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' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

Respondent begins its argument by asserting that something is "amiss" because petitioners and the United States each begin their respective legal arguments by discussing the relevant EPA *regulations* rather than the relevant *statute*. Respondent then posits, somewhat curiously, that this Court in fact need not even consider the relevant regulations because this case can, and should, be decided under the terms of the Clean Water Act.

Yet the only thing amiss is respondent's attempt to alter the trajectory of this case by transforming this enforcement action into an assault on the validity of EPA's regulations. Respondent brought this citizen suit to enforce EPA's stormwater discharge regulation that requires a regulated party to obtain a permit for discharge that is "associated with industrial activity." In a citizen suit—where the complaining party stands in the shoes of the regulating agency—the party cannot challenge the validity of the agency's rules, nor may a court entertain such a challenge. Instead, the reviewing court must determine only whether the agency's rules are being properly enforced. The reviewing court's first task is to determine a regulation's meaning. Where, as here, the agency has provided the court with an interpretation of its own regulation, the court accomplishes that task by considering whether the agency's interpretation of its regulation is reasonable, *i.e.*, consistent with the text and not otherwise plainly erroneous. If an agency's interpretation satisfies that standard, it is entitled to

deference and must be enforced as the agency interprets it.

Here, EPA has consistently interpreted its stormwater discharge rule to exclude stormwater runoff from forest roads from the permitting requirements, and its interpretation is consonant with the text of the rule and EPA's expressed intention when it adopted the rule. In light of its unfaltering interpretation of its rule, EPA's interpretation binds this Court.

But respondent now suggests that this Court should simply pretend as if the very regulation that respondent is seeking to enforce does not exist at all because the relevant statutory language is "plainly dispositive." (Resp. Br. 17). Yet in so arguing, respondent fails to grapple with the two roadblocks in its path: (1) this Court's long-standing recognition that when Congress entrusts an agency with the responsibility to carry out Congress' directives and that agency carries out its responsibility by adopting a rule, the agency's regulations executing those directions cannot simply be ignored; and (2) the limitations on the scope of review in a citizen suit, which preclude a reviewing court from rejecting an agency's regulations because, in the court's view, the agency's interpretation is inconsistent with the relevant statute.

## I. EPA's regulations—not the CWA—are the starting point in this enforcement action, and its reasonable interpretation of its regulations is entitled to deference.

### A. Where, as here, Congress has delegated authority to an agency to administer a statutory scheme, this Court must "discover the meaning" of the agency's subsequent regulations.

Respondent brought this citizen suit alleging that Oregon and private timber defendants were failing to comply with EPA's stormwater discharge regulations. This, then, is an action brought to *enforce* EPA's rules. (Resp. Br. 18-19). In a case that poses the question whether a regulated entity is acting in accordance with an agency's regulation, that regulation is, necessarily, the source of law that resolves the question, bounded by the significant deference that this Court attributes to an agency's reasonable interpretation of its regulations.

That deference is both a function of necessity and practicality, as well as a reflection of the separation of powers. Congress frequently delegates the task of administering a complex regulatory scheme to an agency, such as EPA, that has developed expertise in a relevant area. Under such circumstances, the agency that authored—and implemented—the regulations implementing a complex regulatory scheme is in a far better position than the courts to say definitely what its regulations mean. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *see also* Brief of Amici Curiae Law Professors in Support of Petition-

ers at 19-20. Granting deference to an agency's interpretation of its own regulation thus "imparts (once the agency has spoken to clarify the regulation) certainty and predictability to the administrative process." *Talk Am., Inc. v. Mich. Bell Tel. Co*., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); *see also Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 296 (2009) (Scalia, J., concurring in part and concurring in the judgment) ("It is quite impossible to achieve predictable (and relatively litigation-free) administration of the vast body of complex laws committed to the charge of executive agencies without the assurance that reviewing courts will accept reasonable and authoritative agency interpretation of ambiguous provisions.").[1]

Here, Congress granted EPA—and not the courts—the authority to promulgate regulations implementing the CWA. 33 U.S.C. 1342(p)(3)(A),(4)(A) (requiring Phase I permits for those discharges "associated with industrial activity," yet delegating to EPA the responsibility of promulgating regulations relating to industrial stormwater discharges). Identifying which stormwater discharges are associated with industrial activities is precisely that kind of area that involves "'a complex and highly technical regulatory

