

THE “FOREST ROADS” CASE: A STORMY APPROACH TO JUDICIAL REVIEW OF ENVIRONMENTAL REGULATIONS

INTRODUCTION

Northwest Environmental Defense Center v. Brown is one of the most significant judicial rulings to impact the forest industry today.¹ During the course of an individual citizen suit, the Ninth Circuit invalidated the Environmental Protection Agency’s (EPA) long-standing “Silviculture Rule,” which had been in effect for nearly four decades.² The court, without giving the EPA an opportunity to revise its regulations, held that the agency lacked the authority to exempt from the Clean Water Act’s (CWA) permitting requirements all stormwater runoff from forest logging roads.³

The regulatory impact of requiring permits for runoff from these roads is staggering. Washington State, for example, has approximately 57,000 miles of forest logging roads, and it is estimated that the decision may cost \$159.6 million for that state alone.⁴ Concerned with the ruling’s economic and regulatory burdens, twenty-six states filed a joint brief urging the Supreme Court to reverse the Ninth Circuit.⁵ The Court agreed to review the Ninth Circuit’s decision and will issue a ruling this term.⁶ In addition to potential judicial intervention, the ruling has triggered bi-partisan attempts to overturn the decision in both the House and the Senate through an amendment to the CWA.⁷ And, in May 2012, almost exactly one year after

1. Steve Milloy, *More Ninth Circuit Mayhem*, WALL STREET J., Dec. 9, 2011, <http://online.wsj.com/article/SB10001424052970204826704577074303413746494.html> (noting that, if the decision stands, the U.S. Forest Service alone “would have to obtain more than 400,000 permits, working with 46 states, a process that could take 10 years”).

2. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1067 (9th Cir. 2011).

3. 40 C.F.R. § 122.27 (2006). The dictionary defines “silviculture” as the “care and cultivation of forest trees; forestry.” AMERICAN HERITAGE DICTIONARY 1141 (Second College ed. 1982).

4. John Gordon, *Environmentalists against the Environment*, NAT’L REV. ONLINE (Feb. 23, 2012, 4:00 AM), <http://www.nationalreview.com/articles/291738/environmentalists-against-environment-john-gordon>.

5. Amicus Curiae Brief of the States of Ark., et al. in Support of the Petitioners at 1–2, *Decker v. Nw. Envtl. Def. Ctr.*, 80 U.S.L.W. 3142 (2012) (No. 11-338), *Georgia-Pac. W., Inc., v. Nw. Envtl. Def. Ctr.*, 80 U.S.L.W. 3143 (2012) (No. 11-347) [hereinafter 26-State Brief] (including Arkansas, Alabama, Alaska, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Mexico, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, Wyoming); Jim Petersen, *Washington Doesn’t Need to Regulate Rain: Supreme Court Has a Chance to Stop Judicial Folly*, THE WASH. TIMES, Dec. 6, 2011, <http://washingtontimes.com/news/2011/dec/6/washington-doesnt-need-to-regulate-rain>.

6. *Decker v. Nw. Envtl. Def. Ctr.*, 80 U.S.L.W. 3142 (2012).

7. Silviculture Regulatory Consistency Act, H.R. 2541, 112th Cong. (2011); Lawrence Hurley, *Appeals Court’s Ruling on Stormwater Runoff Provokes Political Backlash*, N.Y. TIMES, July 27, 2011, <http://www.nytimes.com/gwire/2011/07/27/27greenwire-appeals-courts-ruling-on-stormwater-runoff-pro-33516.html>.

the Ninth Circuit issued its decision, the EPA responded by announcing its intent to revise its regulations and re-instate the agency's longstanding silviculture exemption.⁸

Although these responses indicate that regulation of runoff from forest logging roads may eventually return to the status quo, the impact of the decision will nevertheless be far-reaching unless the Supreme Court addresses the Ninth Circuit's jurisdiction over the case. Because the CWA expressly prohibits individuals from challenging EPA rules more than 120 days after their promulgation, the environmental group's claim should have been time-barred.⁹ Therefore, this Note contends that the Ninth Circuit acted *ultra vires* by exercising jurisdiction over the case. Given that a plethora of federal statutes similarly limit review, the court's exercise of jurisdiction—if allowed to stand—will likely have an impact reaching far beyond forest roads in the Pacific Northwest.

This Note seeks to illustrate the crucial role that congressional limits on review play in administrative law generally—and particularly in the context of environmental regulation. Part I outlines the historical background and basic legal framework of review-preclusion statutes and discusses the Supreme Court's treatment of these provisions in several key cases. It suggests that these decisions—by gradually eroding congressional limits—paved the way for the Ninth Circuit's ruling *NEDC v. Brown*. Part II introduces the Ninth Circuit's decision in *NEDC v. Brown*, focusing on its unique procedural history. Part III analyzes in detail the Ninth Circuit's striking procedural deficiencies. Finally, Part IV addresses the impact of the decision, both in terms of the political and regulatory responses to the ruling and how the ruling may undermine environmental regulations across the board.

I. BACKGROUND

A. Statutory Limits on Judicial Review of Agency Actions

Individuals may generally challenge the validity of an action taken by an administrative agency in the federal courts,¹⁰ and there is a “basic

8. Notice of Intent to Revise Stormwater Regulations, 77 Fed. Reg. 30473, 30474 (May 23, 2012) (to be codified at 40 C.F.R. pt. 122), available at <http://cfpub.epa.gov/npdes/stormwater/forestroads.cfm> (“[T]he Agency is announcing its plan to propose revisions to its Phase I stormwater regulations (40 CFR 122.26) to specify that stormwater discharges from logging roads are not included in the definition of ‘storm water discharge associated with industrial activity.’”).

9. 33 U.S.C. § 1369(b)(1) (2006).

10. 5 U.S.C. § 702 (2006). The APA provides, as a general rule, that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” *Id.*

presumption” favoring judicial review of all agency actions.¹¹ However, the Supreme Court has repeatedly recognized that this is “just” a presumption,¹² and may be overcome “whenever the congressional intent to preclude judicial review is ‘fairly discernible in the statutory scheme.’”¹³ Accordingly, individuals may not challenge an agency rule or regulation if Congress has clearly manifested its intent to preclude judicial review.¹⁴ If a statute contains a provision expressly limiting or excluding judicial review, that provision controls, as it is presumed that Congress intended the statutory procedure to be “the exclusive means of obtaining judicial review.”¹⁵

The popularity of review-preclusion statutes can be traced back to the Supreme Court’s 1967 decision *Abbott Laboratories v. Gardner*, in which the Court confirmed the validity of pre-enforcement review of agency rules despite the ripeness issues these challenges often present.¹⁶ Congress soon recognized the value of providing for this type of limited review, given the “clear need for quick establishment of uniform standards” in implementing agency regulations.¹⁷ Pre-enforcement review benefits agencies as well as the private sector, both of which “have interests in getting the legality of these rules settled one way or the other relatively quickly.”¹⁸ As a result, Congress has often made pre-enforcement review the sole mechanism for challenging agency regulations.¹⁹

Today, countless federal environmental statutes adhere to this model, providing that a person may petition for review of an agency action, but placing strict limits on the timing and proper forum for that review. These

11. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *overruled on other grounds by* *Califano v. Sanders*, 430 U.S. 99, 105 (1977) (holding that the APA is not an independent grant of subject-matter jurisdiction).

12. *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993) (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)).

13. *Block*, 467 U.S. at 351 (quoting *Data Processing Serv. v. Camp*, 397 U.S. 150, 157 (1970)).

14. *Abbott Labs.*, 387 U.S. at 140.

15. *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979).

16. *Abbott Labs.*, 387 U.S. at 139–40 (holding ripe for judicial review an action seeking injunctive relief and declaratory judgment that regulations were invalid). Instead of viewing challenges as barred under the ripeness doctrine, the Court held that “judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.” *Id.* at 140 (citations omitted).

17. Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 755 (1983); see also Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2204 (2011) (“A core idea behind these provisions is that rules adopted in these regulatory areas can entail enormous up-front investments of money, effort, and advance planning.”).

18. Levin, *supra* note 17, at 2205.

19. *Id.* at 2221; see also *City of Rochester*, 603 F.2d at 931 (illustrating the concept that statutes providing only for pre-enforcement review bar any additional review).

statutes include, among others: the Clean Water Act;²⁰ the Clean Air Act;²¹ the Comprehensive Environmental Response, Compensation, and Liability Act;²² the Resource Conservation and Recovery Act;²³ the Noise Control Act;²⁴ the Surface Mining Control and Reclamation Act;²⁵ the Safe Drinking Water Act;²⁶ and the Toxic Substances Control Act.²⁷ Although the deadlines for review vary from statute to statute, these provisions generally require that individuals challenge EPA regulations in a federal court of appeals within 45 to 120 days of their promulgation.²⁸

Because they are jurisdictional, review-limiting provisions close the door to challenges raised after the pre-enforcement review period has passed.²⁹ Therefore, under section 509 of the CWA, any challenge that “could have been obtained” within the designated 120-day period for review is precluded from being raised in any subsequent proceeding.³⁰ Indeed, section 509’s 120-day limit for seeking review has proven fatal to numerous challenges to EPA rules.³¹ In *NRDC v. EPA*, for example, the

20. 33 U.S.C. § 1369(b)(1) (2006) (120 days).

21. 42 U.S.C. § 7607(b)(1) (2006) (Sixty days).

22. *Id.* § 9613(a) (2006) (Ninety days).

23. *Id.* § 6976(a)(1) (2006) (Ninety days).

24. *Id.* § 4915(a) (2006) (Ninety days).

