Nos. 11-338, 11-347

In The Supreme Court of the United States

DOUG DECKER, the Oregon State Forester, in his official capacity, *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,

Respondents.

GEORGIA-PACIFIC WEST, INC., *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

STEVEN J. LECHNER
Counsel of Record
JESSICA J. SPUHLER
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

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 appeals. 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?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its creation in 1977, MSLF and its attorneys have been involved in numerous cases concerning the proper interpretation and administration of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. *E.g.*, *Sackett v. EPA*, ___ U.S. ___, 132 S. Ct. 1367 (2012) (amicus curiae); *Coeur Alaska, Inc.*

[1] Pursuant to Supreme Court Rule 37.3(a), the parties have consented to the filing of this amicus curiae brief by filing blanket consents with this Court. Pursuant to Supreme Court Rule 37.6, counsel for MSLF affirms that no counsel for a party authored this brief in whole or in part and that no party, person, or entity other than MSLF, its members, and counsel made a monetary contribution specifically for the preparation or submission of this brief.

v. Southeast Alaska Conservation Council, 557 U.S. 261 (2009) (amicus curiae); *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (amicus curiae); *Rapanos v. United States*, 547 U.S. 715 (2006) (amicus curiae); *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996) (represented plaintiff); *Child v. United States*, 851 F. Supp. 1527 (D. Utah 1994) (represented plaintiff); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (represented intervenor); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (amicus curiae).

In addition, MSLF has members throughout the western United States who are actively involved in the timber industry. The outcome of this case may have serious consequences for these members. Indeed, if the Ninth Circuit's decision is allowed to stand, persons and private entities, including MSLF's members, who own, operate, and/or use forest roads for transporting timber within the jurisdiction of the Ninth Circuit will be exposed to the threat of citizen suits and the associated civil liability. Although the Ninth Circuit suggested that EPA could issue a general permit to cover forest roads over which timber is transported, EPA is not a party to this case. Thus, EPA has no obligation to do anything. Meanwhile, the threat of citizen suits will continue to hang over those who seek to provide timber to the American public.

To make matters worse, the Ninth Circuit eviscerated the exclusive system established by Congress

for challenging the validity of EPA regulations promulgated under the CWA. Under the Ninth Circuit's decision, environmental groups may now challenge the validity of EPA's regulations in citizen suits against private parties in which EPA is not a party. Accordingly, MSLF respectfully submits this amicus curiae brief in support of Petitioners.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND.

A. The Clean Water Act.

Congress passed the CWA for the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." [2] 33 U.S.C. § 1251(a). To accomplish this objective, Congress sought to create a uniform system for regulating point source discharges.[3] *See Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992). For example, Section 301(a) of the CWA provides that, subject to certain exceptions, the "discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). One of these exceptions is a point source discharge authorized by a permit issued pursuant to the

[2] EPA is charged with administering the CWA. 33 U.S.C. § 1251(d).

[3] A "point source" is generally "any discernible, confined and discrete conveyance[.]" 33 U.S.C. § 1362(14).

National Pollutant Discharge Elimination System ("NPDES") under Section 402, 33 U.S.C. § 1342. The combined effect of Sections 301(a) and 402 is that it is unlawful to discharge a pollutant from a "point source" into waters of the United States without a NPDES permit.

Although not specifically defined in the CWA, nonpoint source pollution is generally viewed as water pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. *See Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842, 849 n.9 (9th Cir. 1987) (examples of nonpoint source pollution include runoff from irrigated agriculture and silvicultural activities). As a result, a NPDES permit is not required for nonpoint source pollution, which is more appropriately regulated through other means, such as best management practices.

In passing the CWA, Congress also included a special judicial-review provision for challenging EPA regulations relating to the NPDES program. 33 U.S.C. § 1369(b). This provision provides that the courts of appeals have jurisdiction to review EPA "action . . . in approving or promulgating any effluent limitation or other limitation under [33 U.S.C. §§ 1311, 1312, 1316, or 1345], [and] in issuing or denying any permit under [33 U.S.C. § 1342]." 33 U.S.C. § 1369(b)(1); *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977). This provision further provides that an application for judicial review "shall be made" in a court of appeals "within 120 days

from the date" of EPA's action, or after the 120th day "if such application is based solely on grounds which arose" subsequent thereto. 33 U.S.C. § 1369(b)(1). That Congress intended 33 U.S.C. § 1369(b) to provide the exclusive means of challenging EPA regulations relating to the NPDES program is evident from the following language: "[A]ction of the Administrator with respect to which review could have been obtained under [33 U.S.C. § 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2).

