Nos. 11-338 and 11-347

# In the Supreme Court of the United States

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

*v.*

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, ET AL.

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

*v.*

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, ET AL.

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

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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## QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that a suit in which liability depends on the interpretation of Clean Water Act (CWA) regulations, and in which the court rejected the construction of the regulations proffered by the Environmental Protection Agency (EPA), may be adjudicated under the CWA's citizen suit provision, 33 U.S.C. 1365(a), rather than under the CWA's judicial review provision, 33 U.S.C. 1369(b).

2. Whether the court of appeals erred in not deferring to EPA's interpretation of the Phase I industrial stormwater regulation, 40 C.F.R. 122.26(b)(14), that runoff from logging roads does not constitute a stormwater discharge "associated with industrial activity."

3. Whether the court of appeals erred in not deferring to EPA's interpretation of the Silvicultural Rule, 40 C.F.R. 122.27(b)(1), that runoff from logging roads constitutes silvicultural nonpoint-source pollution.

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## INTEREST OF THE UNITED STATES

The questions presented involve both jurisdictional and substantive issues pertaining to the application of the National Pollutant Discharge Elimination System (NPDES) permitting program to stormwater discharges from logging roads. The United States has a substantial interest in the proper resolution of those questions. Congress has entrusted the Environmental Protection

Agency (EPA) with enforcement of the Clean Water Act (CWA), including administration of the NPDES program, and the proper interpretation of two of EPA's NPDES regulations (40 C.F.R. 122.26(b)(14), 122.27(b)(1)) is at issue in this case. The threshold issue involving 33 U.S.C. 1365(a) and 1369(b) potentially affects the availability of avenues for enforcing the CWA and challenging EPA action. At the Court's invitation, the United States filed a brief amicus curiae at the petition stage of this case.

**STATEMENT**

1. a. In 1972, Congress passed the Federal Water Pollution Control Act Amendments (often referred to as the CWA). 33 U.S.C. 1251 *et seq*. The CWA establishes a comprehensive program designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant"—defined as "any addition of any pollutant to navigable waters from any point source"—except "as in compliance with" specified provisions of the Act. 33 U.S.C. 1311(a), 1362(12)(A).

The Act defines "point source" as

> 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, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. 1362(14). For most point-source discharges, regulated entities achieve compliance by following the

terms of an NPDES permit issued by EPA or an authorized State pursuant to CWA Section 402, 33 U.SC. 1342, or a permit issued by the Army Corps of Engineers under CWA Section 404, 33 U.S.C. 1344. Other CWA provisions establish mechanisms other than permits to address discharges from "nonpoint sources." *E.g.*, 33 U.S.C. 1314(f), 1329.

b. After the CWA was enacted in 1972, EPA struggled with the task of regulating stormwater discharges from the hundreds of thousands of potential point sources. In 1973, to conserve the agency's enforcement resources for more significant sources of pollution, the EPA promulgated a rule that exempted certain discharges—*e.g.*, discharges from stormwater runoff and from silvicultural activities, including forest-land runoff—from the NPDES permitting requirements. See *NRDC* v. *Costle*, 568 F.2d 1369, 1372-1373 & n.5 (D.C. Cir. 1977) (citing 40 C.F.R. 125.4(f) and (j) (1975)). In *NRDC* v. *Costle*, the district court invalidated that exemption as conflicting with CWA Section 402, and the D.C. Circuit affirmed. The D.C. Circuit concluded that, under the statutory scheme as it existed at that time, EPA did "not have authority to exempt categories of point sources from the permit requirements of § 402." *Id*. at 1377; see *id*. at 1383 ("We find a plain Congressional intent to require permits in any situation of pollution from point sources."). The court acknowledged, however, that "[t]here is an initial question, to what extent point sources are involved in agricultural, silvicultural, and storm sewer runoff." *Id.* at 1377. The court stated that the statutory definition of "point source" "suggests that there is room here for some exclusion by interpretation." *Ibid.*

In that vein, EPA also promulgated regulations that further define the term "point source" as it applies to various activities and facilities, including silvicultural sources. In 1976, the agency adopted the Silvicultural Rule, which defined four categories of silvicultural facilities as point sources but excluded from that definition (*inter alia*) "road construction and maintenance from which runoff results from precipitation events." 40 C.F.R. 125.54(a)(1), cmt. (1976). The current version of the Silvicultural Rule, as amended in 1980, maintains the same definition of "silvicultural point source" but now excludes (in pertinent part) "road construction and maintenance from which there is natural runoff." 40 C.F.R. 122.27(b)(1).[1] EPA has construed that rule to mean that logging roads are not silvicultural point sources, even if the runoff from logging roads flows through a ditch, channel, or culvert before being released into waters of the United States. See J.A. 27, 39.

c. In 1987, Congress amended the CWA to take account of the unique challenges that EPA faces in managing the water quality impacts of stormwater discharges. Pub. L. No. 100-4, 101 Stat. 69 (33 U.S.C. 1342(p)).

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[1] The Silvicultural Rule reads as follows:

> *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)(1).

CWA Section 402(p), which addresses "discharges composed entirely of stormwater," established a temporary moratorium on NPDES permit requirements for such discharges, with the exception of five categories of discharges listed in 33 U.S.C. 1342(p)(2). Section 402(p) also required EPA to establish regulations setting forth permit-application requirements for specified categories of stormwater point-source discharges and to conduct studies to determine what other discharges should be regulated to protect water quality. The statute contemplated that those regulations would be promulgated through a phased approach, the first commonly referred to as Phase I and the second as Phase II. 33 U.S.C. 1342(p)(4)(A) and (B).

