

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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

(1) Congress authorized citizens dissatisfied with the Environmental Protection Agency's rules implementing the Clean Water Act's permitting program to seek judicial review of those rules in the courts of appeal. Congress further specified that those rules could not be challenged in any civil or criminal enforcement proceeding. Did the Ninth Circuit err when it held that a citizen may bypass the exclusive method of seeking judicial review of a permitting rule, and challenge the validity of the rule in a citizen suit to enforce the Clean Water Act against regulated parties?

(2) In the Clean Water Act, Congress required permits for stormwater discharges "associated with industrial activity," and delegated to EPA the responsibility to determine what activities qualified as "industrial" for purposes of requiring permits for those activities. EPA determined, after public comment and rulemaking, that stormwater from forest roads and other specified forestry activities is non-industrial stormwater that does not require a permit. Did the Ninth Circuit err when it held that stormwater from forest roads is industrial stormwater under the Clean Water Act and EPA's rules, contrary to EPA's consistent interpretation of its own rules?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE.....	4
A. Congress enacted the Clean Water Act to establish a uniform, nationwide system for protecting the waters of the United States.....	4
1. EPA’s silvicultural rule exempts forest road runoff from permitting requirements.....	7
2. EPA’s Phase I stormwater rule excludes stormwater runoff from forest roads from permitting requirements.	9
3. EPA’s Phase II stormwater rule does not impose permitting requirements on stormwater runoff from forest roads.....	10
4. Consistent with that statutory and regulatory framework, Oregon has developed extensive best management practices to reduce the amount of pollutants entering the water.	11

B. As part of the CWA, Congress enacted a bifurcated system that contains two distinct methods of challenging EPA’s actions under the CWA: one that allows citizens to challenge EPA rules and another that allows citizens to challenge alleged EPA failures to enforce the CWA.....	12
C. Respondent filed a citizen suit alleging that defendants are violating the CWA by discharging stormwater runoff from two roads without NPDES permits, and the district court dismissed for failure to state a claim.	14
D. The Ninth Circuit reversed.	15
Summary of Argument.....	17
Argument	20
I. EPA’s interpretation of its silvicultural rule and Phase I stormwater discharge rule as excluding forest road runoff from permitting requirements is entitled to deference.	21
A. This Court’s longstanding precedents establish that an agency’s reasonable interpretation of its own rules is entitled to deference.	21
B. EPA’s longstanding interpretation of the silvicultural rule and stormwater discharge rule to exclude forest road runoff from permitting requirements is consistent with the text and structure of the rules.	23

1. Since its promulgation nearly 35 years ago, EPA has consistently interpreted the silvicultural rule to exclude forest road runoff from permitting requirements.....	23
2. Since its promulgation nearly 25 years ago, EPA has consistently and reasonably interpreted the stormwater discharge rule to exclude forest road runoff from permitting requirements.....	27
II. The Ninth Circuit exceeded the scope of its review by invalidating EPA’s silvicultural and stormwater discharge rules.....	31
A. Citizen suits may be brought to enforce EPA’s rules, not to challenge their validity..	31
B. The Ninth Circuit invalidated EPA’s rules...	35
1. By rejecting EPA’s controlling interpretation of its silvicultural and stormwater discharge rules, the court of appeals invalidated those rules.....	36
i. Silvicultural rule	38
ii. Stormwater discharge rule	40
C. Invalidating an agency’s rules in a citizen suit upsets the purpose of the CWA and its attendant administrative processes, results that this case amply demonstrates.	43
III. The Ninth Circuit erred to the extent that it held that the CWA requires EPA to classify silvicultural stormwater as “industrial” stormwater.....	46

CONCLUSION..... 47

TABLE OF AUTHORITIES

Page

Cases Cited

<i>Adamo Wrecking Co. v. United States</i> , 434 U.S. 275 (1978)	35
<i>Arkansas v. Oklahoma</i> , 503 U.S. 91 (1992)	5, 43
<i>Auer v. Robbins</i> , 519 U.S. 452 (1997)	<i>passim</i>
<i>Bowles v. Seminole Rock & Sand Co.</i> , 325 U.S. 410 (1945)	21, 26, 37, 42
<i>Chase Bank USA, N.A. v. McCoy</i> , 562 U.S. __, 131 S. Ct. 871 (2011)	21
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	46
<i>Christopher v. Smithkline Beecham Corp</i> , 567 U.S. __, 132 S. Ct. 2156 (2012) .	21-22, 25, 30, 36
<i>Envtl. Def. v. Duke Energy Corp.</i> , 549 U.S. 561 (2007)	36, 37
<i>Gardebring v. Jenkins</i> , 485 U.S. 415 (1988)	26
<i>Georgia-Pacific West v. Northwest Envtl. Defense Center</i> (No. 11-347).....	1
<i>Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Found., Inc.</i> , 484 U.S. 49 (1987)	33

<i>Harrison v. PPG Indus., Inc.</i> , 446 U.S. 578 (1980)	34
<i>Martin v. Occupational Safety & Health Review Comm'n</i> , 499 U.S. 144 (1991)	21
<i>Nat'l Pork Producers Council v. EPA</i> , 635 F.3d 738 (5th Cir. 2011)	32
<i>NEDC v. Brown</i> , 476 F. Supp. 2d 1188 (D. Or. 2007)	1
<i>NEDC v. Brown</i> , 640 F.3d 1063 (9th Cir. 2011); 617 F.3d 1176 (9th Cir. 2010)	1
<i>NRDC v. Costle</i> , 568 F.2d 1369 (D.C. Cir. 1977)	6
<i>NRDC v. EPA</i> , 673 F.2d 400 (D.C. Cir. 1982)	40, 43
<i>NRDC v. EPA</i> , 966 F.2d 1292 (9th Cir. 1992)	13, 32, 41
<i>Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs</i> , 531 U.S. 159 (2001)	5
<i>Thomas Jefferson Univ. v. Shalala</i> , 512 U.S. 504 (1994)	26

Constitutional and Statutory Provisions

28 U.S.C. § 1254(1)	1
28 U.S.C. § 2112(a)(3)	32
33 U.S.C. § 1342(p) (2006)	1, 6

33 U.S.C. § 1362(14) (2006)	1, 6
33 U.S.C. § 1365 (2006)	1, 13, 32
33 U.S.C. § 1365(a)	13, 33
33 U.S.C. § 1365(b)(1)(B)	33
33 U.S.C. § 1369 (2006)	1, 46
33 U.S.C. § 1369(b)(1)	13, 32, 34, 40
Or. Rev. Stat. § 527.765(1)	11, 44

Administrative Rules

40 C.F.R. § 122.26(a)(9)(i)(A)-(B).....	10
40 C.F.R. § 122.26(b)(14) (2011).....	2, 9, 10, 27, 41
40 C.F.R. § 122.27 (2011).....	2
40 C.F.R. § 122.27(a).....	8
40 C.F.R. § 122.27(b)(1)	8, 23
Or. Admin. R. 629-625-0000(3)	11
Or. Admin. R. 629-625-0330(4)	11
Or. Admin. R. 629-625-0600.....	11
Or. Admin. R. 629-625-0700(3)	12
Or. Admin. R. 629-635-0100(7)(a).....	12
Or. Admin. R. 629-635-0110.....	12
Or. Admin. R. 629-635-0130.....	12
Or. Admin. R. ch. 629, div. 625	11, 45
Or. Admin. R. ch. 629, div. 635	12
Or. Admin. R. ch. 629, div. 670	12

Other Authorities

40 Fed. Reg. 56,932 (Dec. 5, 1975)	7, 23, 24
41 Fed. Reg. 24, 709 (June 18, 1976)	8, 23
41 Fed. Reg. 6281 (Feb. 12, 1976)	8, 24
55 Fed. Reg. 20,521 (May 17, 1990)	8, 24
55 Fed. Reg. 47,990 (Nov. 16, 1990).....	10, 28
64 Fed. Reg. 68,722 (Dec. 8, 1999)	11
77 Fed. Reg. 30,473 (May 23, 2012)	45
Carol M. Browner, <i>Environmental Protection: Meeting the Challenges of the Twenty-First Century</i> , 25 Harv. Envtl. L. Rev. 329 (2001)	4, 5
H.R. Rep. No. 92-911 (1972), <i>reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972</i>	34
S. Rep. No. 92-414 (1971), <i>as reprinted in 1972 U.S.C.C.A.N. 3668</i>	5, 34, 35
<i>Webster's Third New Int'l Dictionary 2120 (unabridged ed. 1993)</i>	8

OPINIONS BELOW

The court of appeals' opinion is reported. *NEDC v. Brown*, 640 F.3d 1063 (9th Cir. 2011); 617 F.3d 1176 (9th Cir. 2010). (Pet. App. 1a-47a¹). The district court's opinion is reported. *NEDC v. Brown*, 476 F. Supp. 2d 1188 (D. Or. 2007). (Pet. App. 48a-68a).