25. 30 U.S.C. § 1276(a)(1) (2006) (Sixty days).

26. 42 U.S.C. § 300j-7(a) (2006) (Forty-five days).

27. 15 U.S.C. § 2618(a)(1)(A) (2006) (Sixty days) (providing for pre-enforcement review within a prescribed time but expressly permitting enforcement review).

28. Compare Safe Drinking Water Act, 42 U.S.C. § 300j-7(a) (2006) (Forty-five days) and Clean Water Act, 33 U.S.C. § 1369(b)(1) (2006) (120 days).

29. *Tex. Mun. Power Agency v. EPA*, 799 F.2d 173, 174 (5th Cir. 1986) (“Statutory time limits on petitions for review of agency actions are jurisdictional in nature such that if the challenge is brought after the statutory time limit, we are powerless to review the agency’s action.”); see also *Nat’l Mining Ass’n v. U.S. Dept. of Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995) (“We have repeatedly held that temporal limitations on judicial review are jurisdictional in nature.”).

30. 33 U.S.C. § 1369(b)(2) (2006) (providing that any action that “could have been obtained” under the judicial review provision “shall not be subject to judicial review in any civil or criminal proceeding for enforcement”). Although the Act originally provided only ninety days, when Congress amended the statute in 1987 it increased the review period to 120 days. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987).

31. See, e.g., *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) (“Reviewability under [section 509] carries a peculiar sting. . . . If an EPA action is reviewable under section [509(b)(1)], then it ‘shall not be subject to judicial review in any civil or criminal proceeding for enforcement.’” (quoting 33 U.S.C. § 1369 (b)(2) (1988))); *Chevron U.S.A., Inc. v. EPA*, 908 F.2d 468, 469 (9th Cir. 1990) (noting that the time limit in section 509 “applies *unless* new grounds are discovered”); *Am. Paper Inst., Inc. v. EPA*, 882 F.2d 287, 288 (7th Cir. 1989) (“[T]he Clean Water Act bars review in enforcement proceedings of actions that could have been reviewed earlier.”); *Tex. Mun. Power Agency v. EPA*, 836 F.2d 1482, 1485 (5th Cir. 1988) (holding that review of unsuccessful petition for permit modification unavailable as “second chance” to correct an untimely direct review); *Tex. Mun. Power Agency*, 799 F.2d at 173 (dismissing as untimely a petition seeking review of the EPA’s grant of an NPDES permit); *Cerro Copper Prods. Co. v. Ruckelshaus*, 766 F.2d 1060, 1069 (7th

court dismissed an untimely petition for review under section 509, stating that anyone who wished to challenge an agency action must do so before the 120th day or “lose forever the right to do so.”³² This was true, according to the court, “even though that action might eventually result in the imposition of severe civil or criminal penalties.”³³

The rationale behind such prohibitions is simple—permitting defendants to challenge regulations during individual enforcement proceedings brought against them “would automatically widen from an investigation of the defendant’s actions to an investigation of EPA’s actions in issuing the regulation.”³⁴ This, in turn, “would gravely affect the enforcement of the Act.”³⁵ By “impart[ing] finality to the administrative process,” these time limitations serve the valuable purpose of “conserving administrative resources.”³⁶ Accordingly, courts routinely reject untimely challenges based upon the statutory time limits contained in environmental statutes across the board.³⁷

Although Congress placed strict deadlines on review in many environmental statutes, it nevertheless sought to compromise between a presumption favoring review and administrative finality by providing a single exemption that allows individuals to bring challenges after the

Cir. 1985) (precluding review of an EPA rule after the deadline had passed and noting that “it contravenes the principles of fairness and equity to permit the petitioners to circumvent this limitation, some three years later, by attempting a collateral challenge”); *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1287 n.5 (5th Cir. 1977) (holding that a claim that EPA erred in granting the Commission NPDES authority was barred by the ninety day [now 120 day] time limit for review in section 509 and refusing to review EPA’s failure to veto a permit); *Sun Enters., Ltd. v. Train*, 532 F.2d 280, 290–91 (2d Cir. 1976) (precluding review of a petition filed more than ninety days after issuance of NPDES permit); *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 667–68 (D.C. Cir. 1975) (precluding review of petition filed more than one year after issuance of NPDES permit); *Natural Res. Def. Council, Inc. v. Outboard Marine Corp.*, 702 F. Supp. 690, 693 (N.D. Ill. 1988) (“Section [509(b)(1)(F)] permits review of an EPA action issuing or denying a permit only in the Circuit Court of Appeals. Section [509(b)(2)] then expressly bars review of an EPA-issued or EPA-denied permit in any District Court enforcement proceeding.”).

32. *Natural Res. Def. Council v. EPA*, 673 F.2d 400, 406 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 879 (1982).

33. *Id.*

34. Mary Parker Squiers, *Restricted Judicial Review Provisions of the Clean Air Act—Denial of Due Process or Indispensable to Efficient Administration*, 8 B.C. ENVTL. AFF. L. REV. 119, 120 (1979), available at <http://lawdigitalcommons.bc.edu/ealtr/vol8/iss1/5>.

35. *Id.*

36. *Tex. Mun. Power Agency*, 799 F.2d at 175.

37. See, e.g., *Natural Res. Def. Council v. EPA*, 571 F.3d 1245, 1265, 1269 (D.C. Cir. 2009) (noting that the Clean Air Act’s sixty-day limit on review had “long since past”); *Nat’l Mining Ass’n v. U.S. Dept. of Interior*, 70 F.3d 1345, 1350–1352 (D.C. Cir. 1995) (holding that the deadline for review contained in the Surface Mining Control and Reclamation Act barred petitioner’s challenge); *W. Neb. Res. Council v. EPA*, 793 F.2d 194, 198 (8th Cir. 1986) (holding that the Safe Drinking Water Act’s forty-five-day time limit on review precluded petitioner’s challenge).

specified time period has expired if the petition is based on grounds that arise after the pre-enforcement review period.³⁸ The CWA's provision "allowing [for] belated review," like those found in many environmental statutes, was designed to serve the limited purpose of "accommodat[ing] challenges [that are] based on scientific information" that was unavailable when the regulation in question was originally promulgated.³⁹

As the following discussion illustrates, statutory review-limiting provisions are not only the norm in the field of administrative law—they also play an integral role in promoting the effective implementation of several of the nation's leading environmental statutes. Because these statutorily imposed time limits "show a congressional decision to impose statutory finality on agency actions that [courts] may not second-guess," the judiciary has a duty to strictly enforce them.⁴⁰ As the following discussion demonstrates, however, courts are continually finding ways around the seemingly straightforward mandates imposed by review-preclusion statutes.

B. The Supreme Court's Gradual Erosion of Congressional Limits on Review

1. Adamo Wrecking Co. v. United States

Although the Supreme Court has routinely held that statutory limits on review are valid,⁴¹ recent litigation under the Clean Air Act (CAA) illustrates the Court's struggle to clearly define the extent to which review-limiting provisions actually preclude review. Like section 509 of the CWA, section 307 of the CAA prohibits individuals or entities from challenging

38. See, e.g., Clean Water Act, 33 U.S.C. § 1369(b)(1) (2006) (providing that review may be had after 120 days from challenged action "only if such application is based solely on grounds which arose after such 120th day"); Safe Drinking Water Act, 42 U.S.C. § 300j-7(b) (2006) (providing that review is available after the forty-five days "if the petition is based solely on grounds arising after the expiration of such period"); Noise Control Act, *id.* § 4915(a) (1995) (providing that review is available after ninety days "if such petition is based solely on grounds arising after such ninetieth day"); Resource Conservation and Recovery Act, *id.* § 6976(a)(1) (2006) (providing that review may be had after ninety days if "based solely on grounds arising after such ninetieth day"); Clean Air Act, *id.* § 7607(b)(1) (2006) (providing that review is available only for sixty days, "except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise"). See discussion *supra* Part III.A. for an explanation of how the Ninth Circuit in *NEDC v. Brown* misapplied this exception and incorrectly allowed the environmental group's claim to proceed.

39. *Am. Ass'n of Meat Processors v. Costle*, 556 F.2d 875, 877 (8th Cir. 1977) (discussing the CWA's legislative history).

40. *Tex. Mun. Power Agency*, 799 F.2d at 175.

41. Levin, *supra* note 17, at 2228 (noting that the Court has found "no satisfying basis" for holding that that Congress may not, "if it wishes, foreclose ultra vires challenges to a regulation in an enforcement case").

the validity of a regulation during an enforcement proceeding when such review could have been obtained within sixty days of the EPA's rulemaking.⁴² Despite this express congressional limitation, the Supreme Court held in *Adamo Wrecking Co. v. United States* that, in criminal enforcement proceedings under the CAA, federal courts may review EPA regulations for the limited purpose of determining whether the regulation allegedly violated is an "'emission standard' within the meaning of the Act."⁴³

In an opinion by then-Justice Rehnquist, the Court reasoned that—although Congress clearly intended to preclude judicial review of emission standards in enforcement proceedings—because violations of such standards are "subject to the most stringent criminal liability," it is crucial that a court first determine whether the EPA's "mere designation of a regulation as an 'emission standard' is conclusive as to its character."⁴⁴ However, the Court was careful to clarify that review for any other purpose after the sixty-day statutory deadline passes is strictly prohibited by section 307.⁴⁵ Nevertheless, Justice Rehnquist acknowledged the "possible dangers" of allowing courts to review an agency regulation, even if just to ascertain whether it constitutes an emission standard.⁴⁶ Noting that courts would be "importuned, under the guise of making a determination as to whether a regulation is an 'emission standard,' to engage in judicial review,"⁴⁷ he stressed that this was something "they may not do."⁴⁸

As Justice Stewart accurately predicted in dissent, however, the Court's attempt to selectively limit a court's ability to engage in review would prove futile. According to the dissent, the majority in *Adamo Wrecking*

42. 42 U.S.C. § 7607(b)(1) (2006) ("Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.").

43. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978).

44. *Id.* at 283–84.

45. *Id.* at 285.

46. *Id.* Describing the limited review permitted, the Court stated:

The narrow inquiry to be addressed by the court in a criminal prosecution is not whether the Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. Nor is the court to pursue any of the other familiar inquiries which arise in the course of an administrative review proceeding. The question is only whether the regulation which the defendant is alleged to have violated is on its face an "emission standard" within the broad limits of the congressional meaning of that term.

Id.

47. *Id.*

48. *Id.*

provided “no real guidance” for determining whether a regulation constitutes an “emission standard” that falls “outside the scope of the exclusive judicial review procedure provided by Congress.”⁴⁹ In the words of Justice Stewart, “The Court today has allowed the camel’s nose into the tent, and I fear that the rest of the camel is almost certain to follow.”⁵⁰ Despite the Court’s attempt to reinforce the strict limitations imposed by the CAA’s judicial review provision, Justice Rehnquist’s concerns that the decision might tempt courts to engage in full-blown review proved accurate. More than three decades later, courts are still struggling to define the limits on their authority to engage in judicial review.

2. *Environmental Defense v. Duke Energy Corp.*

In *Environmental Defense v. Duke Energy Corp.*, the EPA brought an enforcement action against Duke Energy, the owner of several coal-fired plants, for operating without a permit required under the CAA.⁵¹ In response, Duke argued that it was not required to obtain a permit under the EPA’s 1980 Prevention of Significant Deterioration (PSD) regulations.⁵² According to Duke, none of its projects increased hourly emissions rates, as they were not “major modification[s]” as defined by the 1980 regulations.⁵³ Several environmental groups intervened in the case, arguing that any claim by Duke that the EPA’s PSD regulation exceeded statutory authority “would be an attack on the validity of the regulation that could not be raised in an enforcement proceeding.”⁵⁴ Because this type of challenge could have been made within the sixty-day deadline for review, the plaintiffs argued that section 307 of the CAA prohibited Duke from seeking review of the PSD regulations, which had been in effect for nearly thirty years.⁵⁵

The Fourth Circuit rejected the environmental group’s argument against its jurisdiction.⁵⁶ Agreeing with Duke’s interpretation of the PSD regulations, the court held that the regulations did not require Duke to obtain a permit.⁵⁷ As a substantive matter, the court reasoned that the EPA lacked the statutory authority to interpret the term “modification” differently for purposes of the PSD program than it did for the Act’s New

49. *Id.* at 292–93 (Stewart, J., dissenting).

50. *Id.* at 293.

51. *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 571 (2007).

52. *Id.*

53. *Id.*

54. *Id.* at 572.

55. *Id.* at 572–73.

56. *Id.* at 573.

57. *Id.* at 571.

Source Performance Standards (NSPS) provisions.⁵⁸ Instead, it found that Congress intended the definitions of “modification” in PSD and NSPS provisions to be interpreted in the same manner.⁵⁹

More important for purposes of this Note, the Fourth Circuit refused to even address the environmental plaintiff’s argument that the sixty-day deadline time-barred Duke’s claim. Under the court’s reasoning, the time limit in section 307 did not apply because the court was not invalidating the PSD regulations simply by adopting its own interpretation “over the EPA’s interpretation” of those rules.⁶⁰ This was true, the court reasoned, because the PSD regulations could be interpreted in different ways, one of which was consistent with the court’s own interpretation and would require an increase in the hourly emissions rate as an element of a major “modification.”⁶¹

In a unanimous decision reversing the Fourth Circuit, the Supreme Court held that the time limit in section 307 precluded Duke’s challenge.⁶² It found that the language of the 1980 regulations, although no “seamless narrative,” clearly did not support the Fourth Circuit’s interpretation of them.⁶³ Thus, the Court held that the lower court’s attempt to “trim” the meaning of the regulations had to be seen as an “implicit declaration that the PSD regulations were invalid as written.”⁶⁴ The Fourth Circuit’s construction of the regulations thus constituted an “implicit invalidation” of them, a form of judicial review clearly prohibited by section 307.⁶⁵

Although the Supreme Court appeared to enforce the CAA’s sixty-day limit for review, it failed to address why this deadline only served to bar the lower court from engaging in judicial review of the PSD 1980 regulations. In its opinion, the Court stated that it had “no occasion at this point to

58. *United States v. Duke Energy Corp.*, 411 F.3d 539, 550 (4th Cir. 2005) (“Congress’ decision to create identical statutory definitions of the term ‘modification’ has affirmatively mandated that this term be interpreted identically in the two programs.”), *vacated sub nom. Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007).

59. *Id.* at 548.

60. *Id.* at 549 n.7. As the Court explained:

Our choice of this interpretation of the PSD regulations—as required under the statute—over the EPA’s interpretation is not an invalidation of those regulations. The PSD regulations remain fully intact and enforceable and, indeed, could even be enforced as the EPA urges provided that, as long as the PSD and NSPS statutes define “modification” identically, the NSPS regulations are similarly interpreted and enforced.

Id.

61. *Id.*

62. *Env’tl. Def.*, 549 U.S. at 581.

63. *Id.* at 577.

64. *Id.* at 573.

65. *Id.* at 581.

consider the significance of § 307(b) [itself].”⁶⁶ However, as Professor Ronald Levin suggests, that statement is “puzzling” at best, given that it came after the Court “did, in fact, suggest that section 307(b) justified rejecting some of the lower court’s views.”⁶⁷ Scrutinizing an agency rule in order to determine whether it is consistent with the statute under which it was promulgated “certainly comes close to implicating a question regarding the validity of the regulation.”⁶⁸

The *Duke Energy* decision demonstrates that our highest court has yet to “articulate a clear concept as to how, if at all,” review limiting statutes preclude courts from reviewing the validity of agency rules and regulations.⁶⁹ Unfortunately, the Supreme Court’s failure to provide a clear standard in *Adamo Wrecking* and *Duke Energy* opened the backdoor for subsequent decisions further eroding congressional limits on review. Unsurprisingly, the plaintiffs in *NEDC v. Brown* explicitly rely on the *Duke Energy* decision, capitalizing on the Supreme Court’s inability to draw a clear line distinguishing between what does and does not constitute the type of judicial review Congress tried so hard to prohibit.⁷⁰

II. NORTHWEST ENVIRONMENTAL DEFENSE CENTER V. BROWN

A. Background of the Case

In 2006, an environmental group filed a citizen suit in federal district court against the State of Oregon and several timber companies for failing to obtain permits for the stormwater that drains from two logging roads they own and operate.⁷¹ The group, Northwest Environmental Defense Center (NEDC), was concerned about the environmental impact this runoff from forest logging roads could cause when it flows into ditches and channels

66. *Id.*

67. Levin, *supra* note 17, at 2228.

68. *Id.* at 2227.

69. *Id.* at 2226. Similarly, Levin points out that in *United States v. Cinergy Corp.*, “a case presenting identical substantive issues,” the court found that the industry’s argument that the EPA must define “modification” the same way in its different clean air regulations “seems an attack on the validity of the [PSD] regulation rather than an argument about its meaning, and issues of validity . . . are beyond the jurisdiction of a regional circuit to resolve.” *Id.* at 2227 n.119 (quoting *United States v. Cinergy Corp.*, 458 F.3d 705, 709 (7th Cir. 2006) (alteration in original)). However, as Levin notes, the Court in *Cinergy* nevertheless “went on to reject the argument on its merits despite [its] conclusion that [the Court] had no jurisdiction to consider it!” *Id.*

70. Respondent’s Brief in Opposition at 2, *Decker v. Nw. Env’tl. Def. Ctr.*, 80 U.S.L.W. 3142 (2012) (No. 11-338), *Georgia-Pac. W., Inc., v. Nw. Env’tl. Def. Ctr.*, 80 U.S.L.W. 3143 (2012) (No. 11-347) (citing *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007)); see also discussion *infra* Part II.B.

71. *Nw. Env’tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1067–1068 (9th Cir. 2011).

and is eventually discharged into forest streams and rivers.⁷² According to NEDC, the defendants were required under the CWA to obtain National Pollutant Discharge Elimination System (NPDES) permits for these discharges.⁷³

Under the CWA, permits are required only for discharges from “point sources,” which the statute defines as any “discernible, confined and discrete conveyance,” such as a ditch or channel.⁷⁴ In its complaint, NEDC argued that this precipitation runoff, because it is collected into systems of ditches and culverts, is “point source” in nature and therefore requires a permit.⁷⁵ However, under the EPA’s long-standing “Silviculture Rule,” certain forestry activities are defined as non-point source and are therefore exempted from the CWA’s permitting requirements.⁷⁶ The district court therefore dismissed NEDC’s complaint, holding that this type of natural runoff from forest logging roads fell within the silviculture exception.⁷⁷

On appeal to the Ninth Circuit, the United States filed an amicus brief in support of the State and the timber defendants arguing that—because the EPA does not require permits for runoff from forest logging roads—NEDC’s claim against the State of Oregon and timber companies had to be seen as a challenge to the EPA’s Silviculture Rule itself.⁷⁸ However, because the rule was not challenged immediately after it was promulgated in 1976, the United States argued that review by the court was “expressly preclude[d]” by the section 509’s 120-day deadline for seeking review.⁷⁹ Despite these arguments, the original parties did not contest jurisdiction and the Ninth Circuit issued its opinion without addressing the issue of whether or not it had subject matter jurisdiction over the citizen suit.⁸⁰

In a decision reversing the district court, the Ninth Circuit sided with the environmental plaintiffs and held that stormwater runoff collected in a system of discrete conveyances—such as the ditches alongside the logging

72. *Id.* at 1067.

