No. 11-347

# In the Supreme Court of the United States

GEORGIA-PACIFIC WEST, INC., HAMPTON TREE FARMS, INC., STIMSON LUMBER CO., SWANSON GROUP, INC., AMERICAN FOREST & PAPER ASSOCIATION, OREGON FOREST INDUSTRIES COUNCIL, & TILLAMOOK COUNTY,
*Petitioners*,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## SUPPLEMENTAL BRIEF FOR PETITIONERS


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**MISCELLANEOUS**

The United States agrees with petitioners that the Ninth Circuit flouted this Court's precedents when it overturned EPA's position that channeled runoff from forest roads does not require an NPDES permit. The Solicitor General explains (at 11-12) that the Ninth Circuit "should have given *Chevron* deference to EPA's Silvicultural Rule" and "should have deferred under *Auer* to EPA's interpretation of" that Rule, which defines precipitation runoff from forest roads as "nonpoint source." "[I]ndependent[ly]," the Ninth Circuit "misapplied established *Auer* deference principles" by "ignor[ing] EPA's construction of its" Phase I regulation, which makes clear that forest road stormwater is not "associated with industrial activity." U.S. Br. 12-14.[1]

The United States recognizes too (at 14) that the Ninth Circuit's ruling "could entail significant practical burdens" for owners and operators of thousands of miles of forest roads who are now potentially in violation of the CWA and subject to substantial penalties for discharging without a permit. The scope and complexity of the permitting and litigation burden facing the industry are evident from EPA's Notice of Intent ("NOI"), 77 Fed. Reg. 30473 (May 23, 2012), which explains that forests are traversed by a "vast and diverse network" of

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[1] The problems with the Ninth Circuit's decision run even deeper than the Government acknowledges. Long before EPA filed its briefs below, it took the same unwavering position as to the meaning of its Silvicultural Rule and Phase I regulation. Pet. 7, 10. Because the meaning of those regulations was well settled decades ago, contemporaneously with their adoption, NEDC's challenge should be treated as filed too late and in the wrong court, as detailed in the petition in No. 11-338 and amicus brief of NAFO.

roads across federal, state, county, tribal and private land, which "creates a highly complex mosaic of overlapping responsibilities." *Id.* at 30475-30476. This "mosaic"—in which "[r]egional differences" abound—includes roads designed to different standards, for different purposes, over different terrain, "pass[ing] through multiple owners and multiple properties," which are already subject to federal, state and other BMP programs that "minimize or prevent discharges of pollutants into surface waters" through "a variety of effective approaches." *Id.* at 30475, 30477.

Despite the plain error of the Ninth Circuit's ruling, the Solicitor General recommends that the petition be denied. He contends that there is no "square" conflict and that EPA or congressional action may address petitioners' concerns. These arguments provide no reason to deny the petition. The Court should grant certiorari and either conduct plenary review or summarily reverse the Ninth Circuit's erroneous and extremely harmful judgment.

1. The Ninth Circuit's ruling squarely conflicts with the Eighth Circuit's decision in *Newton County*. Although *Newton County* gave two reasons for rejecting the environmental group's challenge, neither is "simply dictum." U.S. Br. 15; see *Woods* v. *Interstate Realty*, 337 U.S. 535, 537 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*"). And as the petition (at 25) and reply (at 10) showed, with quotations from the *Newton* briefs that the government ignores, "*channeled* runoff" was at issue in *Newton County*, even though the court did not "specifically refer" to that phrase. U.S. Br. 15. There and here, plaintiffs argued that channeled runoff is a

point source discharge under the Silvicultural Rule. The Ninth Circuit agreed with plaintiffs; the Eighth did not. Had NEDC brought this suit in the Eighth Circuit, it would have been dismissed.

2. Developments in Congress are no reason to deny the petition. The Solicitor General (at 8, 16-17) interprets a provision of the 2012 Consolidated Appropriations Act as "temporarily" "suspend[ing] the permitting requirement imposed by the court of appeals' decision." That moratorium provides very little "breathing space for EPA," petitioners, or amici, because it expires on September 30, 2012. And EPA conspicuously does not predict that it will propose a rule by then, let alone promulgate a final rule. The moratorium does, however, open a narrow window for review by this Court, which is precisely what Congress intended. See 157 Cong. Rec. H9900 (Dec. 16, 2011) ("intent" was to provide "an opportunity for the Supreme Court to weigh in"; "this provision should in no way deter the Court's proceedings") (Rep. Simpson).