JURISDICTION

The court of appeals filed its original opinion on August 17, 2010. It denied rehearing and issued a superseding opinion on May 17, 2011. Petitioners obtained an extension of time, and timely filed their petition for writ of certiorari on September 14, 2011. This Court granted the petition on June 25, 2012, and consolidated the case with *Georgia-Pacific West v. Northwest Envtl. Defense Center* (No. 11-347). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix to the petition (Pet. App. 69a-80a) and in the first volume of the joint appendix (1 JA 62-125). The pertinent statutory provisions involved are 33 U.S.C. § 1342(p) (2006); 33 U.S.C. § 1362(14) (2006); 33 U.S.C. § 1365 (2006); and 33 U.S.C. § 1369 (2006). The pertinent regulatory

¹ Citations to the petition appendix ("Pet. App.") are to the petition appendix filed in *Georgia-Pacific West v. Northwest Envtl. Defense Center* (No. 11-347).

provisions are 40 C.F.R. § 122.26(b)(14) (2011) and 40 C.F.R. § 122.27 (2011).

INTRODUCTION

Protecting our nation's waters is an undertaking that has long occupied Congress. Starting in 1899, Congress enacted a series of laws targeting water pollution. The Clean Water Act represents Congress's most comprehensive effort to date to create safeguards against pollution. The CWA embodies congressional recognition that protecting the nation's interconnected network of waterways is a shared responsibility of the federal, state, and local governments. The CWA thus establishes a federal-state partnership to achieve uniform water quality standards. That holds particularly true for one source of pollutants: stormwater discharges, or discharges resulting from rain and other precipitation. Congress expressly provided that certain categories of stormwater discharges be regulated through a permitting process. Yet for other categories of stormwater, Congress left to EPA and state governments the responsibility for determining how best to define and regulate those discharges. To date, EPA has not required a permit for the kind of discharges at issue in this case—stormwater discharges from forest roads. Instead, EPA relies on what it has long viewed as the most effective way of decreasing pollution from forest road runoff: states' extensive systems of best management practices.

That cooperative system remained in place for decades. That is, until the court of appeals rendered its decision in this case. Respondent brought this citi-

zen suit, purportedly to enforce EPA's rules as they relate to forest road runoff. Because of the congressional limits on the scope of review in a citizen suit, the court of appeals was precluded from assessing the validity of EPA's rules. Instead, it needed only to determine whether the regulated parties were complying with EPA's rules, as EPA has interpreted them. Overlaying that inquiry is the significant level of deference a reviewing court is obligated to give an agency's interpretation of its rules, provided the interpretation is consistent with the rules' text and not plainly erroneous. But the court of appeals here abandoned the typical inquiry that accompanies an agency's interpretation of its rules and disregarded the fact that a citizen suit cannot be used as a vehicle to challenge the validity of an agency's rules; instead, despite acknowledging that EPA's interpretation of its rules was consistent with its intent in promulgating them, the court of appeals nonetheless concluded that the rules were inconsistent with the CWA and therefore invalid.

Having stricken EPA's rules governing forest road runoff, the court of appeals directed EPA to "expeditiously" create a permitting program. In doing so, the court paid no heed to the fact that it had invalidated the rule in a citizen suit where, as in most citizen suits, EPA is not a party and thus is not required to take any action on the court's invalidation. As a practical matter, then, Oregon and other similarly situated states must overlay their longstanding programs for regulating forest road stormwater runoff with a permitting program—a program that EPA is not required to establish and has expressly chosen not to

establish. The court of appeals' decision also undermines the central feature that animates the CWA, uniform national water protection standards. Oregon and other Ninth Circuit states are bound by one set of pollution controls, while the rest of the country is bound by another. This Court should reverse the court of appeals' decision in order to restore the uniform water quality standards that Congress sought to achieve and to enable Oregon and other states in the Ninth Circuit to continue regulating forest road runoff in the manner that EPA intended: through best management practices.

STATEMENT OF THE CASE

The dispute in this case rests on a single question: is the Oregon State Forester required to obtain a permit for stormwater runoff from forest roads when that runoff is collected in culverts, pipes, and ditches? To understand the premises behind that dispute, and to understand the lower court opinions, it is necessary to understand (1) EPA's authority—under the CWA—to determine whether owners and operators of forest roads must obtain permits for stormwater runoff and (2) the “silvicultural” and “stormwater discharge” rules that EPA promulgated to resolve that question.

A. Congress enacted the Clean Water Act to establish a uniform, nationwide system for protecting the waters of the United States.

Before the Clean Water Act, the nation's waters were “fouled with raw sewage and toxic chemicals.” Carol M. Browner, *Environmental Protection: Meeting*

the Challenges of the Twenty-First Century, 25 Harv. Envtl. L. Rev. 329, 331 (2001). Perhaps the most well-known and stark example was Ohio's Cuyahoga River. Coated with industrial waste, the river spontaneously caught fire in 1969. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (Stevens, J., dissenting).

The Clean Water Act was Congress's response and represents its most extensive effort to improve the nation's water quality. *Id.* at 175. Congress recognized that the interconnected nature of the nation's waterways meant that Congress had to take the lead in setting water protection standards. S. Rep. No. 92-414, at 77 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3742 ("Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."). But Congress also recognized that state and local governments play a pivotal role. The CWA thus creates a partnership between the states and the federal government with a shared objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251(a)).

Within that cooperative framework, the CWA focuses on what Congress deemed the most significant source of pollutants: "point source" discharges. Congress thus prohibited the discharge of point source pollutants without a permit. A point source discharge involves the discharge 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). The permitting program for those point source discharges is the National Pollutant Discharge Elimination System (NPDES).

As originally enacted, the CWA did not separately address a significant source of pollution: stormwater. Because of ongoing disputes about whether stormwater was subject to the CWA, *see, e.g., NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977), Congress amended the CWA in 1987 to clarify that permits were required for particular kinds of stormwater discharges.

It did so by creating a two-phase scheme. In what is commonly referred to as “Phase I,” the CWA directed EPA to establish permitting programs for five types of stormwater discharges. 33 U.S.C. § 1342(p)(1)-(2). Only one of those five types is relevant to this case: “discharge[s] associated with industrial activity.” 33 U.S.C. § 1342(p)(2)(B).

In “Phase II,” Congress authorized EPA, in consultation with the states, to study additional point source stormwater discharges “to be regulated to protect water quality.” 33 U.S.C. § 1342(p)(5)-(6). Congress directed EPA, again in consultation with state and local officials, to identify additional categories of stormwater discharge to be regulated and to establish a “comprehensive program” to regulate those discharges. 33 U.S.C. § 1342(p)(6). Congress further directed that, at a minimum, EPA’s Phase II program must “(A) establish priorities, (B) establish require-

ments for State stormwater management programs, and (C) establish expeditious deadlines.” *Id.* Under Phase II, EPA is authorized to require permits for Phase II discharges, but need not do so if, for example, it determines that such discharges do not significantly impact water quality or that other management programs adequately protect water quality.

Within that statutory framework, Congress left to EPA the responsibility of defining the remaining contours of the CWA. As relevant to the question presented here—namely, whether permits are required for stormwater runoff from forest roads—two rules are particularly relevant: the silvicultural rule and the stormwater discharge rule.

1. EPA’s silvicultural rule exempts forest road runoff from permitting requirements.

Shortly after the CWA was enacted, EPA determined that forest road runoff should not be covered by the NPDES permitting program. It reached that conclusion based on the fact that although such runoff often flows into ditches or is collected in pipes, most of the runoff is non-point source in nature and thus should not require a permit. 40 Fed. Reg. 56,932 (Dec. 5, 1975). EPA also noted that it would be “administratively difficult if not impossible” to issue individual permits for every source of runoff. *Id.* Thus, in its silvicultural rule, EPA further defined the CWA’s term “point source” as it applies to silvicultur-

al activities.² “Silvicultural point source” is defined as “any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities . . .” 40 C.F.R. § 122.27(b)(1). Silvicultural activities that meet that definition require an NPDES permit. 40 C.F.R. § 122.27(a).

