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DECKER V. NORTHWEST ENVIRONMENTAL DEFENSE CENTER: HOW JUDICIAL IRRESPONSIBILITY SAVED THE LOGGING INDUSTRY

GREG JACKSON*

On March 20, 2013, the Supreme Court of the United States decided *Decker v. Northwest Environmental Defense Center*.¹ With this decision, as Justice Scalia's partial dissent correctly illustrates, the Supreme Court's deference to an administrative agency's interpretations of its own regulations continues to stray from the foundational principals of federalism embodied by the separation of powers doctrine and mandated by the United States Constitution.² In doing so, however, the Court's decision positively benefited society, preventing both the financial meltdown of the logging industry and a significant increase in unemployment.

I. INTRODUCTION

A. Logging and Forest Road Watershed Pollution

In September of 2006, the Northwest Environmental Defense Center ("NEDC") filed a citizen suit in the United States District Court for the District of Oregon, under Section 505 of the Clean Water Act ("CWA" or "Act"), alleging various CWA violations on two Oregon logging roads.³ The named defendants included state officials ("State Defendants"), who implement the CWA in concert with the Environmental Protection Agency

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¹ *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013).

² *Id.* at 1339-44 (Scalia, J., concurring in part and dissenting in part).

³ 33 U.S.C. § 1365 (2014); see First Amended Complaint, *Nw. Env'tl. Def. Ctr. v. Brown*, 476 F. Supp. 2d 1188 (D. Or. 2007) (No. 06-1270-KI), 2006 WL 3241715; see also *Nw. Env'tl. Def. Ctr. v. Brown*, 476 F. Supp. 2d 1188, 1191 (D. Or. 2007), *rev'd*, *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2011), *rev'd*, *Decker*, 133 S. Ct. 1326.

(“EPA”),⁴ and private logging entities (“Timber Defendants”) that use the roads.⁵

The roads in question, Sam Downs Road and Trask River Road, provide access to various logging sites in Oregon’s Tillamook State Forest and are used to haul timber out of the forest.⁶ While the Oregon Department of Forestry and Oregon Board of Forestry own and control the roads, the Timber Defendants are required to maintain the roads through contracts with the Oregon Department of Forestry.⁷ The roads feature a system of roadside ditches, channels, and culverts, which are also maintained by the Timber Defendants.⁸ These drainage controls ensure stormwater runoff flows into various streams, including tributaries of the Trask River, Kilchis River, and Tillamook Bay.⁹

During periods of high precipitation (0.12 inches or more), runoff washes sediment from the roads’ gravel surface through the ditches, and eventually down into the streams and rivers.¹⁰ Resulting sediment deposits adversely affect aquatic species, particularly salmon and trout that live where this debris collects.¹¹ Specifically, according to NEDC’s Complaint:

[F]ine sediment deposition in spawning gravels . . . can smother salmonid eggs, reduce intragravel oxygen, [increase] turbidity in the water column that can interfere with sight-feeding by salmonids, direct burial of macroinvertebrate insects and their habitat, and bed aggradation throughout the stream network including accumulation of sediment in low gradient channels [can cause] bank erosion . . . impairing navigation.¹²

The Tillamook Bay National Estuary Project’s 1998 *Kilchis Watershed Analysis* describes several fish species found in the Trask and Kilchis rivers as “species of concern.”¹³ Furthermore, according to the same report, of the

⁴ First Amended Complaint, *supra* note 3, at 21, 32.

⁵ 33 U.S.C. § 1365 (2014); First Amended Complaint, *supra* note 3, at 1, 15-21; *see also* *Nw. Envtl. Def. Ctr.*, 640 F.3d at 1067-68, *rev’d*, *Decker*, 133 S. Ct. 1326 (describing Timber Defendants’ use of the Sam Downs Road and Trask River Road).

⁶ First Amended Complaint, *supra* note 3, at 5; *see also* *Nw. Envtl. Def. Ctr.*, 640 F.3d at 1067-68, *rev’d*, *Decker*, 133 S. Ct. 1326.

⁷ First Amended Complaint, *supra* note 3, at 5.

⁸ *Id.* at 2, 5.

⁹ *Id.* at 3, 63-64.

¹⁰ *Id.* at 3, 60, 63-64.

¹¹ *Id.* at 61.

¹² *Id.* (quoting TILLAMOOK BAY NAT’L ESTUARY PROJECT, KILCHIS WATERSHED ANALYSIS 57 (Bruce Follansbee & Ann Stark eds., 1998)) (internal revisions omitted).

¹³ *Id.* at 62 (citing TILLAMOOK BAY NAT’L ESTUARY PROJECT, KILCHIS WATERSHED ANALYSIS 113 (Bruce Follansbee & Ann Stark eds. 1998)).

five Tillamook Basin salmonid populations, only one could be considered healthy.¹⁴

Negative environmental consequences of runoff like those caused by Sam Downs Road and Trask River Road are present wherever similar transportation systems are utilized in the United States.¹⁵ The state of Washington, for instance, has nearly 55,000 miles of comparable roads.¹⁶ Moreover, although forest road best management practice improvements have reduced runoff impact, pollution still poses a significant problem in many areas of the country.¹⁷ Best management practices, such as surfacing roads, stabilizing areas disturbed by their construction, or disconnecting drainage systems from streams, have been shown to reduce sediment loads by over eighty percent.¹⁸ Despite this potential, state implementation requirements for these measures vary widely.¹⁹ From an environmentalist's perspective, imposing federal CWA requirements on all logging and forest roads via National Pollutant Discharge Elimination System ("NPDES") permitting would generate greater pollution control independent of best management practices, on a uniform, national scale.²⁰ The Supreme Court's consideration and decision on the CWA's application to Sam Downs Road and Trask River Road is, therefore, crucial to achieving improved oversight and ultimately reducing runoff pollution because the roads are a microcosm of a much larger problem. Had the Court ruled that the roads were point source discharges requiring NPDES permits, it follows that all similarly situated logging and forest roads would also require permits – expanding CWA requirements for forest roads nationally.

¹⁴ *Id.*

¹⁵ See Mark F. Cecchini-Beaver, "Tough Law" Getting Tougher: A Proposal for Permitting Idaho's Logging Road Stormwater Point Sources After *Northwest Environmental Defense Center v. Brown*, 48 IDAHO L. REV. 467, 471-77 (2012) (discussing the negative impact of sediment runoff from roads on salmonids); see also GEORGE ICE & ERIK B. SCHILLING, NAT'L COUNCIL FOR AIR & STREAM IMPROVEMENT, ASSESSING THE EFFECTIVENESS OF CONTEMPORARY FORESTRY BEST MANAGEMENT PRACTICES (BMPs): FOCUS ON ROADS (2012).

¹⁶ Henry I. Miller, *A Supremely Important Decision About America's Logging Industry*, FORBES (Nov. 29, 2012), <http://www.forbes.com/sites/henrymiller/2012/11/29/a-supremely-important-decision-about-americas-logging-industry/> ("The state of Washington has said that, on average, it will need one permit per mile for all 55,000 miles of its eligible roads.")

¹⁷ ICE & SCHILLING, *supra* note 15, at 12-17 (discussing state specific forest road runoff pollution, the impact of specific best management practices proposed by the National Council for Air and Stream Improvement, and noting that such practices can reduce sediment loads by over 80%).

¹⁸ *Id.* at 17.

¹⁹ See ERIK SCHILLING, NAT'L COUNCIL FOR AIR AND STREAM IMPROVEMENT, COMPENDIUM OF FORESTRY BEST MANAGEMENT PRACTICES FOR CONTROLLING NONPOINT SOURCE POLLUTION IN NORTH AMERICA 1-165 (2009) (detailing varying best management practice requirements for specific states).

²⁰ See discussion *infra* Part II (detailing the CWA, NPDES permitting programs, and the enforcement of both).

B. The Logging Industry

According to the EPA, logging typically involves cutting timber, cutting and transporting timber, or producing wood chips in the field.²¹ Harvesting timber begins when the standing timber is purchased, sometimes with the underlying land.²² After trees are marked for quality, a landing area and access roads, such as those at issue in *Decker*, are constructed.²³ The timber is then felled and collected at the landing area before being transported, typically by truck, to a concentration yard or sawmill.²⁴ Although the dynamics vary, typically individual contractors paid on a volume basis, crews employed by sawmills, or larger entities that handle operations from purchase to finished product in-house perform the harvesting process.²⁵

Annually, the United States' logging industry accounts for approximately \$200 billion in sales and employs one million workers.²⁶ In contrast to other manufacturing sectors, however, enormous corporations do not dominate the market.²⁷ In fact, logging operations are most often highly-localized small businesses.²⁸ In 2013, for instance, the four largest logging entities accounted for just over nineteen percent of industry revenue.²⁹ Still, over the past five years, larger operations' market share has steadily grown,³⁰ while the total number of private logging establishments dropped more than twenty-five percent from 2003 to 2012.³¹ Industry employment dropped even more from 2000 to 2008,³² reducing high-wage

²¹ See *Agriculture: Forestry*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/oecaagct/forestry.html> (last visited Jan. 8, 2014) (describing North American Classification System ("NAICS") 1133 logging activities).