Phase I covers the five enumerated categories of stormwater discharges, including stormwater discharges "associated with industrial activity." 33 U.S.C. 1342(p)(2)(B). The 1987 amendment requires NPDES permits for those discharges and directs EPA to regulate them accordingly. 33 U.S.C. 1342(p)(3) and (4)(A). The CWA does not define the term stormwater discharge "associated with industrial activity." In 1990, EPA promulgated Phase I regulations that define that term as

> 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. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from * * * immediate access roads * * * used or traveled by carriers

> of raw materials, manufactured products, waste material, or by-products used or created by the facility[.] * * * The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):
>
> * * *
>
> (ii) Facilities classified as Standard Industrial Classifications 24 (except 2434), 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373.

40 C.F.R. 122.26(b)(14).[2]

Phase II covers stormwater discharges other than those enumerated in 33 U.S.C. 1342(p)(2). The 1987 amendment authorizes EPA to designate, as part of Phase II, any additional stormwater discharges "to be regulated to protect water quality." 33 U.S.C. 1342(p)(5) and (6). Under Section 402(p)(6), EPA must "establish a comprehensive program" that "shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines." 33 U.S.C. 1342(p)(6). The program "may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." *Ibid.* EPA is authorized to require NPDES permits for Phase II discharges, but it is not required to do so. *Ibid.*

In 1999, EPA promulgated regulations that designated two categories of stormwater point-source discharges (neither of which is relevant to this case) for Phase II

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[2] The regulation incorporates by reference the enumerated Standard Industrial Classification (SIC) codes. "Logging" is a subcategory (2411) of SIC code 24. *Standard Industrial Classifications Manual*, Div. D, Major Group 24, Industry Group 241, 2411 Logging, available at http://www.osha.gov/pls/imis/sic_manual.html.

regulation under Section 402(p)(6). 64 Fed. Reg. 68,722, 68,734 (Dec. 8, 1999) (codified in pertinent part at 40 C.F.R. 122.26(a)(9)(i)). EPA also reserved the authority to designate additional discharges for Phase II regulation at a later date. *Ibid.*[3]

2. Respondent commenced this action under the CWA's citizen-suit provision, 33 U.S.C. 1365. Respondent alleged that stormwater discharges associated with two logging roads in Oregon violate the Act because the roads at issue collect, channel, and discharge stormwater runoff to waters of the United States—without NPDES permits—via ditches, pipes, and culverts. II J.A. 2-3, 7-9 (First Amended Complaint).

Petitioners are state officials and private timber companies who control the relevant logging roads and were named as defendants in this suit. Supported by the United States as amicus curiae, petitioners moved to dismiss the complaint for failure to state a claim. The district court granted the motion. The court held that, under EPA's Silvicultural Rule, 40 C.F.R. 122.27(b)(1), discharges from logging roads were not required to have

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[3] In 2003, the Ninth Circuit remanded to EPA the question whether to regulate stormwater discharges from forest roads under Phase II. See *Environmental Def. Ctr.* v. *EPA*, 344 F.3d 832, 863, cert. denied, 541 U.S. 1085 (2004). EPA continues to review available information on the water-quality impacts of stormwater discharges from forest roads, including logging roads, as well as existing practices to control these discharges. On May 23, 2012, EPA announced that it "is considering designating a subset of stormwater discharges from forest roads for appropriate action" under the agency's Phase II rulemaking authority. *Notice of Intent to Revise Stormwater Regulations to Specify that an NPDES Permit is not Required for Stormwater Discharges from Logging Roads and to Seek Comment on Approaches for Addressing Water Quality Impacts from Forest Road Discharges*, 77 Fed. Reg. 30,473, 30,479.

NPDES permits because EPA had categorized natural runoff from those roads and other sources as "non-point source" pollution. Pet. App. 53-77.[4]

3. The court of appeals reversed. Pet. App. 1-52.[5]

a. As in the district court, the government filed an amicus brief arguing that, under EPA's Silvicultural Rule, all precipitation-driven runoff from logging roads is not currently regulated under the NPDES permitting program, even if it flows through a ditch, channel, or culvert before being discharged into waters of the United States. See I J.A. 27, 39. The court of appeals rejected that interpretation of the regulation. Pet. App. 34-37. The court stated that "there are two possible readings of the Silvicultural Rule," and it acknowledged that the interpretation advanced in the government's amicus brief "reflects the intent of EPA in adopting the Rule." *Id.* at 36. The court concluded, however, that an alternative reading of the rule was preferable because it would "allow [the court] to construe the Rule to be consistent with the statute," in particular, the CWA's definition of "point source." *Id.* at 37. The court held that the Silvicultural Rule does not exempt from NPDES requirements stormwater runoff from logging roads that is systemically collected and channeled through man-made ditches and culverts before being discharged into waters of the United States. *Ibid.*

b. Petitioners and the government further argued that, even if such channeled runoff from logging roads

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

[5] The initial court of appeals opinion was published at 617 F.3d 1176, but the discussion in this brief cites the superseding opinion, which was published at 640 F.3d 1063 and is reprinted in the appendix to the certiorari petition.

constitutes a "point source" discharge, such discharges are not subject to NPDES permitting requirements under EPA's stormwater regulations promulgated pursuant to 33 U.S.C. 1342(p). Pet. App. 37-48. Petitioners and the government contended, in particular, that the discharges at issue here are not "associated with industrial activity" as EPA has defined that term. See *id.* at 44-47; 40 C.F.R. 122.26(b)(14). The court of appeals rejected that understanding of EPA's regulatory definition. The court found it "undisputed that 'logging,' which is covered by SIC [Standard Industrial Classification] 2411 (part of SIC 24), is an 'industrial activity.'" Pet. App. 44-45. The court construed the regulation's reference to "immediate access roads"—defined in EPA's Phase I stormwater rule preamble to mean "roads which are exclusively or primarily dedicated for use by the industrial facility"—as covering the roads at issue here. *Id.* at 45-47.

