No. 11-347

In the Supreme Court of the United States

GEORGIA-PACIFIC WEST, INC., HAMPTON TREE FARMS, INC., STIMSON LUMBER CO., SWANSON GROUP, INC., AMERICAN FOREST & PAPER ASSOCIATION, OREGON FOREST INDUSTRIES COUNCIL, & TILLAMOOK COUNTY,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

PER A. RAMFJORD
LEONARD J. FELDMAN
JASON T. MORGAN
Stoel Rives LLP
900 SW Fifth Ave., Suite 2600
Portland, OR 97204
(503) 224-3380

TIMOTHY S. BISHOP
Counsel of Record
RICHARD BULGER
CHAD CLAMAGE
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600
tbishop@mayerbrown.com

Additional counsel listed on signature page

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MISCELLANEOUS

The United States agrees with petitioners that the Ninth Circuit flouted this Court's precedents when it overturned EPA's position that channeled runoff from forest roads does not require an NPDES permit. The Solicitor General explains (at 11-12) that the Ninth Circuit "should have given *Chevron* deference to EPA's Silvicultural Rule" and "should have deferred under *Auer* to EPA's interpretation of" that Rule, which defines precipitation runoff from forest roads as "nonpoint source." "[I]ndependent[ly]," the Ninth Circuit "misapplied established *Auer* deference principles" by "ignor[ing] EPA's construction of its" Phase I regulation, which makes clear that forest road stormwater is not "associated with industrial activity." U.S. Br. 12-14.[1]

The United States recognizes too (at 14) that the Ninth Circuit's ruling "could entail significant practical burdens" for owners and operators of thousands of miles of forest roads who are now potentially in violation of the CWA and subject to substantial penalties for discharging without a permit. The scope and complexity of the permitting and litigation burden facing the industry are evident from EPA's Notice of Intent ("NOI"), 77 Fed. Reg. 30473 (May 23, 2012), which explains that forests are traversed by a "vast and diverse network" of

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[1] The problems with the Ninth Circuit's decision run even deeper than the Government acknowledges. Long before EPA filed its briefs below, it took the same unwavering position as to the meaning of its Silvicultural Rule and Phase I regulation. Pet. 7, 10. Because the meaning of those regulations was well settled decades ago, contemporaneously with their adoption, NEDC's challenge should be treated as filed too late and in the wrong court, as detailed in the petition in No. 11-338 and amicus brief of NAFO.

roads across federal, state, county, tribal and private land, which "creates a highly complex mosaic of overlapping responsibilities." *Id.* at 30475-30476. This "mosaic"—in which "[r]egional differences" abound—includes roads designed to different standards, for different purposes, over different terrain, "pass[ing] through multiple owners and multiple properties," which are already subject to federal, state and other BMP programs that "minimize or prevent discharges of pollutants into surface waters" through "a variety of effective approaches." *Id.* at 30475, 30477.

Despite the plain error of the Ninth Circuit's ruling, the Solicitor General recommends that the petition be denied. He contends that there is no "square" conflict and that EPA or congressional action may address petitioners' concerns. These arguments provide no reason to deny the petition. The Court should grant certiorari and either conduct plenary review or summarily reverse the Ninth Circuit's erroneous and extremely harmful judgment.

1. The Ninth Circuit's ruling squarely conflicts with the Eighth Circuit's decision in *Newton County*. Although *Newton County* gave two reasons for rejecting the environmental group's challenge, neither is "simply dictum." U.S. Br. 15; see *Woods* v. *Interstate Realty*, 337 U.S. 535, 537 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*"). And as the petition (at 25) and reply (at 10) showed, with quotations from the *Newton* briefs that the government ignores, "*channeled* runoff" was at issue in *Newton County*, even though the court did not "specifically refer" to that phrase. U.S. Br. 15. There and here, plaintiffs argued that channeled runoff is a

point source discharge under the Silvicultural Rule. The Ninth Circuit agreed with plaintiffs; the Eighth did not. Had NEDC brought this suit in the Eighth Circuit, it would have been dismissed.

