Nos. 11-338 and 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, ET AL.

GEORGIA-PACIFIC WEST, INC., ET AL., PETITIONERS

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that a suit in which liability depends on the interpretation of Clean Water Act (CWA) regulations, and in which the court rejected the construction of the regulations proffered by the Environmental Protection Agency (EPA), may be adjudicated under the CWA's citizen-suit provision, 33 U.S.C. 1365(a), rather than under the CWA's judicial-review provision, 33 U.S.C. 1369(b).

2. Whether the court of appeals erred in not deferring to EPA's interpretation of the Silvicultural Rule, 40 C.F.R. 122.27(b)(1), that channeled runoff from logging roads does not constitute a point-source discharge.

3. Whether the court of appeals erred in not deferring to EPA's interpretation of the Phase I industrial stormwater regulation, 40 C.F.R. 122.26(b)(14), that channeled runoff from logging roads does not constitute a stormwater discharge "associated with industrial activity."

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petitions for writs of certiorari should be denied.

STATEMENT

1. a. Section 301(a) of the Clean Water Act (CWA or Act) prohibits the "discharge of any pollutant"—defined as the addition of any pollutant to navigable waters from any point source—except "as in compliance with" specified pro-

visions of the Act. 33 U.S.C. 1311(a), 1362(12). The Act defines "point source" as

> 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, from which pollutants are or may be discharged.

33 U.S.C. 1362(14). For most point-source discharges, regulated entities achieve compliance by obeying the terms of a permit issued under the National Pollution Discharge Elimination System (NPDES) pursuant to CWA Section 402, 33 U.S.C. 1342. Other CWA provisions address "nonpoint sources" through methods other than the NPDES program. See, *e.g.*, 33 U.S.C. 1314(f), 1329.

b. The Environmental Protection Agency (EPA) has promulgated regulations that further define the term "point source" as it applies to various activities and facilities. EPA's Silvicultural Rule defines "silvicultural point source" as "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." 40 C.F.R. 122.27(b)(1). The Rule excludes from the definition "nonpoint source silvicultural activities such as * * * road construction and maintenance from which there is natural runoff." *Ibid*. EPA has construed that rule to exclude from NPDES permitting requirements all precipitation-driven runoff from the specified nonpoint sources, including logging roads, even if the runoff flows through a ditch, channel, or culvert before being released into navigable waters. See 2007 Gov't C.A. Amicus Br. 10.

c. In 1987, recognizing the special regulatory problems posed by stormwater discharges, Congress amended the CWA. Pub. L. No. 100-4, 101 Stat. 52 (1987 CWA amendments). CWA Section 402(p) establishes a phased process, commonly referred to as Phase I and Phase II, for the regulation of stormwater point-source discharges. 33 U.S.C. 1342(p).

Phase I covers various enumerated sources of stormwater pollution, see 33 U.S.C. 1342(p)(2), including discharges of stormwater "associated with industrial activity," 33 U.S.C. 1342(p)(2)(B). The 1987 CWA amendments required NPDES permits for those discharges and directed EPA to regulate them accordingly. 33 U.S.C. 1342(p)(3) and (4). The CWA does not define the term "storm water discharge associated with industrial activity." In 1990, EPA promulgated Phase I regulations that define the term as

> the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from * * * immediate access roads * * * used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility[.] * * * The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): * * * (ii) Facilities classified as Standard Industrial Classifications 24 (except 2434).

40 C.F.R. 122.26(b)(14).

For stormwater discharges other than those enumerated in 33 U.S.C. 1342(p)(2), the CWA authorizes EPA to designate, as part of Phase II, any additional stormwater discharges "to be regulated to protect water quality." 33 U.S.C. 1342(p)(5) and (6). For Phase II discharges, EPA must "establish a comprehensive program," which "may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." 33 U.S.C. 1342(p)(6). EPA is authorized to require NPDES permits for Phase II discharges, but it is not required to do so. *Ibid*. In 1999, EPA promulgated regulations that designated two categories of stormwater point-source discharges (neither of which is relevant to this case) for Phase II regulation. 64 Fed. Reg. 68,722, 68,734 (Dec. 8, 1999) (codified in pertinent part at 40 C.F.R. 122.26(a)(9)(i)). EPA also reserved the authority to designate additional discharges for Phase II regulation at a later date. *Ibid.*[1]

