

## Syllabus

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**SUPREME COURT OF THE UNITED STATES**

## Syllabus

DECKER, OREGON STATE FORESTER, ET AL. *v.*  
NORTHWEST ENVIRONMENTAL DEFENSE CENTER  
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

No. 11–338. Argued December 3, 2012—Decided March 20, 2013\*

The Clean Water Act (Act) requires that National Pollutant Discharge Elimination System (NPDES) permits be secured before pollutants are discharged from any point source into the navigable waters of the United States. See 33 U. S. C. §§1311(a), 1362(12). One of the Environmental Protection Agency’s (EPA) implementing regulations, the Silvicultural Rule, specifies which types of logging-related discharges are point sources. 40 CFR §122.27(b)(1). These discharges require NPDES permits unless some other federal statutory provision exempts them from coverage. One such statutory provision exempts “discharges composed entirely of stormwater,” 33 U. S. C. §1342(p)(1), unless the discharge is “associated with industrial activity,” §1342(p)(2)(B). Under the EPA’s Industrial Stormwater Rule, the term “associated with industrial activity” covers only discharges “from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.” 40 CFR §122.26(b)(14). Shortly before oral argument in the instant cases, the EPA issued a final version of an amendment to the Industrial Stormwater Rule, clarifying that the NPDES permit requirement applies only to logging operations involving rock crushing, gravel washing, log sorting, and log storage facilities, which are all listed in the Silvicultural Rule.

Petitioner Georgia-Pacific West has a contract with Oregon to har-

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\*Together with No. 11–347, *Georgia-Pacific West, Inc., et al. v. Northwest Environmental Defense Center*, also on certiorari to the same court.

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vest timber from a state forest. When it rains, water runs off two logging roads used by petitioner into ditches, culverts, and channels that discharge the water into nearby rivers and streams. The discharges often contain large amounts of sediment, which evidence shows may be harmful to fish and other aquatic organisms. Respondent Northwest Environmental Defense Center (NEDC) filed suit against petitioner and state and local governments and officials, including petitioner Decker, invoking the Act's citizen-suit provision, 33 U. S. C. §1365, and alleging that the defendants had not obtained NPDES permits before discharging stormwater runoff into two Oregon rivers. The District Court dismissed the action for failure to state a claim, concluding that NPDES permits were not required because the ditches, culverts, and channels were not point sources of pollution under the Act and the Silvicultural Rule. The Ninth Circuit reversed. It held that the conveyances were point sources under the Silvicultural Rule. It also concluded that the discharges were "associated with industrial activity" under the Industrial Stormwater Rule, despite the EPA's contrary conclusion that the regulation excludes the type of stormwater discharges from logging roads at issue. Thus, the court held, the discharges were not exempt from the NPDES permitting scheme.

*Held:*

1. A provision of the Act governing challenges to agency actions, §1369(b), is not a jurisdictional bar to this suit. That provision is the exclusive vehicle for suits seeking to invalidate certain agency decisions, such as the establishment of effluent standards and the issuance of permits. It does not bar a district court from entertaining a citizen suit under §1365 when the suit is against an alleged violator and seeks to enforce an obligation imposed by the Act or its regulations. The present action falls within the scope of §1365. Pp. 8–9.

2. The EPA's recent amendment to the Industrial Stormwater Rule does not make the cases moot. A live controversy continues to exist regarding whether petitioners may be held liable for unlawful discharges under the earlier version of the Industrial Stormwater Rule. That version governed petitioners' past discharges, which might be the basis for the imposition of penalties even if, in the future, those types of discharges will not require a permit. These cases thus remain live and justiciable. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U. S. 49, 64–65. The fact that the District Court might rule that NEDC's arguments lack merit, or that relief is not warranted on the facts of these cases, does not make the cases moot. Pp. 9–11.

