

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DOUG DECKER, IN HIS OFFICIAL :

4 CAPACITY AS OREGON STATE :

5 FORESTER, ET AL., :

6 Petitioners : No. 11-338

7 v. :

8 NORTHWEST ENVIRONMENTAL :

9 DEFENSE CENTER, ET AL. :

10 - - - - -x

11 and

12 - - - - -x

13 GEORGIA-PACIFIC WEST, INC., ET AL., :

14 Petitioners : No. 11-347

15 v. :

16 NORTHWEST ENVIRONMENTAL :

17 DEFENSE CENTER, ET AL. :

18 - - - - -x

19 Washington, D.C.

20 Monday, December 3, 2012

21

22 The above-entitled matter came on for oral
23 argument before the Supreme Court of the United States
24 at 11:06 a.m.

25 APPEARANCES:

1 TIMOTHY S. BISHOP, ESQ., Chicago, Illinois; on behalf of
2 Petitioners.

3 MALCOLM L. STEWART, ESQ., Deputy Solicitor General,
4 Department of Justice, Washington, D.C.; for United
5 States, as amicus curiae, in support of Petitioners.

6 JEFFREY L. FISHER, ESQ., Stanford, California; on behalf
7 of Respondents.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 11-338, Decker v. Northwest Environmental Defense Center and Georgia-Pacific v. The Northwest Environmental Defense -- Defense Center.

Mr. Bishop.

ORAL ARGUMENT OF TIMOTHY S. BISHOP
ON BEHALF OF THE PETITIONERS

MR. BISHOP: Thank you, Mr. Chief Justice, and may it please the Court:

There is a straightforward ground for reversal here that rests on a standard application of deference principles to EPA's treatment of stormwater.

CHIEF JUSTICE ROBERTS: Before -- before we get into that, congratulations to your clients --

MR. BISHOP: Thank you.

CHIEF JUSTICE ROBERTS: -- getting almost all the relief they're looking for under -- under the new rule issued on Friday.

MR. BISHOP: Thank you.

CHIEF JUSTICE ROBERTS: And thank you for calling it to our attention.

MR. BISHOP: Thank you.

The problem with that rule is that it puts

1 into place something that EPA has been telling the
2 courts throughout this litigation, that in the
3 stormwater rule, where EPA refers to Standard Industrial
4 Classification 2411, that what it is referring to is
5 solely the four identified point sources in the
6 silvicultural -- rock crushing and so on.

7 In this case, NEDC Respondent argues that
8 the statute -- the language of the statute, which is
9 that discharges that are associated with industrial
10 activity must have NPDES permits, prevents EPA from
11 doing that --

12 JUSTICE GINSBURG: But there was no ruling
13 in the court of appeals. The court of appeals did not
14 rule on the statute -- whether the statute mandates that
15 these logging roads be governed.

16 MR. BISHOP: No. It did not. It did not.

17 JUSTICE GINSBURG: So is --

18 MR. BISHOP: That is an argument that
19 Respondents have made in this Court.

20 JUSTICE GINSBURG: And so that's not a point
21 that this Court could resolve in the first instance.

22 MR. BISHOP: Well, I don't think that's -- I
23 don't think that's right. The -- the Respondent can
24 defend its judgment on grounds other than those that
25 were -- that were the basis of the Ninth Circuit

1 decision.

2 JUSTICE GINSBURG: Yes, you can do that; but
3 this Court is a court of review, not first view, and we
4 don't take questions that haven't been aired below.

5 MR. BISHOP: Well, there -- there is an
6 additional reason why we don't think that the rule here
7 moots -- moots the issue. Let -- let's assume that
8 there is a petition for review.

9 I think that's a fairly safe -- safe
10 assumption, that some environmental groups argue that
11 the new rule is impermissible because it's at odds with
12 the language of the -- language of the statute, an
13 argument that I think is -- is near frivolous, but that
14 I think will be -- predictably will be made.

15 The rule is prospective. What we have is a
16 judgment from the Ninth Circuit that says that we were
17 in violation for decades by not having permits. And --

18 CHIEF JUSTICE ROBERTS: Well, but it's --
19 it's an unusual situation for us to rule in a case --

20 MR. BISHOP: Yes.

21 CHIEF JUSTICE ROBERTS: -- where the issue
22 has ongoing significance and that's taken away. And
23 what we would be doing is, when there is a new rule, we
24 would be considering quite a lot of difficult issues to
25 determine what the old rule was, so that you can unravel

1 what the Ninth Circuit has upheld.

2 MR. BISHOP: Well, let me argue -- let me --
3 maybe --

4 JUSTICE SOTOMAYOR: I thought the case law
5 was fairly clear that, when the EPA changes its rules in
6 your favor, that they can't -- the court can't impose
7 penalties for a past violation.

8 MR. BISHOP: Well, I wish it were so clear.
9 Certainly, we think that that is the case.

10 What they've asked for below is penalties,
11 attorneys' fees, and remediation of environmental harm.
12 Now -- now, we think that, under Laidlaw, they shouldn't
13 be able to get any of those three things.

14 Now, this only happened on Friday, so I
15 can't claim that I've done complete research on -- on
16 the point. But it -- you know, I do think that -- there
17 doesn't appear to be any law on the application of
18 Laidlaw to a claim for remediation.

19 CHIEF JUSTICE ROBERTS: Is this a -- is this
20 a new rule that they -- I too haven't had much of a
21 chance to look at it. But is this a new rule? Or is it
22 an amendment of the existing rule?

23 MR. BISHOP: It's an amendment of the
24 existing rule. But what it does is to put into place
25 against the rule exactly what EPA has been saying

1 throughout this litigation. There is nothing new in the
2 rule.

3 So this is something that EPA has been
4 saying in the litigation and that we think is entitled
5 to Auer deference as a result of that. Now, it's in the
6 rule, so it gets -- it gets Chevron deference. But
7 we --

8 CHIEF JUSTICE ROBERTS: Are you sure you
9 want what you're asking for? What if we go ahead and
10 decide this case and rule against you?

11 MR. BISHOP: Well, we are -- we are hoping
12 that you rule -- you'll rule with us. And certainly, on
13 the basis of this rule --

14 (Laughter.)

15 JUSTICE SCALIA: That's usually the
16 objective.

17 MR. BISHOP: On the basis of this rule, you
18 have to understand that the challenge to this rule is
19 the claim that the -- the words "associated with
20 industrial activity" must be interpreted by EPA to
21 include harvesting activities and the -- the moving of
22 the logs out of the harvest area. Now, that's --

23 CHIEF JUSTICE ROBERTS: Now, I suppose that
24 your clients and others similarly situated -- or I -- I
25 guess it would be the Respondents -- can challenge the

1 new rule, right?

