Nos. 11-338 & 11-347

IN THE

Supreme Court of the United States

DOUG DECKER, IN HIS OFFICIAL CAPACITY AS OREGON STATE FORESTER, *et al.*, *Petitioners*,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *Respondent*.

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

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *Respondent.*

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

BRIEF FOR NATIONAL ALLIANCE OF FOREST OWNERS, AMERICAN FARM BUREAU FEDERATION, FOREST RESOURCES ASSOCIATION, EMPIRE STATE FOREST PRODUCTS ASSOCIATION, FLORIDA FORESTRY ASSOCIATION, GEORGIA FORESTRY ASSOCIATION, LOUISIANA FORESTRY ASSOCIATION, MAINE FOREST PRODUCTS COUNCIL, MICHIGAN FOREST PRODUCTS COUNCIL, NEW HAMPSHIRE TIMBERLAND OWNERS ASSOCIATION, SOUTH CAROLINA FORESTRY ASSOCIATION, VIRGINIA FORESTRY ASSOCIATION, AND WASHINGTON FOREST PROTECTION ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Given that challenges to Clean Water Act ("CWA" or "Act") rules must be presented in an action against the U.S. Environmental Protection Agency ("EPA") in a court of appeals within 120 days of promulgation, and that such challenges are not properly raised in an action for civil or criminal enforcement, and where the intended broad scope of the rules at issue were explained by EPA at the time of promulgation but not challenged then, could the intended scope of the rules nonetheless be challenged years later in a district court enforcement action to which EPA is not a party, based on the theory that the intended scope of the rule had been inconsistent with the Act all along and the rule could be read narrowly to make it consistent with the court's interpretation of the Act?

2. In light of EPA's longstanding view that runoff from forest roads is not subject to CWA permitting requirements, with EPA having excluded such activity from permitting in its 1990 Phase I regulations under the 1987 CWA amendments, and with EPA expressing its view that roads built and used for timber harvesting are not "associated with industrial activity," could the Ninth Circuit nonetheless properly hold that runoff from roads used for timber harvesting is necessarily treated as "associated with industrial activity," subject to CWA permitting requirements, without recognizing EPA's existing interpretation and allowing EPA to consider the issue through rulemaking?

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INTERESTS OF *AMICI CURIAE* [1]

The National Alliance of Forest Owners is a trade association that represents owners and managers of over 79 million acres of private forests in 47 states. Its mission is to protect and enhance the economic and environmental values of privately-owned forests through targeted national policy advocacy.

The American Farm Bureau Federation is the largest non-profit general farm organization in the United States, representing more than 6.2 million member facilities in fifty states and Puerto Rico. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers.

The Forest Resources Association is a trade association concerned with the safe, efficient, and sustainable harvest of forest products and their transport from woods to mill. It represents wood consumers, independent logging contractors, wood dealers, forest landowners, and others with an interest in wood supply chain management.

In addition to these national organizations, the *amici* include the following group of state forestry associations from various forested regions across the country: Empire State Forest Products Association (New York), Florida Forestry Association, Georgia

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no persons other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel for *amici* appeared on behalf of intervenors below but did not participate in drafting either Petition. Letters of consent for the submission of this brief are on file with the Clerk.

Forestry Association, Louisiana Forestry Association, Maine Forest Products Council, Michigan Forest Products Council, New Hampshire Timberland Owners Association, South Carolina Forestry Association, Virginia Forestry Association, and Washington Forest Protection Association. Each of these organizations has members, including companies, individuals, and families, that work on, own, or manage forest lands in their respective states. Each of these organizations promotes the stewardship and wise use of forest resources and is dedicated to forest conservation and the sustainable use of natural resources. Each of them has independently decided that for the reasons expressed in this brief, the Petitions present important issues affecting their members and that those issues warrant this Court's attention.

Amici have direct interests in the outcome of this case. These organizations have members who own or manage forest lands and/or roads with stormwater conveyance structures—*e.g.*, ditches and culverts—that, under the Ninth Circuit's decision, would for the first time be subjected to permitting under CWA section 402, 33 U.S.C. §1342. The decision below could require these members to change longstanding practices and obtain permits for discharging stormwater runoff associated with tree harvests and road construction and maintenance, heretofore defined for over three decades by the Silvicultural Rule, 40 C.F.R. §122.27, as nonpoint source discharges not subject to permitting.