"Permanent legislation" "pending" in the House and Senate is no reason to deny review either. U.S. Br. 17. Those bills have not seen action since July 15, 2011. And passage of "unenacted legislation" is highly uncertain, which is why this Court's "task is to rule on what the law is, not what it might eventually be." *Garcia* v. *Texas*, 131 S. Ct. 2866, 2867 (2011) (per curiam).

Contrary to the Government's suggestion (at 14), this Court has the "institutional capacity" to reverse the Ninth Circuit's judgment. The statutory and regulatory provisions at issue are clear and the administrative law principles that the Ninth Circuit evaded are set forth in this Court's decisions. Indeed,

*because of* this Court's institutional capacity, 26 Senators, 47 Representatives, and 29 State Attorneys General (including 4 that had not signed the States' amicus brief) implored the Government to support certiorari. See Addendum, *infra*.

3. The Government asks this Court to deny the petition because EPA has announced its intent to promulgate a Phase I rule specifying that forest road stormwater is not "associated with industrial activity." That is no reason to leave standing the Ninth Circuit's baseless and damaging decision.

a. Petitioners agree that the Ninth Circuit "did not hold that the CWA compels" its Phase I ruling. U.S. Br. 8. But the court's opinion leaves enough doubt on that score to encourage further litigation. The court held that "collected runoff constitutes a point source discharge of stormwater 'associated with industrial activity' under the terms of [CWA] § 502(14) and § 402(p)"—citing the statutory, not regulatory, provisions. Pet. App. 42a. It ruled that "'if [logging] activity is industrial in nature," then "*EPA is not free* to create exemptions from permitting requirements for such activity.'" *Ibid.* (emphasis added). And it held that the Phase I regulation's reference to the Silvicultural Rule "does not, *indeed cannot*, exempt" forest road discharges from NPDES permitting. *Ibid.* (emphasis added). Unless the decision is vacated, these errors invite a challenge to the new rule EPA says it plans to promulgate.

b. EPA's Notice of Intent also creates intolerable uncertainty. There is no guarantee EPA will timely follow through "'to propose'" or "'complete this revision'" anytime soon. U.S. Br. 17-18. After all, it has been *nine years* since the Ninth Circuit remanded to EPA its determination not to regulate

forest roads under Phase II, *Envtl. Def. Ctr.* v. *EPA*, 344 F.3d 832, 861 (9th Cir. 2003). Until the NOI, all that had come of that remand were representations to courts that EPA is "in the process of developing its response." Pet. App. 91a (2003 Government brief); see 2007 Gov't C.A. Amicus Br. 31 (Phase II remand is "pending").

Without doubt the catalysts for EPA's NOI—published the day before the Government filed its brief—were the certiorari petitions and this Court's call for the views of the Solicitor General. Were the Court to deny certiorari, there would be no way to ensure that EPA completes its "inten[ded]" rule revision, "expeditiously" or otherwise. U.S. Br. 18.

4. The Solicitor General overlooks the serious practical consequences that would result from leaving the Ninth Circuit's judgment undisturbed *even if* EPA revises its Phase I regulation.

a. The Ninth Circuit's erroneous decision distorts the law of review of administrative action and belittles EPA's long-held expert views. Absent review, its decision would remain binding precedent in the circuit containing some of the most heavily forested States in the Nation, *and* the circuit most likely to hear a rule challenge to any Phase I revision.

b. Absent review, the Ninth Circuit's erroneous interpretation of the Silvicultural Rule would remain precedent. The Government agrees (at 11-12) that the court of appeals erred under *Chevron* and *Auer* in holding that EPA has no leeway to define storm-water flowing through a ditch or culvert to be a nonpoint source. Yet it offers no practical response. By contrast to its view (at 17) that the decision below

"leaves EPA free to amend its Phase I regulations," the Solicitor General is silent on EPA's ability to amend its Silvicultural Rule. The Government also does not discuss how the Ninth Circuit's ruling will affect the validity of *other* "regulations that further define the term 'point source' as it applies to various activities and facilities." U.S. Br. 2; see 40 C.F.R. Part 22, Subpart B (regulations defining point sources).

c. So long as the Ninth Circuit's ruling stands, EPA will be forced to make new rules *around* an erroneous decision. There is no good reason why EPA's new rulemaking should be constrained or even influenced by a decision that contorts administrative law principles requiring deference and denigrates a position EPA has held for 35 years. Vacatur would restore the status quo ante as to Phase I and inform EPA's conduct of the Phase II remand.