4. a. Petitioners filed petitions for rehearing in the court of appeals. The court of appeals thereafter ordered a response and posed two threshold questions: (1) "Can a suit challenging EPA's interpretation of its regulations implementing the Clean Water Act's permitting requirements be brought under the Act's citizen suit provision, 33 U.S.C. § 1365(a)?" (2) "Must a suit challenging EPA's decision to exempt the discharge of a pollutant from the Clean Water Act's permitting requirements be brought under the Act's agency review provision, 33 U.S.C. § 1369(b)?" I J.A. 7 (Docket entry No. 106).

Section 1369(b) authorizes private parties to obtain direct court of appeals review of certain EPA actions, including actions taken in "promulgating any effluent limitation or other limitation under section 1311" or "in

issuing or denying any permit under section 1342." 33 U.S.C. 1369(b)(1)(E) and (F). EPA's NPDES regulations are generally subject to immediate appellate review under that provision. See, *e.g.*, *National Cotton Council of Am.* v. *EPA*, 553 F.3d 927, 932-933 (6th Cir. 2009), cert. denied, 130 S. Ct. 1505 (2010); *NRDC* v. *EPA*, 966 F.2d 1292, 1296-1297 (9th Cir. 1992); *NRDC* v. *EPA*, 673 F.2d 400, 404-406 (D.C. Cir.), cert. denied, 459 U.S. 879 (1982) (citing *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 136 (1977)). Such review must be sought within 120 days after the relevant EPA action, unless a challenge is "based solely on grounds which arose after such 120th day." 33 U.S.C. 1369(b)(1). Any action "with respect to which review could have been obtained under [Section 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 response to the court of appeals' questions, the United States filed another amicus brief. The government expressed the view that, although Section 1369(b)(2) would preclude the court in a Section 1365(a) citizen suit from invalidating the EPA regulations implicated by this case, Section 1369(b)(2) did not necessarily preclude the court from interpreting those regulations differently than EPA had interpreted them. I J.A. 55-57. The government further argued, however, that the court was required to defer to the agency's interpretation so long as that interpretation was not "plainly erroneous or inconsistent with the regulation." I J.A. 58 (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)).

The court of appeals denied rehearing and issued a superseding panel opinion. Pet. App. 1-52. In a new section entitled "Subject Matter Jurisdiction," the court held that Section 1369(b) "does not bar a citizen suit

challenging EPA's Silvicultural Rule interpretation first adopted in its initial amicus brief in this case." Pet. App. 8-10. The court adhered to the remainder of its opinion.

## SUMMARY OF ARGUMENT

I. The courts below properly exercised jurisdiction over this action pursuant to the CWA's citizen-suit provision. Because the EPA regulations relevant to this case (the Silvicultural Rule and the Phase I industrial stormwater regulation) could have been challenged in a court of appeals under 33 U.S.C. 1369(b) at the time they were promulgated, they are not subject to judicial review in this citizen suit brought under 33 U.S.C. 1365(a). The court of appeals did not declare either of those rules invalid, however, but rather rejected the interpretations of those rules set forth in the government's amicus brief. Although the court should have deferred to EPA's reasonable construction of its own rules, it did not err in entertaining this citizen enforcement suit.

II. The court of appeals misinterpreted both of the EPA regulations at issue in this case. Properly construed, each of those rules independently dictates the conclusion that NPDES permits are not required for the discharges at issue.

A. EPA's construction of its own rule is "controlling" unless that construction is "plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). That principle applies even where, as here, the court is precluded from determining whether the regulation so construed is consistent with the governing statute. See *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 418-419 (1945).

B. The CWA requires NPDES permits for stormwater discharges "associated with industrial activity," 33

U.S.C. 1342(p)(2)(B), but the Act does not define that term. EPA has construed its Phase I industrial stormwater regulation not to require such permits for stormwater discharges from logging roads. That position reflects a reasonable construction of the regulation's text. The Phase I regulation refers to discharges from "[f]acilities classified as Standard Industrial Classification[] 24," which include logging establishments. 40 C.F.R. 122.26(b)(14)(ii). EPA has construed that reference, however, as encompassing only discharges from the four subcategories of silvicultural facilities it had already identified as point sources in the Silvicultural Rule, which do not include runoff from logging roads. Because the stormwater discharges at issue in this case are not covered by EPA's Phase I regulations, the judgment of the court of appeals should be reversed, without regard to whether those discharges are "point source" discharges under the Act and the Silvicultural Rule.

C. Because the Phase I regulation (properly construed) provides a sound basis for concluding that petitioners were not required to obtain NPDES permits, the Court need not determine whether the Silvicultural Rule also compels the same result. If the Court reaches the issue, however, it should sustain EPA's interpretation of the Silvicultural Rule, under which no permit is required for "natural runoff" from logging roads. The stormwater discharges at issue here do not implicate any of the four types of silvicultural facilities ("rock crushing, gravel washing, log sorting, [and] log storage facilities") that the rule specifically identifies as "[s]ilvicultural point source[s]." 40 C.F.R. 122.27(b)(1). And while the Silvicultural Rule does not state explicitly whether its reference to "natural runoff" includes systematically

channeled runoff, EPA's resolution of that ambiguity is entitled to judicial deference under *Auer*.

The court of appeals rejected EPA's reading on the ground that it would render the Silvicultural Rule inconsistent with the CWA's definition of "point source." *Seminole Rock*, however, precludes that sort of inquiry under the circumstances presented here because EPA's interpretation of its Rule is controlling. In any event, the CWA's definition of "point source," 33 U.S.C. 1362(14), affords EPA "room here for some exclusion by interpretation," particularly with respect to silvicultural sources. *NRDC* v. *Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

## ARGUMENT

The 1987 CWA amendments reflect Congress's determination that, although point-source stormwater discharges can significantly affect the quality of navigable waters, a blanket requirement of NPDES permits for all such discharges was an unwieldy regulatory tool. Congress accordingly enacted a more nuanced scheme that was specifically designed for stormwater. The essence of that scheme was to identify limited categories of stormwater discharges for which NPDES permits would still be required by statute, while giving EPA broad discretion to devise appropriate measures for addressing stormwater discharges outside the defined categories.

