Nos. 11-338 and 11-347

IN THE

Supreme Court of the United States

DOUG DECKER, *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

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

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Clean Water Act defines "point source" to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch [or] channel … from which pollutants are or may be discharged." 33 U.SC. § 1362(14). The U.S. Environmental Protection Agency's stormwater regulation requires National Pollutant Discharge Elimination System permits for point-source stormwater discharges associated with the logging industry. 40 C.F.R. § 122.26(b)(14)(ii). And the agency's "silvicultural rule," 40 C.F.R. § 122.27(b)(1), does not, on its face, exclude any point sources of pollution associated with logging from the Clean Water Act's permit requirement. With these provisions in mind, respondent Northwest Environmental Defense Center brought a Clean Water Act citizen suit alleging that the petitioners were in violation of the Act by discharging polluted stormwater from pipes, ditches and channels along active logging roads without the required permits. The question presented is:

Did the court of appeals err by reversing the district court's Rule 12(b)(6) dismissal of respondent's complaint?

RULE 29.6 STATEMENT

Respondent Northwest Environmental Defense Center has no parent corporations and no publicly held company has any ownership interest in it.

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INTRODUCTION

In this Clean Water Act citizen suit, the court of appeals correctly held that a complaint filed by respondent Northwest Environmental Defense Center (NEDC) stated a claim for relief by alleging that the petitioners must comply with a stormwater regulation of the U.S. Environmental Protection Agency (EPA), 40 C.F.R. § 122.26, which requires National Pollutant Discharge Elimination System (NPDES) permits for point-source stormwater discharges associated with the logging industry. The court further held that another regulation, 40 C.F.R. § 122.27, does not exclude point-source discharges along active logging roads from EPA's stormwater regulation or otherwise redefine those discharges as nonpoint-source pollution that is exempt from the NPDES permit requirement.

The court of appeals' decision does not merit review because it does not conflict with decisions of any other court of appeals. No other decision has addressed whether 40 C.F.R. § 122.26 requires NPDES permits for point-source stormwater discharges along logging roads. Nor does the lower court's interpretation of the NPDES regulations, or the Clean Water Act (CWA or Act) provisions that they implement, conflict in principle with decisions of this Court or another court of appeals. The court's resolution of these narrow regulatory issues, in a non-final ruling that sustains a complaint under Rule 12(b)(6) and that does not determine what relief, if any, respondent may ultimately receive, does not merit review by this Court.

The petitioners' attempts to identify some aspect of the court of appeals' decision that requires further review are without merit.[1] Pursuing an argument that the United States (as amicus) initially advanced *but then conceded was incorrect*, the petitioners claim that the court effectively invalidated EPA rules during a civil enforcement proceeding in violation of section 509(b)(2) of the Act, 33 U.S.C. § 1369(b)(2). But NEDC did not challenge, and the court of appeals did not strike down, any rule. Nor did the court effectively invalidate a rule by construing it in a way that conflicts with its text. Rather, in rejecting the petitioners' claimed regulatory defenses, the court relied on "a purposeful but permissible reading of the regulation adopted to bring it into harmony with the Court of Appeals's view of the statute." *Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007). The court of appeals did not grant NEDC relief that is barred by section 509(b)(2).

Nor did the court err by declining to defer to the claim that the rules do not require permits for stormwater discharges from pipes, ditches and channels along logging roads. The petitioners do not dispute that the roads are used for hauling timber or that they discharge stormwater from pipes, ditches and channels. They nonetheless seek an interpretation of the rules that: ignores EPA's decision to include "logging" on the list of industries subject to the stormwater rule; treats pipes, ditches and channels—

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[1] The petitioners in No. 11-338 are referred to as "the State" and the petitioners in No. 11-347 are referred to as "Georgia-Pacific" (collectively, "the petitioners").

statutory "point sources"—as "nonpoint sources" that are excluded from the NPDES permit program; and deems stormwater discharged from elaborately engineered stormwater collection systems to be "natural runoff." The court of appeals correctly refused to accept that interpretation.

Nearly forty years ago, Congress created the NPDES permit program *precisely* because state water pollution control programs were not adequately protecting the Nation's waters. *EPA v. State Water Res. Control Bd.,* 426 U.S. 200, 202-205 (1976); 117 Cong. Rec. 38,798-99 (1971). The petitioners ignore this fundamental purpose of the NPDES permit program in asking this Court to grant review so that Oregon may continue treating stormwater discharges from pipes, ditches and channels as nonpoint-source pollution. Where, as here, active logging roads discharge pollution from pipes, ditches and channels, Congress prohibited those discharges unless they are in compliance with an NPDES permit. The court of appeals' decision implements Congressional intent; it does not thwart it.

STATEMENT OF THE CASE

I. This CWA citizen enforcement action.

To enhance enforcement of the CWA, section 505(a)(1) of the Act, 33 U.S.C. § 1365(a)(1), authorizes adversely affected citizens to bring suit against any person "who is alleged to be in violation" of an "effluent standard or limitation" or a related federal or state order. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,* 528 U.S. 167, 174 (2000). "The purpose of

the citizen suit provision of the CWA, 33 U.S.C. § 1365, is to permit citizens to enforce the Clean Water Act when the responsible agencies fail or refuse to do so." *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007).

Seeking to enforce EPA regulations, NEDC brought this citizen suit against the petitioners because they failed to apply for and obtain NPDES permits for stormwater discharges from pipes, ditches and channels along logging roads used to haul timber out of the Tillamook State Forest in northwest Oregon. ER 07 (NEDC's First Amended Complaint) at 2-4.[2] The State of Oregon owns the Tillamook State Forest and manages it as a working forest to produce revenue from the harvest and sale of timber. *Id.* at 3, 6-7, 18-20. All of the defendants participate in the logging operations that take place. *Id.* The members of the Oregon Board of Forestry set policy for the Oregon Department of Forestry, the agency that manages logging activities and logging roads in the Tillamook State Forest. *Id.* at 6-7. Mr. Decker, the Oregon State Forester, supervises the Department and administers its timber sale and state forests programs. *Id.* The four timber companies purchase timber from the state; harvest timber in the Tillamook State Forest; haul timber on logging roads that are specifically designated in timber sale contracts as timber hauling routes; and maintain those roads to facilitate the logging activities that take place. *Id.* at 7-8, 19-20.

