No. 11-338

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.

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

REPLY BRIEF

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REPLY BRIEF

Pursuant to Supreme Court Rule 15.6, petitioners submit this reply brief to respond to new points raised in Respondent's Brief in Opposition.

A. The jurisdictional issue is properly presented for this Court's review.

Petitioners ask this Court to grant certiorari because the Ninth Circuit's jurisdictional ruling conflicts with other circuits' rulings and undermines the Clean Water Act's (CWA's) objective of establishing a uniform scheme for protecting the nation's waters. Instead of contesting those points, respondent argues that certiorari is not warranted because, in its view, the jurisdictional issue is not properly presented in this case. (Opp. 2, 19-26). Specifically, respondent contends that (1) petitioners waived their ability to challenge the Ninth Circuit's jurisdiction; and (2) the Ninth Circuit did not, in fact, invalidate the challenged rules but, instead, merely interpreted them. (Opp. 19-26). Respondent is wrong on both accounts.

1. Petitioners did not waive the jurisdictional issue.

Regarding respondent's waiver argument, this Court long has recognized that issues of jurisdiction can be raised at any time. *Henderson v. Shinseki*, 562 U.S. __, 131 S. Ct. 1197, 1202, 179 L. Ed. 2d 159 (2011); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004); *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884). A party may challenge jurisdiction for the first time on appeal, "even initially at the highest appellate instance." *Kontrick*, 540 U.S.

at 455; *see also Mansfield*, 111 U.S. at 382. "Indeed, a party may raise such an objection even if the party had previously acknowledged the trial court's jurisdiction." *Henderson*, 131 S. Ct. at 1202. *Hoover v. Ronwin* is not to the contrary. (*See* Opp. 20). There, this Court held, unremarkably, that a party waived a substantive, non-jurisdictional, constitutional claim when the party raised it for the first time in a response to a rehearing petition in circuit court. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984).

Moreover, even if jurisdictional issues could be waived, petitioners did not waive the issue here. The parties fully litigated it below, once it became apparent that the Ninth Circuit's resolution of the case exceeded its citizen-suit jurisdiction. The court requested the parties to answer two questions about jurisdiction during the rehearing process, when it recognized that its resolution of the case called its jurisdiction into question.[1] In response to those questions, the parties briefed the jurisdictional issue, and the

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[1] The questions posed by the court were:

> 1. Can a suit challenging EPA's interpretation of its regulation implementing the Clean Water Act's permitting requirements be brought under the Act's citizen suit provision, 33 U.S.C. § 1365(a)? 2. Must a suit challenging EPA's decision to exempt the discharge of a pollutant from the Clean Water Act's permitting requirements be brought under the Act's agency review provision, 33 U.S.C. § 1369(b)?

(Order, October 21, 2010; *see also* Order, October 22, 2010 (authorizing joint reply brief by petitioners)).

court resolved it. (Plaintiff-Appellant's Opposition to the Petitions for Rehearing and Rehearing En Banc 2-8; Appellees' Joint Reply in Support of Petition for Panel Rehearing or Rehearing En Banc 3-15; Pet. App. 8-10). Under those circumstances, it was not waived.

2. The Ninth Circuit invalidated EPA's rules.

Respondent also contends that the jurisdictional issue is not presented because, in its view, the Ninth Circuit merely interpreted EPA's rules, but did not invalidate them. (Opp. 19-26). Although "no precise line runs between a purposeful but permissible reading of the regulation adopted to bring it into harmony with the Court of Appeals's view of the statute, and a determination that the regulation as written is invalid," the Ninth Circuit plainly crossed that line from interpretation to invalidation in this case. *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007).

In ruling on its jurisdiction, the court recognized that it was invalidating EPA's regulations. The court acknowledged that respondent's claim—which alleged that EPA's regulations, as interpreted by EPA, conflicted with the CWA—was the type of challenge that had to be brought under 33 U.S.C. § 1369. It also acknowledged that such a challenge ordinarily could not be brought in a citizen suit. (Pet. App. 9-10). The court nonetheless ruled that it had jurisdiction to review the challenge because, in its view, "[t]he basis for [respondent's] challenge to the Silvicultural Rule arose more than 120 days after the promulgation of the rule" and, as a result, "this case comes within the exception in § 1369(b)(1) for suits based on grounds

arising after the 120-day filing window."[2] (Pet. App. 9-10). Had the court thought that it was interpreting the rules, rather than invalidating them, it would not have explained why its resolution of the case fell within what it believed to be an exception to the jurisdictional bar on invalidating EPA regulations in citizen suits. Instead, the court simply would have said that it was not invalidating the rules.

