Nos. 11-338 & 11-347

IN THE

Supreme Court of the United States

DOUG DECKER, *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

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

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONERS

KEVIN P. HOLEWINSKI
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001

BRIAN J. MURRAY
Counsel of Record
THOMAS V. SKINNER
CHARLES T. WEHLAND
JONES DAY
77 W. Wacker Dr.
Chicago, IL 60601
(312) 782-3939
bjmurray@jonesday.com

Counsel for Amici Curiae

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STATEMENT OF INTEREST[1]

Amici curiae are professors of law who specialize in the areas of administrative law and environmental law. They have a strong interest in the proper understanding and application of this Court's various doctrines according judicial deference to the decisions and determinations of expert agencies such as the Environmental Protection Agency. In the view of *amici curiae*, those doctrines should and do require reversal of the Ninth Circuit's decision below.

David S. Day is a Professor of Law at The University of South Dakota Law School. Prior to joining the faculty at South Dakota, he was in private practice at Latham & Watkins in Los Angeles. He has also been a visiting professor at McGeorge Law School and the University of Iowa College of Law. Professor Day teaches courses on constitutional law, economic rights, civil procedure, and civil rights litigation. His academic scholarship includes publications on these topics, and he is co-author of a constitutional law casebook, *Cases and Materials on Constitutional Law* (5th ed. 2009).

James L. Huffman is Dean, Emeritus of Lewis & Clark Law School and formerly the Erskine Wood Sr. Professor of Law at Lewis & Clark, where he served on the faculty from 1973 to 2011. He is a member of the Hoover Institution Task Force on Property Rights, Freedom and Prosperity; serves on the Federalist Society Property and Environment

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[1] Counsel for all parties consented to the filing of this brief. No counsel for a party in this case authored the brief in whole or in part, and nobody, other than *amici* or their counsel, has made a monetary contribution to its preparation or submission.

Practice Group; is a Trustee of the Rocky Mountain Mineral Law Foundation; and sits on the Oregon Citizens Initiative Review Commission. Dean Huffman has written extensively on environmental and natural resources law, including on issues relating to federal public lands and national forests.

Jason Scott Johnston is the Henry L. & Grace Doherty Charitable Foundation Professor of Law and Nicholas E. Chimicles Research Professor in Business Law and Regulation at the University of Virginia Law School. He was formerly on the faculty of the University of Pennsylvania Law School; has been a visiting professor or held fellowship appointments at Yale Law School, the University of Southern California Gould School of Law, the American Academy in Berlin, and the Property and Environment Research Center; and has served on the Board of Directors of the American Law and Economics Association, the National Science Foundation's Law and Social Science grant review panel, and the Board of the Searle Civil Justice Institute. His scholarship has examined a wide range of subjects in natural resources and environmental law. He is the editor of and a contributor to the book *Institutions and Incentives in Regulatory Science* (2012).

Donald J. Kochan is a Professor of Law at Chapman University School of Law. Prior to joining Chapman, he was a visiting Assistant Professor of Law at George Mason University School of Law and an Olin Fellow at the University of Virginia School of Law. He teaches courses in environmental and natural resources law, property, law and economics, federal courts, and administrative law. His academic

scholarship has included publications on environmental, natural resources, and administrative law issues, such as defining point and nonpoint source pollution, evaluating stormwater runoff regulation, and analyzing standards for the sufficiency of agency reasoning in administrative rulemaking.

Alfred R. (Fred) Light is Director of the Graduate Program in Environmental Sustainability and Professor of Law at the St. Thomas University School of Law in Miami Gardens, Florida. He is a LEED Green Associate and has been designated a Certified Sustainability Manager. He has taught courses in environmental and administrative law since 1989, including courses on comparative water law and ecology and ecosystem management for lawyers.

Roger E. Meiners is Chairman of the Department of Economics and Goolsby Distinguished Professor of Law and Economics at the University of Texas at Arlington and a Senior Fellow at the Property and Environment Research Center in Bozeman, Montana. He has also been a faculty member at Texas A&M University, Emory University Law School, the University of Miami, and Clemson University, and was a Regional Director for the Federal Trade Commission and a member of the South Carolina Insurance Commission. His research focuses on common law and market solutions to environmental issues and on the economics of higher education.

Andrew Morriss is the D. Paul Jones, Jr. & Charlene Angelich Jones Chairholder of Law at the University of Alabama School of Law. He is affiliated with the Property and Environment Research Center in Bozeman, Montana, the Regulatory Studies Center

at George Washington University, the Institute for Energy Research, and the Mercatus Center at George Mason University. In addition, he is a Research Fellow at the New York University Center for Labor and Employment Law and chair of the editorial board of the *Cayman Financial Review*. His scholarship focuses on regulatory issues involving environmental, energy, and offshore financial centers. Professor Morriss is the author or coauthor of more than sixty book chapters, scholarly articles, and books, primarily on regulatory and administrative law issues.

Ronald J. Rychlak is the Mississippi Defense Lawyers Association Professor of Law at the University of Mississippi School of Law, where he has been on the faculty since 1987. Prior to joining the faculty, Professor Rychlak practiced law with Jenner & Block in Chicago, and he served as a clerk to Hon. Harry W. Wellford of the U.S. Court of Appeals for the Sixth Circuit. He is a member of the Mississippi Advisory Committee to the U.S. Civil Rights Commission and the committee appointed by the Mississippi Supreme Court to revise that state's criminal code. He the author or coauthor of seven books, including *Environmental Law: Thompson Reuters Law for the Layperson Series* (2011).