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[2] ER refers to the Appellant's Excerpts of Record on file with the court of appeals. They are cited as "ER [document number] at [excerpts of record page number]."

The logging roads at issue collect, channel and discharge polluted stormwater to rivers and streams. *Id.* at 2, 17-18, 31-35. The roads were intentionally designed and built to move stormwater that falls on them into roadside ditches, which then convey stormwater through pipes, ditches and channels before discharging it directly into surface waters. *Id.* Water quality sampling confirmed that the stormwater is heavily polluted with sediment generated by heavy logging trucks that grind up gravel and other surface materials placed on the roads to facilitate industrial activity—logging and timber hauling. *Id.* at 3-4, 33, 35. NEDC alleged that these "discharges of stormwater associated with industrial activity" require NPDES permits. *Id.* at 3, 20-24, 31; *and see* 40 C.F.R. § 122.26(a)(1)(ii) and (e)(1)(i).

II. The NPDES permit program controls "discharges of pollutants."

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to eliminate discharges of pollutants to navigable waters by 1985. 33 U.S.C. § 1251(a). The Act's centerpieces are sections 301(a) and 402(a), which prohibit the "discharge of any pollutant" unless it is authorized by an NPDES permit. 33 U.S.C. §§ 1311(a), 1342(a); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004).

The Act expansively defines "discharge of a pollutant" in part as "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C.

§ 1362(12)(A) (emphases added). The Act also broadly 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) (emphases added); *Miccosukee*, 541 U.S. at 105.

These statutory prohibitions apply to discharges associated with logging. Congress expressly exempted some stormwater discharges associated with mining and oil and gas exploration. 33 U.S.C. § 1342(l). Through statutory definitions, Congress also excluded certain "point sources," including "agricultural stormwater discharges," and certain "pollutants." 33 U.S.C. § 1362(6) & (14). But Congress did not adopt any NPDES permit exemption for the logging industry. *See Natural Res. Def. Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977) (striking down an NPDES permit exemption for point-source stormwater discharges associated with silvicultural activities).

Sections 301(a) and 402(a) thus codify the central principle of the Act: pollutant discharges from "point sources" require NPDES permits, while pollution from something other than a point source—generally referred to as a nonpoint source—does not. Notably, a

single activity can generate both point and nonpoint source pollution. *Miccosukee*, 541 U.S. at 106; *U.S. v. Earth Sciences*, 599 F.2d 368, 372-73 (10th Cir. 1979).

III. EPA's Phase I stormwater regulation requires NPDES permits for stormwater discharges associated with the logging industry.

Since its adoption in 1972, the CWA has also prohibited point-source discharges of polluted stormwater that are not authorized by an NPDES permit. EPA regulations have long defined the term "discharge of a pollutant" to include "additions of pollutants into waters of the United States from: *surface runoff which is collected or channelled by man*." 40 C.F.R. § 122.2 (emphasis added).

Dissatisfied with the pace of stormwater permitting, however, Congress enacted section 402(p) of the Act in 1987 to better control discharges of polluted stormwater. 33 U.S.C. § 1342(p). For stormwater discharges "associated with industrial activity," sections 402(p)(2)(B) & (4)(A) required EPA to issue stormwater regulations by 1989 and required EPA and the states to process NPDES permit applications by 1991. Section 402(p)(5)-(6) then required EPA to study other stormwater discharges and decide whether and how to regulate them. EPA implemented section 402(p) by issuing stormwater regulations in 1990 (Phase I), 55 Fed. Reg. 47990 (Nov. 16, 1990), and 1999 (Phase II), 64 Fed. Reg. 68722 (Dec. 8, 1999). Those regulations are codified at 40 C.F.R. § 122.26.

Like the definition of "discharge of a pollutant" in 40 C.F.R. § 122.2, EPA's Phase I regulation treats stormwater that is collected and channeled by man as a point-source discharge requiring an NPDES permit. The regulations define the term "storm water" (standing alone) to mean "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). But the rules require a permit for a "[s]torm water *discharge* associated with industrial activity," which means in part "*the discharge from any conveyance that is used for collecting and conveying storm water*…." 40 C.F.R. § 122.26(b)(14) (emphases added). This language clarifies that the Phase I regulation requires permits only for point-source discharges of industrial stormwater. *See also* 55 Fed. Reg. at 47996 ("this rulemaking only covers storm water discharges from point sources"). Uncollected stormwater is thus nonpoint-source runoff, while stormwater that is collected and conveyed before being added to waters of the United States is a point-source discharge that requires an NPDES permit.

In the Phase I rule, EPA identified the industrial activities required to obtain NPDES permits for their point-source stormwater discharges by naming industries and listing Standard Industrial Classification (SIC) codes. *See* 40 C.F.R. § 122.26(b)(14)(i) – (xi). Before listing the industries and SIC codes, the regulation states: "The following categories of facilities are considered to be engaging in 'industrial activity' for purposes of paragraph (b)(14)…." *See id.* § 122.26(b)(14) and 55 Fed. Reg. at 48011 ("EPA intends that the list of applicable SICs will define and

identify what industrial facilities are required to apply.")

The Phase I rule includes "Logging" on the list of regulated industries. In 40 C.F.R. § 122.26(b)(14)(ii), EPA required permits for facilities classified as SIC 24, which is entitled "Lumber and Wood Products, Except Furniture." ER 47 at 93. One of the subcategories of SIC 24 is SIC 2411, "Logging," which includes "[e]stablishments primarily engaged in cutting timber and in producing … primary forest or wood raw materials … in the field." *Id*.

The rule also requires NPDES permits for many other industrial activities that do not occur at traditional industrial plants. *See* 40 C.F.R. § 122.26(b)(14)(iii) (inactive mines), (v) (landfills and open dumps), (x) (construction). EPA clearly regulated discharges from "manufacturing, processing or raw materials storage areas at an industrial plant," *id.* § 122.26(b)(14), but EPA also stated that it was "supplementing" that language "with a description of various types of areas that are directly related to an industrial process." 55 Fed. Reg. at 48007.

