No. 03-1125

In the

Supreme Court of the United States

TEXAS CITIES COALITION ON STORMWATER,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and NATURAL RESOURCES DEFENSE COUNCIL, INC.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT NATURAL RESOURCES DEFENSE COUNCIL, INC.

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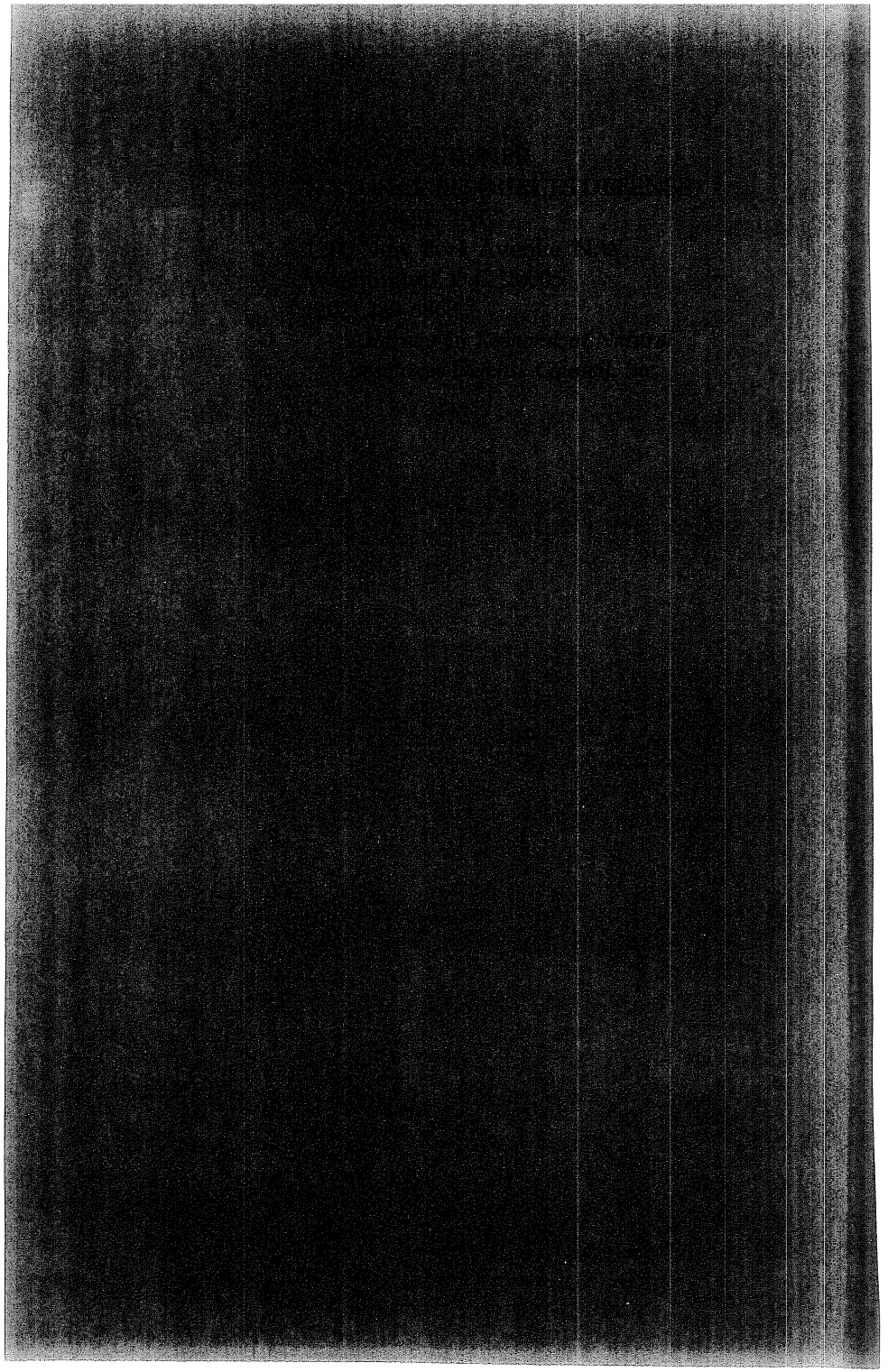

QUESTIONS PRESENTED

The Environmental Protection Agency (EPA) promulgated the Phase II stormwater rule to regulate pollutant discharges from certain small municipal separate storm sewer systems (MS4s). The rule gives the MS4 operator a choice between two compliance options. Under one option, the MS4 has the freedom to design its own pollution reduction program by selecting control activities within six broad categories, but must enact certain ordinances or other regulatory mechanisms. Under the alternative, the MS4 may obtain an individual permit that does not require the MS4 operator to regulate third parties. In the past, EPA has offered such alternative permits to MS4s under the authority of the same regulations that now serve as the basis for the alternative compliance option under the Phase II rule.

The questions presented are:

1. Whether the court of appeals correctly found that the Phase II rule does not violate the Tenth Amendment because the rule does in fact provide MS4s with a compliance alternative that does not require regulation of third parties.

2. Whether the court of appeals correctly held that the canon of construction requiring a clear statement of congressional intent when statutory interpretations raise significant federalism questions does not invalidate the Phase II rule, because the canon does not apply when there is no serious constitutional issue, and EPA's inclusion of the alternative permit option removes any doubt as to whether the rule violates the Tenth Amendment.

LIST OF PARTIES

Petitioner is the Texas Cities Coalition on Stormwater (Texas Cities). The Texas Counties Storm Water Coalition (Texas Counties) also filed a petition for review of the Phase II rule and filed joint briefs with the Texas Cities in the court of appeals. For the purpose of the proceedings before this Court, the Texas Counties wish to remain a party and have adopted the position of the Texas Cities, but will not file separate papers. Respondents are EPA and the respondent-intervenor in the court of appeals, the Natural Resources Defense Council, Inc. (NRDC).

The Environmental Defense Center, the American Forest & Paper Association and the National Association of Home Builders filed petitions for review of the Phase II rule on issues different from those presented in this petition for writ of certiorari. Those three entities did not intervene in the Texas Cities' petition for review and are therefore not parties to these proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, NRDC states that it is a New York nonprofit corporation that has no parent corporation. It further states that no publicly held company owns any of its stock.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and NATURAL RESOURCES DEFENSE COUNCIL, INC.

