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

REPLY BRIEF FOR PETITIONERS

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Like the Ninth Circuit, respondent seems to think it is writing on a blank page. But this Court has long recognized that an agency's interpretations of ambiguous statutes and its own regulations are entitled to deference. This is the kind of case for which such deference was intended: the CWA and its implementing regulations are dauntingly complex and address highly technical subject matter that demands expert agency judgment. The regulations at issue, and EPA's contemporaneous interpretations of them, are thoroughly reasoned, long-standing exercises of judgment that are entitled to deference.

The CWA provides for NPDES permitting of some, but not all, channeled stormwater discharges and state regulation of all others. EPA has maintained for 35 years that forest road and most other silvicultural runoff does not fall under the NPDES program and that, regardless of whether "nonpoint runoff from precipitation" is channeled by "ditches," it "is more effectively controlled by the use of planning and management techniques." 41 Fed. Reg. 6282. Independent forestry experts agree. See Amicus Br. of Society of American Foresters.

Remarkably, respondent fails to acknowledge the States' role under the CWA to address stormwater runoff through best management practices. It ignores that states closely regulate logging and forest roads to minimize sediment discharge, as 32 States have explained. States take these responsibilities seriously, as do petitioners. *E.g.*, http://tinyurl.com/ForestProtLaws; OSU, MANAGING WOODLAND ROADS: A FIELD HANDBOOK (2007). BMPs are part of every timber purchaser's contract with the State, enforced by inspectors with authority to shut down logging, and backed by the threat of monetary sanctions for

violations. *E.g.*, http://tinyurl.com/KlahnberryContract §§ 19, 29, 34, 39, 53-54, 60. Ditches and culverts are BMPs on many roads because they reduce sediment discharge and preserve fish passage. Implementing state BMPs should not become the occasion for federalizing control of precipitation runoff that Congress and EPA meant to leave to the States.

Because Congress's 1987 Amendments comprehensively address stormwater discharges, respondent's claims ultimately rest on its contentions that tree harvesting and hauling are unambiguously "industrial activity," or "associated with" it; and that EPA—though EPA has always insisted to the contrary (*e.g.*, Pet. App. 86a-87a & n.5)—in fact labeled those activities "industrial" in its Phase I regulations. It is with these easily refuted assertions, which turn *Chevron* and *Auer* on their heads, that we begin. As the United States explains (at 27, 32), Congress gave EPA "significant discretion" to define what counts as "industrial activity" and what has a "sufficiently close nexus" to be "associated" with it.

A. Channeled forest road runoff is not a discharge "associated with industrial activity."

When Congress fundamentally revamped the treatment of stormwater in 1987, it required permits only for certain narrow categories of stormwater discharges, the contours of which EPA has broad latitude to define. The issue in this case therefore is whether EPA has declared forest road discharges to be among the few types of stormwater discharges that need permits. It has not.

Contrary to respondent's argument (at 43-50), the statutory phrase "associated with industrial ac-

tivity" leaves EPA with substantial discretion. EPA's Phase I regulation is a paradigm example of the kind of agency interpretation that is entitled to *Chevron* deference, and it plainly excludes channeled forest road runoff from the NPDES requirement. Even if the regulation were unclear, EPA's consistent interpretation of it is entitled to *Auer* deference.

1. Respondent claims that timber harvesting is an "industrial activity" within the plain-text meaning of the Act and regulation, and that timber hauling is either part of or "associated" with this industrial activity. It points to a dictionary definition of "industry" and the regulation's reference to SIC 24. Neither argument is persuasive.

a. Respondent says (at 43-44) that "industry" means "productive, esp. manufacturing, enterprise or any large-scale business activity." Observing that petitioners refer to the "forest products industry" (in contexts that include saw and pulp milling and paper and wood manufacturing), respondent asserts that this definition encompasses "mechanized timber cutting and hauling."

That approach proves too much. Many banks engage in "large-scale business activity," and lawmakers and courts often refer to the "financial services industry." *E.g.*, 12 U.S.C. § 4708(a). That does not make banking "industrial activity" within the meaning of Section 1342(p)(2)(B) or Part 122.26(a).

