Nos. 11-338 and 11-347

IN THE

Supreme Court of the United States

DOUG DECKER, in his official capacity as Oregon State Forester et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC. et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

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

SUPPLEMENTAL BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Pursuant to this Court's order of January 8, 2013, this supplemental brief addresses the following question: What is the effect of the Environmental Protection Agency's amendment to its stormwater-discharge rule on this case?

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SUPPLEMENTAL BRIEF FOR RESPONDENT

INTRODUCTION

Respondent claims that stormwater discharges from logging roads are point-source discharges "associated with industrial activity," 33 U.S.C. § 1342(p)(3)(A) – and thus subject to the Clean Water Act's NPDES permit requirement – when two conditions are present: (1) the roads use man-made pipes, ditches, and channels to collect and funnel stormwater into navigable waters; and (2) the roads are actively used for mechanized timber harvesting and hauling operations.[1]

Several weeks ago, the Environmental Protection Agency (EPA) amended its stormwater regulations to provide that the only types of facilities related to logging that are considered to be engaged in "industrial activity" are "rock crushing, gravel washing, log sorting, and log storage," as well as sawmills. 77 Fed. Reg. 72,970, 72,972 (Dec. 7, 2012) (amending 40 C.F.R. § 122.26(b)(14)(ii)). EPA, however, did not change any regulation describing what it means to be "associated with" a given

[1] Justice Scalia asked at oral argument how one distinguishes active-hauling roads from other logging roads. Tr. Oral Arg. 35. The answer is that timber contracts, such as those here, designate particular roads to be used to execute the logging operations they contemplate. Resp. Br. 50. Oregon law also distinguishes between "inactive" logging roads and "active" roads used for "log hauling." JA 117-19 (Or. Admin. R. 629-625-0600 & -0700).

industrial activity. Nor did EPA address whether the specific kinds of logging roads at issue in this case are "associated with" the industrial activity that occurs at sawmills or other logging facilities. Indeed, while EPA's regulations reject the Ninth Circuit's decision insofar as it can be read to hold that *all* logging roads are associated with industrial activity, EPA's amendment appears to leave open the precise question in this case, stating in the preamble merely that "many" logging roads are not associated with industrial activity. *Id.* at 72,970.

This Court has ordered the parties to address the effect of EPA's new rule on the questions presented in this case. The new promulgation does not affect the so-called "jurisdictional" question – namely, whether 33 U.S.C. § 1369(b) impedes the interpretive pathways available to resolve respondent's lawsuit. For the same reasons the previous version of EPA rule was not subject to Section 1369(b), *see* Resp. Br. 17-30; Amicus Br. of Law Profs. on Section 1369(b) Jurisdiction 6-37; *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1286-88 (11th Cir. 2012), the amended version is not either. Nor does the amended rule undercut the Ninth Circuit's holding that the discharges at issue are from "point sources." If anything, EPA implicitly admits that they are. EPA asserts that it "retains the authority" to regulate at least some logging-road discharges "under either CWA section [1342](p)(2)(E) or [1342](p)(6)." 77 Fed. Reg. 72,972; *see also id.* (EPA is "considering" designating "a subset of stormwater discharges from forest roads for regulation under section 402(p)"). Those statutory sections apply *only to point-source discharges*.

That leaves the question whether the discharges here are "associated with industrial activity" under Section 1342(p)(3)(A). For the reasons that follow, respondent retains meritorious claims for both forward-looking and backward-looking relief based on that statute. We continue to believe that it would be most prudent for this Court to allow lower courts to consider these claims in light of EPA's new rule in the first instance. But we outline them below.

ARGUMENT

I. Respondent Still Has A Viable Claim For Forward-Looking Relief.

Respondent maintains a claim for forward-looking relief because the plain text of the Act requires permits for the discharges. But even if that text were ambiguous, EPA's amendment would not defeat respondent's claim.