²² *Chapter 1 – Introduction to the Timber Industry – Hardwood Timber Industry*, NAT'L TIMBER TAX WEBSITE, <http://www.timbertax.org/publications/irs/msp/hardwood/chapter1/> (last visited Jan. 8, 2014).

²³ *Id.*; see *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013).

²⁴ *Chapter 1 – Introduction to the Timber Industry – Hardwood Timber Industry*, *supra* note 22.

²⁵ *Id.*

²⁶ *Id.*; *Agriculture: Forestry*, *supra* note 21.

²⁷ See *Logging in the US: Market Research Report*, IBISWORLD (Aug. 2013), <http://www.ibisworld.com/industry/default.aspx?indid=78>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Databases, Tables & Calculators by Subject*, U.S. DEP'T LABOR, <http://www.bls.gov/data/> (last visited Jan. 8, 2013) (the annual total of private establishments was 12,444 in 2003 compared to just 9,148 in 2012).

³² U.S. CENSUS BUREAU, SECTION 18: FORESTRY, FISHING, AND MINING 561 tbl.880 (2012), available at <https://www.census.gov/prod/2011pubs/12statab/natresor.pdf>.

jobs.³³ Significantly, since 2009, logging capacity has been reduced by one-fourth.³⁴ As consistently reduced domestic production from 1990 to 2010 (totaling nearly twenty-five percent in some areas) demonstrates,³⁵ the logging industry is far from robust. This reduction persisted despite price index increases over the same period.³⁶ Tellingly, in 2010, fifty-one percent of logging entities reported a loss or zero net gain.³⁷

A deadly combination of higher production costs, reduced demand, greater global competition, and increased regulation continues to plague the logging industry. The cost of raw materials and capital required for timber harvesting has risen dramatically, with new logging equipment prices jumping fifty percent.³⁸ The timber industry experienced similar economic woes as other sectors during the recession,³⁹ with new housing starts dropping seventy-five percent from 2005 to 2011.⁴⁰ Unlike other industries, however, demand for wood products recovered much slower. Demand for paper products, for example, plummeted, perhaps due to increased reliance on electronics, and seems unlikely to recover.⁴¹ Moreover, hardwood lumber markets are still down forty percent from the highs seen in the 1990s.⁴² Simultaneously, global competitors have gained ground. China, in particular, is emerging as a leading timber producer.⁴³ The Campbell Group predicts Brazil, Russia, and China will dominate new pulpwood fiber production over the next five years.⁴⁴ Domestically, government regulations

³³ *Agriculture: Forestry*, *supra* note 21 (listing median logging pay by position: first-line supervisors and managers median pay is \$50,190, while sawing machine setter, operators, and tenders receive a median of \$27,490).

³⁴ MICHAEL GOERGEN ET AL., *THE STATE AND FUTURE OF U.S. FORESTRY AND THE FOREST INDUSTRY: WORKSHOP REPORT AND RECOMMENDATIONS 13* (2013), available at http://www.usendowment.org/images/Forest_Sector_Report_-_FINAL_9.5.13.pdf.

³⁵ UNITED STATES CENSUS BUREAU, *supra* note 32, at 565 tbl.888 (displaying industrial roundwood domestic production fell from 15,577 million cubic feet in 1990 to 11,933 million cubic feet in 2010).

³⁶ *Id.* at 567 tbl.892.

³⁷ GOERGEN ET AL., *supra* note 34.

³⁸ *Id.*

³⁹ *Hard Times Hit U.S. Hardwood Lumber Industry: Changing Consumer Tastes, Construction Downturns Have Slashed Demand*, ASSOCIATED PRESS (Apr. 6, 2008), <http://www.nbcnews.com/id/23959105/#.Us4GZaVRluY>.

⁴⁰ Scott Bowe, *Great Lakes Forest, Industry Products, and Resources Summit: Industry Trends and Marketing Strategies for the Hardwood Lumber Industry*, U. WIS. WOOD PRODUCTS (June 6, 2012), <http://sustainabledevelopmentinstitute.org/wp-content/uploads/2013/05/Bowe-Marketing-Tools-and-Industry-Trends.pdf>.

⁴¹ Dan Newman, *The Real "Growth" Industry: Timber 101*, DAILYFINANCE, <http://www.dailyfinance.com/2013/01/14/the-real-growth-industry-timber/> (last updated Jan. 14, 2013, 10:25 PM) (noting United States' newsprint consumption dropped from 8 million metric tons in 2007 to 4 million metric tons in 2011, and other paper consumption dropped from 80 million metric tons in 2007 to 65 million metric tons in 2011).

⁴² GOERGEN ET AL., *supra* note 34, at 3.

⁴³ *Agriculture: Forestry*, *supra* note 21.

⁴⁴ Newman, *supra* note 41.

hamper industry competitiveness. Under current administrative regulations, manufacturing costs twenty percent more than in many other major industrial nations, and compliance expenses have risen nearly eight percent annually since 1998.⁴⁵ Given these obstacles, it is surprising the industry has not been reduced more substantially.

Requiring NPDES permitting for forest roads would greatly increase financial burdens imposed by regulation compliance. According to Frederick Cobbage and Robert Abt, in the southern states predict an “annual [median] cost for landowners, procurement dealers, loggers, and forest products firms . . . of about \$2 billion per year[,] if every timber harvest operation needed to obtain a NPDES permit.”⁴⁶ Importantly, for an industry dominated by smaller businesses, they also project higher costs for less experienced and/or smaller entities, or those operating tracts around 32 acres, as opposed to experienced and/or larger entities, or those harvesting tracts of about 80 acres or greater.⁴⁷ Experienced entities with staff could expect expenses of about \$16,000 per permit, while estimated costs for those lacking staff or experience were roughly \$24,000 per permit.⁴⁸ Similarly, ownership costs associated with NPDES permits for larger tracts came to about \$14 per acre per year, but exceed \$21 per acre per year for smaller plots.⁴⁹ These increased costs could substantially eliminate what little profits timber harvest operations earn, and cause severe industry investment decline.⁵⁰ For instance, “[o]n a per harvest basis, the cost of preparing, implementing, and monitoring NPDES forest road permits would decrease net timber sales returns by” nineteen percent for larger owners and seventy-one percent for smaller owners.⁵¹

Similar studies project comparable cost increases in other areas of the United States. Estimates put the total NPDES forest road permitting costs for the Northwest between \$654 million to \$883 million per year.⁵² On a state-by-state basis, some expect costs to increase by “\$277.2 million in California, \$66.2 million in Idaho, \$165.5 million in Montana, \$214.4

⁴⁵ GOERGEN ET AL., *supra* note 34, at 19.

⁴⁶ Frederick Cobbage and Robert Abt are professors at North Carolina State University. Their findings are based on analysis of existing data. FREDERICK COBBAGE & ROBERT ABT, POTENTIAL ADMINISTRATION AND ECONOMIC IMPACTS OF NPDES PERMIT REQUIREMENTS FOR FOREST ROADS IN THE SOUTH (2011), available at <http://search.ncforestry.org/WEBPAGES/Bullet%20Points%20for%20South%20-%20Forest%20Roads.pdf>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Economic Impacts of NPDES Permit Requirement*, NAT'L ALLIANCE OF FOREST OWNERS (Jan. 9, 2014), <http://nafoalliance.org/policy-solutions/epa-forest-roads-clean-water-act/economic-impacts-of-npdes-permit-requirement>.

million in Oregon, and \$198.2 million in Washington.”⁵³ Additionally, with job losses in these states estimated to total 24,000, \$585 million in wages would be lost.⁵⁴ Furthermore, the Northeastern and Lake States could experience \$100 million to over \$1 billion in additional costs during the initial permitting phase alone,⁵⁵ with Maine alone losing up to 6,000 jobs.⁵⁶

Considering these potential costs and the logging industry’s already dismal condition, the *Decker* litigation was of enormous importance for industrial timber harvesting’s future.

II. REGULATORY AND STATUTORY BACKGROUND

A. *The Clean Water Act*

In an effort to reduce water pollution throughout the United States, Congress passed the Federal Water Pollution Act (“FWPA”) in 1948.⁵⁷ Still, despite creating a national water pollution policy regime, the FWPA failed to effectuate fundamental change, prompting Congress to revisit the issue in 1972, and again in 1977 when it passed revisions to the FWPA that became the CWA.⁵⁸ The revisions instituted broad, sweeping new regulations designed to revitalize and preserve the “chemical, physical, and biological integrity of the Nation’s waters.”⁵⁹

Under the CWA focus shifted toward controlling and severely limiting water pollution sources. CWA Section 301(a) (codified as 33 U.S.C. § 1311(a)) for example, prohibited the unauthorized “addition of any pollutant to navigable waters from any point source” or discharges by any person.⁶⁰ To legally discharge pollutants into navigable waters from a point source, the discharge must be authorized by and continually comply with CWA Section 402 (codified as 33 U.S.C. § 1342).⁶¹ The compliance requirements rest largely on the discharge classification as either a point source or nonpoint source.⁶² Differences between the CWA’s treatment of

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at n.1 (explaining that the Northeast and Midwest estimates only account for the initial permitting phase).