In contrast, EPA defined runoff from forest roads as a “non-point source” discharge that does not require a permit. 40 C.F.R. § 122.27(b)(1) (“Silvicultural point source” does not include “non-point source silvicultural activities such as . . . surface drainage, or road construction and maintenance from which there is natural runoff.”). EPA explained that rather than requiring permits for such runoff, it relies on state best management practices to reduce pollution from forest road runoff. *E.g.*, 41 Fed. Reg. 24,709, 24,710 (June 18, 1976) (non-point source discharges “are better controlled through the utilization of best management practices”); *see also* 55 Fed. Reg. 20,521, 20,522 (May 17, 1990) (noting that non-point source activities are exempt from the NPDES program). EPA has construed that rule to mean that permits are not required for runoff from forest roads even when that runoff ultimately collects and is channeled in ditches, pipes, and culverts. *See* 41 Fed. Reg. 6281, 6282 (Feb. 12, 1976) (“[D]itches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff from precipitation” are not subject to permitting.).

² “Silviculture” means “a phase of forestry that deals with the establishment, development, reproduction, and care of forest trees.” *Webster’s Third New Int’l Dictionary* 2120 (unabridged ed. 1993).

2. EPA's Phase I stormwater rule excludes stormwater runoff from forest roads from permitting requirements.

As noted, in its CWA stormwater amendments, Congress required permits for “industrial activity.” In its Phase I regulations, EPA defined the contours of what constitutes “industrial activity” and therefore requires a Phase I permit. It first defined what constitutes an “industrial activity” and then, as particularly relevant here, EPA excluded forest road runoff from that definition. EPA defined “storm water discharge associated with industrial activity” as discharge that is “directly related to manufacturing, processing or raw materials storage areas at an industrial plant.” 40 C.F.R. § 122.26(b)(14). The rule then provides a laundry list of activities that constitute “industrial activity.” *Id.* The rule employs shorthand references to Standard Industrial Classifications, which was the federal government’s then-system for classifying industries. *Id.* As relevant here, forest and other wood-products businesses are listed under Standard Industrial Classification 24. *Id.* EPA specified that facilities classified as Standard Industrial Classification 24 are considered to be engaged in “industrial activity” for purposes of delineating which forest activities require permits. 40 C.F.R. § 122.26(b)(14)(ii).

But EPA then excluded stormwater runoff from forest roads from the definition of “industrial activity.” It did so by cross-referencing the silvicultural rule, clarifying that “industrial activity” does not in-

clude activities defined as “non-point source” activities in the silvicultural rule:

Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. *The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122* [including the silvicultural rule].

40 C.F.R. § 122.26(b)(14) (second emphasis added). As it had in relation to the silvicultural rule, EPA explained that state best management practices were better suited to regulating stormwater runoff from forest roads than the NPDES permitting system. 55 Fed. Reg. 47,990, 48,011 (Nov. 16, 1990).

3. EPA’s Phase II stormwater rule does not impose permitting requirements on stormwater runoff from forest roads.

In Phase II rules, promulgated in 1999, EPA again did not require permits for forest road runoff. Instead, EPA identified small municipal storm sewer systems and some construction sites as two additional categories of stormwater discharge that require permitting because both were significant contributors to water pollution. 40 C.F.R. § 122.26(a)(9)(i)(A)-(B). EPA noted that both contributed more pollution, and were therefore a more serious problem, than “agricultural”

or “silvicultural” sources. 64 Fed. Reg. 68,722, 68,726-68,731, 68,734 (Dec. 8, 1999).

4. Consistent with that statutory and regulatory framework, Oregon has developed extensive best management practices to reduce the amount of pollutants entering the water.

Oregon, like many states, has codified the best management practices that both Congress and EPA contemplated. The Oregon legislature directed the Oregon Board of Forestry, in consultation with the Oregon Environmental Quality Commission, to establish best management practices to protect Oregon’s waters from pollution caused by forest operations. Or. Rev. Stat. § 527.765(1). In accordance with those directives and the overarching scheme of the CWA, the Board of Forestry promulgated administrative rules establishing best management practices for forest road construction and maintenance. Or. Admin. R. 629-625-0000(3); *see generally* Or. Admin. R. ch. 629, div. 625. Thus, for example, the rules specify that drainage structures should be designed so that collected stormwater can be filtered before it enters any waterbodies: “[o]perators shall install dips, water bars, or cross drainage culverts above and away from stream crossings so that road drainage water may be filtered before entering waters of the state.” Or. Admin. R. 629-625-0330(4). The rules also require that operators inspect and maintain road drainage systems before the “rainy and runoff seasons” to protect water quality. Or. Admin. R. 629-625-0600. And, at times, operators may be required to cease operations

during wet weather, in order to protect water quality. Or. Admin. R. 629-625-0700(3).

In addition to those rules, the Board of Forestry also has promulgated specific water protection rules that serve “to ensure through the described forest practices that, to the maximum extent practicable, non-point source discharges of pollutants resulting from forest operations do not impair the achievement and maintenance of the water quality standards.” Or. Admin. R. 629-635-0100(7)(a); *see generally* Or. Admin. R. ch. 629, div. 635. The rules require ongoing monitoring and evaluation of the effectiveness of the practices, Or. Admin. R. 629-635-0110, and require, at least in some circumstances, written plans for conducting operations near the waters of the state. Or. Admin. R. 629-635-0130. Finally, the rules contain an enforcement scheme, requiring the state forester to investigate and inspect forest operators for compliance with the rules and authorizing the forester to initiate enforcement actions. *See generally* Or. Admin. R. ch. 629, div. 670.

B. As part of the CWA, Congress enacted a bifurcated system that contains two distinct methods of challenging EPA’s actions under the CWA: one that allows citizens to challenge EPA rules and another that allows citizens to challenge alleged EPA failures to enforce the CWA.

Congress also enacted provisions that allow for citizen oversight of EPA’s implementation of the CWA. Congress provided two distinct oversight mechanisms, carefully distinguishing between rule chal-

lenges and enforcement actions. Section 509 provides for judicial review of EPA “action[s]” in promulgating effluent standards and limitations and in issuing or denying permits. 33 U.S.C. § 1369(b)(1). EPA’s NPDES regulations are generally subject to appellate review under that provision. *See, e.g., NRDC v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992). Challenges to EPA’s rules under that provision must be brought within 120 days, unless the grounds for a rule challenge arose after the 120th day. 33 U.S.C. § 1369(b)(1). Congress intended Section 509’s review mechanism to be exclusive. 33 U.S.C. § 1369(b)(2) (if review of EPA action “could have been obtained” under Section 509, that action “shall not be subject to judicial review in any civil or criminal proceeding for enforcement”).

Congress provided a separate mechanism that allows for citizens to enforce EPA’s rules and regulations. 33 U.S.C. § 1365. That provision allows any citizen to commence a civil action against any individual or governmental agency who is “alleged to be in violation . . . of an effluent standard or limitation.” 33 U.S.C. § 1365(a)(1).

Here, respondent did not challenge the silvicultural rule or the stormwater discharge rules through a suit brought under Section 509. Instead, as detailed below, it brought an enforcement action through a citizen suit.

C. Respondent filed a citizen suit alleging that defendants are violating the CWA by discharging stormwater runoff from two roads without NPDES permits, and the district court dismissed for failure to state a claim.

Respondent filed a citizen suit under § 1365 in federal district court, alleging that defendants are violating the CWA by discharging stormwater runoff from two roads in the Tillamook Forest without NPDES permits. (2 JA 2-3, ¶¶ 1, 2, 4). Oregon owns or operates on these two roads (Trask River Road and Sam Downs Road) in Tillamook County, Oregon, and private defendants maintain and harvest timber along those two roads. (2 JA 2-3, ¶¶ 2, 5). Respondent argued that stormwater runoff from those roads is runoff “associated with industrial activity” that therefore requires a permit under EPA’s Phase I rule and the CWA. (2 JA 3, ¶ 4).