d. Absent action by this Court, this costly and disruptive litigation will continue. Neither EPA's proposed regulation nor Congress's temporary moratorium will resolve NEDC's claims for penalties, attorneys' fees and injunctive relief based on allegations of more than 10 years of past violations on all logging roads in Oregon State forests. NEDC seeks substantial monetary penalties, plus attorneys' fees. Am. Complt. ¶ 1; see 33 U.S.C. §§ 1319(d), 1365(a). And it seeks "injunctive relief requiring defendants" to "remedy any environmental damage caused by their unpermitted discharges." NEDC Opp. to Stay Mot. 12 (D. Or.). These claims require the resolution of complex legal and factual issues, including identifying for which roads NEDC may seek penalties, what parties may have been required to obtain permits for each road, the level of rainfall

necessary to cause discharges on each road, and the number and severity of discharges during the decade covered by the lawsuit. Accordingly, "EPA's proposed regulatory approach" decidedly does *not* "moot petitioners' objections" to the erroneous decision below. U.S. Br. 18. And if EPA does not act, the consequences may be even more severe, as NEDC seeks injunctive relief halting log hauling operations on unpermitted roads.

Unless and until Phase I revisions become final, under the Ninth Circuit's decision every discharge of channeled forest road runoff within vast western forests violates the CWA, except any covered by the temporary congressional rider. New citizen suits attacking past and present discharges could expose owners and operators of forest roads to enormous liability, regardless of action by EPA or Congress.

5. The Government's sole response to "alleviate" these "immediate practical concerns" is to observe (at 19) that EPA has made available, "as appropriate, the Multi-Sector General Permit (MSGP) for discharges *associated with industrial activities*" (emphasis added).[2] But that MSGP is *inappropriate*, because it was not designed to apply to forest roads, which EPA determined are *not* "associated with industrial activity."

Far from being a solution, this suggestion creates its own set of serious problems. There is an enormous difference between contained industrial sites, where the MSGP's requirements may be practical, and the "highly complex mosaic" of forest roads, "vast by any measure," that EPA now

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[2] http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf

cavalierly tries to squeeze into a general permit never designed with such roads in mind. 77 Fed. Reg. at 30475.

For example, the MSGP requires that permittees map the location of all "impervious surfaces," "storm-water conveyances including ditches, pipes, and swales," and "stormwater inlets and outfalls, with a unique identification code for each outfall." MSGP § 5.1.2. But the Government does not know even such basic information as whether forest roads on *its own land* are "on the order of tens of thousands" or "hundreds of thousands of miles," let alone where every potential discharge along those roads is located. 77 Fed. Reg. at 30475. Even if owners and operators of forest roads could map every possible source of a discharge to "navigable waters," the costs of doing so would be astronomical and out of all proportion to any benefits given the effectiveness of BMPs. *Id.* at 30477.[3]

Another example: the MSGP requires frequent inspections of every discharge, and yearly inspection "during a period when a stormwater discharge is occurring." MSGP § 4.1.1. Permittees must "collect a stormwater sample from each outfall," "within the first 30 minutes" of a discharge or "as soon as practicable" thereafter. MSGP §§ 4.2.1, 4.2.3. These requirements, tailored for industrial sites, are impracticable for forest roads, which may be used "during harvesting once every 20 years or so." 77 Fed. Reg. at 30475. And noncompliance with any MSGP provision violates the CWA. MSGP §§ 1.2, 3.1.

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[3] The phrase "navigable waters" is "notoriously unclear," further complicating compliance with the MSGP. *Sackett* v. *EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

Environmental groups frequently sue to enforce general permits, favoring venue in the Ninth Circuit. *E.g.*, *WaterKeepers* v. *AG Indus. Mfg.*, 375 F.3d 913 (9th Cir. 2004); *S.F. BayKeeper* v. *Tosco Corp.*, 309 F.3d 1153 (9th Cir. 2002); *NRDC* v. *Sw. Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000); *Ecological Rights Found.* v. *Pac. Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000). The damages sought in such suits have been enormous. See *Humane Soc'y* v. *HVFG LLC*, 2010 WL 3322512, at *2 (S.D.N.Y. Aug. 19, 2010) (seeking "over $600 million in civil penalties"); *WaterKeepers* v. *AG Indus. Mfg.*, 2005 WL 2001037, at *6 (E.D. Cal. Aug. 19, 2005) (seeking $5 million against company worth $907,000). Given the poor fit between the MSGP and forest roads, forest road operators and owners would be sitting ducks for such suits.

