Nos. 11-338, 11-347

IN THE

Supreme Court of the United States

DOUG DECKER, *et al.*,
Petitioners,
v.
NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,
Respondents.

GEORGIA-PACIFIC WEST, INC., *et al.*,
Petitioners,
v.
NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,
Respondents.

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

AMICI CURIAE BRIEF OF NATIONAL GOVERNORS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND COUNCIL OF STATE GOVERNMENTS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* [1]

The *amici curiae* are as follows:

The National Governors Association ("NGA"), founded in 1908, is the collective voice of the nation's governors. NGA's members are the governors of the 50 states, three territories, and two commonwealths.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths, and territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating

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[1] The parties have consented to the filing of this *amicus curiae* brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amicus* made a monetary contribution to its preparation (Rule 37.6).

and developing the professional management of local governments throughout the world.

The Council of State Governments ("CSG") is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The *amici* represent various state and local governmental organizations that have an interest in the proper implementation of the Clean Water Act ("CWA"). The CWA provides for federal regulation of point source discharges and for state and local regulation of nonpoint source discharges. The U.S. Environmental Protection Agency's ("EPA") Silvicultural Rule interprets the CWA as providing that stormwater runoff from forest lands, with exceptions not relevant here, is a nonpoint source discharge subject to state and local regulation. The Ninth Circuit, however, disregarded the EPA's Silvicultural Rule, and instead interpreted the CWA as providing that such stormwater runoff is a point source discharge subject to federal regulation, if the runoff has been channeled rather than flows naturally. In the *amici*'s view, the Ninth Circuit should have deferred to the EPA's Silvicultural Rule, under this Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), rather than interpreting the statute *de novo* as providing that channeled stormwater runoff from forest lands is a point source discharge. State and local governments frequently own logging roads and regulate nonpoint

source discharges. Therefore, the *amici* have a significant interest in this case.

STATUTORY AND REGULATORY BACKGROUND

The Clean Water Act ("CWA") prohibits an unauthorized "discharge of a pollutant," 33 U.S.C. § 1311(a), which is defined as an "addition" of a "pollutant" to "navigable waters" from a "point source," *id*. at § 1362(12). The CWA establishes the National Pollutant Discharge Elimination System ("NPDES"), which authorizes the U.S. Environmental Protection Agency ("EPA") to issue a permit for the discharge of a pollutant from a "point source." *Id.* at § 1342(a). The NPDES thus regulates discharges from point sources. Under the CWA, discharges from nonpoint sources are regulated by the states under their own laws. *Id.* at §§ 1288, 1314(f), 1329; *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-27 (9th Cir. 2002); *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998).

In 1976, the EPA adopted a regulation—the Silvicultural Rule—defining a point source and nonpoint source in the context of silvicultural stormwater runoff. The Rule defines a "[s]ilvicultural point source" as including four specific silviculturally-related facilities—rock crushing, gravel washing, log sorting, and log storage facilities—when such facilities discharge pollutants into waters of the United States. 40 C.F.R. § 122.27(b). The term does not, however, include "non-point source silvicultural activities" from which "there is natural runoff." *Id.* In adopting the Rule, the EPA explained that although a point source is defined in the CWA as a "discernible, confined and discrete conveyance, including but not

limited to any pipe, ditch [or] channel," a "proper interpretation" of the CWA is that "ditches, pipes and drains that serve only to *channel*, direct, and convey nonpoint runoff are not meant to be subject to the § 402 permit program." 41 Fed. Reg. 6,281, 6,282 (1976) (emphasis added). Thus, the Silvicultural Rule provides that silvicultural stormwater runoff is a nonpoint source discharge—except in specific enumerated situations not applicable here—regardless of whether the runoff is channeled or flows naturally.

In 1987, Congress enacted the Water Quality Act of 1987, which extends the NPDES to stormwater discharges. 33 U.S.C. § 1342(p). The 1987 Act requires the EPA to adopt regulations for five categories of stormwater discharges, including stormwater discharges "associated with industrial activity." *Id*. at § 1342(p)(2). The EPA subsequently adopted regulations for stormwater discharges, which provide *inter alia* that the term "industrial activity" "does not include discharges from facilities or activities excluded from the NPDES program under Part 122." 40 C.F.R. § 122.26(b)(14). The reference to Part 122 includes 40 C.F.R. § 122.27(b), which, as noted above, provides that silvicultural stormwater runoff is generally considered a nonpoint source rather than a point source discharge. Thus, the EPA's stormwater regulations do not change the EPA's Silvicultural Rule, which provides that silvicultural stormwater runoff is a nonpoint source discharge regardless of whether it is channeled or flows naturally.

SUMMARY OF ARGUMENT

This *amicus* brief sets forth the following arguments:

1. The Ninth Circuit held that silvicultural stormwater runoff is a *point source* discharge under the Clean Water Act ("CWA")—and thus subject to regulation under the National Pollutant Discharge Elimination System ("NPDES")—if the runoff is channeled rather than flows naturally. On the contrary, the CWA provides that silvicultural stormwater runoff, even when channeled, is a *nonpoint source* discharge subject to regulation under state and local laws. Since Congress authorized state and local governments to regulate nonpoint sources of pollution, there is no basis for the Ninth Circuit's concern that silvicultural stormwater runoff will be unregulated and the CWA's goals impaired unless such runoff is held to be a point source discharge subject to regulation under the NPDES. Moreover, the CWA defines a "point source" as *not* including "agricultural stormwater discharges" and makes no exception for stormwater discharges that are channeled and those that are not, 33 U.S.C. § 1362(14). Since silvicultural stormwater runoff is analogous to, if not a form of, agricultural stormwater discharges, silvicultural stormwater runoff is also a nonpoint source discharge, regardless of whether it has been channeled. If the conclusion were otherwise, Congress would have created an anomaly by providing that channeled stormwater runoff is a point source discharge if it is from forest lands but not if it is from agricultural lands. Congress presumptively does not create anomalies unless it clearly so provides.

