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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

The United States has recommended that this Court deny the petition for certiorari. But the points that it raises only underscore why this Court should grant the petition and reverse the Ninth Circuit's decision. In fact, summary reversal would be appropriate. The Ninth Circuit's decision is clearly erroneous, has significant practical impacts notwithstanding the potential for action by Congress and EPA, and, most importantly, creates a substantial obstacle to the success of the process that EPA has proposed for regulating stormwater discharges from logging roads.

A. To ensure the success of EPA's planned approach to stormwater discharges from logging roads, this Court should grant certiorari and reverse the decision of the Ninth Circuit.

As the United States explains, the Ninth Circuit "misapplied established *Auer* [*v. Robbins*, 519 U.S. 452 (1997)] deference principles" when it held that the stormwater discharges from logging roads are stormwater discharges "associated with industrial activity" under EPA's Phase I stormwater rule, 40 C.F.R. § 122.26. (Gov't S. Ct. Amicus Br. 12-14). Yet the government recommends that this Court deny the petition. Its primary argument as to why certiorari should be denied on the merits is that EPA has announced that it intends to revise its stormwater rules to clarify that stormwater discharges from logging roads are not stormwater discharges associated with industrial activity. (Gov't S. Ct. Amicus Br. 17-20). That argument should be rejected for two reasons.

First, it is speculative whether and when EPA will act on its proposed plan, notwithstanding its stated intention to do something by September 30 of this year. The plan is in its infancy. EPA has not actually proposed any rules or revisions to rules; it has announced that it has a "plan 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 associated with industrial activity.'" 77 Fed. Reg. 30,473-01, 30,474 (May 23, 2012). The United States made a similar pronouncement in the brief that it filed in the Ninth Circuit four-and-a-half years ago, but has yet to propose any such new rule.[1] Given that history, the mere fact that EPA has announced that it contemplates taking action in response to the Ninth Circuit's decision does not minimize the need for this Court's review.

Second, the United States' argument problematically disregards the fact that the Ninth Circuit's deci-

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[1] In its 2007 amicus brief, the United States announced that EPA was currently assessing how to regulate stormwater runoff from forest roads in response to the 2003 remand in *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003), and requested that the court refrain from reviewing plaintiff's challenge to EPA's failure to regulate logging-road stormwater under its Phase I rule, in light of that ongoing administrative process. (2007 Gov't C. A. Amicus Br. 9, 31-32). EPA's first formal action in this regard, however, appears to be the Federal Register notice filed the day before the United States submitted its brief to this Court.

sion appears to foreclose EPA's proposal. The Ninth Circuit stated in its decision that the Clean Water Act (CWA) *itself* requires EPA to regulate logging-road stormwater as industrial stormwater. Thus, contrary to the United States' belief, the Ninth Circuit's decision may not leave EPA "free" to remedy the court's errors through EPA's proposed regulatory process. (*See* Gov't S. Ct. Amicus Br. 17).

Specifically, EPA proposes addressing the Ninth Circuit's decision by amending its stormwater rules to clarify that stormwater discharges from logging roads are not discharges "associated with industrial activity" for purposes of its Phase I National Pollutant Discharge Elimination System (NPDES) permitting program. 77 Fed. Reg. at 30,474. EPA further contemplates regulating some stormwater discharges from logging roads under its Phase II rules. 77 Fed. Reg. at 30,479. The United States contends that the Ninth Circuit's decision permits this regulatory resolution because, in its view, "the court did not suggest that the CWA requires EPA to" treat logging-road stormwater as industrial stormwater. (Gov't S. Ct. Amicus Br. 17).

The Ninth Circuit's decision, by its terms, indicates otherwise. The court stated that stormwater runoff from logging roads that is collected in ditches, culverts, and channels "constitutes a point source discharge of stormwater 'associated with industrial activity' *under the terms of* [CWA] *§502(14) and § 402(p).*" (Pet. App. 47; emphasis added). The court then reiterated the statutory basis for its ruling in rejecting the government's invitation to refrain from

resolving any issues regarding the stormwater rules on the ground that EPA was currently assessing how to regulate logging-road stormwater under the Phase II rules. (Pet. App. 48). The court explained that in light of EPA's *statutory* obligation to treat logging-road stormwater as industrial stormwater, the court would not wait for EPA to address the issue in its Phase II rules:

> We have just held that *§ 402(p)* provides that stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels is a "discharge associated with industrial activity," and that such a discharge is subject to the NPDES permitting process under Phase I. Whether EPA might, or might not, provide further regulation of stormwater runoff from logging roads in its Phase II regulations *does not reduce its statutory obligation under § 402(p)*.