2. Developments in Congress are no reason to deny the petition. The Solicitor General (at 8, 16-17) interprets a provision of the 2012 Consolidated Appropriations Act as "temporarily" "suspend[ing] the permitting requirement imposed by the court of appeals' decision." That moratorium provides very little "breathing space for EPA," petitioners, or amici, because it expires on September 30, 2012. And EPA conspicuously does not predict that it will propose a rule by then, let alone promulgate a final rule. The moratorium does, however, open a narrow window for review by this Court, which is precisely what Congress intended. See 157 Cong. Rec. H9900 (Dec. 16, 2011) ("intent" was to provide "an opportunity for the Supreme Court to weigh in"; "this provision should in no way deter the Court's proceedings") (Rep. Simpson).

"Permanent legislation" "pending" in the House and Senate is no reason to deny review either. U.S. Br. 17. Those bills have not seen action since July 15, 2011. And passage of "unenacted legislation" is highly uncertain, which is why this Court's "task is to rule on what the law is, not what it might eventually be." *Garcia* v. *Texas*, 131 S. Ct. 2866, 2867 (2011) (per curiam).

Contrary to the Government's suggestion (at 14), this Court has the "institutional capacity" to reverse the Ninth Circuit's judgment. The statutory and regulatory provisions at issue are clear and the administrative law principles that the Ninth Circuit evaded are set forth in this Court's decisions. Indeed,

because of this Court's institutional capacity, 26 Senators, 47 Representatives, and 29 State Attorneys General (including 4 that had not signed the States' amicus brief) implored the Government to support certiorari. See Addendum, *infra*.

3. The Government asks this Court to deny the petition because EPA has announced its intent to promulgate a Phase I rule specifying that forest road stormwater is not "associated with industrial activity." That is no reason to leave standing the Ninth Circuit's baseless and damaging decision.

a. Petitioners agree that the Ninth Circuit "did not hold that the CWA compels" its Phase I ruling. U.S. Br. 8. But the court's opinion leaves enough doubt on that score to encourage further litigation. The court held that "collected runoff constitutes a point source discharge of stormwater 'associated with industrial activity' under the terms of [CWA] § 502(14) and § 402(p)"—citing the statutory, not regulatory, provisions. Pet. App. 42a. It ruled that "'if [logging] activity is industrial in nature," then "*EPA is not free* to create exemptions from permitting requirements for such activity.'" *Ibid.* (emphasis added). And it held that the Phase I regulation's reference to the Silvicultural Rule "does not, *indeed cannot*, exempt" forest road discharges from NPDES permitting. *Ibid.* (emphasis added). Unless the decision is vacated, these errors invite a challenge to the new rule EPA says it plans to promulgate.

b. EPA's Notice of Intent also creates intolerable uncertainty. There is no guarantee EPA will timely follow through "'to propose'" or "'complete this revision'" anytime soon. U.S. Br. 17-18. After all, it has been *nine years* since the Ninth Circuit remanded to EPA its determination not to regulate

forest roads under Phase II, *Envtl. Def. Ctr.* v. *EPA*, 344 F.3d 832, 861 (9th Cir. 2003). Until the NOI, all that had come of that remand were representations to courts that EPA is "in the process of developing its response." Pet. App. 91a (2003 Government brief); see 2007 Gov't C.A. Amicus Br. 31 (Phase II remand is "pending").

Without doubt the catalysts for EPA's NOI—published the day before the Government filed its brief—were the certiorari petitions and this Court's call for the views of the Solicitor General. Were the Court to deny certiorari, there would be no way to ensure that EPA completes its "inten[ded]" rule revision, "expeditiously" or otherwise. U.S. Br. 18.

4. The Solicitor General overlooks the serious practical consequences that would result from leaving the Ninth Circuit's judgment undisturbed *even if* EPA revises its Phase I regulation.

a. The Ninth Circuit's erroneous decision distorts the law of review of administrative action and belittles EPA's long-held expert views. Absent review, its decision would remain binding precedent in the circuit containing some of the most heavily forested States in the Nation, *and* the circuit most likely to hear a rule challenge to any Phase I revision.

b. Absent review, the Ninth Circuit's erroneous interpretation of the Silvicultural Rule would remain precedent. The Government agrees (at 11-12) that the court of appeals erred under *Chevron* and *Auer* in holding that EPA has no leeway to define storm-water flowing through a ditch or culvert to be a nonpoint source. Yet it offers no practical response. By contrast to its view (at 17) that the decision below