2. Assuming *arguendo* that the CWA is ambiguous concerning whether channeled silvicultural storm-

water runoff is a point source discharge or nonpoint source discharge, the EPA's Silvicultural Rule should be upheld under the *Chevron* doctrine, under which an agency interpretation of a statute is entitled to deference if the statute is ambiguous and the agency interpretation is permissible. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The *Chevron* doctrine applies because the Silvicultural Rule limits, rather than expands, federal authority to regulate subjects, such as water use and land use, that are traditionally regulated by state and local governments under principles of federalism. The Ninth Circuit failed to grant *Chevron* deference to the EPA's Silvicultural Rule, and interpreted the CWA *de novo*.

3. The Ninth Circuit decision adversely affects the interests of state and local governments. Under the decision, the states that administer their own NPDES programs—currently, 46 states administer such programs—would be required to regulate channeled stormwater discharges as part of their NPDES programs. Since there are a significant number of forest roads in the nation, state and local governments would bear a heavy regulatory and financial burden if NPDES permit requirements apply to individual stormwater discharges from these roads. Further, state and local governments that own or otherwise regulate forest lands may be potentially responsible as "operators" of point source facilities to obtain NPDES permits for stormwater discharges from such forest lands, which would increase the financial burdens on state and local governments. State and local governments are currently, and adequately, regulating stormwater discharges from forest lands under their nonpoint source programs. To require state and local governments to addi-

tionally regulate such discharges under their NPDES programs would greatly increase the regulatory burdens and costs to state and local governments without providing commensurate additional protection of water quality on forest lands.

ARGUMENT

I. UNDER THE CLEAN WATER ACT, SILVICULTURAL STORMWATER RUNOFF IS A NONPOINT SOURCE DISCHARGE REGARDLESS OF WHETHER IT IS CHANNELED OR FLOWS NATURALLY.

The Ninth Circuit held that silvicultural stormwater runoff is a *point source* discharge within the meaning of the CWA if it is "channeled and controlled" through a "discernible, confined, and discrete conveyance," such as a ditch, culvert, or channel, and is a *nonpoint source* discharge if it is not "channeled and controlled" but instead "is allowed to run off naturally." *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063, 1070-71, 1079-80 (9th Cir. 2011) (hereinafter "*Brown*"). The court stated that a "conveyance" that channels stormwater runoff meets the definition of a "point source" under the CWA. The CWA defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel" or other type of like conveyance. 33 U.S.C. § 1362(14); *Brown*, 640 F.3d at 1079. The court concluded that the EPA's Silvicultural Rule is invalid to the extent that it "exempts" channeled silvicultural stormwater runoff from NPDES permit requirements. *Id.* at 1078-80.[2]

[2] More precisely, the Ninth Circuit held that the "intent" of the Silvicultural Rule is to "exempt" silvicultural stormwater

The Ninth Circuit also held that the Water Quality Act of 1987, which extended the NPDES to stormwater discharges, specifically provides that the NPDES applies to "discharges associated with industrial activity," 33 U.S.C. § 1342(p)(3)(A), and that—since logging activity is a form of "industrial activity"—the 1987 Act also provides that channeled silvicultural stormwater runoff is a point source discharge within the meaning of the CWA. *Brown*, 640 F.3d at 1083-85.

In fact, the CWA contains several provisions and indicia, which the Ninth Circuit did not mention or apparently consider, supporting the conclusion that silvicultural stormwater runoff is *not* a point source discharge within the meaning of the CWA regardless of whether it is channeled or flows naturally.

First, the CWA has the dual goals of promoting improved water quality and preserving the states' traditional authority to regulate water quality and land and water development. The Ninth Circuit decision altogether ignores and fails to consider the

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runoff regardless of whether it has been "channeled," but that such a reading of the Rule is "inconsistent" with the CWA and thus "invalid." *Brown*, 640 F.3d at 1080. Contrary to the Ninth Circuit's view, the Silvicultural Rule does not "exempt" silvicultural stormwater runoff from NPDES permit requirements, but instead it *defines* the term "point source" as used in the silvicultural stormwater context. The Rule states, under "Definitions," that a "silvicultural point source *means*" certain types of silvicultural activities, such as rock crushing and gravel washing but that "[t]he term *does not include*" other types of activities "from which there is natural runoff." 40 C.F.R. § 122.27(b) (emphases added). Obviously an agency cannot grant an exemption from a congressional regulatory enactment unless Congress authorizes the agency to do so, but an agency can, and often does, define the terms of congressional enactments.

importance of the latter goal. Specifically, the CWA's declared goal and policy is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and also to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," and "to plan the development . . . of land and water resources," *id.* at § 1251(b). To the latter end, the CWA authorizes the states to administer their own NPDES programs subject to the EPA's approval, *id.* at § 1342(b). And, more importantly here, the CWA authorizes the states to regulate nonpoint sources of pollution, which are not regulated by the NPDES. *Id.* at §§ 1288, 1314(f); *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-27 (9th Cir. 2002).[3]

