No. 11-338

In The

**Supreme Court of the United States**

DOUG DECKER, et al.,

*Petitioners,*

*v.*

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, et al.,

*Respondents.*

# BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND NATIONAL ASSOCIATION OF MANUFACTURERS

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## INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") and the National Association of Manufacturers ("the NAM") have received the parties' written consent to file this *Amici Curiae* brief in support of Petitioners.[1]

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 130,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes built each year in the United States.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in another Clean Water Act ("CWA") case, *NAHB v. Defenders of Wildlife,* 551 U.S. 644 (2007).

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[1] Under Rule 37.6 of the Rules of this Court, a*mici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than a*mici*, their members, or their counsel contributed monetarily to the preparation and submission of this brief. The parties have given consent and the letters of consent to file this brief are filed with the Court.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The CWA provides authority for the Environmental Protection Agency ("EPA") to regulate *amici's* members due to both their dredge and fill activities, and their point source discharges. Many of these regulations have been in place for years, and *amici's* members have built their businesses by complying with these rules. Thus, the NAM and NAHB are concerned with any decision whereby environmental groups can change the rules that industry has come to rely on in contravention of the procedures Congress established in the CWA.

## SUMMARY OF ARGUMENT

The Court of Appeals for the Ninth Circuit reviewed EPA's Silvicultural Rule in a citizen suit brought by the Respondents. Such suits are "enforcement proceedings" and 33 U.S.C. § 1369(b)(2) therefore prohibits review of the rule in this case. Accordingly, the Ninth Circuit's decision must be reversed.

## STATEMENT OF THE CASE

The Respondents filed suit in District Court pursuant to 33 U.S.C. § 1365. They alleged that the Petitioners discharged pollutants from their forest roads in violation of 33 U.S.C. § 1311(a) because they failed to obtain National Pollutant Discharge Elimination System ("NPDES") permits under 33 U.S.C. § 1342. As a defense, the Petitioners explained to the District Court that 40 C.F.R. § 122.27 (the Silvicultural Rule) only requires NPDES permits for the discharges from their "rock crushing, gravel washing, log sorting or log storage facilities," but that the runoff from the roads was considered "non-point source" pollution. The Environmental Protection Agency submitted an amicus brief that supported Respondent's reading of 40 C.F.R. § 122.27. Therefore, according to the Respondents and the EPA, no permit was necessary for the runoff from the logging roads. The U.S. District Court for the District of Oregon agreed, explaining that even though the road runoff entered ditches, it was still nonpoint source runoff. *Northwest Envtl. Def. Ctr. v. Brown*, 476 F.Supp.2d 1188, 1197 (D. Or. 2007).

The Respondents appealed, and the Court of Appeals for the Ninth Circuit reversed. The court

recognized that suits brought under § 1365 "are limited" by the judicial review mechanisms established in § 1369(b) and examined that limitation. *Northwest Envtl. Def. Ctr. v. Brown,* 640 F.3d 1063, 1068 (9th Cir. 2011) ("NEDC"). Section 1369(b)(1) provides that only Courts of Appeals where interested persons reside have jurisdiction to hear challenges to certain actions of the Administrator. 33 U.S.C. § 1369(b)(1). Furthermore, § 1369(b)(1) provides that the interested person must apply to the Court of Appeals within 120 days of the Administrator's action. An exception to the 120-day statute of limitation exists if the ground for the petition arises solely after the 120-day limitation period has expired. *Id.*

The Ninth Circuit explained that Respondent's "challenge to the Silvicultural Rule arose more than 120 days after" its promulgation. *NEDC*, 640 F.3d at 1068. However, the court asserted that the EPA's interpretation of the Silvicultural Rule, found in its District Court amicus brief, was a ground that arose after the 120-day limitation period. Consequently, the Ninth Circuit held that § 1369(b) did not bar review of the Silvicultural Rule. Regrettably, this is where the court ended its analysis of § 1369(b).

## ARGUMENT

### I. THE COURT OF APPEALS FAILED TO ANALYZE 33 U.S.C. § 1369(b)(2)

Though the court below cited to 33 U.S.C. § 1369(b)(2), it failed to ascertain the extent to which that section impacted its analysis.

Section 1369(b)(2) provides:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any *civil or criminal proceeding for enforcement.*

33 U.S.C. § 1369(b)(2) (emphasis added). Thus, under § 1369(b)(2), if an interested person "could have" obtained review of an action listed in § 1369(b)(1), then she cannot obtain review of that action in an enforcement proceeding.

The Ninth Circuit held that under § 1369(b)(1) EPA's amicus brief was a ground which arose after the 120-day limitation period, and therefore it could review the Silvicultural Rule. *NEDC,* 640 F.3d at 1068-69. Therein lies the rub. Once the Ninth Circuit decided that it may review the Silvicultural Rule under § 1369(b)(1), it lost its jurisdiction if the matter was a "civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2).

The first sentence of Respondent's Complaint reads "This action is a citizen suit brought under Section 505 of the Clean Water Act." First Amended Complaint, *Northwest Envtl. Def. Ctr. v. Marvin*

*Brown*, et al., No. 06-01270 (D. Or. Sept. 22, 2006). Section 505 (33 U.S.C. § 1365) is the CWA "citizen suit" provision. Among other actions, it allows an interested person to commence a civil action in district court against any person alleged to be in violation of an effluent standard or limitation. 33 U.S.C. § 1365(a)(1).