SUMMARY OF ARGUMENT

I. Congress delegated administration of the Clean Water Act ("CWA") to the Environmental Protection Agency ("EPA")—not the Ninth Circuit. The EPA, for its part, made clear in regulations that timber companies need *not*, for two independent reasons, obtain discharge permits for natural runoff from forest roads. Over the course of nearly forty years, the agency has never departed from that view. But the court below, ignoring the EPA's expertise, held to the contrary. In light of the deference properly accorded to agency constructions of ambiguous statutes and regulations, that holding was error.

A. Soon after the CWA was enacted, the EPA reasonably determined that rainfall-induced runoff from forest roads does not require a CWA permit, as it is properly classified as a "nonpoint source" of pollution—whether it reaches navigable waters on its own, or is channeled there by ditches. After all, while the CWA's definition of "point source" is intentionally vague, it is clear that natural runoff, in the ordinary course, is a quintessential *nonpoint* source. And the characteristics that make it so—like the inability to trace its pollutants to a discrete, identifiable act or place—are equally present when the runoff reaches navigable waters through a drainage system. Yet the Ninth Circuit concluded that such indisputably "nonpoint source" runoff unambiguously transforms into a "point source" when channeled to navigable waters through a system of ditches and culverts, of the sort mandated by the State of Oregon to minimize the runoff's environmental impact.

B. After Congress exempted from the CWA's permit scheme all but five categories of stormwater

discharge, the EPA issued regulations explicating those categories. Under these rules, forest-road runoff is not "associated with industrial activity"—sensibly, given that forestry is hardly industrial; forest roads are used for many purposes; and the linkage between forest roads and logging is limited to the timber companies' use of the roads to drive to and from logging sites. Yet, again, the court below thought it knew better, ruling that the runoff *is* so associated.

II. Deference to agencies charged with administering statutory schemes has many benefits. Of course, at least in some cases, it also has costs, and so it behooves this Court to examine carefully the propriety of deference in each particular case. Here, though, such an examination reveals that there is *every reason* to defer to the EPA—and *no reason* to withhold that deference.

The values of fair notice and predictability may counsel against deference when an agency reverses its position without due warning or good cause. But the EPA's approach to forest-road runoff has been a model of consistency for nearly four decades, practically since the CWA was enacted. Similarly, the relative competences of agencies versus courts may suggest that judges take the lead on pure questions of statutory interpretation. But the legal standards here are not disputed; forest-road runoff presents a question of *application*, implicating the EPA's core domain of environmental policy. Finally, it may create perverse incentives for courts to blindly adopt an agency's *post hoc* construction of its own vague regulations. But here the EPA spoke precisely

and definitively to the proper application of the determinative statutory terms.

If the EPA is ever entitled to deference, it is here: in applying vague statutory definitions to a concrete scenario and thereby selecting a suitable method of regulation for a particular source of water pollution, clearly and consistently for over thirty-five years.

ARGUMENT

I. The Ninth Circuit Doubly Denied Deference to the EPA's Reasonable Classification of Forest-Road Runoff.

The Clean Water Act, 33 U.S.C. § 1251 *et seq.*, designed to address the highly complex and multifaceted problem of water pollution in the United States, necessarily relies on various categorizations and classifications to break that larger problem into more manageable segments. Those segments, in turn, are addressed in different ways with due sensitivity to the nature of the problem, including its relative priority, and the feasibility of potential solutions. The EPA, of course, plays a leading role in administering the regime created by the CWA, including the rules and procedures that give it life.

This case turns on two questions of categorization under the CWA. *First*, when rain washes sediment from forest roads and surrounding lands into ditches and ultimately into rivers or lakes, is the resulting pollution the result of a "point source" discharge? *Second*, is this runoff "associated with industrial activity"? If the answer to *either* question is "no," then the timber companies who maintain these roads need not obtain permits under the CWA's National Pollutant Discharge Elimination System ("NPDES").

Such discharges would instead be regulated by the States, under other parts of the CWA and state law.

The EPA has answered "no" to *both* questions. In its view, natural runoff from forest roads is *neither* a "point source" of water pollution *nor* "associated with industrial activity." Therefore, it is doubly exempt from the NPDES scheme. Accordingly, rather than the EPA, States like Oregon have long regulated the roads at issue—including by mandating construction of the very drainage systems that gave rise to this litigation.

In the decision below, the Ninth Circuit ruled that the EPA was wrong on both questions. That is, for each agency answer of "no" to the determinative questions in this case, the court substituted a judicial "yes," holding that the EPA's determinations were at odds with both the CWA itself and the EPA's own implementing regulations. As to both questions, the Ninth Circuit failed to accord the deference that is due to an expert agency's reasonable interpretation of an ambiguous statute, *see Chevron USA Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), or regulation, *see Auer v. Robbins*, 519 U.S. 452, 461 (1997). Congress self-evidently could not enumerate, in the CWA, every source of water pollution and impose a specific rule for each. Rather, Congress relied on the EPA to take the lead in classifying the innumerable contexts in which pollutants contaminate navigable waters, ensuring that each is assigned to the proper category of the complex scheme that Congress designed. That is precisely what the EPA did here. It was error for the Ninth Circuit to second-guess the EPA's reasonable classifications.

