Nos. 11-338, 11-347

In The Supreme Court of the United States

DOUG DECKER, the Oregon State Forester, in his official capacity, *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

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

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

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

AMICUS CURIAE BRIEF OF THE STATES OF ARKANSAS, *ET AL.* IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

For over three decades, federal and state agencies, courts and private parties have understood the Environmental Protection Agency's Silvicultural Rule – 40 C.F.R. § 122.27 – to exempt stormwater runoff from forest roads from the Rule's requirement of a National Pollutant Discharge Elimination System ("NPDES") Permit, regardless of whether that stormwater is collected via man-made ditches or culverts. While the amici curiae states agree that stormwater runoff should be managed to minimize the amount of sediment delivered to a state's waters during storm events, Congress recognized that such potential water pollution resulting from non-point source activities is best regulated at a local level. In that vein, 33 U.S.C. § 1329 requires states to develop management programs for non-point source pollution and report to EPA on the best management practices ("BMPs") that are being used to reduce water pollution from non-point sources, such as forest roads. *See generally* 33 U.S.C. § 1329. The amici curiae states have followed Congressional and EPA's directives, and have worked to ensure individuals and companies who conduct timber harvesting to implement BMPs for forest road construction and maintenance in order to protect water quality and wildlife. The Ninth Circuit's decision effectively invalidates EPA's Silvicultural Rule

[1] In accordance with Rule 37.2 the State of Arkansas provided notice to all counsel of record for all parties on October 3, 2011, which is more than 10 days before filing.

by determining that stormwater runoff collected in ditches and culverts is a point source of pollution, rather than a non-point source of pollution. Compounding the problem, the Ninth Circuit further ruled that timber harvesting constitutes an "industrial activity" under Phase I of the EPA's stormwater permit program, and the roads that are a necessary component of timber harvests requires National Pollution Discharge Elimination ("NPDES") permits. Because this decision fundamentally impacts existing state programs, amici urge this Court to grant certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Congress enacted the Clean Water Act ("CWA") in 1972. The CWA provided EPA with the authority to implement a consistent program throughout the U.S. designed to protect the waters of the nation from pollution. *See*, *e.g.*, *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (CWA's objective was "authorizing EPA to create and manage a uniform system of interstate water pollution regulation."). Prior to the enactment of the CWA, protection of the waters was handled by individual states. *See* S. Rep. No. 92-414, 1-11 (1971).

The CWA's cornerstone is a permitting requirement for "point source" discharges, *i.e.*, discharges of pollutants through "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete

fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft * * * ." 33 U.S.C. § 1362(14). This permitting program is the National Pollutant Discharge Elimination System (NPDES) permitting program.

EPA promulgated rules to implement the NPDES permitting program, including rules clarifying when permits were and were not required. One of these rules is known as the Silvicultural Rule. The Silvicultural Rule states:

> (a) *Permit requirement*. Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program.
>
> (b) *Definitions*.
>
> (1) *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. *The term does not include non-point source silvicultural activities* such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, *surface drainage, or road construction and maintenance from which there is natural runoff*. However, some of these activities (such as stream crossing for roads) may involve point source discharges

> of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233) (emphasis added).

40 C.F.R. § 122.27. EPA has consistently maintained that, pursuant to this rule, "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 [point source] permit program" 41 Fed. Reg. 6,282 (Feb. 12, 1976). State agencies charged with implementing the CWA have followed EPA's lead, and the clear language of the Silvicultural Rule, and have managed runoff from timber harvest roads as non-point sources of pollution. This Court should grant certiorari because EPA's longstanding position that timber harvest roads are a source of non-point source pollution is correct and consistent with the mandates of the CWA, should be given deference, and should not have been overturned by the Ninth Circuit.