Oregon and private defendants argued that EPA’s silvicultural and stormwater rules each provide that stormwater runoff from forest roads does not require permits—even when the runoff is collected in roadside ditches and culverts and ultimately discharged into the waters of the United States. EPA filed an amicus brief in support of Oregon and private timber defendants’ position. EPA raised an additional argument that respondents could not challenge the validity of EPA’s rules because Section 509 requires that suits challenging regulations be brought in courts of appeal. (Pet. App. 107a).

The district court agreed with Oregon and ruled that the silvicultural rule, as interpreted by EPA,

does not require permits for stormwater discharges from forest roads alleged in the complaint because such discharges constitute non-point sources of natural runoff. (Pet. App. 57a-62a). The court did not address whether EPA's stormwater rule also operates to exclude from the NPDES permitting program the stormwater discharges alleged in the complaint. Accordingly, the district court dismissed the case. Respondent appealed.

D. The Ninth Circuit reversed.

The Ninth Circuit first held that the rule-review statute, section 509, did not preclude it from reviewing the validity of EPA's silvicultural and stormwater rules. (Pet. App. 6a). The court reasoned that until EPA filed its amicus briefs in this case, respondent could not have known that EPA interpreted its rules to exclude stormwater discharges from forest roads and their associated ditches and culverts from permitting requirements.³ (Pet. App. 6a-7a). In the court's view, then, respondent could not have sought review of EPA's rules when they were promulgated.

³ The court asked the parties to respond to questions about the scope of its ability to invalidate EPA's rules implementing the NPDES permitting program in a citizen suit. The United States submitted an amicus brief, arguing—contrary to what it argued in its initial Ninth Circuit amicus brief—that the rule-review statute usually would preclude the court from reviewing the validity of EPA's rules in a citizen suit, but did not do so in this case. (1 JA 59-60). In the United States' view, respondent would not have been aware of EPA's interpretation of the silvicultural rule before EPA filed its amicus briefs in this case. (*Id.*).

(Pet. App. 7a). As a result, the court concluded that the challenge to EPA's rules could proceed in this citizen suit, and did not have to be brought in a judicial review proceeding. (*Id.*).

Turning to the merits, the court acknowledged that EPA interpreted both the silvicultural and stormwater rules as not requiring NPDES permits for stormwater discharges from forest roads. (Pet. App. 32a, 38a-39a). The court nonetheless held that such permits are required. The court recognized that the silvicultural rule could be read in two ways. (Pet. App. 32a). The first is consistent with EPA's intent and exempts runoff from silvicultural activities "irrespective of whether, and the manner in which, the runoff is collected, channeled, and discharged into protected water." (*Id.*). The second reading "does not reflect the intent of EPA" and would exempt silvicultural runoff unless and until that runoff is "channeled and controlled in some systematic way." (*Id.*). The court opted to adopt the second reading on the ground that the first, while reflective of EPA's intent, "is inconsistent with [the CWA] and is, to that extent, invalid." (*Id.*).

Turning to the Phase I stormwater rule, the court found that the rule's preamble "makes clear EPA's intent to exempt nonpoint sources as defined in the Silvicultural Rule from the permitting program." (Pet. App. 38a). And, as noted, the court had earlier found that EPA understood its silvicultural rule to exclude runoff from forest roads from permitting requirements. (Pet. App. 32a). Nevertheless, the court concluded that the Phase I rule's "reference to the Silvi-

cultural Rule . . . does not, indeed cannot, exempt such discharges from EPA’s Phase I regulations requiring permits for discharges.” (Pet. App. 42a). The court reasoned that Congress “made clear” that the Phase I rules must include “discharges associated with industrial activity” and “logging” is an “industrial activity” that is “covered” under Standard Industrial Classification 24. (Pet. App. 39a). The court did not explain why EPA’s interpretation of the 1987 stormwater amendments was not entitled to deference.

The court concluded by pointing out other cases in which courts have invalidated NPDES permitting rules, and by summarizing its expectations of how EPA—which was not a party to the action—should respond to its decision:

Until now, EPA has acted on the assumption that NPDES permits are not required for discharges of pollutants from ditches, culverts, and channels that collect stormwater runoff from logging roads. EPA has therefore not had occasion to establish a permitting process for such discharges. But we are confident, given the closely analogous NPDES permitting process for stormwater runoff from other kinds of roads, that EPA will be able to do so effectively and relatively expeditiously.

(Pet. App. 46a).

Summary of Argument

The Ninth Circuit erred when, in the context of a citizen suit, it concluded that EPA’s rules, though

consistent with the text and reflective of EPA's intent, were incompatible with the Clean Water Act and therefore invalid.

It is a fundamental principle that where Congress delegates rulemaking authority to an agency, that agency's reasonable interpretation of its rules is entitled to significant judicial deference. In this case, that principle can be applied with ease: EPA has long interpreted both its silvicultural and stormwater discharge rules to not require permits for forest road runoff, even when that runoff is collected in ditches, culverts, and pipes. Its interpretation is consistent with the text of those rules, the preambles to the rules, and EPA's position in amicus briefs filed at the district court and circuit court levels in this case. Given that constellation of factors, EPA's interpretation was entitled to judicial deference.

But instead of granting deference to EPA's interpretation, the court of appeals jettisoned EPA's rules and replaced them with the court's own—and self-proclaimed more correct—interpretation. That the court cannot do. Congress granted EPA, not the Ninth Circuit, the authority to promulgate rules to carry out the CWA. Because EPA's rules were entitled to deference, the court was not permitted to replace EPA's rules with its own.

That error also led the court to exceed the scope of review in a citizen's suit. Congress created a bifurcated system for reviewing EPA's actions taken pursuant to the CWA: 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 Congress was

clear that a citizen may not bypass the rule-review proceeding and challenge the validity of EPA's rules in a citizen suit. In this citizen suit, then, the reviewing court's inquiry was narrow: whether Oregon was complying with the governing rules as interpreted by EPA. But the court of appeals rejected what it recognized was a reasonable interpretation of the rules because, in its view, EPA's interpretation was inconsistent with the CWA. Rejecting what should have been a controlling interpretation of the agency's rules is tantamount to invalidating those rules, a result that the court of appeals is not entitled to reach in a citizen suit.

The ramifications of the court's error are sweeping. The court's ruling topples the national uniform water quality standards that Congress sought to achieve when it enacted the CWA. Oregon and similarly situated states must now supplement their longstanding best management practices for regulating forest road stormwater runoff and adhere to a permitting system. Yet because the court invalidated the rules in a citizen suit—where EPA was not a party—EPA is not required to establish a permitting system and the Ninth Circuit states are stranded in regulatory limbo. What is more, the court achieved those results without the notice-and-comment process that typically accompanies this kind of monumental shift in the regulatory scheme. Had the court stayed within the proper confines of a citizen suit, each of these deleterious effects could have been—and, in fact, should have been—avoided. This Court should reverse.

Argument

The court of appeals concluded that EPA's silvicultural and stormwater discharge rules excluding forest road runoff from permitting requirements could be read consistently with EPA's interpretation of those rules and reflected EPA's "clear intent" to exclude such runoff. Based on the congressional limitations placed on citizen suits and this Court's directives about deferring to an agency's reasonable interpretation of its rule, the court of appeals should have stopped there. That is, given that EPA's rules exclude stormwater discharges from forest roads from the stormwater permitting program, the court should have affirmed the dismissal of the suit.

It did not do so. Instead, the court of appeals side-stepped EPA's reasonable interpretation of its rules, holding that EPA's silvicultural and stormwater regulations were inconsistent with the CWA. In so doing, the court committed two distinct yet intertwined legal errors: the court failed to afford EPA's interpretations of its rules the controlling weight to which they are entitled and, by replacing EPA's rules with new, court-crafted rules, ultimately exceeded the scope of its review in a citizen suit.

I. EPA’s interpretation of its silvicultural rule and Phase I stormwater discharge rule as excluding forest road runoff from permitting requirements is entitled to deference.

A. This Court’s longstanding precedents establish that an agency’s reasonable interpretation of its own rules is entitled to deference.

