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Supreme Court Reverses 9th Circuit on Logging Roads, Deferring to EPA on Its Industrial Stormwater Rule

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On March 20, 2013, the U.S. Supreme Court held in a 7-1 decision that Clean Water Act permits are not required for stormwater runoff from logging roads. The decision in Decker v. Northwest Environmental Defense Center *defers to the Environmental Protection Agency's long-standing interpretation of its Industrial Stormwater Rule and reverses a Ninth Circuit decision that would have resulted in NPDES permit requirements for countless new sources.*

The Court reached its holding without reviewing EPA's newly amended Industrial Stormwater Rule and without considering one of the principal issues on which the Ninth Circuit based its decision: whether stormwater runoff is a "point source" under the Clean Water Act. The regulatory status quo is thus preserved in this case, with a majority of the Court supporting *Auer* agency deference. However, one critical aspect of the decision is the prospect, signaled in the concurring and dissenting opinions, that support for *Auer* deference is waning and agencies' interpretations of their own regulations will be scrutinized more heavily in future cases.

The Stormwater Regulatory Scheme

The Clean Water Act ("CWA") prohibits the discharge of pollutants from "point sources" into the waters of the United States without a permit.[1] Point sources are defined in the Act itself as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure [or] container … from which pollutants are or may be discharged."[2] Stormwater discharges "associated with industrial activity" are governed under a set of "Phase I" regulations by the Environmental Protection Agency ("EPA") as part of the CWA National Pollutant Discharge Elimination System ("NPDES") program.[3]

[1] 33 U.S.C. §§ 1311(a), 1342.
[2] § 1362(14).
[3] § 1342(p)(2)(B).

The Phase I regulations include the "Industrial Stormwater Rule," which identifies eleven categories of stormwater discharges "associated with industrial activity" that must be covered under an NPDES permit. For facilities in these categories, permit coverage is required for discharges "from any conveyance that is used for collecting and conveying storm water" related to manufacturing, processing, raw materials storage, and raw materials transport. Discharges through such conveyances from "immediate access roads … used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility" also require a permit under the Rule.[4] Significantly, the Rule provides that certain discharges from facilities are *not* regulated as industrial stormwater discharges if excluded from the NPDES program regulations at 40 C.F.R. Part 122.[5] Discharges from logging roads are subject to such an exclusion under the long-standing Silvicultural Rule, which is also part of the NPDES permit program regulations.

The Silvicultural Rule establishes limited "point source" categories of discharges associated with silvicultural activities that require permits under the NPDES program: "any discernible, confined and discrete conveyances related to rock crushing, gravel washing, log sorting, or log storage facilities."[6] Simultaneously, the Silvicultural Rule exempts from NPDES permit requirements discharges from certain silviculture-related activities — including reforestation, thinning, harvesting operations and road construction and maintenance — by defining them as "nonpoint" source activities.[7] Stormwater discharges from logging roads are thus excluded from regulation under the Silvicultural Rule and, because of that exclusion, they also are exempt from NPDES permitting under the Industrial Stormwater Rule.

The regulation of stormwater associated with logging roads is contemplated by EPA in its "Phase II" program. NPDES permits are not required for Phase II sources, but the CWA requires EPA to adopt a comprehensive program to address such sources, potentially including "performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate."[8]

The *Decker* Cases

At issue in *Decker* was whether channeled stormwater runoff from logging roads was "associated with industrial activity" or otherwise required to be permitted per EPA's NPDES regulations in effect at the time. In two CWA citizen suits,[9] Northwest Environmental Defense Center ("NEDC") alleged that logging operations in Tillamook State Forest violated the CWA when they channeled stormwater through man-made drains into nearby rivers and streams without an NPDES permit. NEDC argued that the discharges are point sources regulated under the Act.

The District Court dismissed the action, holding that the discharges were exempt from NPDES permitting by the Silvicultural Rule because the ditches, culverts and channels in question were not "silvicultural point sources" under the CWA and that rule.[10]

The Ninth Circuit reversed. The channels and culverts associated with logging roads were "point sources" pursuant to the statutory definition of that term, the Ninth Circuit asserted, and the Silvicultural Rule, found to be ambiguous, could not exempt runoff channeled through these sources from the statutory definition.[11] The Ninth Circuit further held that the discharges at issue were unambiguously associated with industrial

[4] 40 C.F.R. § 122.26.
[5] § 122.26(b)(14).
[6] § 122.27.
[7] *Id.*
[8] 33 U.S.C. § 1342(p)(6).
[9] The two cases, *Decker and Georgia-Pacific West, Inc. v. Northwest Environmental Defense Center*, were consolidated for review.
[10] 476 F. Supp. 2d 1188.
[11] 640 F.3d 1063, 1080.

activity under the Industrial Stormwater Rule and, therefore, that an NPDES permit was required. The Supreme Court granted certiorari.