What is more, the dictionary that respondent cites "distinguishe[s]" "industry" from "agriculture." WEBSTER'S NEW WORLD DICTIONARY 690 (3d ed. 1988). See *Tigner* v. *Texas*, 310 U.S. 141, 146 (1940) ("the differences between agriculture and industry call for differentiation in the formulation of pub-

lic policy"). The use of a chain saw, feller-buncher, or cable-yarder to harvest trees no more makes logging "industrial" than using a 20-ton combine to pick and separate corn makes crop harvesting "industrial." And EPA has determined that "[f]orestry roads and silvicultural harvesting * * * more closely resemble agricultural land uses than industrial ones." Pet. App. 124a n.19. On that basis, the dictionary definition does *not* cover timber harvesting. That there are "alternative dictionary definitions" that "mak[e] some sense under the statute" suggests "that the statute is open to interpretation." *Nat'l R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 418 (1992).[1]

b. Given ambiguity in the meaning of "industry," respondent does not seriously contend that EPA lacks authority to define "industrial activity." Instead, respondent argues that timber harvesting is "industrial activity" within the meaning of EPA's regulation itself. That is also incorrect.

Respondent admits (at 45) that under the Phase I regulation only "industrial *facilities*" (including "*fa-*

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[1] There is no statutory support for the Ninth Circuit's *ipse dixit* that Phase I covers all but "de minimus sources" of stormwater. In support of its contention (at 44) that industrial activity excludes only "'churches, schools, [and] residential property,'" respondent cites a snippet from one Member of Congress, who in fact urged that "EPA must have the statutory authority to inject some reason back into" stormwater permitting, after "court decisions" departed from "the intent of Congress" by requiring "extensive permitting." 131 Cong. Rec. 19850. In the same debate, another Congressman said EPA would "identify" those "classes and categories" of stormwater "discharges from industrial sites" that are "required to apply for a permit." *Id.* at 19847 (statement of Rep. Roe).

cilities classified as [SIC] 24") are "considered to be engaged in 'industrial activity'" (40 C.F.R. § 122.26-(b)(14)(ii)); and that only "*establishments* primarily engaged" in various "logging" activities fall under SIC 24 (2JA 64) (emphases added). Thus, EPA specified in promulgating the Phase I rule that industrial stormwater means "storm water discharges from facilities" or "[e]stablishments identified under SIC 24" —that is, establishments "engaged in operating sawmills, planing mills and other mills engaged in producing lumber and wood basic materials." 55 Fed. Reg. 48007-48008. This definition does not include discharges from sites other than industrial *facilities* or *establishments* of that type. That is also why the rule describes its coverage in terms of various activities "at an industrial plant" and on "industrial plant yards." 40 C.F.R. § 122.26(b)(14).

Accordingly, EPA's shorthand reference to SIC 24 was intended to reach traditional industrial sources like mills—as the United States points out (at 24-26)—but not transitory harvesting, which does not occur at an "establishment." EPA's reading comports with the SIC Manual's definition. 2JA 57 ("establishment" is "an economic unit, generally at a single physical location"). It is consistent with the dictionary definition of "establishment" as "a more or less fixed" "place of business." WEBSTER'S THIRD NEW INT'L DICTIONARY 778 (1993). And it encompasses fixed mining, construction, and landfill sites while excluding timber cutting, which is "a transitory operation which may occur on a site for only 2-3 weeks once in a 20-30 year period." 55 Fed. Reg. 48011. The government reasonably explains (at 25 & n.9) that by including SIC 2411 within the reference, EPA sought only to capture the four silvicultural point sources defined in the Silvicultural Rule. EPA has discretion

to determine what its reference to SIC 24 means, and from the time EPA promulgated the rule it did not reach timber harvesting.

Nor does this case involve "facilities." Pet. Br. 39. Respondent now contends that "logging roads" are *themselves* facilities. But that approach cannot be reconciled with the rule's description of "immediate access roads" as "directly related to" facilities (40 C.F.R. § 122.26(b)(14)), or with EPA's explanation that "immediate access roads" are "dedicated for use by the industrial facility." 55 Fed. Reg. 48009.

Respondent argues (at 48) that Part 122.2 *defines* "facility" to include any activity "that is subject to regulation under the NPDES program." But that language *qualifies* rather than defines "facility." See 40 C.F.R. § 122.2 ("[f]acility or activity" means one that is "subject to regulation under the NPDES program"). And that qualification sheds no light on the issue presented here, as shown by respondent's circular logic: Forest roads are subject to regulation because they are "facilities," and they are "facilities" because they are subject to regulation. In the end, respondent never disputes that transitory logging sites are *not* "facilities" within the ordinary meaning of the word.