The CWA thus effectuates a partnership between the federal government and state and local governments in controlling water pollution, and recognizes the significant role that state and local governments play in pursuing that goal and in regulating land and water use. Since Congress authorized state and local governments to regulate nonpoint sources of pollution, there is no basis for the Ninth Circuit's concern

[3] The CWA also authorizes the states to adopt ambient water quality standards for bodies of water, separate from NPDES-established effluent limitations applicable to individual discharges into the waters. 33 U.S.C. § 1313. The CWA limits its intrusion into the states' traditional authority to regulate water use and land use by providing that the CWA does not impair or affect "any right or jurisdiction of the States with respect to the waters . . . of such States," *id.* at § 1370, and does not supersede, abrogate, or impair "the authority of each State to allocate quantities of water within its jurisdiction," or "supersede or abrogate rights to quantities of water which have been established by any State," *id*. at § 1251(g).

that silvicultural stormwater runoff will be unregulated and the CWA's goals impaired unless such runoff is held to be a point source discharge subject to regulation under the NPDES. On the contrary, the "primary responsibilities and rights" of state and local governments to control water pollution, 33 U.S.C. § 1251(b), and their authority to regulate nonpoint source discharges including silvicultural stormwater runoff, is fully consistent with Congress' goals. The Ninth Circuit's decision pays no heed to the congressional goal of preserving the states' traditional authority to control water pollution and regulate land and water use, which is a cornerstone of the CWA.

Second, the CWA expressly defines a "point source" as *not* including "agricultural stormwater discharges and return flows from agriculture." 33 U.S.C. § 1362(14). The CWA, in defining a point source as not including "agricultural stormwater discharges," does not distinguish between agricultural stormwater discharges that are "channeled and controlled" and those that are not. Therefore, *agricultural* stormwater discharges are nonpoint source discharges regardless of whether they are channeled or flow naturally. Since *silvicultural* stormwater discharges are analogous to—if indeed not a form of—agricultural stormwater discharges, silvicultural stormwater discharges are also nonpoint source discharges, regardless of whether they are channeled or flow naturally. There is no difference between channeled runoff from agricultural lands and from forest lands regarding the congressional goals and objectives of the CWA, and thus both forms of channeled runoff are nonpoint source discharges under the CWA. If the conclusion were otherwise, Congress would have created an anomaly by providing that channeled

stormwater discharges are point source discharges subject to NPDES regulation if they are from forest lands but not if they are from farm lands. Nothing in the CWA or its legislative history suggests that Congress intended to create such an anomaly. This Court has held that statutes should not be construed as creating anomalies unless Congress clearly so intended. *Small v. United States*, 544 U.S. 385, 390-91 (2005); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 145-46 (1967).

Third, the conclusion that silvicultural stormwater runoff, whether channeled or not, is a nonpoint source discharge is also supported by section 304(f) of the CWA. This provision requires the EPA to adopt "guidelines" for identifying "nonpoint sources of pollutants" and "processes, procedures, and methods to control pollution" resulting from, *inter alia*, "agricultural and silvicultural activities, including runoff from fields and crop and *forest lands*." 33 U.S.C. § 1314(f)(2)(A) (emphasis added). By identifying "nonpoint sources of pollutants" as including both "agricultural and silvicultural activities," including "runoff" from both agricultural lands and "forest lands," Congress made clear that agricultural runoff and silvicultural runoff are treated the same way, and that both are considered nonpoint sources of pollution.

Fourth, the EPA provided a reasonable explanation in its Silvicultural Rule for why silvicultural stormwater runoff cannot properly be considered a point source discharge simply because it has been channeled by ditches, pipes, or other conveyances. The EPA explained:

> [T]he Agency has carefully examined the relationship between the NPDES permit program

> (which is designed to control and eliminate discharges of pollutants from discrete point sources) and water pollution from silvicultural activities (which tends to result from precipitation events). It has been determined that most water pollution related to silvicultural activities is nonpoint in nature. This pollution is basically runoff induced by precipitation events and is not and should not be subject to the National Pollutant Discharge Elimination System (NPDES) permit program as it has been administered to date.
>
> Technically, a point source is defined as a "discernible, confined and discrete conveyance, including but not limited to any pipe, ditch [or] channel . . ." and includes all such conveyances. However, a proper interpretation of the FWPCA . . . is that not every "ditch water bar or culvert" is "meant to be a point source under the Act [FWCPA]." It is evident, therefore, that ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff are not meant to be subject to the § 402 permit program.

41 Fed. Reg. 6,281, 6,282 (1976). Thus, the EPA explained that silvicultural stormwater runoff is primarily caused by rainfall rather than by industrial or municipal activity, unlike most other types of NPDES-regulated point source discharges, and therefore that the same NPDES controls that apply to industrial and municipal activity cannot properly be applied to silvicultural stormwater runoff. An industrial or municipal discharger generally has much greater control over the discharge of pollutants generated by the discharger's activity than counties that own logging roads or a logging company has over

the discharge of silvicultural runoff generated by rainfall.

Fifth, the EPA's Silvicultural Rule has been in place since its adoption in 1976, Congress has never overturned it, and state and local governments have reasonably relied on it since then. This Court has held that Congress may "acquiesce[e]" in administrative interpretations of statutes by failing to enact legislation to overturn the administrative interpretation, although it does so "with extreme care." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 169-70 (2001). While Congress' failure to overturn the EPA's longstanding Silvicultural Rule is not entitled to great weight, it nonetheless has some probative value.