Courts have explicitly provided that suits brought under § 1365 are "enforcement" actions. This Court described § 1365 as authorizing "private enforcement" of the CWA. *United States Dept. of Energy v. Ohio*, 503 U.S. 607, 613 n.5 (1992). Similarly, the Ninth Circuit explained that under § 1365 "actions can be brought by private persons and entities for the purpose of enforcing many of the provisions of the CWA." *Center for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 799 (9th Cir. 2009); *see also Environmental Conservation Org. v. City of Dallas*, 529 F.3d 519, 526 (5th Cir. 2008) (explaining that the "citizen-suit provision is a critical component of the CWA's enforcement scheme . . .").

Congress also has recognized that the various environmental "citizen suit" provisions are enforcement actions. In 1985, the Senate Committee on Environment and Public Works stated:

> Citizen suits are a proven enforcement tool. They operate as Congress intended—to both spur and supplement to [sic] government enforcement actions. They have deterred violators and achieved significant compliance gains. In the past two years, the number of citizen suits to enforce NPDES permits has

> surged so that such suits now constitute a substantial portion of all enforcement actions filed in Federal court under this Act.

S. REP. No. 99-50, at 28 (1985), *reprinted in* ENV'T AND NATURAL RES. POLICY DIV., 99TH CONG., 2 LEGIS. HISTORY OF WATER QUALITY ACT OF 1987, at 1449 (1988).

Therefore, it is clear that the action brought by Respondents was an enforcement proceeding.

Accordingly, once the Ninth Circuit found that, due to EPA's amicus brief, it could review the Silvicultural Rule under § 1369(b)(1), it had no authority (in this suit) to review the rule because of § 1369(b)(2).[2]

## II. 33 U.S.C. § 1369(b)(2) MAY NOT BE CONSTITUIONALLY APPLIED IN ALL CASES

*Amici* accepts that § 1369(b)(2) bars review of EPA's Silvicultural Rule in this matter. However, 1369(b)(2) may not be constitutionally applied in all cases. Thus, *amici* respectfully caution the Court to write a narrow opinion specific to the facts of this case.

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[2] This, however, does not mean that Respondents were without recourse. After the EPA filed its amicus brief explaining its interpretation of the Silvicultural Rule, Respondents could have filed a Petition for Review in the appropriate court of appeals seeking review of EPA's interpretation. That suit would not have been an "enforcement proceeding" and therefore § 1369(b)(2) would not have barred review.

The Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .." The Due Process Clause applies when one's life, liberty or property interests are at stake and "centrally concerns the fundamental fairness of governmental activity." *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 312 (1992).

In *California v. Trombetta,* 467 U.S. 479 (1984), the Court explained:

> Under the Due Process Clause of the Fourteenth[3] Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a *complete defense*.

*Trombetta,* 467 U.S. at 485 (*emphasis added*); *see also Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (providing "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process . . ."). In the civil context, the Court has interpreted the Due Process Clause to

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[3] Of course when the federal government is involved the Fifth Amendment Due Process Clause is implicated. However, the Court has never found that "due process of law" means something different in the two Amendments. *Malinski v. People of State of New York*, 324 U.S. 401, 415 (1945) (J. Frankfurter concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.").

require that the deprivation of life, liberty or property be preceded by a hearing given at a meaningful time and in a meaningful manner. *E.g. Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971). In addition, the "meaningful opportunity to be heard . . . must be protected against denial by particular laws that operate to jeopardize it for particular individuals." *Id.* at 379-380.

Assume the government brings a CWA enforcement action against a person allegedly in violation of an EPA rule. *See* 33 U.S.C. § 1319(b), (c) (authorizing the EPA to commence either civil or criminal actions.) Thus, unlike the Respondents in this case, the defendant would be at risk of losing property and, if criminally charged, liberty. Furthermore, assume that the EPA's rule falls under § 1369(b)(1) and was promulgated more than 120 days before the government initiates its enforcement action. Under those circumstances, § 1369(b)(2) would bar the defendant from challenging the EPA rule even if the EPA had no authority to develop the rule, or if it was utterly irrational or unconstitutional.

A statute that allows the government to deprive one of liberty and property, and simultaneously prohibits that person from introducing a complete or meaningful defense certainly raises questions under the Due Process Clause. *Amici* understand that the Court does not need to reach this issue in this case. However, *amici* respectfully request the Court to confine its interpretation of § 1369(b)(2) to the facts of the case at hand, so as not to impact the rights of those individuals who are charged with violating an EPA rule that falls under § 1369(b)(1).

## CONCLUSION

The Court of Appeals for the Ninth Circuit reviewed EPA's Silvicultural Rule in an enforcement proceeding. Congress prohibited such review in 33 U.S.C. § 1369(b)(2) and therefore, the Ninth Circuit's decision must be reversed.

Respectfully submitted,

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## APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

*Agins v. City of Tiburon,* 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego,* 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825 (1987); *Pennell v. City of San Jose,* 485 U.S. 1 (1988); *Yee v. City of Escondido,* 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council,* 505 U.S. 1003 (1992); *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.,* 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Franconia Assocs. v. United States,* 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005); *Kelo v. City of New*

*London,* 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.,* 547 U.S. 370 (2006); *Rapanos v. United States,* 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife,* 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States,* 551 U.S. 130 (2008); *Summers v. Earth Island Inst.,* 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Prot. Agency*, 129 S. Ct. 1498 (2009); and *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009); *Monsanto v. Geertson Seed Farms,* 130 S. Ct. 2743 (2010); *United States v. Tohono O'odham Nation,* 131 S. Ct 1723 (2011); *Am Elec. Power Co., Inc. v. Connecticut,* 131 S. Ct 2527 (2011); *Sackett v. Envtl. Prot. Agency,* 132 S. Ct. 1367 (2012); *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012); *Armour v. City of Indianapolis*, 132 S. Ct. 2073 (2012).