One of the most fundamental tenets of administrative law is that when Congress has delegated rulemaking authority to an agency, that agency’s interpretation of those rules is entitled to significant deference. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). This Court has explained that, “[b]ecause applying an agency’s regulation to complex or changing circumstances calls upon the agency’s unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency’s delegated lawmaking powers.” *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 151 (1991).

A reviewing court must therefore accept an agency’s interpretation of its own regulations, provided that interpretation is not plainly erroneous or inconsistent with the regulations, and no reason exists to suspect that the agency’s interpretation “does not reflect the agency’s fair and considered judgment on the matter in question.” *Auer*, 519 U.S. at 462; *see also Christopher v. Smithkline Beecham Corp*, 567 U.S. ___, 132 S. Ct. 2156, 2166 (2012); *Chase Bank USA, N.A. v. McCoy*, 562 U.S. ___, 131 S. Ct. 871, 880 (2011). The

latter may occur when, for instance, the “agency’s interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a ‘convenient litigating position,’ or a ‘*post hoc*’ rationalizatio[n] advanced by an agency seeking to defend past agency action against attack[.]” *Christopher*, 132 S. Ct. at 2166 (internal quotation marks and citations omitted). This level of deference (commonly known as “*Auer* deference”) applies with equal force even where an agency presents its interpretation for the first time in an amicus brief in that case. *Auer*, 519 U.S. at 462 (that an “interpretation comes to us in the form of a legal brief” does not “make it unworthy of deference”).

Respondent here alleged that Oregon and the timber defendants were required to obtain permits for stormwater runoff from two roads when that runoff is collected in ditches and culverts. The question, then, is whether EPA’s interpretation of its silvicultural and stormwater rules as excluding forest road runoff from NPDES permitting requirements is plainly erroneous, inconsistent with the terms of the rule, or otherwise is so suspect as to disentitle it to the level of deference traditionally afforded to an agency’s interpretation of its rule. Given EPA’s longstanding and consistent interpretation of both rules, the answer to each inquiry is “no.”

B. EPA’s longstanding interpretation of the silvicultural rule and stormwater discharge rule to exclude forest road runoff from permitting requirements is consistent with the text and structure of the rules.

1. Since its promulgation nearly 35 years ago, EPA has consistently interpreted the silvicultural rule to exclude forest road runoff from permitting requirements.

The silvicultural rule plainly states that those silvicultural activities that involve “rock crushing, gravel washing, log sorting, or log storage facilities” require permits. 40 C.F.R. § 122.27(b)(1). But it also states that silvicultural activities “from which there is natural runoff” do not require permits. 40 C.F.R. § 122.27(b)(1). Since the rule’s inception over 35 years ago, EPA has consistently interpreted it, congruent with its terms, to exclude channelized forest road runoff from permitting requirements. Contemporaneously with its promulgation, EPA explained that “runoff-related problems [are] not susceptible to the conventional NPDES permit program including effluent limitations.” 40 Fed. Reg. 56,932 (Dec. 5, 1975). That is in part due to the fact that most silvicultural discharges are induced by natural processes and are not traceable to any particular industry or source. 41 Fed. Reg. 24, 709, 24,710 (June 18, 1976). EPA explained that rather than regulating forest road runoff through an NPDES permitting system, the runoff is better controlled through best management practices.

E.g., id. (non-point source discharges “are better controlled through the utilization of best management practices”).

EPA also made clear that its rule was intended to exclude forest road runoff that ultimately collects in ditches and pipes. 40 Fed. Reg. at 56,932 (“silvicultural runoff . . . frequently flows into ditches” and “whether or not the rainfall happens to collect,” it “should not be covered by the NPDES permit program”); 41 Fed. Reg. 6281, 6282 (Feb. 12, 1976) (“ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff from precipitation are not meant to be subject” to the permitting requirement); 55 Fed. Reg. 20,521, 20,522 (May 17, 1990) (runoff, “although sometimes channeled,” is “non-point source in nature” because it is “caused solely by natural processes, including precipitation and drainage,” and cannot be “trace[d] to any single identifiable source”).⁴

EPA reiterated its interpretation here. In the amicus briefs submitted at the district and appellate

⁴ This statement came in connection with a notice of regulatory interpretation in early 1990 (and pre-dating promulgation of the stormwater discharge rule). The notice itself related to log sorting facilities, but reiterated that “EPA has intended for its silvicultural point source regulations to be so read” and announced its intent to “continue to interpret them” consonant with EPA’s “longstanding view” that natural runoff from forest roads, even when channeled, is not subject to the NPDES permitting requirements. 55 Fed. Reg. 20,521, 20,522 (May 17, 1990).

court levels, EPA stated that it has interpreted its silvicultural rule for over 30 years to not subject runoff from forest roads to NPDES permitting requirements. (Pet. App. 115a; 1 JA 37-38). Echoing statements in the preamble to the rule, EPA noted that runoff does not transform into the kind of runoff that would require a permit when it is collected in channels or culverts. (1 JA 39 (“EPA has made it clear that the term ‘natural runoff’ in the silvicultural rule categorically excludes all stormwater runoff from forest roads, even where the roads include channels, ditches, or culverts.”). *See also* Pet. App. 87a n.4 (“even if the runoff . . . utilizes such ‘conduits and channels,’ it is not subject to EPA’s Phase I storm water regulations”)).

Under those circumstances, EPA’s unfaltering interpretation of its silvicultural rule controls its meaning. The text of the rule excludes silvicultural natural runoff from permitting requirements, and EPA has interpreted the rule in that same manner. EPA’s interpretation of its rule, and its reasons for excluding forest road runoff from permitting requirements, has remained unaltered since the rule’s inception. *Cf. Christopher*, 132 S. Ct. at 2167-68 (declining to defer to the agency’s interpretation of its rule where the agency’s interpretation and reasoning had changed over time). In short, nothing in EPA’s interpretation suggests that it is, for instance, a “convenient litigating position” or a “*post hoc* rationalizatio[n]’ advanced by an agency seeking to defend past agency action against attack.” *Christopher*, 132 S.Ct. at 2166.

In fact, the court of appeals recognized as much. It agreed that EPA's interpretation is consistent with the text of the rule, and reflected EPA's intent in promulgating the rule. (Pet. App. 32a (noting that the rule can be read to "exempt[] all natural runoff from silvicultural activities . . . irrespective of whether, and the manner in which, the runoff is collected, channeled, and discharged into protected water")). That, of course, should have been the end of the court's analysis. Under those circumstances, EPA's interpretation of its regulation is of "controlling weight." *Seminole Rock*, 325 U.S. at 414-18 (where, as here, an agency's interpretation of its own regulation is consistent with the text of the regulation, the evidence of the agency's intent at the time of promulgation, and the agency's history of implementing the regulation, that interpretation is "controlling"); *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988) (court must accept agency's interpretation of its own rule unless an "alternative reading is compelled by the regulation's plain language or by other indications of [the agency's] intent at the time of the regulation's promulgation"). The silvicultural rule means—bluntly framed—what EPA has said it means. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

Given the court's obligation to treat EPA's interpretation of its rule as "controlling," the court's next step should have been to determine whether, in light of EPA's interpretation of its rule to exclude silvicultural runoff from the permitting requirements, Oregon and timber defendants had violated the rule by not obtaining permits. Because the rule plainly excludes forest road runoff from the permitting re-

quirements, the court should have simply affirmed the district court's judgment of dismissal. Any other action not only defies *Auer* and its progeny, but, as explained more fully in Section II below, falls outside the limitations on review in a citizen-suit enforcement action.

2. Since its promulgation nearly 25 years ago, EPA has consistently and reasonably interpreted the stormwater discharge rule to exclude forest road runoff from permitting requirements.

EPA's stormwater rule independently provides that the stormwater discharges at issue do not require a permit. That rule, as noted, defines the categories that constitute "industrial activity" and therefore require NPDES permits. The rule provides that "industrial activities" include those classified as Standard Industrial Classification 24, which includes logging and other wood-product businesses. 40 C.F.R. § 122.26(b)(14)(ii). Yet the rule simultaneously states that stormwater runoff from forest roads does not fall within the definition of "industrial activity," and does so by cross-referencing the silvicultural rule: the rule explicitly excludes those activities defined by the silvicultural rule from the permitting requirement. 40 C.F.R. § 122.26(b)(14).