The court of appeals' decision in this case depends on the proposition that the discharges at issue here were "associated with industrial activity" within the meaning of an EPA regulation that implements the 1987 CWA amendment, specifically 33 U.S.C. 1342(p)(2)(B). The court did not hold that the statutory language compels that conclusion, but instead interpreted the terms of the EPA rule itself. The court reached that conclusion de-

spite the government's unequivocal explanation, in its amicus brief in the Ninth Circuit, that EPA holds a contrary view about the meaning of the regulation. If this Court rejects that aspect of the court of appeals' analysis, and holds that the pertinent discharges are not "associated with industrial activity" for purposes of Section 1342(p)(2)(B) and EPA's Phase I regulations, the case will be at an end. It will then be unnecessary for the Court to decide whether, under the Act and the Silvicultural Rule, EPA has discretion to determine which discharges of stormwater from logging roads are point-source discharges.

For two basic reasons, a determination that petitioners' discharges are not "associated with industrial activity" would be the soundest and most straightforward way of deciding this case. First, Section 1342(p) reflects Congress's more recent, and more specific, direction to EPA regarding control of stormwater discharges. The Silvicultural Rule, by contrast, was promulgated prior to the 1987 CWA amendments under a statutory regime that required NPDES permits for all point-source discharges of pollutants, including discharges of stormwater. That regime, which fueled multiple agency efforts (including the Silvicultural Rule) to accommodate the CWA's broad application in light of the practical difficulties of including all potentially covered sources, has effectively been superseded with respect to discharges composed entirely of stormwater. See pp. 3-7, *supra*.[6]

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[6] In implementing its responsibility to protect the Nation's interest in maintaining and improving the quality of its waters, EPA in its May 23, 2012, Federal Register notice stated that it is considering the possibility of regulating a subset of stormwater discharges from forest roads, through means other than NPDES permits, pursuant to its

Second, determining that NPDES permits are not required pursuant to the industrial stormwater regulation would obviate the need for the Court to resolve the difficult question, which arises only with respect to the Silvicultural Rule, of whether a court may reject EPA's interpretation of its rule on the ground that the interpretation would be inconsistent with the Act. Petitioners contend that the court of appeals exceeded the limits imposed by 33 U.S.C. 1369(b)(2) because its decision implicitly invalidated the pertinent EPA rules. With respect to EPA's regulatory definition of "discharge associated with industrial activity," that argument clearly lacks merit. Although the court of appeals erred in failing to defer to the agency's construction of that rule, the court's contrary interpretation cannot be viewed as anything other than an interpretation of the rule. With respect to the Silvicultural Rule, however, the line between interpretation and invalidation is less clear, since the court of appeals' stated reason for rejecting EPA's construction of that rule was that the rule, as EPA construed it, would be inconsistent with the CWA. By resolving this case on the basis of the Phase I stormwater regulation, the Court can avoid the issue of "statutory avoidance" raised by the interplay between Section 1369(b)(2) and various principles of regulatory interpretation.

## I. THE CWA CONFERS JURISDICTION OVER THIS CITIZEN SUIT

The CWA's citizen-suit provision authorizes private citizens to bring enforcement actions against any person "who is alleged to be in violation of (A) an effluent

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Section 402(p)(6) stormwater rulemaking authority. 77 Fed. Reg. at 30,479.

standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. 1365(a)(1). The violations that are redressable through a citizen suit include, *inter alia*, discharges of pollutants into waters of the United States without an NPDES permit. See 33 U.S.C. 1365(f) (defining the term "effluent standard or limitation under this chapter"). Section 1369(b), by contrast, provides for immediate review by a court of appeals of various EPA actions, including the promulgation of NPDES regulations. 33 U.S.C. 1369(b)(1); see pp. 9-10, *supra*.[7] A review proceeding under Section

[7] Section 1369(b)(1) authorizes direct court of appeals review of "the Administrator's action * * * (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316 or 1345 of [the Act], [or] (F) in issuing or denying any permit under section 1342 of [the Act]." 33 U.S.C. 1369(b)(1)(E) and (F). In *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), the Court construed that provision to authorize review of EPA's industry-wide regulations establishing uniform effluent limitations for particular categories of plants. See *id.* at 115, 136. The Court explained that a contrary result "would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [CWA Section 402] but would have no power of direct review of the basic regulations governing those individual actions." *Id.* at 136. Based on *Train*, courts of appeals have understood Section 1369(b)(1)(E) to authorize direct review of NPDES permitting regulations, including EPA's consolidated permitting regulations, which set forth "a complex set of procedures for issuing or denying NPDES permits." *NRDC* v. *EPA*, 673 F.2d 400, 402 (D.C. Cir.), cert. denied, 459 U.S. 879 (1982). This Court also has interpreted Section 1369(b)(1)(F) to encompass actions that are "functionally similar" to the issuance or denial of an NPDES permit. *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 196 (1980). Courts of appeals have since relied on that provision to review NPDES permitting regulations. See *National Cotton Council of Am.* v. *EPA*,

1369(b)(1) must be commenced within 120 days of the challenged action, unless the basis for the suit arises after that period. *Ibid.*

Section 1365(a) clearly confers jurisdiction over this citizen suit, in which respondent alleges CWA violations arising from petitioners' discharges into waters of the United States. See 33 U.S.C. 1365(a) ("The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce * * * an effluent standard or limitation."). Although petitioners purport to challenge the court of appeals' "jurisdiction," their challenge, properly conceived, does not go to that court's jurisdiction. Rather, the disputed issue here concerns the range of arguments the courts below could properly consider in determining whether petitioners were liable under the Act for discharges of pollutants without an NPDES permit.