3. The preamendment version of the Industrial Stormwater Rule, as permissibly construed by the EPA, exempts discharges of chan-

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neled stormwater runoff from logging roads from the NPDES permitting scheme. The regulation is a reasonable interpretation of the statutory term “associated with industrial activity,” §1342(p)(2)(B), and the agency has construed the regulation to exempt the discharges at issue here. When an agency interprets its own regulation, the Court, as a general rule, defers to it “unless that interpretation is ‘plainly erroneous or inconsistent with the regulation.’” *Chase Bank USA, N. A. v. McCoy*, 562 U. S. \_\_\_\_, \_\_ (quoting *Auer v. Robbins*, 519 U. S. 452, 461). Here, it was reasonable for the EPA to conclude that the conveyances at issue are “directly related” only to the harvesting of raw materials, rather than to “manufacturing, processing, or raw materials storage areas at an industrial plant.” 40 CFR §122.26(b)(14). The regulatory scheme, taken as a whole, leaves open the rational interpretation that the regulation extends only to traditional industrial buildings such as factories and associated sites and other relatively fixed facilities.

Another reason to accord *Auer* deference to the EPA’s interpretation is that there is no indication that the agency’s current view is a change from prior practice or is a *post hoc* justification adopted in response to litigation. See *Christopher v. SmithKline Beecham Corp.*, 567 U. S. \_\_\_\_, \_\_. Rather, the EPA has been consistent in its view that the types of discharges at issue do not require NPDES permits. Its decision also exists against a background of state regulation with respect to stormwater runoff from logging roads. In exercising the broad discretion the Act gives the EPA in the realm of stormwater runoff, the agency could reasonably have concluded that further federal regulation would be duplicative or counterproductive in light of Oregon’s extensive rules on the subject. Pp. 11–15.

640 F. 3d 1063, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GINSBURG, ALITO, SOTOMAYOR, and KAGAN, JJ., joined, and in which SCALIA, J., joined as to Parts I and II. ROBERTS, C. J., filed a concurring opinion, in which ALITO, J., joined. SCALIA, J., filed an opinion concurring in part and dissenting in part. BREYER, J., took no part in the consideration or decision of the cases.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

Nos. 11–338 and 11–347

DOUG DECKER, IN HIS OFFICIAL CAPACITY AS OREGON  
STATE FORESTER, ET AL., PETITIONERS  
11–338 *v.*  
NORTHWEST ENVIRONMENTAL DEFENSE CENTER

GEORGIA-PACIFIC WEST, INC., ET AL., PETITIONERS  
11–347 *v.*  
NORTHWEST ENVIRONMENTAL DEFENSE CENTER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[March 20, 2013]

JUSTICE KENNEDY delivered the opinion of the Court.

These cases present the question whether the Clean Water Act (Act) and its implementing regulations require permits before channeled stormwater runoff from logging roads can be discharged into the navigable waters of the United States. Under the statute and its implementing regulations, a permit is required if the discharges are deemed to be “associated with industrial activity.” 33 U. S. C. §1342(p)(2)(B). The Environmental Protection Agency (EPA), with the responsibility to enforce the Act, has issued a regulation defining the term “associated with industrial activity” to cover only discharges “from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial

plant.” 40 CFR 122.26(b)(14) (2006). The EPA interprets its regulation to exclude the type of stormwater discharges from logging roads at issue here. See Brief for United States as *Amicus Curiae* 24–27. For reasons now to be explained, the Court concludes the EPA’s determination is a reasonable interpretation of its own regulation; and, in consequence, deference is accorded to the interpretation under *Auer v. Robbins*, 519 U. S. 452, 461 (1997).

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Congress passed the Clean Water Act in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 86 Stat. 816, 33 U. S. C. §1251(a). A central provision of the Act is its requirement that individuals, corporations, and governments secure National Pollutant Discharge Elimination System (NPDES) permits before discharging pollution from any point source into the navigable waters of the United States. See §§1311(a), 1362(12); *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U. S. 200, 205 (1976). The Act defines “point source” as

“any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.” §1362(14).

When the Act took effect, the EPA found it difficult to process permit applications from countless owners and operators of point sources throughout the country. The agency issued regulations exempting certain types of point-source discharges from the NPDES permitting

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