Sixth, contrary to the Ninth Circuit's view, the Water Quality Act of 1987 did not *sub silentio* overturn the EPA's Silvicultural Rule as applied to silvicultural stormwater runoff. Although the 1987 Act extended the NPDES to "stormwater discharges"—including "discharges associated with industrial activity," 33 U.S.C. § 1342(p)(3)(A)—the 1987 Act did not mention silvicultural stormwater runoff, and nothing in the Act reflects a congressional intent to overturn the Silvicultural Rule. Since the EPA adopted the Silvicultural Rule in 1976—11 years before the Water Quality Act was enacted in 1987—Congress would have affirmatively indicated its intent to overturn the Silvicultural Rule in enacting the 1987 Act, if it had intended to overturn the Rule.

Indeed, the Ninth Circuit's view that the Water Quality Act of 1987 provides that silvicultural stormwater runoff is a point source discharge—because such runoff is "associated with industrial activity"—would mean that *all* silvicultural stormwater runoff

is a point source discharge, regardless of whether the runoff has been channeled. The 1987 Act does not distinguish between different types of "discharges associated with industrial activity" depending on whether the discharges are channeled or flow naturally. Thus, if the 1987 Act applies to silvicultural stormwater runoff, as the Ninth Circuit held, it applies to all such runoff, whether channeled or not. This conclusion is inconsistent with the Ninth Circuit's acknowledgement that silvicultural stormwater runoff is a nonpoint source discharge if it has not been channeled. *Brown*, 640 F.3d at 1070. Thus, the Ninth Circuit's analysis of the 1987 Act is not only wrong but also internally inconsistent.

In sum, the CWA contains several provisions and indicia—which the Ninth Circuit did not mention—that support the conclusion that silvicultural stormwater runoff is *not* a point source discharge subject to NPDES regulation, regardless of whether it is channeled or flows naturally. Thus, the CWA should be so construed.

II. ASSUMING *ARGUENDO* THAT THE CLEAN WATER ACT IS AMBIGUOUS, THE EPA'S SILVICULTURAL RULE IS ENTITLED TO DEFERENCE UNDER THE *CHEVRON* DOCTRINE BECAUSE THE RULE LIMITS RATHER THAN EXPANDS FEDERAL AUTHORITY TO REGULATE SUBJECTS TRADITIONALLY REGULATED BY STATE AND LOCAL GOVERNMENTS.

We now assume *arguendo* that the CWA is ambiguous concerning whether channeled silvicultural stormwater runoff is a point source discharge or nonpoint source discharge. Under that assumption, this

Court should apply the *Chevron* doctrine in construing the CWA. Under *Chevron*, an agency's interpretation of a statute that it is responsible for administering is entitled to deference if the statute is "silent or ambiguous" and the agency's interpretation is "permissible." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984); *see Mayo Foundation v. United States*, 131 S.Ct. 704, 711 (2011); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995); *Arkansas v. Oklahoma*, 503 U.S. 91, 107 (1992). This Court should grant *Chevron* deference to the EPA's Silvicultural Rule, which interprets the CWA as providing that silvicultural stormwater runoff, even when channeled, is a nonpoint source discharge subject to regulation under state and local laws.

The *amici* do not argue that *Chevron* necessarily applies because the CWA is ambiguous or the EPA's interpretation is permissible. Rather, the *amici* argue that *Chevron* applies because the EPA's Silvicultural Rule limits, rather than expands, federal authority to regulate subjects, such as land use and water use, that are traditionally regulated by state and local governments under their own laws.

The Ninth Circuit wholly failed to apply the *Chevron* doctrine in analyzing the CWA, beyond briefly mentioning the doctrine in the "Standard of Review" portion of its decision, *Brown*, 640 F.3d at 1069, and in a fleeting passage later in the decision, *id*. at 1071. The court paid no deference whatever to the EPA's interpretation of the terms "point source" and "nonpoint source" in its Silvicultural Rule, and instead engaged in a wholly *de novo* interpretation of those terms. The Ninth Circuit decision was written almost exactly as it would have been written if this

Court had never decided *Chevron*, and if the *Chevron* doctrine did not exist.

Although the *Chevron* doctrine on its face appears to categorically require deference if certain objective factors are present—if the statute is ambiguous and the agency's interpretation permissible—this Court has not always applied *Chevron* based on these objective factors, and instead has often considered additional factors in deciding whether to grant deference. For example, this Court has construed federal statutes in order to avoid constitutional conflicts, thus limiting its deference to an agency construction that creates constitutional conflicts. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001); *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 516 (2009).

This Court has considered an additional, and virtually dispositive, factor in deciding whether to grant *Chevron* deference—namely, whether the agency regulation *expands* the reach of a federal statute into areas traditionally regulated by state and local governments, and thus expansively construes the statute's preemptive effect, or instead whether the agency regulation *limits* the reach of the statute and thus limits its preemptive effect. This Court has readily granted *Chevron* deference to agency interpretations that *limit* federal intrusion into areas of traditional state and local regulation, but has cautiously, if at all, granted *Chevron* deference to agency interpretations that *expand* federal intrusion into such areas, at least where other compelling considerations favoring deference were not present. If an agency interprets a statute as authorizing federal intrusion into areas traditionally regulated by state and local governments, such as

water use and land use, countervailing principles of federalism come into play that limit deference to the agency's interpretation. Under these principles of federalism, Congress presumptively does not authorize federal intrusion into areas traditionally regulated by state and local governments unless it speaks clearly and unequivocally.