A. The EPA reasonably categorized natural runoff from forest roads as a "nonpoint source" of water pollution.

1. One of the basic distinctions created by the CWA is that between "point" and "nonpoint" sources of pollution. While the Act flatly prohibits the "discharge of any pollutant" absent an NPDES permit (or other statutory exception), 33 U.S.C. § 1311(a), it defines "discharge of a pollutant" as the "addition of any pollutant to navigable waters *from any point source*," *id.* § 1362(12)(a) (emphasis added). The net result is that "[t]he CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit." *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003). By contrast, nonpoint sources are regulated by other provisions of the CWA; in particular, States are charged with identifying especially problematic nonpoint sources of pollution and developing "best management practices and measures" to reduce pollution from such sources. 33 U.S.C. § 1329; *see also id.* § 1288(b)(2)(F).

The difference between a "point source" and a "nonpoint source" of water pollution is thus a crucial threshold analytical step. The Act defines the former as "any discernible, confined and discrete conveyance … from which pollutants are or may be discharged." *Id.* § 1362(14). Any other source is, by exclusion, nonpoint. As courts have explained, certain types of pollution can readily be attributed to a specific, identifiable source or activity—like a factory discharging wastewater into a river. These are point sources. By contrast, nonpoint-source pollution

"arises from many dispersed activities over large areas, and is not traceable to any single discrete source." *League of Wilderness Defenders / Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002). The "most common example" is "residue left on roadways by automobiles.... When it rains, the rubber particles and copper dust and gas and oil wash off the streets" and soon "win[d] up in creeks, rivers, bays, and the ocean." *Id.*

2. The difference between point and nonpoint sources explains their differing treatment under the Act. Because point sources can be isolated, they are amenable to regulation by permits. *See* 33 U.S.C. §§ 1311(a), 1323(a). With point sources, it is easy to identify the cause of the pollution and the entity responsible for it; to force that responsible entity to obtain a permit; and to measure the pollution and enforce adherence to any effluent limitations imposed as a condition of the permit. By contrast, nonpoint sources cannot be discretely identified, and pollution attributable to them cannot be readily traced to particular acts or entities. Nor would it be feasible to enforce effluent limitations on such sources, due to the difficulty of measuring the degree of the pollution. "Because it arises in such a diffuse way," nonpoint-source pollution "is very difficult to regulate through individual permits." *Forsgren*, 309 F.3d at 1184. Instead, Congress recognized that it is better regulated by "best management practices" that address underlying causes. 33 U.S.C. §§ 1288, 1329.

Indeed, the CWA's legislative history suggests that it was precisely the varying suitability of these regulatory approaches that led to the creation of the

point/nonpoint distinction in the first place. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979). Congress wanted to require permits for all sources of pollution susceptible to such a scheme, and developed the notion of "point source" to embrace that category. The residual sources of pollution—*i.e.*, those that could not easily be subjected to a permitting scheme—are the "nonpoint" sources. *See id.* at 373 ("It is clear from the legislative history Congress would have regulated so-called nonpoint sources if a workable method could have been derived; it instructed the EPA to study the problem and come up with a solution.").

3. There is no dispute that, if rain washes dirt or other sediment from roads (including forest roads), and those pollutants—without being channeled—ultimately wind up in rivers or streams, the resulting pollution derived from a "nonpoint source." Indeed, that is the quintessential example of nonpoint-source pollution: It is caused by a natural process (rain) over a dispersed area (roads) where pollutants are deposited gradually by multiple different actors (cars and the like) and then diffusely washed away. *See Earth Sciences*, 599 F.2d at 373 ("Congress was classifying nonpoint source pollution as disparate runoff caused primarily by rainfall around activities that employ or cause pollutants."); *Forsgren*, 309 F.3d at 1186 (describing nonpoint-source pollution as "runoff that picks up scattered pollutants and washes them into water bodies"). The original source of such runoff pollution could not be *less* "discernible," "confined," or "discrete"—and the actor responsible for the runoff, who could in theory be subjected to a permitting scheme, is not discernible either. Even the Ninth Circuit acknowledged that, in the ordinary

natural-runoff scenario, the pollution is from a nonpoint source. *See* Georgia-Pacific Pet.App.10a ("Stormwater that … runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source as defined by [the CWA].").

Because forest-road runoff is not generally a point-source form of pollution, States such as Oregon have long regulated forest roads, pursuant to their duties under the CWA, to require "best management practices" and thereby minimize the environmental impact of the sedimentary runoff from such roads. Among other things, Oregon mandates that timber companies "provide a drainage system on new and reconstructed roads that minimizes alteration of stream channels and the risk of sediment delivery to waters of the state." Or. Admin. R. 629-625-0330(1).

4. At issue in this case is whether construction of drainage systems required by States like Oregon, which channel stormwater runoff through a series of ditches before reaching navigable waters, transforms the (now-minimized) pollution from nonpoint-source to point-source. In other words, does nonpoint-source pollution from forest roads become point-source pollution if the runoff is channeled by a drainage system on its way to navigable waters?