[1] Respondent suggests in a footnote that this Court consider overturning the *Auer* framework. (Resp. Br. 42 n. 12). It provides no argument or reasons in support of that suggestion. For the reasons set forth in the state's opening brief, this brief, and as echoed in the Brief of Amici Curiae Law Professors in Support of Petitioner, this Court should decline to do so.

program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ.*, 512 U.S. at 512 (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)). And EPA has that expertise to implement the CWA's complex requirements. In light of Congress' delegation to EPA, the role of any reviewing court in an enforcement action is to consider EPA's regulation and, following the *Auer* framework, determine whether EPA's interpretation of those regulations is entitled to deference. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (to determine how to properly enforce the regulation, the court must "discover the meaning" of the relevant regulations). For a court to begin, as respondent proposes, by reviewing the relevant statute presupposes that it is the court's institutional role to administer the statute. [2] But it is not. EPA has been charged with doing so, and its silvicultural and stormwater discharge regulations are manifestations of EPA carrying out its obligation to implement the

[2] As an aside, respondent's suggestion that this Court must analyze respondent's claims under the CWA—and not EPA's rules—represents a remarkable sea-change in position. As recently as its brief in opposition, respondent insisted that it has "simply sought enforcement of the Phase I regulation" throughout this litigation. (Resp. Opp. Br. 21). In fact, respondent expressly disavowed any claim that EPA's rules were invalid under the CWA, asserting instead that this case concerns the proper interpretation of the rules. It therefore is anomalous for respondent to now suggest that this Court disregard that very rule.

CWA's requirements. Those regulations are therefore the starting point, and the ending point, of this Court's analysis.

### B. Because EPA has consistently and reasonably interpreted its stormwater discharge and silvicultural regulations, EPA's interpretations are entitled to deference.

Since the inception of EPA's stormwater discharge and silvicultural rules, EPA has proffered a consistent interpretation of the regulations, one that is consonant with the regulations' texts and statements accompanying their promulgation. As such, they are entitled to deference under *Auer*. The silvicultural rule states that silvicultural activities "from which there is natural runoff" do not require permits. 40 C.F.R. § 122.27(b)(1). Since its promulgation, EPA explained that runoff is not susceptible to traditional permitting programs and is better controlled through state best management practices, even when that runoff happens to collect into ditches, pipes, and drains. 40 Fed. Reg. 56,932 (Dec. 5, 1975), 41 Fed. Reg. 24,709, 24,710 (June 18, 1976); 55 Fed. Reg. 20,521, 20,522 (May 17, 1990). Similarly, the stormwater discharge rule simultaneously defines "industrial activity" and excludes those activities defined by the silvicultural rule from the permitting program. 40 C.F.R. § 122.26(b)(14). EPA has consistently interpreted that rule to exclude stormwater runoff from permitting requirements. 55 Fed. Reg. 47,990, 48,011 (Nov. 16, 1990).

EPA's unfailing interpretations entitle it to *Auer* deference. The Ninth Circuit was therefore obligated to accept EPA's reasonable interpretation of its rules and enforce the rules as interpreted by the agency. Framed another way, the Ninth Circuit was not permitted, as it did, to reject EPA's reasonable interpretation of its rule and substitute what it views as a rule that adheres more closely to the CWA. *Seminole Rock*, 325 U.S. at 414.

In arguing that this Court can—indeed, must—reject EPA's interpretation in favor of one that, in respondent's view, more closely adheres to the CWA, respondent focuses on this Court's acknowledgement that the statutory scheme may be relevant in "choosing between various constructions." (Resp. Br. 21, citing *Seminole Rock*, 325 U.S. at 414). That concept can best be described as "statutory avoidance." (U.S. Amicus Br. 22; *see also Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 563, 573 (2006) (noting the distinction between "a purposeful but permissible reading of the regulation adopted to bring it into harmony with the [court's] view of the statute, and a determination that the regulation as written is invalid")). But that principle has no place here. In *Seminole Rock*, this Court plainly stated that Congressional intent may be relevant in choosing between various constructions, but that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U.S. at 414. Thus, the relevant statutory scheme is of no moment unless and until it can be said that the agency's interpretation is plainly erroneous or inconsistent with the regulation, or where

the promulgating agency has never offered an interpretation of its statute. Short of that, the agency's reasonable interpretation of its own regulation controls. (*See also* U.S. Amicus Br. 22).