"leaves EPA free to amend its Phase I regulations," the Solicitor General is silent on EPA's ability to amend its Silvicultural Rule. The Government also does not discuss how the Ninth Circuit's ruling will affect the validity of *other* "regulations that further define the term 'point source' as it applies to various activities and facilities." U.S. Br. 2; see 40 C.F.R. Part 22, Subpart B (regulations defining point sources).

c. So long as the Ninth Circuit's ruling stands, EPA will be forced to make new rules *around* an erroneous decision. There is no good reason why EPA's new rulemaking should be constrained or even influenced by a decision that contorts administrative law principles requiring deference and denigrates a position EPA has held for 35 years. Vacatur would restore the status quo ante as to Phase I and inform EPA's conduct of the Phase II remand.

d. Absent action by this Court, this costly and disruptive litigation will continue. Neither EPA's proposed regulation nor Congress's temporary moratorium will resolve NEDC's claims for penalties, attorneys' fees and injunctive relief based on allegations of more than 10 years of past violations on all logging roads in Oregon State forests. NEDC seeks substantial monetary penalties, plus attorneys' fees. Am. Complt. ¶ 1; see 33 U.S.C. §§ 1319(d), 1365(a). And it seeks "injunctive relief requiring defendants" to "remedy any environmental damage caused by their unpermitted discharges." NEDC Opp. to Stay Mot. 12 (D. Or.). These claims require the resolution of complex legal and factual issues, including identifying for which roads NEDC may seek penalties, what parties may have been required to obtain permits for each road, the level of rainfall

necessary to cause discharges on each road, and the number and severity of discharges during the decade covered by the lawsuit. Accordingly, "EPA's proposed regulatory approach" decidedly does *not* "moot petitioners' objections" to the erroneous decision below. U.S. Br. 18. And if EPA does not act, the consequences may be even more severe, as NEDC seeks injunctive relief halting log hauling operations on unpermitted roads.

Unless and until Phase I revisions become final, under the Ninth Circuit's decision every discharge of channeled forest road runoff within vast western forests violates the CWA, except any covered by the temporary congressional rider. New citizen suits attacking past and present discharges could expose owners and operators of forest roads to enormous liability, regardless of action by EPA or Congress.

5. The Government's sole response to "alleviate" these "immediate practical concerns" is to observe (at 19) that EPA has made available, "as appropriate, the Multi-Sector General Permit (MSGP) for discharges *associated with industrial activities*" (emphasis added).[2] But that MSGP is *inappropriate*, because it was not designed to apply to forest roads, which EPA determined are *not* "associated with industrial activity."

Far from being a solution, this suggestion creates its own set of serious problems. There is an enormous difference between contained industrial sites, where the MSGP's requirements may be practical, and the "highly complex mosaic" of forest roads, "vast by any measure," that EPA now

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[2] http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf

cavalierly tries to squeeze into a general permit never designed with such roads in mind. 77 Fed. Reg. at 30475.

For example, the MSGP requires that permittees map the location of all "impervious surfaces," "storm-water conveyances including ditches, pipes, and swales," and "stormwater inlets and outfalls, with a unique identification code for each outfall." MSGP § 5.1.2. But the Government does not know even such basic information as whether forest roads on *its own land* are "on the order of tens of thousands" or "hundreds of thousands of miles," let alone where every potential discharge along those roads is located. 77 Fed. Reg. at 30475. Even if owners and operators of forest roads could map every possible source of a discharge to "navigable waters," the costs of doing so would be astronomical and out of all proportion to any benefits given the effectiveness of BMPs. *Id.* at 30477.[3]

Another example: the MSGP requires frequent inspections of every discharge, and yearly inspection "during a period when a stormwater discharge is occurring." MSGP § 4.1.1. Permittees must "collect a stormwater sample from each outfall," "within the first 30 minutes" of a discharge or "as soon as practicable" thereafter. MSGP §§ 4.2.1, 4.2.3. These requirements, tailored for industrial sites, are impracticable for forest roads, which may be used "during harvesting once every 20 years or so." 77 Fed. Reg. at 30475. And noncompliance with any MSGP provision violates the CWA. MSGP §§ 1.2, 3.1.

