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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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MISCELLANEOUS

Pursuant to this Court's order, petitioners submit this brief to address the effect of EPA's recent rule amendment, which "clarif[ies]" that "even if they are point source discharges," "stormwater discharges from logging roads do not constitute stormwater discharges associated with industrial activity and that [an NPDES] permit is not required." 77 Fed. Reg. 72970-72971 & n.1 (Dec. 7, 2012). This recent regulatory development neither moots the case nor suggests that the writ was improvidently granted. There remain live and important issues as to "industrial activity" and "point source" provisions and as to jurisdiction that this Court should resolve and that require either reversal or a vacatur with instructions to dismiss. At a minimum, the Ninth Circuit's erroneous decision should be vacated and remanded so that it does not distort further proceedings.

ARGUMENT

A. This case is not moot.

1. EPA's amendment to 40 C.F.R. § 122.26-(b)(14)(ii) provides that only "[f]acilities classified within Standard Industrial Classification 24, Industry Group 241 that are rock crushing, gravel washing, log sorting, or log storage facilities operated in connection with silvicultural activities," as "defined in 40 C.F.R. 122.27(b)(2)-(3)," are "engaging in 'industrial activity,'" and that "not included are all other types of silviculture facilities." 77 Fed. Reg. 72974-72975. This amendment did not change the law. Section 122.27(b)(1) already defined silvicultural point sources to mean only rock crushing, gravel washing, log sorting, and log storage (1JA103), and Section 122.26 already specified that discharges not covered by this definition of silvicultural point source were not "discharge[s] associated with industrial activity."

1JA98. Accordingly, the *new rule is the same in substance as the old rule*. It was *always* EPA's intent "to exclude from the Phase I regulation stormwater runoff" from "silvicultural activities" other than rock crushing, gravel washing, log sorting, or log storage. 77 Fed. Reg. 72971; see Tr. 21 (Mr. Stewart: "the new rule was not intended to change the meaning of the preexisting definition").[1]

Respondent contends that both the prior and the new rules are invalid for the same reasons: that logging is "industrial activity" within the plain meaning of the CWA, that roads used to transport logged tim-

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[1] Before this Court granted certiorari, EPA indicated that it planned to engage in rulemaking "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. 30474 (May 23, 2012). The United States unsuccessfully argued that, in consequence, "this Court's intervention is not warranted." U.S. Am. Br. 20 (May 24, 2012). On September 4, 2012, EPA published its notice of proposed rulemaking. 77 Fed. Reg. 53834. On November 30, 2012, the EPA Administrator signed the final rule, which took effect January 7, 2013. 77 Fed. Reg. 72970. Petitioners had urged EPA to await guidance from this Court before issuing any amendment. *E.g.*, Comment from Jan A. Poling, Vice Pres., Am. Forest & Paper Ass'n, EPA Docket EPA–HQ–OW–2012–0195 (Oct. 4, 2012) ("strongly urg[ing] the EPA to defer action on the Proposed Rule until the U.S. Supreme Court completes its review of the Ninth Circuit's decision"); Comment from Kristina McNitt, Pres., Oregon Forest Indus. Council, *id.* (Oct. 4, 2012) (similar); see also, *e.g.*, Comment from Pennsylvania Dep't of Agriculture, *id.* (Oct. 4, 2012) (EPA should "delay this proposed rulemaking until the conclusion" of review by this Court because the "decision could render the need for a new rule moot, or cause a different consideration of what a new rule should actually say"). EPA nevertheless moved forward with unusual speed, issuing the final rule late on the business day before oral argument.

ber are industrial activity or "associated" with it, and that EPA lacks discretion to adopt a rule to the contrary. See NEDC Br. 43-44 (EPA's interpretation of the term "associated with industrial activity" is "incompatible" with "the statutory text," which "[p]lainly" "encompasses the sort of mechanized timber cutting and hauling operations that petitioners use logging roads to conduct"). NEDC informed the Court at oral argument that it will continue to make that statutory argument in this Section 1365 action. See Tr. 31 (Mr. Fisher: "we have and will maintain a claim for forward-looking relief" because "the new rule simply violates the statute" and "we have a right to bring a citizen suit for a violation of the" CWA). NEDC has also filed a "protective" Section 1369(b) petition for review of the new rule. *NEDC* v. *EPA* (9th Cir. No. 13-70057, filed Jan. 4, 2013).