A. The Plain Text Of The Act Requires Permits For The Discharges At Issue.

As respondent and *amici* have explained, discharges from active-hauling logging roads are so plainly "associated with industrial activity" – as that phrase is used in Section 1342(p)(3)(A) – that the Act leaves no room for exempting them from the NPDES permit requirement. *See* Resp. Br. 4-5, 43-44; Amicus Br. of Dr. Boston 3-6. It bears remembering that Section 1342(p) grants EPA discretion over whether to require permits for stormwater point-source discharges "except[]" when they are "associated with industrial activity." The "industrial activity" phrase is thus designed to *restrict* EPA discretion, not – as petitioners and EPA would have it (Industry Reply Br. 4; U.S. Br. 27) – to confer it. It

would thwart Congress's design to hold that this statutory restriction lacks any core meaning that constrains EPA.

In light of the importance of the statutory term "industrial activity," petitioners' failure to offer any definition that excludes mechanized timber harvesting and hauling operations is all the more telling. To the extent petitioners say anything at all, the Industry Petitioners assert that "[t]he use of a chain saw, feller-buncher, or cable-yarder to harvest trees" is not meaningfully different from "using a 20-ton combine to pick and separate corn." Industry Reply Br. 4. Maybe so. But discharges associated with such crop harvesting are exempt from the NPDES permit requirement not because they are not industrial, but rather because the agricultural industry has obtained from Congress a special exemption from the Act. *See* 33 U.S.C. § 1362(14); Resp. Br. 34. The timber industry has repeatedly lobbied for a similar exemption but thus far has been unable to obtain it. Resp. Br. 3 & n.1, 37-38.

Nor has EPA ever articulated any reason why mechanized timber harvesting and hauling operations are not "industrial activity." Instead, EPA has explained only that Congress used the term "industrial" in contrast to activities that are "wholesale, retail, service, or commercial" in nature. 55 Fed. Reg. 47,990, 48,007 (Nov. 16, 1990). Mechanized timber harvesting and hauling clearly fall in the former category.

B. Even If The Act Were Ambiguous, EPA's Amendment Would Not Defeat Respondent's Claim.

Even if EPA's regulations were relevant to whether point-source discharges from active-hauling logging roads were "associated with industrial activity," EPA's amendment – for two independent reasons – would not defeat respondent's claim for forward-looking relief.

1. EPA's regulations still support the claim respondent has alleged in its complaint. EPA's amended rule continues to designate sawmills and other facilities that enable logging operations as "industrial" facilities. *See* 77 Fed. Reg. 72,970; 2JA 64 (SIC Codes 241 & 242). The amendment's preamble also reaffirms EPA's view that "immediate access roads" – defined as "roads which are exclusively or primarily dedicated for use by the industrial facility" – are "associated with" industrial activity. 55 Fed. Reg. 48,009, *cited in* 77 Fed. Reg. 72,971. Furthermore, EPA regulations continue to deem sites used for the "transportation" and "conveyance of any raw material" for an industrial facility to be "associated with" industrial activity. 40 C.F.R. § 122.26(b)(14).

Under these provisions, discharges from active-hauling logging roads are associated with industrial activity. The "primar[y]" use of such roads is to access and haul timber for sawmills. Such roads are also the reason why rock-crushing facilities exist in the forest near harvesting areas; the gravel these facilities generate is used to fill and resurface roads so they can support the heavy truck traffic between the field and the mill. And when trucks transport

timber to log sorting and storage facilities, they do so following these contractually designated haul routes. At the very least, respondent is entitled to develop a factual record on these issues.

To be sure, EPA asserts in the preamble of the new rule that "stormwater discharges from logging roads do not constitute stormwater discharges associated with industrial activity." 77 Fed. Reg. 72,970. But in light of other language in the preamble, this cannot mean that point-source discharges from logging roads are *never* associated with industrial activity – only that such discharges are not *always* so associated. Specifically, the preamble clarifies that due to their "recreation and general transportation" uses, "many" logging roads are not primarily used by industrial facilities. *Id.* at 72,972. "Many" is a very different word than "all." The flip side of that word signals that some fraction of logging roads *is* associated with industrial activity. That fraction comprises roads devoted to active harvesting and hauling – that is, the roads at issue here.[2]