2. Respondent commenced this action under the CWA's citizen-suit provision, 33 U.S.C. 1365. Respondent alleged that stormwater discharges associated with two

[1] In 2003, the Ninth Circuit remanded to EPA the question whether to regulate stormwater discharges from forest roads under Phase II. See *Environmental Def. Ctr.* v. *EPA*, 344 F.3d 832, 863, cert. denied, 541 U.S. 1085 (2004). EPA continues to review available information on the water-quality impacts of stormwater discharges from forest roads, including logging roads, as well as existing practices to control those discharges. On May 23, 2012, EPA announced that it "is considering designating a subset of stormwater discharges from forest roads for appropriate action" under the agency's Phase II rulemaking authority. *Notice of Intent To Revise Stormwater Regulations To Specify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads and To Seek Comment on Approaches for Addressing Water Quality Impacts From Forest Road Discharges*, 77 Fed. Reg. 30,479; see pp. 17-18, *infra*.

logging roads in Oregon violate the Act because the roads at issue collect, channel, and discharge stormwater runoff to navigable waters—without NPDES permits—via ditches, pipes, and culverts. First Am. Compl. 2-4, 17-18, 21-24.

Petitioners are state officials and private timber companies who control the relevant logging roads and were named as defendants in this suit. Supported by the United States as amicus curiae, petitioners moved to dismiss the complaint for failure to state a claim. The district court granted the motion. The court held that, under EPA's Silvicultural Rule, 40 C.F.R. 122.27(b)(1), the logging roads had been categorized as nonpoint sources of natural runoff, and that stormwater discharges from those roads therefore were not subject to NPDES permitting requirements. Pet. App. 53-77.[2]

3. The court of appeals reversed. Pet. App. 1-52.[3]

a. As in the district court, the government filed an amicus brief arguing that, under EPA's Silvicultural Rule, all precipitation-driven runoff from logging roads is excluded from NPDES permitting requirements, even if it flows through a ditch, channel, or culvert before being discharged into navigable waters. See 2007 Gov't C.A. Amicus Br. 10. The court of appeals rejected that interpretation of the regulation. Pet. App. 34-37. The court stated that "there are two possible readings of the Silvicultural Rule," and it acknowledged that the interpretation advanced in the government's amicus brief "reflects the intent of EPA in adopting the Rule." *Id.* at 36. The court concluded, however, that an

[2] References to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 11-338.

[3] The initial court of appeals opinion was published at 617 F.3d 1176, but the discussion in this brief cites the superseding opinion, which was published at 640 F.3d 1063 and is reprinted in the petition appendix.

alternative reading of the rule was preferable because it would "allow [the court] to construe the Rule to be consistent with the statute," in particular, the CWA's definition of "point source." *Id.* at 37. The court held that the Silvicultural Rule does not encompass stormwater runoff from logging roads that is systemically collected and channeled through man-made ditches and culverts before being discharged into waters of the United States. *Ibid*.

b. Petitioners and the United States further argued that, even if such channeled runoff from logging roads constitutes a "point source" discharge, such discharges are not subject to NPDES permitting requirements under EPA's stormwater regulations promulgated pursuant to 33 U.S.C. 1342(p). Pet. App. 37-48. Petitioners and the government contended, in particular, that the discharges at issue here are not "associated with industrial activity" as EPA has defined that term. See *id.* at 44-47; 40 C.F.R. 122.26(b)(14). The court of appeals rejected that understanding of EPA's regulatory definition. The court found it "undisputed that 'logging,' which is covered under SIC [Standard Industrial Classification] subcategory 2411 (part of SIC 24), is an 'industrial activity.'" Pet. App. 44-45. The court construed the regulation's reference to "immediate access roads"—defined in EPA's preamble to mean "roads which are exclusively or primarily dedicated for use by the industrial facility"—as covering the logging roads at issue here. *Id.* at 45-47.

4. a. Petitioners filed petitions for rehearing in the court of appeals. The court of appeals thereafter ordered a response and posed two threshold questions: (1) "Can a suit challenging EPA's interpretation of its regulations 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 deci-

sion 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)?" 10/21/10 Order.