2 MR. BISHOP: Yes. So --

3 CHIEF JUSTICE ROBERTS: So you would have,
4 simultaneously pending, a case involving the
5 interpretation of the old rule and a challenge to the
6 new rule.

7 MR. BISHOP: Right.

8 CHIEF JUSTICE ROBERTS: Each of which would
9 have the same issue.

10 MR. BISHOP: And this Court can cut through
11 all of that by deciding this case, which the simplest
12 way to decide this case is under the stormwater rule.
13 If the Court decides this case in our favor under the
14 stormwater rule, then that will preclude a large part of
15 the basis for the challenge to the new rule.

16 It's squarely in front of this Court.
17 Mr. Fisher has made the argument here. The stormwater
18 rule is squarely here. Congress completely revamped the
19 Clean Water Act's approach to stormwater in 1987, and it
20 made clear that, as a default, point-source stormwater
21 is regulated by the State, with NPDES permits required
22 only for discharges that are associated with industrial
23 activity and a few other categories.

24 And those statutory terms, "industrial
25 activity" and "associated with," are both ambiguous.

1 And with those words, Congress left EPA with discretion
2 to determine what activities count as industrial. And
3 it's in keeping with dictionary definitions for EPA to
4 have categorized activities like law, banking, retail,
5 agriculture, and silviculture as not industrial.

6 JUSTICE KAGAN: But, Mr. Bishop, as -- as
7 Justice Ginsburg said, that question was not decided
8 below, and in the context of this case, which, of
9 course, was very different when it was briefed,
10 Mr. Fisher spent a grand total of 2 pages and rightly
11 so. It wasn't -- it was -- it was not the main issue in
12 the case then.

13 So would we really be doing something -- you
14 know, a good practice to decide this issue, without
15 really any briefing on it and without a decision below?

16 MR. BISHOP: Well, I think there is briefing
17 on it. I mean, both parties have briefed it. It gets 2
18 pages because it's a -- a near-frivolous argument under
19 the -- under the caselaw, I think. But the fact is, if
20 you don't --

21 JUSTICE KAGAN: Well, that isn't really
22 quite fair. It is 2 pages because it wasn't decided
23 below and because -- and because the -- the question in
24 the case was very different, with a different
25 regulation.

1 MR. BISHOP: Now, the issue is before this
2 Court. If the Court doesn't decide the issue, then we
3 go back. We have to fight for years about remedies --
4 about the appropriateness of remedies for this
5 adjudicated past violation under Laidlaw. And Laidlaw
6 has some very complex law that's developed under it.

7 JUSTICE GINSBURG: You wouldn't have to do
8 anything if the Court vacated the decision below. Then
9 you wouldn't be facing anything.

10 MR. BISHOP: Well, obviously, if the Court
11 held the case was moot, then we'd like the -- the
12 vacatur. But in addition --

13 JUSTICE GINSBURG: Would you be --

14 MR. BISHOP: -- there's going to be a
15 challenge to the new rule --

16 JUSTICE GINSBURG: Would you be entitled to
17 it?

18 MR. BISHOP: Yes, we believe we are entitled
19 to vacatur.

20 JUSTICE GINSBURG: So -- so if you're right,
21 that you're entitled to it and we agree with you, then
22 there is nothing. You don't have anything hanging over
23 your head as a result --

24 MR. BISHOP: Well, what's left -- what's
25 left of --

1 JUSTICE GINSBURG: -- of the prior decision.

2 MR. BISHOP: -- what's left at that point is
3 another 5 or 6 years of litigation under the new rule on
4 an issue that is briefed in this Court, before this
5 Court, and I think relatively easy to decide under the
6 stormwater rule.

7 CHIEF JUSTICE ROBERTS: Are you -- which
8 issue are you talking about? The industrial activities
9 issue or the silvicultural?

10 MR. BISHOP: The industrial activities
11 issue. I mean, the -- the rest of this case has become
12 very complex, I think, because of -- of the -- you know,
13 the government has raised the Seminole Rock argument
14 that -- that no one's ever heard of before. Mr. Fisher
15 has introduced an argument about whether the 1375(b)
16 categories -- this case falls within those categories.

17 But there is a simple way to decide this
18 case, and that is, under the stormwater rule, EPA had
19 the discretion to determine what activities are
20 industrial, and it determined that timber harvesting is
21 not industrial. It defined "immediate access roads" in
22 a way that does not cover these -- these roads, even if
23 it were industrial.

24 And these are terms -- the term "industrial"
25 is one that is ambiguous. The term "associated with

1 industrial activity" is one that admits of degree. It's
2 like the word "minimized" --

3 JUSTICE SOTOMAYOR: How do we -- how do we
4 avoid, under your reading -- assuming we agreed with you
5 what the rule says, that there is a difference between
6 logging roads and access roads? The other side raises a
7 lot of question about whether these, in fact, are access
8 roads or not. So do -- do we need to --

9 MR. BISHOP: The public --

10 JUSTICE SOTOMAYOR: Do we have to reach that
11 issue then?

12 MR. BISHOP: The public -- no, you don't
13 have to reach that issue because the EPA has decided
14 that the timber harvesting activity is not industrial.
15 In the rule -- implementing this rule with a -- a
16 multisector general permit for industrial activity,
17 EPA said, quote, "Harvesting activities, including
18 loading and initial transport from an active harvest
19 site, are not required to be covered under the
20 stormwater permits."

21 You know, it's been perfectly clear in --
22 when it promulgated the rule, it said that the reference
23 to SIC 24 was a reference to sawmills, planing mills,
24 and other mills. When, in the briefs in this case,
25 it -- it explained the reference to SIC 2411, it said,

1 "By not excluding SIC 2411, EPA intended to reference
2 only the four categories of silvicultural activities
3 already defined as point sources." So it's -- EPA has
4 been --

5 JUSTICE SOTOMAYOR: So how do we --

6 MR. BISHOP: -- absolutely clear that timber
7 harvesting is not industrial activity --

8 JUSTICE SOTOMAYOR: It may not --

9 MR. BISHOP: -- and, therefore, it does not
10 get to the "associated."

11 JUSTICE SOTOMAYOR: It may not be, but these
12 are pipes, ditches, and channels which the CWA
13 explicitly defines as point sources --

14 MR. BISHOP: Well, you can --

15 JUSTICE SOTOMAYOR: -- that are not part of
16 the harvesting. By definition, they are not.
17 They're -- you're saying public roads and not access
18 roads.