Moreover, statements throughout the Ninth Circuit's opinion demonstrate that the court invalidated EPA's rules. The court acknowledged that the silvicultural rule reasonably can be interpreted as EPA reads it, and that EPA's interpretation "reflects the intent of EPA in adopting the Rule." But the court nevertheless concluded that the rule, so interpreted, "is inconsistent with § 502(14) and is, to that extent, invalid." (Pet. App. 36-37). The court also characterized its decision regarding the silvicultural rule as consistent with other federal courts' decisions invalidating EPA regulations: "in cases where Congress has not provided statutory exemptions from the definition of point source, federal courts have invalidated EPA regulations that categorically exempt discharges included in the definition of point source discharge contained in § 502(14)." (Pet. App. 50). It then cited a

[2] Petitioners seek to challenge this ruling. As explained in the petition, if the grounds for respondent's challenge to EPA's regulations did not arise within the 120-day filing window, respondent's recourse was to initiate a proceeding under 33 U.S.C. § 1369 when those grounds arose. (Pet. 21 n.6).

long list of cases invalidating EPA regulations. (Pet. App. 50-51).

And, in analyzing the stormwater rule, the court invalidated the second sentence of 40 C.F.R. § 122.26(b)(14). That sentence states that "The term [stormwater discharge associated with industrial activity] does not include discharges from facilities or activities excluded from the NPDES program under this part 122." 40 C.F.R. § 122.26(b)(14). The court acknowledged that the text of that sentence, and the preamble to the Phase I stormwater rule, "make[] clear" EPA's intent "to exempt from the definition of 'discharges associated with industrial activity' any activity that is defined as a nonpoint source in the Silvicultural Rule." (Pet. App. 43-44). Yet the court declined to give effect to that sentence, based upon its view that "[t]he reference to the Silvicultural Rule in 40 C.F.R. § 122.26(b)(14) does not, indeed cannot, exempt such discharges from EPA's Phase I regulations requiring permits for discharges 'associated with industrial activity.'" (Pet. App. 47-48).

In addition, cases from this Court and lower courts confirm that respondent's challenge is a substantive challenge to the validity of EPA's regulations. Respondent argued below, and continues to argue to this Court, that the rules, as interpreted by EPA, conflict with the CWA. (Opp. 30-33; Plaintiff-Appellant's Opening Br. 52-53; Plaintiff-Appellant's Reply Br. 2-4, 15-21, 33-35). That type of challenge *is* a challenge to the validity of the rules, not to their interpretation. *Legal Envtl. Assistance Found., Inc. v. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997) (assertion that EPA's

regulations "as interpreted by EPA, are invalid because they are inconsistent with the [authorizing statute] constitutes a substantive challenge to these regulations"); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14, 418-19 (1945) (explaining difference between interpreting rule and assessing "statutory validity of the regulation" as construed by promulgating agency).

Finally, even if there is a question as to whether the Ninth Circuit merely interpreted EPA's rules, or instead invalidated them, the existence of that question favors the grant of the petition for certiorari. This Court's decision in *Duke Energy*, the Ninth Circuit's resolution of this case, and the parties' current arguments illustrate that lower courts and litigants need guidance as to when a court's act of reinterpreting an agency's rule for the purpose of salvaging its statutory validity crosses the line from interpretation to invalidation. The facts of this case present an ideal vehicle in which to explore that issue, given the relative clarity of the rules at issue, the clarity of EPA's interpretation of those rules, and the Ninth Circuit's unqualified decision to reject EPA's interpretation of those rules, notwithstanding the court's explicit recognition that the rules are susceptible to the reading that EPA gives them.

In short, the jurisdictional question raised by petitioners is properly presented in this case. Therefore, for the reasons stated in the petition, this Court should allow certiorari.