In addition to listing the industries subject to the rule, the Phase I regulation explains which stormwater discharges are "associated with" the regulated industries:

> For the categories of industries identified in this section, the term [stormwater discharge associated with industrial activity] *includes, but is not limited to, storm water discharges from* industrial plant yards; *immediate access roads and*

> *rail lines used or traveled by carriers of raw materials*, manufactured products, waste material, or by-products used or created by the facility; [and] *material handling sites* ….

40 C.F.R. § 122.26(b)(14) (emphasis added). EPA's rules define "site" to include "the land or water area where any 'facility or activity' is physically located or conducted…," 40 C.F.R. § 122.2, and define "material handling activities" to include the "storage, loading and unloading, transportation, or conveyance of any raw material," 40 C.F.R. § 122.26(b)(14). "Material handling sites" thus refers to locations used for transporting or conveying any raw material.

IV. The silvicultural rule.

In addition to regulating the logging industry, the Phase I regulation incorporates by reference the general NPDES permit regulations. *Id.* ("The term [storm water discharge associated with industrial activity] does not include discharges from facilities or activities excluded from the NPDES program under this part 122."). The Part 122 regulations include 40 C.F.R. § 122.27, which was promulgated in 1980 and addresses silvicultural activities. 45 Fed. Reg. 33290, 33446-33447 (May 19, 1980). The subsection of the rule at issue in this case states:

> 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. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 C.F.R. 209.120 and part 233).

40 C.F.R. § 122.27(b)(1) (the silvicultural rule).

As its text demonstrates, the silvicultural rule provides a definition of the term "silvicultural point source"; clarifies that *nonpoint*-source activities that generate "natural runoff" are excluded from that term; and notes that some activities that generate nonpoint-source pollution may also generate point-source pollution that requires a CWA permit.

When EPA promulgated the current version of the rule in 1980, one could not have known that it might be construed to exclude point-source discharges from the NPDES program. The text of the prior, 1979 version of the rule only addressed nonpoint source silvicultural activities in a comment and did not use the phrase "natural runoff." *See* 44 Fed. Reg. 32854, 32914-15 (June 7, 1979). The text of the 1980 rule, however, included new regulatory language stating that the term "silvicultural point source" did not include "nonpoint source silvicultural activities" from which there is "natural runoff." *See* 45 Fed. Reg. at

33446-33447. Moreover, the 1980 rule did not explain the meaning of "natural runoff" either in the rule itself or in its preamble.

V. The proceedings below.

After NEDC filed suit, the petitioners moved to dismiss the case under Rule 12(b)(6), contending that NEDC had failed to state a claim upon which relief could be granted. State Pet. App. 56. The petitioners argued that the Phase I rule incorporated the silvicultural rule by reference, and that the silvicultural rule redefined their pipes, ditches and channels as nonpoint sources that do not require NPDES permits. *Id.* at 65-67. According to the petitioners, the second sentence of the silvicultural rule—which addresses natural runoff from nonpoint source silvicultural activities—categorically defines all pollution from the listed activities as nonpoint-source pollution. *Id.* at 66. The United States, which did not exercise its right to intervene, *see* 33 U.S.C. § 1365(c)(2), submitted an amicus brief in support of the petitioners. The district court dismissed NEDC's complaint, finding that it had jurisdiction over the case but that the silvicultural rule redefined "the road/ditch/culvert system" as a nonpoint source of pollution. State Pet. App. 62, 70, 72, 76.

On appeal, the court of appeals focused on the merits because all the petitioners acknowledged that the court had jurisdiction. *See* State Appellee's Br. at 1; Industry Appellee's Br. at 1. The court of appeals concluded that stormwater that is collected by and discharged from a system of ditches, culverts, and channels along logging roads is a point-source dis-

charge requiring an NPDES permit. State Pet. App. 52. The court therefore reversed the judgment of the district court and remanded the case for further proceedings. *Id.*

Specifically, after determining that the silvicultural rule was ambiguous, the court declined to construe the rule as an NPDES permit exemption for discharges from pipes, ditches and channels because, as the court stated, "[i]f the Rule is read in this fashion, it is inconsistent with § 502(14) [33 U.S.C. § 1362(14), the statutory definition of "point source"] and is, to that extent, invalid." State Pet. App. 36-37. Instead, and consistent with the statute and the silvicultural rule's own language, the court construed the rule as exempting only "natural runoff" from nonpoint sources. *Id.* at 37. The court concluded that "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.*

The court then considered the 1987 amendments to the CWA and EPA's Phase I regulation. The court recognized that by incorporating the silvicultural rule into the Phase I rule EPA intended "to exempt from the definition of 'discharges associated with industrial activity' any activity that is *defined as a nonpoint source* in the Silvicultural Rule." *Id.* at 43 (emphasis added). However, for two reasons, the court refused to import into the Phase I rule a construction of the silvicultural rule that exempted *point-source* discharges.

First, because the Act requires NPDES permits for "stormwater discharges associated with industrial ac-

tivity," and because EPA clearly designated "logging" as an industrial activity, that construction would bring the regulation into conflict with the statute by exempting some "stormwater discharges associated with industrial activity" from the NPDES permit requirement. *Id.* at 44 (citing 33 U.S.C. § 1342(p)(2)(B) and (4)(A) and *Natural Res. Def. Council v. EPA*, 966 F.2d 1292 (9th Cir. 1992)) and 47-48. Second, it followed from the court's construction of the silvicultural rule that the "reference to the Silvicultural Rule in 40 C.F.R. § 122.26(b)(14) *does not … exempt [point-source] discharges from EPA's Phase I regulations*…." *Id.* at 47-48 (emphasis added). The court therefore held that neither the silvicultural rule nor the 1987 amendments to the CWA exempt from the NPDES permit requirement any stormwater that is collected and channeled in ditches, channels and conduits along logging roads before being discharged into rivers and streams. *Id.*

The petitioners sought rehearing and rehearing *en banc* on non-jurisdictional grounds. The court of appeals, at the request of a judge not on the original panel, directed the parties to submit supplemental briefs addressing the United States' contention, as amicus curiae, that NEDC's appeal was a challenge to the silvicultural rule that was barred by CWA section 509(b)(2), which prohibits review of certain EPA orders during enforcement actions. *Id.* at 8. In their reply in support of the petitions for rehearing, and for the first time since NEDC filed suit in 2006, the petitioners then argued that section 509(b) barred the court from hearing the case. The United States, however, submitted a second amicus brief conceding that

section 509(b) did not bar the court from construing the regulations as the panel had done. *Id.* at 8.