73. *Id.* at 1068.

74. 33 U.S.C. § 1362(14) (2006).

75. *NEDC*, 640 F.3d at 1067.

76. 40 C.F.R. § 122.27 (2006) (providing that the term silviculture point source “does not include non-point source silvicultural activities such as . . . surface drainage, or road construction and maintenance from which there is natural runoff”).

77. *Nw. Env’tl. Def. Ctr. v. Brown*, 476 F. Supp. 2d 1188, 1197 (D. Or. 2007).

78. United States’ Amicus Curiae Brief, at 1–2, 10, *Nw. Env’tl. Def. Ctr. v. Brown*, 476 F. Supp. 2d 1188 (D. Or. 2007) (Civil No. 06-1270-KI) (“The plain language of EPA’s silviculture regulations, promulgated over thirty years ago, exclude runoff from forest roads from the requirement to obtain an NPDES permit.”).

79. *Id.* at 10.

80. *Nw. Env’tl. Def. Ctr. v. Brown*, 617 F.3d 1176 (9th Cir. 2010).

roads owned by defendants—is a point source discharge,⁸¹ and therefore cannot be exempted from the CWA’s permitting requirements absent congressional authorization.⁸² In addition, the court addressed whether such runoff is nevertheless exempted under the 1987 Amendments to the CWA.⁸³ These amendments sought to reduce administrative burdens by creating a tiered approach for dealing with stormwater discharges that nevertheless constitute “point sources.”⁸⁴ Section 402(p) provides that, as a general rule, stormwater runoff does not require an NPDES permit.⁸⁵ However, Congress listed several major sources of stormwater discharges—including discharges “associated with industrial activity”—that still require permits.⁸⁶ According to the Ninth Circuit, stormwater runoff from forest logging roads is a “discharge associated with industrial activity”—namely timber harvesting—and therefore falls within the scope of the CWA.⁸⁷

Although NEDC argued that the court did not invalidate the EPA’s silviculture exemption,⁸⁸ the decision effectively invalidates the rule insofar as it permits such discharges.⁸⁹ Accordingly, *NEDC v. Brown*, if it stands, overturns the EPA’s thirty-six-year-old policy of interpreting logging road runoff as falling outside the CWA’s permitting program.

81. *Id.* at 1191.

82. *Id.* at 1188.

83. *Id.* at 1191–96.

84. See 133 CONG. REC. 983, 1006 (Jan. 8, 1987) (statement of Rep. Robert Roe) (“[Section 402(p)] establishes an orderly procedure which will enable the major contributors of pollutants to be addressed first, and all discharges to be ultimately addressed in a manner which will not completely overwhelm EPA’s capabilities.”).

85. 33 U.S.C. § 1342(p)(1) (2006) (“[T]he Administrator or the State . . . shall not require a permit under this section for discharges composed entirely of stormwater.”).

86. *Id.* § 1342(p)(2)(B) (2006).

87. In 1987, Congress amended the CWA and established a special regulatory regime for stormwater discharges. *Id.* § 1342(p)(2)(C)–(E) (2006). Congress provided the EPA with the authority to categorically exempt certain types of point source discharges from the NPDES permit requirements, but only if those discharges were not “associated with industrial activity.” *Id.* § 1342(p)(2)(B). Accordingly, the CWA does not apply if the stormwater discharge is not “associated with industrial activity.” *Id.*

88. Respondent’s Brief in Opposition, *supra* note 70.

89. *Nw. Env’tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1080 (9th Cir. 2011) (noting that if the Rule exempts natural runoff from silvicultural activities, “it is inconsistent with [the CWA] and is, to that extent, invalid”); see also Andrew King, *Northwest Environmental Defense Center v. Brown: Delivering the Back Cuts? The Ninth Circuit Leaves the Silvicultural Rule in the Balance*, 24 TUL. ENVTL. L.J. 159, 171 (2010) (“While the court did not expressly invalidate the Silvicultural Rule, it restricted the rule’s application to stormwater runoff that reaches water through a purely natural course, which . . . appears to remove silvicultural runoff that encounters any nonnatural control from the protections of the exemption.”).

B. The Ninth Circuit's Request for Supplemental Briefing and Revised Opinion

Because the Ninth Circuit failed to address its jurisdiction over the case, the decision left many questions unanswered. In October 2010, the defendants petitioned for rehearing, and various parties—including the timber industry, environmental groups, local governments, and the United States—submitted amicus briefs.⁹⁰ Fifteen days later, the court, apparently recognizing its own shortcomings, requested supplemental briefing from the parties on the issue of jurisdiction.⁹¹ Without further explanation, the Ninth Circuit stated that one of “[its] colleagues” had asked the court to discuss its jurisdiction over the case.⁹² In its order, the court directed each of the parties involved to respond to the following two questions:

(1) Can a suit challenging EPA’s interpretation of its regulations implementing the Clean Water Act’s permitting requirements be brought under the Act’s citizen suit provision, [section 505(a)]?

(2) Must a suit challenging EPA’s decision to exempt the discharge of a pollutant from the Clean Water Act’s permitting requirements be brought under the Act’s agency review provision, [section 509(b)]?⁹³

After reading the parties’ responses, the panel on May 17, 2011 withdrew its earlier opinion and issued a new opinion, which was identical to its original opinion except that it included a brief discussion of its jurisdiction.⁹⁴ In its revised opinion, the Ninth Circuit found that it had jurisdiction under the CWA’s citizen suit provision, section 505.⁹⁵ However, the manner in which the court justified its exercise of subject matter jurisdiction is troubling at best. First, the Ninth Circuit circumvented section 509’s requirement that suits be brought within 120 days by misapplying the provision’s “arising after” exception. Second, the court failed to recognize the important distinction between citizen suits and

90. See discussion *infra* Part IV.

91. *NEDC*, 640 F.3d at 1068. Because “challenges to federal court’s subject matter jurisdiction cannot be waived and may be raised at any time,” *Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1181 (9th Cir. 2004), the court was able to raise the issue *sua sponte*.

92. *NEDC*, 640 F.3d at 1068.

93. Plaintiff-Appellant Nw. Envtl. Def. Ctr.’s Opposition to the Petitions for Rehearing & Rehearing en Banc at 2, Nw. Envtl. Def. Ctr. v. Brown, 640 F.3d 1063 (9th Cir. 2011) (No. 07-35266).

94. *NEDC*, 640 F.3d at 1068.

95. *Id.*

petitions for review. Finally, the court's attempt to "interpret" the EPA's Silviculture Rule should—under the reasoning employed by the Supreme Court in *Duke Energy*—be seen as an implicit invalidation of the rule.

III. ANALYSIS

A. Misapplication of the "Arising After" Exception

The Ninth Circuit circumvented section 509's requirement that challenges to EPA regulations be brought within 120 days of their promulgation by incorrectly applying the provision's "arising after" exception.⁹⁶ According to the Ninth Circuit, the environmental group's claim fell within section 509's exception allowing for belated review because "the basis for the suit arose more than 120 days after the agency action."⁹⁷ In reaching this conclusion, the court claimed that the EPA's Silviculture Rule was subject to two interpretations, and that this ambiguity was only resolved when the government first adopted its interpretation of the rule in a brief it filed in this case.⁹⁸ In one of its amicus briefs, the United States had included a footnote in which it stated that, prior to this case, the EPA had not officially addressed whether its silviculture regulations require permits for stormwater runoff that does not remain "natural," but is "collected and channeled by man."⁹⁹ Based solely on this footnote, the Ninth Circuit reasoned that the rule had remained ambiguous ever since it was promulgated more than three decades ago.¹⁰⁰

In light of this alleged uncertainty, the court concluded that the environmental plaintiffs could not have been expected to challenge EPA's interpretation of its Silvicultural Rule first adopted in its initial amicus brief in this case.¹⁰¹ Accordingly—having found that the "basis for NEDC's challenge to the Silviculture Rule arose more than 120 days after the

96. 33 U.S.C. § 1369(b)(1) (2006) (providing that review of enumerated EPA actions may be had after 120 days "only if such application is based solely on grounds which arose after such 120th day").

97. *NEDC*, 640 F.3d at 1068–69.

98. *Id.*

99. Amicus Curiae Brief of the United States Responding to the Court's Questions of October 21, 2010 at 10 n.5, *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2011) (No. 07-35266).

100. *NEDC*, 640 F.3d at 1069. As the Court explained:

Because the Silvicultural Rule was subject to two readings, only one of which renders the Rule invalid, and because the government first adopted its interpretation of the Rule in its initial amicus brief in this case, this case comes within the exception in [section 509(b)(1)] for suits based on grounds arising after the 120-day filing window.

Id.

101. *Id.*

promulgation of the Rule”—the Ninth Circuit concluded that section 509 did not bar NEDC’s claim because it was not one that “could have been obtained” earlier.¹⁰² The court’s absolute reliance on the government’s statement is questionable, given the context in which it was made. Not only was this statement made in a footnote—the government was not even a party to the case in which it filed the brief. More importantly, however, the Ninth Circuit’s reasoning here directly contradicts congressional intent, as well as the court’s own precedent and other portions of the decision itself.