2. Respondent alternatively claims (at 49-50) that forest roads are covered by the Phase I rule because they are "associated with" logging sites. That, too, is wrong, for two independent reasons. First, we have explained, timber harvesting is not "industrial activity" under the rule. Second, the roads at issue are not "associated with" timber cutting in the sense that EPA understands that term. "Association" is a concept of degree, and EPA as the expert agency gets to decide what degree is sufficient.

Forest roads are not "immediate access roads" associated with industrial activity because they are not "within" or "at facilities." 55 Fed. Reg. 48009; Pet. Br. 40-41. Even if logging sites were industrial "facilities," the roads at issue are not "within" or "at" those sites.[2] Respondent argues instead that logging is the "sine qua non" and "primary use" of some logging roads. But the standard articulated by EPA is different: roads "dedicated for use by the industrial facility" and *not* "public access roads." 55 Fed. Reg. 48009. Neither the Sam Downs nor Trask River Roads—public roads built more than 50 years ago and used intermittently to transport logs but constantly by State foresters, fishermen, hunters, campers, OHV enthusiasts and countless recreational and other users—fit into that category. See http://tinyurl.com/TillamookRecGuide. Indeed, one discharge site alleged by respondent features a school bus pullover.

Respondent also argues (at 45) that logging roads are "associated with" industrial activity because they are "sites used for 'loading and unloading, transportation, or conveyance of any raw material.'" But even the Ninth Circuit did not so conclude, for good reason: respondent's expansive reading would swallow the entire U.S. road system. The Phase I regulation sensibly limits "material handling sites" (where "storage, loading and unloading, transportation, or conveyance of any raw material" take place) to those "at

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[2] Respondent claims (at 49) that it is "irrelevant" whether the logging roads here are "immediate access roads" because the list in which that phrase appears is not "exhaustive." But regardless of what *other* objects may fall within the definition, the *roads* EPA considered associated with industrial activity are *immediate access roads*.

an industrial plant," and excludes even "plant lands separate from the plant's industrial activities." 40 C.F.R. § 122.26(b)(14); see 60 Fed. Reg. 50835-50836.

3. Finally, there is the Phase I regulation's reference to the Silvicultural Rule. The regulation says in plain terms that "discharges from facilities or activities excluded from the NPDES program under this part 122," which includes the Silvicultural Rule, are not "associated with industrial activity." 40 C.F.R. § 122.26(b)(14). That sentence, which EPA included for the express purposes of excluding transitory logging operations from the definition of "industrial activity" (55 Fed. Reg. 48011), is alone enough to require reversal.

Respondent ignores this issue. In its view (at 50), "[b]ecause the Silvicultural Rule itself does not exclude the discharges at issue here," EPA's "reference" to the Rule in the Phase I regulation "cannot do so either." That is incorrect.

We demonstrate below why respondent's interpretation of the Silvicultural Rule is mistaken. But even if respondent were correct that the Rule is effectively invalid, it would make no difference for purposes of interpreting the Phase I rule. The question with respect to *that* regulation is whether EPA had authority under the 1987 amendments to exclude those discharges that EPA at the time interpreted the Silvicultural Rule to cover. It did. The Ninth Circuit's later invalidation of the Silvicultural Rule has no bearing on that conclusion. The government offered this same reading of the Phase I regulation's reference to the Silvicultural Rule in a 2003 brief (Pet. App. 86a-87a), repeated it below (1JA 42 n.10), and maintains it here (U.S. Br. 25 n.9). Respondent still has no answer.

4. Any doubt about these issues would be resolved by *Auer* deference to EPA's consistent interpretation of its Phase I regulation. See Pet. Br. 41-43; Pet. App. 124a ("forestry roads" are not "'directly related' to activities associated with an 'industrial plant' under any plain language reading of the regulation"); 60 Fed. Reg. 50835 (explaining, in preamble to the Multi-Sector General Permit for Industrial Activities, "EPA's determination" that "harvesting activities," including "felling, skidding, preparation (e.g., delimbing and trimming), [and] loading and initial transport of forest products from an active harvest site" are "not required to be covered under [NPDES] storm water permits").