19 MR. BISHOP: Well, remember that the
20 stormwater rule applies to point sources. The default
21 position under the stormwater rule is that point sources
22 do not require NPDES permits. And then Congress said
23 there are certain categories that do, and one of those
24 is discharges that are associated with industrial
25 activity.

1 EPA has said that, under these terms,
2 "associated with industrial activity," "in industrial
3 activity," neither the timber harvest nor the roads,
4 "The initial loading and initial transport from an
5 active harvest site are not required to be covered by
6 stormwater permits."

7 It says, in the rule, that immediate access
8 roads are the only things that are covered. It
9 explains, in the preamble to the 1976 rule, that that
10 means on-plant roads that are dedicated for use by an
11 industrial facility, not public roads. These are public
12 roads.

13 These are used by hunters, fishermen,
14 off-road vehicle enthusiasts, bird watchers. These are
15 fairly heavily trafficked public roads that are used for
16 a few weeks, every few decades, for logging activities.
17 And so these are not, EPA has been very clear, the sort
18 of --

19 JUSTICE KENNEDY: Am I correct or incorrect
20 that a considerable number of these roads are -- a
21 significant number of these roads were built initially
22 by the logging industry?

23 MR. BISHOP: Yes, some -- some of them
24 surely -- surely were.

25 JUSTICE KENNEDY: And it's a little hard for

1 you to say that, when these were built by the logging
2 industry and presumably maintained to some respect by
3 the logging industry, to say, oh, well, these are used
4 by hunters and so forth. I --

5 MR. BISHOP: But -- but they are public
6 roads. They are owned by the counties, or they're owned
7 by the State. These two particular roads that we are
8 talking about here have been there between 50 and 75
9 years. They run by the river. There is a school bus
10 pull-off on one of them because there are houses by the
11 side of this road.

12 There -- these are -- these are
13 quintessential public roads that are used by loggers
14 from time-to-time. Are they -- are they built there?
15 Are there other roads that are built by us? Yes. But
16 they are public roads maintained by us under contracts
17 with the State, only during the period when we are using
18 them for -- for logging activity, and otherwise
19 maintained by the -- by the State.

20 So the -- and we think -- to come back to
21 your -- your initial question, Chief Justice, about
22 whether this can be decided without getting into these
23 other complex issues -- that you don't have to -- if you
24 decide this case under the stormwater rule, it's -- and
25 taking at face value what the Ninth Circuit said, which

1 is the rule itself is not clear, we see the Ninth
2 Circuit set a reference here to SIC 2411, which is
3 logging.

4 We see this reference to immediate access
5 roads. So at -- at that point, we -- you look at what
6 EPA has said. And EPA's explanation, in its 1976
7 preamble, in its briefs and in -- in this case, are --
8 are absolutely clear, that there was no intention on
9 EPA's part to cover the channelled runoff alongside
10 these roads.

11 JUSTICE KAGAN: Mr. Bishop, could I -- I'm
12 sorry that I don't understand this well enough yet. But
13 can I understand what's still at stake for you in -- in
14 the case? Put aside the question of whether the new
15 rule is valid or not, all right? And what -- what do
16 you have riding on whether the Ninth Circuit's decision
17 is correct at this point?

18 MR. BISHOP: Well, if there is -- if there
19 is a vacatur, so that we don't have to worry about
20 remedies below --

21 JUSTICE KAGAN: So which remedies are you
22 worried about?

23 MR. BISHOP: Well, the remedies that we --
24 we are obviously not worried about injunctive relief.
25 We are worried about the relief that they have asked

1 for, for past -- supposed past violations, which is
2 penalties, attorneys' fees, and I think the more complex
3 one under the case law is remediation for environmental
4 harm, which the case law just doesn't seem to address
5 under -- under Laidlaw.

6 So we are worried about those. And
7 principally, what we would like to do is to get sorted
8 out, once and for all here, an argument that otherwise
9 would drag through the courts for the next five or six
10 years under this rule, putting the whole industry into a
11 good deal of uncertainty that we think is unwarranted.

12 If I can reserve the remainder of my time?

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Stewart.

15 ORAL ARGUMENT OF MALCOLM L. STEWART,

16 FOR UNITED STATES, AS AMICUS CURIAE,

17 IN SUPPORT OF PETITIONERS

18 MR. STEWART: Mr. Chief Justice, and may it
19 please the Court:

20 On Friday, the EPA administrator signed a
21 new rule that amends EPA's existing regulatory
22 definition of the term "stormwater discharge associated
23 with industrial activity."

24 The new rulemaking specifically disapproves
25 the Ninth Circuit's decision in this case and states

1 explicitly that the only facilities under SIC Code 2411
2 that are industrial are rock crushing, gravel washing,
3 log sorting, and log storing.

4 CHIEF JUSTICE ROBERTS: Were you as
5 surprised, as we were, to learn about that final rule?

6 MR. STEWART: No, we were not.

7 CHIEF JUSTICE ROBERTS: When did you learn
8 that the final rule would be issued on Friday?

9 MR. STEWART: I learned on Friday morning
10 that the final rule would be issued. I learned on
11 Friday afternoon that the final rule had been issued.
12 Within five minutes of that time, I alerted counsel for
13 both the Petitioners and --

14 CHIEF JUSTICE ROBERTS: You had no idea
15 before Friday that this was coming out?

16 MR. STEWART: I knew that it was a strong
17 possibility -- I knew that it was a strong possibility
18 that it would come out. The EPA had issued a notice in
19 September of proposed rulemaking. There was a notation
20 on OMB's website in early November, to the effect that
21 the rule had been transmitted for final approval by OMB.

22 CHIEF JUSTICE ROBERTS: In early November?

23 MR. STEWART: In early November.

24 CHIEF JUSTICE ROBERTS: Maybe in the future,
25 you could let us know when something as definite as that

1 comes.

2 There were 875 pages on the merits briefing
3 in this case, and if we knew that the final rule was
4 imminent, we could have rescheduled the case for April
5 or-- or something along those lines.

6 MR. STEWART: I'm sorry, Your Honor. We --
7 you know, we did explain in the opening brief that the
8 rule had been --

9 CHIEF JUSTICE ROBERTS: Oh, I know, that
10 there was a proposed rule. Is it your experience that
11 proposed EPA rules become final within a couple of
12 months, particularly?

13 MR. STEWART: No, I think that -- well, I
14 think this happened more quickly than it usually does,
15 but I think we intended respect for the Court's
16 processes, rather than disrespect.

17 Obviously, it's suboptimal for the new rule
18 to be issued the Friday before oral argument; but it
19 would have been even worse, I think, from the standpoint
20 of the parties and the Court's decision-making processes
21 if the rule had been issued a week or two after the
22 Court heard oral argument.