The rule's text can readily be reconciled with EPA's longstanding interpretation of its rule to exempt stormwater runoff from forest roads from permitting requirements. At the time of its promulgation, EPA explained in the preamble that it referenced the Standard Industrial Classification 24 to

regulate traditional industrial sources, such as sawmills. 55 Fed. Reg. 47,990, 48,008 (Nov. 16, 1990) (explaining that establishments under Standard Industrial Classification code 24 “are engaged in operating sawmills, planing mills and other mills engaged in producing lumber and wood basic materials”). It further explained what is evident from the rule’s terms: “the definition of ‘storm water discharge associated with industrial activity’ does not include sources that may be included under [Standard Industrial Classification] 24, but which are excluded under 40 CFR 122.27 [the silvicultural rule].” 55 Fed. Reg. at 48,011. As established above, when EPA promulgated the stormwater discharge rule, it consistently interpreted its silvicultural rule to exclude forest road runoff from the NPDES program.

EPA reiterated that interpretation at each stage of this case. EPA explained that it included the reference to the “[Standard Industrial Classification] code to regulate traditional *industrial* sources such as sawmills.” (1 JA 42; *see also* Pet. App. 124a (noting that preamble to rule suggests that the Standard Industrial Classification code referred to sawmills and related activities)). EPA further explained that the “traditional industrial” forest-related activities that it intended to fall within the scope of “industrial activity”—and that would therefore require permits—are “only the four categories of silvicultural facilities [rock crushing, gravel washing, log sorting, and log storage facilities] it had already defined as point sources.” (1 JA 43). In contrast, EPA noted that forest roads are not industrial in nature and are often used

for recreational purposes. (1 JA 44; Pet. App. 125a).⁵ Similarly, forest roads are not “directly related” to “manufacturing, processing or raw material storage areas at an industrial plant.” (1 JA 44). EPA further noted, again echoing the preambles to the rules, that stormwater discharge from forest roads is best regulated through state best management practices. (1 JA 33.)

Under those circumstances, EPA’s unflagging interpretation of its stormwater rule controls its meaning. Its interpretation is consistent with the rule’s text: the rule plainly states (through its exclusion of discharges excluded by the silvicultural rule) that forest road runoff is not subject to NPDES permitting requirements, and EPA has interpreted the rule in that same fashion. That interpretation has been constant over a period of years: it first announced its interpretation in the preamble to the rule, and that interpretation has since remained fixed. In practice, EPA does not require NPDES permits for stormwater discharge from forest roads. No reason exists to suspect that the agency’s interpretation is the result of anything less than its “fair and considered judgment.” *Auer*, 519 U.S. at 462. EPA’s reasons for excluding stormwater discharge from forest roads from the definition of “industrial activity” have remained constant from the time of promulgation: forest roads simply

⁵ In other cases as well EPA has consistently taken the position that it interprets the term “industrial activity” to exclude stormwater discharge from forest roads. (*E.g.*, Pet. App. 85a).

are not the kind of traditional industrial activities that require Phase I permits.⁶

As with the silvicultural rule, the court of appeals recognized that EPA's interpretation of the stormwater rule advanced in its amicus brief represented its intent in promulgating the rule. (Pet. App. 38a ("The preamble to the Phase I regulations makes clear EPA's intent to exempt nonpoint sources as defined in the Silvicultural Rule from the permitting program mandated by § 402(p).")). Once the court determined that EPA's reading of the stormwater rule was reasonable and reflected EPA's intent in promulgating the rule, the court was required to accept that interpretation as controlling. In light of the limitations on review in citizen-suit enforcement actions, the court's only proper course of action was to enforce the stormwater regulation, as interpreted by EPA.

⁶ This case thus stands in stark contrast to this Court's recent decision in *Christopher*, 132 S. Ct. at 2156. There, this Court did not defer to the agency's interpretation of its rule because the agency's position would seriously undermine the principle that agencies should provide regulated parties "fair warning of the conduct [a regulation] prohibits or requires" and would cause "unfair surprise" to the regulated parties. *Id.* at 2167 (internal quotation marks omitted). Here, because EPA's interpretation and reasoning for its interpretation has been constant over a period of many years, there is no risk of unfair surprise. The same cannot be said, of course, if this Court were to uphold the court of appeals' decision, which, as discussed in more detail below, would mean that Oregon—after over 30 years of not having to obtain permits for forest road runoff—would be subject to a permitting requirement.

Because, under that controlling interpretation, the stormwater rule does not require a permit for stormwater discharges from forest roads, the court should have affirmed the district court's judgment of dismissal.

II. The Ninth Circuit exceeded the scope of its review by invalidating EPA's silvicultural and stormwater discharge rules.

That, of course, is not the analytical path that the court of appeals took. Instead of enforcing EPA's rules as interpreted by EPA to exclude forest road stormwater from the NPDES program, the court held that, although EPA's interpretations were reasonable, the rules were nonetheless inconsistent with the CWA itself, and therefore invalid. It then re-wrote EPA's rules to require a permit for the alleged stormwater discharges, even though it recognized that EPA did not intend to require a permit for them. But declaring an agency's rule to be inconsistent with a statute, and therefore invalid, exceeds limitations on review applicable to citizen suits.

A. Citizen suits may be brought to enforce EPA's rules, not to challenge their validity.

When it enacted the CWA, Congress carefully prescribed the time, forum, and substance for challenging EPA's actions under the CWA. It did so by implementing a bifurcated system: parties seeking to challenge the *substance* of EPA's rules may do so through a rule-review process, while parties seeking *enforcement* of those regulations must use the citizen-

suit provisions. As explained below, the separate purposes underlying both the rule-review and citizen-suit statutes lead to defined limits on their uses. As particularly relevant here, a citizen suit—like that filed in this case—may not be used to litigate the validity of the rules underlying the enforcement action.

Congress provided for judicial review of EPA's rules and actions. "[A]ny interested person" may seek review of the administrator's action in "approving or promulgating any effluent limitation or other limitation" or "in issuing or denying any permit." 33 U.S.C. § 1369(b)(1). EPA's rules promulgated under the CWA are generally subject to appellate review under that provision. *See, e.g., NRDC v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992). Review must be sought "within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1). Challenges must be brought in the first instance in the circuit court of appeals. *Id.* If multiple challenges are brought in different circuit courts of appeal, the agency review proceedings can be consolidated into a single case. 28 U.S.C. § 2112(a)(3); *see also Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 741 (5th Cir. 2011) (judicial review proceedings consolidated into a single proceeding).

In contrast, Congress provided a different avenue for citizens to *enforce* EPA regulations when EPA has failed to do so. 33 U.S.C. § 1365. "[A]ny citizen" may bring a civil action against any person or agency who is "alleged to be in violation of (A) an effluent stand-

ard or limitation under this chapter or (B) an order issued by [EPA] or a State with respect to such a standard or limitation[.]” 33 U.S.C. § 1365(a)(1). A citizen can also bring an action against EPA where “there is alleged a failure of [EPA] to perform any act or duty under this chapter which is not discretionary with [EPA].” 33 U.S.C. § 1365(a)(2). Challenges brought to enforce the CWA begin in the district courts. 33 U.S.C. § 1365(a).

The citizen-suit enforcement provision is meant to provide concerned citizens a method of ensuring that EPA’s rules are being followed when other government agencies are unable or unwilling to do so. *Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (noting that citizen suits are proper under Section 505 only when “the Federal, State, and local agencies fail to exercise their enforcement responsibility”). “The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action.” *Id.* Accordingly, if EPA or a state has commenced an enforcement action, no citizen may file suit. 33 U.S.C. § 1365(b)(1)(B) (“No action may be commenced” under § 1365 if EPA or a state “has commenced and is diligently prosecuting a civil or criminal action . . . to require compliance with the standard, limitation, or order.”).

But Congress made clear its intent to prohibit rule challenges in citizen suits by explicitly providing that the review mechanism established by the judicial review provision is exclusive. If review of EPA action

“could have been obtained under [the judicial review provision],” that action “*shall not* be subject to judicial review in any civil or criminal proceeding for enforcement.” 33 U.S.C. § 1369(b)(2) (emphasis added); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 605 (1980) (Stevens, J., dissenting) (concluding under a similar Clean Air Act review provision that “any agency action that was reviewable in the courts of appeals cannot be challenged in an enforcement proceeding, whether or not review was actually sought”).