6. The Government presents a patently false dilemma by claiming that, if the Court grants the petition, it faces an "all-or-nothing" "binary choice: either hold that the stormwater discharges at issue here are not subject to CWA regulation at all (as petitioners contend), or hold that the discharges require NPDES permits (as respondent argues)." U.S. Br. 19. This case poses no such dilemma. As the Solicitor General concedes (at 12-13), petitioners ask the Court to hold that "*under the current regulatory scheme*," they "were not required to obtain an NPDES permit for any of the activities at issue here." Reversal of the Ninth Circuit's judgment would leave EPA free to consider a full "range of regulatory options" (U.S. Br. 19), while relieving the substantial problems that the Ninth Circuit improperly created.

That EPA could "supersed[e]" this Court's decision prospectively by "regulatory action" is

unremarkable. U.S. Br. 19. Agencies usually can supersede this Court's regulatory interpretations, just as Congress can supersede this Court's statutory interpretations. Yet the Court grants certiorari to decide regulatory and statutory questions all the time.

7. This Court should grant the petition and order plenary review, as it has done in other CWA cases in which the United States acknowledged lower court error yet recommended denial of certiorari. See *Coeur Alaska* v. *Se. Alaska Conservation Council*, 557 U.S. 261 (2009) (Ninth Circuit failed to defer to CWA regulations and improperly expanded the NPDES permitting regime); *S. Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe*, 541 U.S. 95 (2004).

Alternatively, this is an especially appropriate case for "summary disposition on the merits." S. Ct. Rule 16.1. Summary reversal is a useful tool, when the lower court has disregarded this Court's precedent, to ensure consistency in the law and respect for this Court's decisions. *E.g.*, *Wilkins* v. *Gaddy*, 130 S. Ct. 1175, 1177 (2010) (per curiam) (summarily reversing decision "at odds" with this Court's precedents). Here, the Ninth Circuit's ruling is so clearly contrary to *Chevron*, *Auer*, and their progeny that summary disposition is warranted. See Diarmuid O'Scannlain, *A Decade of Reversal*, 14 LEWIS & CLARK L. REV. 1557, 1559 (2010) ("approximately one in ten Ninth Circuit cases reviewed by the Supreme Court results in a summary reversal"); *Karuk Tribe* v. *USFS*, 2012 WL 1959231, at *30-31 (9th Cir. June 1, 2012) (en banc) (describing the ruling here as an "extreme recent exampl[e]" of the court "break[ing] from decades of precedent and creat[ing] burdensome, entangling

environmental regulations out of the vapors") (M. Smith, J., dissenting).

Summary reversal would also ensure that the serious adverse consequences for defendants, the forest products industry generally, and state regulators, described above, will not result from a blatantly erroneous decision. That is another appropriate use of summary disposition. *E.g.*, *Thaler* v. *Haynes*, 130 S. Ct. 1171, 1172 (2010) (per curiam) (summarily reversing "holding [that], if allowed to stand, would have important implications").

This case is procedurally well-postured for summary reversal. No party can complain that it has not argued the merits. The merits were briefed in the certiorari papers by the parties and amici, including Oregon, 26 State Attorneys General, the National Association of Counties, and forest road user organizations, as well as by the Solicitor General. Respondent devoted much of its brief in opposition to the merits. In addition, the Ninth Circuit's error is plain and arises from disregard of settled precedent that is in no need of further percolation. *Cf. Spears* v. *United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting). Given EPA's intent to undertake new rulemaking, summary disposition is "just under the circumstances" and a compelling alternative to plenary review. 28 U.S.C. § 2106; see EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 344, 351 (9th ed. 2007).

## CONCLUSION

The Court should grant the petition for certiorari and either order plenary review or summarily

reverse the Ninth Circuit's judgment.[4]

Respectfully submitted.

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[4] This Court may alternatively wish to hold the petition in abeyance until EPA undertakes the promised Phase I rule-making, during which period the current stay of district court proceedings pending this Court's action on the petition should remain in place. See SUPREME COURT PRACTICE, *supra*, at 339. If EPA does not expeditiously issue a final rule, petitioners would move for consideration of the petition some months from now.