2. If EPA's amendment were read to foreclose active-hauling logging roads from being associated with industrial activity, the regulation would not be

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[2] If EPA asserts for the first time in its supplemental brief that the precise type of logging roads at issue here are not "associated with industrial activity," this Court should afford no deference to the assertion. EPA has declined every opportunity before now to take a clear position on this issue. It should not be allowed to claim deference at a point when respondent lacks the ability to respond to its argument. *See generally* Amicus Br. for Law Profs. on the Propriety of Admin. Deference.

entitled to administrative deference. This is so for two reasons.

a. An EPA regulation foreclosing active-hauling logging roads from being associated with industrial activity would be "arbitrary" and "capricious." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984). As this Court implicitly acknowledged last Term, "the very paradigm of arbitrary agency action" is an "unexplained inconsistency" in regulations concerning materially identical issues. *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2019 (2012) (internal quotation marks and alteration omitted). Such would be the case if EPA exempted active-hauling logging roads from the NPDES system.

The SIC Manual – the manual created by the Office of Management and Budget that EPA incorporates for purposes of identifying which kinds of activities are industrial in nature – classifies "logging" (that is, "cutting timber . . . in the field"), along with other silvicultural activities listed in industry group 241 and sawmills, as industrial manufacturing activity. 2JA 64-65 (SIC 241 & 242). EPA's original regulations accepted these classifications. JA 99-100. EPA's amendment continues to accept that "rock crushing, gravel washing, log sorting, and log storage facilities" related to logging are industrial activities. 77 Fed. Reg. 72,972. It also continues to recognize sawmills as industrial. *Id.* But the amendment treats *other* activities within SIC 241, including timber harvesting, as non-industrial. What is the basis for this differential treatment? The preamble to EPA's amendment does not say. Nor can respondent conceive of what it might be. Timber harvesting is

considerably more mechanized and large-scale than, say, rock crushing and gravel washing. And both typically occur in the field, away from any plant or factory.

Even if some legitimate reason existed for distinguishing among these various logging activities, there surely can be no justification for differentiating between timber harvesting and certain other mechanized activities that EPA recognizes as industrial – namely, surface mining, construction projects larger than five acres, and landfill operations. *See* 40 C.F.R. § 122.26(b)(14)(iii) (mining), (x) (construction), (v) (landfills). Extracting rock or minerals from the land is not materially different than extracting timber. What is more, construction activity itself often involves clearing forest land to make room for the buildings or facilities to be erected. Given that EPA acknowledges that removing trees for a residential development is industrial activity, it would be absurd simultaneously to deem the identical activity of cutting timber for sawmills to be non-industrial.

The Industry Petitioners attempt to justify such differential treatment by suggesting that timber cutting is more "transitory" than mining, construction, or landfill operations. Industry Reply Br. 5. The short answer is that EPA has never made any such argument. Nor is it apparent why a "transitory" activity might be necessarily less industrial than a non-transitory one.

At any rate, logging is no more transitory than construction or many types of exploratory drilling and mining. The Industry Petitioners suggest that a harvesting operation "may" take "2-3 weeks," but

reference guides say that such operations "frequently" last "6 months to one year." *FAQs*, Univ. of Md. Extension, Forest Stewardship Education, http://tinyurl.com/NEDC-S2 (last visited Jan. 21, 2013).[3] This is the same amount of time, for example, that many construction projects last.

b. New regulations implementing the Act not only must be substantively legitimate but also must comply with the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* Under the APA, an agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). The APA also requires EPA rationally to respond to comments "which, if true, . . . would require a change in [the] agency's proposed rule." *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1188 (D.C. Cir. 1990) (internal quotation marks omitted); *see* 5 U.S.C. § 553(c).