(Pet. App. 48; emphasis added).

The Ninth Circuit's express statement that its decision defines EPA's "statutory obligation" under the CWA calls into question whether the decision "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." (Gov't S. Ct. Amicus Br. 17). If the court's decision is not set aside, the parties and the public will remain in an untenable state of uncertainty as to whether stormwater discharges from logging roads require NPDES permits, regardless of the steps that EPA takes to clarify its

rules. Further, the parties and EPA risk investing substantial time and resources in an administrative process that ultimately may not be effective to remedy the judicial error that it is designed to correct. That process will be of little value to the parties to this case or the residents of Ninth Circuit states if, notwithstanding any clarification to its rules by EPA, owners and operators of logging roads remain subject to citizen suits for stormwater discharges without NPDES permits because of the Ninth Circuit's statement that EPA has a statutory obligation to require permits. This Court's intervention therefore is warranted to ensure that EPA's planned process for addressing the issue of stormwater discharges from logging roads—a process that is the appropriate (and congressionally intended) one for determining how best to address stormwater discharges from logging roads and any associated pollution—is not impaired by the Ninth Circuit's erroneous decision.

The issue need not consume much of this Court's time. For the reasons stated by petitioners and the United States, the Ninth Circuit clearly erred when it rejected EPA's interpretation of its Phase I stormwater rule. (Pet. 28-30; Reply Br. 9-10; Gov't S. Ct. Amicus Br. 12-14). As explained by petitioners, the novel analysis employed by the Ninth Circuit in reaching its apparent statutory interpretation looks nothing like the interpretive methodology dictated by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). (Pet. 15-16, 33; Reply Br. 10-12). Moreover, a straightforward application of *Chevron* demonstrates that the Ninth Circuit erred when it concluded that the CWA itself re-

quires EPA to treat stormwater runoff from logging roads as industrial stormwater. (Pet. 33; Reply Br. 11-12). Where, as here, Congress has delegated to an administrative agency the authority and obligation to give content to a statutory term, a reviewing court cannot give that term a "static judicial definition." *Chevron*, 467 U.S. at 842. Given those circumstances, this Court should summarily reverse the Ninth Circuit's decision if it concludes that additional briefing and argument are not needed. *See INS v. Orlando Ventura*, 537 U.S. 12, 14, 16 (2002) (*per curiam*) (granting certiorari and summarily reversing Ninth Circuit decision based on court's failure to comply with "well-established principles of administrative law.").

B. The potential for action by Congress does not diminish the need for this Court's review.

The United States also argues that this Court should not resolve the case because Congress might act. (Gov't S. Ct. Amicus Br. 16-17). But it is speculative whether Congress will act. In addition, the legislative history of Congress's moratorium on NPDES permits for logging-road stormwater reflects that the purpose of the moratorium was to permit this Court an opportunity to review the case. *See* 157 Cong. Rec. H-9823-02, H-9900 (Dec. 16, 2011) (statement of Rep. Simpson explaining that "[w]ith such an abrupt change in the interpretation of the [CWA], it is important that there be an opportunity for the Supreme Court to weigh in," and that "this provision should in no way deter the Court's proceedings.").

Moreover, Congress appropriately is looking to this Court to resolve the issues generated by the Ninth Circuit's decision. Part of this Court's objective in adopting the *Chevron* framework was to define a court's role when reviewing a federal agency's regulation interpreting a statute that the agency administers. *Chevron*, 467 U.S. at 844-45. The Ninth Circuit's failure to apply the *Chevron* framework when determining whether stormwater discharges from logging roads are discharges "associated with industrial activity" under the CWA thus stems from the court's misapprehension of its judicial role. This Court, not Congress, is best suited to remedy errors that flow from a lower court's misperception of the proper judicial role. *See*, *e.g.*, *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 570 (1979) (granting certiorari in part because of lower courts' "departure . . . from the procedure normally followed" by the courts in resolving the types of issues presented by the case).