EPA's interpretation of its "own regulations" is "controlling unless plainly erroneous or inconsistent with the regulation" (*Auer*, 519 U.S. at 461), or if it does not reflect its "fair and considered judgment," "conflicts with a prior interpretation," or is but "a convenient litigating position." *Christopher*, 132 S. Ct. at 2166; see *Talk Am.*, 131 S. Ct. at 2260-2261. A "reasonable" agency interpretation has "controlling weight." *Thomas Jefferson Univ.*, 512 U.S. at 515. No exception to *Auer* deference applies here, and respondent's supposedly "better" reading of EPA's regulation is beside the point. Pet. Br. 35-37; Law Prof. Br. Supporting Pet. 20-32.

B. Channeled forest road runoff is not a "point source" discharge.

1. In arguing (at 31-38) that the Ninth Circuit's interpretation of the CWA's "point source" definition is the *better* one, respondent misses the point: EPA's long-standing interpretation of the CWA fills a gap in the statute, is rational, and accordingly is entitled

to *Chevron* deference. The Ninth Circuit erred in substituting its view for EPA's.

a. Respondent asserts that the statute is "straightforward" because it defines "point source" to include "*any* pipe, ditch, [or] channel," and the word *any* "means *all*." Br. 31-32 (emphasis added). In respondent's view, *all* "pipes, ditches, and channels" are categorically "point sources," and *all* water that "is collected, channeled, and discharged through" such conveyances "is inescapably a point source discharge." Br. 32-33.

But that is self-evidently wrong. As respondent acknowledges (at 34), "the CWA contains an explicit exemption" from the definition of point source, which, by the statute's own terms (33 U.S.C. § 1362(14)), "does not include agricultural stormwater discharges." Accordingly, *some* discharges from ditches and channels are *not* from point sources. So much for "any" meaning "all."

Beyond that, under respondent's interpretation virtually all runoff would become "point source" as it leaves graded surfaces and erodes channels. But that interpretation would eliminate the CWA's careful differentiation between point source discharges from "discernible, confined, and discrete" sources best regulated through effluent limitations and nonpoint source discharges best regulated through BMPs. That too suggests the term is subject to interpretation, as every court to consider the matter has held. See Pet. Br. 21.

Against this backdrop, the definition of "point source" is ambiguous as it concerns forest road runoff. That follows from the CWA's language, including the words "discrete" and "by any person" (Pet. Br. 19-

25) and from its structure (*id.* at 25-30). And EPA's Silvicultural Rule, which interprets "point source" as *not* covering such runoff, is a reasonable interpretation entitled to *Chevron* deference.

b. Respondent objects (at 32-33) to our and the government's reliance on the ambiguity of the term "discrete," contending that when a statute lists "generic requirements" (point sources must be "discrete") followed by "expressly listed" examples that satisfy the requirements ("ditches"), the "generic requirements" become "immaterial as applied to" the examples listed. Respondent's own example proves that is not so. A statute regulating all "deadly weapons" could not sensibly be read to cover *plastic toy* crossbows simply because it "expressly lists" a "crossbow" as a general example of a "deadly weapon." So the word "deadly" would continue to limit even items expressly listed. Just so here, concerning the word "discrete." And respondent does not disagree that channeled silvicultural stormwater has no discrete source.

c. Responding to our contention (at 24) that silviculture is a kind of agriculture falling within the agricultural stormwater exception, respondent notes (at 35) that when Congress enacted the CWA 15 years before it enacted that exception, it used "agriculture" and "silviculture" conjunctively. Thus, according to respondent, Congress must have acted intentionally when it omitted the word "silviculture" from the agricultural exception. That is wrong for three reasons.

First, the "negative implications" that may be drawn from the disparate inclusion and exclusion of a word from different statutory provisions are strongest when "the relevant statutory provisions

were considered simultaneously"; they are limited when, as here, "the two relevant provisions were not considered or enacted together." *Gomez-Perez* v. *Potter*, 553 U.S. 474, 486 (2008).