Even though the CWA provides a general definition of "point source," that definition does not resolve this question one way or the other. The Act defines a point source as a "discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). But here, the pollutants are initially discharged from forest roads and surrounding lands—which plainly do not constitute a "discernable, confined and discrete conveyance"—and only later are channeled through

ditches and culverts. Thus, the answer to the point/nonpoint inquiry depends on a temporal focus: When the pollutants are washed from their *original* source (the roads and lands), they cannot plausibly be described as coming from any point source. But drainage ditches that *ultimately* release the runoff into navigable waters, at least if viewed in isolation, could arguably be so characterized. The issue is thus inherently murky—like many line-drawing exercises that the Act requires.

5. So, pursuant to its delegated authority, the EPA promulgated more than thirty-five years ago a rule to address this question. Confronting the specific issue of pollution from silvicultural activities, the EPA "determined that most water pollution related to [these] activities is nonpoint in nature." 41 Fed. Reg. 6281, 6282 (Feb. 12, 1976). The agency explained that this pollution "is basically runoff induced by precipitation events," and would be "more effectively controlled by the use of planning and management techniques" rather than a "permit program" and "effluent limitations." *Id.* The latter point strongly suggested that the runoff be classified as nonpoint, because Congress created the "point source" category to capture sources of pollution that could effectively be regulated through permits. Accordingly, the EPA concluded that "*ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff from precipitation* are not meant to be" treated as point sources. *Id.* (emphasis added).

When it promulgated the final rule, the EPA further clarified the characteristics of forest-road runoff that render it a nonpoint source of pollution,

while recognizing that "no definition of point or nonpoint source can be exact or absolute." 41 Fed. Reg. 24,709, 24,711 (June 18, 1976). *First*, such pollution is "induced by natural processes" and therefore tends to derive from a dispersed area rather than a discrete source. *Id.* at 24710. *Second*, the pollutants are "not traceable to any discrete or identifiable facility," even if ultimately gathered and channeled by a drainage system. *Id.* Indeed, 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, 30,475 (May 23, 2012). This makes it particularly difficult to attribute responsibility for the runoff or to require a permit from any particular entity. *Third*, and partly for these two reasons, this type of water pollution is "better controlled" by "best management practices." 41 Fed. Reg. at 24,710. By contrast, "point sources of water pollution are generally characterized by discrete and confined conveyances from which discharges of pollutants into navigable waters can be controlled by effluent limitations." *Id.*

Consistent with these principles from the text and history of the CWA, the EPA promulgated a regulation—the "Silvicultural Rule"—which provides that "road construction and maintenance from which there is natural runoff" constitutes a "non-point source" of pollution. 40 C.F.R. § 122.27(b).

6. In the decision below, the Ninth Circuit held that the Silvicultural Rule was incompatible with the CWA. The court believed it to be "clear" that natural runoff from forest roads, when channeled through ditches and culverts, meets the statutory definition of

"point source," such that the EPA acted outside its authority by declaring otherwise. Pet.App.30a.

This refusal to defer to the EPA's determination was error. The EPA's treatment of forest-road runoff was, under basic *Chevron* principles, entitled to deference so long as it was a reasonable construction of an ambiguous CWA provision. *See Chevron*, 467 U.S. at 845. As shown above, it was. While the statute does define "point source," that definition is not self-applying; as even the Ninth Circuit admitted, "the EPA has some power to define point source and nonpoint source pollution where there is room for reasonable interpretation of the statutory definition." Pet.App.30a (quoting *Forsgren*, 309 F.3d at 1190). There is ample such room in this context, given that these pollutants—even though they are *ultimately discharged* via a discrete drainage system—*originally derive* from a quintessentially nonpoint source: naturally induced runoff from forest roads over a dispersed area and resulting from the acts of untold different entities. In that factual context, where the true, original source of the pollution cannot be traced or effectively regulated, and a permit scheme would therefore be impractical, it is fair to categorize the runoff as not deriving from a "discernible, confined and discrete conveyance." By refusing to uphold the EPA's classification to that effect, the Ninth Circuit contravened *Chevron*.

B. The EPA also reasonably declined to characterize natural forest-road runoff as "associated with industrial activity."

1. In 1987, Congress amended the CWA, adding a new provision, 33 U.S.C. § 1342(p), to govern the particular problem of stormwater discharges. All

stormwater discharges qualifying as "point sources" under the Act had previously required permits, but § 1342(p) created a new, more lenient, two-track regime under which only *some* stormwater point sources need permits. In particular, § 1342(p)(2) set forth five subcategories of stormwater discharges that (under so-called "Phase I" rules) would remain under the NPDES program. All *other* stormwater discharges were exempted from the permit scheme. *See id.* § 1342(p)(1)-(2). The EPA was tasked with conducting a study and then issuing regulations (called the "Phase II" rules) to govern these other discharges. *See id.* § 1342(p)(5)-(6).

2. There is no dispute that the EPA has not issued Phase II rules that would require NPDES permits for forest-road runoff. *See Envt'l Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 860-62 (9th Cir. 2003) (adjudicating challenge to EPA's failure to include forest-road runoff in its Phase II regulations). Rather, at issue here is whether such runoff triggers the requirement of an NPDES permit because it falls within one of the Phase I categories—in particular, the class of stormwater discharges "associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B).