That Congress intended citizen suits to be only an enforcement mechanism—and not a mechanism for bringing a broader rule challenge—is also reflected in the CWA’s legislative history. See H.R. Rep. No. 92-911, at 133 (1972), *reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 753, 820 (“The district courts are granted jurisdiction to enforce the effluent standards or limitations, orders of [EPA], and to order [EPA] to perform [its] functions.” (emphasis added)). The Senate Committee on Public Works suggested that the judicial review provisions of Section 509 allow “judicial review of administratively developed and promulgated requirements, standards, and regulations.” S. Rep. No. 92-414, at 84-85 (1971), *as reprinted in 1972 U.S.C.C.A.N.* 3668, 3750. The Committee explained that the citizen-suit provision, in contrast, was “carefully restricted” to enforcement actions so that district courts would not be required to reanalyze technical issues related to water-quality management questions that would have been addressed in enacting the rules. S. Rep. No. 92-414, at 79, 1972 U.S.C.C.A.N. at 3745. Rather, the question in a citi-

zen suit would simply be a factual question whether the regulated party had complied with EPA's regulations. S. Rep. No. 92-414, at 80, 1972 U.S.C.C.A.N. at 3746.

In short, in a citizen suit brought to enforce EPA's regulations, the reviewing court is not free to "pursue any of the . . . familiar inquiries which arise in the course of an administrative review proceeding." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978). If a citizen wishes to challenge an administrative rule, it must do so via the rule-review process. A citizen may not seek to invalidate an EPA regulation, nor may a court actually do so, in a citizen suit brought to enforce those regulations. That bifurcated system, as explored in more detail below, is not arbitrary: where—as here—a court exceeds the careful limits on review in a citizen suit, the court usurps state and federal government's efforts to protect our nation's waters.

B. The Ninth Circuit invalidated EPA's rules.

In this citizen suit, respondent sought to enforce the CWA against Oregon and private timber defendants. In respondent's view, Oregon violated the CWA by failing to obtain permits for stormwater runoff from two roads that was channeled and collected in ditches and culverts. Because this was an enforcement action filed in district court, the court of appeals' inquiry was narrow: is stormwater discharge from a road used for forest activities a "discharge associated with industrial activity" that requires a permit?

In answering that question, the court of appeals certainly could have concluded that the agency's interpretation is not entitled to *Auer* deference if it found, for instance, EPA's interpretation conflicted with longstanding practice and would have caused unfair surprise to the parties. *Christopher*, 132 S. Ct. at 2167-68. Likewise, the court of appeals could have rejected EPA's interpretation if it concluded the agency repeatedly changed its justification for that interpretation. *Id.*

But that is not what happened here. The court of appeals did not disregard EPA's interpretation because it believed that its interpretation conflicted with the text of the rules or EPA's prior interpretations. Nor did it conclude that the interpretation would cause unfair surprise to any of the regulated parties. Quite to the contrary, the court of appeals concluded that EPA's rules reasonably could be read—as EPA read them—to not require NPDES permits for channelized forest road runoff. (Pet. App. 32a, 38a-39a). But the court of appeals concluded that EPA's rules, so interpreted, conflicted with the Clean Water Act. That is quite a different outcome and one that, as explained in detail below, overstepped the scope of review in a citizen suit.

1. By rejecting EPA's controlling interpretation of its silvicultural and storm-water discharge rules, the court of appeals invalidated those rules.

Isolating the precise line between mere interpretation and invalidation can be a nuanced and difficult task. *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561,

573 (2007) (“[N]o precise line runs between a purposeful but permissible reading of the regulation adopted to bring it into harmony with the Court of Appeals’s view of the statute, and a determination that the regulation as written is invalid.”). That task becomes even more difficult, for instance, in cases where an agency has not interpreted a rule or has offered competing interpretations. In such cases, “[t]he intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions.” *Seminole Rock*, 325 U.S. at 414.

But this is not a case in which the court of appeals turned to the CWA to choose between various unarticulated constructions or, as the United States has argued, merely construed the rule to harmonize it with the CWA. (Supreme Ct. U.S. Amicus Br. at 10, filed May 2012). When an agency’s interpretation is entitled to deference under *Auer*, a court has no latitude to “interpret” the rules differently from EPA’s controlling interpretation. When a court rejects an agency interpretation that is otherwise entitled to *Auer* deference because the court believes the agency’s interpretation would violate the statute, that action is tantamount to invalidating the rule. That is precisely what occurred in this case: as to each rule, the court of appeals rejected an agency interpretation that otherwise is entitled to *Auer* deference because it believed the agency’s interpretation would violate the CWA.

i. Silvicultural rule

The most telling evidence of the court of appeals crossing the line from mere interpretation to invalidation can be found in what is absent from its opinion: any analysis of whether the rule warranted judicial deference. That is, the court of appeals did not suggest that EPA's interpretation of the silvicultural rule was not entitled to deference under *Auer*. It did not, for instance, suggest that EPA's interpretation was clearly erroneous or contrary to the text of the rule. Yet if, as respondent and the United States have argued, the court were merely interpreting the rule, that is the analysis the court would have had to engage in to conclude that EPA's interpretation was not entitled to deference. *Auer*, 519 U.S. at 461.

Rather than engaging in that analysis, the court instead invalidated the rule as definitively interpreted by the EPA to not require permits for stormwater runoff as in conflict with the CWA. The court then replaced the rule as interpreted by EPA with a new rule, written by the court, that requires permits for that type of runoff: "we hold that the Silvicultural Rule does not exempt from the definition of point source discharge under § 512(14) [of the CWA] stormwater runoff from logging roads" that is collected and channelized. (Pet. App. 32a-33a). Invalidating the rule as inconsistent with the statute is not an analytic path the court was entitled to take in a citizen suit.

Indeed, the court of appeals' rationale underlying its rejection of the silvicultural rule reflects that the court understood its ruling to do far more than simply

interpret the silvicultural rule. The court went to great lengths to explain *why* it believed it was entitled to reach the validity of EPA's rules in a citizen suit. The court explained that respondents could not have known how EPA interpreted its rule before EPA filed its amicus briefs in this case.⁷ (Pet. App. 6a-7a). In the court's view, then, this case fell within the exception in the rule-review statute for suits based on grounds arising after the 120-day filing window. (Pet. App. 7a). Had the court thought that it was interpreting the rules, rather than invalidating them, it would not have been forced to explain why its resolution of the case fell within what it believed to be an exception to the bar on invalidating EPA regulations in citizen suits. That explanation reflects, instead, that the court set out to determine whether the rules were valid under the CWA.

It also bears noting that the court's assertion that EPA's construction remained a mystery until after this case commenced is plainly wrong. EPA an-

⁷ That, of course, is the position that EPA took in its second amicus brief in the court of appeals. (1 JA 59, 59 n.5). It is difficult, if not impossible, to reconcile that position with the over 30 years of history in which EPA has repeatedly and consistently interpreted its silvicultural and stormwater discharge rules to exclude stormwater runoff from the NPDES program, even when that runoff is collected in a system of ditches and culverts. (*See, e.g.*, Pet. App. 114a (recognizing that the natural runoff would, as a practical matter, end up in "ditches, culverts and the like" and therefore does not fall outside of the silvicultural rule's definition of non-point source silvicultural activities)).

nounced its interpretation of both the silvicultural and stormwater rules in the preambles to those rules and in subsequent cases. But even if EPA had not previously articulated its interpretation, this Court has applied the deferential standard even when an agency presents its interpretation for the first time in an amicus brief in that same case. *Auer*, 519 U.S. at 462. And the court’s analysis confuses the issue of the proper *timing* of a challenge to the validity of EPA’s regulations with the issue of proper *forum* for reviewing the validity those regulations. *NRDC v. EPA*, 673 F.2d 400, 404 (D.C. Cir. 1982) (distinguishing between timing of rule challenges and forum for rule challenges). That is, even if respondent could not have brought its challenge earlier, respondent must still bring any rule challenge under the rule-review provision. See 33 U.S.C. § 1369(b)(1) (allowing for review of EPA’s actions outside of 120-day period based “on grounds which arose after [the] 120th day”).

ii. Stormwater discharge rule

The same holds true for the stormwater discharge rule. Again, if the court of appeals were simply interpreting EPA’s rule, it would have explained why EPA’s interpretation was not entitled to *Auer* deference. The court never did that, precisely because it did not view itself as merely engaging in a rule-interpretation exercise. It instead concluded that, under the CWA, channeled stormwater runoffs from logging roads are “industrial activities” and therefore subject to the permitting requirements. The court acknowledged that the text of the rule, and the preamble to the Phase I stormwater rule, “make[] clear”

that EPA intended to exclude discharges from activities defined by the silvicultural rule to be non-point sources from the definition of “stormwater discharge associated with industrial activity.” (Pet. App. 38a-39a). Yet the court declined to give effect to that sentence, based upon its view that “[t]he reference to the Silvicultural Rule in 40 C.F.R. § 122.26(b)(14) does not, indeed cannot, exempt such discharges from EPA’s Phase I regulations requiring permits for discharges ‘associated with industrial activity.’” (Pet. App. 42a). In so doing, the court effectively excised the last sentence of the stormwater discharge rule and rewrote the rule to accomplish a result it believed to be consistent with the CWA: “We therefore hold that the 1987 amendments to the CWA do not exempt from the NPDES permitting process stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels, and is then discharged into streams and rivers.” (*Id.*).