Any EPA action that could have been challenged under Section 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). Because a citizen suit is a "civil * * * proceeding for enforcement" within the meaning of that provision, the court in such a suit may not disregard pertinent EPA regulations on the ground that they are inconsistent with the statute, since that would constitute the "judicial review" of EPA action that Section 1369(b)(2) forbids. Cf. *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 581 (2007) (explaining that a lower court's "implicit invalidation" of a pertinent EPA rule was "a form of judicial review implicating" an analogous limitation of review under the Clean Air Act). By contrast, courts in CWA citizen suits often must *in-*

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553 F.3d 927, 932-933 (6th Cir. 2009), cert. denied, 130 S. Ct. 1505 (2010); *NRDC* v. *EPA*, 966 F.2d 1292, 1296-1297 (9th Cir. 1992).

*terpret* applicable EPA regulations in order to determine whether the defendant has violated any "effluent standard or limitation."

Under that rubric, the court of appeals' interpretation of EPA's "associated with industrial activity" regulation raises no jurisdictional concern under Section 1369(b)(2). As we explain below (pp. 23-27, *infra*), the court's interpretation of that rule is *erroneous*, both because it is contrary to the most natural reading of the regulatory text, and because the court failed to give appropriate deference to EPA's interpretation of its own rule. Nothing in the court's analysis suggests, however, that the decision was anything other than an *interpretation* (as opposed to invalidation) of the "associated with industrial activity" rule.

The court of appeals' treatment of the Silvicultural Rule presents a closer question. The court adopted an interpretation of that rule that "does not reflect the intent of EPA," based on a determination that the court's own construction "would allow [the court] to construe the Rule to be consistent with the statute." Pet. App. 37. Petitioners contend that the court of appeals' ruling amounts to an implicit invalidation of the rule, which Section 1369(b)(2) bars. See 11-338 Pet. Br. 38-39; 11-347 Pet. Br. 52-54. This Court's decision in *Duke Energy* indicates, however, that Section 1369(b)(2) generally does not preclude the court in a CWA citizen suit from invoking what might be termed "statutory avoidance" principles in resolving a regulatory ambiguity.

The Court in *Duke Energy* distinguished, for purposes of an analogous Clean Air Act judicial-review provision, "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 determina-

tion that the regulation as written is invalid." 549 U.S. at 573. The present case falls into the former category. The Silvicultural Rule's reference to "natural runoff" associated with logging roads neither clearly encompasses nor clearly excludes the sort of channeled runoff that is at issue in this case. The court of appeals' construction therefore qualifies as a "purposeful but permissible reading of the" Silvicultural Rule, rather than a de facto invalidation. Compare *Duke Energy*, 549 U.S. at 581 (where court of appeals' interpretation was "doomed" by the "text of the [pertinent] regulations," court's decision constituted "an implicit invalidation of those regulations").

The question of the court of appeals' treatment of the Silvicultural Rule is further complicated by the fact that, in choosing an interpretation the court believed necessary to render the rule consistent with the statute, the court of appeals rejected EPA's own construction of that rule as set forth in the government's amicus brief. As we explain below, the court of appeals erred in rejecting EPA's construction of the Silvicultural Rule. That error, however, is properly viewed as a misapplication of general administrative-law principles rather than as a violation of Section 1369(b)(2). *Duke Energy* suggests that the court of appeals did not violate Section 1369(b)(2) by engaging in statutory avoidance, but *Seminole Rock* precluded the court from rejecting EPA's interpretation of the Silvicultural Rule on the ground that it would conflict with the Act. See pp. 21-22, 28-30, *infra*.

## II. THE COURT OF APPEALS ERRED IN FAILING TO DEFER TO EPA'S INTERPRETATION OF ITS REGULATIONS

Two independent rationales support the district court's conclusion that NPDES permits are not required

for discharges of systematically collected and channeled runoff from logging roads. First, under EPA's interpretation of its Phase I stormwater regulations, the discharges at issue here are not "associated with industrial activity." Second, under EPA's interpretation of its Silvicultural Rule, such discharges do not constitute "point source" discharges. The court of appeals identified no sound basis for rejecting the agency's definitive interpretations of its own rules.

### A. An Agency's Interpretation Of Its Regulation Is Controlling Unless It Conflicts With The Text Or Structure Of The Regulation

Where (as here) resolution of a citizen suit turns on the interpretation of ambiguous regulatory terms, a court must defer to the agency's interpretation of its own rule, as presented in an amicus brief, unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (quoting *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))); see, *e.g.*, *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2265 (2011) ("The FCC as *amicus curiae* has advanced a reasonable interpretation of its regulations, and we defer to its views."). The *Auer* inquiry focuses solely on the regulatory text and structure. If an agency's interpretation is not "plainly erroneous or inconsistent with the regulation," the agency's interpretation of its regulation becomes "controlling." *Auer*, 519 U.S. at 461; see, *e.g.*, *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 278 (2009) (finding that EPA's interpretation of its regulations was "not plainly erroneous or inconsistent with the regulations, and so we ac-

cept it as correct") (internal quotation marks and brackets omitted).

After a court defers to the agency's linguistically plausible construction of its own regulation, it typically may then consider any contention that the regulation, so construed, is inconsistent with the governing statute. See *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977) ("Since [the agency's] interpretation is not plainly inconsistent with the wording of the regulations, we accept the Government's reading of those regulations as correct. This, however, does not end our inquiry. For regulations, in order to be valid, must be consistent with the statute under which they are promulgated."). Under some judicial-review provisions, however, a court that is authorized to interpret an agency regulation is barred from passing on the regulation's validity. In that circumstance, the court must assess the propriety of the agency's interpretation based on the *Auer* standard alone, *i.e.*, by determining whether the agency's construction conflicts with the text and structure of the regulation. The court may not reject an agency interpretation that would otherwise be entitled to deference based on the court's view that a different construction is necessary to prevent a conflict with the governing statute.