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NRDC respectfully requests that the Court deny the petition for a writ of certiorari to review the September 15, 2003, judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The final opinion below is *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003). App. 1-92.[1] In issuing the final opinion, the Ninth Circuit vacated its initial opinion, re-

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[1] Citations to "App." refer to the Appendix to the Texas Cities' petition for writ of certiorari.

ported as *Environmental Defense Center* v. *EPA*, 319 F.3d 398 (9th Cir. 2003).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The relevant provision of the Clean Water Act (CWA), section 402(p), 33 U.S.C. § 1342(p), is reproduced at App. 93-97. The Phase II rule and its preamble were published at 64 Fed. Reg. 68722-68852. App. 98-166 (excerpts). The rule itself is codified at various sections of 40 C.F.R. parts 9, 122, 123 and 124. *See* App. 167-81 (setting forth certain provisions of the rule, including 40 C.F.R. §§ 122.30, 122.34 and 122.36); NRDC App. 11-12 (setting forth excerpts from 40 C.F.R. § 122.33(b)(2)(ii))[2]. Certain relevant provisions of EPA's Phase I stormwater rule are incorporated by reference in the Phase II rule. *See* NRDC App. 1-11 (setting forth excerpts from 40 C.F.R. § 122.26(d)).

STATEMENT OF THE CASE

A. Stormwater Pollution and the Stormwater Provision of the Clean Water Act – Section 402(p)

Urban stormwater discharges are a leading cause of water pollution. Uncontrolled discharges of polluted stormwater

[2] Citations to "NRDC App." refer to the Appendix to this brief.

from MS4s convey metals, pathogens, toxins, sediment, nutrients, trash and other pollutants to the waters of the United States. *National Pollutant Discharge Elimination System - Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule*, 64 Fed. Reg. 68722, 68744 (Dec. 8, 1999) (hereinafter Phase II Pream. & R.).

The cornerstone of the nation's water pollution control efforts is the National Pollutant Discharge Elimination System (NPDES) established under section 402 of the Clean Water Act, 33 U.S.C. § 1342. Under the NPDES regime, it is unlawful to discharge pollutants to the waters of the United States from a point source[3] without authorization to do so pursuant to a permit that sets conditions on the discharges.

Since the enactment of the Clean Water Act in 1972, most NPDES permits have relied on numeric effluent limits as the conditions that must be met to render the discharges lawful. Numeric effluent limits are quantitative "end of pipe" restrictions on the amounts or concentrations of pollutants that may be discharged.

In 1977, the District of Columbia Circuit held that storm sewers were point sources that EPA could not exempt from NPDES permitting requirements. *NRDC* v. *Costle*, 568 F.2d 1369, 1377, 1379 (D.C. Cir. 1977). EPA subsequently attempted to promulgate stormwater regulations in the 1970s and 1980s.

In 1987, Congress enacted section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p), App. 93-97. Among other things, that statute created a two-phase regulatory program for

[3] The Clean Water Act defines a point source as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

stormwater discharges. Section 402(p)(4) required that EPA establish regulations setting forth permit application requirements for stormwater discharges from large and medium MS4s, that is, MS4s serving populations of 100,000 persons or greater. 33 U.S.C. § 1342(p)(4), App. 95-96. Section 402(p)(6), in turn, required EPA to designate additional sources of stormwater pollution for regulation and to establish a comprehensive pollution control program for the designated sources. 33 U.S.C. § 1342(p)(6), App. 97.

B. The Phase I Rule

In 1990, EPA promulgated regulations under section 402(p)(4) for large and medium MS4s. Those regulations became known as the Phase I rule.[4] Consistent with the statute, the Phase I rule sets out permit application requirements for those MS4s. 40 C.F.R. § 122.26(d). Among the information that the Phase I rule requires in those permit applications is description of "a program . . . to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the [MS4]." 40 C.F.R. § 122.26(d)(2)(iv)(B)(*1*), NRDC App. 7. However, the rule also provides that the permitting authority can excuse an MS4 from certain of the application requirements, including the requirement that the MS4 describe its program to implement and enforce an illicit discharge ordinance, if the requirement is not "practicable" or "applicable." 40 C.F.R. § 122.26(d)(2)(viii), NRDC App. 10.

[4] *National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges*, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at various sections of 40 C.F.R. pts. 122-124).

C. The Fifth Circuit's Decision in *City of Abilene*

Since promulgation of the Phase I rule, EPA and other permitting authorities have issued Phase I permits to large and medium MS4s. In *City of Abilene* v. *EPA*, 325 F.3d 657 (5th Cir. 2003), *reh'g en banc denied*, 71 Fed. Appx. 443 (5th Cir. 2003), a unanimous panel of the Fifth Circuit upheld EPA-issued Phase I MS4 permits against two as-applied challenges. The first challenge was based on the canon of construction requiring a clear statement of congressional intent when a statutory interpretation raises serious federalism questions, as set out in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (hereinafter *SWANCC*). The second challenge was based on the Tenth Amendment.

In *City of Abilene*, EPA had offered the plaintiffs, two Texas cities, a choice between (1) permits that would have required the cities to implement and enforce ordinances or other programs to prevent the discharge of pollutants into their MS4s, and (2) permits containing numeric effluent limits. *Id.* at 660. The cities chose permits of the first type rather than numeric effluent limit permits. Upon issuance of the permits, the cities sought administrative and judicial review. The cities contended that the Clean Water Act did not provide sufficiently clear authority to allow EPA to require an MS4 operator to regulate third parties, and that such regulation of third parties "invoke[d] the outer limits of [federal] power," so that the permits violated the *SWANCC* clear statement canon of construction. *Id.*

In denying that challenge, the Fifth Circuit quoted section 402(p)(3) of the Clean Water Act, 33 U.S.C. § 1342(p)(3), which requires that MS4 permits include "a requirement to effectively prohibit non-stormwater discharges into the storm sewers" and "controls to reduce the discharge of pollutants to the maximum extent practicable, including management prac-

tices, control techniques and system, design and engineering methods, and *such other provisions as the Administrator or the State [permitting authority] determines appropriate for the control of such pollutants.*" *Id.* at 660-61 (emphasis in original). Based on this statutory language, the Fifth Circuit concluded that "even if *Chevron* deference is not warranted, the challenged permit conditions are within EPA's discretion." *Id.* at 661 (referencing *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984)).

The Fifth Circuit also rejected the argument that the permits violated the Tenth Amendment because they required the cities to regulate third parties. *Id.* at 661-63. Following *New York* v. *United States*, 505 U.S. 144 (1992), the court stated that the federal government could encourage states and municipalities to implement a federal regulatory program so long as the choice to do so or not remained with the state or municipal government. *City of Abilene*, 325 F.3d at 662. As a result, the cities could not "establish a Tenth Amendment violation without demonstrating that they had no other option but to regulate [third parties] according to federal standards." *Id.* The Fifth Circuit concluded that EPA's offer of a numeric effluent limit permit gave the cities that other option:

> Like [the statute at issue in *Reno* v. *Condon*, 528 U.S. 141 (2000)], the proposed numeric end-of-pipe permits would not have required the Cities to regulate their own residents but instead, by requiring the Cities to meet effluent limitations, would have regulated them in the same manner as other dischargers of pollutants. Because the record shows that the Cities voluntarily chose the management permits over permits that did not require the Cities to regulate according to federal standards, the Cities have not been compelled to implement a federal regulatory scheme. Accordingly, their Tenth Amendment challenge fails.