The question whether EPA's decision to treat logging operations and the forest roads used by them as non-industrial warrants *Chevron* deference is therefore a "live" issue in which the parties have "a legally cognizable interest in the outcome." *Already, LLC* v. *Nike, Inc.*, No. 11-982, slip op. at 4 (U.S. Jan. 9, 2013). The change in EPA's rule has no effect on that issue, which is "embedded in [an] 'actual controversy'" about whether forest road discharges require NPDES permits. *Alvarez* v. *Smith*, 130 S. Ct. 576, 580 (2009). See *Douglas* v. *Independent Living Center*, 132 S. Ct. 1204, 1210 (2012) (case not moot when agency action while case pending before this Court "d[id] not change the underlying substantive question"); Eugene Gressman, et al., SUPREME COURT PRACTICE 927 (9th ed. 2007) ("review is not mooted when the questioned conduct is likely to recur" or the "'underlying question persists and is agitated by the continuing activities and program of petitioners'")

(quoting *Carroll* v. *Pres. & Comm'rs of Princess Anne*, 393 U.S. 175, 179 (1968)).

Deciding that *Chevron* issue would largely resolve the current case, informing—if not eliminating—any question whether NEDC could be entitled to relief for past discharges despite the new rule.[2] It also would resolve a central issue in the challenge to the new rule. And that issue has been as fully briefed before this Court as such an "implausible" argument can be. U.S. Br. 26-27; see Oregon Br. 46-47; NEDC Br. 42-44; Pet. Reply 2-6; Oregon Reply 19-25. Furthermore, while we disagree with Oregon that the Ninth Circuit *held* that the CWA's plain language precludes EPA from determining that forest road runoff is not an industrial discharge, there is stray language in the opinion that could lead a panel in a rule

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[2] We believe that if petitioners' discharges are lawful under the new rule, NEDC is entitled to no relief in this citizen suit for petitioners' past conduct. See *Gwaltney of Smithfield* v. *Chesapeake Bay Foundation*, 484 U.S. 49, 59 (1987) ("the harm sought to be addressed by the citizen suit [under § 1365] lies in the present or the future, not in the past"); *id.* at 66-67 ("Mootness doctrine thus protects defendants from the maintenance of suit under the [CWA] based solely on violations wholly unconnected to any present or future wrongdoing"); *Friends of the Earth* v. *Laidlaw Envt'l Servs.*, 528 U.S. 167, 185-188, 192 (2000); *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 105-107 (1998). But NEDC appears to believe that backward-looking remedies do remain available to it. See Tr. 41 (Mr. Fisher: "We have to decide whether we would want" to "press a claim for any kind of civil penalties or remediation" for past conduct). And as Justice Scalia observed at argument, "we don't know the answer to th[e remedies] question" until NEDC's contention that "this rule contradicts the statute" is adjudicated. Tr. 24.

challenge to that conclusion. That Oregon's Attorney General believes the opinion "unequivocally" rests on the statutory issue (Supp. Br. 6) suggests that a subsequent Ninth Circuit panel might mistakenly read it the same way. In these circumstances, this Court should decide the issue because—far from it being "impossible for a court to grant any effectual relief whatever to the prevailing party" (*Knox* v. *SEIU*, 132 S. Ct. 2277, 2287 (2012))—holding that EPA has discretion to determine that forest road runoff is not a discharge "associated with industrial activity" will substantially resolve this suit and greatly simplify litigation over the new rule, focusing it instead on NEDC's meritless contention that the new rule is "arbitrary and capricious." Tr. 44.