In addition to establishing an exclusive method for challenging NPDES-related regulations, Congress also included a citizen-suit provision in the CWA for *enforcing* those regulations. 33 U.S.C. § 1365. Under the citizen-suit provision, a citizen may commence an action against any person, including the United States, "who is alleged to be in violation of . . . an effluent standard or limitation." 33 U.S.C. § 1365(a)(1). It is axiomatic that the purpose of citizen suits is to enforce EPA regulations, not to invalidate them. *Delaware Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 265 (3d Cir. 1991) (citizen suits under the Clean Air Act are for the purpose of enforcing EPA standards).[4]

---

[4] The CWA and the Clean Air Act are read in *pari materia*. *United States v. Stauffer Chem. Co.*, 684 F.2d 1174, 1187 (6th Cir. 1982), *aff'd*, 464 U.S. 165 (1984); *United States v. Anthony Dell'Aquilla, Enterprises and Subsidiaries*, 150 F.3d 329, 338 n.9 (3d Cir. 1998).

B. EPA's Silvicultural Rule.

In 1976, EPA issued its Silvicultural Rule. 41 Fed. Reg. 24,709-24,712 (Jun. 18, 1976). This Rule, after a minor revision in 1980 (45 Fed. Reg. 33,290 (May 19, 1980)), currently provides, in relevant part:

> "Silvicultural point source" means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, *harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff*.

40 C.F.R. § 122.27(b) (emphasis added). Thus, under the plain language of EPA's 30-year-old Silvicultural Rule, all natural runoff from harvesting operations, surface drainage, and road construction and maintenance is treated as nonpoint source pollution, even if the runoff is ultimately discharged through a discrete conveyance. Importantly, no one sought judicial review of the Silvicultural Rule when it was promulgated in 1976 or when it was revised in 1980.

C. The 1987 Stormwater Amendments.

In 1987, Congress amended the CWA to specifically deal with water pollution caused by stormwater. Pub. L. No. 100-4, 101 Stat. 7 (1987). In so doing, Congress added Section 402(p) to the CWA, 33 U.S.C. § 1342(p), which establishes a two-phase approach to stormwater discharges. Section 402(p) prohibited EPA from requiring NPDES permits for stormwater discharges until October 1, 1994, except for five categories of so-called "Phase I" stormwater discharges. 33 U.S.C. §§ 1342(p)(1), (2). As relevant here, one Phase I category is "discharge associated with industrial activity." 33 U.S.C. § 1342(p)(2). Congress mandated NPDES permits for the Phase I stormwater discharges and directed EPA to promulgate regulations governing them. 33 U.S.C. §§ 1342(p)(3), (4).

With respect to those stormwater discharges not included in Phase I, Congress instructed EPA to study those discharges, determine which ones needed to be regulated, and establish a comprehensive program to regulate these so-called "Phase II" stormwater discharges. 33 U.S.C. §§ 1342(p)(5) and (6). Importantly, stormwater discharges not regulated under either Phase I or Phase II are not subject to NPDES permitting requirements. *See Conservation Law Found. v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325, 330-32 (D. Vt. 2004), *aff'd*, 139 Fed. Appx. 338 (2d Cir. 2005).

D. EPA's Stormwater Regulations.

In 1990, EPA promulgated its Phase I stormwater regulations. 55 Fed. Reg. 47,990-48,075 (Nov. 16, 1990) (codified in 40 C.F.R. Part 122). Because Congress did not define the term "discharge associated with industrial activity," EPA defined the term to exclude "discharges from facilities or activities excluded from the NPDES program under [40 C.F.R. Part 122]." 40 C.F.R. § 122.26(b)(14). Thus, all activities that were defined as nonpoint source silvicultural activities under EPA's Silvicultural Rule (codified at 40 C.F.R. § 122.27(b)), are excluded from the definition of stormwater "discharge associated with industrial activity." 55 Fed. Reg. at 48,011. EPA also explained that it would evaluate discharges from forest roads under Phase II. *Id*.

In 1999, EPA adopted its Phase II stormwater regulations. *See* 64 Fed. Reg. 68,722-68,851 (Dec. 8, 1999). In so doing, EPA designated two additional categories of stormwater discharges for regulation and retained the authority to designate others on a case-by-case basis. *Id*. at 68,724. In *Environmental Defense Center v. EPA,* 344 F.3d 832 (9th Cir. 2003), the Ninth Circuit upheld EPA's Phase II stormwater regulations in most respects. However, the Ninth Circuit held that, in promulgating the Phase II regulations, EPA had not responded adequately to comments asserting that EPA should require NPDES permits for stormwater discharges from forest roads. *Id*. at 860-63. Implicit in this ruling is that discharges involving runoff from forest roads may be regulated,

if at all, under Phase II. *See id*. at 863 ("[W]e remand this issue to the EPA, so that it may consider in an appropriate proceeding Petitioners' contention that § 402(p)(6) [of the CWA] requires EPA to regulate forest roads.").