The use of ditches and culverts to protect forest roads from the destructive effects of precipitation is integral to building and maintaining those roads. Given the number of such roads and the need for

maintenance, the Ninth Circuit's decision would require the private, state, county, and federal actors that build and maintain roads for timber harvesting to obtain potentially hundreds of thousands (or millions) of section 402 permits. *See* Ex. 1. to Am. Forest Res. Council C.A. *Amicus* Br. ("If the [U.S. Forest Service] is required to obtain permits on a road by road basis, that would mean obtaining up to 400,000 permits."); Am. Loggers Council C.A. Amicus Br. 13 ("At the national level, *Amici* estimate that the decision will create an additional 3,000,000 permit applications, based on number of affected landowners, or 750,000 applications, based on number of tree harvests, or 264,000,000 point source discharges requiring permits."). The expansion of the section 402 permitting program resulting from the Ninth Circuit's decision is well-illustrated by comparing the number of permits this decision will require with EPA's 2009 estimate that the total universe of discharges then requiring permits (individual or general) was only 400,000. *See* Hanlon Decl. in Supp. of Am. Loggers Council C.A. Amicus Br. ¶ 11.

Accordingly, *amici* emphasize the practical importance of the decision on their ongoing forestry activities. But for the reasons set forth below, they also emphasize the broader disruption flowing from the type of belated review of long-established EPA rules that the Ninth Circuit's decision allows.

The basic principle that should control here is clear. If an agency tries to apply a rule in a manner not specified at the time of promulgation, that application should then be susceptible to challenge as inconsistent with the governing law. But if the scope of a rule was announced at the time of promulgation,

and left unchallenged, then affected parties should be able to continue to rely on that rule, as they have on the 1976 Silvicultural Rule and the 1990 Phase I regulations. The Ninth Circuit undercuts these fundamental understandings, threatening the imposition of new, unexpected obligations on *amici* and others potentially subject to the Clean Water Act.

INTRODUCTION AND SUMMARY

This case began as a citizen suit brought in a district court under 33 U.S.C. § 1365. The district court had little difficulty concluding that the challenged failure to obtain section 402 (33 U.S.C. § 1342) permits for sediment runoff from forest roads did not violate the CWA. The Silvicultural Rule, promulgated in 1976, made it clear that such runoff did not involve point source discharges and thus was beyond the reach of section 402 permitting requirements. *See* Pet. App. 53-77. In so holding, the district court followed a conventional approach, consistent with other courts, in concluding that under the Silvicultural Rule, forest road rainwater runoff is from a "non-point" source, and thus no permits were required. *See Newton Cnty. Wildlife Ass'n v. Rogers*, 141 F.3d 803 (8th Cir. 1998); *Sierra Club v. Martin*, 71 F. Supp. 2d 1268 (N.D. Ga. 1996). Because the Silvicultural Rule itself made clear that such runoff was not subject to section 402 permitting, the district court concluded that it need not address the challenge to EPA's rules implementing Phase I of the 1987 CWA amendments, which also declined to subject such rainwater runoff to section 402 permitting requirements.

On appeal, however, this case took on a very different cast. The Ninth Circuit allowed this enforcement action, to which EPA was not a party, to become the vehicle for attacking EPA rules that had been in effect for decades. It then seemingly leap-frogged EPA's primary authority and responsibility to consider in the first instance, through continued rulemaking, whether stormwater runoff from forest roads used for logging gave rise to a need for section 402 permits under the 1987 CWA amendments.

In so doing, the Ninth Circuit created a device for bypassing jurisdictional requirements limiting challenges to EPA-promulgated rules. By statute, such challenges must be raised in a case against EPA in a court of appeals no more than 120 days after promulgation, unless the grounds for the challenge arose later. *See* 33 U.S.C. § 1369(b)(1). A claim that the rule's intended scope as described by EPA would render the rule inconsistent with the CWA is, of course, an issue that could have been raised in such a review action. If such a challenge could have been presented under §1369(b)(1), then the following subsection, 33 U.S.C. §1369(b)(2), makes it clear that the rule is truly final, and the claim cannot be pursued later by way of collateral attack in enforcement proceedings.

When EPA promulgated the two rules at issue in this case—the 1976 Silvicultural Rule and the 1990 Phase I regulations—it made clear how those rules were to apply to the issues raised in this case. Any affected party who believed that the rules as explained by EPA were inconsistent with the CWA could have challenged them at that time.