Second, those implications are most persuasive when the provision omitting the relevant word "tracks the language and structure" of the provision including it. *City of Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 434 (2002). They are "undermined" when the relevant provisions address different issues in "different terms" and are "not modeled after" one another. *Gomez-Perez*, 553 U.S. at 486-487. That is the case here: 33 U.S.C. §§ 1288(b)(2)(F) and 1314(f)(2) address different issues and are drafted with different grammatical and syntactical structures bearing little resemblance to Section 1362(14). That is even more clearly the case with respect to 33 U.S.C. § 1344(f)(1). See Resp. Br. 34. Section 404 addresses fill, and "EPA's function is different, in regulating fill, from its function in regulating other pollutants." *Coeur Alaska* v. *Se. Alaska Conservation Council*, 557 U.S. 261, 274 (2009). And unlike Section 402, Section 404 unambiguously would require a permit without the express exemption.

Finally, the disparate inclusion-omission rule is but one example of the general canon that a phrase must be read within its broader statutory context. It is trumped when it produces a result "contrary" to Congress's overall "purpose" reflected in "the broader context of the statute as a whole." *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1398-1399 (2011). In a situation like that, "[t]he omission of [certain] language from" one statutory provision and its inclusion in another is best understood as "reflect[ing] Congress' belief

that [the word] was unnecessary" in the other. *Id.* at 1400 n.7.

That describes this case exactly. We gave a number of reasons why the CWA's structure made it unnecessary for Congress separately to include the word "silviculture" as part of the broader agricultural exemption (Pet. Br. 23-28); each one has gone unanswered.

We explained (at 31-32) that if Congress wanted to abolish the Silvicultural Rule, it could have said so as part of the 1987 stormwater amendments, or earlier.[3] Instead, it inserted the agricultural exception and otherwise left it to EPA to determine which stormwater discharges should be regulated as "associated with industrial activity." In a situation like that, "congressional failure" to "repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Bell Aerospace*, 416 U.S. at 275.

We explained, too (at 26-27), that the "conceptual differentiation" between "the pollution control mechanisms available for point and nonpoint sources" is reflected in the CWA's bifurcated federal-state regulatory scheme. That structure suggests Congress intended forest road runoff—which is "not susceptible"

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[3] EPA early on promulgated regulations subjecting irrigation return flows to NPDES permitting. 41 Fed. Reg. 28493 (July 12, 1976). Congress quickly overturned that rule. Pub. L. No. 95-217, § 33, 91 Stat. 1566, 1577 (1977). Though the same regulation referenced the Silvicultural Rule, Congress left that Rule undisturbed. Congress's rejection of a proposed CWA amendment exempting "silviculturally related" discharges from permitting (relied on by respondent, at 37) is likewise consistent with Congress's satisfaction with the Silvicultural Rule.

to regulation by "effluent limitations" (40 Fed. Reg. 56932)—to be regulated by States as nonpoint source discharges. That is especially apparent because respondent's contrary reading would create a catch-22. Ditch-and-culvert systems are common BMPs to address *non*-channeled forest road runoff. According to respondent, implementation of state BMPs to regulate avowedly *non*point source runoff would transform the runoff into a point source discharge subject to *federal* regulation. This "expansive interpretation would 'result in a significant impingement of the States' traditional and primary power over land and water use.'" *Rapanos* v. *United States*, 547 U.S. 715, 737-738 (2006) (plurality). Congress could not have intended such a result. Indeed, when Congress revised the treatment of stormwater in 1987, it was to ensure that most channeled stormwater would *not* trigger a permit requirement.

2.a. Respondent contends (at 38) that the Silvicultural Rule denotes ditches "draining logging roads as point sources." The rule, however, unambiguously states otherwise. It provides an exclusive list of four silvicultural point sources: "rock crushing, gravel washing, log sorting, or log storage facilities." 40 C.F.R. § 122.27(b)(1). It then says that the term "[s]ilvicultural point source" discharge "*does not include*" discharges related to "*non-point source* silvicultural activities," including "harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff." *Ibid*. (emphasis added).

That language is clear. The rule classifies channeled forest road runoff—"surface drainage" related to "harvesting operations" and "road construction

and maintenance"—as nonpoint source and *not* one of the four "[s]ilvicultural point sources."

Respondent nevertheless contends (Br. 39) that the only "linguistically possible" interpretation of this text is the opposite of what it actually says. To support that strange theory, respondent points to 40 C.F.R. § 122.2, which states that a "[d]ischarge of a pollutant" "includes" surface runoff "which is collected or channelled by man." But that does not mean that *all* channeled runoff is *categorically* a "point source" discharge. Indeed, in light of the agricultural stormwater exception, it could not.