Section 1369(b) authorizes private parties to obtain direct court of appeals review of certain EPA actions, including actions taken in "promulgating any effluent limitation or other limitation under section 1311" or "in issuing or denying any permit under section 1342." 33 U.S.C. 1369(b)(1)(E) and (F). EPA's NPDES regulations are generally subject to immediate appellate review under that provision. See, *e.g.*, *NRDC* v. *EPA*, 673 F.2d 400, 404-406 (D.C. Cir.), cert. denied, 459 U.S. 879 (1982) (citing *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 136 (1977)); *NRDC* v. *EPA*, 966 F.2d 1292, 1296-1297 (9th Cir. 1992). Such review must be sought within 120 days of the relevant EPA action, unless a challenge is "based solely on grounds which arose after such 120th day." 33 U.S.C. 1369(b)(1). Any EPA action "with respect to which review could have been obtained under [Section 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).

In response to the court of appeals' questions, the United States filed another amicus brief. The government expressed the view that, although Section 1369(b)(2) would preclude the court in a Section 1365(a) citizen suit from *invalidating* the EPA regulations implicated by this case, Section 1369(b)(2) did not preclude the court from *interpreting* those regulations in a manner different from the interpretations advanced in the government's prior amicus brief on the merits. See 2011 Gov't C.A. Amicus Br. 7-11.

b. The court of appeals denied rehearing and issued a superseding panel opinion. Pet. App. 1-52; see n.3, *supra*. In a new section entitled "Subject Matter Jurisdiction," the

court agreed with the position set forth in the government's rehearing brief that Section 1369(b) "does not bar a citizen suit challenging EPA's Silvicultural Rule interpretation first adopted in its initial amicus brief in this case." Pet. App. 8-10. The court adhered to the remainder of its previous opinion.

DISCUSSION

The court of appeals correctly rejected petitioners' jurisdictional challenge to this citizen suit, since the dispute between the parties concerns the proper *interpretation*, rather than the *validity*, of the EPA regulations at issue here. On the merits, the court erred in failing to give appropriate deference to EPA's interpretation of its own regulations. That error, however, does not warrant this Court's review.

No square circuit conflict exists on the questions presented in the certiorari petitions. And while the court of appeals construed EPA's current Phase I industrial stormwater regulation to require NPDES permits for channeled stormwater discharges associated with logging roads, the court did not hold that the CWA compels that result. Congress has temporarily barred EPA from implementing the court of appeals' decision, and EPA has announced its intent to amend expeditiously its Phase I regulation to make clear that discharges of the sort at issue here do not require NPDES permits. Those developments address petitioners' concerns about the practical burdens that the court's ruling could entail. The petitions for writs of certiorari therefore should be denied.

A. The CWA Confers Jurisdiction Over This Citizen Suit

A citizen suit under Section 1365(a) may be brought against a person or entity alleged to be violating the CWA by, *inter alia*, discharging pollutants into navigable waters

without an NPDES permit. 33 U.S.C. 1365(a) and (f)(1); see 33 U.S.C. 1311(a). Section 1369(b), by contrast, provides for immediate review of various EPA actions, including the promulgation of NPDES regulations. 33 U.S.C. 1369(b)(1); see p. 7, *supra*. A review proceeding under Section 1369(b)(1) must be commenced within 120 days of the challenged EPA action, unless the basis for the suit arises after that period. *Ibid.* Any EPA action that could have been challenged under Section 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 court of appeals correctly held that Section 1369(b)(2) did not preclude the courts below from exercising jurisdiction over this citizen suit. See Pet. App. 8-10. Petitioners premise their jurisdictional challenge on the assertion that the court of appeals invalidated an EPA rule. 11-338 Pet. 19-24. If the court had taken that step, its decision would have run afoul of Section 1369(b)(2), since the pertinent EPA regulations could have been challenged at the time those rules were promulgated. See 2011 Gov't Amicus Br. 6-7; Br. in Opp. 19-24.