⁵⁶ *Id.*

⁵⁷ Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251-1376 (1987)).

⁵⁸ Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816; Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566; *see also* *Envtl. Prot. Agency v. California*, 426 U.S. 200, 202 (1976) (describing confusion concerning regulatory authority and the ineffective focus on the impact of pollution rather than its causes).

⁵⁹ 33 U.S.C. § 1251(a) (2014).

⁶⁰ 33 U.S.C. § 1311(a) (2014).

⁶¹ 33 U.S.C. § 1342 (2014).

⁶² *Id.*; 33 U.S.C. § 1329 (2014).

the classifications reflects not only a more serious concern with point source discharges, but also the practical limitations of such regulation.⁶³ Further, costs associated with more stringent standards for point source discharges provide great economic incentive to seek nonpoint source classification.⁶⁴

1. Point Source Discharges

Under the CWA point sources are defined as:

[A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operations, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.⁶⁵

Based on this language, determining whether a discharge is considered a point source hinges on the man-made collection systems implemented to control runoff.⁶⁶ In classifying discharges, courts have recognized the definition's breadth.⁶⁷

Barring an exception, NPDES permits are required for point source discharges.⁶⁸ These permits require applicants to first comply with the CWA Section 307(a) effluent standards and prohibitions.⁶⁹ Then, once an NPDES permit is granted for the discharge, the holder must take steps to ensure continued compliance through observation and testing, maintenance, and periodic reports to the EPA.⁷⁰

Importantly, the statute's language specifically exempted "agricultural stormwater discharges and return flows from irrigated

⁶³ See *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002).

⁶⁴ The Timber Defendants' willingness to pursue this undoubtedly expensive litigation all the way to the Supreme Court for nearly 7 years demonstrates the importance private parties place on avoiding point source classification. See discussion *infra* Part I.B (discussing the potential economic impact and costs of requiring NPDES permits for forest roads).

⁶⁵ 33 U.S.C. § 1362(14) (2014).

⁶⁶ *Id.*; *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011).

⁶⁷ See *United States v. Lambert*, 915 F. Supp. 797 (S.D.W. Va. 1996); see also *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002); *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994); *Sierra Club v. Abaston Constr. Co.*, 620 F.2d 41 (5th Cir. 1980).

⁶⁸ 33 U.S.C. § 1342 (2014).

⁶⁹ 33 U.S.C. § 1317 (2014); 40 C.F.R. § 122.41 (2014).

⁷⁰ 40 C.F.R. § 122.41 (2014).

agriculture” from NPDES permitting.⁷¹ Nor are “[d]ischarges incidental to the normal operation of recreational [water] vessels” and certain “discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities” required to participate in NPDES permitting programs.⁷² Finally, under the 1987 Stormwater Amendments, the EPA was given significant discretion to determine whether NPDES permits would be required for certain types of point source discharges.⁷³

2. Nonpoint Source Discharges

Although the CWA fails to define “nonpoint source,” these discharges are typically understood as all discharges falling outside the point source discharge definition.⁷⁴ Per the United States Court of Appeals for the Ninth Circuit, nonpoint sources are “widely understood to be the type of pollution that arises from many dispersed activities over large areas . . . [which] is not traceable to any single discrete source.”⁷⁵ Additionally, the Ninth Circuit has noted a lack of confinement is indicative of such “dispersed activities.”⁷⁶

Contrasted with regulation of point source discharges, the CWA left nonpoint source discharges virtually unregulated.⁷⁷ Instead of NPDES permits, these discharges only require monitoring and status reports.⁷⁸

B. The Silvicultural Rule

Since 1973, the EPA has attempted to exempt silvicultural discharges from NPDES permitting.⁷⁹ The EPA’s determination that regulating logging road stormwater discharges would be “administratively difficult if not impossible” appears to have motivated it to avoid logging road discharge regulation altogether by defining the discharges as nonpoint

⁷¹ 33 U.S.C. § 1362(14) (2014).

⁷² 33 U.S.C. §§ 1342(r), 1342(l)(2) (2014).

⁷³ *Id.* § 1342(p)(5)-(6).

⁷⁴ *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002).

⁷⁵ *Id.* at 1184.

⁷⁶ *Id.*; *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1072 (9th Cir. 2011) (citing S. REP. NO. 92-414, at 98-99 (1971) (statement of Sen. Dole) (“[A] non-point source of pollution is one that does not confine to one fairly specific outlet.”)).

⁷⁷ See David Zaring, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act’s Bleak Present and Future*, 20 HARV. ENVTL. L. REV. 515 (1996). Compare 33 U.S.C. § 1329 (2014), with 40 C.F.R. § 122.41 (2014).

⁷⁸ 33 U.S.C. § 1329 (2014).

⁷⁹ See *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1073 (9th Cir. 2011), *rev'd*, *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013).

sources under the Silvicultural Rule.⁸⁰ Currently, the rule defines a “[s]ilvicultural point source” as:

[A]ny discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into the waters of the United States. The term does not include non-point source silvicultural activities such as . . . harvesting operations, . . . or road construction and maintenance from which there is natural runoff.⁸¹

For decades the EPA successfully avoided implementing NPDES permitting for logging roads by interpreting the above language as exempting the roads.⁸² In fact, as early as 1976, the EPA articulated that man-made water control systems, when used primarily to control nonpoint runoff produced by precipitation and unassociated with the named activities, should not be covered by the CWA.⁸³ Applied in conjunction with the EPA’s Industrial Stormwater Rule, discussed below, the Silvicultural Rule resulted in a lack of NPDES permitting for logging roads, such as the ones involved in this litigation.⁸⁴

C. 1987 Stormwater Amendments

In 1987, stormwater runoff regulation remained underdeveloped and ineffective, prompting Congress to pass additional statutory requirements.⁸⁵ At that time, CWA section 402(p) was added, and later

⁸⁰ *Nw. Env’tl. Def. Ctr.*, 640 F.3d at 1074-75, *rev’d*, *Decker*, 133 S. Ct. 1326 (the 1976 Final Rule “meant that any natural runoff containing pollutants was not a point source, even if the runoff was channeled and controlled through a ‘discernible, confined and discrete conveyance’ and then discharged into navigable waters, if it was not associated with rock crushing, gravel washing, log sorting, or log storage facilities” (citing 40 Fed. Reg. 56932 (Dec. 5, 1975))).

⁸¹ 40 C.F.R. § 122.27(b)(1) (2014).

⁸² *Nw. Env’tl. Def. Ctr.*, 640 F.3d at 1080, 1086, *rev’d*, *Decker*, 133 S. Ct. 1326 (noting the EPA wants its Silvicultural Rule to categorically exempt all runoff associated with silvicultural activities, and has operated under the assumption NPDES permits were not required for point source discharges on logging roads).

⁸³ *Id.* at 1074 (citing 41 Fed. Reg. 6282 (Feb. 12, 1976)).

⁸⁴ *See* *Cecchini-Beaver*, *supra* note 15, at 482 (“Until recently, NPDES permits were not required for stormwater runoff from logging roads because it was assumed to be either nonpoint source pollution . . . or exempt from the Phase I and II regulations.” (citing *Nw. Env’tl. Def. Ctr. v. Brown*, 476 F. Supp. 2d 1188, 1196–97 (D. Or. 2007))); *see also* *Cecchini-Beaver*, *supra* note 15, at 476-85 (discussing the CWA’s historical application to road pollution discharges); *Nw. Env’tl. Def. Ctr. v. Brown*, 476 F. Supp. 2d 1188 (D. Or. 2007), *Nw. Env’tl. Def. Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2011), *rev’d*, *Decker*, 133 S. Ct. 1326.

⁸⁵ *Nw. Env’tl. Def. Ctr.*, 640 F.3d at 1081, *rev’d*, *Decker*, 133 S. Ct. 1326 (citing Pub. L. No. 100-4, 101 Stat. 7 (1987)); *Nw. Env’tl. Def. Ctr.*, 640 F.3d at 1082 (citing 132 Cong. Rec. 32381 (Oct. 16,

became known as the 1987 Stormwater Amendments.⁸⁶ The amendments classified stormwater discharges based on their associated activities, and prescribed different requirements to each classification.⁸⁷ The result was a two-tier system that categorizes stormwater runoff as either Phase I or Phase II.⁸⁸

CWA Section 402(p), however, governs only “stormwater discharges.”⁸⁹ Consequently, for the “Phase” classifications to apply, the nonpoint runoff, such as rain, must pick up pollutants, flow through a point source, and then deposit the pollutants into navigable United States waters.⁹⁰ Based on the type of activity it is associated with, the stormwater point source will be classified as either Phase I or Phase II, and must comply with different regulatory schemes based on this classification.⁹¹ Thus, the first step is to determine whether runoff qualifies as stormwater discharge, implicating the Silvicultural Rule, then, if it qualifies, classify it as either Phase I or Phase II.