2. Congress recognized that runoff from timber harvesting operations and forest roads, if improperly managed, can result in a significant degradation of water quality. Congress also recognized that management of non-point source activities is best handled by state and local government. To address the issue of non-point source runoff, Congress enacted 33 U.S.C. § 1329. This law requires amici states to develop best management practices and programs for non-point source pollution, report to EPA the BMPs that are being utilized within a state to reduce, and in some instances eliminate, water pollution from non-point

sources. *See*, 33 U.S.C. § 1329. Amici states urge this Court to grant certiorari because the Ninth Circuit's decision effectively rescinds the authority granted to the states by Congress' passage of 33 U.S.C. § 1329, and rescinds the best management programs adopted and tailored by each individual state in favor of the CWA's NPDES permit program.

3. EPA's approach that channeled precipitation from forest management and timber harvesting roads should be managed as a non-point source of pollution has been consistently upheld by other courts. This Court should grant certiorari because the Ninth Circuit is at odds with the decisions of other circuits and threatens the consistent interpretation upon which EPA, the states, and the forest industry have relied since the inception of the CWA.

ARGUMENT

A. The Ninth Circuit Failed To Defer To EPA's Reasonable Interpretation Of The Clean Water Act

1. The Silvicultural Rule

The Ninth Circuit's refusal to defer to the EPA's Silvicultural Rule violates what is commonly known as the *Chevron* deference rule. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Under *Chevron*, if "Congress has directly spoken to the precise question at issue," the agency must effectuate Congress' express intent. *Id.* at 842. *See United States*

v. Mead Corp., 533 U.S. 218, 226-227 (2001). And if a statute is "silent or ambiguous with respect to the specific issue," a court should defer to the agency's interpretation if that interpretation is reasonable. *Chevron*, 467 U.S. at 843. *See*, *e.g.*, *Auer v. Robbins*, 519 U.S. 452, 461 (1997). In this instance, Congress *has* spoken to the issue of channeled runoff from forest roads – and EPA's Silvicultural Rule implements that congressional intent. At the very least, EPA's rule is a reasonable interpretation of the CWA.

In the CWA Congress defined the term "point source" to exclude "agricultural stormwater discharges." CWA § 502(14), 33 U.S.C. § 1362(14). Silviculture, the growing and harvesting of trees, is an agricultural practice. John Gifford, *Practical Forestry* 12 (1907). Consistent with the fact that silviculture is an agricultural practice Congress has directed EPA to develop BMPs to control "to the extent feasible" the "agriculturally and silviculturally related nonpoint sources of pollution." 33 U.S.C. § 1288(b)(2)(F). Despite this clear legislative directive, the Ninth Circuit overturned Congress' intent by holding that timber harvesting is an "industrial activity." *See* slip Pet. App. 42a.[2]

The Ninth Circuit's error in ignoring the CWA's exemption that applies to agricultural stormwater discharges was magnified when it analyzed the two

[2] Cited to Petitioner, Georgia-Pacific West, Inc. *et al*. Appendix.

rules at issue in this case – EPA's 1976 Silvicultural Rule and EPA's Phase I 1990 stormwater regulations. If there was any debate or ambiguity regarding whether precipitation from forestry roads, whether channeled or not, constitutes a non-point source of pollution, or whether timber harvesting is an industrial activity under the CWA, it was removed by the promulgation of the Silvicultural Rule and EPA's Phase I stormwater regulations.

EPA's Silvicultural Rule clearly and unambiguously defines "surface drainage, or road construction and maintenance" as a "non-point source" of pollution. 40 C.F.R. § 122.27. EPA has repeatedly explained the basis for its interpretation that forest road construction and maintenance constitutes a non-point source of pollution. Contemporaneous with the promulgation of the Silvicultural Rule, EPA stated that runoff from forestry road construction and maintenance is from "natural processes, including precipitation," and these natural processes are "better controlled" through the use of best management practices. 41 Fed. Reg. 24,710 (June 18, 1976). EPA stated that ditches, pipes and drains that serve only to channel, direct and convey non-point source runoff from precipitation are "not meant to be subject" to the NPDES program. 41 Fed. Reg. 6,282 (Feb. 12, 1976). Finally, EPA contemporaneously opined with the promulgation of the Silvicultural Rule in 1976 that stormwater runoff from forestry road construction and maintenance has more of the characteristics "of nonpoint source pollution." 41 Fed. Reg. 24,711 (June 18, 1976).