II. PROCEDURAL BACKGROUND.

On September 5, 2006, Respondent, Northwest Environmental Defense Center, filed a citizen suit, under 33 U.S.C. § 1365, against Petitioners, the Oregon State Forester and members of the Oregon Board of Forestry in their official capacities (collectively "the State") and several timber companies.[5] Respondent alleged that the State and the timber companies were violating the CWA by discharging stormwater from two forest roads without NPDES permits.

Before the district court, the United States filed an amicus brief explaining its position that, under both its Silvicultural Rule and Phase I stormwater regulations, discharges from forest roads do not require a NPDES permit. United States' Amicus Curiae Brief at 11-31, *NEDC v. Brown,* No. 306-CV-01270 (D. Or., filed Dec. 6, 2006). Based, in part, on the United States' amicus brief, the district court dismissed Respondent's citizen suit for failure to state a claim. *NEDC v. Brown*, 476 F. Supp. 2d 1188 (D. Or. 2007).

---

[5] The Oregon State Forester and members of the Oregon Board of Forestry are Petitioners in No. 11-338 and the timber companies are Petitioners in No. 11-347.

On appeal, the United States filed another amicus brief, again explaining that under its Silvicultural Rule and Phase I regulations, discharges from forest roads did not require a NPDES permit. Amicus Curiae Brief of the United States at 13-20, *NEDC v. Brown,* 9th Cir. No. 07-35266, (filed Nov. 16, 2007). The United States also noted that the Ninth Circuit lacked jurisdiction over Respondent's citizen suit because it was a challenge to EPA's Silvicultural Rule and Phase I stormwater regulations. *Id*. at 12-13. The United States explained that such a challenge could be brought only within the 120-day limitation period in 33 U.S.C. § 1369(b)(1), and that Respondent could not circumvent review in a court of appeals by styling its challenge as a citizen suit. *Id*.

The Ninth Circuit, however, reversed. *NEDC v. Brown*, 617 F.3d 1176 (9th Cir. 2010). In so doing, the Ninth Circuit concluded that EPA's Silvicultural Rule was invalid because it was susceptible to two "possible readings[,]" both of which violated the CWA. *Id*. at 1184-91. After ruling the Silvicultural Rule was invalid, the Ninth Circuit ruled that EPA's Phase I stormwater regulations were invalid. *Id*. at 1194-96.

Petitioners timely sought rehearing. While the petitions for rehearing were pending, the Ninth Circuit asked the parties to address whether it had jurisdiction over NEDC's citizen suit. In response to that question, the United States filed another amicus brief, in which it argued that the judicial-review provision in 33 U.S.C. § 1369(b) generally bars courts from reviewing the validity of EPA regulations in a

citizen suit. Amicus Curiae Brief of the United States at 5-7, *NEDC v. Brown,* 9th Cir. No. 07-35266 (filed Feb. 10, 2011). The United States then argued that, because the Ninth Circuit had ruled the Silvicultural Rule ambiguous, the Ninth Circuit had jurisdiction over Respondent's citizen suit. *Id*. at 10-11.

On May 17, 2011, the Ninth Circuit denied the petitions for rehearing, vacated its original opinion, and issued a superseding opinion in which it again reversed the judgment of the District Court. *NEDC v. Brown*, 640 F.3d 1063 (9th Cir. 2011). The Ninth Circuit first ruled that it had jurisdiction over Respondent's citizen suit. *Id*. at 1068-69. In so ruling, the Ninth Circuit concluded that Respondent could not have sought review of the Silviculture Rule when it was promulgated because no one could have known how EPA interpreted the Rule before the United States filed its amicus curiae brief in this case. *Id*. Thus, the Ninth Circuit determined that the case fell "within the exception in [33 U.S.C. § 1369(b)(1)] for suits based on grounds arising after the 120-day filing window." *Id*. at 1069.

The Ninth Circuit then reviewed the history of the Silvicultural Rule. *Id*. at 1073-80. In direct contravention to its earlier conclusion that no one could have known how EPA interpreted its Silviculture Rule, the Ninth Circuit recognized that EPA has always interpreted its Silvicultural Rule to exclude natural runoff from forest roads from the NPDES permitting system even when that water is collected and channeled in discrete conveyances. *Id*. at 1073-80.