Under the EPA's Phase I rules implementing § 1342(p), natural runoff from forest roads is clearly *not* "associated with industrial activity." The EPA, in defining that category, expressly stated that it "does not include discharges from facilities or activities excluded from the NPDES program under this part 122." 40 C.F.R. § 122.26(b)(14). As explained, the Silvicultural Rule already categorically excluded forest-road runoff from NPDES. *See id.* § 122.27(b).

Thus, under the plain meaning of the regulations, forest-road runoff is not encompassed by Phase I.

Excluding forest-road runoff from the category of stormwater discharges "associated with industrial activity" is perfectly reasonable. As the EPA told the District Court below, forest roads are not directly associated with industrial activity, "within the traditional sense" of that term. Pet.App.124a. While forest roads allow access to logging sites, they also serve other purposes (such as recreation) and are geographically and functionally remote from logging. And logging is not a traditional "industrial" activity in any event; it is more closely akin to agricultural harvesting. The EPA's exclusion of forest-road runoff from Phase I (through the cross-reference to the Silvicultural Rule) is thus entirely consistent with § 1342(p)(2)(B).

3. The Ninth Circuit, however, ruled that forest-road runoff *is* "associated with industrial activity." *See* Pet.App.42a. The court did not say that the CWA amendments compelled that result; rather, the court reached its conclusion only by parsing the regulatory definition of the phrase that the EPA provided in 40 C.F.R. § 122.26(b)(14), including the regulation's use and explications of the words "immediate," "facility," and "industrial." *See* Pet.App.39a-42a.

This was error. Again, it cannot be disputed that, under *Chevron*, the EPA *could permissibly* deem forest-road runoff outside the statutory category of stormwater discharges "associated with industrial activity"; literally every word of that phrase is ambiguous, admits of degree, and requires concrete application. The only question, therefore, as evidenced by the Ninth Circuit's reliance on the

EPA's regulatory elaboration, is whether the *regulation* includes forest-road runoff. On that question, the agency is entitled under *Auer* to great deference—indeed, the agency's construction is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer*, 519 U.S. at 461 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). And the EPA made perfectly clear, in briefs submitted in this very litigation, that it "never contemplated that forestry roads would be included within the industrial activities subject to the Phase I regulations." Pet.App.123a.

Far from being "plainly erroneous or inconsistent with the regulation," *Auer*, 519 U.S. at 461, the EPA's interpretation of § 122.26(b)(14) is *compelled* by it. After all, the regulation expressly excludes from the definition of "associated with industrial activity" all of the stormwater discharges that the Silvicultural Rule deems to be nonpoint sources of pollution (and thus already exempt from the NPDES scheme), including natural runoff from forest roads.

The Ninth Circuit appears to have simply set that portion of § 122.26(b)(14) aside, saying only that the cross-reference to the Silvicultural Rule "does not, indeed cannot" exempt forest-road runoff from the class of Phase I stormwater discharges. Pet.App.42a. Why not is unclear. There is no reason why the EPA could not (for good cause) exempt the runoff from its otherwise applicable definition of "associated with industrial activity." Even if the Silvicultural Rule was, as the court held, *ultra vires*, the EPA's authority for purposes of defining "point sources," § 122.26(b)(14) cross-references the Rule for another purpose—*viz.*, setting the parameters of the class of

discharges "associated with industrial activity"—and the statute clearly does not forbid *that* classification.

In short, the CWA requires permits only (as relevant here) for the vague category of stormwater discharges "associated with industrial activity." The EPA reasonably determined that natural runoff from forest roads does not fall into that category, and said so—in its regulation, and to the court. By resting on a contrary understanding of the EPA regulations to nonetheless conclude otherwise, the Ninth Circuit violated the *Auer* deference principle.

II. There Is Every Reason to Accord Deference Here, and No Reason to Discard the EPA's Considered, Expert, and Long-Held Judgment.

Deference to expert agencies, whether as to the meaning of statutes or the proper application of regulations, offers many benefits, as this Court has repeatedly recognized. Agencies are more competent than courts to resolve questions that implicate technical or scientific policy concerns; agencies are more politically accountable for the impacts of their determinations; and agencies alone can offer advance guidance, applicable on a national level, about the meaning of a statute or regulation, fostering the values of clarity, predictability, and fairness.

At the same time, deference is not always warranted and should not always be available. This Court, its individual Justices, and academic commentators have on occasion remarked on the potential dangers of deference and outlined some of the situations in which it should not be accorded.

In this case, however, all of the grounds for deference are present and none of the grounds to

withhold deference is implicated. Deference to the EPA on the question of the proper treatment under the CWA of natural runoff from forest roads would advance the important values of fair notice and predictable enforcement of the law; it would allow an expert agency to decide a question that falls squarely within its core competence (and well outside the judicial bailiwick); and it would comport with the structure of agency incentives that administrative law should help to promote. Under *any* view of the appropriate conditions for deferring to an expert agency, such deference is warranted here.

A. Only deference to the EPA's longstanding approach toward forest-road runoff would respect fair notice and the rule of law.