2. Lest there be any doubt with respect to mootness, a number of other issues remain in controversy. The Ninth Circuit accepted NEDC's argument that *other* elements of the stormwater rule bring forest roads within the scope of NPDES regulation, and NEDC will continue to rely on these arguments after the rule amendment, which did not alter the relevant language. See Tr. 38-39 (Mr. Fisher: "we still have a claim that logging roads are, quote, 'immediate access roads'"; "the definition of 'immediate access roads' [is] unchanged by the new regulation," so "the language [EPA] gave us on Friday, it doesn't moot the case").

In fact, petitioners argued (Br. 38-41; Reply Br. 2-9), and this Court should conclude, that unchanged elements of the stormwater rule unambiguously provide that forest road runoff is not "associated with industrial activity," or at least that EPA's interpretation of these elements is entitled to deference.

The regulation continues to provide that a "discharge associated with industrial activity" is limited to discharges "directly related to manufacturing, processing or raw materials storage areas at an industrial plant" (40 C.F.R. § 122.26(b)(14)), which EPA has specified does not include "loading and initial transport of forest products from an active harvest site." 60 Fed. Reg. 50835. It continues to provide that stormwater associated with industrial activity "does not include discharges from facilities or activities excluded from the NPDES program under [the Silvicultural Rule]." 40 C.F.R. § 122.26(b)(14). And it continues to be the case that covered "immediate access roads" are only those "within" or "at" industrial facilities, not public roads. *Ibid.*; 55 Fed. Reg. 48009; see 77 Fed. Reg. at 72971-72973 (explaining that the definition of "immediate access roads" has not changed and still does "not include public access roads that are state, county, or federal roads" that "happen to be used by the facility").

The meaning of the stormwater regulation is therefore clear, independent of EPA's amendment to the rule: channeled forest road runoff—which is *not* directly related to manufacturing, processing, or raw materials storage at an industrial plant, *is* covered by the Silvicultural Rule, and is *not* from "immediate access roads"—is not associated with industrial activity. EPA has espoused the same interpretation of those portions of the stormwater rule for decades. That interpretation is unquestionably rational and entitled to *Auer* deference. Br. 42-43; Reply Br. 9. The Court accordingly can reverse on the merits of the stormwater regulation without regard to EPA's amendment, terminating this case and making a challenge to the new rule substantially pointless.

3. Nor are these questions about the stormwater rule the only ones unaffected by EPA's rule amendment. The district court correctly granted petitioners' motion to dismiss NEDC's citizen suit because the *Silvicultural Rule* (40 C.F.R. § 122.27) makes clear that the discharges at issue are not point source discharges under the CWA: forest road runoff is not one of the four defined silvicultural point sources. If petitioners are correct that the Silvicultural Rule defeats respondent's claims, that conclusion was and remains dispositive of the case, independently of the stormwater discharge rule.

As petitioners and amici have demonstrated, the Silvicultural Rule is a complete bar to NEDC's claims, for two reasons.

First, EPA made clear at the time of its promulgation, and has repeated many times since in regulatory materials and briefs, that the Silvicultural Rule provides that channeled forest road runoff is not a point-source discharge. We have explained that EPA acted well within its authority in concluding that the channeling of natural runoff through culverts and ditches was not a "discrete conveyance" of the kind targeted by the CWA. Br. 6-9, 29-37; Reply 9-16. EPA's long-standing interpretation of its rule should be controlling. See *Chevron*, 467 U.S. 837; *Auer*, 519 U.S. at 461.

Second, NEDC's suit, whatever respondent's protestations to the contrary, is a challenge to the meaning of the Silvicultural Rule as described in the Rule's preamble at the time of its promulgation and as confirmed by EPA many times since, because if that rule were applied as written and as understood by EPA respondent's suit could not succeed. A challenge to EPA's Silvicultural Rule, last amended in

1980, is untimely and has been brought in the wrong court (the district court rather than the court of appeals) under the wrong statute (Section 1365 instead of Section 1369(b)). Br. 50-58; Reply Br. 18-23.

The Ninth Circuit erred in both these respects, which are not affected by EPA's amendment of the stormwater rule. Its decision should therefore be reversed under the Silvicultural Rule, or alternatively vacated and remanded with instructions to dismiss for lack of jurisdiction.[3]

4. The Court should not delay reaching the merits of the questions presented. This suit was filed in 2006, and if the Court simply remands in light of the regulatory change there will be no end in sight for years to come. As the Court recognized in granting the petition, the issues presented are of tremendous importance. The status of petitioners' activities will remain in doubt until this Court has had the final say.