In an attempt to moot the Ninth Circuit decision and appeal to the Supreme Court, EPA entered into a hurried rulemaking process, issuing a final amendment to the Industrial Stormwater Rule just three days ahead of oral arguments before the Supreme Court.[12] The amended Rule ratifies EPA's long held interpretation. It provides that the only "facilities" associated with logging activity that are considered "industrial" for purposes of the Rule are those that involve the four activities defined as "silvicultural point sources" under the Silvicultural Rule: "rock crushing, gravel washing, log sorting, or log storage." Notably, the amended Rule excluded discharges associated with logging roads that were at issue in this case. EPA made no changes to the Silvicultural Rule. EPA argued in its preamble to the amended Industrial Stormwater Rule that "by clarifying what constitutes a discharge 'associated with industrial activity,' [the Rule] makes clear that such discharges [from logging roads] do not require NPDES permits *even if they are point source discharges*."[13]

In granting review, the Court stated that it was interested in two questions: (1) whether the CWA requires timber companies and forest operators to obtain a permit before discharging stormwater that runs off logging roads into U.S. waters, and (2) whether the Court has jurisdiction under the citizen suit provision of the CWA to review a private party's challenge to EPA's interpretation of its own regulations. Oral arguments, however, were largely spent discussing the new Industrial Stormwater Rule. The federal government, participating as *amicus curiae*, urged the Court to find the case moot in light of the new Rule. The Supreme Court, frustrated by the potential legal implications of the new Rule, ordered additional briefing on the issue following oral arguments. Ultimately, the Court ruled on the validity of the pre-amendment Industrial Stormwater Rule, reversing the Ninth Circuit in an opinion written by Justice Kennedy.

The Supreme Court's Decision: Resolution of Procedural Questions

Before reaching the merits, the Court resolved two jurisdictional issues. First, the Court held that the case was not jurisdictionally barred by CWA Section 1369(b), which provides an exclusive avenue for challenging particular actions by the EPA administrator within 120 days. The Court emphasized that because the language of the Silvicultural Rule is ambiguous, the "instant suit is an effort not to challenge the Silvicultural Rule" as promulgated by EPA but a suit to "enforce [the Rule] under a proper interpretation."[14] The Court noted: "NEDC does not seek an implicit declaration that the regulations were invalid as written."[15] Accordingly, the Court found that a CWA Section 1365 citizen suit was proper.

Second, the Court ruled that EPA's recent amendment of the Industrial Stormwater Rule did not moot the Court's review of the pre-amendment Rule. In the view of the Court, a live controversy still existed because the petitioner's liability for a past violation under the pre-amendment version of the Industrial Stormwater Rule was "real and not remote."[16]

[12] Revisions to Stormwater Regulations to Clarify that an NPDES Permit is Not Required for Stormwater Discharges From Logging Roads, 77 Fed. Reg. 236, at 72970 (Dec. 7, 2012). The new Rule was issued the Friday before Monday oral arguments.

[13] *Id*. at 72971 fn.1 (emphasis added).

[14] 2013 U.S. LEXIS 2373, at *18.

[15] *Id.* at *19.

[16] *Id.* at *21.

The Merits: Administrative Deference under *Auer v. Robbins*

After finding the Industrial Stormwater Rule to be ambiguous, the majority opinion focused on the validity of EPA's interpretation of that Rule itself. The High Court applied deference principles from *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*[17] and held that EPA had permissibly construed the Industrial Stormwater Rule to exempt channeled stormwater runoff associated with logging roads from the NPDES permitting scheme.

Under *Auer*, courts defer to an agency's interpretation of its own regulation unless that interpretation is plainly erroneous or inconsistent with the regulation. Applying this principle, the Court found it was reasonable for EPA to conclude that the discharges at issue were directly related only to harvesting of raw materials, rather than to manufacturing, processing, or raw materials storage areas at an industrial plant as targeted by the Industrial Stormwater Rule. The Court also underscored the Industrial Stormwater Rule's reference to "facilities" as support for EPA's interpretation that the Rule regulates only stormwater discharged from industrial sites that are "more fixed and permanent than outdoor timber-harvesting operations."[18]

As further support for its ruling, the Court noted that stormwater discharges of the kind at issue are controlled by the state of Oregon. As such, an interpretation that excluded them from duplicative federal regulation was not contrary to the purposes of the CWA when considered in the context of the entire regulatory scheme. In addition, the Court was persuaded by the fact that EPA's newly issued amendment to the Industrial Stormwater Rule was consistent with its long-standing interpretation and practice.