The Ninth Circuit’s reasoning runs contrary to Congress’s stated intent regarding section 509’s exception for challenges based on arising-after grounds. This exception was not, as the Act’s legislative history demonstrates, intended to provide a mechanism for individuals to circumvent the 120-day limitation absent a genuine change in circumstances rendering the agency’s prior regulation suddenly inadequate. Congress recognized the need for the exception in its Committee Report:

[I]t would not be in the public interest to measure for all time the adequacy of a promulgation of any standard requirement or regulation by the information available at the time of such promulgation. . . . The judicial review section, therefore, provides that any person may challenge any requirement after the date of promulgation whenever it is alleged that *significant new information* has become available.¹⁰³

In light of the limited purpose of the exception, courts have distinguished between “late-breaking news” and “newly discovered strategies” in determining whether petitions for review are truly based on grounds that arose after the period for bringing challenges has expired.¹⁰⁴ In so doing, they often admonish parties who seek to avoid a statutory deadline by advancing grounds “that are ‘new’ only in the sense that counsel has learned a lesson.”¹⁰⁵ Several circuits have held, for example, that the “arising-after” exception does not enable parties to bring challenges after the statutory deadline simply because they were uncertain regarding

102. *Id.* at 1069 (citing 33 U.S.C. § 1369(b)(2) (2006)).

103. S. Rep. No. 92-414, at 509 (1971), *reprinted in* 1972 U.S.C.C.A.N., 3668, 3751 (emphasis added).

104. 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 4:4 (1986).

105. *Id.* (“Invariably, while truly new and probative information can help a litigant clear the time hurdles and even win a raised eyebrow or two, the eventual outcome is a trip back to the Administrator to start over . . .”).

where to file their claim,¹⁰⁶ or because a lower court ruled that it lacked jurisdiction.¹⁰⁷ In fact, according to the Second Circuit, even new scientific evidence may be insufficient to support a belated challenge if it was collected and gathered for the sole purpose of supporting a party's position.¹⁰⁸

In these review-preclusion statutes, Congress struck a "careful balance between the need for administrative finality and the need to provide for subsequent review in the event of unexpected difficulties."¹⁰⁹ Therefore, in holding that it lacked jurisdiction to review a petition filed two days after the statutory deadline for review, the Sixth Circuit stated that "what is sought from us is a judicial amendment of the statute [regarding the date] as chosen by Congress. This invitation we decline."¹¹⁰ By permitting NEDC's challenge to proceed even though it could have been raised within the statutorily designated period for review, the Ninth Circuit's decision in *NEDC v. Brown*, if allowed to stand, threatens to unravel Congress's well-laid plan.

Second, the Ninth Circuit's rationale contradicts its own prior interpretations of section 509. For example, in *Chevron U.S.A. v. EPA*, the Ninth Circuit was faced with the issue of what constitutes "new grounds" within the meaning of the CWA's exception allowing for judicial review based on arising-after grounds. In that case, Chevron sought to challenge an EPA order establishing limits for discharges of water-borne oil and grease from its offshore oil facilities.¹¹¹ In holding that Chevron's claim was time-barred by section 509, the court explained that it was the discovery of the unknown pollution problem regarding oil dissolved in water that constituted the "new grounds," not the discovery of an unknown legal problem in the form of the enforcement action brought against Chevron.¹¹² Although the court noted that the enforcement action may have triggered the petition for review insofar as Chevron would not have otherwise had any reason to

106. *Am. Ass'n of Meat Processors v. Costle*, 556 F.2d 875, 876-77 (8th Cir. 1977) (noting that although there was "substantial uncertainty as to the proper forum in which to seek review of existing source effluent guidelines," these circumstances did "not constitute grounds arising after the ninetieth day within the meaning of § 1369(b)").

107. *Sun Enters., Ltd. v. Train*, 532 F.2d 280, 291(2d Cir. 1976).

108. *Id.* ("The additional scientific data collected by and offered through the expert who testified for petitioners at the DEC hearings is just that: additional evidence in support of the position petitioners have maintained throughout the proceedings. It does not constitute new grounds for a petition.")

109. *Nat'l Mining Ass'n v. U.S. Dept. of Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995).

110. *Peabody Coal Co. v. Train*, 518 F.2d 940, 942 (6th Cir. 1975) ("The legislative history of [the CWA] shows that Congress desired a clear and prompt time schedule for applications for judicial review.")

111. *Chevron U.S.A., Inc. v. EPA*, 908 F.2d 468, 468 (9th Cir. 1990).

112. *Id.* at 471.

challenge the order, the court explained that this was not what Congress had in mind. Instead, the basis for the challenge accrued when Chevron first became aware of the “dissolved oil phenomenon.”¹¹³ Because section 509’s ninety-day (now 120-day) period for seeking judicial review began to run at that time, and had “long since expired,” the court dismissed the challenge as time-barred.¹¹⁴

Under this reasoning, NEDC’s claim should have been similarly time-barred because the alleged ambiguity arising from the statement by the United States in its amicus brief did not rise to the level of “new grounds” within the meaning of section 509. A court’s jurisdiction depends only upon “the state of things at the time of the action brought” and does not arise simply because a court finds that a rule is ambiguous.¹¹⁵ Therefore, the government’s apparent concession of ambiguity in the footnote of its amicus brief—like the enforcement action in *Chevron U.S.A. v. EPA*—did not constitute new grounds sufficient to trigger the Ninth Circuit’s jurisdiction to review the agency’s Silviculture Rule. Because individuals may always argue for new interpretations of existing regulations, invoking jurisdiction under section 509 and similar provisions must require the existence of objective circumstances external to those issues raised by the litigation itself.

Finally, the Ninth Circuit’s rationale for applying the “arising-after” exception based upon the Silviculture Rule’s latent ambiguity runs counter to other portions of its opinion. Later in the opinion, for example, the court recognized that only one interpretation of the Silvicultural Rule actually “reflects the intent of EPA in adopting the Rule.”¹¹⁶ Under this interpretation, the court noted, the regulation exempts *all* natural runoff from silvicultural activities, regardless of whether the runoff is “collected, channeled, and discharged into protected water.”¹¹⁷ The court further acknowledged that, ever since the EPA first promulgated its silviculture regulations, the agency has consistently “acted on the assumption” that discharges from stormwater runoff on forest logging roads do not require a permit.¹¹⁸

These discrepancies, combined with the fact that the EPA had never required permits for precipitation runoff from forest logging roads, severely

113. *Id.*

114. *Id.*

115. *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (“It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought . . .”).

116. *Nw. Env’tl. Def. Ctr. v. Brown*, 617 F.3d 1176, 1191 (9th Cir. 2010).

117. *Id.*

118. *Id.* at 1198.

undermine the court's assertion that NEDC could not have raised its claim after the rule was originally promulgated. Provisions allowing for "belated review" are designed to give individuals a chance to challenge agency rules and regulations in situations where new information arises that was unavailable when the agency first issued its rule.¹¹⁹ By allowing NEDC's challenge to proceed under the theory that the EPA's position was "ambiguous," therefore, the Ninth Circuit disregards Congress's fundamental purpose for providing "arising-after" exceptions in review-limiting provisions.

*B. Failing to Distinguish Between Enforcement Actions and
Petitions for Review*

Even if one ignores the Ninth Circuit's misapplication of section 509's "arising-after" exception, the court's revised opinion still fails to address why NEDC's claim was allowed to proceed in the district court under the CWA's citizen suit provision. Section 509 grants exclusive jurisdiction in the court of appeals for all cases that fall within its terms.¹²⁰ Accordingly, as discussed in Part I of this Note, section 509 mandates that individuals seeking review of EPA rules and regulations bring their challenge on a direct petition for review in the circuit court of appeals.¹²¹ The district courts, on the other hand, have jurisdiction over citizen suits.¹²² Therefore, even if NEDC's claim did somehow fall within the "arising after"

119. *Am. Ass'n of Meat Processors v. Costle*, 556 F.2d 875, 877 (8th Cir. 1977) (citing S. Rep. No. 92-414 (1971), reprinted in 1972 U.S.C.A.N. 3668, 3751).

120. 33 U.S.C. § 1369(b)(1)-(2) (2006) (noting that actions of the Administrator that "could have been obtained" under section 509 "shall not be subject to judicial review in any civil or criminal proceeding for enforcement").

121. *See E. I. du Pont de Nemours & Co. v. Train*, 528 F.2d 1136, 1137 (4th Cir. 1975) (noting that under section 509, the jurisdiction of the courts of appeals to review a regulation "on direct petition for review" is exclusive, "for if we [the court of appeals] have the jurisdiction, the district courts do not"), *aff'd*, 430 U.S. 112 (1977); *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 658-59 (D.C. Cir. 1975) ("Since Section 307 [of the CAA] is exclusive, this challenge is cognizable only in this court on a direct petition for review.").

122. 33 U.S.C. § 1365(a) (2006) ("The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation."); *id.* § 1365(c)(1) ("Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section *only* in the judicial district in which such source is located.") (emphasis added); *see also Sun Enters. Ltd. v. Train*, 532 F.2d 280, 287-88 (2d Cir. 1976). As the Court explained:

Section 505(a)(1) of the Water Act provides jurisdiction in the district court where there is an alleged violation of an effluent standard or limitation or an alleged violation of an order of the Administrator or a State with respect to such a standard or limitation. . . . To the extent that appellants are challenging the promulgation of those limits, they are required to do so in the court of appeals.

