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

## PETITIONERS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND PETITIONERS' SUPPLEMENTAL BRIEF

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## MOTION FOR LEAVE TO FILE BRIEF

Pursuant to Rule 25(6), petitioners request leave to file this supplemental brief addressing the effect of the Environmental Protection Agency's (EPA's). amendment to its stormwater-discharge rule, 40 C.F.R. § 122.26. The rule is one of the primary rules at issue in this case. Because the EPA administrator signed the final rule on November 30, 2012, the business day before oral argument, petitioners did not have the opportunity to address the impact of the amended rule in the brief on the merits, the reply brief, or in supplemental briefing submitted before oral argument.

In addition, this Court consolidated oral argument in this case with oral argument in *Georgia-Pacific West, Inc.*, *et al.*, *v. Northwest Environmental Defense Center*, Case No. 11-347, and counsel for petitioners in *Georgia-Pacific West, Inc.* argued the case. As a result, petitioners have not had the opportunity to present to the Court their view on how the amendments to 40 C.F.R. § 122.26 bear on the disposition of the two questions presented on which the Court granted certiorari in this case. The supplemental brief sets forth those views.

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## PETITIONERS' SUPPLEMENTAL BRIEF

On November 30, 2012, the administrator of the Environmental Protection Agency (EPA) signed a final rule amending the stormwater discharge rule, 40 C.F.R. § 122.26. 77 Fed. Reg. 72970, 72974-72975 (Dec. 7, 2012). The amendments to the rule take effect on January 7, 2013. 77 Fed. Reg. at 72970. As amended, the rule reiterates EPA's longstanding view that stormwater discharges from roads used for timber growing and harvesting (the types of stormwater discharges alleged to be occurring in this case) are not discharges "associated with industrial activity" for purposes of the rule and 33 U.S.C. § 1342(p), and therefore do not require National Pollutant Discharge Elimination System (NPDES) permits.[1] *See generally*

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[1] The preamble to the amended rule (at footnote 1) explains:

> This rulemaking responds to the uncertainty created by the Ninth Circuit's holding in [this case] that certain channeled discharges of stormwater from logging roads constitute point source discharges, bringing them within the Section 402 NPDES permitting framework. This final rule, by clarifying what constitutes a discharge "associated with industrial activity," makes clear that such discharges do not require NPDES permits even if they are point source discharges.

77 Fed. Reg. at 72970-72971. Although respondent asserted at oral argument that there are factual issues regarding whether the stormwater discharges alleged in the

77 Fed. Reg. at 72970-72975. This supplemental memorandum addresses the effect of the amendment to the rule on this proceeding. In brief, the amendment moots one part of this case, but live issues remain and should be resolved by this Court.

**A. The amendment to 40 C.F.R. § 122.26 does not moot the first question presented.**

The first question presented is:

> Did the Ninth Circuit err when, in conflict with [other] circuits, it held that a citizen may bypass judicial review of an NPDES permitting rule under 33 U.S.C. § 1369, and may instead challenge the validity of the rule in a citizen suit to enforce the CWA?

(Pet. i).[2]

The issuance of the amended rule does not moot that question, because there remains a controversy in this case with respect to that issue. As respondent stated at oral argument, respondent's position is that (a) 33 U.S.C. § 1342(p) requires EPA to treat stormwater discharges from roads used for timber cultivation and harvesting as "industrial" stormwater, which

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complaint require permits under the amended rule, those assertions conflict with EPA's unequivocal statements that the amendments perpetuate EPA's longstanding practice of treating the type of stormwater at issue in this very case as non-industrial. It is difficult to imagine EPA making its intent any more explicit.

[2] Citations to "Pet." and "Pet. App." are to the petition and appendix filed in this case, No. 11-338.

requires an NPDES permit under the statute;[3] (b) EPA's decision to treat that type of stormwater as non-industrial stormwater, embodied in both the original stormwater discharge rule and the amended rule, conflicts with 33 U.S.C. § 1342(p); (c) 33 U.S.C. §§-1365 and 1369 permit respondent to litigate that issue in this citizen suit; and (d) in respondent's view, respondent cannot litigate that issue in a review proceeding under 33 U.S.C. § 1369, so it must be permitted to proceed here. (Tr. 31-36).

By contrast, petitioners' position is that 33 U.S.C. §§ 1365 and 1369 *require* respondent to raise its challenge to EPA's stormwater-discharge rule in a review proceeding under 33 U.S.C. § 1369, and prohibit respondent from litigating the issue in this citizen suit under any circumstances. (Petitioners' Opening Br. 31-34, 43-46; Reply Br. 10-19). The Ninth Circuit's ruling represents a third position with respect to that issue: that a citizen-suit plaintiff can litigate the validity of an NPDES permitting rule in a citizen suit

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[3] As noted in petitioners' reply brief, respondent's current focus on the statute represents a shift from the claim alleged in the complaint, and from its arguments below, both of which asserted that the stormwater at issue was "industrial" under EPA's storwmater-discharge rule. Respondent did not clearly argue below that the statute alone mandated that EPA treat the discharges at issue as "industrial." That said, as explained below, the Ninth Circuit opinion, by its terms, holds that the stormwater discharges at issue are "industrial" under 33 U.S.C. § 1342(p).

depending on certain vagaries of timing. (Pet. App. 8-10).

Resolving the dispute among the competing positions will have a practical effect on the parties. A ruling in favor of petitioners' position would end this case, and would shift litigation over the validity of the amended stormwater-discharge rule to a review proceeding under 33 U.S.C. § 1369. A ruling in favor of respondent's position would prolong this case and result in duplicative litigation over whether 33 U.S.C. § 1342(p) permits EPA to treat stormwater discharges from roads used for timber maintenance and harvesting as non-industrial stormwater. That, in turn, creates the potential for inconsistent results. The first question presented, therefore, is not moot.