The Ninth Circuit also ruled that EPA's interpretation was reasonable. *Id*. at 1080 ('[T]here are two *possible* readings of the Silvicultural Rule. The first reading reflects the intent of EPA in adopting the Rule." (emphasis added)). Despite this ruling, the Ninth Circuit held that EPA's interpretation of its Silvicuture Rule was "invalid." *Id*.

Although the second reading of the Silvicultural Rule did "not reflect the intent of EPA[,]" the Ninth Circuit ruled that this reading would be consistent with the CWA:

> The second reading does not reflect the intent of EPA, but would allow us to construe the Rule to be consistent with the statute. Under this reading, the Rule exempts natural runoff from silvicultural activities such as those listed, but only as long as the "natural runoff" remains natural. That is, the exemption ceases to exist as soon as the natural runoff is channeled and controlled in some systematic way through a "discernible, confined and discrete conveyance" and discharged into the waters of the United States.

Id. Yet, the Ninth Circuit held that, "[u]nder either reading, . . . the Silvicultural Rule does not exempt from the definition of point source discharge . . . stormwater runoff from logging roads that is collected and channeled in a system of ditches, culverts, and conduits before being discharged into streams and rivers. *Id*.

The Ninth Circuit next addressed whether NPDES permits are required for stormwater discharges from forest roads under EPA's Phase I stormwater regulations. *Id*. at 1082-85. The Ninth Circuit recognized that the plain language of these regulations define "'discharges associated with industrial activity'" not to include discharges that are excluded from the NPDES program under the Silvicultural Rule. *Id.* at 1083 (quoting 40 C.F.R. § 122.26(b)(14)). In fact, the Ninth Circuit explained that "[t]he 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)." *Id*.; *see also* 55 Fed. Reg. at 48,011. Despite the plain language of the regulations and EPA's clear intent, the Ninth Circuit ruled that EPA's Phase I stormwater regulations are invalid. *Id*. at 1083-85.

Finally, the Ninth Circuit tried to downplay the disastrous effect of 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.

Id. at 1087. The Ninth Circuit's words were cold comfort because EPA is not a party. Thus, EPA has no obligation to do anything. Amicus Curiae Brief of the United States at 3 n.1, *NEDC v. Brown,* 9th Cir. No. 07-35266 (filed Feb. 10, 2011) ("[A]ny relief afforded to [Respondent] 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."). Thus, fears regarding the disastrous effect of the Ninth Circuit's decision remain.

SUMMARY OF ARGUMENT

This Court should vacate and remand the Ninth Circuit's decision with instructions to dismiss for lack of jurisdiction. The Ninth Circuit's decision abrogates Congress's carefully crafted, bifurcated system that vests exclusive jurisdiction over challenges to EPA's regulation in the courts of appeals. Under the Ninth Circuit's novel and seriously flawed reasoning, a district court may confer jurisdiction on itself over a citizen suit by simply deeming a longstanding EPA regulation ambiguous. Needless to say, this frustrates Congress's intent in passing 33 U.S.C. § 1369(b). More dangerously, the Ninth Circuit's ruling will open the courthouse doors to environmental groups who seek to challenge longstanding EPA regulations under the guise of citizen suits in which EPA is not a party.

ARGUMENT

I. THE PURPOSE OF 33 U.S.C. § 1369(b) IS TO ENSURE PROMPT, AUTHORITATIVE REVIEW OF EPA REGULATIONS IN THE COURTS OF APPEALS.

The judicial-review mechanism in 33 U.S.C. § 1369(b) authorizes interested persons and regulated industries to obtain immediate review in the courts of appeals of certain EPA actions, including the promulgation of NPDES regulations, without waiting for the regulations to be applied in a concrete factual setting.[6] *NRDC v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992) *see also Shell Oil Co. v. Train*, 415 F. Supp. 70, 76 (N.D. Cal. 1976) (Congress's intent in passing 33 U.S.C. § 1369(b) was to insure prompt, high-level

