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

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

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 11-338

DOUG DECKER, IN HIS OFFICIAL CAPACITY AS OREGON STATE FORESTER, ET AL., PETITIONERS

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER

No. 11-447

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

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order of January 8, 2013, to address the effect on this case of a recent regulatory amendment promulgated by the Environmental Protection Agency (EPA), 77 Fed. Reg. 72,970 (Dec. 7, 2012). In the view of the United States, this case is now moot. Because the case was rendered moot by circumstances beyond the

parties' control, the judgment of the court of appeals should be vacated, and the case should be remanded with instructions that respondent's complaint be dismissed. In the alternative, the court of appeals' judgment should be vacated and the case remanded to allow the court of appeals to address in the first instance the effect of the regulatory amendment on the proper disposition of the case.

ARGUMENT

1. Respondent's complaint alleged that ongoing unpermitted stormwater discharges associated with two logging roads in Oregon violated the Clean Water Act (CWA). II J.A. 2-3, 7-9. Specifically, respondent alleged that the stormwater flowing from culverts and ditches along the roads into forest streams resulted in "point source" discharges for which National Pollutant Discharge Elimination System (NPDES) permits were required "because [petitioners'] maintenance of and timber hauling on the [two roads] constitute 'industrial activities' under 40 C.F.R. 122.26(b)(14)." II J.A. 3. The district court granted petitioners' motion to dismiss the complaint. Pet. App. 53-77.[1] The court of appeals reversed and remanded for further proceedings. *Id.* at 1-52. This Court granted the petitions for a writ of certiorari. 133 S. Ct. 22 (2012).

2. The EPA recently amended its Phase I industrial stormwater rule to clarify that NPDES permits are not required for the stormwater discharges at issue and that petitioners' conduct does not violate the CWA. The amendment was signed by the EPA's Administrator on November 30, 2012, was published

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

in the Federal Register on December 7, 2012, and became effective on January 7, 2013. 77 Fed. Reg. at 72,970. The amendment states that discharges of stormwater from silvicultural facilities, other than those associated with four enumerated silvicultural activities (rock crushing, gravel washing, log sorting, or log storage),[2] are not subject to the NPDES program because they are not "associated with industrial activity." *Ibid.* In promulgating the amendment, the EPA explained that the agency's intent was to clarify rather than to change its understanding of the pre-existing rule. See *id.* at 72,973 (stating that amendment "reaffirm[s] the EPA's longstanding regulatory position regarding the applicability of stormwater regulations to logging roads").

The amendment makes clear that, under the EPA's regulations, *future* stormwater discharges of the sort at issue here do not require NPDES permits, regardless of whether they are viewed as "point source" discharges under the CWA. As amended in 1987, the CWA does not require NPDES permits for all point-source stormwater discharges, but only for enumerated categories thereof. Respondent contended, and the court of appeals held, that petitioners' logging-road discharges fall within one of those categories, namely "discharges associated with industrial activity." The regulatory amendment unequivocally rejects that view. See 77 Fed. Reg. at 72,973 (stating that the amendment "ends any uncertainty created by the Ninth Circuit's holding" and "cancels out any on-the-ground impact of the Ninth Circuit's decision" in this case); see also *id.* at 72,970 n.1.

---

[2] Those are the same activities expressly defined as "silvicultural point sources" by the EPA's Silvicultural Rule. 40 C.F.R. 122.27.

3. The recent regulatory amendment leaves open two potential areas of continuing disagreement between the parties concerning the legality of petitioners' logging-road stormwater discharges. First, the amendment does not definitively resolve the parties' dispute as to the legality of discharges that occurred before the amendment's effective date. In promulgating the amendment, the EPA reaffirmed the view, which the government had expressed throughout this litigation, that petitioners' discharges were not "associated with industrial activity" even under the EPA's pre-amendment definition of that phrase. See 77 Fed. Reg. at 72,973. Nevertheless, because the agency did not purport to give the amendment retroactive effect, but instead stated that it would become effective January 7, 2013, the amendment does not of its own force govern discharges that occurred before January 7, 2013. *Id.* at 72,974.

Second, respondent has filed a "protective" petition for review of the new rule in the United States Court of Appeals for the Ninth Circuit. See No. 13-70057 (filed Jan. 4, 2013). It is possible that other challenges to the rule will be filed as well. Thus, notwithstanding the regulatory amendment, the parties continue to disagree on the question whether future discharges of the sort at issue here will require NPDES permits.

For the reasons that follow, neither of those disagreements prevents this case from becoming moot. Even if this Court decided the questions on which it previously granted certiorari, and agreed with the court of appeals that petitioners' discharges required NPDES permits under the pre-amendment regulation, no meaningful relief could be awarded. And while the issue of the amended rule's validity is clearly

a question of continuing importance, that issue is appropriately resolved in a separate challenge to the amendment itself, not in this citizen suit (to which the government is not a party).