On the merits of whether EPA's interpretation of its rules is entitled to deference, respondent remonstrates that "there are so many reasons why EPA's proposed interpretation of the Silvicultural Rule is illegitimate that its decades-ago statements in the Federal Register" cannot save its interpretation. (Resp. Br. 41-42). In making that argument, respondent overlooks three points. First, it is not only a "decades-old Federal Register" from the 1970's that supports EPA's interpretation. EPA repeated its interpretation in a 1990 Federal Register. (*See* Petitioner's Opening Br. 24). Second, no party relies upon the statements in the Federal Register alone to justify EPA's interpretation. Above and beyond the Federal Register, EPA has interpreted that rule to not require permits for stormwater runoff from forest roads, an interpretation that is consistent with the text of the rule itself. (1 JA 39; *see also* Petitioner's Opening Br. 23-25). Third, even if the government's amicus brief in this case were the first time that EPA articulated its interpretation, it is still entitled to deference. *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

Respondent's arguments with respect to the stormwater discharge rule similarly fail. Respondent makes no apparent attempt to grapple with whether the rule is entitled to *Auer* deference. Instead, it blithely asserts that because the silvicultural rule does not exclude the discharges at issue from permit-

ting requirements, the stormwater discharge rule "cannot do so either." (Resp. Br. 50). But as the state explained in its opening brief, EPA has interpreted its stormwater discharge rule to exclude stormwater runoff from forest roads from permitting requirements (through its exclusion of discharges listed in the silvicultural rule). (Petitioner's Opening Br. 27-29). And at the time that EPA promulgated the stormwater discharge rule, it had consistently interpreted its silvicultural rule to exclude forest road runoff from the permitting requirements. (Petitioner's Opening Br. 28). The Ninth Circuit was therefore required to defer to EPA's interpretation.[3]

[3] It ultimately makes no difference whether the silvicultural rule itself is, as respondent argued, invalid under the CWA. What matters is how the rule evidences EPA's intent as to what is or is not "industrial." That is, even assuming that the silvicultural rule is invalid, that does not change the fact that the stormwater discharge rule defines "industrial activity" and reflects EPA's intent to exclude the type of activities delineated in the silvicultural rule from permitting requirements.

## II. The Ninth Circuit's failure to accord EPA's interpretation proper deference led it to exceed the scope of review in a citizen's suit.

### A. By rejecting an otherwise controlling interpretation of EPA's rules, the Ninth Circuit invalidated EPA's rules and exceeded the scope of its review in a citizen's suit.

Respondent's attempt to have this case decided under the CWA, rather than EPA's stormwater discharge rule, is blunted by a second, statutorily mandated limit: in the context of a citizen suit, a reviewing court is not permitted to invalidate a controlling agency interpretation of its regulation because it views that interpretation as inconsistent with the CWA. As detailed in the state's opening brief, Congress created a deliberate, bifurcated system for reviewing EPA's actions: a citizen can challenge the validity of EPA's rules in a rule-review proceeding and can *enforce* EPA's rules in a citizen suit, but cannot bypass the rule-review proceeding and challenge the validity of the rules in a citizen suit. (Petitioner's Opening Br. 31-35). Where, as here, the citizen suggests that the regulations cannot be sustained under the relevant statute, that is a challenge to the validity of the rules, and it is a challenge that the reviewing court cannot entertain. (*See* Resp. Br. 38 (asserting that given the clarity of the CWA, there is no need to consult the relevant regulations)). Instead, a reviewing court, like the Ninth Circuit here, is precluded from doing anything but enforcing the agency's

rules as those rules have been reasonably interpreted by the agency.

But respondent asserts that that limitation poses no bar where the agency's regulations are ambiguous and must be construed contrary to the agency's interpretation of its regulations to prevent a conflict with the governing statute. (Resp. Br. 19). In respondent's view, EPA's stormwater discharge and silvicultural regulations are ambiguous, and EPA's interpretations of those regulations cannot be reconciled with the CWA itself. Therefore, EPA's interpretations must yield in the face of that inconsistency.