B. *Duke Energy* confirms that the jurisdictional issue warrants certiorari in this case.

Respondent next argues that *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007) weighs against granting the petition for certiorari on the jurisdictional issue. (Opp. 20-24). But, if anything, *Duke Energy* confirms that certiorari is warranted in this case to address the serious issues presented in that Clean Air Act (CAA) case in the context of this CWA case.

In *Duke Energy*—a CAA enforcement action—the Fourth Circuit confronted a challenge asserting that certain EPA regulations implementing the CAA, as interpreted by EPA, conflicted with the CAA. *Duke Energy*, 549 U.S. at 566, 572-74. The Fourth Circuit resolved that challenge by rejecting EPA's otherwise reasonable interpretation of its regulations, and by re-interpreting the regulations to conform them to the court's view of the CAA's requirements. *Id.* at 573.

On certiorari, this Court vacated the Fourth Circuit's opinion, concluding that the court erred in two respects in its resolution of the challenge to EPA's regulations. *Id.* at 566, 581. First, this Court concluded that the Fourth Circuit erred when it failed to recognize that it had invalidated those regulations by holding that EPA's otherwise reasonable interpretation of them conflicted with the CAA. As a result of that failure, the court erroneously disregarded the CAA's limitations on review of challenges to the validity of EPA regulations in enforcement actions. *Id.* at 566, 573-76, 581. Second, this Court held that the Fourth Circuit's alternative savings construction of

EPA's regulations could not be squared with the words of the regulations, and thus was affirmatively wrong. *Id.* at 566, 577-80. This Court remanded for the Fourth Circuit to re-evaluate the case in light of this Court's decision and the CAA's limitations on challenges to the validity of CAA regulations in enforcement actions. *Id.* at 581.

The Ninth Circuit's errors in this case parallel the Fourth Circuit's errors in *Duke Energy*. Like the Fourth Circuit, the Ninth Circuit invalidated EPA regulations in an enforcement action, notwithstanding jurisdictional limitations on its ability to do so. Although, unlike the Fourth Circuit, the Ninth Circuit affirmatively recognized the applicable jurisdictional limitations, it ultimately did not adhere to them. And like the Fourth Circuit, the Ninth Circuit has interpreted an EPA regulation in a manner that affirmatively conflicts with its terms. To interpret the stormwater rule in the manner that it did, the Ninth Circuit had to excise the second sentence of 40 C.F.R. § 122.26(b)(14) from the rule, giving it no effect. An interpretation of a rule that requires a court to disregard an entire sentence is an interpretation that conflicts with the rule's terms.

The errors at issue in *Duke Energy* were worthy of certiorari in that CAA case. Therefore, the Ninth Circuit's parallel missteps in this CWA case likewise warrant this Court's review.

C. The Ninth Circuit's decision conflicts with this Court's established methodology for construing administrative rules.

Respondent disputes that the Ninth Circuit's decision to interpret the stormwater rule to include stormwater discharges from logging roads within the definition of "stormwater discharge[s] associated with industrial activity" is inconsistent with this Court's precedent. (Opp. 26-33). Again, respondent is wrong.

The proper application of this Court's rule-interpretation methodology to the stormwater rule is straightforward. Respondent alleges that stormwater discharges from roads used for "maintaining and hauling timber" are stormwater discharges "associated with industrial activity" under 40 C.F.R. § 122.26(b)(14) that therefore require a Phase I NPDES permit. (First Amended Complaint ¶¶ 69-76; E.R. 18-20). The question for a reviewing court is thus "Is a stormwater discharge from a road used for the logging activities of timber maintenance and hauling a 'discharge associated with industrial activity' under the Phase I stormwater rule?" To answer that question, a reviewing court must look to the promulgating agency's interpretation of the rule. *Seminole Rock*, 325 U.S. at 413-14 (in construing administrative regulation, "ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.").

Here, EPA interprets its Phase I stormwater rule to exclude stormwater discharges from logging roads from the definition of "stormwater discharge[s] asso-

ciated with industrial activity." (United States Amicus Curiae Br. 8, 31, November 17, 2007; explaining that the only silvicultural stormwater discharges considered to be "discharge[s] associated with industrial activity" are stormwater discharges from "rock crushing, gravel washing, log sorting and log storage facilities", and that "logging and timber hauling [are] not industrial activities under this definition"). That interpretation of the stormwater rule is reasonable. The Ninth Circuit acknowledged as much. It observed that EPA's intent "to exempt from the definition of 'discharges associated with industrial activity' any activity that is defined as a nonpoint source in the Silvicultural Rule" is clear from the text and history of the rule. (Pet. App. 43-44).