Contrary to petitioners' contention, however, the court of appeals did not expressly or implicitly invalidate either the Silvicultural Rule or the EPA regulation that defines the term "stormwater discharge associated with industrial activity." Rather, the court of appeals simply interpreted those regulations in a manner different from the constructions advanced in the government's amicus brief. See Pet. App. 36-37, 44-47. To be sure, in choosing between two competing interpretations of the Silvicultural Rule, the court was significantly influenced by its view that the Rule would be contrary to the CWA if EPA's interpretation were adopted. See *id.* at 36-37. But just as a court does not invalidate a statute by construing it to avoid perceived consti-

tutional difficulties, the court of appeals did not invalidate the Silvicultural Rule by adopting the interpretation that the court viewed as necessary to achieve compliance with the governing statute. Cf. *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 573, 581 (2007) (distinguishing, for purposes of an analogous Clean Air Act judicial-review provision, "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"). And because EPA did not announce its official reading of the Silvicultural Rule at the time of the rule's promulgation, respondent could not reasonably have been expected to challenge that potential reading under Section 1369(b)(1) at that time. Pet. App. 9-10; see 2011 Gov't Amicus Br. 7-11 & n.5.[4]

The decisions cited by the state petitioners (11-338 Pet. 20) simply reiterate the undisputed propositions that challenges to the validity of an EPA rule promulgated under the CWA must be brought pursuant to Section 1369(b)(1), and that a court may not invalidate an EPA rule in a citizen suit brought under Section 1365(a). None of those decisions suggests that the court in a CWA citizen suit is foreclosed from either (a) rejecting EPA's construction of its own rule, or (b) adopting a competing construction that the court views as necessary to render the rule consistent with the statute. Because the court below did not explicitly or implicitly invalidate any EPA rule, the precedents on which

[4] The industry petitioners argue (11-347 Pet. 23 n.2) that EPA had officially interpreted the term "natural runoff" in the Silvicultural Rule as including runoff that is systematically channeled well before the government filed its amicus brief in this case. The court of appeals rejected that contention (Pet. App. 9), and that aspect of the court's analysis raises no legal issue of recurring importance.

the state petitioners rely are inapposite. Further review of this issue is not warranted.

B. The Court Of Appeals Erred In Failing To Defer To EPA's Interpretations Of Its Regulations Advanced In The Government's Amicus Brief

In a CWA citizen suit, a court determines whether the defendant's discharges violate the requirements of the CWA and applicable regulations. 33 U.S.C. 1365(a) and (f). In making that determination, the court must defer to EPA's regulatory construction of an ambiguous CWA provision unless that interpretation conflicts with the statute. See *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 841-844 (1984); cf. *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). When the legality of a citizen-suit defendant's conduct turns on the interpretation of EPA regulations, the court similarly must defer to EPA's construction of its own rule unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461-462 (1997) (citation omitted). An agency's reasonable interpretation of its regulation, as presented in an amicus brief, is entitled to *Auer* deference. See, *e.g.*, *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 880 (2011).

1. The legality of petitioners' conduct depends in part on whether stormwater runoff from a logging road constitutes a "point source" discharge within the meaning of the CWA if the runoff is collected and channeled through pipes, ditches, or culverts before entering waters of the United States. In resolving that question, the court of appeals should have given *Chevron* deference to EPA's Silvicultural Rule, which provides that "non-point source silvicultural activities such as * * * road construction and maintenance from which there is natural runoff" are excluded from the definition of "silvicultural point source." 40 C.F.R.

122.27(b)(1). The CWA's broad definition of "point source" under Section 502(14) gives EPA at least some discretion in distinguishing between point and nonpoint sources. In particular, "the concept of a 'discrete conveyance'" contained in the statutory definition "suggests that there is room here for some exclusion by interpretation" by the agency. *NRDC* v. *Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977); see *id*. at 1382 ("[T]he power to define point and nonpoint sources is vested in EPA and should be reviewed by the court only after opportunity for full agency review and examination.") (citation and internal quotation marks omitted).