The panel voted unanimously to deny rehearing, and not a single judge requested a vote on whether to hear the case *en banc*. *Id.* at 4. Accordingly, the court issued a revised opinion that held that section 509(b)(2) did not bar NEDC from contesting the regulatory interpretations offered by the United States in its amicus brief and that reiterated the court's holding that EPA's rules require NPDES permits for stormwater discharges from pipes, ditches and channels along logging roads used for hauling timber.

REASONS FOR DENYING THE WRIT

I. The court of appeals' decision does not conflict with decisions of other circuits or of this Court.

A. No other court has addressed whether the Phase I regulation requires NPDES permits for point-source discharges along logging roads.

1. Georgia-Pacific incorrectly claims that the court of appeals' construction of the Phase I and silvicultural rules conflicts with decisions of other courts of appeals. GP at 25-28. Yet Georgia-Pacific has not identified *any* case holding that the Phase I regulation exempts industrial logging activities from the NPDES permit requirement. Nor can they: the decision below is the first appellate opinion to address whether 40 C.F.R. § 122.26(b)(14) requires NPDES permits for stormwater discharges from pipes and ditches along

active logging roads. No conflict could possibly result from its holding.

Nor have the courts issued conflicting interpretations of the silvicultural rule. *See League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) (holding that 40 C.F.R. § 122.27 is not an NPDES exemption for point-source pesticide discharges associated with forestlands); *North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates*, 278 F. Supp. 2d 654 (E.D.N.C. 2003) (holding that 40 C.F.R. § 122.27 is not an NPDES permit exemption for stormwater drainage ditches associated with forestlands); *Envtl. Prot. Info. Ctr. v. Pacific Lumber Co.*, 2003 WL 25506817 (N.D. Cal.) (holding that 40 C.F.R. § 122.27 does not exempt stormwater drainage ditches associated with forestlands from the NPDES permit requirement); *and see also Driscoll v. Adams*, 181 F.3d 1285 (11th Cir. 1999) (holding that discharges of collected and channeled stormwater associated with timber harvest were subject to NPDES permit requirements). There is no final decision that considers the silvicultural rule and holds that it exempts point-source discharges associated with timber hauling from the NPDES permit requirement.

2. Georgia-Pacific's reliance on *Newton County Wildlife Association v. Rogers*, 141 F.3d 803 (8th Cir. 1998), is misplaced because that case did not address the regulation of logging roads under the Phase I rule. *Newton County* considered whether the Forest Service's failure to obtain NPDES permits for logging and road construction activities rendered its approval of timber sales unlawful under the Administrative Procedure Act, 5 U.S.C. § 706(2). The court found no

violation because EPA regulations require *operators* to obtain the permits and because the plaintiff cited no authority requiring the Forest Service to obtain permits "before contracting to allow others to harvest timber and build roads." *Newton County*, 141 F.3d at 810 (citing 40 C.F.R. § 122.21(b)). The court then added a single sentence stating that EPA regulations do not require NPDES permits for "logging and road building activities." *Id.* (citing, *inter alia*, the silvicultural rule).

Newton County's passing mention of the silvicultural rule does not justify review of the court of appeals' unanimous holding in this case. First, the court's statement about NPDES permits for "logging and road building" was dicta unnecessary to its holding that the Forest Service did not violate the APA by approving a timber sale without obtaining an NPDES permit. Second, the Eighth Circuit's passing comment did not cite, much less consider, the Phase I regulation, nor did it analyze the terms or scope of the silvicultural rule. Indeed, *Newton County* did not in any way address the issue here, which is not whether "logging and road building activities" by themselves require NPDES permits, but whether *discharges from point sources*—that is, pipes, ditches and channels—along timber hauling routes require NPDES permits. As to whether the silvicultural rule excludes point sources, every court that has examined the rule has determined that it does not. There is no conflict between the unanimous court of appeals' decision and *Newton County*.

3. The court of appeals' decision also does not conflict with the district court's decision in *Conserva-*

tion Law Foundation v. Hannaford Bros. Co., 327 F. Supp. 2d 325 (D. Vt. 2004), which the Second Circuit affirmed in an unpublished order, 139 F. App'x 3381 (2005). In *Conservation Law Foundation*, 327 F. Supp. 2d at 330-32, the district court held that stormwater discharges only require NPDES permits if they are from activities listed in EPA's stormwater rules. Georgia-Pacific now claims that the decision below conflicts with *Conservation Law Foundation* by requiring NPDES permits for stormwater discharges not listed in EPA's stormwater rules. GP at 26-27.

The fatal flaw in Georgia-Pacific's argument is that the court of appeals *did not rule* that NPDES permits are required for stormwater discharges that are not listed in EPA's rules. Rather, it held that by listing logging in the Phase I rule EPA required permits for stormwater discharges associated with that industry. State Pet. App. 42-48. Even if a conflict with a single district court opinion would merit review (*but see* S. Ct. R. 10), there is no conflict: the two cases have different outcomes because logging is listed in the stormwater rule and the parking lot at issue in *Conservation Law Foundation* was not. But the decisions are otherwise consistent.

4. The court of appeals' decision also does not conflict with the other cases cited by Georgia-Pacific. GP at 28. It does not conflict with the Ninth Circuit's own decision in *Environmental Defense Center v. EPA*, 344 F.3d 832, 860-63 (9th Cir. 2003), because that decision did not address the Phase I rule or hold that logging roads are subject to the Phase II rule. Rather, in *Environmental Defense Center* the court remanded the question *whether* logging roads should be covered

by the Phase II rule because EPA had not adequately addressed that issue in responding to comments. There is no intra-circuit conflict with *Environmental Defense Center*, as the court of appeals explained. State Pet. App. 48.