What is more, respondent's reading of Part 122.2 would reduce the Silvicultural Rule to a pointless tautology: "non-point source natural runoff is not a silvicultural point source." Resp. Br. 15.

b. Respondent repeats (at 39) the Ninth Circuit's conclusion that "natural runoff" is better interpreted as meaning *non-channeled* runoff. But EPA has rationally interpreted "natural runoff" to mean runoff "from precipitation events," channeled or not (Pet. App. 113a-114a), and that conclusion is entitled to *Auer* deference. The "minor wording changes" EPA made to the Rule in 1980 (45 Fed. Reg. 33372; see also 55 Fed. Reg. 20521) could not have worked, unnoticed, the radical revision in meaning that respondent and the Ninth Circuit postulate. Furthermore, under the rule of the last antecedent—relied on by respondent in other contexts—the phrase "from which there is natural runoff" does not modify "surface drainage" (40 C.F.R. 122.27(b)(1)), which can be read independently to exclude forest road runoff from permitting.

c. Finally, there is the matter of *Auer* deference. Whatever might be said of respondent's strained reading of the Silvicultural Rule, there assuredly is no merit to its assertion (at 41) that EPA's interpretation of the Rule is "illegitimate." EPA's approach is consistent with the regulatory language, reflects EPA's expert judgment, and was rationally explained by the agency in preambles and briefs. See 40 Fed. Reg. 56932; 41 Fed. Reg. 6282; 41 Fed. Reg. 24710; 55 Fed. Reg. 20522; 64 Fed. Reg. 46077; U.S. Br. in *Newton* (8th Cir. Sept. 8, 1997) (see Pet. Br. 34 n.4); Pet. App. 114a. It has been consistently expressed and enforced for 35 years, ever since EPA stated in explaining the final rule that "drainage [that] serves only to channel diffuse runoff from precipitation events" is "nonpoint in nature." 41 Fed. Reg. 24711. Even if the Rule were ambiguous, *Auer* would require deference to EPA's interpretation for all the reasons set forth in our opening brief (at 29-32).

C. Respondent's interpretations would undermine the purpose of the CWA.

We have demonstrated that the Ninth Circuit's decision would fundamentally undermine Congress's purpose in enacting the CWA. Pet. Br. 43-50. It would impose astronomical costs on regulators and regulated alike; invite endless litigation at all phases of the permitting process; and inject destructive uncertainty concerning an issue that has been governed for decades by settled, sensible, and workable rules that protect our Nation's waterways. And it offers no environmental benefits whatever to offset these enormous costs.

Respondent replies (at 1, 52-53) that public policy arguments must be directed to Congress, not this Court. That is true, but irrelevant. Our point was

that the Ninth Circuit's holding throws a wrench into EPA's pursuit of its statutory mission. And constructions of statutes that undermine "the achievement of an agency's ultimate purposes" in this way are disfavored absent "compelling evidence" to support them, which is conspicuously lacking here. *Weinberger* v. *Bentex Pharm., Inc.*, 412 U.S. 645, 653 (1973). EPA's conclusion that pollution from forest road runoff is "better controlled through the utilization of best management practices" must be taken seriously. 41 Fed. Reg. 24710. NEDC and its amici have no claim to know better than EPA, or the amici States to which Congress gave authority to regulate nonpoint sources and whose "primary responsibilities and rights" over land and water use Congress meant to "preserve and protect." 33 U.S.C. § 1251(b). Notably, no State supports respondent.

Respondent recites (at 7-8, 51-52) general reasons why forest road runoff should be regulated. But the question here is not *whether* such runoff should be regulated, but *how*. As we explained (at 43-50), and as EPA concluded from the outset (*e.g.*, 40 Fed. Reg. 56932), the most sensible way to regulate forest road runoff is through state BMPs, which experts and regulators alike agree work *better* than centralized NPDES permitting focused on effluent limitations.[4]

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[4] Respondent suggests (at 11, 53-54) that this case involves a "few miles" of road. But the complaint (2JA 4, 15-16, ¶¶ 6, 57) alleges "459 different discharge points" along some 40 miles of road, and violations on the two named roads *and* at "hundreds of other locations throughout Oregon State Forests." Many hundreds of thousands of miles of road would fall within the reach of the Ninth Circuit's ruling. The U.S. Forest Service pre-