In general, allowing agencies to construe ambiguous legal texts promotes consistency, uniformity, and predictability in the law. Unlike courts, agencies are able to consider the meaning of statutes and regulations *before* concrete disputes arise over their application. *Compare* 5 U.S.C. § 553 (authorizing agencies to promulgate rules), *with* U.S. Const. Art. III (granting judiciary power to resolve only "cases" and "controversies"). Thus, only agency interpretations can effectively give regulated entities advance notice about what conduct would violate the law. Moreover, apart from this Court, only agencies are able to give *national* guidance about the law.

Deference to agency interpretations thus "imparts (once the agency has spoken to clarify the [law]) certainty and predictability to the administrative process." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). Indeed, "without the assurance that reviewing courts will

accept reasonable and authoritative agency interpretation of ambiguous provisions," it would be "impossible to achieve predictable … administration of the vast body of complex laws committed to the charge of executive agencies." *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 296 (2009) (Scalia, J., concurring in part and in judgment). Ordinarily, then, these values counsel in favor of deference to administrative agencies.

That general principle, however, holds only to the extent that an agency adopts an interpretation in advance and then adheres to it. When, instead, an agency *reverses* its longstanding position on the meaning of a statute or regulation, the values of fair warning and adequate notice may require rejection of the new position. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (refusing to defer to Secretary's interpretation of statute where his "current interpretation … is contrary to the narrow view … advocated in past cases"). Similarly, an agency's acquiescence in a certain practice—even if not accompanied by an express position on its legality—may make it inappropriate to defer to a subsequent determination that the practice violates the law. For example, in *Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156 (2012), this Court found, as one "strong reaso[n] for withholding the deference that *Auer* generally requires," that a regulatory interpretation adopted by the Department of Labor would "impose potentially massive liability … for conduct that occurred well before that interpretation was announced." *Id.* at 2167. Despite "decades-long practice" by industry, the Department had "never initiated any enforcement actions … or otherwise suggested that it thought the industry was

acting unlawfully." *Id.* at 2168. Deference under those circumstances, this Court held, would create an "acute" risk of "unfair surprise." *Id.*

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Id.

Here, the "EPA's construction was made [nearly] contemporaneously with the passage of the Act, and has been consistently adhered to since." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 167 (D.C. Cir. 1982). The Silvicultural Rule, which expressly categorizes forest-road runoff as a nonpoint source of pollution, was proposed and promulgated in 1976, only a few years after the CWA was enacted. *See* 41 Fed. Reg. at 6282; *id.* at 24,709. Over the ensuing thirty-five years, the EPA has never deviated from its position that operators of forest roads need not obtain NPDES permits for such naturally induced runoff. To the contrary, the EPA has repeatedly reaffirmed its view on the question. *See, e.g.*, 55 Fed. Reg. 20,521, 20,522 (May 17, 1990) (reaffirming "longstanding view" that "runoff from … forest lands," "although sometimes channeled," is "non-point source in nature" because it is "caused solely by natural processes," is "not otherwise traceable to any single identifiable source," and is "best treated by non-point source controls"); *see also* 65 Fed. Reg.

43,586, 43,652 (July 13, 2000) (setting aside, after notice-and-comment, proposal to amend Silvicultural Rule).

Likewise, there is no dispute that the EPA, since the enactment of the new stormwater regulatory regime in 1987 and the EPA's subsequent effort to flesh out the "Phase I" categories of discharge that require permits, has adhered to the position that forest-road runoff does not require an NPDES permit. *See* 40 C.F.R. § 122.26(b)(14). It has advanced that same view in litigation, including this case. *See, e.g.*, Pet.App.91a (affirming in 2003 that "storm water discharges from forest roads are not currently subject to NPDES permit requirements"); Pet.App.127a (reaffirming to district court "interpretation of EPA's [Phase I] storm water regulations to exclude forestry road construction and maintenance activities").

Given that the EPA has, for nearly four decades, held firm to an interpretation of the CWA under which forest-road operators need not obtain permits for naturally induced runoff however it ultimately reaches navigable waters, the values of predictability and fair-notice would here be served by deference. This case thus presents the opposite scenario as *Christopher*. Here, it would be the *judicial* act of refusing to defer that would present the "acute" risk of "unfair surprise." *Christopher*, 132 S. Ct. at 2168. Adapting this Court's teaching in that case:

> It is one thing to expect regulated parties to conform their conduct to an [court's] interpretations once the [court] announces them; it is quite another to require regulated parties to divine the [court's] interpretations in advance or else be held liable when the

> [court] announces its interpretations for the first time in [a citizen lawsuit] and [denies] deference [to the agency's contrary view].

B. Determining the best approach toward water pollution is within the EPA's unique expertise, as Congress understood.

Another obvious benefit of deference to expert agencies is that it puts determinations bearing major policy implications into the hands of those best suited to understand those implications. The regulatory schemes overseen by agencies are usually complex and specialized. "[T]o administer a congressionally created … program necessarily requires the formulation of policy," because no statute will foresee and resolve its every potential application. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Construing and applying a statute thus often "involve[s] reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation … depend[s] upon more than ordinary knowledge respecting the matters"—often technical or scientific in nature—"subjected to agency regulations." *United States v. Shimer*, 367 U.S. 374, 382 (1961).

Courts, of course, lack that type of expertise. *See Chevron*, 467 U.S. at 865 ("Judges are not experts in the field …."). But agencies are created precisely to develop and house it; they possess "special expertise" at the "frontiers" of their fields. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). Thus, when it comes to applying a statute like the Clean Water Act or its regulations, it is agencies like the EPA—not the federal courts—that are best positioned to appreciate and weigh the policy consequences of differing constructions of the law.