Id.

exception, that challenge should have been filed directly in the court of appeals as a petition for review under section 509.¹²³

Nevertheless, after finding that section 509 did not preclude NEDC's claim because the claim was based on arising-arising grounds, the Ninth Circuit concluded that the case was properly filed as a citizen suit under section 505.¹²⁴ Ignoring the fundamental distinction between section 505 and section 509, the Ninth Circuit concluded its discussion of jurisdiction by stating, "We thus have subject matter jurisdiction under [section 505(a)]."¹²⁵ The Ninth Circuit's exercise of jurisdiction thus confuses what section 509 makes abundantly clear: The federal courts of appeals have exclusive jurisdiction over challenges to agency rules and regulations.¹²⁶

By blurring the crucial distinction between citizen suits and petitions for review, the decision permits courts to review agency actions in a manner that effectively circumvents the statutory restrictions Congress explicitly placed on judicial review. Given the nature of petitions for review, requiring challenges to the validity of EPA's rules to be brought under a statute's judicial review provision—instead of during the course of a citizen suit—serves several important purposes. The Ninth Circuit's decision, by providing a way around these requirements, threatens to disrupt the statutory schemes imposed by Congress in countless environmental statutes.

For example, when an individual seeks to challenge an EPA regulation under section 509, the agency is by necessity a party to the litigation.¹²⁷ Because the EPA is not ordinarily a party to a citizen suit under section 505, if a court decides to strike down one of its regulations during its resolution of a citizen suit, the agency lacks the opportunity to engage in the rulemaking process generally required in suits under the CWA's judicial review provision.¹²⁸

123. *Nat'l Mining Ass'n v. U.S. Dept. of Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995) ("To the extent that appellants' challenge to the [agency] rule is based on grounds that existed within [the statutory deadline], the district court did not have jurisdiction over the challenge.").

124. *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1069 (9th Cir. 2011).

125. *Id.*

126. 33 U.S.C. §1369(b)(1) (2006).

127. *See id.* § 1369(b); *see also, e.g.,* *Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1306 (9th Cir. 1992) (remanding to the EPA after reviewing its rule under section 509 and concluding that a portion of that rule was invalid).

128. Brief for National Alliance of Forest Owners et al. as Amici Curiae Supporting Petitioners at 23, *Decker v. Nw. Env'tl. Def. Ctr.*, 80 U.S.L.W. 3142 (2012) (No. 11-338), *Georgia-Pac. W., Inc., v. Nw. Env'tl. Def. Ctr.*, 80 U.S.L.W. 3143 (2012) (No. 11-347). Specifically, the Forest Landowners point out:

[C]hallenges must be mounted against the agency, which is thereby given a full and fair chance to defend its views. Such challenges, where the agency is the named defendant, allow for binding nationwide uniform determinations about the validity of agency rules. Moreover, other interested parties have the opportunity

Furthermore, citizen suits are not subject to the same forum requirements as petitions for review. Under section 509, petitions for review of EPA actions must be filed only in the circuit courts of appeals.¹²⁹ Providing the courts of appeals with jurisdiction to review the validity of agency rules makes sense for several reasons. First, because regulations of general applicability often have a much broader impact—often affecting “an entire industry or class of persons”—questions regarding their validity are “likely to end up in a court of appeals eventually anyway.”¹³⁰ According to the Supreme Court in *Harrison v. PPG Industries*, this is precisely why the circuit courts have original jurisdiction to review nationally applicable agency regulations and other agency actions having “nationwide consequences.”¹³¹ Several circuits have also recognized that it was the “express intent” of statutes such as the CWA to require direct review of agency regulations in the circuit courts in order to “streamline decision-making and ensure prompt high level judicial review.”¹³² Individual enforcement proceedings, on the other hand, fall within the jurisdiction of the district courts. Unlike petitions for review, these enforcement actions usually only impact the particular parties to a case and are not frequently appealed beyond the district court.¹³³

Second, given the scope of their jurisdiction, courts of appeals are also better equipped than the district courts to deal with challenges to agency regulations. This is because the circuit courts are able “to develop and maintain a uniform and coherent case law for a large geographical area.”¹³⁴ This bifurcated system of review thus provides “a mechanism for the resolution of inconsistencies within and between districts and for the

to contribute to the defense of (or the assault on) the rule. By contrast, collateral citizen suit attacks on agency regulations risk inconsistent and piecemeal litigation and determinations, and uncertainty as to effect of judicial decisions on the agency and non-parties.

Id.

129. 33 U.S.C. § 1369(b)(1) (2006) (“Review of the Administrator’s action . . . may be had by any interested person in the Circuit Court of Appeals . . .”).

130. David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 52 (1975).

131. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 590 (1980).

132. *Shell Oil Co. v. Train*, 415 F.Supp. 70, 76 (N.D. Cal. 1976), *aff’d*, 585 F.2d 408 (9th Cir. 1978); *see also* *Natural Res. Def. Council v. EPA*, 673 F.2d 400, 405 n.15 (D.C. Cir. 1982) (“National uniformity, an important goal in dealing with broad regulations, is best served by initial review in a court of appeals.”); *Cent. Hudson Gas & Elec. Corp. v. EPA*, 587 F.2d 549, 557 (2d Cir. 1978) (“The fact that judicial review of the actions covered by [section 509] is in the Court of Appeals in the first instance evidences a purpose . . . to save procedural steps and time.”).

133. Currie & Goodman, *supra* note 130, at 57.

134. *Id.* at 12.

achievement of circuit-wide uniformity.”¹³⁵ As the Supreme Court noted in *Arkansas v. Oklahoma*, given that the CWA was enacted in part to establish “a uniform system of interstate water pollution regulation,” such inconsistent results diminish the objectives of Act.¹³⁶ The Ninth Circuit has itself recognized that judicial review provisions in statutes such as the CWA and the CAA serve to prevent “continual piecemeal attacks” on broadly applicable EPA rules and regulations.¹³⁷

Finally, on a much broader scale, the Ninth Circuit’s decision also threatens to undermine environmental regulations across the board by transforming citizen suits into a vehicle for challenging agency regulations. It is generally understood that the sole purpose of a citizen suit is to enforce EPA standards.¹³⁸ Section 505 of the CWA, for example, authorizes citizens to bring suit against any person or entity in violation of either an effluent limitation or standard established under the Act.¹³⁹ Citizen suits therefore enable individuals to act as “private attorney[s] general” by allowing them to bring enforcement actions against regulated entities violating a statute or its implementing regulations, or against the EPA for failing to perform a nondiscretionary duty.¹⁴⁰

Because citizen suits are designed to enforce EPA standards, not to challenge their adequacy, courts have consistently found that citizen suits are not the proper mechanism for challenging EPA actions.¹⁴¹ For example, in *Delaware Valley Citizens Council for Clean Air v. Davis*, the Third Circuit found that a citizen suit could not be used to challenge an EPA regulation establishing an emission standard under the CAA.¹⁴² According

135. *Id.* at 16.

136. *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992).

137. *Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1447 (9th Cir. 1984).

138. *See, e.g., Del. Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 265 (3rd Cir. 1991) (“[C]itizens who claim that the emission standards themselves are inadequate must petition the appropriate court of appeals pursuant to [the judicial review provision], while citizens who merely wish to enforce the emissions standards may sue in district court pursuant to [the citizen suit provision].”).

139. 33 U.S.C. § 1365(a)(1) (2006).

140. *Sierra Club v. Morton*, 405 U.S. 727, 737–38 (1972); *see also Bennett v. Spear*, 520 U.S. 154, 155 (1997) (noting that the Endangered Species Act’s citizen suit provision’s “obvious purpose is to encourage enforcement by so-called ‘private attorneys general’”).

141. *Greenpeace, Inc. v. Waste Technologies Indus.*, 9 F.3d 1174, 1180 (6th Cir. 1993). As the Court explained:

By specifying that review of the Administrator’s permit decisions may be had in the courts of appeals within ninety days, but otherwise “shall not be subject to judicial review in civil or criminal proceedings for enforcement,” Congress gave the courts of appeals exclusive jurisdiction to review permit decisions and render judgments that cannot be relitigated or otherwise collaterally attacked in the district courts.

Id. (quoting 42 U.S.C. § 6976(b) (2006)).

142. *Del. Valley*, 932 F.2d at 265.

to the court, “[C]itizens who claim that the emission standards themselves are inadequate must petition the appropriate court of appeals pursuant to [the judicial review provision], while citizens who merely wish to enforce the emissions standards may sue in district court pursuant to [the citizen suit provision].”¹⁴³

Despite these important distinctions, the Ninth Circuit permitted NEDC’s challenge against the State of Oregon and the timber companies to proceed as an individual citizen suit, instead of as a direct petition for review under section 509. Accordingly, *NEDC v. Brown*, if allowed to stand, opens the door for challenges to agency actions through individual citizen suits brought against regulated entities themselves—rather than against the agency, as the statute contemplates.¹⁴⁴ Opening this type of “collateral route to attack” provides individuals with what is effectively an “end run” around the limitations Congress deliberately placed on review.¹⁴⁵ In the words of one court, these explicit statutory limitations on review—such as the strict 120-day deadline in section 509—“would be rendered a nullity” if citizen suits could be used to challenge activities not prohibited under the statute.¹⁴⁶

C. Implicit Invalidation of EPA’s Silviculture Rule

Lastly, the Ninth Circuit’s decision in *NEDC v. Brown* should be seen as an invalidation of the EPA’s Silviculture Rule, not merely an attempt to “interpret” the rule in a manner that conforms with the language of the CWA. The defendants claim that the Ninth Circuit failed to give sufficient deference to the EPA when it interpreted the CWA’s permitting requirements.¹⁴⁷ Under the *Chevron* doctrine, courts may not substitute their own construction of a statutory provision for a reasonable interpretation made by the agency.¹⁴⁸ If congressional intent is clear—for example because the language of the statute is unambiguous—then the court “must give effect to the unambiguously expressed intent of Congress.”¹⁴⁹ However, where a statute is silent or ambiguous on this issue, courts must defer to an agency’s “permissible construction of the statute.”¹⁵⁰ Defendants

143. *Id.*

144. *Id.* at 265 n. 7.