23 CHIEF JUSTICE ROBERTS: Well, maybe. And it
24 would have been best if we had known about this in early
25 November.

1 MR. STEWART: With -- with respect to the
2 impact of the rule on this case, the new rule was not
3 intended to change the meaning of the preexisting
4 definition, and in our view, it renders the case moot.

5 And, really, the point of issuing the new --

6 JUSTICE SOTOMAYOR: How do you deal with his
7 points about the ex-fact remedies of attorneys' fees and
8 remediation? Why are -- why are those moot?

9 MR. STEWART: Well, I think the question of
10 attorneys' fees, if the Ninth Circuit's decision was
11 vacated on the ground that the case would become moot,
12 attorneys' fee are available under the Clean Water Act
13 and citizen suits only to prevailing or substantially
14 prevailing parties. And I don't see any way that
15 Respondent could make a claim to be a prevailing or
16 substantially prevailing party when, at the end of the
17 day, it got no relief.

18 Now, with respect to questions of
19 remediation and, particularly, of civil penalties, the
20 Court, in Steel Company and Laidlaw, addressed the
21 circumstances under which civil penalties would -- could
22 and could not be awarded in citizen suits. And the
23 Court in Steel Company said that, in citizen suits, a
24 citizen plaintiff lacks standing to seek civil penalties
25 as a remedy for past violations because the citizen

1 derives no benefit from payment of the penalties into
2 the treasury.

3 In Laidlaw, the Court held that, where there
4 is a prospect of recurring violations or ongoing
5 violations, the citizen plaintiff does have standing to
6 seek civil penalties as a deterrent to future
7 illegality.

8 CHIEF JUSTICE ROBERTS: Do you -- are you
9 saying that the private companies would not be liable
10 for civil penalties, even though the alleged violation
11 was ongoing at the time of the district court
12 litigation?

13 MR. STEWART: That's correct. That even
14 if -- if, by the time the -- the suit was wound up,
15 there was no prospect of an ongoing or future violation
16 because EPA had amended the rule to make clear that the
17 conduct was lawful, there would be no future illegality
18 to deter. And then there --

19 CHIEF JUSTICE ROBERTS: Well, can I stop you
20 just for a moment? EPA made clear that the conduct was
21 not unlawful. We have a new regulation. The fact that
22 they have issued a new regulation doesn't mean that the
23 reading -- doesn't mean that that's a demonstration that
24 the prior conduct under the old regulation was lawful.

25 Now, I know you've taken the position that

1 it was not, but you've got a court of appeals decision
2 saying it was.

3 MR. STEWART: That's correct. And if we
4 actually had a civil penalty award issued by the
5 district court in the first instance, it might be a more
6 complicated question whether that award should be
7 vacated. But the district court ruled in the
8 petitioner's favor. There was never any civil penalty
9 award.

10 And so if -- if the question is can the
11 district court, at some future stage of this case, enter
12 a civil penalty award, under Laidlaw, the only
13 justification for that in a citizen suit would be to
14 deter illegal conduct that might be thought to be
15 possible after the civil penalty award was issued and --

16 CHIEF JUSTICE ROBERTS: That -- that would
17 have to be based on the assumption that the Ninth
18 Circuit decision was wrong.

19 MR. STEWART: It would not have to be based
20 on the assumption that the Ninth Circuit decision was
21 wrong at the time that it was entered; that is, even if
22 EPA had done something that was explicitly characterized
23 as a change in the law, if EPA had issued a rule-making
24 that said, what Petitioners had been doing was unlawful
25 up to this point, but we've decided that it shouldn't be

1 unlawful, and, therefore, we're amending the rule to
2 make it legal, if EPA had done that, there would still
3 be no prospect of future illegality, assuming that the
4 rule is taken to be valid.

5 And, therefore, although in an EPA
6 enforcement action, there might be a possibility of
7 getting monetary awards for past misconduct because
8 that's something the government can do, the citizen's
9 only stake in the matter would be to deter future
10 illegalities.

11 JUSTICE SCALIA: What if -- what if the rule
12 is held invalid? I mean, we don't know the answer to
13 that question until this rule is challenged, and there
14 is ultimately a -- I'm sure it will be challenged
15 because their position is that the -- this rule
16 contradicts the statute. So how does that factor in to
17 your analysis?

18 MR. STEWART: It certainly is possible that
19 the rule will be challenged, but, as -- as Petitioners
20 have emphasized in their brief, and we agree, the proper
21 forum for adjudicating challenges to the validity of an
22 EPA regulation is through a suit brought against EPA
23 based on the administrative record; that is, a citizen
24 suit against the petitioners --

25 JUSTICE SCALIA: I understand that, but my

1 point is, until that suit is -- is concluded, you don't
2 know whether there is a possibility of future violation
3 or not, do you?

4 MR. STEWART: You don't know. But I think,
5 at this point, the prospect that the EPA rule would be
6 both challenged and vacated is sufficiently speculative
7 that it would be out of keeping with general principles
8 of mootness for the Court to go on to decide the
9 question of what the old rule meant.

10 And really --

11 JUSTICE KAGAN: Is what you said true also
12 of the remediation piece of this? You said that, at
13 this point, even if we understand this as a change in
14 the law, the Plaintiffs would not be entitled to fines.
15 Would they also not be entitled to any kind of
16 remediation?

17 MR. STEWART: I -- I think we would want to
18 study that a little further. The general rule,
19 certainly, is that injunctive -- the propriety of
20 injunctive relief is determined on the basis of the law
21 in effect at the time of the Court's decision.

22 And under the -- the newly promulgated rule,
23 once the rule took effect, that -- that would be to the
24 effect that the discharges from stormwater runoff are
25 not covered, and an order requiring remediation would be

1 a form of prospective injunctive relief. It would
2 address --

3 JUSTICE KENNEDY: Is it your submission that
4 we should issue an order vacating this moot or issue an
5 order for the court of appeals to consider whether it's
6 moot?

7 MR. STEWART: I think either one would be --

8 JUSTICE KENNEDY: What is your submission?

9 MR. STEWART: Our preference would be that
10 the Court issue an order vacating as moot; but it would
11 also be an appropriate decision to -- to leave that to
12 the court of appeals in the first instance.

13 And, again, EPA's objective in this was to
14 obviate the need to decide vex questions concerning the
15 meaning of the old rule. That is, EPA has said for
16 nearly 40 years that it doesn't believe that NPDES
17 permits are the appropriate way of addressing the -- the
18 dangers to water quality that are posed by these sorts
19 of discharges and --

20 CHIEF JUSTICE ROBERTS: I -- I'm having
21 trouble seeing how we can dismiss it as moot when there
22 would remain pending claims for civil penalties and
23 injunctive relief, which you've already said you want to
24 take a closer look at, and attorneys' fees.