Nonetheless, under the Ninth Circuit's decision, there is now an alternative way of attacking long-standing rules as inconsistent with the CWA. That attack may be mounted decades after promulgation, even if the intended scope of the rule was clear at the time of promulgation and could have been timely challenged. Moreover, that attack can be pursued in a district court citizen suit to which EPA is not even a party. Even decades later, if the court concludes that the scope of the rule as described by the agency had been inconsistent with the CWA, the court can force a transformative interpretation upon the rule to now render it consistent with (the court's current understanding of) the CWA, but inconsistent with the agency's contemporaneously stated intent. Under that approach, the rule is, in theory, merely "interpreted." It survives as neutered, deprived of its intended contemporaneously described meaning. That approach, however, ignores the central question under 33 U.S.C. § 1369(b)(2), namely, whether the challenge to the scope of the rule as inconsistent with the CWA "could have been" maintained—and thus was required to have been maintained—at the time of promulgation.

The Ninth Circuit used that tack here. Based on the CWA's definition of "point source," the Ninth Circuit held that because ditching and culverts channel runoff from forest roads, the runoff requires section 402 permitting. It then applied that holding to overturn one of the core applications of EPA's Silvicultural Rule, which since the Act's earliest days defined runoff from forest roads as "non-point source" in nature, and thus not subject to section 402 permitting.

The Ninth Circuit then reviewed EPA's 1990 rulemaking in connection with Congress's effort to comprehensively address stormwater runoff with the 1987 CWA amendments. *See* 33 U.S.C. § 1342(p)(1)-(4). In 1990, EPA determined that channeled runoff from forest roads were not discharges "associated with industrial activity" and thus did not require permits under Phase I rulemaking implementing the 1987 amendments. It did so in part—but only in part—because the Silvicultural Rule already specified that discharges from such activities were not point source discharges. Indeed, EPA filed an amicus brief in this case noting that even if the Silvicultural Rule was not itself sufficient to clarify that logging road runoff is not "industrial activity," the preamble to the Phase I rulemaking explains that timber harvesting—silviculture—is not industrial activity. *See* U.S. 1st C.A. Amicus Br. 28-31.

But the Ninth Circuit nonetheless declared that runoff from forest roads used for logging must be deemed discharges "associated with industrial activity," preempting EPA's longstanding contrary position under its Phase I regulations. *See* Pet. App. 42-48. The Ninth Circuit relied on EPA's reference to facilities classified within Standard Industrial Classification ("SIC") 24 as being "associated with industrial activity." In so holding, it declined to recognize EPA's clarification, made at the time of promulgation and again as amicus in this case, that the Agency's reference to SIC 24 did not encompass "logging" and forest roads used for logging. And it paid no heed to EPA's stated view, in its district court amicus brief, that silviculture is more akin to agriculture than "industrial activity." *See* Pet. App. 124a n. 19. The

Ninth Circuit thus did not noticeably defer to EPA's interpretation of its Phase I regulations as required by this Court's precedents. *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

But the error runs deeper. Even assuming that the Ninth Circuit's narrowing of the Silvicultural Rule now opened the door to reexamination of EPA's decision to exclude forest road runoff from Phase I regulation, that reexamination must be conducted first by EPA, as part of its rulemaking responsibility, and not the courts. But the Ninth Circuit did precisely that, again using an enforcement action to intrude on agency rulemaking.

The practical impact of the Ninth Circuit's ruling on forest road construction and maintenance is likely to be overwhelming. Forest roads of the type used for timber harvesting cover hundreds of thousands of miles, crossing "waters of the United States" in countless locations. They are built and maintained by private citizens and companies, counties and states, and the federal government. To ensure that they remain useful, the roads are constructed with appropriate ditching and culverts to channel precipitation runoff. And for the last 35 years, under the Silvicultural Rule and EPA's 1990 Phase I regulations, runoff from forest roads has not been subjected to the Act's section 402 permitting requirements. Yet according to the Ninth Circuit, all that has been wrong. We have set forth additional information about the practical impact of the decision on forest and farm owners in the *amici's* statement of interests and will not repeat it here. The ruling below casts a wide net over forestry.

The effects of the decision on administrative law and process are even wider for it allows belated challenges to longstanding EPA rules to be bootstrapped into enforcement actions to which the EPA is not even a party. It thus allows collateral challenges to rules that—because no timely challenge had been raised at the time of promulgation—had long taken on the force of established law. This Court should grant the petitions to resolve the important questions presented.