Because EPA's interpretation of the stormwater rule is reasonable, this Court's precedent required the Ninth Circuit to accept it and enforce the rule as interpreted by EPA. *Seminole Rock*, 325 U.S. at 413-14. That court's failure to do so warrants this Court's review.

D. The Ninth Circuit's decision conflicts with *Chevron*.

Respondent does not seriously dispute that *Chevron U. S. A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires a reviewing court to accept EPA's reasonable determinations about what activities constitute "industrial activit[ies]" under 33 U.S.C. § 1342(p). (Opp. 32). Respondent also does not dispute that Congress delegated to EPA the responsibility to determine what activities were and were not industrial activities for

purposes of 33 U.S.C. § 1342(p). (Opp. 32). Instead, respondent asserts that the Ninth Circuit was not required to review EPA's determination of what activities qualify as industrial activities under the *Chevron* framework because (1) in respondent's view, EPA did not present a construction of the term "industrial activity" in the CWA; and (2) EPA did not argue that it was entitled to *Chevron* deference. (Opp. 32). Those contentions provide no basis for denying the petition for certiorari.

Here, the issue before the Ninth Circuit was whether stormwater discharges from logging roads were stormwater discharges "associated with industrial activity" under 33 U.S.C. § 1342(p), as that statutory phrase has been interpreted by EPA in the stormwater rule. (Pet. App. 40-47). *Chevron* defines the very role of a reviewing court confronted with such an issue. *Chevron*, 467 U.S. at 842-45. The particular arguments that EPA made have no bearing on whether the Ninth Circuit properly performed its judicial role when reviewing EPA's regulations interpreting the requirements of 33 U.S.C. § 1342(p).[3]

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[3] Respondent's assertion that EPA did not present the court with an interpretation of 33 U.S.C. § 1342(p), or alert the court that *Chevron* applies, also is incorrect. EPA explained that its interpretation of 33 U.S.C. § 1342(p) is contained in its stormwater rules. (United States Amicus Curiae Br. 7-9, November 17, 2007). EPA also alerted the court that *Chevron* governed the court's review of its interpretation of the CWA. (United States Amicus Curiae Br. 11, November 17, 2007).

Moreover, as explained in the petition, the Ninth Circuit did not play the judicial role cast by *Chevron*. The court rejected EPA's interpretation of 33 U.S.C. § 1342(p), as embodied in the stormwater rule, without explaining why it was unreasonable for EPA to deem some, but not all, logging activities to be "industrial" within the meaning of the statute. In particular, the court never explained why it was impermissible for EPA to determine, as it did in the stormwater rule, that some activities listed in Standard Industrial Classification 24 qualified as "industrial," but that others—namely, those defined to be nonpoint sources in the silvicultural rule—did not qualify as "industrial." That omission conflicts with *Chevron*.

E. This case has great practical importance.

Finally, respondent asserts that this case has no great practical importance, except to the parties and to water quality in Oregon's Coast Range. (Opp. 34-37). Respondent's claim is belied by the numerous amicus briefs submitted in support of the petitions for certiorari. In particular, the amicus brief submitted by 26 states reflects that this case is of significant importance to a diverse array of states across the entire country. Respondent's claim also is belied by the fact that, as a practical matter, the Ninth Circuit's opinion supplies the governing law for all of the states in the Ninth Circuit. In other words, the ruling affects not only the parties to this case, it governs all similarly-situated parties across the western states. And the claim is belied by respondent's admission that Oregon's Department of Environmental Quality will have to develop a new NPDES permitting pro-

gram in order to enable compliance with the ruling, and that the permitting program will, at a minimum, alter Oregon's existing scheme for regulating logging-road stormwater. Developing new permitting programs, and changing a longstanding regulatory scheme, will consume significant amounts of time and monetary resources; avoiding such upheavals is the very purpose of the jurisdictional limitations disregarded by the Ninth Circuit. As a result, this case has significant practical importance.

F. Conclusion

The petition for certiorari should be granted.

Respectfully submitted,
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