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[3] The phrase "navigable waters" is "notoriously unclear," further complicating compliance with the MSGP. *Sackett* v. *EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

Environmental groups frequently sue to enforce general permits, favoring venue in the Ninth Circuit. *E.g.*, *WaterKeepers* v. *AG Indus. Mfg.*, 375 F.3d 913 (9th Cir. 2004); *S.F. BayKeeper* v. *Tosco Corp.*, 309 F.3d 1153 (9th Cir. 2002); *NRDC* v. *Sw. Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000); *Ecological Rights Found.* v. *Pac. Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000). The damages sought in such suits have been enormous. See *Humane Soc'y* v. *HVFG LLC*, 2010 WL 3322512, at *2 (S.D.N.Y. Aug. 19, 2010) (seeking "over $600 million in civil penalties"); *WaterKeepers* v. *AG Indus. Mfg.*, 2005 WL 2001037, at *6 (E.D. Cal. Aug. 19, 2005) (seeking $5 million against company worth $907,000). Given the poor fit between the MSGP and forest roads, forest road operators and owners would be sitting ducks for such suits.

6. The Government presents a patently false dilemma by claiming that, if the Court grants the petition, it faces an "all-or-nothing" "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)." U.S. Br. 19. This case poses no such dilemma. As the Solicitor General concedes (at 12-13), petitioners ask the Court to hold that "*under the current regulatory scheme*," they "were not required to obtain an NPDES permit for any of the activities at issue here." Reversal of the Ninth Circuit's judgment would leave EPA free to consider a full "range of regulatory options" (U.S. Br. 19), while relieving the substantial problems that the Ninth Circuit improperly created.

That EPA could "supersed[e]" this Court's decision prospectively by "regulatory action" is

unremarkable. U.S. Br. 19. Agencies usually can supersede this Court's regulatory interpretations, just as Congress can supersede this Court's statutory interpretations. Yet the Court grants certiorari to decide regulatory and statutory questions all the time.

7. This Court should grant the petition and order plenary review, as it has done in other CWA cases in which the United States acknowledged lower court error yet recommended denial of certiorari. See *Coeur Alaska* v. *Se. Alaska Conservation Council*, 557 U.S. 261 (2009) (Ninth Circuit failed to defer to CWA regulations and improperly expanded the NPDES permitting regime); *S. Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe*, 541 U.S. 95 (2004).

Alternatively, this is an especially appropriate case for "summary disposition on the merits." S. Ct. Rule 16.1. Summary reversal is a useful tool, when the lower court has disregarded this Court's precedent, to ensure consistency in the law and respect for this Court's decisions. *E.g.*, *Wilkins* v. *Gaddy*, 130 S. Ct. 1175, 1177 (2010) (per curiam) (summarily reversing decision "at odds" with this Court's precedents). Here, the Ninth Circuit's ruling is so clearly contrary to *Chevron*, *Auer*, and their progeny that summary disposition is warranted. See Diarmuid O'Scannlain, *A Decade of Reversal*, 14 LEWIS & CLARK L. REV. 1557, 1559 (2010) ("approximately one in ten Ninth Circuit cases reviewed by the Supreme Court results in a summary reversal"); *Karuk Tribe* v. *USFS*, 2012 WL 1959231, at *30-31 (9th Cir. June 1, 2012) (en banc) (describing the ruling here as an "extreme recent exampl[e]" of the court "break[ing] from decades of precedent and creat[ing] burdensome, entangling

environmental regulations out of the vapors") (M. Smith, J., dissenting).

Summary reversal would also ensure that the serious adverse consequences for defendants, the forest products industry generally, and state regulators, described above, will not result from a blatantly erroneous decision. That is another appropriate use of summary disposition. *E.g.*, *Thaler* v. *Haynes*, 130 S. Ct. 1171, 1172 (2010) (per curiam) (summarily reversing "holding [that], if allowed to stand, would have important implications").

This case is procedurally well-postured for summary reversal. No party can complain that it has not argued the merits. The merits were briefed in the certiorari papers by the parties and amici, including Oregon, 26 State Attorneys General, the National Association of Counties, and forest road user organizations, as well as by the Solicitor General. Respondent devoted much of its brief in opposition to the merits. In addition, the Ninth Circuit's error is plain and arises from disregard of settled precedent that is in no need of further percolation. *Cf. Spears* v. *United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting). Given EPA's intent to undertake new rulemaking, summary disposition is "just under the circumstances" and a compelling alternative to plenary review. 28 U.S.C. § 2106; see EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 344, 351 (9th ed. 2007).