25 Now, you seem fairly confident that they'll

1 lose on those, but you felt pretty confident that you'd
2 win on this.

3 MR. STEWART: Well, I think the one piece
4 that we would want to take a closer look at is the
5 specific question of remediation for past harm; that is,
6 concrete steps on the ground to undo the results of past
7 discharges. The -- the other two pieces of it --

8 JUSTICE KAGAN: It seems strange that you
9 would -- that there would be an order of remediation to
10 undo the results of past discharges when, at this point,
11 the law going forward is, go ahead and discharge.

12 MR. STEWART: I think that's correct, that,
13 as I say, we haven't -- we haven't specifically focused
14 on this question; but my instinct is that an order of
15 remediation would be an aspect of prospective injunctive
16 relief that would be governed by the general rule that
17 injunctive relief is to be determined under the law at
18 the time of the Court's decisions.

19 But with respect to the other two elements
20 of relief, I think those can be easily dealt with as a
21 matter of law; that is, to the extent that they are
22 seeking an injunction ordering that no further
23 discharges occur without a permit, then clearly, the
24 propriety of that sort of injunction would be determined
25 under the new rule, and it wouldn't be available.

1 And I think Laidlaw is clear that the only
2 basis that a citizen has for seeking civil penalties is
3 to deter future violations, not to punish prior
4 violations.

5 CHIEF JUSTICE ROBERTS: Is this something
6 that -- in terms of mootness, we should evaluate under
7 the voluntary cessation doctrine?

8 MR. STEWART: No, I don't believe so
9 because, here, the basis for mootness is not that the --
10 the defendants in the suit have promised to change their
11 ways; it is that the EPA has issued a new regulation to
12 make clear --

13 CHIEF JUSTICE ROBERTS: The EPA has changed
14 its ways.

15 MR. STEWART: Well, EPA is -- EPA is not the
16 defendant in the case; so, even if this were viewed as a
17 change in ways, it wouldn't be voluntary cessation.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Fisher.

20 ORAL ARGUMENT OF JEFFREY L. FISHER

21 ON BEHALF OF THE RESPONDENTS

22 MR. FISHER: Mr. Chief Justice, and may it
23 please the Court:

24 It seems to me, in light of the recent
25 events, that the most appropriate course for this Court

1 is to just simply dismiss this case as improvidently
2 granted.

3 If this Court had reached its -- had gotten
4 a cert petition under the circumstances present right
5 now, it seems to me there'd be three very strong reasons
6 simply just to deny the petition.

7 First of all, because EPA, in its rulemaking
8 on Friday afternoon, itself says that the Ninth Circuit
9 decision has -- cancels out any impact of the Ninth
10 Circuit decision on the ground, moving forward.

11 Second of all, the case is interlocutory in
12 posture. Remember, we are just on a reversal of a
13 motion to dismiss. So every argument that's left in the
14 case, in addition to whatever mootness arguments anyone
15 wants to make -- which I'll explain why in a moment we
16 would disagree with -- can all be made on remand to the
17 Ninth Circuit.

18 And if people are unhappy -- or not on
19 remand, but just simply when the case returns -- if
20 people are unhappy with those results, they can bring
21 the case back up to this Court. And --

22 CHIEF JUSTICE ROBERTS: So if we do that --
23 if we dismiss as improvidently granted, you still go
24 back and you -- you get your attorneys' fees, you get
25 the civil penalties, you get remediation because the law

1 governing your case would be the existing Ninth Circuit
2 opinion.

3 MR. FISHER: Well, if that's where the case
4 ends up when it's over and they bring it back and you
5 deny cert --

6 CHIEF JUSTICE ROBERTS: Well, the case is
7 not --

8 MR. FISHER: But there's a much --

9 CHIEF JUSTICE ROBERTS: I was just going to
10 say the case is not going to be over if we dismiss.

11 MR. FISHER: No.

12 CHIEF JUSTICE ROBERTS: Because, as you just
13 said, it's interlocutory.

14 MR. FISHER: But that's my point, yes.
15 And -- but I want to make one thing very clear.

16 JUSTICE KENNEDY: But -- but, in other
17 words, it goes -- under your view, it would go back to
18 the district court; the district court would try all
19 this. And, as the Chief Justice says, we know what the
20 law of the case is, if -- if the opinion stands.

21 MR. FISHER: Well, the law of the case would
22 be --

23 JUSTICE KENNEDY: And -- and so isn't --
24 isn't it fairly clear, well, we know that the district
25 court must do under the court of appeals' decision?

1 MR. FISHER: All the district court must do
2 under the Ninth Circuit decision is consider this to be
3 a point source, for the reason that Justice Sotomayor
4 mentioned, and that -- the other side has virtually
5 walked away from that argument, anyway.

6 It is pipe, ditch, or channel; it's
7 perfectly obvious we're dealing with point sources here.
8 The only question is whether you have this covered by
9 the stormwater rules, to the extent they are valid. And
10 that -- the district court or the Ninth Circuit or
11 whoever would consider in the first instance, and that
12 could come back to this Court.

13 But if I might just explain to this Court, I
14 think it will help the conversation if I explain exactly
15 what our case looks like, going forward, because we have
16 and will maintain a claim for forward-looking relief for
17 two reasons.

18 One is, for the reason that was mentioned a
19 couple of times in the -- in the beginning part of the
20 argument, because we contend that the new rule simply
21 violates the statute. And we have a right to bring a
22 citizen suit for a violation of the Clean Water Act
23 itself, which is to say the language that requires EPA
24 to regulate --

25 JUSTICE SOTOMAYOR: Is this a --

1 MR. FISHER: -- all discharges associated
2 with industrial activity.

3 JUSTICE SOTOMAYOR: So you're disclaiming
4 that you have to go to the court of appeals; you think
5 you can bring a citizen suit to challenge the validity
6 of the regulation?

7 MR. FISHER: Well, I wouldn't put it exactly
8 that way, Justice Sotomayor. What I would say is that
9 we have the power to bring -- or we have the right to
10 bring a citizen suit to enforce the Act. And if there
11 is a regulation that the other side brings up that says,
12 we are -- supposedly says, we are exempt from having to
13 get permits, our position is that regulation just simply
14 doesn't fall under 1369(b)(1), for the reasons Judge
15 Pryor just found for the Eleventh Circuit.