In order to cast aside EPA's analysis that channeled runoff from forestry road construction and maintenance is a non-point source of pollution, the Ninth Circuit relied on its decision in *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002). However, a close reading of the *Forsgren* decision reveals that it actually supports the long-standing interpretation of the Silviculture Rule from which the Ninth Circuit now departs. The issue in *Forsgren* was whether spraying insecticide from an aircraft constituted point source pollution or non-point source pollution. The United States Forest Service maintained that aerial spraying was a non-point source of pollution, and relied on the Silvicultural Rule and informal correspondence and guidance from EPA to buttress this position. The Ninth Circuit concluded that the Silvicultural Rule excluded the non-point source activities listed in the rule when natural runoff was present, "whereas the spraying involved here is not a non-point source activity at all." 309 F.3d at 1186. The Ninth Circuit then reviewed the two one-paragraph letters written by EPA, and a brief passage in an EPA guidance document that the Forest Service maintained indicated EPA's intent that an NPDES permit was not required for aerial spraying. According to the Ninth Circuit, "these post hoc informal documents provide no rebuttal to the contemporaneous explanation of the regulation published through notice and comment rule making in the Federal Register." *Id.* at 1190.

Unlike informal EPA letters and a guidance document, which were rejected by the Ninth Circuit as

unpersuasive in *Forsgren*, in this case the Ninth Circuit *had* contemporaneous EPA explanations concurrent with the passage of the 1976 Silvicultural Rule and published in the Federal Register. These contemporaneous explanations, as detailed in the amicus brief filed by EPA in this case below, demonstrate that EPA's position was – and always has been – stormwater runoff from channeled forestry road construction and maintenance is a non-point source of pollution. Nonetheless, the Ninth Circuit gave no credence, nor deference, to EPA's explanations published in the Federal Register during the passage of 40 C.F.R. § 122.27. In doing so, the Ninth Circuit's decision also runs afoul of the second step of this Court's *Chevron* analysis. Completely rejecting EPA's reasoned and contemporaneous explanations that forestry road construction and maintenance is a non-point source of pollution, the Ninth Circuit impermissibly rewrote EPA's Silvicultural Rule by espousing a completely new test, unsupported by any legislative intent or regulatory interpretation and unrecognized by any court. According to the Ninth Circuit, with respect to forest roads, the Silvicultural Rule's definition of a non-point source of pollution is limited to solely non-channeled, 'natural runoff.' *See* Pet. App. 32a. The Ninth Circuit's flawed interpretation of the Silvicultural Rule directly conflicts with EPA's contemporaneously stated view published in the Federal Register, and effectively nullifies the Silvicultural Rule in violation of *Chevron*.

2. The 1987 Stormwater Amendments

In 1987, Congress amended 33 U.S.C. § 1342(p) to address the problems associated with stormwater discharges. Congress directed EPA to require permits for five categories of stormwater discharges in Phase I of the program, including those stormwater discharges associated with "industrial activity." *See* 33 U.S.C. § 1342(p)(1)-(3). EPA promulgated its Phase I regulations in 1990, and defined discharges associated with industrial activity to include only those discharges directly related to manufacturing, processing or raw materials storage areas "at an industrial plant." *See* 55 Fed. Reg. at 48,011 (November 16, 1990). Forestry roads, even if channeled, cannot reasonably be considered industrial plants.

When it promulgated its Phase I regulations, EPA referenced Standard Industrial Classification ("SIC") 24. This regulation provides that facilities classified as SIC 24 are among those "considered to be engaging in industrial activity". *See* 40 C.F.R. § 122.26(b)(14)(ii). EPA explained in the Federal Register that the reference to SIC 24 in the Phase I rule was *not* intended to classify silvicultural practices and forestry roads as industrial sources. *See* 55 Fed. Reg. at 48,088 (November 16, 1990) (explaining that establishments under SIC code 24 "are engaged in operating sawmills, planning mills and other mills in producing lumber"). Despite the numerous contemporaneous explanations of EPA in the Federal Register that its reference to SIC 24 was not intended to include silvicultural activities and precipitation runoff

from forestry roads, and that timber harvesting and forestry roads were not intended to be included within the definition of "industrial," the Ninth Circuit reached a conclusion directly in conflict with EPA and ruled that forestry roads used to transport timber are "industrial" roads, and the transport of timber on forestry roads is an industrial activity. *See* 55 Fed. Reg. at 48,008-48,011 (November 16, 1990); *See* Pet. App. 35a-42a.