Nor does the court of appeals' decision conflict with *Fishermen Against the Destruction of the Environment v. Closter Farms*, 300 F.3d 1294 (11th Cir. 2002) (holding that a sugar-cane farm was entitled to a statutory exemption for agricultural stormwater discharges) or *Association to Protect Hammersley, Eld, & Totten Inlets v. Taylor Resources*, 299 F.3d 1007 (9th Cir. 2002) (deferring to EPA's determination that mussel-harvesting rafts are not point sources). Neither decision creates an inter- or intra-circuit conflict because neither addresses logging, logging roads, the silvicultural rule, or the Phase I stormwater regulation.

B. There is no conflict with cases decided under section 509(b) of the Act because NEDC did not challenge, and the court of appeals did not invalidate, any action of the EPA administrator.

The petitioners contend that the court of appeals held, in conflict with decisions from other circuits, that it had jurisdiction in a citizen suit to invalidate an EPA rule. The petitioners rely on decisions holding that section 509(b) of the Act, 33 U.S.C. § 1369(b), provides the sole opportunity for judicial review of certain "Actions of the Administrator," including, the petitioners contend, judicial review of NPDES permit regulations. State at 19-24; GP at 29-30. Although pe-

titioners contend that this issue is jurisdictional, their argument is not really that the district court lacked jurisdiction over respondent's citizen suit, but rather that section 509(b) limits the construction that a court may place upon an EPA regulation in a suit over which it *has* jurisdiction. The petitioners waived their section 509(b) arguments by failing to raise them until their joint reply brief in support of the petitions for rehearing. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984). Moreover, as EPA essentially conceded when it abandoned its section 509(b) argument below, the petitioners' arguments are without merit.

The CWA limits citizen suits in two important ways. First, district courts only have jurisdiction if the plaintiff provides notice of the alleged violations to EPA, the state in which the alleged violations are occurring, and the alleged violators, and if neither EPA nor the state files an enforcement action before the citizen files suit. 33 U.S.C. § 1365(b); *Laidlaw,* 528 U.S. at 174-75. Second, the CWA limits the *relief* available to citizen plaintiffs: section 509(b)(2) prohibits courts in civil enforcement actions from providing judicial review of any "Actions of the Administrator" that could have been reviewed under section 509(b)(1), which authorizes direct review in the courts of appeals of certain EPA actions. 33 U.S.C. § 1369(b).

1. The decision below does not conflict with decisions applying section 509(b). The bar on judicial review in section 509(b)(2) is inapplicable to this case because NEDC did not challenge any "Action of the Administrator." ER 07 at 2, 24-25. After complying with the Act's jurisdictional requirements, *see id.* at 2-5, 26-71, NEDC filed suit contending that EPA's regu-

lations *as written* require the petitioners to obtain NPDES permits. NEDC has *never* alleged in this litigation that the Phase I regulation or the silvicultural rule violates the CWA or is otherwise invalid. *See* ER 07 at 24-25 (prayer for relief). NEDC simply sought enforcement of the Phase I regulation.

2. Consistent with NEDC's complaint, the court of appeals did not invalidate any rule. Rather, the court *interpreted* the rules when it held that they require NPDES permits for stormwater discharges from pipes, ditches and channels along logging roads used for hauling timber. Based on those holdings the court reversed the judgment of the district court and remanded the case for further proceedings, but it did not vacate any rule. State Pet. App. 52.

3. The court of appeals was well within its authority to interpret the NPDES permit regulations as it did. In applying what the State calls the "near-identical" provision of the Clean Air Act, 42 U.S.C. § 7607(b), (State at 20), this Court recently recognized that federal courts can construe Clean Air Act regulations during civil enforcement proceedings, provided they do not determine that a regulation as written is invalid. *Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007). In *Duke Energy*, this Court vacated a judgment because the lower court "effectively invalidated" a regulation by giving it a reading "inconsistent with its terms" (*id.* at 566) in derogation of section 7607(b), which, like section 509(b), "limit[s] challenges to the validity of a regulation during enforcement proceedings" when such review could have been obtained in a court of appeals. *Id.* at 581 (citing 42 U.S.C. § 7607(b)). Because this Court viewed a

construction of the regulation that contradicted its text as "an implicit invalidation" of that rule, this Court remanded the matter so the lower courts could consider the "applicability or effect" of section 7607(b). *Id.* On remand, the district court determined it could interpret and apply the regulations at issue in resolving EPA's civil enforcement action. *U.S. v. Duke Energy Corp.*, 2010 WL 3023517, *6 (M.D.N.C.).

Duke Energy is pertinent here for two reasons. First, this Court recognized a distinction between interpreting a regulation to "bring it into harmony" with a statute, which is permissible, and determining that the regulation as written is invalid, which runs afoul of the prohibition on judicial review in enforcement proceedings. As this Court put it, the preclusion of review does not bar "a purposeful but permissible reading of the regulation adopted to bring it into harmony with the Court of Appeals's view of the statute…." *Duke Energy*, 549 U.S. at 573. Second, this Court looked to the plain language of the rule to determine whether the court of appeals' interpretation "effectively invalidated" the regulation. *Id*. at 577-578. This Court held "that the Court of Appeals's reading of the 1980 PSD regulations, intended to align them with the NSPS, *was inconsistent with their terms and effectively invalidated them*; any such result must be shown to comport with the Act's restrictions on judicial review of EPA regulations for validity." *Id.* at 566 (emphasis added).

In this case, the court of appeals permissibly construed the silvicultural rule to ensure harmony with the statute. Finding the rule to be ambiguous, the court rejected the petitioners' interpretation because

it would redefine pipes, ditches and channels as nonpoint sources, thereby creating an impermissible conflict with the statutory definition of point source. State Pet. App. 34-37. Instead, and consistent with both the statute and the regulatory text, the court construed the rule as excluding *only* stormwater that is not channeled and controlled through point sources. *Id.* at 37. The court's determination that stormwater discharged through point sources is not "nonpoint source" "natural runoff" is entirely consistent with the rule's text; it does not "implicitly invalidate" it in any way.

Nor is there any credible argument that the court invalidated the Phase I regulation. The court relied on the rule's plain language in holding that EPA included SIC 2411 in the list of regulated "industrial activities." *Id.* at 44-47. The court further relied on its holding that the silvicultural rule does not exclude point-source discharges from the NPDES permit requirement. *Id.* at 47-48. And the court bolstered its reading of the Phase I regulation by noting that reading the rule to exempt point-source discharges associated with logging would be contrary to sections 502(14) and 402(p) of the Act. *Id*. But the court did not give the Phase I rule a meaning that conflicts with its text; consequently, it did not "effectively invalidate" that rule or grant NEDC any relief barred by section 509(b)(2).