ARGUMENT

I. The Ninth Circuit's Failure To Respect The Prescribed Means For Challenging Agency Rules Makes This A Case Of Exceptional Importance.

Challenges to rules promulgated under the CWA must be initiated in a Circuit Court of Appeals of the United States within 120 days of the rule's promulgation unless "based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1). Absent challenge, the rule becomes law. The prohibition on collateral challenges to EPA rules is emphatic: "Action of the Administrator with respect to which review could have been obtained under [§ 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2). The Ninth Circuit's rulings in this case flout this basic, jurisdictional limitation on judicial review of agency rules.

A. The Ninth Circuit Forced A Transformative Construction Upon The Silvicultural Rule To Render It Consistent With Its View Of The Requirements Of The Clean Water Act.

A foundational requirement of the CWA is that pollutant discharges from "point sources" are prohibited unless granted a permit under section 402. *See* 33 U.S.C. §§ 1311(a), 1342. More than 35 years ago, however, EPA promulgated the Silvicultural Rule (currently, 40 C.F.R. § 122.27). That rule specifies that permits are not required for silvicultural rainwater runoff, including runoff from the hundreds of thousands of miles of forest roads nationwide, because such runoff is "nonpoint source" in nature. Accordingly, private actors, states, counties and federal agencies were not required to obtain section 402 permits when they installed a culvert, deepened ditches, or extended or moved a forest road used for timber harvesting and similar silvicultural activities.

The Ninth Circuit's decision recollects the history of the Silvicultural Rule and its intended scope. *See* Pet. App. 20-32. EPA first tried to exempt categories of discharges, including any related to silviculture, from the CWA's permitting requirements. But upon the D.C. courts' determination that EPA could not simply exempt point source discharges from the Act, it issued the Silvicultural Rule. *See* 41 Fed. Reg. 24709 (June 18, 1976).[2] The Rule clarifies and lists the four silvicultural activities that EPA regarded as

[2] EPA codified the current version of the Rule in 1980, but that version differs from the 1976 version only in minor respects. *See* 45 Fed. Reg. 33,290, 33,446-47 (May 19, 1980).

involving point sources: discharges through "discernible, confined, and discrete conveyance[s] related to rock crushing, gravel washing, log sorting, or log storage facilities." At the same time, EPA determined by rule that stormwater runoff from roads and road maintenance, including through ditches and culverts integral to forest road survival, was a nonpoint source discharge outside the permitting process. *See* Pet. App. 31-32.

Throughout most of its opinion, the Ninth Circuit correctly described the Silvicultural Rule as unambiguously defining stormwater runoff from forest roads as nonpoint sources, whether channeled through ditches and culverts or not. *See* Pet. App. 20-32. Relying on the text and EPA's explanatory statements in the preambles to the proposed rule, *see* 41 Fed. Reg. 6281 (Feb. 12, 1976), and the final rule, *see* 41 Fed. Reg. 24709 (June 18, 1976), the Ninth Circuit panel stated repeatedly that the Rule treated stormwater runoff from forest roads as nonpoint source, even if channeled. *See, e.g.*, Pet. App. 24 ("[A]ny natural runoff containing pollutants was not a point source, even if the runoff was channeled and controlled through a 'discernible, confined and discrete conveyance' and then discharged into navigable waters."); *id.* at 26 ("[T]he effect of the Rule was to treat all natural runoff as nonpoint pollution, even if channeled and discharged through a discernible, confined and discrete conveyance."); *id.* at 31 ("[D]ischarges of 'natural runoff' are nonpoint sources of pollution, even if such discharges are channeled and controlled through a 'discernible, confined and discrete conveyance.'").

Even if some ambiguity could be forced on the bare words of the Rule as written, its intended application to stormwater runoff through culverts and ditches—the issue here—was unequivocally set forth and ripe for challenge at the time of promulgation. The preamble to the proposed rule declared that "ditches, pipes and drains that serve only to channel, direct, and convey non-point runoff from precipitation are not meant to be subject to the § 402 permit program." *Id.* at 27. Responding to comments on the proposed rule, EPA emphasized that "[i]nsofar as [surface] drainage serves only to channel diffuse runoff from precipitation events, it should also be considered nonpoint in nature." 41 Fed. Reg. at 24,711.