That argument, of course, is analogous to the one that respondent employs in its attempt to evade *Auer*. It fails, for similar reasons. Where an agency's interpretation of its regulation is reasonable and entitled to deference, a court's rejection of that interpretation *is* tantamount to invalidating that regulation. Framed more explicitly, the failure to adhere to *Auer* is, in and of itself, error. But that error takes on unique import in the context of a citizen suit, where a court engages in "statutory avoidance" not because it concludes that the agency's interpretation conflicts with text of the rule or with prior interpretations, but because it concludes that the interpretation conflicts with the governing statute. To so hold is to invalidate the agency's rule, which in turn is to defy the limits on invalidating a regulation in a citizen suit.[4]

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[4] The United States, relying on *Duke Energy*, suggests that the limits on invalidating a rule in a citizen suit are not violated by a court interpreting the rule to make it

### B. The limits on challenging the validity of EPA's rules in a citizen suit apply when a reviewing court is determining whether a permit is required for a particular kind of discharge.

Respondent next asserts that even if the limits on citizen suits would otherwise preclude reviewing the validity of EPA's rules, those limits do not apply to EPA's regulations exempting discharges from the permitting program. Respondent acknowledges that any challenge to EPA's actions "in approving or promulgating any effluent limitation or other limitation" or "in issuing or denying any permit" must be brought in a rule-review proceeding, 33 U.S.C. § 1369(b)(1)(E), (F), but asserts that EPA's stormwater discharge and silvicultural regulations themselves do

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consistent with the governing statute (*i.e.*, statutory avoidance). (U.S. Amicus Br. 19). That position appears to be inconsistent with its subsequent argument that statutory avoidance has no place where the regulation is otherwise entitled to *Auer* deference. (U.S. Amicus Br. 22). In all events, as noted above, *Duke Energy* simply stands for the fairly unremarkable proposition that if an agency does not proffer an interpretation of its rule or its interpretation is unreasonable, a court can turn to the statute for guidance in how to interpret and apply the regulation. But nothing in *Duke Energy* suggests that where the agency has offered a reasonable interpretation of its rule that is otherwise entitled to deference, a court can reject that interpretation as inconsistent with the statute. Such a position is irreconcilable with this Court's holding in *Seminole Rock*. *See infra* at 6.

not constitute an action "issuing or denying any permit." (Resp. Br. 23-24). But in light of this Court's caselaw and the widespread upset that respondent's argument—if correct—would cause to the well-settled avenues for bringing a challenge to EPA's rules, its argument must fail.

**1. This Court has, and should continue to, give the rule-review provision in Section 1369 a broad construction.**

This Court has historically given Section 1369 "a practical rather than a cramped construction." *NRDC v. EPA*, 673 F.2d 400, 405 (D.C. Cir. 1982). In *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 194, 196 (1980), for instance, this Court held that EPA's action in denying a variance in a state-issued permit was reviewable as an action "issuing or denying any permit." This Court noted that reviewability "would best comport with the congressional goal of ensuring prompt resolution of challenges to EPA's actions." *Id.* at 196. Because EPA's veto of a state permit was "functionally similar" to the denial of a permit, "the precise effect" of EPA's action in vetoing the state permit was "to 'den[y]' a permit within the meaning of [33 U.S.C. § 1369(b)(1)(F)]." *Id.*; *see also E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977) (court of appeals should have authority to review the regulations underlying the permitting process because to hold otherwise "would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [33 U.S.C. § 1342] but

would have no power of direct review of the basic regulations governing those individual actions").

Both cases are rooted in large part on the impracticalities that would result if the rules at issue in those cases could not be reviewed under the rule-review provision. The same holds true here. The regulations at issue delineate "more precisely those discharges that c[o]me within statutory exemptions (and thus d[o] not need permits) and those that d[o] not come within statutory exemptions (and thus need [] permits)." *Nw. Env. v. EPA*, 537 F.3d 1006, 1017-18 (9th Cir. 2008).[5] If respondent were correct, any chal-

[5] Respondent relies upon the Eleventh Circuit's recent decision in *Friends of the Everglades v. EPA*, __F. 3d__(11th Cir. Oct. 26, 2012), which held that an EPA regulation that exempted discharges from the permitting program was not reviewable under Section 1369. That decision follows in steps of the Ninth Circuit's *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008). To the extent that those opinions might be relevant to whether the silvicultural rule, which similarly creates a categorical exemption from the permitting program that is not based on a specific provision of the CWA, is reviewable under 33 U.S.C. § 1369, the same cannot be said of the stormwater discharge rule. That regulation does not create any categorical exemptions from the statutory permit program, but instead implements specific statutory provisions that themselves provide that permits are not required for all types of stormwater discharges, and which allow EPA to define more precisely what stormwater discharges require permits. Thus, under the reasoning of both *Friends of the Everglades* and *Northwest Environmental Advocates*, EPA's stormwater rule falls within Section 1369 and, as