Although the Silvicultural Rule does not specifically confirm that the reference to "natural runoff" includes systematically *channeled* runoff, neither does it suggest that such runoff should be treated as a "point source" discharge. To the extent that the absence of any specific reference to channeled runoff renders the Silvicultural Rule ambiguous, the court of appeals should have deferred under *Auer* to EPA's interpretation of its own Rule provided in the government's amicus brief. That brief unequivocally expressed EPA's view that "the term 'natural runoff' in the silvicultural rule categorically excludes all stormwater runoff from forest roads, even where the roads include channels, ditches, or culverts." 2007 Gov't Amicus Br. 25.[5]

2. The court of appeals should also have deferred to EPA's interpretation of its Phase I industrial stormwater regulation. Properly construed, that regulation provides an independent basis for concluding that, under the current

[5] In its recent Federal Register notice, EPA stated that it is considering the possibility of regulating a subset of stormwater discharges from forest roads under its Phase II stormwater rulemaking authority. 77 Fed. Reg. at 30,479; see pp. 17-18, *infra*.

regulatory scheme, petitioners were not required to obtain an NPDES permit for any of the activities at issue here.

To identify the categories of "facilities" that are engaged in "industrial activity," EPA's Phase I regulation incorporates by reference Standard Industrial Classifications (SIC) codes, including SIC code 24, of which "logging" is a subcategory. 40 C.F.R. 122.26(b)(14)(ii). In its amicus brief below, the government explained that "EPA primarily referenced this SIC code to regulate traditional *industrial* sources such as sawmills." 2007 Gov't C.A. Amicus Br. 29. The government further explained that, "[b]y not excluding SIC code 2411 (the logging subcategory), EPA intended to reference only the four categories of silvicultural facilities it had already defined as point sources in" the Silvicultural Rule—*i.e.*, rock crushing, gravel washing, log sorting, and log storage. *Id.* at 29-30.[6] Those facilities are more closely associated with traditional industrial activities than are logging roads, which are often used for recreational purposes rather than as "immediate access roads" to those facilities. See *id.* at 31. EPA's interpretation is also consistent with the terms of SIC code 2411, which defines "logging" facilities as "*[e]stablishments* primarily engaged in cutting timber and in producing . . . primary forest or wood raw materials . . . in the field." Pet. App. 45 (emphasis added).

In concluding that the discharges at issue here are "associated with industrial activity" within the meaning of EPA's current Phase I rule (Pet. App. 42-47), the court of appeals ignored EPA's construction of its own regulation.

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[6] That understanding is buttressed by the fact that EPA's definition of "storm water discharge associated with industrial activity" expressly exempts activities that are "excluded from the NPDES program under this part 122," 40 C.F.R. 122.26(b)(14), including under the Silvicultural Rule, 40 C.F.R. 122.27.

The interpretation set forth in the government's amicus brief did not clearly conflict with the text of the regulation. Nor did the court of appeals hold that its expansive construction of the term "associated with industrial activity" was necessary to bring EPA's Phase I regulation into conformity with the statute. In adopting a construction of the regulation that was inconsistent with EPA's own stated understanding of the rule, the court of appeals misapplied established *Auer* deference principles.

C. This Case Does Not Warrant Further Review

Notwithstanding the court of appeals' errors on the merits, the decision below does not warrant this Court's review. The decision does not create a square conflict among the courts of appeals. And while application of NPDES permitting requirements to petitioners' stormwater discharges could entail significant practical burdens if the current regulatory scheme remained unchanged, those concerns are being addressed by both Congress and EPA—entities with greater institutional capacity to resolve the complex regulatory issues involved.

1. There is no conflict among the courts of appeals warranting further review

a. As discussed above (see pp. 10-11, *supra*), the Ninth Circuit's jurisdictional analysis does not conflict with other court of appeals decisions holding that Section 1369(b) provides the exclusive CWA avenue to review the validity of an EPA rule implementing the NPDES permitting system. The court of appeals did not invalidate an EPA regulation explicitly or implicitly. Rather, it interpreted the pertinent EPA rules as requiring NPDES permits for the type of discharges at issue, as urged by respondent in this Section 1365(a) citizen suit. *Ibid.*; see Br. in Opp. 19-26. Although the court of appeals' interpretations of those rules were

flawed on the merits, the court did not err in entertaining the suit.