EPA's reasoned and logical assessment that surface drainage from forestry road construction and maintenance constitute non-point sources of pollution and that silviculture is not an industrial activity has not wavered for the last thirty-five years, despite the fact that Congress has amended the CWA a number of times since it original passage in 1972. This Court has stated repeatedly that when "Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 846 (1986).

The Ninth Circuit's defiance of *Chevron* warrants this Court's review.

B. The Ninth Circuit's Decision Raises An Issue Of Exceptional Importance Warranting Review Because Of The Impact It Will Have On Existing State BMP Programs

Forestry activities generally involve numerous small operations occurring sporadically over large amounts of space and long periods of time. Complicating the situation is the fact that different forests, even those in close proximity with one another, may have very different characteristics in terms of topography, tree species, soil types, wildlife habitat, geology and hydrology. In order to be effective, the approach to protecting the environment from forestry activities must be adapted to local conditions and circumstances. Congress recognized the fact that non-point pollution is unique to each state when it added section 319 to the CWA in 1987. *See* 33 U.S.C. § 1329. Section 319 required states to develop plans for any non-point source activities that are causing a state's water to fall short of the state's respective water quality goals. See 33 U.S.C. § 1329. Together, sections 218 and 319 authorize the states to obtain federal funding to manage non-point source pollution, with oversight from EPA. 33 U.S.C. §§ 1298 & 1329.

Forestry practices in the United States are now conducted under the most comprehensive program of BMPs of any land use activity in the nation. Some

amici states employ mandatory[3] BMPs administered by state foresters or forest practice boards or commissions. National Council for Air and Stream Improvement, Inc., *Compendium of forestry best management practices for controlling nonpoint source pollution in North America*, Technical Bulletin No. 966 (2009). Other amici states employ non-regulatory BMPs[4] that are developed or approved by state agencies, with landowner education to encourage compliance, and authority for agencies to take action against landowners who do not comply. *See*, *e.g.*, Florida Division of Agriculture and Consumer Services, *Silvicultural Best Management Practices* (2008). BMPs vary among amici states for good reason. A BMP that is appropriate for a coastal pine forest in Georgia may be wholly inadequate for a temperate rainforest in Oregon, or an Ozark mountain forest in Arkansas. But while individual BMPs may vary, the single goal of protecting the waters of the nation is served in consistent fashion. Indeed, in order to advance the laudatory goals of the CWA, the BMPs must, of necessity, be designed in response to local conditions.

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[3] These sign-on states have mandatory BMP programs: Alaska Code 41.17.055(d) and the implementing regulation is 11 AAC 95.295; Idaho Code §§ 38-1301 *et seq.*; Kentucky KRS 149.344; New Hampshire.

[4] These sign-on states have non-regulatory BMP programs: Arkansas, Alabama, Florida, Georgia, Maine, Michigan, South Carolina, Tennessee, Virginia, Wyoming.

In spite of their variations, amici states' BMPs share a number of attributes because each state's BMPs are based upon a common set of science-based principles. National Council for Air and Stream Improvement, Inc. *Compendium of forestry best management practices for controlling nonpoint source pollution in North America*, Technical Bulletin No. 966 (2009). BMPs will generally be designed to 1) minimize soil compaction; 2) separate exposed soils from surface waters; 3) separate fertilizer and herbicide application from surface waters; 4) inhibit hydraulic connections between bare ground and surface waters; 5) provide forested buffers around watercourses; and 6) properly plan, locate, and design roads to have a minimal impact on soil erosion and water quality. R. Olszewski & C.R. Jackson, *Best Management Practices and Water Quality*, National Council for Air and Stream Improvement, Inc. (2006).