In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), the seminal precursor to *Auer*, the Court applied that framework in interpreting regulations promulgated by the Office of Price Administration under the Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23. 325 U.S. at 411. The Court announced the standard, later reiterated in *Auer*, that an agency's interpretation is controlling "unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414. The

Court explained that, in construing the pertinent regulation, its "*only tools*, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator." *Ibid.* (emphasis added). After affording the administrative interpretation controlling weight under that standard, the Court did not address the statutory or constitutional validity of the regulation so construed. See *ibid.* (stating that the "only problem" before the Court was "to discover the meaning of" particular regulatory provisions, while noting that "[t]he legality of the result reached by this process * * * is quite a different matter"). Rather, the Court held that it lacked authority to decide that separate question because, under the applicable statutory regime, questions of regulatory validity were required to be presented in the first instance to the Emergency Court of Appeals. *Id.* at 418-419.

The same principle applies here. In order to adjudicate respondent's citizen suit against petitioners, the court of appeals was required "to discover the meaning," *Seminole Rock*, 325 U.S. at 414, of the pertinent EPA regulations. If EPA had not proffered an interpretation of those regulations that was entitled to *Auer* deference, the court would have been required to construe the rules de novo, and it might have adopted "a purposeful but permissible reading of the regulation adopted to bring it into harmony with the [court's] view of the statute." *Duke Energy*, 549 U.S. at 573. The court could not, however, permissibly invoke "statutory avoidance" principles as a ground for rejecting an agency interpretation of the regulation that satisfied the criteria for *Auer* deference.[8]

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[8] In its brief in opposition to the petitions for certiorari, respondent disavowed any argument that either the Silvicultural Rule or the

### B. The Court Of Appeals Erred In Not Deferring To EPA's View That Channeled Runoff From Logging Roads Does Not Give Rise To A Stormwater Discharge "Associated With Industrial Activity"

The 1987 CWA amendment established an exception, with respect to stormwater discharges, to the Act's general requirement that point-source discharges of pollutants to waters of the United States require NPDES permits. See 33 U.S.C. 1342(p). The Act continues to require NPDES permits for stormwater discharges in five enumerated categories, 33 U.S.C. 1342(p)(2), including those "associated with industrial activity," 33 U.S.C. 1342(p)(2)(B). Pursuant to Section 402(p)(6), EPA is authorized, but not required, to designate additional sources of stormwater for regulation, either through NPDES permits or through other regulatory mechanisms.

The Act does not define the term "associated with industrial activity," but the 1987 amendment required EPA to promulgate regulations relating to industrial and other Phase I stormwater discharges. 33 U.S.C. 1342(p)(4)(A). In 1990, EPA issued Phase I regulations that, *inter alia*, define "storm water discharge associated with industrial activity" to mean

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Phase I regulation violates the CWA, and reaffirmed that it is not seeking to invalidate either regulation in this litigation. Br. in Opp. 20-21. This case therefore does not present the question whether, under the CWA's judicial-review provisions, clarification of EPA's interpretation of its preexisting rule can provide a new opportunity for review of the rule itself. See 33 U.S.C. 1369(b)(1) (requiring application for review within 120 days of the regulation's promulgation, unless "such application is based solely on grounds which arose after such 120th day"); 33 U.S.C. 1369(b)(2) (precluding review in enforcement proceedings of EPA actions "with respect to which review could have been obtained" under Section 1369(b)(1)).

> 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. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from * * * immediate access roads * * * used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility.

40 C.F.R. 122.26(b)(14). To identify the categories of "facilities" engaged in "industrial activity," EPA's regulation further incorporates by reference Standard Industrial Classification (SIC) codes, including SIC code 24, of which "logging" is subcategory 2411. 40 C.F.R. 122.26(b)(14)(ii).

As explained above (pp. 20-22, *supra*), EPA's interpretation of its regulation defining "associated with industrial activity" is controlling unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461. Relying primarily on the regulation's reference to SIC code 2411, the court of appeals construed EPA's rule to treat the discharges at issue here as discharges "associated with industrial activity." Pet. App. 44-47. The government's amicus brief explained, however, that "EPA primarily referenced this SIC code to regulate traditional *industrial* sources such as sawmills." I J.A. 42. That understanding is consistent with EPA's explanation, at the time the rule was promulgated, that "[e]stablishments identified under SIC 24 (except 2434) are engaged in operating sawmills, planing mills and other mills engaged in producing lum-

ber and wood basic materials." 55 Fed. Reg. 47,990, 48,008 (Nov. 16, 1990).

The government's amicus brief further explained that "[b]y not excluding SIC code 2411 (the logging subcategory), EPA intended to reference only the four subcategories of silvicultural facilities it had already defined as point sources in" the Silvicultural Rule—*i.e.*, rock crushing, gravel washing, log sorting, and log storage. I J.A. 43.[9] Those facilities are more closely associated with traditional industrial activities than are logging roads, which are often used for recreational purposes rather than as "immediate access roads" to those facilities. I J.A. 44. EPA's interpretation is also consistent with the terms of SIC code 2411, which defines "logging" facilities as "*establishments* primarily engaged in cutting timber and in producing . . . primary forest or

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[9] That understanding is buttressed by the fact that EPA's definition of "storm water discharge associated with industrial activity" expressly exempts activities that are "excluded from the NPDES program under this part 122," 40 C.F.R. 122.26(b)(14), including under the Silvicultural Rule, 40 C.F.R. 122.27. See also 55 Fed. Reg. at 48,011 (preamble stating that EPA did not intend "to change the scope of 40 CFR 122.27 in this rulemaking," and that "'storm water discharge associated with industrial activity' does not include sources * * * which are excluded under 40 CFR 122.27"). In the preamble to the 1990 Phase I regulations, EPA stated its intent to examine the scope of the Silvicultural Rule as it related to stormwater discharges in the course of two studies required under CWA Section 402(p)(5). *Ibid.* Based on those studies, EPA promulgated the Phase II rule in 1999. That rule was challenged in *Environmental Defense Center* v. *EPA*, 344 F.3d 832, 860-863 (9th Cir. 2003), cert. denied, 541 U.S. 1085 (2004), and the court of appeals remanded to EPA the question whether stormwater discharges from forest roads should have been regulated pursuant to Section 402(p)(6). That remand would have been pointless if such runoff was already regulated under Phase I pursuant to Section 402(p)(2)(B).