Id. at 663.

D. The Phase II Rule

In 1999, EPA promulgated regulations under Clean Water Act section 402(p)(6), 33 U.S.C. § 1342(p)(6). Phase II Pream. & R., 64 Fed. Reg. 68722-852. Those regulations became known as the Phase II rule. Consistent with the statute, the Phase II rule designated certain stormwater dischargers for regulation – including certain small MS4s – and established a comprehensive permitting program to regulate them. The preamble to the rule listed approximately 5,700 cities or counties in "urbanized areas" that would be actually or potentially subject to the rule. Phase II Pream. & R., 64 Fed. Reg. at 68812-37. Certain federal facilities are also regulated under the Phase II rule's MS4 provisions. *Id.* at 68749.

The Phase II rule provides two compliance options. One option gives MS4 operators the freedom to design their own regulatory program by selecting pollution control activities from six broad categories referred to as the minimum measures.[5] App. 108 ("each permittee will determine appropriate [management practices] to satisfy each of the six minimum control measures"). EPA designed the rule in this way to provide "maximum flexibility in MS4 permitting" because "MS4s need . . . flexibility to optimize reductions in storm water pollutants on a location-by-location basis." App. 107. The six minimum measure categories are: (1) public education and outreach on stormwater impacts; (2) public involvement/participation; (3) illicit discharge detection and elimina-

[5] In ruling on a separate petition for review of the Phase II rule, the Ninth Circuit held that the MS4 operators' choice of pollution control measures must be reviewed by the permitting authority to ensure that the MS4 pollution control programs meet relevant statutory standards. App. 37-38. That issue is not before this Court.

tion; (4) construction site stormwater runoff control; (5) post-construction stormwater management in new development and redevelopment; and (6) pollution prevention/good housekeeping for municipal operations. App. 109-42.

Though the minimum measures approach provides flexibility, the MS4's minimum measure pollution control program must include certain features. For the illicit discharge, construction site, and new development and redevelopment minimum measures, the pollution control program must include certain ordinances or other regulatory mechanisms. 40 C.F.R. §§ 122.34(b)(3)(ii)(B), 122.34(b)(4)(ii)(A) & 122.34(b)(5)(ii)(B), App. 171, 172 & 174.

The alternative to the minimum measures approach under the Phase II rule allows regulated small MS4s to obtain individual permits under the Phase I rule's permit application requirements for large and medium MS4s. App. 152-53. EPA stated that those individual Phase II permits would "more specifically focus[ ] on the pollutants" discharged from the regulated MS4s, App. 157, and expressly noted that the permits could be based on numeric effluent limits. App. 158; *see also* App. 158-59 (explaining how appropriate effluent limits might be determined). EPA indicated that MS4 operators seeking permission to discharge under the alternative permit option did not need to submit details about future stormwater program requirements unless the MS4 operator intended that those future program components be considered when developing the permit conditions. App. 159; *see also* 40 C.F.R. § 122.33(b)(2)(ii), NRDC App. 11-12.

EPA added the alternative compliance option in response to comments suggesting that the minimum measures approach might violate the Tenth Amendment by requiring the operators of MS4s to regulate third parties. App. 153-54. EPA explained that the minimum measures approach, standing

alone, did not excessively interfere with the functioning of municipal governments, and therefore did not violate the Tenth Amendment. App. 155-57. EPA further noted that, in any event, providing the alternative permit option resolved any Tenth Amendment concerns:

> Even if the minimum measures approach was constitutionally suspect, a requirement that standing alone would violate constitutional principles of federalism does not raise concerns if the entity subject to the requirement may opt for an alternative action that does not raise a federalism issue.

App. 157.

E. The Court of Appeals' Decision in This Case

In its September 15, 2003 revised opinion, a unanimous panel of the Ninth Circuit rejected the Texas Cities' clear statement and Tenth Amendment challenges to the rule.[6] App. 14-22.

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[6] The court of appeals issued its original opinion, in which the entire panel rejected the clear statement challenge and a majority of the panel rejected the Tenth Amendment challenge, on January 14, 2003. *Environmental Defense Center* v. *EPA*, 319 F.3d 398 (9th Cir. 2003). Judge Richard C. Tallman dissented on the Tenth Amendment point, and on certain other points not relevant to this petition for writ of certiorari. The Texas Cities and Texas Counties filed a petition for panel and en banc rehearing on the clear statement and Tenth Amendment issues. On September 15, 2003, the court of appeals denied the Texas Cities' and Texas Counties' petition for panel and en banc rehearing, but issued a revised opinion. While continuing to uphold the rule against the clear statement and Tenth Amendment challenges, the court amended its opinion on those two points in the wake of the Fifth Circuit's *City of Abilene* decision, which had been issued after the Ninth Circuit's original decision in this action. Judge Tallman joined in the revised opinion on the Tenth Amendment point, making the revised opinion unanimous on both the

On the clear statement issue, as set out in more detail in section II.A below, the court of appeals ruled that EPA's statutory interpretations passed muster under the test for administrative deference set out in *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984) as well as under *SWANCC*.

As for the constitutional issue, the Ninth Circuit, like the Fifth Circuit in *City of Abilene*, held that there is no Tenth Amendment violation when EPA offers MS4s at least one compliance alternative that does not require the state or municipality to regulate third parties. App. 19 (citing *New York* v. *United States*, 505 U.S. 144, 168 (1992)). Since under the Phase II rule MS4s may choose either the minimum measures approach or the alternative permit, the Ninth Circuit concluded that the rule would not violate the Tenth Amendment so long as the alternative permit option standing alone did not violate the Tenth Amendment's federalism guarantees. App. 20.

The court found that the alternative permit option did not offend Tenth Amendment principles because it did not compel MS4s to regulate third parties. The court recognized that the Phase I rule application requirements, which served as the application requirements under the alternative permit option, did require an MS4 to provide information concerning proposed ordinances or other regulatory measures. App. 20. But the court found that those application requirements did not "specif[y] the contents of the permit that will result from the application process." App. 20. Thus, "nothing in [the Phase I permit application requirements] will compel the operator of a small MS4 to implement a federal regulatory program or regulate third parties." App. 21. In further support for its conclusion on this point, the Ninth Circuit noted that EPA had in fact already offered the Phase I cities at issue in *City of Abilene* "an option for obtaining permits that would not have involved . . . regulating third parties." App. 21. The court of appeals concluded that "by presenting the option of seeking a permit under [the Phase I permit application requirements], the Phase II rule avoids any unconstitutional coercion." App. 21-22.

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clear statement and Tenth Amendment issues. Judge Tallman continued to dissent on other issues. No judge of the court of appeals requested a vote on the petition for en banc rehearing.