b. The industry petitioners allege (11-347 Pet. 25-26) a conflict between the court of appeals' interpretation of the Silvicultural Rule and that of the Eighth Circuit in *Newton County Wildlife Ass'n* v. *Rogers*, 141 F.3d 803 (1998). The court in *Rogers* held that the Forest Service's failure to obtain an NPDES permit before contracting with others to harvest timber and build roads did not constitute an abuse of discretion under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 141 F.3d at 810. The court relied principally on the rationale that the private operator, not the Forest Service, would be responsible for obtaining any required permit. *Ibid.* (citing 40 C.F.R. 122.21(b)). The Eighth Circuit added that "EPA regulations do not include the logging and road building activities cited by [plaintiff] in the narrow list of silvicultural activities that are point sources requiring NPDES permits." *Ibid.* (citing, *inter alia*, 40 C.F.R. 122.27(b)(1)). But that single, passing statement was simply dictum, and it did not specifically refer to the sort of *channeled* runoff at issue in this case. See *ibid.*; see also Br. in Opp. 16-17.

c. The court below is the first court of appeals to address whether EPA's Phase I industrial stormwater regulation, 40 C.F.R. 122.26(b)(14), requires permits for the type of discharges at issue. See Br. in Opp. 15-16. Contrary to the industry petitioners' suggestion (11-347 Pet. 26-27), the decision below does not conflict with the Second Circuit's unpublished summary affirmance of the district court's decision in *Conservation Law Foundation* v. *Hannaford Bros. Co.*, 327 F. Supp. 2d 325 (D. Vt. 2004), aff'd, 139 Fed. Appx. 3381 (2005). In *Conservation Law Foundation*, the district court held that a shopping plaza owner was not liable under the CWA for stormwater discharges from the

plaza's parking lot. *Id.* at 330-335. Because the parties agreed that the parking-lot discharges were not covered by either Phase I or Phase II rules, however, the court had no occasion to consider whether the discharges were in fact regulated by EPA's stormwater rules—the relevant question here. *Id.* at 330 ("[Plaintiff] does not contend that the [plaza] falls into the categories of stormwater discharges required to obtain a permit under the Phase I and Phase II rules. Therefore, the question before the Court is whether § 301(a) of the CWA prohibits the [plaza] from discharging stormwater without an NPDES permit even though neither EPA nor [the responsible state agency] require the [plaza] to obtain a NPDES permit.").

2. Both Congress and EPA have taken steps to mitigate petitioners' practical concerns about the effects of the decision below

Petitioners contend that, by requiring NPDES permits for a potentially vast number of logging-road discharges, the decision below threatens to impose significant compliance burdens on both regulators and the timber industry. 11-338 Pet. 24-28; 11-347 Pet. 30-35. Congress and EPA have already taken steps, however, to address those concerns.

a. Congress has suspended the permitting requirement imposed by the court of appeals' decision:

> From the date of enactment of this Act until September 30, 2012, the Administrator of the Environmental Protection Agency shall not require a permit under section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342), nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from roads, the construc-

> tion, use, or maintenance of which are associated with silvicultural activities.

Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, Div. E, § 429, 125 Stat. 1046-1047. That legislation provides breathing space for EPA to fashion an administrative response to the court of appeals' decision. Permanent legislation is also pending in both the Senate and the House of Representative that would amend Section 402 so as to not require NPDES permits for stormwater discharges resulting from silvicultural activities. H.R. 2541, S. 1369, 112th Cong., 1st Sess. (2011).

b. The court of appeals held that, if the Silvicultural Rule were construed to designate channeled runoff from logging roads as a "nonpoint source," the Rule would be inconsistent with the CWA's definition of "point source." Pet. App. 36-37. Under the 1987 CWA amendments, however, not all point-source discharges of stormwater runoff require NPDES permits. See pp. 3-4, *supra*. And while the court below held that the discharges at issue here are "associated with industrial activity" as EPA's current regulations define that term, see Pet. App. 44-47, the court did not suggest that the CWA requires EPA to take that approach. See, *e.g.*, *id.* at 46 ("The [Phase I regulation's] definition of a 'facility' engaging in 'industrial activity' is very broad."). The court's decision thus leaves EPA free to amend its Phase I regulations to make clear that runoff from logging roads is not "associated with industrial activity" and therefore is not subject to NPDES permitting requirements.