wood raw materials . . . in the field." Pet. App. 45 (emphasis added). Thus, while the text of the regulation might not foreclose respondent's alternative reading of the term "associated with industrial activity," EPA's interpretation of its own rule is reasonable and therefore should have been afforded *Auer* deference. See *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991) ("While it is possible that the claimants' parsing of these impenetrable regulations would be consistent with accepted canons of construction, it is axiomatic that the Secretary's interpretation [of the regulations] need not be the best or most natural one by grammatical or other standards. Rather, the Secretary's view need be only reasonable to warrant deference.") (citations omitted).

With respect to the Silvicultural Rule, the court of appeals identified the need for consistency with the governing statute as its rationale for rejecting EPA's understanding of its own regulation. See Pet. App. 36-37. With respect to the regulatory definition of "discharge associated with industrial activity," by contrast, the court did not hold that the CWA compelled its expansive construction of the rule.[10] Any such contention would be

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[10] Although the State petitioners contend otherwise (11-338 Pet. Br. 40-42), this aspect of the court of appeals' opinion is best read as resting on the text of the industrial stormwater rule, not on any view that CWA Section 402(p) compelled EPA to treat forest-road discharges as "associated with industrial activity." See, *e.g.*, Pet. App. 46 ("The [Phase I regulation's] definition of a 'facility' engaging in industrial activity' is very broad."); *id.* at 47 (reasoning that because EPA considered logging activities to be "industrial in nature" by virtue of the *regulation's* reference to the logging SIC code, EPA could not exempt such activities from NPDES permits); see also 11-347 Pet. Br. 39, 43 (describing court of appeals' rejection of EPA's interpretation of industrial stormwater rule as "the product of a myopic focus on isolated snippets of regulatory language" and as "second-guessing

implausible. As noted above, the 1987 amendment did not define the term "associated with industrial activity," but rather directed EPA to promulgate regulations implementing that provision. See 33 U.S.C. 1342(p)(4)(A). That language gives EPA significant discretion to define both what will count as "industrial activity," and what stormwater discharges bear a sufficiently close nexus to such activity as to be "associated with" it.

Whatever the precise limits of that discretion, the statutory term "discharge associated with industrial activity" does not ineluctably cover channeled runoff from all logging roads. Thus, even if the desire to avoid a conflict with the governing statute could provide a sound basis for rejecting an agency interpretation that would otherwise be entitled to deference under *Seminole Rock* and *Auer* (but see pp. 20-22, *supra*), any such justification would be absent here. Under these circumstances, the Ninth Circuit's refusal to defer to EPA's interpretation of its own regulatory definition is contrary to basic administrative-law principles.[11]

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EPA's expert judgment concerning its own regulation"). That discussion stands in sharp contrast to the court of appeals' discussion of the Silvicultural Rule, in which it explicitly characterized EPA's interpretation as "inconsistent with [CWA] § 502(14)." Pet. App. 37.

[11] In response to the Ninth Circuit's decision, EPA issued a notice in the Federal Register indicating its intent "to propose revisions to its Phase I stormwater regulations (40 C.F.R. 122.26) to specify that stormwater discharges from logging roads are not included in the definition of 'storm water discharge associated with industrial activity.'" 77 Fed. Reg. at 30,474. EPA thus has expressed its intent to amend Section 122.26(b) to respond to the Ninth Circuit's contrary reading of the regulation by making explicit the interpretation advanced in the government's 2007 amicus brief. On September 4, 2012, EPA published a notice of proposed rulemaking to that effect. *Notice of Proposed Revisions to Stormwater Regulations to Clarify that an NPDES Permit is not Required for Stormwater Discharges from*

### C. The Court Of Appeals Erred In Not Deferring To The EPA's Interpretation Of The Silvicultural Rule That Runoff From Logging Roads Constitutes Nonpoint-Source Pollution

Properly construed, the Phase I regulation provides an adequate and independent basis to conclude that petitioners were not required to obtain an NPDES permit for the alleged discharges at issue here. Accordingly, the Court need not decide whether the Silvicultural Rule—promulgated under a regulatory framework predating the 1987 stormwater amendment—also excludes such discharges from the NPDES permitting scheme. If the Court reaches the question, however, it should reverse the court of appeals' conclusion that stormwater runoff from logging roads that is collected and channeled by a system of ditches and culverts requires a permit under the Silvicultural Rule.

The Silvicultural Rule specifically identifies four categories of silvicultural facilities ("rock crushing, gravel washing, log sorting, [and] log storage facilities") as "[s]ilvicultural point source[s]." 40 C.F.R. 122.27(b)(1). Discharges of pollutants from those enumerated industrial activities are different in kind from stormwater discharges associated with precipitation-driven runoff from logging roads. The Silvicultural Rule further provides that the term "[s]ilvicultural point source" does not include "harvesting operations * * * or road construction and maintenance from which there is natural

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*Logging Roads*, 77 Fed. Reg. __ (forthcoming), available at http://www.ofr.gov/OFRUpload/OFRData/2012-21432_PI.pdf. EPA's proposed regulatory approach, if and when finalized, effectively would render moot the court of appeals' conclusion that such discharges are subject to NPDES permitting requirements under the current regulatory scheme.

runoff." *Ibid.* Although the rule does not specifically confirm that the reference to "natural runoff" encompasses systematically channeled runoff, neither does it suggest that such runoff should be treated as a "point source" discharge.