CONCLUSION

The Court should grant the petition for certiorari and either order plenary review or summarily

reverse the Ninth Circuit's judgment.[4]

Respectfully submitted.

PER A. RAMFJORD
LEONARD J. FELDMAN
JASON T. MORGAN
Stoel Rives LLP
900 SW Fifth Ave., Suite 2600
Portland, OR 97204
(503) 224-3380

TIMOTHY S. BISHOP
Counsel of Record
RICHARD BULGER
CHAD CLAMAGE
Mayer Brown LLP
71 South Wacker Dr.
Chicago, IL 60606
(312) 782-0600
tbishop@mayerbrown.com

WILLIAM K. SARGENT
Tillamook County Counsel
1134 Main Avenue
Tillamook, OR 97141
(503) 842-4921

JUNE 2012

[4] This Court may alternatively wish to hold the petition in abeyance until EPA undertakes the promised Phase I rule-making, during which period the current stay of district court proceedings pending this Court's action on the petition should remain in place. See SUPREME COURT PRACTICE, *supra*, at 339. If EPA does not expeditiously issue a final rule, petitioners would move for consideration of the petition some months from now.

ADDENDUM

United States Senate
Washington, DC 20510

February 14, 2012

The Honorable Eric Holder
Attorney General
Department of Justice
950 Pennsylvania Ave., NW
Wahington, DC 20530

Dear Attorney General Holder:

On December 12, 2011 the Supreme Court issued an order inviting the Solicitor General to provide the views of the United States on two petitions challenging the Ninth Circuit Court of Appeals' ruling overturning longstanding U.S. Environmental Protection Agency (EPA) regulations regarding the application of the Clean Water Act (CWA) to silvicultural activities. We write to urge you to support EPA's regulations of forest roads and other forest management activities as nonpoint sources and support review by the Supreme Court of the Ninth Circuit decision.

For 35 years, the EPA, through both Democratic and Republican presidencies, prudently recognized that forest roads and other forest management activities are non-point sources under the CWA and are most appropriately regulated through Best Management Practices at the state level. Congress and the courts have consistently supported this interpretation.

The Ninth Circuit's decision to reinterpret these provisions of the CWA imposes unprecedented and onerous regulatory burdens on private, state, tribal, and federal forest managers and the agencies that regulate them. Furthermore, it exposes forest managers and operators as well as state and federal agencies to CWA-based lawsuits that could impair critical work to improve watersheds, reduce fire risk, maintain forest access and support family-wage jobs in struggling rural communities.

Last December Congress passed, and the President signed, H.R. 2055, the omnibus appropriations bill, which included language preserving EPA's existing regulations under the CWA for fiscal year 2012. This provision, which was based on House and Senate bills with strong bipartisan support in both chambers, demonstrates strong congressional support for maintaining EPA's regulations and reversing the position of the Ninth Circuit Court of Appeals.

We urge you to uphold 35 years of regulatory interpretation by defending the nonpoint source designation of forest roads and silviculture practices and seek Supreme Court review of the Ninth Circuit's decision.

Sincerely,

/s/	/s/
Ron Wyden	Mike Crapo
United States Senator	United States Senator
/s/	/s/
Kay R. Hagan	Roy Blunt
United States Senator	United States Senator

/s/
Joe Manchi III
United States Senator

/s/
Saxby Chambliss
United States Senator

/s/
Mary L. Landrieu
United States Senator

/s/
Olympia J. Snowe
United States Senator

/s/
Mark Begich
United States Senator

/s/
Pat Roberts
United States Senator

/s/
Claire McCaskill
United States Senator

/s/
Roger F. Wicker
United States Senator

/s/
Jeanne Shaheen
United States Senator

/s/
Susan M. Collins
United States Senator

/s/
Mark L. Pryor
United States Senator

/s/
David Vitter
United States Senator

/s/
Amy Klobuchar
United States Senator

/s/
Michael B. Enzi
United States Senator

/s/
Herb Kohl
United States Senator

/s/
James E. Risch
United States Senator

/s/
John Boozman
United States Senator

/s/
Thad Cochran
United States Senator

/s/	/s/
Lindsey Graham	Richard Burr
United States Senator	United States Senator
/s/	/s/
Patrick J. Toomey	Marco Rubio
United States Senator	United States Senator