[6] Importantly, prompt, authoritative review in the courts of appeals benefits regulated industries, the public, and EPA by providing immediate clarity to all concerned. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284 (1978) (By vesting exclusive jurisdiction in the courts of appeals to review EPA's emissions standards under the Clean Air Act, Congress ensured that the "standard[s] would be uniformly applied and interpreted and that the circumstances of [their] adoption would be quickly reviewed by a single court intimately familiar with administrative procedures."); *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 911 (D.C. Cir. 1985) (Statutory time limits on petitions for review of agency action are jurisdictional in nature. These limitations serve the important purpose of imparting finality into the administrative process, thereby conserving administrative resources. Furthermore, timeliness requirements reflect a deliberate congressional choice to impose statutory finality on agency orders, a choice we may not second-guess." (internal quotations omitted)).

judicial review of the EPA's regulations). Thus, this judicial-review mechanism tends to alleviate prudential ripeness concerns that might otherwise bar judicial review of facial challenges to non-applied regulations. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 891-94 (1990) (a facial challenge to a non-applied agency regulation is "ordinarily" not ripe for review). Congress expressed the importance of immediate review by requiring that review be sought within 120 days of issuance of the regulations, unless the challenge "is based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1). This provision is the only avenue by which a party may challenge the validity of EPA's NPDES regulations. Collateral attacks on EPA regulations are explicitly barred by 33 U.S.C. § 1369(b)(2), which provides: "Action of the Administrator with respect to which review could have been obtained under [1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement."

II. THE NINTH CIRCUIT LACKED JURISDICTION TO DETERMINE THE VALIDITY OF EPA'S LONGSTANDING REGULATIONS IN A CITIZEN SUIT.

A. The Ninth Circuit Ignored Binding Precedent And Created A Dual System For Challenging the Validity Of EPA Regulations.

In *E. I. du Pont*, this Court addressed regulations issued by EPA under 33 U.S.C. § 1311, which set

effluent limitations for the discharge of various pollutants from existing plants. 430 U.S. at 115. Numerous companies sought review of the regulations concurrently in both the Fourth Circuit and the Western District of Virginia. The district court dismissed the companies' challenge to the regulations because, under 33 U.S.C. § 1369(b)(1), exclusive jurisdiction was in the Fourth Circuit. *E. I. du Pont de Nemours & Co. v. Train*, 383 F. Supp. 1244, 1256 (W.D. Va. 1974). On appeal, the Fourth Circuit affirmed the district court's dismissal. *E. I. du Pont de Nemours & Co. v. Train*, 528 F.2d 1136, 1139-42 (4th Cir. 1975). As to the companies' original petition for review, the Fourth Circuit ruled that EPA had authority to promulgate regulations establishing effluent limitations for existing plants under 33 U.S.C. § 1311. *E. I. du Pont De Nemours & Co. v. Train*, 541 F.2d 1018 (4th Cir. 1976).

After granting the companies' petitions for writ of certiorari, this Court upheld EPA's asserted authority. *E. I. du Pont*, 430 U.S. at 126-34. As to the jurisdictional issue, this Court rejected the companies' contention that the judicial-review provision in 33 U.S.C. § 1369(b)(1) applied only to EPA's actions in issuing and denying individual permits:

> [The companies'] construction 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.

Id. at 136.

Later, in *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 195 (1980) (per curiam) this Court emphasized that 33 U.S.C. § 1369(b) should be read to effectuate the intent of Congress in ensuring prompt, authoritative resolution of challenges to EPA's actions. At issue was EPA's veto of a NPDES permit issued by California, which had been delegated authority by EPA to administer the NPDES program. *Id*. at 193-94. Because EPA itself had not denied the permit, the Ninth Circuit ruled that it lacked jurisdiction under 33 U.S.C. § 1369(b)(1)(F), which provides for review in the courts of appeals of EPA's actions "in issuing or denying any permit [under 33 U.S.C. § 1342]." *Id*. at 195-96. Recognizing that 33 U.S.C. § 1369(b)(1)(F) would vest the courts of appeals with jurisdiction to review EPA's permit decisions in States that had not been delegated authority to administer NPDES program, this Court reversed:

> [We] hold that the Court of Appeals had jurisdiction over this action under [33 U.S.C. § 1369(b)(1)(F)]. When EPA, as here, objects to effluent limitations contained in a state-issued permit, the precise effect of its action is to "den[y]" a permit within the meaning of [33 U.S.C. § 1369(b)(1)(F)]. Under the contrary construction of the Court of Appeals, denials of NPDES permits would be reviewable at different levels of the federal-court

> system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits. . . . Absent a far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly irrational bifurcated system.

Id. at 196-97 (footnotes omitted).

As *E. I. du Pont* and *Crown Simpson* demonstrate, the purpose of 33 U.S.C. § 1369(b) is to ensure prompt, authoritative review of EPA's actions, including NPDES-related regulations, in the courts of appeals. Moreover, 33 U.S.C. § 1369(b) should be given a practicable interpretation so as to avoid creating an "irrational" dual system.