lenges to the specific grant or denial of a stormwater discharge permit would be heard in courts of appeal, but review of the regulations that govern whether those permits should issue in the first place would be heard in district courts. That, in turn, creates the very real possibility that different district courts may reach inconsistent results, leading to inconsistent water quality standards that defy the underlying purpose of the CWA. *See Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (noting "the Act's purpose of authorizing the EPA to create and manage a uniform system of interstate water pollution regulation"). Additionally, as explained in the state's opening brief, EPA is often not a party to citizen suits and need not take any action in response to a district court decision. If district courts are permitted to rule on the validity of EPA's rules yet EPA is not required to respond to the ruling, regulated parties are left in regulatory limbo. (*See* Petitioner's Opening Br. 43-46).

**2. Barring litigants from challenging the regulation's validity in a citizen suit is consistent with the CWA and maintains the orderly and efficient process for reviewing EPA's rules.**

Respondent and its amici contend that strict adherence to Section 1369 would unjustifiably limit litigants' ability to seek review of EPA's actions. Those claims are unfounded. Respondent, for instance,

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such, is reviewable under Section 1369. *See Nw. Envtl. Advocates*, 537 F.3d at 1017-18 (so noting). It therefore is not reviewable in this citizen suit.

maintains that this Court should take a narrow view of the statute because the limits on review carry "a particular sting – namely, the preclusion of any challenge to EPA action not brought within 120 days." (Resp. Br. 26). To be sure, EPA's rules must generally be challenged within that time frame. But respondent is not without recourse. If respondent could not have brought its challenge earlier because it could not have known how EPA interpreted its rules, respondent was required to seek review of EPA's rules once it became aware of the grounds for challenge. 33 U.S.C. § 1369(b)(1) (allowing for review of EPA's actions outside of the 120-day period based "on grounds which arose after the 120th day"); *Maier v. EPA*, 114 F.3d 1032, 1036-39 (10th Cir. 1997) (citizens may seek review of EPA's permitting rules under 33 U.S.C. § 1369 based on new information obtained outside of original 120-day review period).

And it is neither unduly complex nor impractical to require respondent to challenge the validity of EPA's permitting regulations in an agency review proceeding. Respondent suggests that a citizen suit will provide the courts with a superior record on which to assess the validity of EPA's permitting regulations. (Resp. Br. 27). Yet this very case belies that claim: because the district court dismissed the suit under Fed. R. Civ. P. 12(b)(6), the Ninth Circuit invalidated EPA's rules with *no* record at all. And as a general matter, a court in a citizen suit typically will not have EPA's rulemaking record before it. As a result, a citizen-suit court generally will be ill-equipped to assess the validity of EPA's choices because it will not have before it all the information that EPA had

when it determined the scope of its permitting requirements.[6]

Furthermore, the timely and proper challenges to EPA's stormwater rules illustrate that the review process functions smoothly, is not too confusing for citizen-suit plaintiffs, and does not result in wasteful parallel litigation in the district courts and appellate courts. *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992) (proceeding to review Phase I stormwater discharge rule); *Am. Mining Cong. v. EPA*, 965 F.2d 759 (9th Cir. 1992) (proceeding to review Phase I stormwater discharge rule); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003) (consolidated proceeding to review Phase II stormwater discharge rule). In fact, it is respondent's proposal that will upend this orderly and efficient review process, resulting in a multiplicity of law suits. Respondent's theory of administrative procedure, if sustained, will encourage those who failed to seek review of the permitting regulations to collaterally attack EPA's regulations in the guise of enforcing them. That multiplicity of lawsuits, in turn, likely

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[6] EPA's current efforts to revise the stormwater rule illustrate this point. EPA's notices reveal the extensive amount of information it is considering about current silvicultural practices in evaluating how to clarify that logging-road stormwater is non-industrial stormwater. *See, e.g.,* 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. 30,473 (May 23, 2012).

will lead to a multiplicity of results, undermining the CWA's objective of uniformity. Concomitantly, because EPA most often is not a party to citizen suits, respondent's proposed scheme shifts the responsibility of defending the validity of EPA's rules from the agency that promulgated the regulation to the regulated entities. Stated another way, the responsibility of defending the validity of EPA's regulatory decisions and choices will shift from EPA to its regulated parties.