Congress of the United States
Washington, DC 20515

February 14, 2012

Mr. Jack Lew
White House Chief of Staff
1600 Pennsylvania Ave., NW
Wahington, DC 20500

Dear Mr. Lew:

As sponsors of H.R. 2541, the Silviculture Regulatory Consistency Act, we are writing you to encourage the Administration to defend before the Supreme Court EPA's 35 year interpretation that forest roads should be regulated as nonpoint sources under the Clean Water Act (CWA). As you know, the Supreme Court recently asked for the views of the federal government on this issue because of a decision by the Ninth Circuit Court that reversed this proven and longstanding practice.

We support our states and their rigorous oversight of forest roads through the use of Best Management Practices (BMP). BMPs are environmentally proven and responsible approaches for regulating runoff that allow states to appropriately address unique, local forest management challenges – as opposed to one size fits all National Pollutant Discharge Elimination Systems (NPDES) permits under the CWA.

Requiring CWA permits for forest roads would impose unprecedented and onerous regulatory burdens on states and forest owners and operators that would seriously threaten sound forest management and the many good paying jobs it supports. Furthermore, the Ninth Circuit's decision would subject private, tribal, state and federal forest management to debilitating citizen lawsuits. Given the benefits to watersheds, the increased forest access, the reduced forest fire risk, and the hundreds of thousands of rural jobs that come with responsible forest management, we can ill afford to effectively shut down forest production under a court-imposed regulatory requirement that runs counter to 35 years of success.

Congress has consistently supported the EPA's existing regulations and state BMPs because they provide an approach to water quality management that works. The Ninth Circuit Court's decision to unilaterally reinterpret the CWA is inconsistent with good public policy and contrary to congressional intent. We introduced H.R. 2541 to codify EPA's existing forest roads rule into law, and a similar provision was included in the 2011 Omnibus Appropriations Act. This legislation, which enjoys bipartisan support from members representing nearly every forested state, is a clear rebuttal to the Ninth Circuit and a strong reaffirmation of congressional support for EPA's longstanding interpretation of forest roads regulation under the CWA.

As the administration prepares its views for presentation to the Supreme Court by the Solicitor General, we strongly urge you to fully defend EPA's existing rule and seek to overturn the Ninth Circuit's erroneous interpretation of the Clean Water Act and EPA's policy.

Sincerely,

/s/	/s/
Jaime Herrera Beutler	Kurt Schrader
Member of Congress	Member of Congress
/s/	/s/
Greg Walden	Collin Peterson
Member of Congress	Member of Congress
/s/	/s/
Doc Hastings	Sanford Bishop Jr.
Member of Congress	Member of Congress
/s/	/s/
Bob Goodlatte	Bennie Thompson
Member of Congress	Member of Congress
/s/	/s/
Cathy McMorris Rodgers	Tim Holden
Member of Congress	Member of Congress
/s/	/s/
Glenn Thompson	G.K. Butterfield
Member of Congress	Member of Congress
/s/	/s/
Thomas Petri	Mike Michaud
Member of Congress	Member of Congress
/s/	/s/
Shelley Moore Capito	Mike McIntyre
Member of Congress	Member of Congress