In applying the preemption doctrine, for example, this Court has held that Congress presumptively does not preempt state and local authority to regulate subjects within their traditional areas of jurisdiction "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947); *see Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion) ("We ordinarily expect a 'clear and manifest' expression from Congress to authorize an unprecedented intrusion into traditional state authority."); *see BFP v. Resolution Trust Corp*., 511 U.S. 531, 544 (1994). Similarly, this Court has held that the Constitution's Commerce Clause, U.S. Const. art. I, § 8, cl.3, limits Congress' power to enact laws that "effectually obliterate the distinction between what is national and what is local . . . ." *United States v. Lopez*, 514 U.S. 549, 557 (1995); *see United States v. Morrison*, 529 U.S. 598, 619 n.8 (2000).

These principles of federalism inform the meaning and application of the *Chevron* doctrine. If a federal agency interprets an ambiguous statute as *limiting* federal regulation of areas traditionally regulated by state and local governments, the *Chevron* doctrine is more likely to converge with principles of federalism and properly be applied. If, however, the agency interprets an ambiguous statute as *expanding* federal

regulation of such areas, the *Chevron* doctrine is more likely to diverge from principles of federalism and properly not be applied.

Although this Court has not expressly distinguished for *Chevron* purposes between agency interpretations that expand federal intrusion into traditional areas of state and local regulation and agency interpretations that limit federal intrusion, this Court's decisions are nonetheless consistent with this distinction. Indeed, this distinction is supported by this Court's decisions construing the specific statute involved here, the CWA.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001), this Court *declined* to grant *Chevron* deference to a regulation adopted by the U.S. Army Corps of Engineers under the CWA, which authorized the Corps to regulate "isolated" waters, *i.e.*, waters not physically connected to navigable waters. The CWA authorizes the Corps to regulate "navigable waters," which are defined as "the waters of the United States." 33 U.S.C. §§ 1344(a), 1362(7). Although the Court stated that the phrase "the waters of the United States" is not ambiguous and does not include "isolated" waters, the Court also stated that—even if the phrase were ambiguous—there would be no basis for applying *Chevron* in upholding the Corps' regulation. *SWANCC*, 531 U.S. at 172-73. The Court stated that the states have traditionally and historically regulated non-navigable waters, and thus the Corps' claimed authority to regulate "isolated" waters would result in a "significant impingement of the States' traditional and primary power over land and water use," *id*. at 161, 174, thus improperly allowing "federal encroachment upon a

traditional state power," *id*. at 173. The Court stated that Congress would not have invoked the "outer limits" of its constitutional power without a "clear expression" of its intent. *Id.* at 172. Invoking its "prudential desire not to needlessly reach constitutional issues," *id*., the Court concluded that the CWA does not authorize the Corps to regulate "nonnavigable, isolated, intrastate waters," *id*. at 166. The Court overturned the Seventh Circuit decision below, which had relied on *Chevron* in upholding the Corps' regulation. *SWANCC*, 191 F.3d 845, 851, 853 (7th Cir. 1999), *rev'd* 531 U.S. 159, 174 (2001). Thus, the Court declined to grant *Chevron* deference to a federal regulation that expanded federal authority to regulate subjects traditionally regulated by state and local governments, and instead applied long-standing principles of federalism in construing the CWA.

Similarly, in *Rapanos v. United States*, 547 U.S. 715 (2006), this Court again *declined* to grant *Chevron* deference to a regulation adopted by the U.S. Army Corps of Engineers under the CWA, which interpreted the statutory phrase "the waters of the United States" as including virtually all wetlands in the nation. The Court's plurality opinion stated that the Corps' "expansive" interpretation of the phrase was foreclosed by its "natural definition," *Rapanos*, 547 U.S. at 731-32, but that "[e]ven if the phrase 'the waters of the United States' were ambiguous . . . our own canons of construction would establish that the Corps' interpretation of the statute is impermissible." *Id.* at 737.[4] Citing the Court's decision in *SWANCC*,

[4] The plurality opinion interpreted the phrase "the waters of the United States" as including only "relatively permanent, standing or flowing bodies of water," *Rapanos*, 547 U.S. at 732,

the plurality opinion stated that "the Government's expansive interpretation would 'result in a significant impingement of the States' traditional and primary authority over land and water use,'" and that "[w]e would ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Id*. at 738 (citations and internal quotation marks omitted). As in *SWANCC*, the plurality opinion applied principles of federalism rather than the *Chevron* doctrine in construing the CWA.[5]

On the other hand, in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), this Court *applied Chevron* deference in upholding a federal regulation that—by limiting federal authority under the Endangered Species Act ("ESA")—effectively allowed a state to administer its

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and as including only wetlands that have a "continuous surface connection" to such waters," *id*. at 742. Justice Kennedy wrote a concurring opinion arguing that the phrase "the waters of the United States" also includes wetlands that have a "significant nexus" to navigable waters, but—like the plurality opinion—Justice Kennedy did not apply the *Chevron* doctrine in reaching this conclusion. *Id*. at 782 (Kennedy, J., concurring).

[5] On the other hand, this Court in *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995), in upholding the Secretary of the Interior's regulation defining "take" under the Endangered Species Act ("ESA"), applied *Chevron* as part of its statutory analysis, *id*. at 703, only after the Court had already determined that its interpretation was supported by the "text of the Act," *id*. at 697, by the "broad purpose" of the Act, *id*. at 698, and by the fact that Congress "understood" that the Act prohibited "indirect as well as deliberate takings," *id*. at 700. Although the Court's decision may have expanded the preemptive reach of the ESA, the decision was based largely on the Court's own analysis of the statute and not on the Court's deference to the Secretary's regulation under *Chevron*.

own NPDES programs under the CWA. There, the State of Arizona applied to the EPA for authority to administer its NPDES permit program. The CWA provides that the EPA "shall" approve such a state program if it meets the CWA's statutory criteria. 33 U.S.C. § 1342(b). The EPA determined that the Arizona program met the statutory criteria and approved the Arizona program. *Home Builders*, 551 U.S. at 654-55. But the Ninth Circuit held that the EPA violated the ESA by failing to "consult" with a designated service agency before approving the Arizona program. Under the ESA, a federal agency must "consult" before taking any action "authorized, funded or carried out" by the agency that may affect an endangered species. *Id*. at 649-50; 16 U.S.C. §§ 1536(a)(2), -(c)(1).