Such statements put all affected parties on notice that runoff from forest roads, even if channeled through ditches and culverts and the like, was not subject to permitting. If anyone believed the Rule was improper because ditches, pipes, and drains that channel runoff are, in fact, point sources that must be permitted under section 402, this was a challenge that "could have been" mounted under 33 U.S.C. § 1369(b)(1) within 120 days of the Rule's promulgation.

The Ninth Circuit nevertheless found itself unconstrained by the jurisdictional bar of § 1369(b). The Ninth Circuit first concluded that the Rule, as originally intended by EPA, would be inconsistent with the Act. *See* Pet. App. 36-37. Having so concluded, it forced an alternative interpretation on the Rule—contrary to its contemporaneously described scope—to conform it to the Act. Thus, the Ninth Circuit miraculously read the Rule as applying only to stormwater runoff from forest roads in the rare

circumstance where no channeling of the runoff through ditches and culverts occurs. Of course, without ditches and culverts to carry away the forest stormwater, the stormwater would wash away the forest roads.

By converting arguments about whether the Rule is consistent with the CWA—which should have been raised upon promulgation—into a mechanism for belatedly giving the Rule a transformative reinterpretation, the Ninth Circuit's approach to 33 U.S.C. § 1369(b) renders its jurisdictional bar ineffectual. If EPA has described the scope of a rule at the time of promulgation, then that is the time to object to that scope as being inconsistent with the CWA. It is no longer subject to challenge in an enforcement proceeding. The decisive jurisdictional question is whether the claim could have been brought at the time of promulgation. 33 U.S.C. § 1369(b)(2).

The controlling principle was explained by the United States in its second amicus brief to the Ninth Circuit: "If EPA states its interpretation at the time it promulgates the regulation (e.g., in an accompanying Federal Register preamble), a potential plaintiff must accept EPA's interpretation as authoritative and challenge the regulation directly and in a timely fashion . . . . Otherwise, Section 1369(b)'s purposes would be completely subverted by allowing a court to reject EPA's interpretation in a later citizen suit." U.S. 2d C.A. Amicus Br. 9. The issue is not whether the Rule is ambiguous in the eyes of one reading the Rule today, but whether an affected party could have mounted the challenge in a court of appeals against EPA within 120 days of promulgation. 33 U.S.C. § 1369(b)(2).

The Ninth Circuit supported its tack here by citing a statement in a footnote in an amicus brief of the United States[3] suggesting that the first time EPA had interpreted the Silvicultural Rule as defining forest road runoff through ditches and culverts as nonpoint source was in a brief filed earlier in this very case. According to the Ninth Circuit, this brought the issue within § 1369(b)(1)'s exception for suits challenging a rule based on grounds arising more than 120 days after promulgation. *See* Pet. App. 9-10. But the Ninth Circuit's explanation is transparently incorrect. The notion that this interpretation was new was inconsistent with EPA's statements at the time of promulgation. Even if correct, that would only overcome the time bar in the second sentence of § 1369(b)(1). It would not explain how the challenge could be mounted through a district court citizen suit, rather than in an appropriate court of appeals.

In 1976, when EPA promulgated the Silvicultural Rule, no affected party claimed that the Rule's prescribed scope exceeded EPA's power under the CWA, though such a challenge, if it had merit, would have been ripe to be raised. Consequently, for over three decades, discharges of the type in question here were deemed nonpoint source discharges, not subject to permitting. The Ninth Circuit, therefore, should

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[3] That footnote, in a brief to which EPA was not a party, is difficult to reconcile with EPA's contemporaneous description of the Silvicultural Rule. The footnote was in the same amicus brief in which the United States stated clearly that a statement of the rule's scope in the preamble triggers the obligation to mount a challenge to that stated scope within 120 days. *See* Pet. App. 9-10.

have either rejected the suit as an untimely collateral attack on the Rule, or followed the lead of the district court and other federal courts in similar litigation, by applying the Rule and dismissing the claim on the merits. *See* Pet. App. 53-77; *Newton Cnty. Wildlife Ass'n*, 141 F.3d 803; *Sierra Club*, 71 F. Supp. 2d 1268.

B. The Ninth Circuit Further Allowed This Enforcement Action To Displace EPA's Rulemaking Authority With Respect To The 1987 Stormwater Amendments.