/s/
Sue Myrick
Member of Congress

/s/
Larry Kissell
Member of Congress

/s/
Jo Ann Emerson
Member of Congress

/s/
John Barrow
Member of Congress

/s/
Dave Reichert
Member of Congress

/s/
Mike Ross
Member of Congress

/s/
Walter Jones Jr.
Member of Congress

/s/
Dan Boren
Member of Congress

/s/
Mike J. Rogers
Member of Congress

/s/
William Owens
Member of Congress

/s/
Cynthia Lummis
Member of Congress

/s/
Terri Sewell
Member of Congress

/s/
Robert Aderholt
Member of Congress

/s/
Jeff Duncan
Member of Congress

/s/
Alan Nunnelee
Member of Congress

/s/
Lynn Westmoreland
Member of Congress

/s/
Raul Labrador
Member of Congress

/s/	/s/
Jeff Denham	Bill Huizenga
Member of Congress	Member of Congress
/s/	/s/
Robert Wittman	Mick Mulvaney
Member of Congress	Member of Congress
/s/	/s/
Reid Ribble	Marthy Roby
Member of Congress	Member of Congress
/s/	/s/
Tim Walberg	Brett Guthrie
Member of Congress	Member of Congress
/s/	/s/
Sean Duffy	Vicky Hartzler
Member of Congress	Member of Congress
/s/	/s/
Dan Benishek	David McKinley
Member of Congress	Member of Congress
/s/	/s/
Renee Ellmers	Morgan Griffith
Member of Congress	Member of Congress

CC: Lisa Jackson, Administrator of the Environmental Protection Agency
Tom Vilsack, Secretary of the United States Department of Agriculture
Ken Salazar, Secretary of the United States Department of the Interior

State of Arkansas
The Attorney General
Dustin McDaniel
323 Center Street, Suite 200
Little Rock, Arkansas 72201

January 31, 2012

Donald B. Verrilli, Jr.
Solicitor General
950 Pennsylvania Ave., NW
Wahington, DC 20530-0001

Re: Decker v. NEDC, Nos. 11-338, 11-347

Mr. Verrilli,

The State of Arkansas writes on behalf of the *Amici Curiae* States, who filed a brief in this case on October 14, 2011, along with the other interested states listed below. On December 12, 2011, the United States Supreme Court invited the Solicitor General to submit the views of the United States on this issue. The States ask that you carefully consider the impact this case has on the States when making your decision. Amici states urge the Solicitor General to support the grant of 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 indi-

vidual state in favor of the CWA's NPDES permit program.

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. The Solicitor General should urge the Court to grant certiorari because the decision of 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.

The Amici States ask the Solicitor General to consider the long term application of the Silviculture Rule, the impact this sudden change would have on the States, as well as EPA, and the departure from previous case law that the change represents. This issue will fundamentally impact the state programs that have been developed and enforced based upon the long term application of the Silviculture Rule. After a review of these issues we request the Solicitor General urge the Supreme Court to grant certiorari for this case.

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 are and are 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 nonpoint 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.

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 all states to develop best management practices and programs (BMPs) for non-point source pollution and 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.

Again, the Amici states urge the Solicitor General to support the grant of 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. We welcome the opportunity to discuss the States' concerns further with you. Thank you for your time and consideration of this matter.

Sincerely,

/s/
Dustin McDaniel
Arkansas Attorney General

/s/
Luther Strange
Alabama Attorney General

/s/
Lawrence G. Wasden
Idaho Attorney General

/s/
Richard A. Svobodny
Alaska Acting Attorney General

/s/
Greg Zoeller
Indiana Attorney General

/s/
Pamela Jo Bondi
Florida Attorney General

/s/
James D. "Buddy" Caldwell
Louisiana Attorney General

/s/
Samuel S. Olens
Georgia Attorney General

/s/
Catherine Cortez Masto
Nevada Attorney General

/s/
Derek Schmidt
Kansas Attorney General

/s/
Michael A. Delaney
New Hampshire Attorney General

/s/
Jack Conway
Kentucky Attorney General

/s/
Mike DeWine
Ohio Attorney General

/s/
William J. Schneider
Maine Attorney General

/s/
E. Scott Pruitt
Oklahoma Attorney General

/s/
Bill Schuette
Michigan Attorney General

/s/
Linda L. Kelly
Pennsylvania Attorney General

/s/
Jim Hood
Mississippi Attorney General

/s/
Alan Wilson
South Carolina Attorney General

/s/
Chris Koster
Missouri Attorney General

/s/
Marty J. Jackley
South Dakota Attorney General

/s/
Steve Bullock
Montana Attorney General

/s/
Gregory A. Phillips
Wyoming Attorney General

/s/
Robert E. Cooper, Jr.
Tennessee Attorney General

/s/
Greg Abbott
Texas Attorney General

/s/ Mark L. Shurtleff Utah Attorney General	/s/ Kenneth T. Cuccinelli, II Virginia Attorney General
/s/ Robert M. McKenna Washington Attorney General	/s/ Darrell V. McGraw, Jr. West Virginia Attorney General