Thus, the CWA provides for (1) judicial review actions in courts of appeals under Section 509(b)(1), brought against EPA as defendant, in which parties may seek to *invalidate* EPA regulations, and (2) citizen suits in the district courts under Section 505, in which parties may seek to *enforce* EPA regulations. And regulations "with respect to which review could have been obtained under [Section 509(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2).

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[6] *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 136 (1977), rejected the contention that the courts of appeals' exclusive jurisdiction applies only to individual permit decisions, explaining that it would be "truly perverse" if "courts of appeals would review numerous individual actions issuing or denying permits pursuant to § 402 but would have no power of direct review of the basic regulations governing those individual actions."

These are jurisdictional requirements, not "claim-processing rule[s]." *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011). Congress barred district courts from invalidating EPA regulations, specifying that they may not be collaterally attacked in enforcement proceedings. And it barred rule challenges brought more than 120 days after a rule's promulgation. As the D.C. Circuit held with regard to the 60-day time limit in the Clean Air Act, 42 U.S.C. § 7607(b), it "is jurisdictional in nature." *Med. Waste Inst.* v. *EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011). Thus when "petitioners have failed to comply" with the deadline, courts "are powerless to address their claim." *Ibid.*

B. The Ninth Circuit Erred In Undertaking Judicial Review Of EPA's Rules.

NEDC's citizen "enforcement" suit, filed in district court in 2006, sought to invalidate EPA's Silvicultural Rule, last modified in 1980, and EPA's 1990 stormwater regulation that incorporated the Silvicultural Rule. The Silvicultural Rule deems collected runoff from forest roads to be nonpoint source and thus outside NPDES requirements; but respondent contended "that the discharges at issue [are] point source stormwater discharges" that require a permit. Pet. App. 57a; see Complaint ¶¶ 4, 67, 76, 2JA 3, 18, 20; NEDC Reply Br. 2-3, 15-21 (9th Cir. filed Dec. 17, 2007)); NEDC Opening Br. 52-53 (9th Cir. filed Sept. 17, 2007); NEDC Br. in Opp. 5-7. This suit therefore presents a challenge to the validity of EPA regulations. Under the plain terms of Section 509, it was filed too late, in the wrong court, and against the wrong defendants.

Respondent nevertheless obtained its desired invalidation, at least implicitly. In *Environmental De-*

fense v. *Duke Energy Corp.*, 549 U.S. 561, 581 (2007), this Court found that the Fourth Circuit's "construction" of Clean Air Act regulations amounted to "implicit invalidation," thereby "implicating" the CAA's 60-day time limit for seeking judicial review. To no less extent, the Ninth Circuit "interpreted" an important element of the Silvicultural Rule into invalidity.[7]

The Ninth Circuit held that the Silvicultural Rule, if given a meaning consistent with "the intent of EPA," would be "inconsistent with" the CWA's point source definition "and is, to that extent, invalid." Pet. App. 32a; see also *id.* at 6a (on EPA's "reading, the Rule is inconsistent with the CWA and hence invalid"). On that basis, the court "construe[d] the Rule to be consistent with the statute" so that EPA's designation of silviculture runoff as "nonpoint source" applies only to *non-channeled* runoff. *Id.* at 6a-7a, 32a. This was no more than an "invalidation" in disguise.

The Ninth Circuit then imported the *rewritten* Silvicultural Rule into EPA's Phase I stormwater regulation, 40 C.F.R. § 122.26(b)(14). There is no other way to harmonize the court's reading of the Phase I regulation as unambiguously requiring permits for channeled silvicultural runoff with that regulation's express exclusion of runoff covered by the Silvicultural Rule from the scope of discharges "associated with industrial activity." The Phase I regulation's reference to the Silvicultural Rule, the Ninth Circuit held, "does not, indeed cannot, exempt such

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[7] The Court did not rule on the significance of the CAA's judicial review provision in *Duke Energy* because—unlike here—it was not addressed below. 549 U.S. at 581.

discharges from EPA's Phase I regulations," even though "EPA's intent to exempt nonpoint sources as defined in the Silvicultural Rule from the permitting program mandated by § 402(p)" was "clear." Pet. App. 38a, 42a. The effect of that holding was to invalidate an element of EPA's stormwater regulation.

The United States' contention that the Ninth Circuit engaged only in "interpretation" of regulations "in a manner different" from an EPA construction that was "contrary to the CWA" is mere wordplay. U.S. Cert. Am. Br. 9. For 35 years, the meaning of the Silvicultural Rule has been clear: precipitation runoff from forest roads, whether or not collected in ditches, is nonpoint source and not subject to permitting. And since its adoption in 1990, EPA's Phase I rule has made clear that collected runoff is not a point source discharge "associated with industrial activity." EPA has reiterated these interpretations time and again, and has enforced each consistently from the outset.

The Ninth Circuit interpreted the rules to reach a contrary result only because it thought EPA's reading inconsistent with the CWA, and thus unenforceable. The appropriate way to look at its decision is that the Ninth Circuit *invalidated* important aspects of rules of long standing, substituting alternative rules of its own creation. A court cannot escape the strictures of Section 509(b) by first invalidating a regulation and then promulgating a different one in its place in the name of "interpretation."[8] The Ninth

[8] The Government analogizes the Ninth Circuit's approach to interpreting a statute narrowly to ensure its constitutionality. U.S. Cert. Am. Br. 9-10. But the CWA's specification of different

Circuit's reliance on cases in which "federal courts have invalidated EPA regulations" shows that it well understood this to be the effect of its ruling. Pet. App. 44a-45a.