The Ninth Circuit went equally far afield in addressing whether forest roads used for logging are "industrial activity" subject to permitting under Phase I of the 1987 CWA amendments. Although EPA's amicus brief made clear that EPA regarded channeled runoff from logging roads to be beyond the scope of Phase I regulations, *see* U.S. 1st C.A. Amicus Br. 28-31, the Ninth Circuit refused to defer to EPA's views on the proper scope of its Phase I regulations, though deference was required under this Court's precedents. *See Chase Bank USA v. McCoy*, 131 S. Ct. 871, 880 (2011) ("[W]e defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'") (quoting *Auer*, 519 U.S. at 461-62). Even if the Ninth Circuit's reinterpretation of the Silvicultural Rule in this case called into question EPA's 1990 determination that logging road runoff is outside the scope of Phase I regulation, the Ninth Circuit should have stayed its hand to allow EPA to reexamine whether such runoff

was nonetheless non-industrial and thus remained beyond the scope of Phase I regulation.

That this issue is one for agency determination, rather than judicial edict, is clear from the regulatory history. As the Ninth Circuit recounted, EPA had long been reluctant to regulate channeled stormwater runoff, citing among other things the sheer scope of such an effort. In 1987, Congress amended 33 U.S.C. § 1342(p) to address stormwater under a comprehensive new regime. It directed EPA to erect a permitting program for stormwater discharges in two phases. As part of Phase I, Congress directed EPA to require permits for five categories of stormwater discharges, including those "associated with industrial activity." *See* 33 U.S.C. § 1342(p)(1)-(3). EPA promulgated its Phase I regulations in 1990. *See* 55 Fed. Reg. 47,990 (Nov. 16, 1990). Congress required EPA to consider, in Phase II, whether other types of stormwater discharges should also be subject to permitting, given "the nature and extent of pollutants in such discharges." *See id.* § 1342(p)(5)-(6).

In its 1990 Phase I regulations, EPA defined discharges "associated with industrial activity" to refer only to discharges "directly related to manufacturing, processing or raw materials storage areas at an industrial plant." *See* 55 Fed. Reg. at 48,011. Runoff from a rural road running through the forest and used to haul timber does not reasonably fit within this definition. Moreover, EPA stated that its Phase I permit requirement would "not include discharges from facilities or activities excluded from the [permitting] program under this Part 122." *See* 40 C.F.R. § 122.26(b)(14); *see also* 55 Fed. Reg. at 48,011. Thus, EPA specifically carried forward into the Phase I

regulations the understanding that runoff historically outside section 402 permitting obligations pursuant to the Silvicultural Rule was not "industrial."

Further, EPA explained that by including a reference to Standard Industrial Code ("SIC") 24 in its regulatory definition of "associated with industrial activity," *see* 40 C.F.R. § 122.26(b)(14)(ii), it meant to require permits for "sawmills . . . and other mills engaged in producing lumber and wood basic materials" because such facilities could be expected to contain potential pollution sources such as "storing raw materials . . . [or] waste products . . . or chemicals outside." 55 Fed. Reg. at 48,008. But EPA specified that its reference to SIC 24 was not intended to include silvicultural activities in the forest itself, such as stormwater runoff from logging roads. *See* 55 Fed. Reg. at 48,011. It agreed with comments urging exclusion of logging road runoff from Phase I permitting, emphasizing that runoff is better controlled through best management practices. Thus, the "definition of discharge associated with industrial activity does not include activities or facilities that are currently exempt from permitting under [s]ection 402," such as natural runoff from forest roads, even if collected and discharged through ditches, culverts, and channels. *See id.*

EPA's decision that such activities are outside of Phase I could have been challenged at the time of promulgation. Notwithstanding timely challenges to other aspects of the Phase I regulations, EPA's decision on forest roads emerged unscathed. *See Am. Mining Cong. v. U.S. E.P.A.*, 965 F.2d 759 (9th Cir. 1992); *Natural Res. Def. Council v. U.S. E.P.A.*, 966 F.2d 1292 (9th Cir. 1992). Indeed, in 1999 EPA

declined to subject forest road runoff even to Phase II regulation, a conclusion that the Ninth Circuit later directed EPA to reconsider and which remains under consideration.[4] If EPA was properly directed to reconsider whether forest road runoff should be regulated under Phase II, that same activity could not have been mandatorily subject to Phase I regulation.