1. Phase I

CWA Section 402(p) articulated five categories of stormwater discharges explicitly covered by Phase I regulations.⁹² All five categories require NPDES permits.⁹³ The *Decker v. Northwest Environmental Defense Center* litigation concerns discharges “associated with industrial activity,” which the statute specifically places within Phase I.⁹⁴ The Stormwater Amendments did not, however, define “associated with industrial activity.”⁹⁵ Instead, Congress chose to grant the EPA discretion to “establish regulations setting forth the permit application requirements for stormwater discharges” associated with industrial activity.⁹⁶ Therefore, if the logging roads are “associated with industrial activity,” then they are Phase I point source discharges requiring NPDES permits.

1986) (Sen. Stafford “EPA should have developed this [stormwater] program long ago. Unfortunately, it did not.”).

⁸⁶ 33 U.S.C. § 1342(p) (2014); *Nw. Envtl. Def. Ctr.*, 640 F.3d at 1082, *rev'd*, *Decker*, 133 S. Ct. 1326.

⁸⁷ 33 U.S.C. § 1342(p) (2014).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 33 U.S.C. §§ 1311, 1362(7), 1362(12), 1362(14) (2014).

⁹¹ 33 U.S.C. § 1342(p) (2014).

⁹² *Id.* § 1342(p)(2).

⁹³ *Id.* § 1342(p)(1)-(2).

⁹⁴ *Id.* § 1342(p)(2)(B); *see Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013).

⁹⁵ 33 U.S.C. § 1342(p) (2014).

⁹⁶ *Id.* § 1342(p)(4)(A).

2. Phase II

Phase II covers all discharges falling outside the five statutory Phase I categories.⁹⁷ The 1987 Amendments directed the EPA to conduct a study of Phase II discharges, and then issue regulations for Phase II discharges based on its findings.⁹⁸ While Phase I unequivocally requires NPDES permitting, Congress accorded the EPA discretion in promulgating these Phase II regulations. Specifically, the EPA must designate which discharges required regulation “to protect water quality.”⁹⁹

D. Defining Industrial Activity: The EPA’s Revision of the Industrial Stormwater Rule

The 1987 Stormwater Amendments exempted the majority of “discharges composed entirely of stormwater.”¹⁰⁰ As mentioned above, the Stormwater Amendments required the EPA to adopt regulations defining “associated with industrial activity.”¹⁰¹ The Supreme Court termed the resulting regulation the Industrial Stormwater Rule, which, prior to December 7, 2012, read as follows:¹⁰²

Storm water discharge associated with industrial activity means discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For categories of industries identified in this section, the term includes, but it not limited to, storm water discharges from . . . immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility.¹⁰³

⁹⁷ *Id.* § 1342(p)(1)-(2).

⁹⁸ *Id.* §§ 1342(p)(2), 1342(p)(6).

⁹⁹ *Id.* §§ 1342(p)(2), 1342(p)(5), 1342(p)(6).

¹⁰⁰ *Id.* § 1342(p)(1); *see also* Decker v. Nw. Env’tl. Def. Ctr., 133 S. Ct. 1326, 1332 (2013).

¹⁰¹ 33 U.S.C. § 1342(p) (2014).

¹⁰² Revisions to Stormwater Regulations To Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads, 77 Fed. Reg. 72970 (Dec. 7, 2012) (codified at 40 C.F.R. pt. 122).

¹⁰³ 40 C.F.R. § 122.26(b)(14) (2006); *see also* Decker v. Nw. Env’tl. Def. Ctr., 133 S. Ct. 1326, 1332 (2013) (quoting 40 C.F.R. § 122.26(b)(14) (2006)).

Importantly, the Industrial Stormwater Rule also incorporated the Department of Labor's Standard Industrial Classification ("SIC") 24 by reference,¹⁰⁴ including logging.¹⁰⁵ According to SIC 24, Industry Group 2411 defines entities engaged in logging activities as "[e]stablishments primarily engaged in cutting timber and producing . . . primary forest or wood raw materials, or producing wood chips in the field."¹⁰⁶

On Friday, December 7, 2012, however, the EPA issued revisions to its Phase I Industrial Stormwater Rule.¹⁰⁷ These revisions sought to clarify the EPA's position on stormwater discharges associated with industrial activity.¹⁰⁸ Specifically, the altered language of 40 C.F.R. § 122.23(b)(14)(ii) states that "stormwater discharges from logging roads do not constitute stormwater discharges associated with industrial activity and that a NPDES permit is not required."¹⁰⁹ The revision explicitly targets the Ninth Circuit's 2011 decision, discussed below.¹¹⁰ Effective January 7, 2013, "the only facilities under SIC code 2411 [(a subpart of SIC 24)] that are 'industrial' are: rock crushing, gravel washing, log sorting, and log storage."¹¹¹ The relevant portion of the Industrial Stormwater Rule now reads:

Facilities classified within Standard Industrial Classification 24, Industry Group 241 that are rock crushing, gravel washing, log sorting, or log storage facilities operated in connection with silvicultural activities defined in 40 CFR 122.27(b)(2)-(3) and Industry Groups 242 through 249; 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373; (*not included are all other types of silvicultural facilities*).¹¹²

¹⁰⁴ 40 C.F.R. § 122.26(b)(14)(ii) (2014).

¹⁰⁵ *Decker*, 133 S. Ct. at 1332; *see also Industry Group 241: Logging*, U.S. DEP'T LABOR, https://www.osha.gov/pls/imis/sic_manual.display?id=538&tab=description (last visited Jan. 9, 2014).

¹⁰⁶ *Industry Group 241: Logging*, *supra* note 105.

¹⁰⁷ 33 U.S.C. § 1342(p) (2014); Revisions to Stormwater Regulations To Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads, 77 Fed. Reg. 72970 (Dec. 7, 2012) (codified at 40 C.F.R. pt. 122).

¹⁰⁸ Revisions to Stormwater Regulations To Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads, 77 Fed. Reg. 72970, 72970 (Dec. 7, 2012) (codified at 40 C.F.R. pt. 122).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 72974-75 (emphasis added).

Thus, the new rule excludes timber harvesting as an industrial activity, previously included under SIC 24 and the Industrial Stormwater Rule.¹¹³

E. Enforcement

The CWA provides the EPA with near plenary power to investigate, enforce, and prosecute violations, including NPDES permitting.¹¹⁴ In addition to such governmental action, however, the CWA also provided an avenue for private enforcement. Private citizens are permitted to bring action against “any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State.”¹¹⁵ Violations of effluent standards or limitations include unlawful violations of CWA Sections 301(a) and 402(p).¹¹⁶ Additionally, the “prevailing or substantially prevailing party” may recover litigation costs where the court deems appropriate.¹¹⁷

The expansive language allowing citizens suits is, however, limited by the CWA’s judicial review mechanism.¹¹⁸ CWA Section 509(b) provides judicial review of:

[T]he Administrator’s action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l) of this title, may be had by any interested person in [a] the Circuit Court of Appeals of the United States Any such application shall be made within 120 days from the date of such determination, approval, promulgation,

¹¹³ Compare *id.* at 72970, and 40 C.F.R. § 122.26(b)(14) (2014), with 40 C.F.R. § 122.26(b)(14) (2006).

¹¹⁴ 33 U.S.C. § 1319 (2014).

¹¹⁵ *Id.* § 1365.

¹¹⁶ *Id.* § 1365(f)(1).

¹¹⁷ *Id.* § 1365(d).

¹¹⁸ *Nw. Env’tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1068 (9th Cir. 2011), *rev’d*, *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326 (2013).

issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.¹¹⁹

According to the Ninth Circuit's interpretation of this rule, which the Supreme Court validated,¹²⁰ the subject matter of a citizen suit may be limited by the 120-day rule.¹²¹ Actions questioning the validity of certain EPA actions must be brought within 120 days or all judicial review will be forfeited.¹²² But, this "does not bar a district court from entertaining a citizen suit under [33 U.S.C.] § 1365 when the suit is against an alleged violator and seeks to enforce an obligation imposed by the Act or its regulations."¹²³

F. Potential Civil & Criminal Liability for Violations

Under CWA Section 309, a court or the EPA Administrator may assess penalties for permit violations up to \$25,000 per day per violation.¹²⁴ Where one act results in multiple simultaneous violations, each "pollutant parameter" breach is treated individually; meaning multiple CWA violations potentially create liability for each violation separately.¹²⁵ In addition to penalties, citizen suits carry liability for litigation costs and other forms of monetary or equitable relief for losing entities.¹²⁶

The CWA also creates criminal liability for "any responsible corporate officer"¹²⁷ based on levels of culpability.¹²⁸ Negligent permit violation convictions carry a \$2,500 to \$25,000 per-day fine and/or up to one-year imprisonment.¹²⁹ Knowing breaches may result in \$5,000 to

¹¹⁹ 33 U.S.C. § 1369(b).

¹²⁰ *Decker*, 133 S. Ct. at 1334-35.