See Chevron, 467 U.S. at 865-66 (holding that challenge to agency construction must fail if it "really centers on the wisdom of the agency's policy").

Indeed, the relative competence of agencies and courts explains why it is generally fair to construe—as *Chevron* famously does—statutory gaps as implicit congressional delegations to the agency charged with administering the law. *See id.* at 844 (observing that statutory ambiguity can reflect "implicit" "legislative delegation to an agency"). Congress is aware that it cannot make every decision on its own, in advance, and by leaving ambiguity in statutory text for agencies to resolve, it recognizes "that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so." *Id.* at 865.

To be sure, this Court and some of its Members have observed that not *every* question of statutory construction presents the type of policy-laden question that agencies are best suited to answer. In *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), for example, the Court was presented with a "pure question of statutory construction," rather than a dispute over application of a legal standard "to a particular set of facts." *Id.* at 446, 448. With respect to that type of question—which "is well within the province of the Judiciary," *id.* at 448, and which does not implicate the agency's unique competence to the same degree—the assumption of implicit legislative delegation to the agency is more dubious. In such instances, judicial deference to the agency's interpretation may be unwarranted. *See id.* at 446 (holding that this "pure question of statutory construction" was "for the courts to decide"); *accord*

Negusie v. Holder, 555 U.S. 511, 530 (2009) (Stevens, J., concurring in part and dissenting in part) ("Courts are expert at statutory construction, while agencies are expert at statutory implementation.").

In this case, in contrast, the disputed questions plainly involve "applying law to fact," not "pure questions of statutory construction." *Id.* at 531. Applying the nebulous point/nonpoint distinction to the particular case of naturally induced runoff from forest roads that is channeled through a series of ditches to navigable waters, and deciding whether that runoff falls within the category of stormwater discharges that is "associated with industrial activity," both require applying statutory legal tests to highly fact-specific contexts. Both trigger the inherent exercise of policymaking discretion, because classifying forest-road runoff as "point" or "nonpoint," or as "associated with industrial activity" or not so associated, determines to which regulatory regime it will be subjected. Importantly, what is ultimately disputed here is not *whether* to regulate forest-road runoff, but *how* to best regulate it—and that question can be effectively answered only by those with "more than ordinary knowledge respecting the matters." *Shimer*, 367 U.S. at 382. Application of the CWA, in other words, "require[s] scientific and technical expertise." *Nat'l Wildlife*, 693 F.2d at 167. Congress knew that—which is why it left the EPA substantial discretion to fill the law's ambiguities.

In particular, "Congress expressly meant EPA to have not only substantial discretion in administering the Act generally, but also at least some power to define the specific ter[m] 'point source.'" *Id.*; *accord Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d

1369, 1382 (D.C. Cir. 1977) ("We agree with the District Court 'that the power to define point and nonpoint sources is vested in EPA.'"). As one of the lead sponsors of the CWA explained, "[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. 38,816 (1971) (Sen. Muskie). Indeed, the dispute over what constitutes a "point source" for the CWA is strikingly reminiscent of the dispute over the definition of a "stationary source" for the Clean Air Act—which gave rise to *Chevron*, and was treated as the quintessential example of an ambiguity for the EPA to resolve. *See* 467 U.S. at 860-62.

Likewise, in enacting the stormwater-discharge amendments, Congress *expressly* delegated to the EPA much of the responsibility for addressing this issue. "Congress use[d] clear language in [33 U.S.C.] § 402(p)(5)-(6) to grant EPA discretion to determine that certain stormwater discharges require regulation while others do not." *Conservation Law Found. v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325, 330 (D. Vt. 2004), *aff'd*, 139 F. App'x 3381 (2d Cir. 2005); *see also Envt'l Def. Ctr.*, 344 F.3d at 869 (reviewing Phase II regulations with "great deference because we are reviewing the agency's technical analysis and judgments … within [its] technical expertise"). Of course, Congress enumerated, albeit in vague terms, the five categories of stormwater discharges that were to remain subject to NPDES permit requirements. But, through its recognition of the EPA's policy authority in this area, the express delegation as to Phase II nonetheless bolsters the presumption of an *implicit* delegation as to Phase I.

In sum, the nature of the questions at issue in this case directly implicates one of the basic rationales for agency deference—the comparative advantage of scientifically expert agencies over inexpert courts.

C. Deferring to the EPA would encourage it to write specific regulations, whereas judicial usurpation would encourage agencies to promulgate only vague generalities.

Notwithstanding the many benefits of deferring to agency interpretations, "it has been argued that the Supreme Court should abandon deference to agency interpretations of ambiguous regulations, because it arguably creates perverse incentives for an agency to draft vague regulations that give inadequate guidance." *Paralyzed Veterans of Am. v. DC Arena, L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997).