Regardless of each state's chosen approach, BMPs and non-point source pollution prevention programs implemented by amici states are subject to EPA oversight and approval. *See* 33 U.S.C. § 1329. States whose water quality inventories fail to demonstrate continued improvement over time are subject to closer scrutiny and review by EPA, and poor performance can result in grant funding reductions. In short, BMPs have become an accepted, well-understood, documented, approved and successful method of protecting water quality in the United States, and in particular, in the nation's forests.

There are hundreds of millions of privately and publicly owned acres of forest land in the United States, with millions of miles of forest roads having some form of water conveyance, or channeling, associated with them that are currently managed by amici states BMP programs. A timber harvest does not occur overnight. Each site designated for timber harvesting and reforestation is the culmination of several years of multiple resource assessment and detailed project planning. Over the last three decades each amici state has expended thousands of hours and millions of dollars developing and implementing their respective BMP programs. The states' BMP programs have been developed by certified silviculturists, and these individuals meet certain standards of professional knowledge, skills and experience in multiple-use silviculture activities. In order to meet EPA standards, amici states provide training and certification in soils and watershed management, and while these individual BMP specialists are knowledgeable regarding the practices and procedures necessary to comply with sections 218 and 319 of the CWA, they are completely unfamiliar with the requirements of the CWA's NPDES program. If the Ninth Circuit decision in this case is not reviewed by this Court, the states established BMP programs will be jettisoned in favor of NPDES permits. These BMP professionals will likely be forced to learn a new discipline in order to comply with NPDES permit requirements.

Moreover, if the Ninth Circuit decision is not addressed by this Court, a blizzard of NPDES permit

applications will, out of necessity, be filed. Amici states are justifiably alarmed regarding the resulting tumult at the state level if hundreds of thousands of applications for new NPDES permits related to forest roads are filed within a short time frame. Furthermore, the Ninth Circuit's decision that channeled forestry roads require NPDES permits could not have come at a more inopportune time. While amici states are being tasked with an ever growing list of EPA initiatives, the supporting flow of federal and state dollars to keep up with these new government initiatives continues to diminish. *EPA FY 2012 Budget Hearing Before the Senate Interior, Environment and Related Agencies Subcommittee*, 112th Cong. (2011). Amici states have legitimate concerns about the overwhelming number of regulations they are facing from new EPA initiatives that are far outstripping the financial support received from EPA for implementation.

Forestry BMPs have been highly successful in controlling non-point source pollution from forest operations and roads for decades. National Water Quality inventories conducted by EPA demonstrate that stormwater runoff associated with urban areas, storm sewer discharges, and pollutants deposited from the atmosphere are more significant contributors of non-point source pollution than forestry activities and forestry roads. United States Environmental Protection Agency, *National Management Measures to Control Nonpoint Source Pollution from Forestry*, Pub. No. EPA-841-B-05-001, at page 1-1 (April 2005).

The Ninth Circuit's decision is tantamount to yet another unfunded mandate, by replacing amici states' long-standing and effective BMP programs with more complex and regulatory resource-intensive NPDES permits. Eventually, no state will be able to meet all of these new mandates when federal and state budgets are consistently reduced year after year, and the number of new EPA rules and programs to be implemented continues to increase year after year. Amici states, EPA, state agencies, and the forestry community have found the state-based system of BMPs to be workable and effective. Amici states, forest landowners small and large, and the forestry professional on the ground have over three decades of effort invested in the BMP programs. By discarding EPA's long-standing construction of the CWA and Silvicultural Rule that forestry roads are sources of non-point source pollution and that the harvesting of trees is not an industrial activity requiring an NPDES permit for channeled runoff, the Ninth Circuit has jeopardized the continued viability of amici states' BMP programs.

It is for these reasons that amici states urge this Court to grant certiorari.

C. The Ninth Circuit's Decision Creates A Conflict

This Court should grant the Petitions for Writ of Certiorari because the decision by the Ninth Circuit creates a conflict. When there is a split of opinion between circuits as to interpretation of a regulation or

statute, it creates legal uncertainty and confusion for the regulatory agencies as well as the regulated community.