This Court, overturning the Ninth Circuit decision, applied *Chevron* in deferring to, and upholding and applying, a regulation adopted by the Secretaries of Interior and Commerce that did not require the EPA to consult with designated service agencies. The regulation required agency consultation in "all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added). This Court held that since the CWA provides that the EPA "shall" approve state NPDES programs that meet the statutory criteria, the EPA had no "discretionary" authority to disapprove the Arizona program, and therefore the EPA was not required to consult before approving the program. *Home Builders*, 551 U.S. at 665-68. Thus, the Court applied *Chevron* deference in upholding an agency regulation that, by limiting an agency's consultation obligation under the ESA, broadened a state's authority to administer its NPDES program under the CWA. The

Court's decision thus limited federal intrusion into areas traditionally regulated by the states.

In sum, in conformity with principles of federalism, this Court has applied *Chevron* deference where an agency construed a federal statute as *limiting* federal authority to regulate subjects of traditional state and local regulation, as in *Home Builders*, but has not applied *Chevron* deference where an agency construed a federal statute as *expanding* such authority, as in *SWANCC* and *Rapanos*.

Here, the EPA's Silvicultural Rule interprets silvicultural stormwater runoff, whether channeled or not, as a nonpoint source discharge subject to regulation under state and local laws, and thus limits federal regulation of a subject traditionally regulated by state and local governments. Thus, the *Chevron* doctrine converges with principles of federalism and properly applies. The Ninth Circuit accorded no *Chevron* deference whatever to the EPA's Silvicultural Rule. Thus, while the Silvicultural Rule is entitled to the greatest *Chevron* deference because it limits federal regulation of areas traditionally regulated by state and local governments, the Ninth Circuit accorded the Silvicultural Rule the least deference—indeed, no deference at all—and instead interpreted the statute *de novo* as authorizing federal regulation of traditional areas of state and local regulation. By *pro forma* acknowledging the *Chevron* doctrine but declining to apply it, the Ninth Circuit ignored the powerful jurisprudential principle embodied in the doctrine, namely that the courts should to the extent possible avoid construing ambiguous federal statutes as authorizing federal intrusion into areas traditionally regulated by state and local governments.

III. THE NINTH CIRCUIT DECISION WILL HAVE SIGNIFICANT, ADVERSE IMPACTS ON STATE AND LOCAL GOVERNMENTS.

A. The Ninth Circuit Decision Potentially Imposes Significant Costs And Liabilities On State And Local Governments.

If this Court upholds the Ninth Circuit's decision, this Court's decision would significantly burden state and local governments in their roles as NPDES permitting agencies and NPDES-regulated dischargers. To date, 46 states have been authorized to administer their own NPDES programs.[6] These NPDES-administering states issue permits to dischargers in lieu of the EPA's issuance of such permits. *Shell Oil Company v. Train*, 585 F.2d 408, 410, 412 (9th Cir. 1978); *District of Columbia v. Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980); *State of California v. U.S. Department of Navy*, 845 F.2d 222, 225-26 (9th Cir. 1988). An approved state program must have requirements at least as stringent as those of the federal program, and may have more stringent requirements if the state chooses. 33 U.S.C. § 1370; 55 Fed. Reg. 48,027 (Nov. 16, 1990).

Under the Ninth Circuit's decision, states that administer their own NPDES programs would be required to exercise NPDES permit authority over all stormwater discharges from logging roads that are channeled through ditches, culverts, and other conduits into rivers and streams because the Ninth Circuit's decision holds that such stormwater dis-

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[6] All states have EPA-approved NPDES programs except Idaho, Massachusetts, New Hampshire, and New Mexico. *State Program Status*, ENVIRONMENTAL PROTECTION AGENCY, http://cfpub.epa.gov/npdes/statestats.cfm (last visited Aug. 16, 2012).

charges are point source discharges subject to regulation under the NPDES. *Brown*, 640 F.3d at 1067. The states' exercise of NPDES permit authority over such stormwater discharges would impose a heavy regulatory and financial burden on the states. According to the U.S. Forest Service, there are approximately 386,000 miles of forest roads on forest lands owned by the federal government, and this figure does not even include logging roads on forest lands owned by state and local governments. 66 Fed. Reg. 3,245 (Jan. 19, 2001). As the EPA has stated, "the networks of forest roads on federal land are vast by any measure." 77 Fed. Reg. 30,475 (May 23, 2012). If the NPDES-administering states were required to exercise NPDES permit authority over every ditch, culvert, or other conduit on every logging road in the nation, and to monitor compliance with NPDES requirements, the states would bear a heavy regulatory burden, which would cost millions of dollars annually.