The government unequivocally expressed in its amicus brief EPA's view that, under the Silvicultural Rule, channeled "natural runoff" from logging roads does not require a permit. That brief explained that "the term 'natural runoff' in the silvicultural rule categorically excludes [from the definition of silvicultural point source] all stormwater runoff from forest roads, even where the roads include channels, ditches, or culverts." I J.A. 39. EPA's interpretation of its Silvicultural Rule was not "plainly erroneous or inconsistent with the regulation"; indeed, it was the more linguistically plausible reading of the rule. The court of appeals therefore should have deferred under *Auer* to that interpretation.

The court of appeals did not disagree that EPA's reading was consistent with the terms of the Silvicultural Rule. Rather, it rejected EPA's reading on the ground that the agency interpretation would bring the rule into conflict with the CWA's definition of "point source." Pet. App. 36-37. That mode of analysis was erroneous. As discussed above (pp. 20-22, *supra*), if an agency has offered a definitive interpretation of its own regulation that is otherwise entitled to deference under *Seminole Rock* and *Auer*, a court may not adopt a different interpretation based on principles of "statutory avoidance." That principle applies even when the pertinent judicial-review scheme prevents the court from taking what would ordinarily be the logical next step of determining whether the regulation, as construed by the agency, is

consistent with the governing statute. See *Seminole Rock*, 325 U.S. at 414, 418-419.[12]

In any event, the CWA does not compel the court of appeals' conclusion that the discharges at issue required a permit. Just as a court must defer under *Seminole Rock* and *Auer* to an agency's reasonable construction of its own regulation, a court must defer to EPA's regulatory interpretation of an ambiguous CWA provision unless

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[12] The court of appeals' opinion, as well as the government's amicus brief at the rehearing stage, relied in part on when EPA first announced its official interpretation of the Silvicultural Rule as excluding systematically channeled runoff from logging roads from NPDES permit requirements. See Pet. App. 9-10; I J.A. 59-60 & n.5. The timing is not clear: although the government had previously contended that EPA's interpretation dated back to 1976, it argued on rehearing that EPA's interpretation was first articulated during this litigation. Compare I J.A. 33-34 with I J.A. 59-60 & n.5. That divergence arises from respondent's emphasis, as the litigation developed, on the ambiguous term "natural runoff," which was added to the Silvicultural Rule in 1980. 45 Fed. Reg. 33,290, 33,447 (May 19, 1980). The rule itself does not specify whether runoff that is systemically conveyed by channels, ditches, or culverts is "natural" (thereby constituting nonpoint-source pollution), and the EPA's pre-2007 written statements did not definitively resolve that specific issue.

On further reflection, however, the timing question is irrelevant to the resolution of this case. Even assuming that EPA's interpretation was first announced during this litigation, the court of appeals could not properly invoke principles of "statutory avoidance" to reject an agency interpretation of the Silvicultural Rule because that would be a misapplication of *Auer* principles. Quite apart from the restrictions imposed by Section 1369(b)(2) on "judicial review" of EPA regulations, the background rule of administrative law set forth in *Seminole Rock* foreclosed the court's approach. See pp. 20-23, *supra*. That is, a court can never reject an agency's interpretation of a regulation that is consistent with the regulation's text and structure, and then substitute the court's own interpretation of the regulation that it views as more consistent with the statute.

the statute dictates a different interpretation. See *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (citing *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 843-844 (1984)). The CWA's definition of "point source," 33 U.S.C. 1362(14), gives EPA meaningful discretion in distinguishing between point and non-point sources. "[T]he concept of a 'discrete conveyance'" in the statutory definition, for example, "suggests that there is room here for some exclusion by interpretation." *NRDC* v. *Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977); see *id.* at 1382 ("[T]he power to define point and nonpoint sources is vested in EPA and should be reviewed by the court only after opportunity for full agency review and examination.") (citation omitted); see also *League of Wilderness Defenders* v. *Forsgren*, 309 F.3d 1181, 1190 (9th Cir. 2002); *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 167 (D.C. Cir. 1982). That is particularly true with respect to silvicultural sources of pollution. See *Costle*, 568 F.2d at 1377 (noting "question, to what extent point sources are involved in * * * silvicultural * * * runoff"); *NRDC* v. *Train*, 396 F. Supp. 1393, 1401 (D.D.C. 1975) ("Congress intended for the agency to determine, at least in the agricultural and silvicultural areas, which activities constitute point and nonpoint sources."), aff'd, 568 F.2d 1369 (D.C. Cir. 1977).[13] Thus, read in light of the Act as a whole, the CWA's definition of "point source" does not foreclose EPA from determining that

[13] The CWA elsewhere refers to silvicultural activities as generating pollution from nonpoint sources. See 33 U.S.C. 1288(b)(2)(F) (referring to "agriculturally and silviculturally related nonpoint sources of pollution"); 33 U.S.C. 1314(f)(A) (addressing identification and control of "nonpoint sources of pollution" from "agricultural and silvicultural activities, including runoff from fields and crop and forest lands").

channeled stormwater runoff from logging roads should be treated as nonpoint-source discharges.

It should be acknowledged, however, that EPA's latitude to distinguish between point-source and nonpoint-source stormwater discharges served a significantly greater practical need when the Silvicultural Rule was adopted in 1976, and amended to its present form in 1980, than it does under the current statutory scheme. Until 1987, designating particular categories of stormwater discharges as nonpoint-source discharges was EPA's only statutory mechanism for insulating them from NPDES permitting requirements. Congress recognized the shortcomings of that rigid approach, and it enacted the 1987 amendment to provide EPA a greater range of regulatory options to address the distinct issues that stormwater discharges pose. That amendment gives EPA substantial discretion to designate which stormwater discharges, other than the five categories listed in Section 402(p)(2), are subject to the Act, and to determine whether to address those discharges through means other than permits. Because EPA's regulatory definition of "discharge associated with industrial activity" is part of the agency's effort to implement that current, more nuanced statutory scheme, it represents the most appropriate ground on which to decide this case. See pp. 13-15, *supra*.

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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