16 I sent that up as supplemental authority.

17 JUSTICE GINSBURG: But we didn't --

18 MR. FISHER: It is, A --

19 JUSTICE GINSBURG: But that -- that is the
20 question, the question of what the statute requires, was
21 not decided below.

22 MR. FISHER: That's correct, Justice
23 Ginsburg. The Ninth Circuit had no -- no reason to
24 reach it because the regulations on stormwater, as then
25 written, were absolutely clear, that logging

1 activities --

2 JUSTICE GINSBURG: And you -- you're not
3 urging that we reach it?

4 MR. FISHER: I think the most prudent thing,
5 as I've said, is for this Court not to reach that, and
6 to let -- as you described, to let a lower court look at
7 it first and to bring it back.

8 But if I can finish my question -- or my
9 answer to Justice Sotomayor, the reason why that
10 regulation doesn't require us to go to court of appeals
11 in the first instance and actually lets us proceed on a
12 citizen suit is because the only two subsections of
13 1369(b)(1) that they have mentioned are subsections (E)
14 and (F).

15 Subsection (F) deals with EPA decisions,
16 quote, "issuing or denying a permit." Well, this
17 decision does neither of those things.

18 Secondly, it covers EPA actions that set
19 effluent levels or effluent limitations. And, again,
20 for the reasons the Eleventh Circuit just held and other
21 courts have held, this doesn't do that either.

22 So there is nothing in 1369(b)(1) that
23 stands in our way of bringing a citizen suit to enforce
24 the statute on those terms. So --

25 JUSTICE KAGAN: Mr. Fisher, why would you

1 proceed that way? It's at least arguable that you're
2 wrong on that. I mean, it's a -- it's a question as to
3 what 1369 does. And you obviously do have the route of
4 direct review. Why don't you proceed that way with
5 respect to the new regulation?

6 MR. FISHER: Well, I think that what -- what
7 we'll do is proceed whatever way we can because our --
8 you know, either -- either we are supposed to go
9 directly to the Ninth Circuit -- or any court of
10 appeals, or we are not. And if we are, then we will;
11 and if we're not supposed to go to the court of appeals,
12 as we believe a fair reading of the law -- I don't think
13 there is any plain text meaning of the law that could go
14 otherwise -- then we have -- the only way we can do this
15 is through a citizen suit.

16 JUSTICE KAGAN: Do you think that, on your
17 view of 1369, you can't go to the Ninth Circuit?

18 MR. FISHER: Exactly. And that's what the
19 Eleventh Circuit just held in a case just like this,
20 where there was a regulation at issue that exempted
21 certain discharges from the permitting program. And the
22 Eleventh Circuit said, case dismissed. You can't bring
23 this directly to us.

24 So we have an -- an ongoing claim for a
25 violation of the statute, which I can't imagine this

1 Court would want to address in the first instance.

2 We also, it's important to understand, have
3 a second claim. And before I describe that second
4 claim, let me describe overall -- just remind the Court
5 what exactly the case is about. The case isn't about,
6 as the other side has -- has portrayed many times, all
7 logging roads, all logging roads that may exist in the
8 world -- or the United States.

9 What the case is about are two very specific
10 kinds of logging roads: One, logging roads that drain
11 themselves by way of pipes, ditches, and channels, only
12 the small subset of logging roads that do that; and
13 second of all, only logging roads used -- being used for
14 active timber harvesting and hauling, not roads that
15 just happen to be sitting in the forest not being used,
16 but only the small subset of logging roads being used
17 for active timber cutting and harvesting.

18 JUSTICE SCALIA: What do you mean, "active"?
19 What does that mean?

20 MR. FISHER: It means under --

21 JUSTICE SCALIA: They -- they cut maybe,
22 what, every -- every 10 years? Is that active?

23 MR. FISHER: Well -- well --

24 JUSTICE SCALIA: What about the 9 years
25 in-between? Are they being actively used?

1 MR. FISHER: No, Justice Scalia. And so
2 under this -- the facts of this case, remember, we're on
3 a motion to dismiss, so when Mr. Bishop says 1 or 2
4 weeks out of whatever, we would like to have a record on
5 that because we don't think that's the reality.

6 But what -- what the case -- what we say in
7 our complaint is that they have a contract with the
8 State of Oregon to harvest particular areas and use
9 particular roads to access that timber and to take it
10 out. And the -- and the contract actually requires them
11 to use those roads and to maintain their drainage
12 systems.

13 And so our claim -- again, just to remind
14 you what our claim is under the statute -- is that that
15 harvesting activity can't be thought of in any other way
16 than industrial in nature and that these roads are
17 associated with that activity. They are designed for
18 that purpose, and they're indispensable to the activity.

19 Now, we have a second argument. Even if the
20 Court thought that we couldn't win -- or a -- whatever
21 court looks at this -- thought we couldn't win on the
22 statute, we have a Chevron Step II argument that we will
23 make and have every right to make because if -- and I'll
24 beg this Court's indulgence -- if -- this rule that they
25 have just announced on Friday afternoon is not as clear

1 as you might think.

2 So if you start with the language of the
3 rule, which is on page 18, what they have done is they
4 have amended -- they have amended the stormwater rules
5 to -- to provide that the only industrial activities
6 associated with logging are sawmills, which are covered
7 elsewhere, and then these four categories of things:
8 Rock crushing, gravel washing, log sorting, and log
9 storage. All --

10 JUSTICE KENNEDY: Excuse me. This is
11 page 18. That's -- that's the last page?

12 MR. FISHER: It's page 18, the last page
13 of -- at least, I'm -- I hope your copy is the same as
14 mine, but on the PDF that -- that was sent up to the
15 Court.

16 JUSTICE KENNEDY: And -- and so I'm reading
17 under where it says, "stormwater discharges"?

18 MR. FISHER: Yes. And if you go all the way
19 to the bottom, sub 2, "facilities classified under
20 SIC 24."

21 JUSTICE KENNEDY: Thank you.

22 MR. FISHER: And they list those four
23 things. And -- and then industry -- industry group 242
24 is the sawmills.

25 So they are saying those are the only

1 industrial activities that are associated with logging.
2 But that doesn't answer our claim. Our claim isn't that
3 logging roads themselves are industrial activities. Our
4 claim is that logging roads are associated with
5 industrial activities.

6 And so we still have a claim that, under
7 that -- even if those are the only four industrial
8 activities -- or, sorry, five, those four things plus
9 sawmills -- we still have a claim that logging roads
10 are, quote, "immediate access roads" to those
11 activities.