Lastly, it should not be difficult for a citizen to determine whether to seek review of EPA's regulations or whether, instead, to bring a citizen suit to enforce the permitting regulations. The citizen need only ask, "Do I agree with the choices EPA has made regarding permitting requirements, as those requirements are expressed in EPA's rules?" If the answer to that question is "yes," then a citizen suit enforcement action against a party who is not in compliance with the rules will be appropriate. If the answer is "no," then the citizen's dispute is with EPA, and the citizen must seek review of EPA's action, rather than attempting to enforce that action while simultaneously attacking it. The dual suits contemplated by respondent will be necessary only in those very rare cases where it is truly impossible for the citizen to discern what choice EPA has made regarding the need for a permit.[7] And those cases will be few. EPA's regula-

[7] This case is not one of those rare cases. As set forth in petitioners' opening briefs and the numerous amicus briefs submitted in support of petitioners' brief, it has long been clear that EPA chose not to require permits for storm-

tions identifying what types of dischargers need permits are generally comprehendible, as they must be to give notice to those covered by the permit requirements, as is required by due process.

## III. EPA's stormwater discharge rule is, in all events, a reasonable interpretation of the CWA.

As just explained, in the context of an action brought to enforce EPA's stormwater discharge regulation, and where EPA's interpretation of its rule is entitled to deference, this Court need not, and should not, do anything beyond enforcing EPA's rule, as that rule is interpreted by EPA. Because EPA reasonably interprets its stormwater discharge rule to not require permits for stormwater discharges from forest roads, that means this Court should reverse the Ninth Circuit's decision and affirm the district court's dismissal of the suit. But in any event, if respondent's argument that EPA's decision to treat stormwater discharges from timber maintenance and hauling as non-industrial conflicts with the CWA itself is cognizable in this enforcement action, the argument fails on its merits under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

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water runoff from silvicultural roads. And because this is not one of those rare cases, none of the "ripeness" problems highlighted by respondent's amici exist. (*See* Brief for Amici Curiae Law Professors on Section 1369(b) Jurisdiction at 32-33).

Congress did not define the term "industrial activity" in the CWA, and the statute does not otherwise indicate whether the maintenance of forest roads and their associated drainage systems should be considered "industrial activity." 33 U.S.C. § 1342(p)(2)(B).[8] Because the term is not subject to a single, precise definition, EPA has the power and, indeed, the responsibility to define its scope. *Chevron*, 467 U.S. at 843 ("'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" (Quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)); 131 Cong. Rec. 19,847 (1985) (statement of Mr. Roe), *reprinted in* 2 *A Legislative History of the Water Quality Act of 1987*, at 879 (1989) ("In the case of discharges from industrial sites, EPA is directed to identify within 1 year those classes and categories which are required to apply for a permit."). In fact, if in defining the term "industrial activity" EPA acts "reasonably, and in accordance with other applicable

[8] 33 U.S.C. § 1362(18) defines "industrial user" as "those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category of 'Division D—Manufacturing' and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate." The definition identifies who qualifies as an "industrial user" of "treatment works" and "treatment services" for purposes of certain provisions of the CWA. *See, e.g.*, 33 U.S.C. §§ 1281, 1284, 1342(b)(9). 33 U.S.C. § 1362 contains no similar definition of what type of activity qualifies as "industrial activity."

(*e.g.,* procedural) requirements, the courts accept the result as legally binding." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007). In other words, EPA's duly-promulgated interpretation "prevails if it is a reasonable construction of the statute, whether or not it is the only interpretation or even the one a court might think best." *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2017 (2012).

Here, EPA has interpreted Congress' stormwater amendment to mean that a discharge of stormwater from a forest road is not a stormwater "discharge associated with industrial activity." EPA defined "discharge associated with industrial activity" in 40 C.F.R. § 122.26(b)(14). As explained above, that definition expressly excludes discharges from any activities excluded from the permitting program by EPA's other rules, including, pertinent to this case, "silvicultural activities such as . . . harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff." 40 C.F.R. § 122.27(b)(1); *see also* 40 C.F.R. § 122.26(b)(14). The terms of EPA's rules, as well as EPA's amicus briefs, make clear the agency's view that forest road stormwater is not industrial stormwater.