In light of its determination to accord *Auer* deference to EPA's interpretation of the Industrial Stormwater Rule, the Court found it unnecessary to address the Ninth Circuit's insistence that the statutory definition of "point source" could not be overcome by EPA's Silvicultural Rule.[19] Nor did the Court address the validity of EPA's amended Industrial Stormwater Rule, although the Court's decision implied that it would view the amended Rule as valid.[20]

Justices Roberts, Alito and Scalia: Challenging *Auer* Deference

A majority of the Court supported *Auer* deference in this case but the dissenting and concurring opinions call into question how long the Court will continue to apply the *Auer* principles.

Justice Scalia would have affirmed the Ninth Circuit's decision. He concurred on the jurisdictional issues but dissented on the merits, specifically on applying *Auer* deference. Stating emphatically that "[e]nough is enough," Justice Scalia protested the Court's giving "effect to a reading of EPA's regulations that is not the most natural one" and claimed, "*Auer* deference encourages agencies to be vague in framing regulations with the plan of issuing interpretations to create the intended new law without observance of notice and comment procedures." Citing separation of powers concerns, Justice Scalia insisted that "there is surely no congressional implication that the agency can resolve ambiguities in its own regulations … the power to write a law and the power to interpret it cannot rest in the same hands."[21]

A concurring opinion, authored by Justice Roberts and joined by Justice Alito, agreed that Justice Scalia had presented "serious questions" about the propriety of applying *Auer* principles but asserted that the

[17] *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

[18] 2013 U.S. LEXIS 2373, at *26.

[19] This is similar to EPA's position regarding its amended rule, *i.e.*, that the amended Industrial Stormwater Rule properly exempted the logging road discharges regardless of whether they are point sources.

[20] In January of this year, NEDC filed a new lawsuit challenging EPA's amended Industrial Stormwater Rule.

[21] 2013 U.S. LEXIS 2373, at *36.

Decker case was not the proper forum because the issues had not been properly raised and argued. However, Justice Roberts asserted that the issue is a basic one "going to the heart of administrative law" and acknowledged that *Auer* deference issues arise regularly.[22] Stating that "the bar is now aware that there is some interest in reconsidering" *Auer*, the concurring opinion invites future litigants to take on the deference issues.

Implications

For now, the principles of *Auer* are preserved. A clear majority of the Justices on the Court – even with Justice Breyer abstaining – relied upon and validated *Auer* in the *Decker* opinion. Notably, Justice Thomas did not join either Justice Roberts' concurrence or Justice Scalia's dissent. However, future cases will reveal the limits of agency deference going forward. Agency action based on significant changes to past interpretations of regulations, such as those involving expansions of agency jurisdiction, could be more vulnerable to challenge in the future.[23] Both the bar and federal agencies are on notice that agency adoption of vague, ambiguous regulations, which are then given enforceable form through subsequent agency "interpretations" could result in a narrowing or even rejection of *Auer* deference.

Finally, it is important to note that the Court's ruling does not free logging road stormwater runoff from regulation, even under the CWA. As discussed above, discharges from logging roads are a Phase II source, meaning that, although NPDES permits are not required, EPA continues to have regulatory authority over such discharges. As discussed in the preamble to the Industrial Stormwater Rule amendment, EPA continues to review water quality impacts and consider its regulatory options under the Phase II program. Accordingly, EPA could decide to adopt additional Phase II regulations to address logging roads in the future.[24] Further, the states, including Oregon and California, have extensive regulatory programs in place to control discharges of pollutants associated with logging, including from logging roads. Finally, both point and nonpoint sources of water pollution are covered by the CWA Total Maximum Daily Load ("TMDL") program; if runoff from logging roads is contributing to water quality impairment in a particular watershed, specific measures may be required as part of TMDL implementation to address that contribution and thereby improve water quality. Despite the clarity and regulatory relief reflected in the *Decker* decision, the regulation and control of stormwater discharges from logging roads and other nonpoint sources of pollution promise to remain source of complex challenges and vigorous debate.

If you have questions, please contact the Pillsbury attorney with whom you regularly work, or the authors:

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[22] *Id.* at *30.

[23] Indeed, the scope of deference accorded an agency's interpretation of its own jurisdiction was argued in the Supreme Court this term in *City of Arlington v. FCC*, No. 11-1545 (argued Jan. 16, 2013).

[24] 77 Fed. Reg. 236, at 72973.