Several courts of appeals, including the Ninth Circuit, have recognized that 33 U.S.C. § 1369(b) confers exclusive jurisdiction on the courts of appeals to review the validity of NPDES-related regulations. *E.g.*, *Nat'l Cotton Council v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009) ("The Final Rule before us today . . . regulates the [NPDES] permitting procedures, and we therefore conclude that jurisdiction is proper under § 1369(b)(1)(F)."); *Maier v. EPA*, 114 F.3d 1032, 1037-38 (10th Cir. 1997) (The courts of appeals have exclusive jurisdiction over challenges to EPA's denial of petitions for rulemaking affecting the NPDES program); *American Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992) ("The jurisdictional grant of [33 U.S.C. § 1369(b)(1)(F)] authorizes the courts of appeals "to review the regulations governing the

issuance of permits under section 402, 33 U.S.C. § 1342, as well as the issuance or denial of a particular permit.").

For example, in *NRDC v. EPA*, 673 F.2d 400 (D.C. Cir. 1982) the D.C. Circuit, relying on this Court's decisions in *E. I. du Pont* and *Crown Simpson*, ruled that the courts of appeals have jurisdiction under 33 U.S.C. § 1369(b) to review non-technical, NPDES-related regulations. The regulations were – like EPA's Silvicultural Rule and Phase I stormwater regulations – based upon general, policy-based choices made by EPA. *Id*. at 405. Industry groups argued that non-technical, NPDES-related regulations may be challenged only in the district courts. *Id*. at 402-03. In rejecting this argument, the D.C. Circuit noted that "the case for first-instance judicial review in a court of appeals is stronger for broad, policy-oriented rules than for specific, technology-based rules." *Id*. The D.C. Circuit also explained that "[n]ational uniformity, an important goal in dealing with broad regulations, is best served by initial review in a court of appeals." *Id*. at 405 n.15 (citing *Virginia Electric & Power Co. v. Costle,* 566 F.2d 446, 451 (4th Cir. 1977)). Finally, the D.C. Circuit – like this Court in *E. I. du Pont* – noted the anomaly that would be created if the courts of appeals could review only EPA's actions in issuing or denying NPDES permits but not the regulations governing those decisions. *Id*. at 405-06.

More recently, in *NRDC v. EPA* an environmental group challenged EPA's Phase I stormwater regulations by filing a petition for review with the Ninth

Circuit. 966 F.2d 1296-97. Before addressing the merits, the Ninth Circuit noted that it had jurisdiction, under 33 U.S.C. § 1369(b), to review the regulations. *Id*. at 1296-97 ("33 U.S.C. § 1369(b)(1)(F) allows the court to review the issuance or denial of a [NPDES] permit. . . . The court also has the power to review rules that regulate the underlying permit procedures." (citing *NRDC v. EPA*, 656 F.2d 768, 775 (D.C. Cir. 1981))).

Here, Respondent also challenged EPA's Phase I stormwater regulations, specifically the regulation that incorporated the Silvicultural Rule. *See NEDC*, 640 F.3d at 1083. However, Respondent did not utilize the judicial-review mechanism in 33 U.S.C. § 1369(b), Instead, Respondent filed a citizen suit in district court, pursuant to 33 U.S.C. § 1365. Thus, the Ninth Circuit should have followed its earlier decision in *NRDC v. EPA* and ruled that it lacked jurisdiction to entertain Respondent's citizen suit. *See Gen. Constr. Co. v. Castro*, 401 F.3d 963, 975 (9th Cir. 2005) ("[W]e are bound by decisions of prior panels unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions.").

In this case, the Ninth Circuit ignored not only its own precedent, but the previous decisions of this Court and created a dual system that allows environmental groups to challenge EPA regulations in either the courts of appeals or the district courts. To say that this could result in inconsistent decisions throughout the Nation is an understatement.

To make matters worse, an environmental group can avoid EPA's involvement, as Respondent did here, by naming only the alleged discharger in a citizen suit and styling its challenge to the regulations in terms of an attack on EPA's interpretation thereof. Without EPA in the case to defend its regulations, the environmental group has necessarily increased it odds of prevailing. Moreover, the reviewing court is placed in the unusual position of judging the validity of EPA's regulations without the benefit of the EPA's administrative record for the rulemaking.