Nonetheless, more than a decade after the close of the 120-day filing window under 33 U.S.C. § 1369(b)(1), the Ninth Circuit here addressed whether forest road runoff was subject to Phase I regulation. Having held that the Silvicultural Rule does not permissibly define channeled forest road runoff as nonpoint source discharges (a holding that arguably displaced one of the reasons why EPA had found it beyond the scope of Phase I regulation), the Ninth Circuit decided to examine whether it was, in fact, subject to Phase I permitting. It noted that EPA had referenced SIC 24 in defining industrial activity, leading the Ninth Circuit to declare it "undisputed that

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[4] When EPA promulgated its Phase II regulations, it required permits for activities that "present a high likelihood of having adverse water quality impacts." *See* 64 Fed. Reg. 68,722, 68,734 (Dec. 8, 1999). EPA did not subject channeled runoff from forest roads to permitting under Phase II. Timely challenges to EPA's Phase II regulations were filed in three courts of appeals and consolidated in the Ninth Circuit. *See Envtl. Def. Ctr. v. U.S. E.P.A.*, 344 F.3d 832, 843 (9th Cir. 2003). Among the many issues raised was whether EPA's decision not to subject forest road runoff to Phase II permitting was unlawful. *See id.* at 860-63. The Ninth Circuit remanded the issue to EPA on the theory that even if EPA had previously concluded that such activity was not subject to permitting, that did not mean that EPA should not now consider whether it should be, as part of Phase II. *See id.* at 863. *See* Pet. App. 48.

'logging,' which is covered under SIC 2411 (part of SIC 24), is an 'industrial activity.'" *See* Pet. App. 44-45. This analysis, however, bypassed EPA's own statements—made at the time of promulgation and in its first amicus brief to the Ninth Circuit—that by referencing SIC 24 in the regulation, EPA did not intend to encompass runoff from roads used for logging and did not view silvicultural activity as industrial. In deciding the issue, the Ninth Circuit thwarted Congress' bar on untimely CWA rulemaking challenges (and indeed, did not even discuss it), failed to defer to the agency and thwarted Congress' intent to allow EPA to decide how best to regulate stormwater discharges—including how to define discharges "associated with industrial activity."

Even if the Ninth Circuit's ruling on the proper scope of the Silvicultural Rule opened the door to rethinking EPA's earlier conclusion that forest road runoff is outside the scope of Phase I regulation, *i.e.*, it created grounds to challenge the Phase I regulations that were unavailable 120 days after promulgation, the Ninth Circuit had no warrant to determine whether such forest road construction and maintenance was, in fact, "industrial activity" subject to Phase I regulation. Whether such runoff is "associated with industrial activity" subject to Phase I regulation, whether it should be subject to Phase II regulation, or whether it should remain outside the permitting process entirely, are questions for EPA to resolve in the first instance. These questions are not properly resolved in an enforcement action to which EPA is not even a party.

Congress gave EPA broad discretion to determine both whether stormwater discharges are industrial and how best to regulate non-industrial stormwater discharges. *See* 33 U.S.C. § 1342(p). The Ninth Circuit's assertion that silviculture, which is akin to agriculture, is actually an "industrial activity," is far from obvious. *Cf.* Pet. App. 124a n. 19 ("Forestry roads and silvicultural harvesting . . . more closely resemble agricultural land uses than industrial ones."). The operative definition of "storm water discharge associated with industrial activity" applied by EPA in Phase I—referring to discharges from "industrial plants," 40 C.F.R. § 122.26(b)(14)—was not on its face broad enough to reach forest roads used for logging. As amicus in this case, EPA had clarified that even apart from the Silvicultural Rule, it did not believe that forest road maintenance could properly be considered industrial activity. U.S. 1st C.A. Amicus Br. 29-31; Pet. App. 123a-127a. Moreover, the determination that runoff from forest roads, channeled or not, ought not be subject to permitting, had been the agency's view for more than three decades, since promulgation of the Silvicultural Rule itself. Thus, EPA's conclusion that silviculture is more closely allied to agriculture than "industrial activity," is neither plainly erroneous nor inconsistent with the regulation. Quite the contrary, it is intuitively correct and consistent with the historical treatment of silviculture.

Nonetheless, the Ninth Circuit inexplicably ignored EPA's interpretation, holding that roads used to transport logged timber are "industrial," thus imposing its own view of what is industrial activity under the Phase I regulations. *See* Pet. App. 44-47.