**B. The amendment to the rule moots part of the second question presented, but not the entire question.**

The second question presented is:

> Did the Ninth Circuit err when it held that stormwater from logging roads is industrial stormwater under the CWA and EPA's rules, even though EPA has determined that it is not industrial stormwater?

(Pet. i-ii).

The issuance of the amended rule moots part of that question, specifically, the part that asks whether the Ninth Circuit erred when it held that stormwater from logging roads was industrial stormwater "under

* * *EPA's rules." [4] The amended rule makes crystalline that, under EPA's rules, that type of stormwater is non-industrial. As a result, the amended rule moots the question of whether the Ninth Circuit erred when it rejected EPA's interpretation of its stormwater-discharge rule.

Under this Court's decision in *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), respondent's request for civil penalties and remediation for petitioners' alleged violations of the prior version of 40 C.F.R. § 122.26 does not prevent mootness of the rule issue. In that case, this Court explained that the remedies available to a citizen-suit plaintiff are those that "abate current violations and deter future ones." *Laidlaw*, 520 U.S. at 192. Where, as here, EPA amends the rule that the citizen-suit defendant is alleged to have violated to clarify that the defendant's conduct does not violate the rule, there is no current violation to abate or future violation to deter. There are thus no remedies available under the circumstances presented by this case. To hold otherwise would convert each citizen into an independent environmental regulatory agency. That would undermine Congress's intent "that the citizen suit is meant to supplement rather than supplant governmental action," inappropriately transforming "the nature of the citizens' role from interstitial to potentially intrusive." *Gwaltney of Smithfield*

[4] This is the issue addressed in Petitioners' Opening Brief at 21-31 and 35-42, and Petitioners' Reply Brief at 3-9.

*Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60-61 (1987), *superseded by statute on other grounds as recognized by Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1005 (11th Cir. 2004).

The amendment to the rule does not, however, moot the part of the question that asks whether the Ninth Circuit erred "when it held that stormwater from logging roads is industrial stormwater under the *CWA* * * * even though EPA has determined that it is not industrial stormwater." (Pet. i-ii; emphasis added). Although the United States and private defendants contend that the Ninth Circuit did not address the statutory issue, the Ninth Circuit's opinion unequivocally states otherwise. The decision explicitly opines that EPA has a "statutory obligation under § 402(p)" to provide for NPDES permits for such stormwater:

> 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.

(Pet. App. 48; *see also* Pet. App. 48-52 (directing EPA to design permit for stormwater discharges from logging roads to satisfy its responsibilities under the CWA)). Whether the Ninth Circuit erred when it reached that conclusion about EPA's "statutory obligation" remains live. As noted above, it is the primary issue that respondent seeks to litigate in this case. Resolving it would have a practical effect on the par-

ties because it will determine whether Congress required permits for the discharges at issue as a statutory matter, or whether Congress instead delegated to EPA the authority to decide whether and to what extent silvicultural stormwater should be categorized as "industrial" stormwater.

### C. If this Court determines that the case is not moot, the proper disposition hinges on how the Court resolves the first question presented but, in all events, requires reversal of the Ninth Circuit's decision and affirmance of the district court's dismissal of the case.

The proper disposition of this case depends on how the Court answers the first question presented. If the Court concludes that respondent's challenge to the statutory validity of EPA's NPDES permitting rules is not cognizable in a citizen suit, then the Court should hold that EPA's rules dispose of this case. On that basis, it should conclude that no permit is required for the alleged discharges under the operative rules, reverse the Ninth Circuit's decision and affirm the district court's dismissal of the case.

Alternatively, if the Court determines that respondent's statutory claim is cognizable in a citizen suit, then it should evaluate EPA's decision that 33 U.S.C. § 1342(p) does not require permits for the stormwater discharges at issue in this case under the analytic framework established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). For the reasons stated in petitioners' briefing (Petitioners' Opening Br. 46-47; Reply Br. 19-25), the Court should hold that EPA's interpretation

of 33 U.S.C § 1342(p) is reasonable, reverse the decision of the Court of Appeals, and affirm the district court's dismissal of the case.

### D. If the Court determines that the case is moot, vacatur is appropriate.

If this Court concludes that the case is moot, it should vacate the Court of Appeals' decision and order a remand to the district court for a dismissal of the case as moot. Any mootness did not result from the conduct of petitioners. Vacatur therefore is appropriate to free petitioners from any ongoing obligations resulting from the Ninth Circuit opinion, which was erroneosly decided, but, because of EPA's actions, became moot before this Court could complete review. *Camreta v. Greene*, 120 S. Ct. 2020, 2035-36 (2011). Vacatur also is appropriate to ensure that whatever Court of Appeals reviews EPA's amended rule will not be hampered by the Ninth Circuit's stated conclusion that 33 U.S.C. § 1342(p) requires EPA to classify stormwater discharges from logging roads as discharges "associated with industrial activity."

Moreover, vacating the Ninth Circuit decision will not harm respondent. Respondent will have a full and fair opportunity to litigate the primary substantive issue that remains following EPA's adoption of the amended rule—whether EPA reasonably has concluded that silvicultural stormwater discharges from logging roads are not stormwater discharges "associated with industrial activity" under 33 U.S.C. § 1342(p)—in a rule challenge to the amended rule under 33 U.S.C. § 1369 on the administrative record.

**E. Conclusion**

Petitioners respectfully request this Court to reverse the decision of the Court of Appeals and affirm the district court's judgment of dismissal.

Respectfully submitted,

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