145. *Greenpeace*, 9 F.3d at 1181.

146. *Id.*

147. Petition for Writ of Certiorari at 4–5, *Georgia-Pac. W., Inc. v. Nw. Env’tl. Def. Ctr.*, 80 U.S.L.W. 3143 (2012) (No. 11-347).

148. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

149. *Id.* at 842–43.

150. *Id.* at 843.

claim that the Ninth Circuit, “having concluded that EPA’s silviculture rule is invalid . . . took it upon itself to rewrite EPA’s stormwater rule.”¹⁵¹

In response, the environmental group claims that it “did not challenge, and the court of appeals did not strike down, any rule. Nor did the court effectively invalidate a rule by construing it in a way that conflicts with its text.”¹⁵² Instead, NEDC maintains that the court of appeals properly applied *Chevron* in rejecting EPA’s interpretation of its Silviculture Rule because the language of the CWA is not unclear or silent on the issue. According to NEDC, Congress was “unambiguous” when it defined “any pipe, ditch [or] channel” as a point source.¹⁵³ However, even if an agency rule appears to be inconsistent with its enabling statute, the language of section 509 makes clear that the time to challenge that rule is immediately after its promulgation. NEDC’s argument thus illustrates the difficulty that both litigants and the courts have in adhering to the time limits Congress imposed on judicial review.

Interestingly, though not surprisingly, NEDC relies on the *Duke Energy* Court’s failure to articulate a clear standard to support its argument that the Ninth Circuit did not implicitly invalidate EPA’s Silviculture Rule.¹⁵⁴ Quoting language from the Supreme Court, the environmental group asserts that the Ninth Circuit merely relied on “a purposeful but permissible reading of the regulation adopted to bring it into harmony with the Court of Appeals’s view of the statute.”¹⁵⁵ However, the Ninth Circuit itself stated in its opinion that the Silviculture Rule, if interpreted to exempt natural runoff, “is inconsistent with [the Act] and is, to that extent, *invalid*.”¹⁵⁶

Furthermore, the Ninth Circuit sought to garner support for its decision by pointing to several cases in which courts “have invalidated EPA regulations that categorically exempt discharges.”¹⁵⁷ The Ninth Circuit

151. Petition for Writ of Certiorari, at 29, *Decker v. Nw. Env’tl. Def. Ctr.*, 80 U.S.L.W. 3142 (2012) (No. 11-338).

152. Respondent’s Brief in Opposition, *supra* note 70, at 2.

153. Petition for Writ of Certiorari, *supra* note 151, at 31.

154. Respondent’s Brief in Opposition, *supra* note 70, at 2 (citing *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007)).

155. *Id.* (quoting *Duke Energy*, 549 U.S. at 573). Although NEDC cites language from *Duke Energy*, it does not mention that the Supreme Court in *Duke Energy* actually found that what the Fourth Circuit had done was not in fact a “purposeful but permissible” reading of the EPA regulation, but an implicit invalidation of it. *Duke Energy*, 549 U.S. at 573. Furthermore, NEDC fails to distinguish the Ninth Circuit’s interpretation of the Silviculture Rule from the Fourth Circuit’s “efforts to trim” the EPA’s PSD regulations, or explain why the Ninth Circuit’s approach should not also be classified as an implicit invalidation of the rule. See discussion *supra* Part II.B.

156. *Nw. Env’tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1080 (9th Cir. 2011) (emphasis added).

157. *Id.* at 1086.

therefore appears to acknowledge that it did in fact engage in review of the EPA's Silviculture Rule, despite NEDC's arguments to the contrary. If this is true, then the decision begs the question of where the court found the authority to engage in judicial review and invalidate the EPA's regulation in the context of a citizen suit—over which only the district courts have jurisdiction—that was filed more than three decades after the time for challenging the regulation had expired.

IV. IMPLICATIONS OF THE DECISION

Reaction to the Ninth Circuit's decision in *NEDC v. Brown* was overwhelmingly negative and unusually widespread—spanning across all branches of government. The chaos caused by this myriad of responses is precisely what Congress sought to avoid by placing time limits on review, and illustrates why it is essential that courts strictly adhere to these limitations in order to reduce uncertainty. Moreover, as the following discussion suggests, these statutory time limits are particularly important for effectively implementing environmental regulations.

A. Legislative, Regulatory, and Judicial Responses to the Decision

The decision triggered hasty responses from all branches of government seeking to reduce the impact of the court's ruling. Immediately after the Ninth Circuit issued its decision, Democrats and Republicans in both houses sought to overturn the ruling through legislation amending the CWA. The Silviculture Regulatory Consistency Act (SRCA) and its companion bill in the Senate would have reversed the Ninth Circuit's decision by codifying the Silviculture Rule, thereby restoring management authority of runoff from forest logging roads to the states.¹⁵⁸ Although neither bill was successful, Congress used an appropriations bill to temporarily overturn the *NEDC v. Brown* decision, barring the EPA from requiring NPDES permits for forest logging roads during the year 2012.¹⁵⁹ The omnibus spending measure was passed by Congress and signed by President Obama in December of 2011.¹⁶⁰ However, the rider has since expired and leaves open the question of what will happen at the close of the 2012 fiscal year.

158. H.R. 2541, 112th Cong. (2011) (“The Administrator shall neither require a permit under this section, nor directly or indirectly require any State to require a permit under this section, for a discharge resulting from the conduct of any silvicultural activity . . . from which there is runoff.”); S. 1369, 112th Cong. (2011) (same).

159. Alexandra D. Dunn, *10 Key Recent Clean Water Act Cases to Know*, in ENVIRONMENTAL LAW 507, 512 (ALI-ABA Course of Study, Feb. 1–3, 2012).

160. *Id.*

The EPA is also using its regulatory authority in an attempt to overturn the Ninth Circuit's ruling. In September 2012, the agency issued a proposed rule to clarify that—"contrary to the Ninth Circuit's decision in [*NEDC*]"—an NPDES permit is not required for runoff from forest logging roads.¹⁶¹ In its proposed rule, the EPA explained that "[t]his rulemaking responds to the uncertainty created by the Ninth Circuit's holding in *NEDC* that certain channeled discharges of stormwater from logging roads constitute point source discharges" and that the proposed rule, "by clarifying what constitutes a discharge 'associated with industrial activity,' makes clear that such discharges do not require NPDES permits even if they are point source discharges."¹⁶²

In addition to these legislative and regulatory proposals, the Supreme Court has agreed to weigh in on the issue. In two separate petitions—*Decker v. NEDC* and *Georgia-Pacific West Inc. v. NEDC*—the State of Oregon and the timber industry asked the Supreme Court to reverse the Ninth Circuit.¹⁶³ Unsurprisingly, both petitions argued that the court of appeals erred in exercising jurisdiction over the case because NEDC's claim should have been viewed as a direct challenge to the EPA's Silviculture Rule, which would have been precluded based upon the CWA's 120-day deadline for review.¹⁶⁴ Concerned with the substantive impact of the Ninth Circuit's ruling, twenty-six states also filed a joint brief urging the Supreme Court to overrule the decision.¹⁶⁵ In June 2012, the Court granted certiorari.¹⁶⁶

Before deciding to grant the petitions, the Court asked the U.S. Solicitor General to file a brief stating the United States' position in the two cases regarding whether stormwater runoff from logging roads requires a NPDES permit.¹⁶⁷ In a brief filed in May 2012, the Solicitor General asserted that *NEDC v. Brown* was incorrectly decided because the Ninth Circuit "fail[ed] to give appropriate deference to EPA's interpretation of its

161. Notice of Proposed Revisions to Stormwater Regulations to Clarify that an NPDES Permit is not Required for Stormwater Discharges from Logging Roads, 77 Fed. Reg. 53834, 53835 (proposed Sept. 4, 2012) (to be codified at 40 C.F.R. pt. 122).

162. *Id.* at 53835 n.1.

163. Petition for Writ of Certiorari, *supra* note 151; Petition for Writ of Certiorari, *supra* note 147.

164. Petition for Writ of Certiorari, *supra* note 151, at 17; Petition for Writ of Certiorari, *supra* note 147, at 29.

165. 26-State Brief, *supra* note 5, at 20–21.

166. *Decker v. Nw. Env'tl. Def. Ctr.*, 80 U.S.L.W. 3142 (2012).

167. Order inviting Solicitor General to file a brief expressing the views of the United States, *Decker v. Nw. Env'tl. Def. Ctr.*, 132 S.Ct. 865 (2011). The order simply states: "The Solicitor General is invited to file a brief in these cases expressing the views of the United States. Justice Breyer took no part in the consideration or decision of these petitions." *Id.*

own regulations.”¹⁶⁸ Nevertheless, he argued that review by the Supreme Court was unnecessary in light of the legislative and administrative steps already underway.¹⁶⁹ According to the Solicitor General, although the regulatory system created by the court’s ruling “could entail significant practical burdens,” there was no need for the Court to hear the case because “those concerns are being addressed by both Congress and EPA.”¹⁷⁰ By agreeing to review the Ninth Circuit’s decision, the Court at least implicitly rejected the United States’ argument that the issues raised by the ruling could be resolved by the agency through the regulatory process or by Congress through its proposed legislation.¹⁷¹

In addition to jurisdiction, the appeal raises important questions regarding deference.¹⁷² However, unless the Supreme Court rules on the jurisdictional issue, the procedure employed by the Ninth Circuit in *NEDC v. Brown*—and its misapplication of section 509—will remain intact. Because the chaotic regulatory response to the decision is precisely what Congress sought to avoid by placing statutory limits on judicial review of agency actions in the first instance, *NEDC v. Brown* sets a dangerous precedent.