D. The courts lack jurisdiction to invalidate EPA regulations in enforcement actions like this one.

1. Section 509(b) bars this suit. From the outset, NEDC sought to challenge the *validity* of EPA's Silvicultural Rule. Its complaint, after quoting the Rule, claims that "EPA may not exempt" channeled silvicultural runoff from NPDES permitting. 2JA 12 ¶¶ 40-41. As the government told the Ninth Circuit, if a "request for relief against a private party logically depends on the proposition that an EPA regulation is invalid, the suit is an impermissible 'challenge' to the regulation itself." 1JA 56. The district court should have dismissed this case *at the threshold* for lack of jurisdiction, because the complaint itself revealed that plaintiff could not prevail unless the court invalidated EPA rules.

As in *Seminole Rock*, "[a]ny doubts" about the meaning of the Phase I regulation and Silvicultural Rule "are removed by reference to the administrative construction," particularly constructions issued "concurrently with" the Rules. 325 U.S. at 417. EPA consistently has explained that the regulations exclude forest road runoff, even if channeled, from the NPDES program. Pet. Br. 30-31, 35-37. From the beginning, EPA said that "ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff from precipitation" are excluded from "the § 402 permit program." 41 Fed. Reg. 6282. According to *Seminole Rock*, failure to defer to that pronouncement is to invalidate the regulation it interprets.

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dicts that it alone would have to obtain up to 400,000 permits if the decision below is left standing. See Pet. 31.

Respondent argues that a court may not defer to an agency interpretation that would make the regulation inconsistent with a federal statute. But as the United States observes (at 17), a court adjudicating a citizen enforcement action "may not disregard pertinent EPA regulations on the ground that they are inconsistent with the statute, since that would constitute the 'judicial review' of EPA action that Section 1369(b)(2) forbids." Section 509(b)(2) is clear that judicial review of agency action "shall not" occur in any "proceeding for enforcement" like this one. In such cases, *Seminole Rock* says that deference to a reasonable agency interpretation is the end of the matter. U.S. Br. 22.

Citing *Duke Energy*, the government nevertheless argues (at 17-18) that Section 509(b) would not bar a court from *interpreting* a rule to make it consistent with the court's construction of the statute. That is wrong for at least two reasons.

First, this Court in *Duke Energy* did not find that the court of appeals had engaged in "permissible" interpretation. It held that the lower court's holding could "only be seen as an implicit declaration that [the] regulations were invalid as written." 549 U.S. at 573. The same is true here. The text of both the Silvicultural Rule and the Phase I stormwater regulation clearly says that no permit is required; EPA's contemporaneous explanations confirm this meaning; yet the Ninth Circuit "interpreted" the rules to require a permit. A rule "interpretation" is no interpretation at all if it results in the precise opposite of what even the Ninth Circuit acknowledged (Pet. App. 32a) was "the intent" of the drafter. It is, instead, an *invalidation*.

Second, nothing in *Duke Energy* overrides the holding in *Seminole Rock* that the "statutory validity of the regulation" "must in the first instance be presented to" the court of appeals designated by the governing statute. 325 U.S. at 418-419. Respondent (at 20-21) points to *Seminole Rock*'s statement that "[t]he intention of Congress" in "some situations may be relevant in the first instance in choosing between various constructions." 325 U.S. at 414. But in those "situations" there is no administrative interpretation. Where there is one, as here, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Ibid.* Then a court's "only tools" are "the plain words of the regulation and any relevant interpretations of the Administrator." *Ibid.*

Seminole Rock thus controls this case with respect to the Ninth Circuit's statutory avoidance ruling. Here, both regulations unambiguously exempt the forest road activities at issue from the NPDES program. The Ninth Circuit's rejection of the regulations' unambiguous meanings on the basis of the court's own view of the underlying statute was a clear-cut invalidation of each. Even if the regulations were ambiguous, *Seminole Rock* and *Auer* mandate that "controlling weight" be given to EPA's view that its own regulations exempt channeled forest road runoff from the permit requirement.