¹²¹ *Nw. Envtl. Def. Ctr.*, 640 F.3d at 1068, *rev'd*, *Decker*, 133 S. Ct. 1326.

¹²² 33 U.S.C. § 1369(b) (2012); *Decker*, 133 S. Ct. at 1334-35; *Nw. Envtl. Def. Ctr.*, 640 F.3d at 1068.

¹²³ *Decker*, 133 S. Ct. at 1334.

¹²⁴ 33 U.S.C. § 1319(b), (d) (2014).

¹²⁵ *Id.* § 1319(d).

¹²⁶ *Id.* § 1365(a) (allowing district courts to assess civil penalties and "enforce such an effluent standard or limitation"); *Id.* § 1365(d) (allowing awards of litigation costs "to any prevailing or substantially prevailing party," and equitable relief); *Id.* § 1365(e) (preserving any other applicable common law or statutory party rights).

¹²⁷ *Id.* § 1319(c)(6).

¹²⁸ *Id.* § 1319(c).

¹²⁹ *Id.* § 1319(c)(1).

\$50,000 per-day fines and/or imprisonment for up to three years.¹³⁰ If a knowing violation puts “another person in imminent danger of death or serious bodily injury,” the conviction carries a \$250,000 fine and/or up to a fifteen-year imprisonment.¹³¹ Finally, knowing false statements on permit applications or dishonestly disrupting monitoring is punishable by a fine up to \$10,000 and/or up to two-year imprisonment.¹³²

III. PROCEDURAL HISTORY

A. First Amended Complaint and District Court Action

The NEDC’s First Amended Complaint, filed in September of 2008, alleged various permit violations, and requested: (1) injunctive relief to ensure compliance with the CWA; (2) environmental-remedial relief to rectify past harms from the discharges; (3) a declaratory judgment stating Defendants violated and continue to violate the CWA; (4) civil penalties against the Timber Defendants; and (5) litigation expenses.¹³³ First, the NEDC alleged the Defendants violated the CWA “by discharging pollutant and/or industrial stormwater from point sources along” the Trask River Road and Sam Downs Road “to waters of the United States without NPDES permits.”¹³⁴ Second, NEDC contended the Defendants violated and continue to violate the above CWA Sections “by failing to apply for NPDES permits for their discharges of pollutants and/or industrial stormwater from point sources along the Trask River Road, the Sam Downs Road, and other logging roads in the Oregon State Forests.”¹³⁵ According to the NEDC, NPDES permits were required for both roads, and these violations, both past and present, were the result of “discharging pollutants and/or industrial stormwater from point sources along the . . . [roads] to waters of the United States without NPDES permits.”¹³⁶ It should be noted that, if NPDES permits are not required for either road, then no violation of the CWA exists, and the Defendants cannot be held liable. Consequently, the litigation’s deciding issue was whether NPDES permits are required.¹³⁷

After the NEDC filed its complaint, both the State Defendants and the Timber Defendants filed Federal Rules of Civil Procedure 12(b)(6)

¹³⁰ *Id.* § 1319(c)(2).

¹³¹ *Id.* § 1319(c)(3)(A).

¹³² *Id.* § 1319(c)(4).

¹³³ First Amended Complaint, *supra* note 3, at VII:A-G.

¹³⁴ *Id.* at 85, 89.

¹³⁵ *Id.* at 92.

¹³⁶ *Id.* at 85, 89.

¹³⁷ See generally *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013).

motions to dismiss, and raised three challenges to the NEDC's suit.¹³⁸ First, the Defendants argued that the NEDC failed to allege sufficient facts in its First Amended Complaint to maintain representational standing.¹³⁹ Second, they claimed the NEDC did not to meet the CWA's procedural prerequisites for bringing a CWA citizen suit.¹⁴⁰ Finally, the Defendants contended that NPDES permits were not required for the logging roads.¹⁴¹ The litigation has focused on these three contentions.¹⁴²

The District Court was convinced, and dismissed the complaint for failure to state a claim.¹⁴³ According to the court, NEDC had standing because a particular member could later be identified during discovery, and it was not "beyond doubt that NEDC [could] prove no set of facts in support of its complaint which would entitle it to relief."¹⁴⁴ Relying on a 2002 Ninth Circuit opinion, the district court found that NEDC could bring a citizen suit because such suits may be brought to require a permit.¹⁴⁵ Despite this, however, the District Court ultimately concluded:

[T]he plain language of § 402(p)[33 U.S.C. § 1342] authorizes EPA to issue regulations designating which stormwater discharges are to be regulated and which are to be left unregulated. When those Phase II regulations went into effect, a stormwater discharge left unregulated fell into compliance with § 402(p) unless EPA or an authorized state agency later exercised its residual designation authority to require an NPDES permit for that discharge. A stormwater discharge that complies with § 402(p) does not violate § 301(a) [33 U.S.C. § 1311(a)].¹⁴⁶

Thus, the District Court dismissed NEDC's claims.¹⁴⁷

¹³⁸ *Nw. Envtl. Def. Ctr. v. Brown*, 476 F. Supp. 2d 1188, 1190 (D. Or. 2007), *rev'd*, *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2011), *rev'd*, *Decker*, 133 S. Ct. 1326.

¹³⁹ *Id.* at 1191.

¹⁴⁰ *Id.* at 1192.

¹⁴¹ *Id.* at 1193-99.

¹⁴² *See Decker*, 133 S. Ct. 1326.

¹⁴³ *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1068 (9th Cir. 2011), *rev'd*, *Decker*, 133 S. Ct. 1326.

¹⁴⁴ *Nw. Envtl. Def. Ctr. v. Brown*, 476 F. Supp. 2d 1188, 1192 (D. Or. 2007), *rev'd*, *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2011), *rev'd*, *Decker*, 133 S. Ct. 1326.

¹⁴⁵ *Id.* at 1193 (citing *Ass'n to Protect Hamersly, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007 (9th Cir. 2002)).

¹⁴⁶ *Id.* at 1199 (quoting *Conservation Law Found. v. Hannaford Bros.*, 327 F. Supp. 2d 325, 331 (D. Vt. 2004)).

¹⁴⁷ *Id.*

B. The Ninth Circuit Court of Appeals' Decision

NEDC appealed to the Ninth Circuit, where the District Court opinion was reversed and remanded.¹⁴⁸ The defendants requested a rehearing, however, and the Ninth Circuit withdrew the 2010 opinion and superseded it with a new, nearly identical opinion in May 2011, denying the defendants' motions for rehearing and a rehearing en banc.¹⁴⁹ Just as in the 2010 opinion, the Ninth Circuit overruled the District Court's dismissal, and ultimately concluded that "stormwater runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is a point source discharge for which an NPDES permit is required," effectively invalidating the Silvicultural Rule, as interpreted by the EPA.¹⁵⁰

After first finding subject matter jurisdiction appropriate, the Ninth Circuit based its decision on the statutory language defining a point source discharge, and the relationship between the Silvicultural Rule and the 1987 Stormwater Amendments.¹⁵¹ The Ninth Circuit's interpretation of the CWA's point source discharge definition understands natural runoff to be transformed into a point source discharge when it "is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances."¹⁵² Based on the presence of man-made collection systems controlling the runoff along the roads, the court reasoned that the language inescapably defined the logging roads in question to be point sources.¹⁵³

Considering the Silvicultural Rule and the 1987 Amendments, the Ninth Circuit first found that:

[t]he text of the CWA distinguishes between point and nonpoint sources depending on whether the pollutant is channeled and controlled through a 'discernible, confined, discrete conveyance' . . . [while] [t]he Silvicultural Rule, by contrast, categorically distinguishes between the two types of discharges depending on the source of the pollutant.¹⁵⁴

¹⁴⁸ *Nw. Env'tl. Def. Ctr. v. Brown*, 627 F.3d 1176, 1198 (9th Cir. 2010).

¹⁴⁹ *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1066 (9th Cir. 2011), *rev'd*, *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013).

¹⁵⁰ *Id.* at 1070, 1087.

¹⁵¹ *Id.* at 1069-87.

¹⁵² *Id.* at 1071.

¹⁵³ *Id.* at 1073, 1087.

¹⁵⁴ *Id.* at 1078 (internal citations omitted) (quoting 33 U.S.C. § 1362(14) (2014)).