On this view, advanced most prominently by Professor John Manning in his article, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996), while *Chevron* deference appropriately divides the power to make law (exercised by Congress) from the power to interpret it (exercised by the agency), *Auer* deference combines these two functions, giving agencies the power to interpret regulations that they themselves promulgated. *Id.* at 654. The problem with such a system—and why the Framers of the Constitution adopted the separation of powers—is that combining lawmaking with law-exposition poses a threat of arbitrary government. It destroys any "incentive to enact rules that impose clear and definite limits upon governmental authority," instead encouraging "adop[tion of] vague and discretionary grants of power" that maximize

future power. *Id.* at 647. Deferring to an agency's interpretations of its own rules could thus "push an agency toward regulatory imprecision," *id.* at 655, a result that administrative law ought to prevent.

Although this Court has generally adhered to *Auer* despite this critique, several Justices have taken note of the doctrine's potential for abuse. In *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994), Justice Thomas (joined by Justices Stevens, O'Connor, and Ginsburg) observed in dissent that the agency had "merely replaced statutory ambiguity with regulatory ambiguity." *Id.* at 525. As such, he wrote, deference to the agency's interpretation of its "hopelessly vague regulation" would "disserv[e] the very purpose behind the delegation of lawmaking power to administrative agencies," *i.e.*, resolving ambiguity, and would fail to provide "clear and definite" guidance to regulated parties. *Id.* More recently, Justice Scalia echoed Professor Manning's warning that "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases," thus "frustrat[ing] the notice and predictability purposes of rulemaking." *Talk Am.*, 131 S. Ct. at 2266 (Scalia, J., concurring). And it is notable that in last Term's *Christopher* case, in which this Court declined to defer to the Department of Labor's interpretation of its own regulation, that regulation did not add any meaningful elaboration to the critical statutory phrase "outside salesman," and simply "adopt[ed] the broad statutory definition of 'sale'" as its own. 132 S. Ct. at 2167.

In light of these concerns, there may be reason to withhold *Auer* deference when the agency—instead of

using its regulatory authority to *clarify* the statute's meaning—has simply *parroted* it, promulgating unduly vague regulations that it hopes to later "interpret" as it sees fit. Under those circumstances, deference would only encourage arbitrariness.

This, however, is decidedly not such a case. As to both of the questions at issue, the EPA issued clear regulations that set forth its interpretations of the law. With respect to the definition of "point source," the EPA's Silvicultural Rule definitively determined that "road construction and maintenance from which there is natural runoff" constitutes a "non-point source." 40 C.F.R. § 122.27(b). The agency made abundantly clear, in its explanation for the rule, that this was the case even if "ditches, pipes and drains" would "channel, direct, and convey" the runoff. 41 Fed. Reg. at 6282. Even the Ninth Circuit conceded that the agency's intent on this point was clear. *See* Pet.App.32a. With respect to whether forest-road runoff qualifies as "associated with industrial activity," the agency was equally unambiguous, expressly defining that category to exclude anything that the Silvicultural Rule declared to be nonpoint in nature. *See* 40 C.F.R. § 122.26(b)(14).

By issuing "clear and definite" guidance on the meaning of the statutory terms, *Thomas Jefferson Univ.*, 512 U.S. at 525, the EPA bound itself to its stated approach, eliminating the risk of arbitrary government that may otherwise result from joinder of the lawmaking and law-exposition powers (and inviting Congress to step in if it disagreed with the EPA's approach, which it tellingly did not). Because the EPA made its intent clear up-front, manifesting that intent in plain regulations, this is not a case

where deference would "encourage the agency to enact vague rules." *Talk Am.*, 131 S. Ct. at 2266.

To the contrary, it is the Ninth Circuit's approach, if anything, that would encourage such perversity. After all, the Ninth Circuit concluded that forest-road runoff was "associated with industrial activity" only by extensively parsing the agency's own, precise definitions of some of those terms—while ignoring the part of the rule that clearly excluded the forest-road runoff from their scope. *See* Pet.App.39a-42a. The lesson to any agency seeking to protect its own authority would be: "No good deed goes unpunished." Had the EPA offered *no* advance, binding guidance about the meaning of "associated with industrial activity," the Ninth Circuit never would have been able to conclude that the forest-road runoff fit unambiguously within that category. In effect, the Ninth Circuit used the EPA's precision against it, and therefore against the objectives of fairness and certainty to regulated parties. Affirmance would therefore "push [agencies] toward regulatory imprecision," Manning, *supra*, at 655, a result at odds with the basic values of administrative law.

Courts should not be blind to the incentives created by agency deference in particular cases, and sometimes that may require withholding the great deference that *Auer* ordinarily accords. In this case, however, deferring to the EPA's longstanding and definitive approach toward forest-road runoff would recognize its responsible exercise of administrative authority, and encourage similar such behavior.

* * *

Deference to agencies is not an unqualified good, but on any view of deference, its rationales, and its

scope, it is warranted here. "The usual factors, then (regulatory agency, contemporaneous construction, expertise, congressional acquiescence, thoroughness) generally support giving great deference to EPA's interpretation." *Nat'l Wildlife*, 693 F.2d at 170.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the decision below and to defer to the EPA's reasonable classifications of the forest-road runoff at issue here.

Respectfully submitted,

KEVIN P. HOLEWINSKI
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001

BRIAN J. MURRAY
Counsel of Record
THOMAS V. SKINNER
CHARLES T. WEHLAND
JONES DAY
77 W. Wacker Dr.
Chicago, IL 60601
(312) 782-3939
bjmurray@jonesday.com

Counsel for Amici Curiae

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