This irrational result underscores Congress's wisdom in bifurcating challenges to the validity of regulations from enforcement actions, like citizen suits. As this Court has recognized, the "narrow inquiry" in enforcement actions "is not whether [EPA] has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. Nor is the court to pursue any of the other familiar inquiries which arise in the course of an administrative review proceeding." *Adamo Wrecking Co.*, 434 U.S. at 285. Instead, the inquiry is simply whether the defendant violated the regulation. *Id*.

Accordingly, this Court should vacate the Ninth Circuit's decision and remand with instructions to dismiss for lack of jurisdiction, both to correct the irrational dual system created by the Ninth Circuit for challenging EPA regulations and to undo what

amounts to an improper invalidation of EPA's Silvicultural Rule and Phase I stormwater regulations.

B. The Ninth Circuit's Novel And Seriously Flawed Jurisdiction Determination Frustrates Congress's Intent In Passing 33 U.S.C. § 1369(b).

The Ninth Circuit concluded that this case was properly brought as a citizen suit, even though it recognized that courts of appeals have exclusive jurisdiction over challenges to the validity of EPA regulations. *NEDC*, 640 F.3d at 1068. The Ninth Circuit reached this remarkable conclusion by first finding that the Silvicultural Rule is ambiguous because the Rule is "susceptible to two different readings." *Id*. at 1068. Casting a blind eye towards EPA's longstanding and well-publicized interpretation, the Ninth Circuit stated that "there was no way for the public to know which reading of the Silvicultural Rule" EPA would adopt until the United States filed its brief in this case. *Id*. at 1068-69. Finally, the Ninth Circuit determined that Respondent's citizen suit was proper because the case fell "within the exception in [33 U.S.C. § 1369(b)(1)] for suits based on grounds arising after the 120-day filing window."[7] *NEDC*, 640

[7] This determination was evidently influenced by the United States' amicus curiae brief responding to the Ninth Circuit's jurisdictional questions. *NEDC*, 640 F.3d at 1068. In that brief, the United States simply acquiesced in the Ninth Circuit's ruling that the Silvicultural Rule was ambiguous and

(Continued on following page)

F.3d at 1069. The Ninth Circuit's novel and seriously flawed reasoning requires that this Court vacate the Ninth Circuit's decision and remand with instructions to dismiss for lack of jurisdiction.

First, jurisdiction cannot be dependent on a judicial finding that a regulation is ambiguous, whether that finding is correct or not. It is well established that the existence of a federal court's jurisdiction depends on the facts as they exist when an action is initiated. *Mollan v. Torrance*, 22 U.S. 537, 539 (1824) ("It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought. . . ."). Similarly, jurisdiction may neither be created retroactively, nor conferred on a court by the

---

argued that a challenge to an ambiguous EPA regulation could be brought as a citizen suit. Amicus Curiae Brief of the United States at 10-11, *NEDC v. Brown,* 9th Cir. No. 07-35266 (filed Feb. 10, 2011). Ironically, the Ninth Circuit deferred to the United States' jurisdictional argument, although it accorded no deference to EPA's interpretation of its regulations. *NEDC*, 640 F.3d at 1068; *see* Brief for Petitioners, No. 11-338 at 22-31 (explaining that the Ninth Circuit's failure to accord deference to EPA's interpretation of its regulations violated this Court's precedents); Brief for Petitioners, No. 11-347 at 18-50 (same). Yet, a federal court is obligated to determine for itself whether it has jurisdiction and may not defer to an interpretation regarding its jurisdiction proffered by an agency or the United States. *See Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) ("An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."); *Our Children's Earth Found. v. EPA*, 527 F.3d 842, 846 n.3 (9th Cir. 2008) (agency's position on a federal court's jurisdiction under the CWA is not entitled to deference).

parties. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569, n.4 (1992) (noting that Article III standing may not be created retroactively); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("no action of the parties can confer subject-matter jurisdiction upon a federal court").

Here, the Ninth Circuit reversed this analysis by finding an ambiguity in the Silvicultural Rule and then, based upon that finding, determined that it had jurisdiction over the citizen suit. The Ninth Circuit's analysis is simply backwards. It allows a court to frustrate Congress's intent in passing 33 U.S.C. § 1369(b) by deeming an EPA regulation ambiguous and, thereby, creating its own jurisdiction over a citizen suit.[8] Just as pleading an Article III injury must "be something more than an ingenious academic exercise in the conceivable[,]" *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973), defeating the exclusive jurisdiction of the courts of appeals under 33 U.S.C. § 1369(b) should require more than whether a court can come up with two possible readings of an EPA regulation.