The only remaining question then is whether EPA's interpretation of the term "discharge associated with industrial activity" to exclude discharges from forest roads is reasonable. It is. For one, it fits with the common understanding of the word "industrial." The term typically brings to mind factories and manufacturing plants, not forests. *See Roget A to Z* 358 (Robert L. Chapman, ed., 1st ed. 1994) (stating that

synonyms for "industrial" are "manufacturing, manufactural, fabricational, smokestack").

Moreover, it is apparent from the legislative history of the stormwater amendments that Congress shared that typical vision of what type of activity was "industrial." 33 Cong. Rec. H170, H176 (daily ed. Jan. 8, 1987) (statements of Mr. Hammerschmidt and Mr. Stangeland), *reprinted in* 1 *A Legislative History of the Water Quality Act of 1987*, at 529, 538 (describing a stormwater "discharge from industrial activity" as a discharge "directly related to manufacturing, processing or raw materials storage areas at an industrial plant"); 132 Cong. Rec. H10928 (daily ed. Oct. 15, 1986) (statement of Mr. Stangeland), *reprinted in* 2 *A Legislative History of the Water Quality Act of 1987* at 665 (same). It is equally apparent that Congress did not intend to *compel* EPA to require an industrial stormwater permit for discharges of silvicultural stormwater. The legislative history of the stormwater amendments indicates that Congress created the management program described in 33 U.S.C. § 1329 to address pollution generated by stormwater runoff associated with, among other things, timber operations and forestry practices.[9] Had Congress been of

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[9] 33 Cong. Rec. S1015 (daily ed. Jan. 21, 1987) (statement of Mr. Durenberger), *reprinted in* 1 *A Legislative History of the Water Quality Act of 1987*, at 483 (management program targets "runoff from farms and cities, construction sites and timber cutting operations"); 132 Cong. Rec. S16439-S16440 (daily ed. Oct. 16, 1986) (statement of Mr. Durenberger), *reprinted in* 2 *A Legislative History of the Water Quality Act of 1987*, at 639-41 (explaining that

the view that EPA *necessarily* had to place stormwater runoff from forest roads into the permitting program for industrial stormwater, there would have been little purpose in creating the management program envisioned by the stormwater amendments.

Finally, EPA's determination that forest road stormwater is not industrial stormwater subject to the mandatory permitting is reasonable because it is consistent with the agency's longstanding view that pollution from forest-road stormwater is most effectively managed through best management practices, rather than a permitting program. *See Astrue v. Capato*, 132 S. Ct. 2021, 2033 (2012) (taking into account that agency had "adhered to [its interpretation of pertinent statutory provisions] without deviation for many decades" in determining that interpretation was entitled to deference). As EPA acknowledged in the "Frequently Asked Questions" document prepared in connection with its notice of intent to amend its stormwater rule, it has held this view for decades: "EPA maintains its consistent position of over 30 years that stormwater discharges from thousands of miles of forest roads can be effectively addressed by best management practices (BMPs)." EPA, Frequently Asked Questions on "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 Ap-

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management program would, among other things, aim to reduce runoff from silvicultural activities through road design and placement).

proaches for Addressing Water Quality Impacts from Forest Road Discharges." Available at http://www.epa.gov/npdes/pubs/sw_forestroad_faq.pdf (last visited Nov. 9, 2012).

Given those circumstances, EPA's determination that stormwater discharges from logging roads are not "discharges associated with industrial activity" represents a reasonable interpretation of Congress' stormwater amendments.[10] As a result, it binds the

[10] Respondent does not appear to contend seriously that it was *unreasonable* for EPA to conclude that stormwater associated with timber maintenance and hauling is non-industrial. Instead, respondent cites pictures and videos available on the internet that suggest that some logging activities could plausibly characterized as "industrial" due the mechanization involved. But the question is not whether EPA could have decided to treat stormwater associated with timber hauling as maintenance as "industrial." The question is whether EPA's affirmative decision to treat it as non-industrial is reasonable. Moreover, respondent's one-sided citation of images in support of its argument that logging qualifies as "industrial" only underscores why a judicial-review proceeding is the appropriate mechanism for reviewing EPA's decision to treat timber road stormwater as non-industrial. Only in such a judicial review proceeding will a court have a thorough and balanced record of the information about silvicultural practices across the nation that EPA considered in reaching its ultimate decision to treat stormwater from roads used for timber maintenance and hauling as non-industrial stormwater. Although the images cited by respondent provide one view of contemporary silviculture, that view certainly is not the only view.

courts. To the extent the Court of Appeals held otherwise, its decision should be reversed.

Respectfully submitted,

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