4. In its complaint, respondent requested four distinct forms of relief: (a) injunctive relief to prevent future CWA violations, (b) injunctive relief requiring remediation of the effects of petitioners' past discharges, (c) civil penalties, and (d) attorneys' fees and other litigation expenses. II J.A. 24-25. In light of the recent regulatory amendment, none of those forms of relief remains available.

a. Respondent's complaint sought injunctive relief requiring petitioners "to apply for and obtain NPDES permits" and to take other steps designed to prevent future violations. II J.A. 24. In determining whether prospective equitable relief is appropriate, a court generally applies the law in effect at the time of its decision. See, *e.g.*, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 273-274 (1994). Because the EPA has clarified by notice and-comment rulemaking that NPDES permits are not required for stormwater discharges from logging roads, a prospective order to require petitioners to seek and comply with a permit would be inappropriate and inconsistent with the current regulatory scheme.

b. Respondent's complaint also sought "injunctive relief requiring [petitioners] to remediate the environmental damage and ongoing impacts resulting from their illegal discharges to the Trask and Kilchis River systems." II J.A. 24. To the extent that remediation would be calculated to reduce or eliminate future discharges, it would be more properly characterized as prospective relief and thus not available for the

reasons already discussed. If the remediation were instead aimed at undoing the impacts of past stormwater discharges, such relief would be a clearly inappropriate exercise of equitable discretion under the circumstances of this case.

The purpose of the recent regulatory amendment was to clarify that logging-road discharges of the sort at issue here do not require NPDES permits and do not violate the CWA. That clarification reflects EPA's consistently expressed view that petitioners' discharges did not require NPDES permits even before the regulation was amended. There would be no sound rationale under those circumstances for a court to require petitioners to undo the effects of past unpermitted discharges at the same time that similar discharges into the same rivers are lawfully occurring under the current regulatory scheme.

c. The recent regulatory amendment likewise precludes an award of civil penalties in this citizen suit. Because any civil penalties imposed under the CWA flow to the United States Treasury, a citizen-suit plaintiff (unlike a government enforcement agency) lacks standing to seek penalties as punishment for a completed violation. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 107 (1998); see also *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987). A citizen-suit plaintiff does have standing, however, to seek civil penalties when the imposition of such relief is likely to redress the plaintiff's injury from the underlying CWA violations "by abating current violations and preventing future ones." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 187 (2000). In the current posture of this case, civil penalties could

not reasonably be viewed as a means of abating or deterring ongoing or future CWA violations, since the recent regulatory amendment makes clear that the conduct in which petitioners are alleged to have engaged is not a violation at all.

In *Laidlaw*, this Court addressed whether the defendant permit holder's voluntary post-complaint compliance with permit limits and shutdown of a violating facility rendered a citizen-suit plaintiff's claim for civil penalties moot. The Court concluded that the claim for penalties would be moot only if it was "absolutely clear that [the defendant's] permit violations could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189. That standard rested, however, on the Court's "voluntary cessation" cases, which make clear that an especially demanding mootness standard applies when a defendant purports to forswear future repetition of conduct in which it has previously engaged. See *ibid.* (citing *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968); *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). Here, by contrast, mootness results not from any representation by petitioners that they will henceforth seek NPDES permits for their logging-road stormwater discharges, but from the clarification by the EPA (which is not a party to this case) that such permits are not required.

The future conduct in which petitioners are expected to engage could be viewed as a CWA violation only if the EPA's regulatory amendment is set aside as inconsistent with the statute. As we explain below, any challenge to the amended rule should be resolved through the statutory procedures for judicial review of EPA action. Although it is conceivable that the

amended rule could be declared invalid in those proceedings, and that the legality of petitioners' conduct could again be called into question based on that holding, that possibility is too speculative to prevent this case from becoming moot.

d. Respondent's request for attorneys' fees does not prevent this case from being moot. Under the CWA's citizen-suit provision, a court may award litigation costs only to a "prevailing or substantially prevailing party." 33 U.S.C. 1365(d). A "prevailing party" is one who has been awarded some relief from a court that "create[s] the 'material alteration of the legal relationship of the parties,'" such as an enforceable judgment on the merits or a consent decree. *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Servs.*, 532 U.S. 598, 603-605, 606 (2001) (quoting *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-793 (1989)). In this case, neither of the courts below has determined that petitioners are liable for any CWA violations, let alone issued any form of tangible relief. Because no such relief is available for the reasons discussed above, respondent cannot qualify as a prevailing party (substantially or otherwise) and is therefore ineligible for a fee award.

5. Respondent has argued in this Court that the CWA term "associated with industrial activity" *unambiguously* encompasses the logging-road discharges at issue in this case. See Resp. Br. 42-44. That argument, if accepted, would logically imply that the EPA's recent regulatory amendment is inconsistent with the governing statute and therefore invalid. Precisely for that reason, however, the question is more appropriately addressed through the procedures

specifically designed for judicial review of EPA action, rather than through continued adjudication of this citizen suit. (Indeed, respondent has already filed such a challenge in the Ninth Circuit. See p. 4, *supra*.). That approach would ensure that the validity of the new regulation is determined in a suit to which the EPA is a party, based on the administrative record compiled during the recent rulemaking proceedings. It would also ensure that, if this Court were ultimately called on to determine whether the CWA term "associated with industrial activity" unambiguously encompasses logging-road stormwater discharges, it could make that determination as "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718 n.7 (2005).