Other aspects of the court’s opinion make it evident that the court did not view itself as simply interpreting the rule. In one instance, the court couched its holding in terms of what the statute—not the stormwater discharge rule—required: “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 discharge is subject to the NPDES permitting process under Phase I.” (Pet. App. 43a). The court also declared that the CWA did not permit EPA to create exemptions similar to the stormwater discharge rule: “As we explained in *NRDC v. EPA*, 966 F.2d at 1306, ‘if [log-

ging] activity is industrial in nature, and EPA concedes that it is [see Standard Industrial Classification 2411], EPA is not free to create exemptions from permitting requirements for such activity.” (Pet. App. 42a).⁸

In short, determining whether a court has interpreted as opposed to invalidated a rule might in some cases be a close or difficult question. This is not one of those difficult cases. Rather than engaging in the analysis of whether EPA’s interpretations were entitled to deference under *Auer*, the court simply declared EPA’s rules inconsistent with the CWA. In doing so, it crossed the line from interpreting EPA’s rules to invalidating them. That it cannot do in a citizen suit.

⁸ To be clear, respondent invited that result by arguing that the court should, in effect, invalidate EPA’s rules excluding forest road stormwater from the NPDES program. Respondent asserted that the rules, as interpreted by EPA, conflict with the CWA. (Resp.’s Br. in Opp. 30-33; Pl.-Appellant’s 9th Cir. Opening Br. 52-53; Pl.-Appellant’s 9th Cir. Reply Br. 2-3, 15-21). That type of challenge *is* a challenge to the validity of the rules, not to their interpretation. *Seminole Rock*, 325 U.S. at 413-14 , 418-19 (explaining difference between interpreting rule and assessing “statutory validity of the regulation” as construed, and observing that issue of whether rule as interpreted by promulgating agency is valid is “quite a different matter” from issue of whether agency has reasonably interpreted its own rule).

C. Invalidating an agency's rules in a citizen suit upsets the purpose of the CWA and its attendant administrative processes, results that this case amply demonstrates.

Congress's proscription on invalidating EPA's rules in citizen suits serves one of the goals underlying the CWA: protecting our nation's water through *uniform* water quality standards. *Arkansas*, 503 U.S. at 110 (CWA's objective was "authorizing the EPA to create and manage a uniform system of interstate water pollution regulation"). That national uniformity is best sustained by requiring that all rule challenges be brought in courts of appeal, where the petitions can then be consolidated in a single court that can assess the validity of EPA's regulations in a single decision.

If, in contrast, review of EPA's rules may be initiated via a citizen suit, different district courts may reach inconsistent results, leading to inconsistent water quality standards. *NRDC*, 673 F.2d at 405 n.15 (recognizing that risk). As a practical matter, having one state subject to different water quality standards affects *every* state because no single water source exists in isolation. The nation's waters are an interconnected labyrinth, and water does not remain within the confines of the particular judicial district that rules on the validity of EPA's rules in a citizen's suit. Yet inconsistent water quality standards are precisely what the court of appeals singlehandedly achieved here: Oregon and other states in the Ninth Circuit are now required to follow a different level of water protection standards than the rest of the country.

And the court of appeals reached that result uninformed and unaided by the process that typically accompanies this kind of seismic shift in EPA's regulatory scheme. Once the time period for rule challenges has passed and the rules become established law, states and regulated parties are entitled to—and in fact do—rely on and act in accordance with those rules. If the agency later moves to amend those rules, states and interested parties have the opportunity to participate in any revision process, thereby ensuring that public process accompanies any changes in the legal landscape. In contrast, citizen suits, when allowed to masquerade as a challenge to the rule's validity, undermine those cooperative efforts because they effectuate change without a considered public process in which all affected constituents can participate. This case is exemplary. None of the individuals and businesses (other than the two parties to this case) that will be bound by the court of appeals' new mandate had any voice in this monumental change in the regulatory scheme.

Additionally, by passing on the validity of EPA's rule in a citizen suit, the court's decision fundamentally alters how Oregon and other states in the Ninth Circuit have treated stormwater. Until the court of appeals upended the silvicultural and stormwater rules, Oregon had followed EPA's rules that did not require a permit for stormwater runoff from forest roads. Instead, Oregon—in cooperation with EPA—expended significant resources creating, following, and enforcing best management programs designed to reduce the amount of pollution entering the water. *See, e.g.*, Or. Rev. Stat. § 527.765(1); Or. Admin. R.

ch. 629, div. 625; 77 Fed. Reg. 30,473, 30,476 (May 23, 2012) (noting that state best management practices are well-suited to “address stormwater discharges originating from the complex and diverse forest road universe because such approaches provide for flexibility and prioritization and allow EPA to focus on the subset of forest roads with stormwater discharges that cause or contribute to water quality impacts”); 1 JA 33 (“stormwater runoff from forest roads is best addressed by the states”).

Under the court of appeals’ decision, however, Oregon and other similarly situated states are now forced to obtain permits for a type of discharge where those permits were not previously required. But Oregon faces a paradox in doing so: because EPA has never required permits, there is no system or national criteria set up for doing so. Because EPA is not a party and is not bound by the court of appeals’ ruling, Oregon and other similarly-situated states must in isolation structure a permitting scheme without any guidance or assistance from EPA. EPA made that point clear in its amicus brief:

Although the United States filed *amicus* briefs at the district court and appellate court levels to provide its views to the Court on important matters of interpreting the CWA and associated regulatory provisions, the United States is not a party to this action. As such, any relief afforded to NEDC in this case must be limited to the parties and applicable only to the specified discharges before the Court, and cannot directly bind EPA, a non-party.

(1 JA 52-53 n.1).

Forcing a handful of states to institute a permitting scheme that EPA is not bound to establish (or enforce) and creating non-uniform water quality standards is not what Congress intended when it enacted the CWA and its citizen-suit provision. Accordingly, this Court should reverse the court of appeals' invalidation of EPA's rules.

III. The Ninth Circuit erred to the extent that it held that the CWA requires EPA to classify silvicultural stormwater as “industrial” stormwater.

Apart from (and, probably, as a result of) the court of appeals' failure to adhere to the limits on its scope of review imposed by *Auer* and the CWA, the court of appeals also stated that stormwater runoff from logging roads that is collected in ditches, culverts, and channels “constitutes a point source discharge of stormwater ‘associated with industrial activity’ *under the terms of* [CWA] § 502(14) and 402(p).” (Pet. App. 42a; emphasis added). The court stated further that EPA has a “statutory obligation under § 402(p)” to regulate stormwater discharges from logging roads. (Pet. App. 43a). However, in making those statements about the requirements of the CWA, the court of appeals did not even attempt the interpretive analysis required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). (See Pet. App. 42a-43a). Moreover, *Chevron* states clearly that a court may not adopt “a static judicial definition” of a statutory term, where—as it has done with the term “industrial”—Congress has delegated to an adminis-

trative agency the authority and obligation to give content to that statutory term. Therefore, to the extent that the court of appeals' opinion can be read as a holding that silvicultural stormwater, *as a matter of law*, is "industrial" stormwater under the CWA, thereby foreclosing EPA from treating silvicultural stormwater as non-industrial, the decision must be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

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