The differing criteria prompted the court to question whether the Silvicultural Rule was a permissible interpretation of the CWA.¹⁵⁵ Rather than invalidate the rule, however, the court interpreted it to not exempt the roads.¹⁵⁶ As for the 1987 Amendments, the Ninth Circuit concluded “that the 1987 amendments to the CWA . . . [did] not exempt from the NPDES permitting process stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels, and . . . discharged.”¹⁵⁷ The collected runoff was properly considered a point source discharge associated with industrial activity, covered by Phase I regulations.¹⁵⁸ Additionally, the EPA could not exempt these discharges from its Phase I regulations by referencing the Silvicultural Rule.¹⁵⁹ Thus, according to the Ninth Circuit, stormwater runoff from the logging roads, when controlled by man-made collection systems, was a point source discharge and required NPDES permitting.¹⁶⁰

C. NEDC Action Challenging EPA’s Regulation Revision

The NEDC also filed a challenge to the new regulation on January 4, 2013, pursuant to CWA Section 509(b), the Administrative Procedure Act, and Federal Rules of Appellate Procedure 15(a).¹⁶¹ While this appears to complicate the litigation, the challenge is merely a protective petition designed to preserve a challenge to the revision in case the Supreme Court determines the final rule is subject to challenge in the Court of Appeals under CWA 509(b), which requires challenges to regulations promulgated under the CWA to be challenged within 120 days of the EPA Administrator’s signing.¹⁶² Consequently, the challenge serves only to ensure NEDC an avenue to challenge the revised regulation.

D. Supreme Court Appeal & Oral Arguments

Following the Ninth Circuit’s final decision, Doug Decker, who replaced Marvin Brown as the Oregon State Forester in 2011, and Georgia-Pacific West, Inc., one of the private defendants, appealed to the United

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1080.

¹⁵⁷ *Id.* at 1085.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1087.

¹⁶¹ 33 U.S.C. § 1369(b) (2014); 5 U.S.C. § 551 (2014); FED. R. APP. P. 15(a); Petition for Review and Corporate Disclosure Statement, Northwest Environmental Defense Center v. Jackson, No. 13-70057, at 2 (9th Cir. 2013), available at <http://environblog.jenner.com/files/click-here-10.pdf>.

¹⁶² 33 U.S.C. § 1369(b)(1); Petition for Review and Corporate Disclosure Statement, *supra* note 161, at 3.

States Supreme Court.¹⁶³ The Court granted both writs for certiorari, consolidating the cases and allotting one hour for oral argument.¹⁶⁴ Unfortunately, following oral arguments, the EPA issued its Industrial Stormwater Rule revisions.¹⁶⁵ Both the parties and the Supreme Court were aware of the impending changes prior to oral arguments.¹⁶⁶ This substantially changed the content of the oral argument, which focused on the proper action the Supreme Court should take, rather than the merits of the case.¹⁶⁷

At oral arguments, on behalf of the Petitioners, Timothy S. Bishop urged the Court to consider the merits of the case, despite the impending revision.¹⁶⁸ Stressing judicial efficiency and deference to the EPA, he argued the case should be decided in the Petitioners' favor under the 1987 Stormwater Amendments, and that the revision simply codified the EPA's prior interpretation of earlier regulations.¹⁶⁹ Malcolm L. Stewart, on behalf of the United States as *Amicus Curiae* in support of Petitioners, argued the EPA's revision made the case moot.¹⁷⁰ The Court was not very receptive to Stewart's mootness argument, and admonished him for not informing the Court of revision sooner.¹⁷¹ Jeffery L. Fisher made arguments on behalf of the Respondent.¹⁷² According to Mr. Fisher, the best course of action was to dismiss as improvidently granted and remand for further consideration on the merits.¹⁷³

¹⁶³ Petition for Writ of Certiorari, *Decker v. Nw. Env'tl. Def. Ctr.*, 640 F.3d 1063 (9th Cir. 2011) (No. 11-338), 2011 WL 4352279; Petition for Writ of Certiorari, *Georgia-Pacific W., Inc., v. Nw. Env'tl. Def. Ctr.*, 640 F.3d 1063 (9th Cir. 2011) (No. 11-347), 2011 WL 4352287; *Doug Decker Selected as New Oregon State Forester*, OR. DEP'T FORESTRY, <http://www.oregon.gov/ODF/Pages/newsroom/newsreleases/2011/NR1105.aspx> (last visited Jan. 11, 2013).

¹⁶⁴ *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 22 (2012); *Georgia-Pacific W., Inc., v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 23 (2012).

¹⁶⁵ Revisions to Stormwater Regulations To Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads, 77 Fed. Reg. 72970 (Dec. 7, 2012) (codified at 40 C.F.R. pt. 122).

¹⁶⁶ See Transcript of Oral Argument at 4, *Decker v. Nw. Env'tl. Def. Ctr.*, (No. 11-338); see also Revisions to Stormwater Regulations To Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads, 77 Fed. Reg. 72970 (Dec. 7, 2012) (codified at 40 C.F.R. pt. 122).

¹⁶⁷ See *id.*; see also Revisions to Stormwater Regulations To Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads, 77 Fed. Reg. 72970 (Dec. 7, 2012) (codified at 40 C.F.R. pt. 122) (the revisions are dated for the Friday following oral arguments, but the EPA administrator signed the rule the Friday before oral arguments).

¹⁶⁸ Transcript of Oral Argument, *supra* note 166, at 12:17-23.

¹⁶⁹ *Id.* at 4-18.

¹⁷⁰ *Id.* at 18-28.

¹⁷¹ *Id.*

¹⁷² *Id.* at 28-49.

¹⁷³ *Id.*

The Court seemed most receptive to Fisher's argument.¹⁷⁴ On January 8, 2013, however, the Supreme Court granted petitioners' motion for supplementary briefing, and issued an order providing the parties with an opportunity to file briefs on the effect of the new regulations by January 22, 2013.¹⁷⁵ On March 20, 2013, the Supreme Court ruled that NPDES permits were not required for the logging roads.¹⁷⁶

IV. THE MARCH 20, 2013 DECISION: *DECKER V. NORTHWEST ENVIRONMENTAL DEFENSE CENTER*

The Supreme Court's 7-1 opinion found the EPA determination of the Industrial Stormwater Rule "a reasonable interpretation of its own regulation; and, in consequence," the rule should be accorded deference under *Auer v. Robbins*.¹⁷⁷ Justice Kennedy authored the majority opinion, while Chief Justice Roberts, joined by Justice Alito, contributed a concurring opinion.¹⁷⁸ Justice Scalia concurred in part and dissented in part, while Justice Breyer participated in neither the case's consideration nor the decision.¹⁷⁹

A. Justice Kennedy's Majority Opinion

The majority first found NEDC's citizen suit permissible because it did "not seek an implicit declaration that the regulations were invalid as written."¹⁸⁰ Second, turning to the mootness question, the Court recognized that Article III justiciability required a live case or controversy throughout all litigation stages.¹⁸¹ But, because assessment of CWA civil penalties, attorney's fees, and environmental remedial costs against the Defendants, "the cases remain[ed] live and justiciable, for the possibility of some remedy for a proven past violation . . . [was] real and not remote."¹⁸² Consequently, the new EPA regulations did not moot the litigation.¹⁸³

¹⁷⁴ *Id.*

¹⁷⁵ Memorandum Decisions at 927, *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013) (No. 11-338).

¹⁷⁶ *Decker*, 133 S. Ct. at 1336-39.

¹⁷⁷ *Id.* at 1331 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1335 (quoting *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007)) (internal quotation marks and punctuation omitted).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 1335-36.

Surprisingly, given the Ninth Circuit's extensive treatment,¹⁸⁴ the Court's analysis focuses very little on the EPA's Silvicultural Rule.¹⁸⁵ Beyond concluding that under the "rule, any discharge from a logging-related source that qualifies as a point source requires an NPDES permit unless some other federal statutory provision exempts it from that coverage," it is hardly mentioned.¹⁸⁶ The agency's partial admission that its rule's "reference to natural runoff associated with logging roads neither clearly encompasses nor clearly excludes the sort of channeled runoff at issue," perhaps explains this.¹⁸⁷ Still, the Court recognized the revision's purpose was "to bring within the NPDES permit process only those logging operations that involve the four types of activity . . . defined as point sources by the explicit terms of the Silvicultural Rule."¹⁸⁸

Turning to the merits, the Court primarily focused on the EPA's interpretation of its unamended Industrial Stormwater Rule, which excluded logging from "associated with industrial activity" under the 1987 Stormwater Amendments.¹⁸⁹ According to the majority, "petitioners were required to secure NPDES permits for the discharges of stormwater runoff *only if* the discharges were associated with industrial activity," as defined by the unamended Industrial Stormwater Rule.¹⁹⁰ If not, the CWA's general exemption of "discharges composed entirely of stormwater" would apply, and NPDES permits were not required.¹⁹¹

After determining the EPA's narrowed definition of "associated with industrial activity" was permissible because the statute did not outline its scope, the Court considered whether the EPA's interpretation of its Industrial Stormwater Rule was reasonable.¹⁹² According to the majority, the EPA could reasonably "conclude that the conveyances at issue [were] . . . directly related only to the harvesting of raw materials, rather than to manufacturing, processing, or raw materials areas," specified by the

¹⁸⁴ See *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1073-80 (9th Cir. 2011), *rev'd*, *Decker*, 133 S. Ct. 1326 (discussing the EPA's Silvicultural Rule).

¹⁸⁵ See *Decker*, 133 S. Ct. 1326.

¹⁸⁶ *Id.* at 1331.