EPA's Silvicultural Rule, found at 40 C.F.R. § 122.27, clearly distinguishes between silvicultural activities that are point source, and thus require NPDES permits, and those that are non-point source and do not require a NPDES permit. The rule states "The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, *or road construction and maintenance* from which there is natural runoff." 40 C.F.R. § 122.27(b) (emphasis added). The language in this rule is clear and unambiguous. It has been reviewed by many courts and has been followed nationwide; even in the Ninth Circuit until this decision.

The Ninth Circuit's decision directly conflicts with the Eighth Circuit's decision in *Newton County Wildlife Association v. Rogers*, 141 F.3d 803 (8th Cir. 1998). In the *Newton* case an environmental group sued the U.S. Forest Service advancing several claims regarding a sale of timber, one of which was that the Forest Service should be required to obtain a NPDES permit for discharges of pollutants associated with logging and road construction. The Eighth Circuit decided these "contentions are without merit." *Id.* at 810. In the *Newton* case the Eighth Circuit stated: "EPA regulations do not include the logging and road

building activities cited by the Wildlife Association in the narrow list of silvicultural activities that are point sources requiring NPDES permits." *Id.*

The Ninth Circuit decision runs contrary to all then-existing judicial interpretations of the Silviculture Rule. *See*, *e.g.*, *Sierra Club v. Martin*, 71 F.Supp.2d 1268 (N.D. Georgia 1996). In this case various environmental groups sued claiming that a sale of timber would create a large amount of discharge to waters of the United States and that the U.S. Forest Service should have obtained a NPDES permit. The Court stated: "Because none of the discharges about which Plaintiffs complain relates to rock crushing, gravel washing, log sorting, or log storage facilities, they are 'non-point' sources for purposes of the Clean Water Act and do not require an NPDES permit." *Id.* at 1305. The Court reached this conclusion after a review of the CWA in which the Court found "the legislative history and the implementing regulation of the Clean Water Act show that Congress and the Environmental Protection Agency intended to exempt most silvicultural activities from the Clean Water Acts permit requirements." *Id.* The Court then went a step further and examined specifically the complaint of Plaintiffs that most of the discharge would result from logging road construction. The Plaintiffs argued "the runoff from the logging roads in issue will cause 'unnatural' as opposed to 'natural' runoff and, thus, becomes a point source for purposes of the Clean Water Act." *Id.* at 1306. The Court reasoned that "reading the exemption for road construction and

maintenance as narrowly as Plaintiffs urge would run counter to the EPA's intent to exclude timber harvesting and road construction and maintenance and to limit the Clean Water Act's permit requirements to only a few silvicultural activities." *Id*.

In *Waltman v. King William County School Board*, 2010 EL 10006889 (E.D. Virginia 2010), the court recognized that not all stormwater needs a permit. There the Plaintiff claimed that the School Board discharged pollutants onto her property and did not obtain a NPDES permit. The Court ruled: "the Clean Water Act does not require the EPA to regulate all stormwater discharges, nor does it require EPA to use NPDES permits to regulate those discharges EPA does designate for regulation." *Id.* at 3 (*citing Conservation Law Foundation v. Hannaford Bros. Co.*, 327 F.Supp.2d 325, 331 (D. Vermont 2004). These cases are just a few examples of how the Silvicultural Rule has been interpreted by courts. The Ninth Circuit purports to recraft the heretofore unambiguous definition of non-point source in the Silvicultural Rule and in doing so has disregarded the plain language of the CWA, the plain language of the Silvicultural Rule, EPA's original and consistent interpretation of the rule, and every existing judicial interpretation.

Congress did not intend for the CWA to result in a patchwork of uneven regulation due to inconsistent interpretations by the Courts. Amici states are convinced that a denial of certiorari by this Court will result in environmental groups being emboldened to file future citizen suits under the CWA in an effort to

extend the reach of the Ninth Circuit's decision in this case into other circuits. This Court should grant the Petition for Writ of Certiorari to restore the proper, and appropriately deferential, interpretation and application of the Silvicultural Rule of the CWA.

CONCLUSION

Based upon the above stated arguments, the amici states respectfully request that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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