2. Respondent now argues for the first time (at 23-24) that Section 509(b) "does not apply" because EPA's regulations "did not issue or deny an NPDES permit" (citing subdivision (F) of Section 509(b)(1)). The question whether EPA's actions fit within one of the Section 509(b)(1) categories is not properly

framed for decision because it was not raised, argued, or decided below. To the contrary, respondent conceded below that "Section 509(b)" is "one of at least two ways *to challenge an NPDES permit exemption*." NEDC Opp. to Rhg. 8 (Dkt. 111) (9th Cir. Dec. 13, 2010) (emphasis added); *id.* at 9 (similar). The Ninth Circuit apparently agreed—without discussion—holding not that the suit fell outside the 509(b)(1) categories, but that the Section 509(b) exception for grounds arising after the 120-day filing period applied. Pet. App. 7a. It would be inequitable to allow respondent to change its tune now. See *New Hampshire* v. *Maine*, 532 U.S. 742, 750-751 (2001). That is especially so because respondent did no more than mention in its brief in opposition this new argument that has divided the courts of appeals. Opp. 26 n.3; see *Friends of the Everglades* v. *EPA*, 2012 WL 5274826, at *6 (11th Cir. Oct. 26, 2012); Resp. Br. 30 n.10 (labeling a recent Sixth Circuit decision "simply incorrect").

Respondent mentions only subdivision (F). But subdivision (E) separately provides for exclusive court of appeals review of EPA action "approving or promulgating any effluent limitation or other limitation." The term "other limitation" addresses limitations other than "effluent limitation[s]." See *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2071-2072 (2012) (general language "will not be held to apply to a matter" dealt with by specific language). Here, the Silvicultural Rule and Phase I regulation set forth limitations on what can be done without an NPDES permit; and they limit the silvicultural discharges that are subject to permitting. Indeed, EPA has argued (for example in *Friends of the Everglades*, *supra*) that a rule that states simply that an activity requires no permit falls within sub-

division (E). As then-Judge Ginsburg wrote—"follow[ing] the lead of the Supreme Court in according section 509(b)(1) a practical rather than a cramped construction"—consolidated permit regulations fit within the broad "effluent limitation or other limitation" language of subdivision (E). *Natural Res. Def. Council* v. *EPA*, 673 F.2d 400, 403-405 (D.C. Cir. 1982).

Furthermore, this Court's precedents establish that Section 509(b)(1)(F) applies to regulations specifying which activities are subject to permitting. As the Court explained in *du Pont*, it would be "truly perverse" if the courts of appeals could review "individual actions issuing or denying permits" but have "no power of direct review of the basic regulations governing those individual actions." 430 U.S. at 136; see also *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 196 (1980) (review of EPA's disapproval of effluent restrictions should be "in the courts of appeals under § 509(b)(1)(F)" because it was "functionally similar" to issuance or denial of an NPDES permit).

That is especially clear here. To begin with, the Silvicultural Rule is the practical equivalent of a blanket permit for forest road discharges, providing the same insulation from liability that an NPDES permit—subject to court of appeals review under Subsection (F)—would provide. Furthermore, the Silvicultural and Phase I Rules subject numerous activities to NPDES permitting and effluent limitations, prohibiting those activities unless a permit is obtained. The rules as a whole surely fall within 509(b)(1)'s scope; it should make no difference that the particular aspect being challenged defines when a permit and effluent limitations are not required. See U.S. Br. 16 n.7.

3. Respondent argues (at 21) that adherence to the 120-day deadline in Section 509(b) "would open the floodgates" to "'hypothetical' lawsuits" addressed to every possible future interpretation of agency regulations. But it is respondent's argument that is hypothetical. The Federal Register gave clear notice when the rules at issue were adopted that channeled forest road runoff does not require a permit. See 44 U.S.C. § 1507 (Federal Register publication "give[s] notice of the contents of the document to a person subject to or affected by it"). The insubstantial changes EPA made to the Silvicultural Rule in 1980 had no impact on the clear notice of its scope that EPA gave in 1976, when respondent had the opportunity to raise an objection or forever hold its peace.

Section 509(b) *reduces* litigation by barring lawsuits filed after the 120-day window and preventing serial district court citizen suits in which EPA need not be a party. By contrast, respondent would allow *unending* enforcement actions over the validity of regulations, with the possibility of inconsistent district court rulings. Enforcing Section 509(b)'s 120-day deadline would not "needlessly burden the federal courts" (Resp. Br. 26), but would "best comport with the congressional goal of ensuring prompt resolution of challenges to EPA's actions." *Crown Simpson*, 445 U.S. at 196.

For these reasons, courts lack subject matter jurisdiction over the regulatory challenges presented in this enforcement action.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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