Petitioners in No. 11-338 argue (Supp. Br. 6) that the court of appeals has already construed the CWA to require that petitioners' discharges be treated as "associated with industrial activity." That is incorrect. With respect to the Silvicultural Rule, the court of appeals identified the need for consistency with the governing statute as its rationale for rejecting the EPA's interpretation of its own regulation. See Pet. App. 36-37. With respect to the regulatory definition of discharge "associated with industrial activity," by contrast, the court did not hold that the CWA compelled its expansive construction of the rule, but instead relied on the text and history of the then-current industrial-stormwater regulation. See, *e.g.*, *id.* at 44-45 (explaining that "[i]ndustries covered by the Phase I 'associated with industrial activity' regulation are defined in accordance with Standard Industrial Classifications ('SIC')," and that "logging" is defined as an "industrial activity" under the applicable

SIC); *id.* at 46 ("The [Phase I regulation's] definition of a 'facility' engaging in 'industrial activity' is very broad."); see also 11-347 Pet. Br. 39, 43 (describing court of appeals' rejection of the EPA's interpretation of its industrial stormwater rule as "the product of a myopic focus on isolated snippets of regulatory language" and as "second-guessing EPA's expert judgment concerning its own regulation"). The court invoked the CWA only to hold that, because the EPA had (in the court's view) defined petitioners' logging-road discharges to be "associated with industrial activity," the agency could not insulate those discharges from NPDES permitting requirements by declaring them to be nonpoint-source discharges. See Pet. App. 36-37, 47-48. Respondent has conceded that the court of appeals did not rest its Phase I decision on statutory grounds. See 12/3/2012 Oral Arg. Tr. 32-33.

6. Petitioners in No. 11-338 contend (Supp. Br. 2-4) that this case is not moot because the parties continue to disagree on the threshold question whether respondent's suit fell within the district court's subject-matter jurisdiction. That argument provides no sound basis for continued adjudication of the case. Even if petitioners' argument were properly viewed as a challenge to the jurisdiction of the courts below, but see Gov't Br. 17, this Court would have no obligation to decide that question now that subsequent developments have eliminated the possibility of awarding respondent meaningful relief. See, *e.g.*, *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 584-585 (1999) (explaining that federal courts have discretion to choose among threshold non-merits grounds of decision); *Steel Co.*, 523 U.S. at 100-101 & n.8 (same); *Arizonans*

for Official English v. *Arizona*, 520 U.S. 43, 66-67 (1997) (same).

Petitioners in No. 11-338 contend (Supp. Br. 4) that "[r]esolving the dispute among the competing positions [with respect to initial subject-matter jurisdiction] will have a practical effect on the parties." That is incorrect. If the Court resolved that issue in respondent's favor and decided that the courts below had subject-matter jurisdiction, the appropriate disposition of this case would be to vacate the court of appeals' judgment and remand with instructions that the case be dismissed as moot for the reasons explained in this brief. See pp. 11-12, *infra*. If the Court instead decided that the courts below lacked subject-matter jurisdiction, it would grant petitioners' request to vacate the court of appeals' judgment and remand with instructions to affirm the district court's judgment of dismissal. See 11-338 Supp. Br. 9. The distinction between those two possible dispositions is of no practical consequence to the parties.

7. The Court should vacate the court of appeals' judgment and remand the case with instructions that the case be dismissed as moot. When a civil suit becomes moot on appeal, the Court may "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. 2106. "[V]acatur must be decreed * * * where a controversy presented for review has 'become moot due to circumstances unattributable to any of the parties.'" *United States Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) (quoting *Karcher* v. *May*, 484 U.S. 72, 83 (1987)). Here, mootness results from regulatory action by the EPA, which is not a

party to the suit. Because the Court has already granted review, but has not yet rendered a decision, vacatur is appropriate to free petitioners from any ongoing obligations resulting from the court of appeals' decision.

8. Even if the Court determines that the EPA's amendment does not render the case moot, or if it prefers not to address that issue, the Court should vacate the judgment below and remand for a reexamination of the case in light of the amended rule. EPA's amendment to the stormwater rule constitutes a significant change in the relevant regulatory regime occurring after this Court's grant of certiorari. At a minimum, those changed circumstances warrant vacatur of the court of appeals' judgment and a remand for further proceedings to allow the court of appeals to address the impact of the regulatory amendment in the first instance. See *Douglas* v. *Independent Living Ctr.*, 132 S. Ct. 1204, 1207-1208 (2012).

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded with instructions that the case be dismissed as moot. In the alternative, the judgment should be vacated and the case remanded for further proceedings to consider the impact of the EPA's recent regulatory amendment.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

JANUARY 2013