In addition, state and local governments may incur significant additional burdens and costs if they own or regulate the forest lands where logging operations take place. Although the federal government owns most of the public forest lands in the nation (76%), state and local governments also own a significant amount of such forest lands; the states own 21% and local governments own 3% of such lands. 77 Fed. Reg. 30,475 (May 23, 2012). In this case, for example, the State of Oregon, through its Department of Forestry and Board of Forestry, owns the lands in the Tillamook State Forest in Oregon, where the defendant timber companies conducted their logging operations. *Brown*, 640 F.3d at 1067. Under the EPA's regulations, the "operator" of a facility or activity subject to NPDES requirements is responsible for

acquiring an NPDES permit. 40 C.F.R. § 122.21(b). The EPA defines an "operator" of an industrial facility as the entity that has either "operational control over industrial activities, including the ability to modify those activities," or "day-to-day operational control of activities at a facility necessary to ensure compliance with the permit." ENVIRONMENTAL PROTECTION AGENCY, CONSTRUCTION GENERAL PERMIT App. A (2012), http://www.epa.gov/npdes/pubs/cgp2012_appendixa.pdf (definition of "operator"). Thus, if a state or local government has "operational control" over logging operations because it owns or regulates the forest lands and roads where the operations take place, or for the same reason has "day-to-day operational control" sufficient to "ensure compliance with the permit," the state or local government may be considered an "operator" of the logging operation and thus subject to NPDES permit requirements.

In short, state or local governments may be an "operator" subject to NPDES permit requirements simply because they own or regulate the forest lands where the logging operations take place. Under the Ninth Circuit's decision, any level of ownership, control, or regulatory authority over the forest roads may be sufficient to trigger NPDES permit requirements. A simple lease agreement under which a state or local government allows access to a forest road may be enough to establish liability. Thus, state or local governments may be subject to significant burdens and costs under the CWA to the extent they are considered "operators" and thus subject to NPDES permit requirements.

B. The NPDES Permitting Process Is Lengthy And Time Consuming, And State And Local Governments Would Incur Significant Additional Burdens And Costs If They Assume NPDES Authority Over Silvicultural Stormwater Discharges.

The CWA authorizes two types of NPDES permits: individual permits and general permits. Individual permits are issued for individual discharges and are specifically tailored to the individual facility or activity, and general permits are issued for categories of discharges that are substantially similar and result from substantially similar activity. 40 C.F.R. §§ 122.28, 123.25.

The process of issuing an NPDES permit, whether individual or general, is lengthy and time consuming. State and local governments would incur substantial burdens and costs if they were responsible for conducting this permit process or receiving permits in the context of silvicultural stormwater runoff. In issuing NPDES permits, the permit-issuing agency is required to take numerous, time consuming steps. These steps include drafting and submitting a permit application, 40 C.F.R. §§ 122.21(a), -(f), -(g), 122.26(c); developing technology-based and water quality-based effluent limitations, *id*. at §§ 122.44(a), -(d); developing monitoring requirements, *id.* at § 122.48; developing special conditions and considering variances and other applicable requirements, *id*. at §§ 122.21(m), 124.62; preparing a draft permit, *id*. at § 124.6; preparing supporting legal and factual analysis, *id*. at §§ 124.8, 124.56; issuing public notice and inviting public comments, *id*. at §§ 124.10, 124.57; responding to public comments, *id*. at §§ 124.11, 124.17; and

completing the review and issuance process, *id*. at § 124.15. This permit-issuing process routinely takes from three to five years, and requires countless hours of staff time by the permitting agency, as well as involvement by the permittee and the public. Moreover, the regulation of stormwater discharges affects a wide range of individual activities, is often highly controversial, and frequently leads to litigation.

An example of this lengthy and time consuming permit process is found in California's issuance of a general NPDES permit for stormwater discharges associated with construction activity. The California State Water Resources Control Board ("Board"), which administers the NPDES program in California, issued the first draft of the general permit for such discharges in March 2007. *California Building Industry Association v. State Water Resources Control Board*, Cal. Superior Court, Sacramento County, No. 34-2009-80000338 CU-WM-GDS, 6-7 (Dec. 2, 2011), http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/construction/judgment.pdf. The Board held a series of workshops during 2007 and 2008, in which it received public comments, and then issued a second draft in 2008. *Id*. The Board held a second series of workshops in 2008 and 2009, and issued a third draft in April 2009. *Id*. The Board conducted a formal hearing on the third draft on September 9, 2009, and adopted the permit on that date. *Id*. The permit was challenged by members of the construction industry, and the litigation was concluded at the trial level in December 2011, when a California Superior Court struck down portions of the permit. *Id*. at 28. Thus, it took more than four years—from early 2007 to late 2011—for the Board to issue the general permit and for the permit to be adjudicated in the courts.

Thus, the process for issuing a single *general* NPDES permit, as illustrated by the above example, is lengthy and time consuming, and imposes significant burdens and costs on the permitting agency and the permit applicant. If, as the Ninth Circuit decision holds, the permitting agency were required to issue *individual* NPDES permits for individual logging operations, and to establish effluent limitations for each logging operation, the cumulative burdens and costs to the agency and permit applicant would be significantly greater. At a time when state and local governments are already facing severe budgetary constraints, these additional burdens and costs should not be imposed upon state and local governments unless Congress clearly required NPDES permits, which it has not.

C. The Environmental Impacts Associated With Forest Roads Are Adequately And Appropriately Addressed Under The States' Nonpoint Source Programs.

The imposition of these additional burdens and costs is particularly inappropriate because state and local governments are adequately addressing the impacts associated with stormwater runoff from forest roads under their nonpoint source discharge programs. Congress has authorized the states to regulate nonpoint sources of pollution under sections 208 and 304(f) of the CWA. 33 U.S.C. §§ 1288, 1314(f).