Again, the Ninth Circuit lost sight of the fact that this was a citizen suit under 33 U.S.C. § 1365, not a challenge to EPA rulemaking under 33 U.S.C. § 1369, and that these were issues Congress assigned to EPA, not to the courts.

C. The Decision Below Undermines Congressional Limits On Judicial Review Under Various Statutes.

Even beyond the great practical impact of the Ninth Circuit's ruling on the timber industry, the Ninth Circuit's rulings on the judicial review of agency regulations in the context of an enforcement action are important. Many federal statutes limit judicial review of agency rules to suits against the agency in particular venues, subject to specific filing deadlines. *See, e.g.*, 42 U.S.C. § 7607(b) (Clean Air Act: 60 days); 30 U.S.C. § 1276(a)(1) (Surface Mining Control and Reclamation Act (SMCRA): 60 days); 42 U.S.C. § 300j-7(a) (Safe Drinking Water Act: 45 days); 42 U.S.C. § 300aa-32 (National Childhood Vaccine Injury Act: 60 days); 42 U.S.C. § 4915(a) (Noise Control Act: 90 days); 42 U.S.C. § 6976(a)(1) (Resource Conservation and Recovery Act: 90 days). Review provisions such as these are jurisdictional, and courts routinely reject untimely rulemaking challenges filed outside of the statutory review period. *See, e.g.*, *Natural Res. Def. Council v. U.S. E.P.A.*, 571 F.3d 1245, 1265, 1269 (D.C. Cir. 2009) (Clean Air Act); *Nat'l Mining Ass'n v. U.S. Dep't of the Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995) (SMCRA); *Chevron U.S.A., Inc. v. U.S. E.P.A.*, 908 F.2d 468, 471 (9th Cir. 1990) (CWA); *Tex. Mun. Power Agency v. Adm'r of U.S. E.P.A.*, 836 F.2d 1482, 1485 (5th Cir. 1988) (same); *W. Neb. Res. Council v.*

E.P.A., 793 F.2d 194, 198 (8th Cir. 1986) (Safe Drinking Water Act).

By limiting the time and circumstances under which rules may be challenged, Congress "struck a careful balance between the need for administrative finality and the need to provide for subsequent review in the event of unexpected difficulties." *Nat'l Mining Ass'n*, 70 F.3d at 1350; *see also Tex. Mun. Power Agency*, 836 F.2d at 1484 ("These time limitations impart finality to the administrative process, thus conserving administrative resources . . . . The requirements show a congressional decision to impose statutory finality on agency actions that we, as a court, may not second-guess[.]").

The Ninth Circuit's approach to 33 U.S.C. § 1369(b) allows for ready circumvention of statutory limits on judicial review in the CWA and other statutes with similar review provisions. Regulations that have been interpreted and applied consistently by agencies for decades, as announced at the time of promulgation, may nevertheless be challenged based on claims that the regulations were, all along, inconsistent with statutory authority. Indeed, that inconsistency can be used to drive a finding that the regulation is somehow ambiguous. Yet, it was clearly Congress's intent that all available challenges to rules be presented in an action against the agency near the time of promulgation. Any other result would effectively leave rules—here, a rule that has been consistently applied for more than three decades—perpetually open to judicial review as inconsistent with the governing statute.

The requirement that a rulemaking challenge be timely presented in a suit against the promulgating agency addresses more than finality. Such challenges must be mounted against the agency, which is thereby given a full and fair chance to defend its views. Such challenges, where the agency is the named defendant, allow for binding nationwide uniform determinations about the validity of agency rules. Moreover, other interested parties have the opportunity to contribute to the defense of (or the assault on) the rule. By contrast, collateral citizen suit attacks on agency regulations risk inconsistent and piecemeal litigation and determinations, and uncertainty as to effect of judicial decisions on the agency and non-parties.

Even apart from timing and venue requirements, the Ninth Circuit's decision to allow a citizen enforcement action to become the vehicle for issuing pronouncements that preempt an agency's authority to consider an issue plainly entrusted to its discretion is inconsistent with basic principles of administrative law, *see Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735, 740-41 (1996), and subverts the jurisdictional direction that rulemaking is to be reviewed in the courts of appeals through 33 U.S.C. § 1369(b). In this case of great practical importance, this Court should resolve the questions presented on the permissible scope of judicial review of agency rules in an enforcement action.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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