REASONS FOR DENYING THE PETITION

The Texas Cities contend that the Phase II rule violates the Tenth Amendment because the alternative permit option requires MS4 operators to regulate third parties. The decision of the court of appeals creates no conflict of authority or important, unresolved question of law on this point, however. Both the Ninth Circuit, in this case, and the Fifth Circuit, in the *City of Abilene* case, have held that there is no Tenth Amendment violation when EPA provides MS4s with a compliance alternative that does not require MS4s to regulate third parties. The Texas Cities do not dispute this principle. Instead, the Texas Cities simply disagree with the court's finding that the Phase II rule provides MS4s with such an alternative. However, the Texas Cities invoke no interpretive principles in support of their reading of the regulation, and the plain language of the regulation is contrary to their position.

The Texas Cities also contend that the Phase II rule violates the clear statement canon of construction that governs when a statutory interpretation raises serious constitutional questions concerning the balance of authority between the federal and state governments. There is, however, no conflict of authority or important, unresolved question of federal law on this point either. The court of appeals applied the same decision of this Court – *SWANCC* – that the Texas Cities argue that

this Court should apply. Because the availability of the alternative permit option eliminates any purported Tenth Amendment concern, the court of appeals correctly decided that there was no serious constitutional question and thus that no clear statement was necessary. Moreover, the canon provides that statutes should be interpreted to avoid constitutional problems. The court of appeals' decision to uphold EPA's interpretation, which avoids any Tenth Amendment concerns by providing a compliance alternative that does not require MS4s to regulate third parties, is thus fully consistent with the canon.

In addition, the Texas Cities now argue, for the first time in this petition for writ of certiorari, that decisions of this Court obliged EPA to provide additional information about the compliance alternatives available to MS4s under the Phase II rule so that MS4 operators could "voluntarily and knowingly" choose between the alternatives. Because the Texas Cities never raised this argument in the proceedings in the court of appeals, the argument is not properly before this Court.

I.

THERE ARE NO GROUNDS FOR FURTHER REVIEW OF THE COURT OF APPEALS' FINDING THAT THE PHASE II RULE DOES NOT VIOLATE THE TENTH AMENDMENT BECAUSE THE RULE PROVIDES A COMPLIANCE ALTERNATIVE THAT DOES NOT REQUIRE MS4 OPERATORS TO REGULATE THIRD PARTIES

In a careful application of this Court's jurisprudence, the Ninth Circuit agreed with the Fifth Circuit in holding that there is no Tenth Amendment violation if EPA offers MS4s a compliance alternative that does not require them to regulate third parties. No court has held otherwise, and the Texas Cities do not challenge that holding in this petition.

Instead, the Texas Cities contend that the Phase II rule violates the Tenth Amendment because the alternative permit option in fact requires MS4s to regulate third parties. Pet. at 27-30. According to the Texas Cities, because certain parts of the relevant regulations for the alternative permit option require that the MS4 provide information about proposed ordinances or other regulatory mechanisms in the permit application, the permits themselves must include ordinances or other similar regulatory mechanisms. *Id.* The court of appeals found to the contrary, and for several reasons this issue does not merit review by this Court.[7]

First, there is no conflict in authority or important, unresolved issue of law on this point. The Texas Cities' position is simply an argument that certain regulations mean something other than what their plain language states and what the agency charged with their interpretation says they mean. The Texas Cities admit that what they seek is correction of a purported "mistake," Pet. at 27, and simple correction of a mistake is not a sufficient ground for certiorari. The Texas Cities invoke no interpretive principles and cite only two cases – neither of which is a decision of this Court, and one of which is discussed solely for the purpose of arguing that it does not govern here.[8] Pet. at 27-30.

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[7] The Texas Cities state that the rule "potentially affects more than 50,000 State and local governmental entities in the nation." Pet. at 27; *see also* Pet. at 14. However, the Texas Cities do not cite any source for this 50,000 figure. The rule itself identifies approximately 5,700 cities or counties actually or potentially subject to the rule. Phase II Pream. & R., 64 Fed. Reg. at 68812-37.

[8] The Texas Cities do suggest that EPA's interpretation caused the court of appeals to "misapply" *SWANCC* because both the minimum measures option and the alternative permit option allegedly require MS4s to regulate third parties, so that the rule raises "significant federalism issues." Pet. at

Second, the Texas Cities' position on the merits is not correct. The plain language of the relevant statute indicates that the Phase I rule provisions were to establish "regulations setting forth the permit application requirements" for large and medium MS4s. 33 U.S.C. § 1342(p)(4)(A) & (B), App. 95-96 The Phase I rule does exactly that: establish permit application requirements. *See, e.g.*, 40 C.F.R. 122.26(d), NRDC App. 1 (captioned "Application requirements for large and medium municipal storm sewer systems"). The court of appeals found that these regulations, which now also serve as the application requirements for the alternative permit option under the Phase II rule, did not "specif[y] the contents of the permit that will result from the application process." App. 20. As a result, "nothing in [the permit application requirements] will compel the operator of a small MS4 to implement a federal regulatory program or regulate third parties." App. 21. Citing *City of Abilene*, the court of appeals also noted that EPA has in fact already offered permits to MS4s that do not require the MS4s to regulate third parties. EPA did so, of course, under the Phase I permit application requirements that now apply to Phase II MS4s under the alternate permit option.

Additional support for finding of the court of appeals is found in the text of the regulations. The regulations give the permitting authority the power to excuse an MS4 from certain application requirements – including the requirement to describe the illicit discharge ordinance – if those requirements are not applicable or practicable, as they would not be for an alternative permit based on numeric effluent limits. 40 C.F.R. § 122.26(d)(2)(viii), NRDC App. 10. Moreover, the Phase II rule

30. As noted in section II.A below, however, the interpretation upheld by the court of appeals does not *create* a federalism issue, but in fact *eliminates* any alleged federalism issue, since the alternative permit option allows MS4s to avoid regulating third parties.

expressly provides that an MS4 applying for an alternative permit need not demonstrate its legal authority to enact such ordinances. 40 C.F.R. § 122.33(b)(2)(ii), NRDC App. 11-12.

The exceptions to the application requirements found in 40 C.F.R §§ 122.26(d)(2)(viii) and 122.33(b)(2)(ii) are consistent with EPA's statement, in the preamble to the Phase II rule, that MS4 operators seeking alternative permits do not need to provide information concerning such program requirements if they seek an alternative permit. App. 159. That agency interpretation of its own regulations is entitled to deference. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (administrative interpretation is of "controlling weight unless it is plainly erroneous or inconsistent with the regulation"). These exceptions are also, of course, consistent with the fact that the alternative permit option does not require MS4s to regulate third parties.

II.