---

[8] If allowed to stand, the Ninth Circuit's decision will no doubt entice environmental groups to challenge longstanding EPA regulations in citizen suits and argue ambiguity to avoid the 120-day limitation period in 33 U.S.C. § 1369(b)(1), and limitation periods in other environmental statutes. *See, e.g.*, 42 U.S.C. § 7607(b)(1) (60-day time limit to challenge EPA regulations promulgated under the Clean Air Act).

Second, the Ninth Circuit's suggestion that Respondent could not know which reading of the Silvicultural Rule EPA would adopt until the United States weighed in on this case stretches credulity and is belied by the Ninth Circuit's own decision. In examining the history of the Silvicultural Rule, the Ninth Circuit reviewed EPA's 1976 notice of proposed rulemaking for the Silvicultural Rule. *NEDC*, 640 F.3d at 1074 (quoting 41 Fed. Reg. 6,281-82 (Feb. 12, 1976)). From this notice of proposed rulemaking, the Ninth Circuit was able to discern that EPA's intent was to:

> [C]haracterize discharges of pollutants through a discernible, confined and discrete conveyance as point source discharges only when they were "a result of controlled water used by a person." Under this criterion, the proposed rule named as point source discharges only those related to "rock crushing, gravel washing, log sorting, [and] log storage facilities." Any other silvicultural discharge of pollutants, even if made through a discernible, confined and discrete conveyance, was considered a nonpoint source of pollutants. *In effect, this meant that any natural runoff containing pollutants was not a point source, even if the runoff was channeled and controlled through a "discernible, confined and discrete conveyance" and then discharged into navigable waters*.

Id. at 1074-75 (emphasis added) (internal citations omitted). Importantly, the Ninth Circuit recognized

that EPA made no substantive changes to its proposed Silvicultural Rule when EPA issued the final Silvicultural Rule in 1976 or when it revised it in 1980. *Id*. at 1075-78. Moreover, the Ninth Circuit's characterization of EPA's intent in promulgating the Silvicultural Rule, as discerned from EPA's 1976 notice of proposed rulemaking, was identical to EPA's interpretation of its Silvicultural Rule proffered in this case. United States' Amicus Curiae Brief at 11-17, *NEDC v. Brown,* No. 306-CV-01270 (D. Or., filed Dec. 6, 2006).

The public is generally charged with constructive notice of what is published in the *Federal Register*. 44 U.S.C. § 1507; *see Lawrence v. Dep't of Interior*, 525 F.3d 916, 920 (9th Cir. 2008); *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947) ("the appearance of rules and regulations in the Federal Register gives legal notice of their contents"). Thus, the Ninth Circuit's suggestion that Respondent could not know which reading of the Silvicultural Rule EPA would adopt until the United States filed its amicus curiae brief is specious. The Ninth Circuit figured it out by reading the *Federal Register*. Therefore, the Ninth Circuit erred in ruling that the grounds for Respondent's challenge arose more than 120 days after the challenged regulations were promulgated *See NEDC*, 640 F.3d at 1069. Instead, the Ninth Circuit should have dismissed this case as time-barred.

Finally, even if the Ninth Circuit were somehow correct in ruling that the grounds for Respondent's challenge arose more than 120 days after EPA's

regulations were promulgated, it erred in ruling that that delay somehow changed the proper forum. The discovery of new grounds upon which to challenge an EPA regulation does not create an exception to having to seek judicial review in a court of appeals, it creates an exception to the 120-day limitation period. Indeed, this is evident from the plain language of 33 U.S.C. § 1369(b)(1), which provides that "[r]eview of the Administrator's action . . . may be had by any interested person in [a court of appeals] . . . upon *application*. . . . Any such *application* shall be made 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." (Emphasis added). Nothing in this language suggests that an "application" may be filed in the form of a citizen suit in a district court under 33 U.S.C. § 1365. *See Maier,* 114 F.3d at 1038 (When the "challenge is to the substance of a regulation that the agency has already promulgated, exclusive jurisdiction in the court of appeals may not be evaded merely by styling the claim as [something else]."). Thus, contrary to the decision of the Ninth Circuit, the courts of appeals have exclusive jurisdiction over challenges to EPA's regulations, even if the grounds for the challenge arose more than 120 days after the regulations were promulgated.

CONCLUSION

For the foregoing reasons, this Court should vacate the decision of the Ninth Circuit and remand with instructions to dismiss for lack of subject matter jurisdiction.

Respectfully submitted,

STEVEN J. LECHNER
Counsel of Record
JESSICA J. SPUHLER
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Counsel for Amicus Curiae