4. To demonstrate error under *Duke Energy*, the petitioners must establish that the court of appeals' interpretations are impermissible because they are *inconsistent with the text of the rules*. 549 U.S. at 566. Yet the petitioners make little attempt to explain how

the court's interpretations conflict with the regulatory text. Instead, they fail to alert this Court to obviously pertinent authority—*Duke Energy*—and they rely on bare assertions that lack specificity and analysis. Those failures alone render the petitioners' arguments unpersuasive.

Any argument that the court of appeals' reading of the rules is impermissible—that it is inconsistent with the regulatory text—ultimately must rest on a demonstration that the silvicultural rule *expressly exempts* certain activities from the NPDES permit requirement even when they convey pollution through statutory point sources. The petitioners rely on the second sentence of the silvicultural rule, but that sentence does not categorically define the listed activities as "nonpoint sources" nor does it *redefine* any point-source discharge as a nonpoint source of pollution, as claimed. GP at 18; State at 31-32. "Simply put, the regulation excludes nonpoint source silvicultural activities from NPDES permit requirements…." *Forsgren*, 309 F.3d at 1186. Indeed, the plain language of the rule does not allow for a construction that excludes statutory point sources from regulation. But even if there is some ambiguity in the language, as the court of appeals concluded, the court's construction is at least a *permissible* one.

Two elements of the text confirm this. First, the phrase "the term" at the beginning of the second sentence indicates that the subsequent text elaborates on the definition of "silvicultural point source" by explaining that it does not include "non-point source silvicultural activities … from which there is natural runoff." The second sentence is thus not an additional

definition of a new term but rather a continuation of the definition of "silvicultural point source." Together, the first two sentences reflect the Act's point/nonpoint dichotomy and explain the axiom that "silvicultural point source" does not include "nonpoint source silvicultural activities."

Indeed, and second, the text demonstrates that the second sentence *only* excludes nonpoint source "natural runoff." The phrases "such as" and "from which there is natural runoff" demonstrate that the second sentence is providing a list of silvicultural activities that are considered to be nonpoint sources of pollution *when and where* they produce "natural runoff." In other words, the phrase "from which there is natural runoff" conditions the nonpoint status of a pollution source on its production of "natural runoff." The rule also gives meaning to the term "natural runoff": the phrase "nonpoint source silvicultural activities…from which there is natural runoff" *equates* the terms "nonpoint source" and "natural runoff." In doing so, the rule indicates that "natural runoff" refers to stormwater that is *not* discharged from point sources like pipes, ditches and channels.

The silvicultural rule does not categorically define the listed activities as nonpoint sources nor redefine any point-source discharge as a nonpoint source of pollution. Consequently, there is no credible argument that the court of appeals' interpretations conflict with the regulatory text or that the court granted NEDC relief that is barred by section 509(b)(2). The court of appeals did not "effectively invalidate" the

rules by giving the terms "nonpoint source" and "natural runoff" their natural and accepted meaning.[3]

C. The court of appeals' methodology for interpreting administrative rules is consistent with this Court's precedents.

The petitioners contend that the court of appeals' approach to interpreting the Phase I regulation conflicts with this Court's methodology for interpreting administrative rules. State at 28-30; GP at 16-17, 24. According to the petitioners, the court should have deferred to EPA's claim that the Phase I regulation excludes point-source discharges along logging roads by generally incorporating the NPDES program rules. State at 29; GP at 20-21. Here again, the petitioners' arguments are without merit.

1. The court of appeals explicitly recognized and applied the well-accepted principle that courts must defer to an agency's construction of its regulation unless it is plainly erroneous, contrary to its text, or inconsistent with the statute. State Pet. App. 10-11 (citing *Auer v. Robbins*, 519 U.S. 452, 457, 461-62 (1997) and *Chevron U.S.A., Inc. v. Nat. Res. Defense Council,* 467 U.S. 837, 842-43 (1984)); *see also Duke Energy*, 549 U.S. at 573. The petitioners' complaint is therefore that the court misapplied a properly stated rule

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[3] Should this Court grant the petitions, NEDC would also argue that the position EPA stated in its rehearing amicus brief is correct and, additionally, that the rules at issue are not subject to section 509(b)(1) or (2) *at all* because they are not the result of any of the reviewable "actions" listed in section 509(b)(1).

of law to a highly particular set of circumstances. But even that is incorrect.

2. The State fundamentally misunderstands the Phase I rule when it claims that it excludes "from the definition of 'industrial activity' those activities defined to be nonpoint-source silvicultural activities in the silvicultural rule." State at 29. The Phase I regulation does not exclude any silvicultural activities *from the definition of "industrial activity"*; rather, the rule applies to the logging industry but does not require NPDES permits for *nonpoint sources* of pollution. The State's argument has two critical flaws.

First, to the extent the State is arguing that the Phase I rule incorporates an interpretation of the silvicultural rule that defines *all* pollution from the listed activities as nonpoint-source, that construction of the rule is not entitled to deference because it is inconsistent with the regulation's text. The petitioners completely fail to parse the silvicultural rule or explain how *its text* redefines the discharges at issue in this case as nonpoint-source pollution. Parsing the rule, however, demonstrates that it does not categorically "define" any activity as exclusively nonpoint in nature. As explained in section I.B.4., *supra*, the silvicultural rule excludes only nonpoint source natural runoff associated with certain logging activities; it does not exempt any point-source discharge from regulation.

Second, to the extent the State is arguing that the Phase I rule categorically excludes some silvicultural activities from the set of "industrial activities" covered by the rule, that interpretation is not entitled to

deference because it is inconsistent with the Phase I regulation. The rule contradicts that claim by stating explicitly that logging *is* an "industrial activity." The regulation states: "The following categories of facilities *are considered to be engaging in 'industrial activity' for purposes of paragraph (b)(14)*…." 40 C.F.R. § 122.26(b)(14) (emphasis added). The rule then undisputedly includes logging on the list of regulated industries. *See id.* § 122.26(b)(14)(ii) (listing facilities classified as SIC 24, which includes SIC 2411, "Logging").