12 And the definition of "immediate access
13 roads," which is unchanged by the new regulation, is at
14 Pet. App. 40a -- the Ninth Circuit quoted it, and I
15 think it was described earlier by my friend -- "Roads
16 which are exclusively or primarily dedicated for the use
17 by the industrial facility."

18 So it's still a mystery to us how logging
19 roads are not primarily for use by even sawmills or
20 these other four things. And, indeed, if you look very
21 carefully at EPA's new regulation in the preamble, on
22 page 6, about two-thirds of the way down the middle of
23 the page, the only sentence here that EPA gives us, that
24 even suggests a possible response to the argument I just
25 described is the one that begins with the word "unlike."

1 They say, "Unlike immediate access roads
2 associated with industrial activities, many logging
3 roads" -- "many logging roads have multiple uses,
4 including recreation and general transportation, and
5 commonly extend over long distance, i.e., may not
6 provide immediate access to an industrial site."

7 So EPA is leaving open our argument. EPA is
8 saying, well, logging roads that are just generally
9 recreational, et cetera, are not immediate access roads.
10 But our claim --

11 CHIEF JUSTICE ROBERTS: I thought -- I
12 thought -- I'm sorry. I thought they said that their
13 rules mooted this case.

14 MR. FISHER: Well, that's what they are
15 standing here today saying. But I'm telling you, on the
16 language that they gave us on Friday, it doesn't moot
17 the case. And I can't imagine an argument being made on
18 Monday, that hasn't been prepared in any written form,
19 based on a written thing that we got on Friday, that we
20 have an argument under, would moot our case.

21 And particularly, Mr. Chief Justice -- and
22 this is my point about going through all this -- I can't
23 imagine why this Court would want to touch all this in
24 the first instance, particularly without supplemental
25 briefing, but it seems to me to make every sense to let

1 the Ninth Circuit address our arguments first.

2 CHIEF JUSTICE ROBERTS: Well, if we -- if we
3 dismiss as improvidently granted, are you suggesting
4 that the Ninth Circuit would then be the -- be a court
5 to consider this?

6 MR. FISHER: Yes.

7 CHIEF JUSTICE ROBERTS: I'm -- I'm just
8 thinking if we vacate, perhaps another court will
9 consider it, but if we dismiss as improvidently granted,
10 the Ninth Circuit will, quite reasonably, think they are
11 done.

12 MR. FISHER: No, because we have a forward
13 look at the -- the first thing we'll tell the Ninth
14 Circuit is --

15 CHIEF JUSTICE ROBERTS: Well, I mean,
16 they're done -- they are done in terms of their
17 interpretation of the regulation and the applicable law.

18 MR. FISHER: I think only as to the
19 backward-looking regulation, but now, we have -- our
20 complaint -- you know, as a citizen suit does --

21 JUSTICE KENNEDY: But then -- but then
22 why -- why isn't your -- aren't your concerns met if we
23 vacate for the court of appeals to consider, in the
24 first instance, the extent to which this regulation may
25 bear on its opinion?

1 MR. FISHER: Well, I -- I think that gets
2 you very close to the same place, Justice Kennedy. I'm
3 just saying there is no reason to vacate because the
4 Ninth Circuit's point-source holding is so
5 self-evidently right, that I don't know why you'd go to
6 the trouble to do that. It makes the case simpler going
7 forward.

8 CHIEF JUSTICE ROBERTS: Well, I think the --
9 the Ninth Circuit had the -- of course, EPA's views
10 before it. I don't know, if I'm the Ninth Circuit, why
11 I would reconsider my ruling, in light of this new
12 regulation.

13 MR. FISHER: Do you mean the
14 backward-looking ruling?

15 CHIEF JUSTICE ROBERTS: I mean the ruling in
16 the -- the decision that they --

17 MR. FISHER: Right.

18 CHIEF JUSTICE ROBERTS: -- issued that's
19 before us today.

20 MR. FISHER: Well, I don't know that they
21 would reconsider that --

22 CHIEF JUSTICE ROBERTS: No.

23 MR. FISHER: -- but the -- but the main
24 event going forward is the new rule because the citizen
25 suit seeks cessation of ongoing violations of the Act,

1 and that remains the core of our lawsuit, which is
2 still seeking damages --

3 JUSTICE SOTOMAYOR: But that's the -- but
4 that's the whole point, which is if you go back what's
5 the value of the backward-looking construction, if what
6 you're seeking is injunctive relief that has to be based
7 on the new rule?

8 MR. FISHER: It doesn't matter very much,
9 Justice Sotomayor. There is two ways in which it might
10 matter a little bit. One is, if we want to press a
11 claim for any kind of civil penalties or remediation,
12 the backward-looking thing would matter. We have to
13 decide whether we want to do that.

14 The second way it would matter would be it
15 would provide a helpful baseline for judging the new
16 rule in the totality of EPA action, which brings me to
17 my -- which brings me back to the argument I was
18 describing, which would be our Chevron Step II argument,
19 that EPA has simply either left this argument open -- I
20 still -- it is still a mystery to us what EPA thinks
21 about our real argument, which is that active hauling
22 logging roads, when they are being used for active
23 harvesting and hauling, are subject to the Act because
24 they are plainly associated with industrial activity.

25 And if EPA later on came out and said, no,

1 no, no, we mean to exclude that, too, then we
2 respectfully submit, EPA would still have a lot of
3 explaining to do.

4 First of all, we would very much wonder why
5 log sorting, log storage, gravel washing, and rock
6 crushing are industrial activities, but mechanized
7 timber harvesting with 20-ton pieces of machinery is
8 not.

9 We'd also wonder why this stuff isn't
10 industrial activity, where construction activity,
11 landfill operations, surface mining operations that have
12 all the same attributes of being done out in the field,
13 extraction of resources, heavy machinery, et cetera,
14 are, as the EPA itself admits, industrial activity; but,
15 somehow -- somehow, logging, which has all the same
16 attributes, isn't.

17 And so that's what our claim is going
18 forward. Now, I'm not asking this Court to address that
19 because I'm not sure this Court wants to get into all of
20 this stuff yet; but what I am telling this Court is,
21 there is no basis whatsoever to find this case is
22 moot -- or I don't think this Court would want to touch
23 any of the arguments being made here without further
24 briefing, at least as to the new rule.

25 We do think it's absolutely clear we are

1 dealing with point sources. We do think it's absolutely
2 clear, based on the language of -- of 1369(b)(1), that
3 there just can't be any way that there is a
4 jurisdictional, or whatever other kind of problem you
5 want to label it, with us bringing a claim based on the
6 statute itself. The new regulation just simply doesn't
7 fall into those.