C. The jurisdictional issue warrants this court's review.

Although the United States argues against the grant of certiorari on the jurisdictional issue, the points raised in its brief, particularly when considered in conjunction with its varying past positions on the issue, illustrate why this Court's review of that issue also is warranted.[2]

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[2] Even if EPA follows through on its proposed rulemaking, the jurisdictional issue presented by this case—whether 33 U.S.C. § 1369 precludes a court from reviewing a citizen-suit plaintiff's challenge to the validity of an EPA

As an initial matter, the United States does not dispute that the Ninth Circuit's decision conflicts with the decisions of other circuits if the Ninth Circuit's decision is viewed as invalidating EPA's rules. The United States also expressly acknowledges that if the Ninth Circuit had invalidated EPA's rules, "its decision would have run afoul of Section 1369(b)(2)." (Gov't S. Ct. Amicus Br. 9). Instead, the government asserts that the Ninth Circuit decision does not create a circuit split because, in its view, the Ninth Circuit interpreted EPA's rules but did not invalidate them. (Gov't S. Ct. Amicus Br. 14). However, for the reasons stated in the reply brief, the Ninth Circuit's action is properly characterized as the invalidation EPA's rules. (Reply Br. 3-6). As a result, the decision necessarily conflicts with the decisions of other circuits, conflicts with 33 U.S.C. § 1369, and has significant practical consequences. (Pet. 19-24; *see also* National Alliance of Forest Owners, *et al.*, S. Ct. Amicus Br. Supporting Petitioners).

Moreover, as the reply brief also explains, even if there is a dispute about whether the Ninth Circuit invalidated EPA's rules or, instead, merely interpreted them, the existence of that dispute demonstrates the need for additional guidance from this Court as to when a court's act of interpreting an agency's regula-

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rule in a citizen suit—will not be moot. Plaintiff has sought retrospective relief against the private defendants in this case. If this Court ruled in petitioners' favor on the jurisdictional issue, that would have the practical effect of precluding the imposition of civil penalties against private defendants.

tion crosses the line from interpretation to invalidation. (Reply Br. 6). The fact that the United States now has taken three different positions on the jurisdictional issue in the course of this litigation only accentuates the need for this Court to continue the exploration of this issue that it commenced in *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007).[3] For all those reasons, this Court should

[3] In its 2007 amicus brief, the United States argued that 33 U.S.C. § 1369 precluded the court from reviewing plaintiff's untimely challenge to EPA's silvicultural and stormwater rules in the context of a citizen suit. (2007 Gov't C. A. Amicus Br. 12-13, 32). In its 2011 amicus brief, the United States changed positions. It asserted that whether 33 U.S.C. § 1369 bars a citizen-suit plaintiff from litigating whether EPA's reasonable interpretation of a regulation conflicts with the CWA in the context of a citizen suit turns on (1) whether the regulation is ambiguous; and (2) the timing of EPA's announcement of its interpretation of its regulation. (2011 Gov't C. A. Amicus Br. 5-11). In the government's view at that time, 33 U.S.C. § 1369 would bar citizen-suit review of a claim that an unambiguous EPA regulation conflicts with the CWA. (2011 Gov't C. A. Amicus Br. 8 n.4). The provision also would bar a citizen-suit challenge to an ambiguous EPA regulation, as reasonably interpreted by EPA, if EPA announced its interpretation at the time it promulgated the regulation. (2011 Gov't C. A. Amicus Br. 9). However, 33 U.S.C. § 1369 would not bar citizen-suit review of a plaintiff's claim that an ambiguous EPA regulation, as reasonably interpreted by EPA, conflicts with the CWA, where EPA announced its interpretation subsequent to the promulgation of the regulation. (2011 Gov't C. A. Amicus Br. 8-11). The United States now contends that 33 U.S.C. § 1369 is not implicat-

grant the petition to address jurisdiction as well as the merits.[4]

D. Conclusion

The petition for certiorari should be granted and the Ninth Circuit's decision should be reversed.

Respectfully submitted,
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ed by this case at all because, from its current perspective, the Ninth Circuit merely interpreted EPA's rules, but did not invalidate them. (Gov't S. Ct. Amicus Br. 9-11).

[4] Were this court to summarily reverse the Ninth Circuit's decision on the merits, it would not need to reach the jurisdictional issue. A court's acceptance of EPA's reasonable interpretation of its own regulation in a citizen suit does not raise the jurisdictional issues raised by a court's rejection of EPA's reasonable interpretation of its own regulation.