¹⁸⁷ Brief for United States as Amicus Curiae Supporting Petitioners at 19, *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013) (Nos. 11-338, 11-347), 2012 WL 3864278 (internal quotation marks omitted); see also *Decker*, 133 S. Ct. at 1342 (Scalia, J., concurring in part and dissenting in part) (characterizing the statement as an admission that the discharges were not natural runoff).

¹⁸⁸ *Decker*, 133 S. Ct. at 1333 (the four activities include rock crushing, gravel washing, log sorting, and log storage facilities).

¹⁸⁹ *Id.*; see also 33 U.S.C. § 1342(p); Revisions to Stormwater Regulations To Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads, 77 Fed. Reg. 72970, 72970 (Dec. 7, 2012) (codified at 40 C.F.R. pt. 122).

¹⁹⁰ *Decker*, 133 S. Ct. at 1336 (quoting 33 U.S.C. § 1342(p)(2)(B)) (citing 40 C.F.R. § 122.26(b)(14) (2006)) (emphasis added) (internal quotation marks omitted).

¹⁹¹ *Id.* (quoting 33 U.S.C. § 1342(p)(1)).

¹⁹² *Id.* at 1336-37.

rule.¹⁹³ Furthermore, the regulation’s “at an industrial plant” language provided an additional exclusionary basis, supporting an application to only “more fixed and permanent [facilities] than timber-harvesting operations.”¹⁹⁴ Considered wholly, the Court found “the regulation’s references to facilities, establishments, manufacturing, processing, and an industrial plan leave open the rational interpretation that the regulation extends only to traditional industrial buildings such as factories and associated sites, as well as other relatively fixed facilities.”¹⁹⁵

Under *Auer* deference, which the Court found applicable because the EPA was consistently interpreting its own regulation, the “EPA’s interpretation . . . [was] a permissible one.”¹⁹⁶ This deference approach does not require that an agency’s interpretation be the best or only possible reading to survive.¹⁹⁷ Instead, where an agency is interpreting its own regulation, courts are to accord its understanding deference, absent a plainly erroneous or inconsistent reading.¹⁹⁸ Here, the EPA’s rational interpretation satisfied this requirement, and “[t]he pre-amendment version of the Industrial Stormwater Rule . . . permissibly . . . exempt[ed] discharges of channeled stormwater runoff from logging roads from the NPDES permitting scheme.”¹⁹⁹

B. Chief Justice Roberts’ Concurrence, Joined by Justice Alito

Chief Justice Roberts, responding to Justice Scalia’s partial concurrence and partial dissent, believed “serious questions” had been raised regarding administrative deference.²⁰⁰ Although the concurrence wished to reconsider the underlying principles, it argued this was not the appropriate case.²⁰¹ The parties only committed one footnote each to the subject, and only two *amicus* briefs out of twenty-two seriously addressed the matter’s merits.²⁰² Considering the administrative law doctrine’s foundational nature and regular judicial consideration, Chief Justice

¹⁹³ *Id.* at 1337 (internal quotation marks omitted).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* (internal quotation marks omitted).

¹⁹⁶ *Id.* at 1337-38 (citing *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012)) (consistent interpretation of the Industrial Stormwater Rule buttressed the application of *Auer* deference).

¹⁹⁷ *Id.* at 1337.

¹⁹⁸ *Id.* (quoting *Chase Bank USA v. McCoy*, 131 S. Ct. 871 (2011)).

¹⁹⁹ *Id.* at 1337-38.

²⁰⁰ *Id.* at 1338 (Roberts, C.J., concurring) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997)).

²⁰¹ *Id.*

²⁰² *Id.* at 1338-39.

Roberts concluded that an alteration of important precedent required the issue be raised and argued properly.²⁰³

C. Justice Scalia's Partial Concurrence and Partial Dissent

Although Justice Scalia agreed the case was justiciable and NEDC's citizen suit was not barred,²⁰⁴ his scathing dissent challenged the constitutionality of *Auer* deference on separation of powers grounds before concluding the Industrial Stormwater Rule required the logging roads have NPDES permits.²⁰⁵ According to Justice Scalia, deference required the Court to baselessly yield to agencies' interpretations of regulations they wrote.²⁰⁶ By focusing on the plausibility of an agency's regulatory interpretation and the regulation's intent, the Court has granted agencies too much authority, impermissibly straying from the foundational premises of statutory and regulatory interpretation:²⁰⁷ "[w]hether governing rules are made by the national legislature or an administrative agency, . . . [the Court is] bound by *what they say*, not by the unexpressed intention of those who made them."²⁰⁸ Although the dissent recognized the merit of the doctrine's justifications, this principle remained inescapable.²⁰⁹

Furthermore, Justice Scalia argued the entire doctrine flew in the face of the Constitution's separation of powers principles and structure.²¹⁰ Accordingly, a comparison of *Auer* deference and *Chevron* deference reveals the former's central flaw.²¹¹ *Chevron* deference, which allows Congress to confer agencies discretion to administer a statute via interpretive regulation, grants agencies a level of authority "courts must respect, regarding the meaning of the statute."²¹² Yet, despite this broad power, Congress remains unable to increase its own sphere of influence because another branch, either the Judiciary or Executive, must determine the statute's meaning.²¹³ To the contrary, *Auer* deference allows an agency to assume not only a legislative role in writing regulations, but also a judiciary function in interpreting them.²¹⁴ Consequently, such agency activity embodies the exact political structure the Constitution sought to

²⁰³ *Id.* at 1339.

²⁰⁴ *Id.* (Scalia, J., concurring in part and dissenting in part).

²⁰⁵ *See id.* at 1339-44.

²⁰⁶ *Id.* at 1339.

²⁰⁷ *Id.* at 1339-40.

²⁰⁸ *Id.* at 1340 (emphasis in original).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1340-41.

²¹¹ *Id.*

²¹² *Id.* (citing *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996)).

²¹³ *Id.* at 1341.

²¹⁴ *Id.*

eradicate,²¹⁵ and “contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.”²¹⁶

As for the EPA regulations in question, Justice Scalia urged the Court apply the fairest reading of the regulations.²¹⁷ Accordingly, because runoff from the logging roads is collected and discharged via ditches, pipes, and channels, the roads are plainly a point source discharge under the CWA.²¹⁸ Indeed, in Justice Scalia’s view, the roads match the CWA’s point source definition identically, and any application of the Silvicultural Rule otherwise openly contradicts the statute’s definition.²¹⁹ Furthermore, under this analysis, the Industrial Stormwater Rule does not provide refuge either.²²⁰ The rule provides that, for any of the eleven listed industries, “discharges are associated with industrial activity if they come from sites used for transportation of any raw material.”²²¹ Thus, because the Timber Defendants utilize the roads to transport logs (a raw material), if timber harvesting is an industry the regulation covers, the discharges fall within Phase I of the 1987 Stormwater Amendments and require NPDES permits.²²² Industry Group No. 2411, under SIC 24, which the regulation incorporates by reference, includes logging as entities primarily devoted to harvesting timber.²²³ For Justice Scalia, the logging roads, therefore, explicitly require NPDES permitting because the Timber Defendants used them to transport raw materials while harvesting timber.²²⁴

Going further and considering the EPA and majority interpretations of the Industrial Stormwater Rule, Justice Scalia insisted the fairest reading required NPDES permits for the roads.²²⁵ First, the interpretative doctrine of the Rule of Last Antecedent, which dictates “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows,”²²⁶ meant “at an industrial plant” only modified “raw material storage areas.”²²⁷ Consequently, Justice Scalia concluded this meant “manufacturing and processing *anywhere*, including in the forest, would be associated with industrial activity.”²²⁸ Second, Justice Scalia rejected the EPA and the majority’s traditionally fixed industrial site

²¹⁵ *Id.* (citing THE FEDERALIST NO. 81 (Alexander Hamilton) (J. Cooke ed., 1961)).

²¹⁶ *Id.* at 1342.

²¹⁷ *Id.*

²¹⁸ *Id.* (citing 33 U.S.C. § 1365(14)).

²¹⁹ *Id.* at 1342-43.

²²⁰ *Id.* at 1343-44.

²²¹ *Id.* at 1343 (quoting 40 C.F.R. § 122.26(b)(14)) (internal quotation marks omitted).

²²² *Id.*

²²³ *Id.* (citing *Industry Group 241: Logging*, *supra* note 105).

²²⁴ *Id.*

²²⁵ *Id.* at 1343-44.

²²⁶ *Id.* at 1343 (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)).

²²⁷ *Id.* at 1343-44; *see also* 40 C.F.R. § 122.26(b)(14).