8 So if this Court dismisses the case, we'll
9 go to the Ninth Circuit and tell them, we want to go
10 forward for -- for the following reasons. And if
11 anybody is unhappy with what happens in the Ninth
12 Circuit, obviously, we can file or they can file
13 petitions for -- for cert in this Court.

14 Let me just say one last thing to this Court
15 about what we view as really the arbitrary and
16 capricious nature of EPA's new rule and why you
17 shouldn't touch it.

18 Remember, I said -- and this is in EPA's
19 regulations themselves -- that construction activity --
20 any construction activity in a site five acres or more
21 is industrial activity.

22 So if a developer buys a parcel of forested
23 land and wants to build a subdivision there and the
24 first thing the developer does is punch in some roads
25 and drainage systems and cut some trees down to make

1 room for the houses, that is covered by the EPA's
2 stormwater rules; but, if a logging company does
3 precisely the same thing, EPA's position seems to be
4 it's not covered.

5 And not only is it not covered if it happens
6 on public land, but I think at least the implication of
7 my friend's position is that, for logging companies, of
8 which there are many in the northwest, that own their
9 own land -- own their own giant pieces of forest land,
10 and that are not open to the public, that are not open
11 to hunters, that are not open to recreation, but they
12 have their own logging roads on their own private lands
13 that nobody can use, but them, I still think his
14 position is that's not covered by the Act.

15 And finally, EPA has one other thing that I
16 want to point out to the Court about this new rule. And
17 it's, again, got our heads -- it gets our heads
18 scratching as to what EPA is really doing here.

19 EPA says twice in the preamble to their new
20 rule, once on page 7 and also on page 12, that it,
21 quote, "retains the authority to designate at least some
22 logging roads as covered by its so-called point -- Phase
23 II system."

24 What the Phase II system is, is under
25 Section 1342(p), which is the stormwater amendments to

1 the Act, it's the category of point source discharges
2 that EPA says are not a covered -- are not industrial
3 activity -- associated industrial activity, but we,
4 nonetheless, are going to require certain things of
5 them.

6 This is the critical point. EPA says this
7 twice. Well, the only authority EPA would have to
8 regulate any logging roads -- discharges from logging
9 roads, is if they are point sources because you don't
10 get into the Phase II program, you don't get into the
11 stormwater amendments, unless you have a point source.

12 If it's a non-point source, then, as my
13 friend has pointed out quite at length in his brief,
14 it's entirely up to the States, and EPA has -- has
15 nothing to say about it.

16 JUSTICE SCALIA: I'm looking at page 7, and
17 it doesn't say the authority to designate additional
18 roads. It says additional stormwater discharges.

19 MR. FISHER: Right.

20 JUSTICE SCALIA: That could be stormwater
21 discharges that have nothing to do with logging.

22 MR. FISHER: I think if that's all we had,
23 Justice Scalia, it might be a little bit ambiguous,
24 although, of course, this is in the context of logging
25 the roads.

1 But look at page 12. And this is the
2 final -- this is the very end of -- of the preamble.
3 The last sentence, "EPA believes that stormwater
4 discharges from forest roads, including logging roads,
5 should be evaluated under Section 402(p)(6)."

6 The only authority EPA has for -- for doing
7 that is if they -- if they are point sources; whereas
8 EPA has filed a brief in this case that says that they
9 are, at least some of them, are not. I don't know if
10 it's walking away from that or is planning on walking
11 away from that.

12 But, again, there is a variety of questions,
13 I think, that EPA should have to address and answer --
14 Did you have one? I'm sorry -- that EPA should have to
15 address and answer before any court does anything based
16 on this new rule.

17 JUSTICE GINSBURG: But if you were
18 challenging the new rule, you would have EPA as your
19 adversary. The format of this case now is we have -- we
20 have Decker on one side and you on the other, and the
21 EPA is not in the lawsuit.

22 MR. FISHER: Well, EPA, of course, is an
23 amicus, Justice Ginsburg, and EPA has an ongoing right
24 to intervene in any citizen suit. That's a statutory
25 right. And there's a statutory notice that any

1 plaintiff in a citizen suit is required to provide to
2 EPA, which we did provide to EPA. And so EPA has every
3 right to intervene in the case at any point as a party.

4 JUSTICE SOTOMAYOR: Does that include a
5 right to intervene and dismiss the action?

6 MR. FISHER: Well, I think that EPA has a
7 right to intervene and make an argument that the case is
8 moot or any other substantive argument they would like
9 to make back in the Ninth Circuit. And of course,
10 mootness, if it's genuinely moot, which, for all of
11 these reasons, we think, of course, it's not, but
12 mootness is an Article III principle that an amicus
13 could raise, and a court would be bound to consider on
14 its own.

15 JUSTICE SCALIA: Yes, they -- they are just
16 intervening. It's -- it's not like what happens in
17 the -- in the suits for fraud against the government,
18 where they take over the litigation.

19 MR. FISHER: Right.

20 JUSTICE SCALIA: They don't take it over.
21 They just intervene.

22 MR. FISHER: I think that's what would
23 happen. You could ask them how they would like to
24 proceed, but I assume that's how it would happen, and I
25 assume the defendants in the case would remain the same.

1 So I'm happy to answer any other questions
2 about what the case looks like or what you ought to do,
3 but otherwise, I'll submit it.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Bishop, you have 4 minutes remaining.

6 REBUTTAL ARGUMENT OF TIMOTHY S. BISHOP

7 ON BEHALF OF THE PETITIONERS

8 MR. BISHOP: Thank you.

9 We are not asking you to adjudicate the new
10 rule. I'm not sure why we are hearing all of this about
11 the -- the details of the new rule. What we are asking
12 you to do is to get rid of this case. In getting rid of
13 this case on the basis of the stormwater rule, it will
14 eliminate one of the arguments that the plaintiffs will
15 make in a -- in a challenge to the new rule. It will
16 simplify that challenge.

17 What it will do is to get rid of this case
18 and get rid of a Ninth Circuit opinion that really put
19 the court in a -- the position of overriding what EPA
20 has been saying consistently since 1976, consistent
21 position that collected forest road runoff is not point
22 source and, since 1980, that logging is not industrial
23 activity, and these roads are not associated with
24 industrial activity.

25 And for my clients, that is -- has a great

1 deal of -- of values, particularly since, as Mr. Fisher
2 has admitted, what he really wants here is to be back in
3 the Ninth Circuit seeking not only, apparently,
4 relief -- backward-looking relief, but also prospective
5 relief.

6 If there are no further questions, I'll
7 submit.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 The case is submitted.

10 (Whereupon, at 11:55 a.m., the case in the
11 above-entitled matter was submitted.)

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