Further, the rule does not place any limits on the logging activities that require permits for point-source stormwater discharges. Where EPA intended to exclude a category of facilities, it clearly stated that exclusion in the list of regulated industries. *See, e.g.*, *id.* § 122.26(b)(14)(ii) ("Facilities classified as Standard Industrial Classification 24 (*except* 2434), 26 (*except* 265 and 267), 28 (*except* 283)…") (emphases added). EPA excluded SIC 2434 from SIC 24, but did not exclude SIC 2411. *Id*. Moreover, the Phase I regulation does not even *mention* the silvicultural rule in connection with the list of regulated industries. *Id.*

The rest of the regulatory text confirms that the rule applies to logging roads that support timber hauling. 40 C.F.R. § 122.26(b)(14). The rule requires permits for "immediate access roads traveled by carriers of raw materials" and for "material handling sites" "used for the transportation or conveyance of any raw material." *Id*. Additionally, the rule's narrative text is illustrative, not exhaustive, so stormwater discharges that are clearly "associated with" logging require NPDES permits even if they are not specifically listed.

See id. ("For the categories of industries identified in this section, the term includes, but is not limited to…."). Under any of these criteria, forest roads used for timber hauling are clearly "associated with" the logging industry. *See also* ER 47 at 94-100 (Klahnberry Timber Sale Contract).

3. Because there is no textual support for their interpretations, the petitioners look elsewhere for support. The petitioners' invitation to pore over regulatory preambles and litigation briefs to discern an intent not shown in the text of the rules does not, however, demonstrate that the court of appeals' decision conflicts with established principles of regulatory review; it is merely an argument that the lower court erred in applying those principles to the particular regulatory framework before the court. But even as a claim of error, the petitioners' arguments are unconvincing.

The State incorrectly claims that the preamble to the Phase I rule "reiterates" that EPA did not intend to require permits for stormwater discharged from logging roads. State at 29. But the preamble says *nothing* about excluding logging roads from the Phase I rule. To the contrary, it demonstrates that EPA fully intended that the list of applicable SIC codes would determine what activities require permits.

In response to public comments requesting that EPA exclude SIC 2411 from the Phase I rule, EPA refused to do so. Instead, EPA noted that the silvicultural rule "excludes certain sources." *See* 55 Fed. Reg. at 48011. But the preamble does not say *anything* about *which sources* are excluded, let alone suggest that the rule excludes any point-source discharges.

Instead, at the end of the discussion about SIC 2411, the preamble states: "*EPA intends that the list of applicable SICs will define and identify what industrial facilities are required to apply.*" *Id.* (emphasis added).

Taking a different approach, Georgia-Pacific seeks support for its argument in miscellaneous Federal Register notices and agency practice. Yet the Ninth Circuit has *twice* canvassed "the yellowed pages of the Federal Register," *Forsgren*, 309 F.3d at 1188, and *twice* ruled that the silvicultural rule is not an exemption for point-source discharges. *Id.* at 1186-88; State Pet. App. 20-32. The materials cited by Georgia-Pacific cannot justify construing the silvicultural rule in conflict with its text.

Nor can those materials justify construing the silvicultural rule in a manner that conflicts with the statute, which unambiguously defines pipes, ditches and channels as point sources. If, as NEDC has contended throughout this litigation, the silvicultural rule unambiguously excludes only nonpoint sources from the NPDES permit requirement, then the text's plain meaning controls and those materials are irrelevant. *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) (*Auer* is deference only at issue where a regulation is ambiguous); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct.. 2458, 2469 (2009). Alternatively, if the silvicultural rule is ambiguous, as the court of appeals found, then those materials and agency practice may be relevant to discerning the agency's intent. *Coeur Alaska*, 129 S. Ct.. at 2469, 2472-77. But their relevance for that purpose cannot justify, much less *require*, construing the rule in conflict with the statutory definition of point

source. Indeed, if the silvicultural rule is ambiguous then the court of appeals was fully empowered to construe the rule in harmony with the CWA. *Duke Energy*, 549 U.S. at 573. Either way, federal register notices and agency practice cannot justify deferring to an interpretation of the silvicultural rule that directly conflicts with Congress' unambiguous determination that "any pipe, ditch [or] channel" is a point source. 33 U.S.C. § 1362(14).

D. The court of appeals' decision does not conflict with this Court's precedents affording deference to agency statutory interpretations.

The petitioners incorrectly contend that the court of appeals' decision conflicts with this Court's established methodology for reviewing an agency's interpretation of a statute that it administers. State at 30-33; GP at 17, 20-24. The court of appeals explicitly recognized that a court reviewing an agency's construction of a statute must first determine whether Congress has directly spoken to the precise question at issue. State Pet. App. 10-11, 16; *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. If the statute is silent or ambiguous, however, the court must defer to a reasonable construction of the statute embodied in an agency's lawful exercise of delegated authority. *Id.* at 843.

1. Here, the court of appeals' decision is entirely consistent with *Chevron*. The court was not obligated

to defer to an interpretation of the silvicultural rule that conflicts with the unambiguous statutory definition of point source. *Id.* at 842-43; *Duke Energy*, 549 U.S. at 573. Nor did the court have to defer to an interpretation of the Phase I rule that conflicts with the plain statutory obligation to require NPDES permits for point-source stormwater discharges associated with industrial activity. *Id.*

2. The State claims there is a conflict with *Chevron* because the court of appeals did not defer to what the State claims is EPA's construction of the statutory term "a storm water discharge associated with industrial activity." State at 29 (citing U.S. Amicus Br. at 28-31) and at 30-33. But the cited pages of EPA's amicus brief were not entitled to *Chevron* deference because in those pages EPA did not present a *statutory* argument that EPA claimed was entitled to *Chevron* deference. EPA did not assert that it identified a statutory ambiguity or gap in section 402(p)(2)(B) that it then construed and clarified by excluding logging roads from the Phase I rule. The court of appeals was not obligated to defer to a construction of the CWA that EPA did not present.