THERE ARE NO GROUNDS FOR FURTHER REVIEW OF THE COURT OF APPEALS' HOLDING THAT THE PHASE II RULE IS CONSISTENT WITH THE CLEAR STATEMENT CANON OF CONSTRUCTION THAT GOVERNS WHEN A STATUTORY INTERPRETATION RAISES SERIOUS FEDERALISM QUESTIONS

The Texas Cities argue that the Phase II rule is inconsistent with the canon of construction that requires a clear statement of congressional intent for statutory interpretations that raise serious constitutional issues regarding the balance of federal and state authority. Pet. at 16-17. Though the Texas Cities contend that the court of appeals' rejection of their clear statement challenge presents an issue of "immense importance" and constitutes a "radical departure from settled law," Pet. at 13, the court of appeals was able to resolve the challenge easily through a simple and correct application of the decision of this

Court – *SWANCC* – upon which the Texas Cities themselves rely.

A. The Court of Appeals Applied the Same Authority – *SWANCC* – that the Texas Cities Assert This Court Should Apply and Correctly Held That the Phase II Rule Is Fully Consistent with the Clear Statement Canon

The Texas Cities contend that EPA lacked statutory authority under *SWANCC*. *SWANCC* stands for the proposition that statutes should be interpreted to avoid significant constitutional problems unless such an interpretation is plainly contrary to the intent of Congress. 531 U.S. at 173, 174.

The court of appeals held the rule to be a valid exercise of EPA's statutory authority under *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). App. 16 n.18. However, to address the Texas Cities' argument that *SWANCC* governed, the Ninth Circuit also examined whether *SWANCC* invalidated the rule. *Id.* Similarly, in *City of Abilene*, the Fifth Circuit determined whether *SWANCC* invalidated the MS4 permits at issue in that case. 325 F.3d at 660-61. Both courts concluded that *SWANCC* did not invalidate EPA's actions. Given that the only two courts to examine this issue applied the same legal authority that the Texas Cities contend that this Court should apply and reached the same conclusion, the Texas Cities have no grounds to assert the existence of a conflict in authority or an unresolved question of law as a basis for certiorari.

Because there is no conflict of authority or unresolved question of law, the Texas Cities' position is simply that the court of appeals misapplied *SWANCC*. But the Ninth Circuit's holding that the Phase II rule did not violate the clear statement canon was correct. The court of appeals found that the Phase II rule did not present any serious constitutional problems be-

cause the existence of the alternative permit option eliminated any purported Tenth Amendment concerns. App. 16, n.18. As noted above, the Fifth Circuit agrees that there is no Tenth Amendment problem when EPA provides a compliance alternative that does not require MS4s to regulate third parties, and no court has disagreed.

The clear statement canon of construction only governs, however, when there *is* a serious constitutional issue. Accordingly, in the absence of a serious constitutional issue, the court of appeals correctly determined that the canon did not apply, and there was no need for a special clear statement authorizing the Phase II rule's choice of compliance alternatives. App. 16 n.18.

In particular, the canon applies in situations where the statutory interpretation at issue alters the traditional balance of federal and state authority. *SWANCC*, 531 U.S. at 173. The court of appeals found, however, that the Phase II Rule maintained, rather than altered, the existing balance of federal-state authority, given that (1) EPA's authority to regulate MS4s was established over a quarter of a century ago, and (2) EPA promulgated the Phase I rule over a decade ago. App. 16, n.18.

The court also noted that, "even if a clear statement of congressional intent were necessary, § 402(p) of the Clean Water Act is replete with clear statements that Congress intended EPA to require MS4s either to obtain . . . permits or to stop discharging stormwater."[9] *Id.*

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[9] Applying *SWANCC*, the Fifth Circuit found that the Clean Water Act provided clear statements granting EPA discretion to impose permit conditions similar to those in the minimum measures. *City of Abilene*, 325 F.3d at 661. The Fifth Circuit cited Clean Water Act sections 402(p)(3)(B)(ii) and (iii), which provide that MS4 permits include "a requirement to effectively prohibit nonstormwater discharges into the storm sewers" and "controls to re-

Indeed, the court of appeals' decision to uphold the rule is fully consistent with the clear statement canon. As this Court has stated, the clear statement canon provides that statutes should be interpreted to avoid significant constitutional problems unless such an interpretation is plainly contrary to the intent of Congress. *SWANCC*, 531 U.S. at 173, 174.

In *New York* v. *United States*, 505 U.S. 144 (1992), this Court applied this affirmative aspect of the canon in a Tenth Amendment context. In that case, the Court confronted two interpretations of a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("LLRWPA"). Under one interpretation, the statutory provision was a mandate requiring states to enact and enforce a federal regulatory program in violation of the Tenth Amendment. Under the other interpretation, the statute provided a series of compliance alternatives. Applying the clear statement canon, the Court held that the latter interpretation was correct because the former was constitutionally problematic.[10] *Id.* at 170.

The court of appeals' decision here is fully consistent with *New York*. The court of appeals confronted two interpretations of the Phase II rule. Under the Texas Cities' interpretation, the Phase II rule is an unconstitutional reading of EPA's

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duce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques . . . and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(ii) & (iii), App. 94.

[10] In *New York*, the Court ultimately found, of course, that the final alternative under the LLRWPA, the "take title" provision, did not provide a constitutional alternative. 505 U.S. at 176. Unlike the "take title" provision of the LLRWPA, however, the alternative permit option under the Phase II rule is not unconstitutional standing alone, because it allows MS4s to control pollutant discharges without requiring them to regulate third parties.

statutory authority, because, according to the Texas Cities, both the minimum measures option and the alternative permit option require MS4 operators to regulate third parties in violation of the Tenth Amendment. On the other hand, under EPA's interpretation, the rule is a constitutional reading of the statutory authority because the alternative permit option does not require MS4 operators to regulate third parties, and thus the rule offers a choice that does not violate the Tenth Amendment. The clear statement canon of construction requires that the court choose the interpretation that is least constitutionally problematic – EPA's interpretation – and the court of appeals did so. A decision by this Court to reverse the court of appeals' decision and reject EPA's interpretation would be directly contrary to the canon of construction, and thus there is no reason to grant the petition for writ of certiorari on this point.[11]

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[11] Citing *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Texas Cities suggest that the court of appeals' decision "failed to ensure the efficacy of the procedural political safeguards" that protect state and municipal interests. Pet. at 22. The Texas Cities appear to be arguing that the court of appeals somehow ran roughshod over Congress' views on EPA's authority under the relevant statutes. *Id.* at 22-23.

The Texas Cities' invocation of *Garcia* makes no sense, however. Congress, like the court of appeals, declined to invalidate the Phase II rule. Prior to promulgation of the rule, at the behest of a Senator from Texas, Congress directed EPA to report on the proposed rule. Department of Veterans Affairs & Housing and Urban Dev. & Indep. Agencies Approp. Act of 2000, Pub. L. 106-74 § 431, 113 Stat. 1047 (1999) (enacting Hutchison Amend., 145 Cong. Rec. S11445 (Sept. 24, 1999)). Congress received that report when the EPA administrator signed the rule in October 1999 and would have received a copy of the rule itself pursuant to the Congressional Review Act of 1996, 5 U.S.C. § 801(a)(1)(A) (the "Review Act"). Nonetheless, Congress did not use its Review Act authority to invalidate the rule. 5 U.S.C. §§ 801(b)(1) & 802. NRDC respectfully suggests that this Court should not grant certiorari to vacate the rule on a clear statement challenge when Congress itself declined to vacate the rule.