B. Undermining the Integrity of Environmental Regulations

At first blush, the Ninth Circuit’s decision in *NEDC* appears to result in more stringent environmental protection. However, the opposite may be true. As a substantive matter, by leaving regulation of nonpoint sources to the states, Congress recognized that this type of pollution is best dealt with at the local level through “best management practices,” which tend to provide flexibility that allows for continuous improvement.¹⁷³ Therefore,

168. Brief for United States as Amici Curiae at 8, *Decker v. Nw. Env’tl. Def. Ctr.*, 80 U.S.L.W. 3142 (2012) (No. 11-338), *Georgia-Pac. W., Inc., v. Nw. Env’tl. Def. Ctr.*, 80 U.S.L.W. 3143 (2012) (No. 11-347).

169. *Id.* at 14.

170. *Id.*

171. *Decker*, 640 F.3d at 1063.

172. Specifically, the Court is asked to determine “whether the Ninth Circuit erred when it held that stormwater from logging roads is industrial stormwater under the rules of the CWA and the Environmental Protection Agency, even though EPA has determined that it is not industrial stormwater?” *Decker v. Northwest Environmental Defense Center*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/decker-v-northwest-environmental-defense-center/> (last visited Nov. 16, 2012). The petitioners argue that the Ninth Circuit failed to give appropriate *Chevron* deference, and many of the amicus briefs focus on this issue. However, those questions—while important—are beyond the scope of this Note.

173. Gordon, *supra* note 4 (noting that the term “[b]est management practices” is described in other contexts as “Continuous Process Improvement” because it allows states to make continuous improvements without waiting for national standards to change).

many believe the prior system of leaving regulation of stormwater runoff to the states is preferable and that the EPA “had been doing the right thing before the courts got involved.”¹⁷⁴

In addition, by adding another layer of permitting, the decision may actually hinder the objectives of the CWA by using up precious resources that could be better utilized in areas that serve to directly improve environmental quality.¹⁷⁵ The “administrative burdens” the court’s ruling places on both public and private landowners, the EPA, and state governments have been described as “staggering.”¹⁷⁶ According to Senator Wyden, a democrat from Oregon, the Ninth Circuit’s decision—which “overturn[ed] 35 years of widely-accepted [EPA] policy”—would impose substantial burdens on landowners, administrative officials, and the courts if left to stand:

[E]very use of forest roads will require permitting and will therefore be subject to challenge by citizen lawsuits. This will not only overburden landowners and managers in the Ninth Circuit states by adding significant compliance and permitting costs, it will create an opportunity for administrative appeal and litigation every time a permit is approved.¹⁷⁷

More importantly for purposes of this Note, the procedural implications of the decision threaten to undermine the environmental protection schemes in a broad array of federal environmental laws.¹⁷⁸ As Congress has recognized in statute upon statute, deadlines for judicial review in the field of environmental law serve “to avoid needless delays in the implementation of important national programs caused by incessant litigation and inconsistent decisions.”¹⁷⁹ Furthermore, although *NEDC* involved a suit brought by an environmental group seeking to increase

174. Hurley, *supra* note 7.

175. Gordon, *supra* note 4 (“Injecting permit requirements into this process will only make the ongoing upgrade of our methods slower and more expensive, diverting resources from reducing sediment to the legal machinery of permit review and litigation.”).

176. Petersen, *supra* note 5.

177. 157 CONG. REC. S4611 (daily ed. July 14, 2011).

178. See *supra* notes 20–27 (listing environmental statutes with similar preclusion schemes).

179. *Lubrizol Corp. v. Train*, 547 F.2d 310, 315 (6th Cir. 1976) (describing the D.C. Circuit’s review of the legislative history of the CAA’s judicial review provisions in *Natural Resources Defense Council v. EPA*, 512 F.2d 1351, 1354–56 (1975)). See also *Natural Res. Def. Council v. Nuclear Regulatory Comm’n*, 666 F.2d 595, 602 (D.C. Cir. 1981) (noting that these CERCLA time limitations “serve[] the important purpose of imparting finality into the administrative process, thereby conserving administrative resources”).

environmental protection, many cases in which statutory time limits on review come into play involve challenges by industry groups that would welcome the opportunity to challenge stringent environmental regulations even though the deadline for review has long since passed.¹⁸⁰

Environmentalists themselves acknowledge the vital role statutory limits on review play in preserving the integrity of environmental statutes. In a brief filed with the Supreme Court in *Duke Energy*, the National Parks Conservation Association recognized that—by requiring that challenges to EPA rules be initiated at the time they are promulgated—Congress has “consistently established a sensible system for judicial review.”¹⁸¹ Allowing challenges to proceed after this time hinders the EPA’s ability to successfully enforce the environmental statutes Congress entrusted the agency with implementing.¹⁸² In a statement foreshadowing the ruling in *NEDC v. Brown*, the Parks Association cautioned that allowing that type of attack to EPA regulations would “not only undermine the Clean Air Act’s enforcement scheme, but similar restrictions on judicial review established by Congress in many other environmental statutes.”¹⁸³ Although the Supreme Court in *Duke Energy* held that the company’s challenge was time-barred by section 307 of the CAA, the Ninth Circuit failed to abide by the environmental group’s warning. Accordingly, *NEDC v. Brown* opens the door to individuals seeking to challenge long-standing EPA regulations that Congress—in crafting many of the nation’s most successful environmental statutes—expressly sought to preclude.¹⁸⁴

180. See, e.g., *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 571 (2007); *Natural Res. Def. Council v. EPA*, 673 F.2d 400, 401–02 (D.C. Cir. 1982) (involving challenges by industry groups to Consolidated Permit Regulations issued by EPA); *Central Hudson Gas & Elec. Corp. v. EPA*, 587 F.2d 549, 552 (2d Cir. 1978) (involving challenge by power utility companies); *Am. Ass’n of Meat Processors v. Costle*, 556 F.2d 875, 876–77 (8th Cir. 1977) (involving action by meat processors seeking review of existing point source effluent guidelines for the meat products point source category promulgated by the EPA); *Peabody Coal Co. v. Train*, 518 F.2d 940, 942 (6th Cir. 1975) (involving challenge by coal company seeking review of a determination of the EPA with regard to a state permit program).

181. Brief for Nat’l Parks Conservation Ass’n as Amici Curiae at 14, *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007) (No. 05–848); see also Thomas Gremillion, *Environmental Defense v. Duke Energy Corporation*, 31 *Harv. Env’tl. L. Rev.* 333, 341 (2007) (“Even if the Court rejects Duke’s regulatory interpretation, however, reaching the merits of that claim will invite litigation on a broad range of matters previously barred under the judicial review provisions of the CAA and other environmental statutes.”).

182. Brief for Nat’l Parks Conservation Ass’n as Amici Curiae, *supra* note 181, at 11.

183. *Id.*

184. *Citizen Suit Watch: Ninth Circuit Asserts Citizen Suit Jurisdiction Over Challenge to Longstanding Regulation And Reaffirms Clean Water Act Permitting Requirements for Forest Roads*, CROWELL & MORING (May 31, 2011), <http://www.crowell.com/NewsEvents/AlertsNewsletters/all/1358852>.

CONCLUSION

Congress routinely places limits on a court's jurisdiction to review administrative actions. Although the wisdom of review-preclusion statutes has been repeatedly questioned,¹⁸⁵ their legitimacy is undisputed.¹⁸⁶ Moreover, the Supreme Court has consistently upheld these statutory limits on judicial review where Congress expressly provides them.¹⁸⁷ Nevertheless, courts have long expressed their discomfort with being told they cannot engage in judicial review—even in the face of Congress's unambiguous intent to proscribe review of agency rules and regulations.¹⁸⁸

Although the CWA expressly prohibits individuals from challenging EPA regulations more than 120 days after their promulgation, the Ninth Circuit in *NEDC v. Brown* invalidated an EPA rule that had been in effect for more than thirty-six years.¹⁸⁹ By exercising jurisdiction under the Act's citizen suit provision, the court transformed individual enforcement actions into a vehicle for attacking agency regulations that may have been in effect for years—or even decades. Recognizing the need to reduce uncertainty in the context of environmental regulation, Congress placed strict time limits for reviewing agency rules promulgated under many of the nation's most important environmental statutes. Because these requirements do not apply in the context of citizen suits, *NEDC v. Brown* allows individuals to circumvent those requirements. The Ninth Circuit's decision—if allowed to stand—threatens to undermine the judicial review provisions contained in each of these statutes. Accordingly, the Supreme Court should overturn the Ninth Circuit's ruling in *NEDC v. Brown* and send a clear message that “no means no” when it comes to statutory restrictions on review.

—Marie Kyle^{*†}

185. See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (arguing that Congress may not limit jurisdiction so as to destroy the essential function of the courts).

186. Frederick Davis, *Judicial Review of Rulemaking: New Patterns and New Problems*, 1981 DUKE L.J. 279, 307–08 (1981) (listing express preclusion statutes).

187. See discussion *infra* Part II.

188. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

189. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1069 (9th Cir. 2011).

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† A special thanks to Phil Ferester for his continued guidance on this topic, to the staff of the *Vermont Law Review* for all of their hard work throughout production, to the many friends and colleagues for their invaluable input and feedback, and to my parents for their unwavering support.