There are no legal or practical impediments to reaching the merits, and judicial economy counsels in favor of doing so to bring this lawsuit to an end and forestall, or at least substantially narrow, further litigation over the meaning and validity of the new amendment. In the interests of "judicial economy," this Court previously has declined to "vacate and remand without addressing" the "merits" in cases involving intervening developments when doing so

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[3] The "settled disposition of a case" over which federal courts lack subject matter jurisdiction (including when the case "has become entirely moot") is "to vacate the judgment below and remand with a direction to dismiss" for lack of jurisdiction. *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 621 n.1 (1989). See *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 648 (2006).

would serve no practical purpose other than providing a "brief round trip to the courts below" before returning to this Court. *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447 (1988). That is what likely would follow from a remand, only the round trip would be prolonged and costly. Judicial economy favors deciding the case now, on the merits.

B. If the Court does not resolve the merits it should vacate and remand.

Even if the Court elects not to reach the merits it should vacate the judgment and remand for reconsideration in light of the regulatory change. When "intervening developments" (including "administrative reinterpretations of federal statutes") produce "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," and where it appears that such reconsideration "may determine the ultimate outcome of the litigation," the generally "appropriate" course is to vacate the judgment and remand in light of the intervening development. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). Thus this Court's general "practice" is to "vacat[e] the judgment" and "remand" where "intervening" events "compel re-examination of the case." *Henry* v. *City of Rock Hill*, 376 U.S. 776, 776-777 (1964) (per curiam). See *Stutson* v. *United States*, 516 U.S. 163, 191-192 (1996) (Scalia, J., dissenting) ("vacating" and "remanding for further consideration" is appropriate "where an intervening factor has arisen that has a legal bearing upon the decision"). That same course would be warranted here if the Court declined to reach the merits.

There are compelling reasons to vacate the judgment. The Ninth Circuit overturned 37 years of

regulatory practice and a settled division of responsibility between federal and state governments, distorting in the process settled CWA and administrative law principles. Its decision prompted petitioners, Oregon, 26 additional States, 26 Senators, 47 Representatives, and numerous *amici* to request this Court's review. It prompted Congress to grant a temporary reprieve of EPA's permitting requirement so this Court could intervene. Pub. L. No. 112-74, Div. E, § 429, 125 Stat. 1046-1047 (2011). And it was important enough that this Court granted certiorari despite EPA urging it not to in light of the planned rule change. For the same reasons the Court agreed to review the decision in the first place, it should at minimum vacate the judgment to prevent the enormous damage the Ninth Circuit's erroneous decision could perpetuate if allowed to stand.

Indeed, as the Chief Justice observed, without vacatur the Ninth Circuit might, "reasonably, think they are done" with this case. Tr. 40; *id.* at 41 (Chief Justice: "I don't know, if I'm the Ninth Circuit, why I would reconsider my ruling, in light of this new regulation"). That result would have pernicious effects, with the Ninth Circuit's incorrect decision remaining law of the case and governing circuit precedent.

A dismissal of the writ as improvidently granted is certainly *not* appropriate. A DIG is warranted only if an intervening change undercuts the reasons that justified the grant of the petition in the first place. *E.g.*, *Triangle Improvement Council* v. *Ritchie*, 402 U.S. 497, 499 (1971). This is not a case where the regulatory change "eliminate[s] the issue or make[s] it unlikely that the question will arise again." Gressman et al., *supra*, at 361. To the contrary, it guarantees that the issues remain live ones, which

the decision below would continue to distort. The questions presented remain of enormous practical importance, and none of the reasons that warranted the grant of review have been affected by the recent amendment, which merely confirmed EPA's long-standing position and the need for reversal.

CONCLUSION

The judgment of the court of appeals should be reversed. Alternatively, it should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. At minimum, the judgment should be vacated and the case remanded for reconsideration in light of the regulatory change.

Respectfully submitted.

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