B. Because the Texas Cities Did Not Previously Argue That EPA Had a Duty to Provide Additional Information About the Alternative Permit Option, This Argument Is Not Properly Before This Court

The Texas Cities now contend, for the first time, that the Phase II rule is invalid because EPA had a legal duty to provide additional information concerning the alternative permit option so that MS4 operators could "voluntarily and knowingly" choose between the two compliance options. Pet. at 25 (citing *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-84 (1999); *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987); *Pennhurst St. Sch. & Hosp.* v. *Haldermann*, 451 U.S. 1, 17-18 (1981)). The Texas Cities did not make this argument before the court of appeals. Thus, it is not properly before the Court. *See, e.g., Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212-13 (1998).

Besides, even if the Texas Cities had made this argument before the court of appeals, the three decisions they cite do not concern the Tenth Amendment, so in any event there could be no direct conflict between the holdings in those cases and the Ninth Circuit's decision. *See College Savings Bank*, 527 U.S. at 680-84 (sovereign immunity); *South Dakota*, 483 U.S. at 207 (spending clause); *Pennhurst St. Sch. & Hosp.*, 451 U.S. at 17-18 (spending clause). Moreover, the rule and preamble do give MS4 operators sufficient information to make an informed choice between the minimum measures option and the alternative permit option.[12] *See generally* App. 100-160.

[12] In addition to the information EPA provided in the preamble to the rule, there is in general great familiarity with numeric effluent limit permits, which are available to MS4s under the alternative permitting option, since permitting authorities have been using numeric effluent limit permits for decades in a wide variety of contexts.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 03-1125

In the Supreme Court of the United States

TEXAS CITIES COALITION ON STORMWATER, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Environmental Protection Agency's Phase II Stormwater Rule, 64 Fed. Reg. 68,722 (1999), violates the Tenth Amendment by coercing local governmental entities to either enforce a federal program or surrender their police powers.

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In the Supreme Court of the United States

No. 03-1125

TEXAS CITIES COALITION ON STORMWATER, PETITIONER

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-92) is reported at 344 F.3d 832.

JURISDICTION

The initial decision of the court of appeals was entered on January 14, 2003. The court denied all petitions for rehearing, but vacated its opinion, and entered its final decision and judgment, on September 15, 2003. The petition for a writ of certiorari was filed on December 15, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Environmental Protection Agency (EPA) issued its Phase II Stormwater Rule, 64 Fed. Reg. 68,722 (1999), pursuant to the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. 1251 *et seq.*, to control pollutants discharged to waters of the United States by municipal separate storm sewer systems serving fewer than 100,000 people (small MS4s). Petitioner and other parties challenged various aspects of the rule. The court of appeals rejected most of those challenges, Pet. App. 1-92, including petitioner's contention that the rule violates the Tenth Amendment, *id.* at 14-22.

1. Section 301(a) of the Clean Water Act prohibits the "discharge of any pollutant by any person," except in compliance with the Act. 33 U.S.C. 1311(a). Section 402 authorizes EPA (or a State with a program approved by EPA) to issue permits for the discharge of pollutants under the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1342. Congress amended the CWA in 1987 to better regulate stormwater discharges from point sources. See Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat. 69. It added new Section 402(p), 33 U.S.C. 1342(p), which establishes two separate phases for the regulation of MS4 stormwater discharges.[1]

[1] MS4s are subject to CWA regulation if they collect stormwater runoff and convey it to waters of the United States. The MS4 may contain pollutants picked up by runoff before it enters the MS4 (*e.g.*, fertilizers from lawns, oil from roads) or pollutants introduced directly into the MS4 (*e.g.*, wastes dumped into storm sewers). The MS4 outfall (*i.e.* the pipe(s) or other conveyance(s) through which stormwaters exit the MS 4 and enter the waters of the United States) constitutes the "point source" from which there is a "discharge of pollutants" to "navigable waters." See § 502(6), (12) and (14), 33 U.S.C. 1362(6), (12) and (14).

First, subsections (p)(2) through (4) require EPA t establish a permit program for certain dischargers including large and medium MS4s (*i.e.*, those serving popu lations greater than 100,000), according to a prescribe schedule. Section 402(p)(3)(B)(iii) provides that "[p]ermit for discharges from municipal storm sewers * * * shal require controls to reduce the discharge of pollutants to th maximum extent practicable." 33 U.S.C. 1342(p)(3)(B)(iii) Pursuant to those provisions, EPA issued the Phase stormwater rule in 1990. Second, subsections (p)(5) an (6) require EPA to investigate other stormwater discharge and to create a "comprehensive program to regulate" them See 33 U.S.C. 1342(p)(5) and (6). The Phase II stormwate rule addresses those sources, including small MS4s.

2. The Phase II rule requires small MS4s to implemen a stormwater management program to reduce discharge of pollutants from the MS4 to the "maximum extent practicable" (MEP). To implement that requirement, the rule gives small MS4 operators three options for NPDE permitting. 40 C.F.R. 122.33(a). An operator may either submit a notice of intent (NOI) to comply with a genera permit, apply for an individual permit, or apply to be regu lated under a revised or re-issued individual permit cover ing a nearby large or medium MS4. 40 C.F.R. 122.33(b).[2]

a. Small MS4s seeking authorization under a genera NPDES permit must submit an NOI, which describes "bes management practices" (BMPs) through which the MS4 o others will implement six minimum control measures (the Minimum Measures). 40 C.F.R. 122.33(b)(1), 122.34(d)(1) The Minimum Measures set out a discharge management program consisting of: (1) public education; (2) public

[2] MS4s can also avoid regulation under the CWA if, for example, they have the ability to direct stormwater discharges to detention ponds that do not discharge to waters of the United States.

participation in program development and implementation; (3) detection and elimination of "illicit," or non-stormwater discharges to the MS4; (4) reduction of pollutants in stormwater runoff to the MS4 from construction activities disturbing one acre or more; (5) control of stormwater runoff from new development and redevelopment projects disturbing one acre or more; and (6) pollution prevention and good housekeeping for municipal operations. 40 C.F.R. 122.34(b)(1)-(6).