On May 23, 2012, EPA issued a formal notice in the Federal Register indicating its intent "to propose revisions to its Phase I stormwater regulations (40 CFR 122.26) to specify that stormwater discharges from logging roads are not included in the definition of 'storm water discharge as-

sociated with industrial activity.'" 77 Fed. Reg. at 30,474. As that notice explains, "[t]he effect of this revision would be to remove any obligation for an owner or operator of a logging road that has discharges of stormwater to waters of the United States to seek" an NPDES permit for such a discharge. *Ibid.* The notice further explains that "EPA is aware that a Congressional moratorium on NPDES permitting of some logging roads is set to expire on September 30, 2012, and intends to move expeditiously to complete this revision." *Ibid.*

The notice also states that EPA intends further study and seeks public comment on "alternative approaches for addressing stormwater discharges from forest roads." 77 Fed. Reg. at 30,479. Among those alternatives, "EPA is considering designating a subset of stormwater discharges from forest roads for appropriate action under section 402(p)(6) of the Act," *i.e.*, its Phase II regulatory authority, which "allows the EPA flexibility in issuing regulations to address designated stormwater discharges and does not require the use of NPDES permits." *Ibid.*

By clarifying that channeled stormwater discharges from logging roads are not "associated with industrial activity," EPA's proposed regulatory approach would render moot petitioners' objections to the court of appeals' conclusion that such discharges are subject to NPDES permitting requirements under the current regulatory scheme. EPA's proposed approach would also facilitate further inquiry concerning possible alternative measures that would mitigate the environmental impacts giving rise to respondent's suit. If an interested party is unhappy with the ultimate outcome of EPA's rulemaking process, any new rule will be subject to direct judicial review pursuant to 33 U.S.C. 1369(b) on the agency's developed administrative record.

If the Court grants certiorari in this case, however, it will be faced with a binary choice: either hold that the stormwater discharges at issue here are not subject to CWA regulation at all (as petitioners contend), or hold that the discharges require NPDES permits (as respondent argues). In authorizing EPA to engage in Phase II regulation, Congress sought to obviate the need for that all-or-nothing choice, and to expand the range of regulatory options available to the agency. And because any decision this Court might issue would focus on EPA's *current* regulatory framework, that decision could be superseded by further regulatory action. If the Court reversed the court of appeals and held that the discharges at issue do not require NPDES permits under the Phase I regulations because they are not "associated with industrial activity," EPA could impose alternative regulatory requirements under the more flexible Phase II provisions of the 1987 CWA amendments, see 33 U.S.C. 1342(p)(6). Alternatively, if the Court upheld the court of appeals' determination that the discharges at issue are covered by the current Phase I industrial stormwater regulation, EPA could still revise that regulation (in accordance with its recent Federal Register notice) to exclude those discharges from the NPDES requirement. For these reasons, review by this Court to consider the proper interpretation of EPA's current regulatory scheme would neither represent a sound use of the Court's resources nor definitively resolve the legal status of channeled stormwater discharges from logging roads.

Even before Congress suspended the permitting requirement imposed by the court of appeals' decision, EPA had taken steps to alleviate petitioners' immediate practical concerns by making available, as appropriate, the Multi-Sector General Permit (MSGP) for discharges associated with industrial activities, 73 Fed. Reg. 56,572 (Sept. 29,

2008), to persons responsible for channeled runoff from logging roads. See Letter from Nancy K. Stoner, Acting Assistant Administrator, EPA, to Congressman Kurt Schrader (July 1, 2011). *Inter alia*, the MSGP allows permit holders to select their own methods for reducing discharges to meet narrative effluent limitations. 73 Fed. Reg. at 56,574-56,576. The MSGP could apply to groups of roads and could considerably lessen the administrative burdens associated with obtaining separate permits for each individual road or discharge. See 40 C.F.R. 122.28. Although the MSGP is available only in States where EPA is the permitting authority, other States authorized to issue NPDES permits may choose to make available a similar general permit.

* * * * *

In light of the significant attention directed by Congress and EPA to the regulation of stormwater discharges from logging roads in response to the court of appeals' decision, this Court's intervention is not warranted. The complex regulatory issues implicated by the decision below are currently being addressed in the first instance, and can be addressed more definitively and in a more nuanced fashion, by Congress and the expert agency.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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