If necessary, respondent will pursue a challenge to EPA's amendment as violating these requirements. EPA has provided no rational explanation for concluding that the only facilities under SIC Code 2411 that are "industrial" are rock crushing, gravel washing, log sorting, and log

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[3] The Industry Petitioners quote a page of the Federal Register for their assertion but do not divulge that EPA was merely paraphrasing two comments seemingly made by timber companies. Industry Reply Br. 5 (quoting 55 Fed. Reg. 48,011). EPA expressed no agreement with the comments.

storage. Nor has EPA provides any response to comments from respondent and others that the active cutting and hauling of timber is industrial in nature. *See* http://tinyurl.com/NEDC-S6 (Oct. 4, 2012); http://tinyurl.com/NEDC-S9 (June 22, 2012). Thus far, EPA has merely indicated that it would prefer to regulate point-source discharges on logging roads outside of the NPDES system. 77 Fed. Reg. 72,972. But such a bureaucratic preference is irrelevant to the question whether the discharges here are associated with industrial activity, and "[n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

If, as respondent contends (Resp. Br. 23-30), such claims must be initiated in district court, respondent will do so on remand. Alternatively, if such claims are subject to Section 1369(b), respondent will pursue them through the protective petition it filed earlier this month. *See* Petition for Review, *NEDC v. Jackson*, No. 13-70057 (9th Cir. Jan. 4, 2013). Either way, no judgment may be issued against respondent in this case while the legality of EPA's recent amendment is subject to challenge.

II. If Necessary, Respondent Could Press A Claim For Solely Backward-Looking Relief.

Assuming this Court agrees that respondent retains a viable claim for forward-looking relief, this Court should remand and go no further. But even if respondent were to lack a claim for forward-looking relief, a remand would still be required because this case would then present an issue neither this Court

nor, so far as we know, any lower court has ever considered: whether plaintiffs in a citizen suit who filed a complaint properly alleging ongoing violations of the Act may seek only backward-looking relief (either civil penalties or remediation) when the law changes during litigation.

When a statute is repealed during a lawsuit, the general savings statute, enacted in 1871, provides that the repeal "shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." 1 U.S.C. § 109. This provision applies equally to regulations. *United States v. Hark*, 320 U.S. 531, 536 (1944); *cf. Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535, 554-55 (1954). And "[w]hether the earlier [provision] has been amended or repealed outright is of no consequence; the general savings statute applies in either instance." *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 432 (2d Cir. 2001). The statute is designed to "maintain the integrity of the law by insisting that those who violate it suffer the consequences." *United States v. U.S. Coin & Currency*, 401 U.S. 715, 739 (1971).

As respondent and the court of appeals have already explained, EPA's regulations when this suit was filed deemed the discharges to be associated with the "industrial activity" of "logging." Resp. Br. 45-50; Pet. App. 38a-42a. Therefore, if a court ultimately determines that EPA's recent amendment extinguishes respondent's claim for forward-looking

relief, the amendment would constitute a repeal of EPA's prior regulation. And in that event, the general savings statute would seemingly require the court to "treat[] as still remaining in force" the previous version of 40 C.F.R. § 122.26(b)(14)(ii) for the purpose of adjudicating respondent's claims for backward-looking civil penalties and remedial injunctive relief.

Contrary to the Solicitor General's suggestions at oral argument, this Court's decisions addressing the propriety of citizen suits' seeking penalties for wholly past violations do not dictate otherwise. *See Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987). This Court has suggested that *factual* changes after a CWA citizen suit has been filed (namely, voluntary compliance with the Act) might moot the suit. *See, e.g.*, *Gwaltney*, 484 U.S. at 66-67. But this Court has never suggested that *legal* changes can do so. To the contrary, "liability for civil penalties under the Clean Water Act attaches at the time the violations occur." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1153 (9th Cir. 2000). And this Court suggested in *Gwaltney* that "[l]ongstanding principles of mootness" "protect[] plaintiffs" from having properly filed citizen suits terminated by changed circumstances. 484 U.S. at 66-67. One such "longstanding principle" is the general savings statute. *See, e.g.*, *Hertz v. Woodman*, 218 U.S. 205, 217-18 (1910).

In short, the complexities inherent in resolving any backward-looking claims that may emerge in this

case reinforce the propriety of remanding to allow the lower courts to press ahead in the first instance.

CONCLUSION

For the foregoing reasons, the case should be dismissed as improvidently granted or, insofar as this Court addresses the issues it raises, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 22, 2013