b. Alternatively, small MS4 operators may choose to apply for individual NPDES permits (alternative permits). 40 C.F.R. 122.33(b)(2)(ii), 122.34(a). The alternative permit option allows a small MS4 to dispense with some or all of the Minimum Measures and, instead, obtain a custom-designed individual permit based on an abbreviated form of the Phase I MS4 permit application requirements of 40 C.F.R. 122.26(d). In applying for an individual permit, a small MS4 must describe its current stormwater management program, as well as certain components of the program proposed as a basis for permit authorization, but need not provide information concerning its authority to regulate discharges to the MS4. 40 C.F.R. 122.33(b)(2)(ii) (cross referencing permit application regulations for large and medium MS4s at 40 C.F.R. 122.26(d)(1) and (2)). Neither the Phase II alternative permit provisions nor the Phase I permit application provisions they incorporate specify what the permit ultimately issued must contain, except that an alternative permit must require a stormwater management program "designed to reduce the discharge of pollutants from [the] MS4 to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act." 40 C.F.R. 122.34(a).

c. Under the third alternative, small MS4s can apply to be regulated under a revised or re-issued individual NPDES permit covering a nearby large or medium MS4, with provisions adapted and applicable to the small MS4. 40 C.F.R. 122.33(b)(2)(ii). That option, too, affords small MS4s an opportunity to avoid implementing the Minimum Measures that would otherwise apply under a general NPDES permit.

In providing those three alternatives, EPA recognized that it would generally be less expensive for MS4s to implement management practices to limit the introduction of pollutants into their stormwater collection systems than to remove pollutants from their discharges. In implementing management practices, the Phase II rule gives MS4s a choice between utilizing specified minimum control measures or designing another approach to reduce discharges of pollutants to the maximum extent practicable.

3. Various entities brought judicial challenges to the Phase II rule. The court of appeals rejected virtually all of those challenges, remanding the rule on four matters not at issue here. See Pet. App. 4-5. The court specifically rejected petitioner's contention that the Phase II rule violates the Tenth Amendment. Pet. App. 14-22.

The court of appeals recognized that, "[u]nder the Tenth Amendment, 'the Federal Government may not compel States to implement, by legislation or executive action, federal regulatory programs.'" Pet. App. 19 (quoting *Printz* v. *United States*, 521 U.S. 898, 925 (1997)). Consequently, the federal government may not coerce States or municipalities to regulate third parties to implement a federal program. *Ibid.* (citing *Reno* v. *Condon*, 528 U.S. 141, 151 (2000), and *Printz*, 521 U.S. at 931 n.15)). However, the federal government may encourage States and municipalities to choose to utilize their legislative

participation in program development and implementation; (3) detection and elimination of "illicit," or non-stormwater discharges to the MS4; (4) reduction of pollutants in stormwater runoff to the MS4 from construction activities disturbing one acre or more; (5) control of stormwater runoff from new development and redevelopment projects disturbing one acre or more; and (6) pollution prevention and good housekeeping for municipal operations. 40 C.F.R. 122.34(b)(1)-(6).

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authorities to implement a federal program. *Ibid.* (citing *New York* v. *United States*, 505 U.S. 144, 166-168 (1992)).

Applying those principles to this case, the court of appeals ruled that the Phase II rule gives each MS4 a choice: either seek a general permit that requires the MS4 to adopt the Minimum Measures, or seek an individual permit, the terms of which are not prescribed by the rule, but which offers MS4s flexibility in proposing the controls to reduce pollutants to the maximum extent practicable. Pet. App. 20.[3] For example, an individual permit might simply require an MS4 to satisfy specific effluent limitations rather than implement management programs or regulate third parties. *Id.* at 20-21 (citing *City of Abilene* v. *EPA*, 325 F.3d 657, 661-663 (5th Cir. 2003)). The availability of the individual permit option avoids any unconstitutional coercion of MS4s, even if the Minimum Measures option requires MS4s to regulate third parties. *Id.* at 21-22.

The court also ruled that, because the Phase II rule does not coerce States to exercise their legislative powers, the rule does not alter the federal-state framework. Consequently, Congress was not required to provide a clear statement of its intent to authorize EPA to offer MS4s the choice of implementing Minimum Measures. Pet. App. 16 n.18.

[3] The court remanded portions of the general permitting program of the Phase II rule to the extent that the rule allows regulated entities to establish their own plans to reduce discharges to the maximum extent practicable without requiring that those plans be the subject of review by a permitting authority, or public notice and comment. Pet. App. 29-41. EPA presently is addressing the remand. EPA's actions on remand will not affect the constitutional issues presented in the petition.

ARGUMENT

The court of appeals correctly rejected petitioner' Tenth Amendment challenge to EPA's Phase II Storm water Rule. That decision does not conflict with an decision of this Court or any other court of appeals Further review is not warranted.

1. Petitioner's Tenth Amendment challenge to EPA' Phase II rule rests on petitioner's construction of th regulatory provisions establishing the alternative permi program. Pet. App. 20. Specifically, petitioner contend that 40 C.F.R. 122.26(d) requires small MS4s to regulat third parties in order to obtain an individual permit. Pet 14, 27-29. Petitioner's construction is incorrect and ha been rejected by the two courts of appeals that have addressed the issue. *Id.* at 14-22; *City of Abilene* v. *EPA*, 32 F.3d 657 (5th Cir. 2003).

Petitioner's interpretation is flawed because it i inconsistent with the regulation's unambiguous language. EPA promulgated Section 122.26(d) as part of the Phase I stormwater rule applicable to medium and large MS4s. The Phase II rule provides that any small MS4 operator also may apply for an individual permit by submitting a permit application that complies with Section 122.26(d). 40 C.F.R. 122.33(b)(2)(ii), 122.34(a). Nothing in those regulations requires that a MS4 operator undertake to regulate the activities of third parties in order to obtain an individual permit. Indeed, the regulations expressly allow MS4 operators, when applying for individual permits, to decide not to control third-party discharges into MS4s.[4] Conse-

[4] "You do not need to submit the information required by §§ 122.26(d)(1)(ii) and (2) regarding your legal authority [to control discharges to the MS4], unless you intend for the permit writer to take such information into account when developing your other permit conditions." 40 C.F.R. 122.33(b)(2)(ii).

quently, and notwithstanding petitioner's unsubstantiated allegation to the contrary (Pet. 27-28), a permit application that does not contain information regarding controls on third parties would not be denied on the grounds that a MS4 operator has elected not to use its authority to regulate third persons.

2. The Phase II rule does not violate the Tenth Amendment because it allows MS4s to achieve applicable pollution limits by choosing an alternative–individual permits–that does not subject the local government to any conceivably unconstitutional burden. As the court of appeals correctly recognized, EPA's provision of that alternative ensures that the other alternative–general permits with Minimum Measures–does not contravene the Tenth Amendment.[5]

Petitioner does not dispute that the CWA authorizes EPA to limit an MS4's discharges of pollutants. Pet. 2. Those discharge limitations are restrictions of general applicability and are thus constitutional under *Reno* v. *Condon*, 528 U.S. at 150. As discussed above, the individual permit option is a constitutional means of regulating such discharges.