C. The Statutory Exception For Grounds Arising After The Filing Deadline Is Inapplicable.

Recognizing that it was engaged in judicial review of EPA rules, the Ninth Circuit relied for its "subject matter jurisdiction" on the exception in Section 509(b)(1) for "grounds arising after the 120-day filing window." Pet. App. 7a. But that exception is inapplicable.

The purported post-promulgation ground giving rise to jurisdiction was the Government's adoption "for the first time in its initial amicus brief in this case" of a "reading of the Silvicultural Rule" that "does not require permits for silviculture stormwater runoff." Pet. App. 6a-7a. That is incorrect.

First, the exception for new "grounds" simply extends the 120-day window; it has no bearing on the statutory requirements that (1) judicial review actions be filed in a court of appeals against EPA, or (2) enforcement proceedings not be used for judicial review—both of which were violated here.

Second, a "provision for judicial review" for "suits based on newly arising grounds" applies only with respect to "an event that ripens a claim." *Chamber of Commerce of United States* v. *EPA*, 642 F.3d 192, 208 n.14 (D.C. Cir. 2011). See also *Coal. for Responsible Regulation, Inc.* v. *EPA,* 684 F.3d 102, 129-130 (D.C.

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forums and procedural mechanisms for invalidating and enforcing EPA regulations makes that analogy specious.

Cir. 2012). Such ripeness exceptions are common in regulatory statutes, allowing courts to dismiss unripe appeals and authorize appeal once outstanding factual contingencies have been resolved. *E.g.*, *Clean Air Implementation Project* v. *EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998); *Atl. States Legal Found., Inc.* v. *EPA*, 325 F.3d 281, 285-286 (D.C. Cir. 2003).

Here, any challenge to the Silvicultural Rule was manifestly ripe within 120 days after its 1976 promulgation or 1980 revision. Any challenge to EPA's Phase I stormwater regulation was ripe within 120 days of its promulgation in 1990. Claims are unripe if an interpretation's inconsistency with the statute is "only speculative." *Coalition*, 684 F.3d at 131. There has never been anything "speculative" about EPA's understanding of these rules, which has been clear for decades. EPA consistently has expressed (and acted on) the view that the regulations exclude collected forest road runoff from the permit requirement.

The Government's initial amicus brief below did not adopt that view for "the first time," but reiterated a long-held position. Reiteration does nothing to reopen a rule for judicial review. That was the D.C. Circuit's conclusion in *American Road & Transportation Builders Association* v. *EPA*, where it rejected petitioner's contention that EPA's description of existing regulations in a later rulemaking "effectively reopened" those regulations to judicial review. 588 F.3d 1109, 1114 (D.C. Cir. 2009). The court explained that "the agency gave no 'indication that [it] had undertaken a serious, substantive reconsideration' of the rules in question." *Id.* at 1115. Here, too, the United States did not reopen any issue about the scope of the rules at issue by its amicus filing below.

The basis for NEDC's challenge to the rules at issue was no different when it filed this suit in 2006 than it would have been in 1976, 1980, or 1990. NEDC was established in 1969 (http://tiny.cc/NEDC) and has no excuse for not filing a judicial review action in the court of appeals at the proper time. Respondent filed its claim in the wrong court, under the wrong statutory provision, and much too late.

D. The Ruling Below Undermines The Purposes Of The CWA's Jurisdictional Requirements.

Congress mandated that challenges to EPA actions identified in Section 509(b)(1) be filed in a court of appeals within 120 days to avoid piecemeal district court rulings and ensure early and authoritative resolution of any challenge. Preventing a multiplicity of judicial review proceedings ensures that "the substantive provisions of the standard would be uniformly applied and interpreted." *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 284 (1978). And the time limit provides EPA, regulated parties, and the public with certainty. Cf. *RSR Corp.* v. *EPA*, 102 F.3d 1266, 1269 (D.C. Cir. 1997) (CERCLA's time bar reflects "a deliberate congressional choice to impose statutory finality").

Allowing the validity of EPA regulations to be determined in citizen suits years or decades after a rule takes effect would inundate district courts with belated challenges to established regulations. The result would be inconsistent rulings and confusion among regulators and the regulated. Furthermore, because citizen suits often do not name EPA as a party, EPA's ability to defend its rules would be compromised and the impact of any decision on the agency would be uncertain. Here, EPA was not a de-

fendant and is not bound by the judgment even in the Ninth Circuit. See 1JA 52 n.1. Judicial review actions, by contrast, lie against the agency, and when multiple petitions for review are filed they are consolidated in a single case to provide an authoritative national ruling. 28 U.S.C. § 2112(a)(3).

Complying with EPA rules "can entail enormous up-front investments of money, effort, and advance planning. Both the agency and the private sector have interests in getting the legality of these rules settled one way or the other relatively quickly." Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2204-2205 (2011). To accomplish that goal, Congress chose an "orderly approach": allocating judicial review "to reconcile society's competing goals of restraining government abuses and expediting the implementation of pressing regulatory programs." *Id.* at 2238. This Court should reverse the Ninth Circuit's jurisdictional ruling to restore Congress's orderly allocation of judicial review and citizen suit proceedings.

CONCLUSION

The judgment of the court of appeals should be reversed. Alternatively, the judgment should be vacated and the case remanded with instructions to dismiss for want of subject matter jurisdiction.

Respectfully submitted.

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