An example of how the states are adequately addressing the impacts of stormwater runoff from forest roads is found in the instant case. Like most states, Oregon has adopted a comprehensive system for regulating water quality, which includes regula-

tion of nonpoint source discharges. *See*, *e.g*, ORE. REV. STATS. §§ 468B.015-468B.050. Under this regulatory system, the Oregon Department of Forestry ("ODF") has adopted best management practices ("BMPs") that logging companies must implement in conducting logging operations on forest lands in the state. For example, the ODF has mandated that discharges from forest roads must be directed away from surface waters. According to the ODF regulations:

> The forest floor can usually absorb large amounts of water, and can be used to greatly reduce the potential for muddy runoff entering streams. In western Oregon, undisturbed forest soils can often absorb over 10 inches of water per hour. When muddy runoff waters are directed to these soils, water flows into the ground, leaving the road-generated sediment on the forest floor . . . .
>
> Drainage waters must be directed onto undisturbed soils. Cross drains need to be installed as close to stream crossings as possible and allow between 15 and 200 feet of ground filtering between the outlet of the cross drain and the high water level of the stream, as measured from the stream.

OREGON DEPARTMENT OF FORESTRY, INSTALLATION AND MAINTENANCE OF CROSS DRAINAGE SYSTEMS ON FOREST ROADS 6 (2003).[7]

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[7] For additional BMP requirements applicable within the State of Oregon, *see also Road Maintenance*, THE FOREST PRACTICE NOTES (Oregon Department of Forestry, Salem, Oregon), July 1999, http://cms.oregon.gov/odf/privateforests/docs/roadmaintfpnote4.pdf; and OREGON DEPARTMENT OF FORESTRY, FOREST

Thus, Oregon appropriately addresses stormwater discharges from forest lands under its nonpoint source laws. Because of differences in climate, soil conditions, and geography among the states, BMPs for stormwater discharges are best developed at the state and local level rather than the national level. State and local governments that are most familiar with these local conditions can properly tailor BMPs to local conditions. In authorizing state and local governments to regulate silvicultural stormwater discharges under their nonpoint discharge programs, Congress fully recognized the importance of state and local governments in effectuating the broad goals of the CWA.

D. Requiring NPDES Permits For Forest Roads Would Limit Public Access To Public Lands.

The Ninth Circuit decision, by imposing significant additional burdens and costs on state and local governments, would discourage the construction of new forest roads and potentially result in the divesture or closing of existing roads. This would, in turn, potentially reduce public access to public forest lands.

Although the Ninth Circuit downplayed the point, forest roads are more than access paths for timber companies to conduct logging operations. *Brown*, 640 F.3d at 1084. Forest roads also provide public access to the nation's forest lands for recreational activities such as backpacking, camping, fishing, hiking, birding, hunting, and mountain biking. The roads likewise provide the basis for economic activity, such as

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ROADS MANUAL (July 2000), http://cms.oregon.gov/odf/pages/state_forests/roads_manual.aspx.

mining operations, fishing, and agriculture. The Ninth Circuit decision places these recreational and economic activities at risk by increasing the liability of state and local governments for logging operations on public forest lands, which may result in fewer roads and less public access to the nation's forest lands. This outcome is contrary to the CWA's declared "national goal" of providing for "the protection and propagation of fish, shellfish, and wildlife" and for "recreation in and on the water." 33 U.S.C. § 1251(a)(2).

E. Requiring NPDES Permits For Silvicultural Activities Would Potentially Have Adverse Economic Consequences Without Providing Any Significant Environmental Protection.

As described above, state and local governments are able to effectively regulate stormwater discharges from forest lands under their nonpoint source laws. Here, for example, the State of Oregon has adopted nonpoint source programs and other laws that reduce and limit pollutant discharges from forest roads. To require state and local governments to adopt an additional system of regulation, by requiring them to apply NPDES permit requirements to pollutant discharges from forest roads, would add another layer of bureaucracy in regulating stormwater discharges from the roads, without commensurately increasing the environmental protection of forests and their water quality. The Ninth Circuit decision also would increase the potential exposure of state and local governments to third party lawsuits claiming that stormwater discharges are not being adequately regulated under the NPDES program.

In addition, the Ninth Circuit decision would potentially increase the costs of, and substantially delay, the production and sale of timber products supplied by forest lands. A recent study conducted by the National Association of Forest Owners estimates that the costs to a timber company of obtaining an NPDES permit for a logging operation could be between $16,000 and $24,000 per logging operation. FREDERICK CUBBAGE & ROBERT ABT, POTENTIAL ADMINISTRATIVE AND ECONOMIC IMPACTS OF NPDES PERMIT REQUIREMENTS FOR FOREST ROADS IN THE SOUTH 2 (Dec. 7, 2011), http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-South1.pdf. According to the study, such a cost increase could lead to very large decreases in net revenues and the elimination of all profits for small and probably large landowners. *Id*. By increasing the costs of and substantially delaying the production of timber products, the Ninth Circuit would threaten the economic viability of other industries that are dependent on the timber industry, such as sawmills that process timber products, and would jeopardize the jobs of those employed by these other industries. This would, in turn, cause economic hardship to communities, particularly small communities near forests, that are dependent on the timber industry for providing jobs and a tax-base. Depending on the severity of the economic hardship, the effect might even erode the tax base of an entire state. Thus, the Ninth Circuit decision has consequences, perhaps unintended, that extend far beyond the simple regulation of stormwater discharges from forest lands.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand the Ninth Circuit decision.

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