The Phase II rule is not rendered unconstitutional by offering MS4 operators the additional option of complying with a general permit that includes the Minimum Measures. By offering that choice, the Phase II rule observes the principle that "[t]he Federal Government may not compel the States to enact or administer federal regulatory

"Your storm water management program must include the minimum control measures * * * *unless* you apply for a permit under § 122.26(d)." 40 C.F.R. 122.34(a) (emphasis added).

[5] Because the individual permit option does not compel MS4 operators to exercise their police powers, there is no reason to resolve the further question whether the Minimum Measures actually do compel such exercise.

programs," *New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 925-926, but the federal government may offer the States the option of voluntarily participating in implementing those programs, *id.* at 936 (O'Connor, J., concurring). See *New York*, 505 U.S. at 167 ("we have recognized Congress' power to offer States the choice of regulating"); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981) ("We fail to see why the * * * Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role.").

As the court of appeals recognized, the federal government may create inducements for States to participate in the implementation of federal programs, so long as the inducements are not coercive. See Pet. App. 19. This Court has "identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests." *New York*, 505 U.S. at 166. Federal encouragement is permissible if "the residents of the State retain the ultimate decision as to whether or not the State will comply." *Id.* at 168.

Under the Phase II rule, each MS4 operator retains the ultimate decision as to whether it will exercise its legislative authority to control pollutants entering the MS4 or take other measures to reduce discharges of pollutants by the MS4 to waters of the United States. For example, MS4s that conclude that it is contrary to local interests to implement the challenged Minimum Measures may decline to do so and elect to apply for an individual permit. That power to choose ensures that MS4 operators are not commandeered or coerced into enacting and enforcing a federal regulatory program.

Petitioner contends that MS4 operators cannot make an informed choice because, according to petitioner, EPA has not fully informed MS4s of the terms of the individual

permit option. Pet. 24-26. Petitioner has not previously made that argument, and the argument should therefore be treated as waived. In any event, the predicate for the argument is mistaken.

MS4s have various means of acquiring the information necessary to make an informed decision about which stormwater permitting option best suits them. Permitting authority staff members are typically available to discuss the range of options available under both individual and general permits. In addition, EPA regulations provide that an MS4 be given information necessary to determine whether the proposed terms of an individual permit would be acceptably tailored to that MS4's circumstances.[6] For example, after receipt of an individual permit application, the permitting authority issues a draft permit. 40 C.F.R. 124.6. The MS4 can comment on the terms of the proposed permit and otherwise continue to pursue an individual permit. At any juncture in that process, the MS4, knowing the likely terms of an individual permit, can decide that pursuing an individual permit is not the most advantageous option, and can elect to pursue coverage under a general permit.

As the Fifth Circuit's decision in *City of Abilene*, *supra*, illustrates, the NPDES permitting process provides MS4s with sufficient information to make an informed choice. In that case, two cities participated in the application process under 40 C.F.R. 122.26(d)—the process applicable to the

[6] Each Phase II permitting authority "must comply with the requirements for all NPDES permitting authorities under Parts 122, 123, 124, and 125" of Title 40. 40 C.F.R. 123.35(a). The Phase II Rule simply supplements those requirements. 40 C.F.R. 123.35(a); 64 Fed. Reg. at 68,744.

alternative permit program. 325 F.3d at 660.[7] Under the negotiated permitting process, EPA offered the cities two options: they could obtain permits with conditions that required the cities to develop, implement, and enforce programs to prevent the discharge of pollutants into their MS4s from a variety of sources, or they could pursue numeric end-of-pipe permits that would have required the cities to satisfy specific effluent limitations rather than implement management programs. *Ibid.* The court rejected the cities' Tenth Amendment challenge, ruling that the cities were not compelled to implement a federal regulatory scheme because they voluntarily chose the management permits over the permits imposing end-of-pipe effluent limitations. *Id.* at 663.

3. Petitioner mistakenly argues (Pet. 16) that, under the Tenth Amendment, only Congress, and not an executive branch agency, may offer States a choice of regulating third parties or being regulated themselves. The Tenth Amendment preserves certain powers of the States against federal encroachment; it does not distinguish between intrusion by the legislative branch as opposed to the executive branch. Cf. *Printz*, 521 U.S. at 935 ("The *Federal Government* may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce federal regulatory programs.") (emphasis added). Because the Phase II Stormwater Rule provides MS4s with choices that eliminate any prospect of a Tenth Amendment violation, petitioner's argument, at most, raises only the question of whether the CWA authorizes EPA to offer MS4 operators the opportunity to

[7] The process was applicable in that case because the cities operated medium MS4s, for which EPA and authorized States issue only individual NPDES permits.

protect water quality by regulating discharges of pollutants into their MS4s.

Petitioner incorrectly contends (Pet. 16-20) that the Phase II rule is invalid because there is no "clear indication" of congressional intent to allow EPA to offer the choices set out in the rule. Congress delegated EPA broad authority to offer that choice. See, *e.g.*, 33 U.S.C. 1342(p)(6) (directing EPA to develop a regulatory program that meets specified minimum requirements and "may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate"). EPA responded by allowing MS4 operators to decide for themselves whether to exercise their legislative and executive powers to implement "controls" to reduce the pollutants entering the stormwater. The plain statement rule has no application here, because that approach does not "upset the usual constitutional balance of federal and state powers." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991).

Contrary to petitioner's contentions (Pet. 16-17), the court of appeals did not err in deferring to EPA's interpretation of the CWA under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Pet. App. 16 n.18. This Court has indicated that *Chevron* deference is not appropriate where "the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001). But that is not the case here. The Phase II rule does not commandeer the sovereign powers of MS4 operators, but instead allows them to reduce pollutants in their stormwater discharges either by electing to control pollutants coming into MS4s or by

removing pollutants before discharging to waters of the United States.

Petitioner suggests, for the first time, that the Phase II rule is inconsistent with 33 U.S.C. 1251(b).[8] Pet. 19-20. Even if that argument had been timely raised, it would be wrong. Congress granted EPA broad authority to "prescribe such regulations as are necessary to carry out [the Administrator's] functions under this chapter," 33 U.S.C. 1361(a), and it specifically directed EPA to "establish a comprehensive program to regulate" the kinds of stormwater discharges at issue here. 33 U.S.C. 1342(p)(6). The only relevant constraints are that the regulations, "at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines." 33 U.S.C. 1342(p)(6). EPA's decision to give MS4 operators the option of exercising their regulatory authorities to reduce stormwater-based pollution does not run afoul of Section 1251(b). Rather, EPA's provision of that option distinguishes MS4s from other entities subject to regulation and actually preserves the "primary responsibilities and rights" of political subdivisions of the States "to prevent, reduce, and eliminate pollution." 33 U.S.C. 1251(b).

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[8] Section 1251(b) provides: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. 1251(b).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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