Nor did the court of appeals err by declining to defer to the statutory argument that EPA *did* present. EPA asserted in its amicus brief that the statutory definition of *point source* is ambiguous and that EPA's interpretation of the silvicultural rule was a reasonable construction of the Act. U.S. Amicus Br. at 13-20. The court of appeals explicitly relied on *Chevron* in rejecting that argument because Congress unambiguously defined pipes, ditches and channels as point sources. State Pet. App. 10-16; 33 U.S.C. § 1362(14).

Similarly, the court correctly declined to accept the contention that EPA could exclude logging roads from the Phase I rule even though EPA had determined that logging is an "industrial activity" subject to sections 402(p)(2)(B) and (4)(A) of the Act. *See* pp. 13-14, *supra*, and State Pet. App. 44-45, 47-48.

3. Making an altogether different argument, Georgia-Pacific now claims for the first time that the Act's definition of "point source" excludes "agricultural stormwater discharges" from the NPDES permit requirement and that silviculture is a form of agriculture. GP at 17, 20-24. Georgia-Pacific waived its new argument by failing to raise it below. *TRW, Inc. v. Andrews*, 534 U.S. 19, 33-34 (2001). But the argument also fails for two other reasons.

First, the CWA itself demonstrates that Congress did not intend the agricultural exemption to include logging activities: the plain language of the statute distinguishes agriculture from silviculture by referring to the two separately when it means a statutory provision to apply to both. *See* 33 U.S.C. §§ 1288(b)(2)(F); 1281(d)(1); 1314(f)(A); 1344(f)(1)(A). Because the statutory definition of point source only references "agricultural" stormwater, it does not also include stormwater discharges associated with silvicultural activities.

Second, EPA does not consider stormwater discharges associated with logging to be "agricultural stormwater discharges." That is clear enough from the Phase I regulation, which excludes agricultural stormwater from regulation but requires NPDES permits for the logging industry. *See* 40 C.F.R.

§ 122.26(a)(1)(v) *and* (b)(14)(ii). Georgia-Pacific has cited *no* evidence that EPA construes the agricultural stormwater exemption to include logging. Here again, the court of appeals was not obligated to defer to an interpretation of the statute that EPA never adopted.

II. The court of appeals' decision does not present a question of great practical importance.

Finally, the State contends that the court of appeals' decision warrants review because it "displaces" Oregon's regulatory scheme and requires Oregon to develop an NPDES permit for logging roads. State at 24-28. Georgia-Pacific complains that the decision unsettles the state-federal balance; that NPDES permits and associated legal requirements will overly burden logging road owners and operators; and that the court of appeals' ruling is bad environmental policy. GP at 30-35. According to the petitioners, owners and operators of logging roads must be allowed to continue collecting, channeling and dumping heavily polluted stormwater into waters of the United States without NPDES permits.

As an initial matter, NPDES permits will supplement, not eliminate, Oregon's existing regulatory programs. Oregon regulates forest practices through its Forest Practices Act; regulates nonpoint source pollution through its state water quality programs; and regulates point-source pollution through its authorized NPDES program. *See generally* Oregon Revised Statutes Ch. 468B and 527; Oregon Admin. Rules Ch. 340-041, -042, and -045. Although those programs have been in place for decades, Oregon still

does not adequately protect waters in its coastal areas from nonpoint-source pollution generated by logging activities.[4] In any event, to the extent Oregon currently regulates logging road pollution at all, NPDES permits will supplement those programs, not displace them.

More importantly, for point-source discharges of pollutants and stormwater, Congress fully intended to supplement ineffective state programs with the NPDES permit program. *See State Water Res. Control Bd.*, 426 U.S. at 202-205. Far from unsettling "the balance of environmental responsibilities between the State and federal government" (GP at 33), the court of appeals' decision implements longstanding Congressional intent to regulate point-source discharges of pollution to our Nation's waters, while leaving nonpoint-source pollution control to the states. 33 U.S.C. §§ 1311(a), 1329.

For this reason, any complaints about hypothetical regulatory burdens should be directed to the district court on remand or to the Oregon Department of Environmental Quality, the agency that will develop an NPDES permit for logging roads in Oregon. Georgia-Pacific claims that the court's decision "severely impacts" owners of logging roads and that "[t]he burden of NPDES permitting is substantial." GP at 30-31. Yet Georgia-Pacific cannot know anything about regulatory burdens until it obtains and complies with

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[4] *See* 16 U.S.C. § 1455b; the complaint and agreed dismissal order in *Northwest Environmental Advocates v. Gutierrez*, U.S. District Court for the District of Oregon, No. 09-cv-00017; *and* http://coastalmanagement.noaa.gov/nonpoint/pro_approve.html.

NPDES permits, which it has yet to do. Speculation about the effects of the decision is particularly premature because the court of appeals has only determined that NEDC's complaint states a cause of action. On remand, the district court has bifurcated liability and remedy proceedings and has not yet even determined liability. The petitioners' concerns can, and likely will, be addressed through the district court proceedings or through the upcoming public and transparent NPDES permit development process.

Congress long ago determined it would be good environmental policy to require NPDES permits for the logging industry when it opted not to exempt that industry from the NPDES permit program. Since then, the U.S. Court of Appeals for the District of Columbia has rejected EPA's NPDES permit exemption for point-source stormwater discharges associated with silvicultural activities (1977); EPA has required permits for stormwater discharges associated with the logging industry (1990); and the Ninth Circuit has held that EPA's silvicultural rule does not exempt statutory point sources from the NPDES permit program (2002). *Costle*, 568 F.2d at 1379; 40 C.F.R. § 122.26(b)(14)(ii); *Forsgren*, 309 F.3d at 1185-86. Notwithstanding those developments, Congress has refused to adopt a statutory exemption for the logging industry. Far from acquiescing in the petitioners' claimed exemption (GP at 23-24), Congress has steadfastly maintained its determination that discharges of pollutants associated with logging are prohibited unless authorized by an NPDES permit.

Under the court of appeals' decision, the petitioners will have to comply with the CWA like nearly eve-

ry other American industry. *See* 40 C.F.R. 122.26(b)(14)(i)-(xi). And just like those industries, the logging industry will adjust to NPDES permitting requirements, whatever they may turn out to be. This case is important to the parties, and it is important to water quality in Oregon's Coast Range, but it does not present an issue of great practical importance that warrants Supreme Court review.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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