²²⁸ *Id.* at 1343 (internal quotation marks omitted).

interpretation because other covered activities, such as producing wooden ships in the field, were just as impermanent as timber harvesting.²²⁹ Thus, according to Justice Scalia, when the underlying rule's language was considered, the fairest reading required NPDES permitting program participation.²³⁰

V. JUSTICE SCALIA IS RIGHT: "ENOUGH IS ENOUGH."²³¹

A. Separation of Powers Principles and Role in the United States' Federal Government System

The separation of powers doctrine, embodied in the United States Constitution,²³² seeks to preserve liberty,²³³ and is "crucial" to the United States' system of government.²³⁴ As James Bryce observed in 1888, "[t]he fundamental characteristic of the American National Government is its separation of the legislative, executive, and judicial departments," which was the Founding Fathers' central aim during the Philadelphia Convention.²³⁵ Divided spheres of influence can be "traced back to the . . . fundamental wellsprings of democracy: the writings of John Locke and Charles de Montesquieu; the Founding Father's constitutional debates; and the Federalist Papers."²³⁶

Because "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny,"²³⁷ the Constitution sought to preserve liberty by creating a system where independent governmental branches checked each other's actions through the removal of each power to "separate and distinct" governmental bodies.²³⁸ The healthy fear of encroachment leading to despotism motivated this, and has been a basic tenant of our system since its inception²³⁹ that remains highly relevant today.²⁴⁰ Exercising its Article

²²⁹ *Id.* at 1344.

²³⁰ *Id.*

²³¹ *Id.* at 1339.

²³² See U.S. CONST. art. I, II, III (dividing legislative, executive, and judicial power between the three branches of the federal government).

²³³ THE FEDERALIST NO. 47 (James Madison).

²³⁴ *Bowsher v. Synar*, 478 U.S. 714, 725 (1986).

²³⁵ 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 216 (1888).

²³⁶ Sheldon Whitehouse, *The Impetuous Vortex*, 7 R.I. B. J. 43, 7 (1995).

²³⁷ THE FEDERALIST NO. 47 (James Madison).

²³⁸ *Id.*; see also U.S. CONST. art. I, II, III (dividing legislative, executive, and judicial power between the three branches of the federal government).

²³⁹ "The spirit of encroachment tends to consolidate powers of all departments in one, and thus to create, whatever the form of government, a real despotism." Book v. State Office of Bldg. Comm'n, 149 N.E.2d 273, 294 (Ind. 1958) (quoting George Washington, Farewell Address (1796)).

III role in reviewing executive and legislative action,²⁴¹ the Supreme Court has repeatedly reaffirmed the importance of the constitutional scheme of the separation of governmental powers into three coordinated branches.²⁴² Justice Scalia's partial dissent merely asks the Court to reaffirm this once again, within the context of administrative law.²⁴³

B. Auer Deference Unconstitutionally Permits Separation of Powers Violations

Auer deference not only allows an agency to write regulations, but also allows it to interpret and enforce those regulations, assuming the role of all three federal branches in violation of constitutional separation of powers. The EPA's conduct regarding both the Silvicultural Rule and Industrial Stormwater Rule clearly demonstrates this. The agency exercised quasi-legislative power when promulgating the regulations.²⁴⁴ It usurped the federal judiciary's role when it interpreted the meaning of its regulations.²⁴⁵ And, when NPDES permitting is required, the EPA utilizes its executive power by enforcing permitting schemes.²⁴⁶ Thus, the EPA's promulgation, interpretation, and enforcement of regulations consolidated in one branch the powers that the Constitution vests in the legislature, judiciary, and executive branches. This merger illustrates the "accumulation of powers" James Madison warned was "the very definition of tyranny,"²⁴⁷ and the Framers' separation of powers scheme sought to prevent.²⁴⁸ Consequently,

²⁴⁰ See *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1339-44 (2013) (Scalia, J., concurring in part and dissenting in part); see also *Stern v. Marshall*, 131 S. Ct. 2594, 2608-11 (2011) (discussing separation of powers regarding an Article III challenge to a bankruptcy court's disposition).

²⁴¹ See U.S. CONST. art. III; see also *Marbury v. Madison*, 5 U.S. 137 (1803) (declaring the Court's power to review the constitutionality of congressional acts); *Little v. Barreme*, 6 U.S. 170 (1804) (reviewing a ship commander's actions undertaken pursuant to presidential instructions).

²⁴² *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

²⁴³ See *Decker*, 133 S. Ct. at 1339-44 (Scalia, J., concurring in part and dissenting in part).

²⁴⁴ See U.S. CONST. art. I (providing Congress the power to enact legislation); see also *Wickard v. Filburn*, 317 U.S. 111 (1942) (noting Congress' Article I, Section 8, Clause 3, Commerce Clause power allows it to pass legislation regulating activities affecting commerce among the several states); 40 C.F.R. § 122.26(b)(14) (2013) (Industrial Stormwater Rule promulgated by the EPA).

²⁴⁵ See U.S. CONST. art. III (describing the federal judiciary branch's interpretive role); see also *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (interpreting statutory language of the Clean Air Act, enacted by Congress); *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1067-87 (9th Cir. 2011), *rev'd*, *Decker*, 133 S. Ct. 1326 (discussing the EPA's interpretations of the Silvicultural Rule and Industrial Stormwater Rule).

²⁴⁶ See U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."); see also 33 U.S.C. § 1319 (2014) (providing the EPA with authority to investigate, enforce, and prosecute CWA violations, including NPDES permitting violations); *Cunningham v. Neagle*, 135 U.S. 1 (1890) ("[I]s the president's duty to take care that the laws be faithfully executed.").

²⁴⁷ THE FEDERALIST NO. 47 (James Madison).

²⁴⁸ See 1 BRYCE, *supra* note 235, at 216; see also U.S. CONST. art. I, II, III (dividing legislative, executive, and judicial power between the three branches of the federal government).

as Justice Scalia correctly observed, this plainly violates the constitutional separation of powers by impermissibly combining the roles of the three branches in one centralized governmental body.²⁴⁹

C. Auer Deference Doctrine is an Unconstitutional Exercise of Legislative Power by the Federal Judiciary

The separation of powers doctrine applies equally to all federal government branches, including the judiciary.²⁵⁰ When the Court grants executive agencies quasi-judicial interpretive powers under *Auer* deference, it unconstitutionally infringes upon Congress' power to confer federal judicial power.²⁵¹ By yielding to an agency's interpretation of its own regulations absent "plainly erroneous or inconsistent" interpretations,²⁵² *Auer* deference implicitly grants the EPA, or any other agency, authority to interpret their own rules.²⁵³ Although Congress may delegate administrative authority, including allowing agencies to write interpretive regulations and requiring courts to respect these agency determinations,²⁵⁴ allowing the agency to interpret those regulations is entirely different.²⁵⁵ Instead of congressionally authorized quasi-legislative powers of creation exercised when an agency promulgates interpretive regulations, determining the meaning of those regulations is judicial in nature, and an exercise of Article III capacities.

The Constitution does not grant the federal judiciary the power to expand the role of the Executive branch.²⁵⁶ Nor does it wholly grant the Supreme Court the power to determine its sphere of review.²⁵⁷ To the contrary, except in a few specific circumstances, under Article III, Section 2, of the Constitution, "the disposal of the judicial power belongs to Congress"²⁵⁸ because "Congress, having the power to establish the courts,

²⁴⁹ See *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1339-42 (2013) (Scalia, J., concurring in part and dissenting in part) (noting agency action under *Auer* deference violates constitutional separation of powers).

²⁵⁰ See *Baker v. Carr*, 367 U.S. 691 (1962) (refusing to consider issues under the Political Question Doctrine based on separation of powers principles).

²⁵¹ See *Sheldon v. Sill*, 49 U.S. 441 (1850) (recognizing general congressional control over federal jurisdiction).

²⁵² *Id.* at 1337 (quoting *Chase Bank USA v. McCoy*, 131 S. Ct. 871, 880 (2011)).

²⁵³ *Id.* at 1338-41 (Scalia, J., concurring in part and dissenting in part).

²⁵⁴ *Id.* at 1340 (citing *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996)).

²⁵⁵ *Id.* at 1341.

²⁵⁶ Compare U.S. CONST. art. III., with U.S. CONST. art. II, § 3, and U.S. CONST. art. I.

²⁵⁷ See U.S. CONST. art. III; see also *Ex parte McCordle*, 74 U.S. 566 (1868) (noting the Court's appellate jurisdiction is derived from the Constitution, but conferred by Congress, suggesting at least some congressional influence over its appellate jurisdiction).

²⁵⁸ *Sheldon v. Sill*, 49 U.S. 441, 449 (1850) (quoting *Turner v. Bank of N. Am.*, 4 U.S. 8, n.a (1799)).

must define their respective jurisdictions.”²⁵⁹ Thus, conveying federal jurisdiction and conferring certain bodies with judicial interpretive powers falls within the legislature’s sphere.²⁶⁰ *Auer* deference, as a judicial doctrine, effectively confers quasi-judicial Article III interpretive powers on executive agencies without congressional approval, unconstitutionally violating fundamental separation of powers principles. Therefore, the doctrine is unconstitutional.

VI. APPLICATION OF *AUER* DEFERENCE PROBABLY SAVED THE LOGGING INDUSTRY

A. Absent Auer Deference, the Logging Roads Require NPDES Permits under Applicable Regulations

The majority’s disposition, that the logging roads did not require NPDES permits, was wholly based on *Auer* deference and the EPA’s rational interpretation of its regulations.²⁶¹ Absent this unconstitutional reliance on *Auer* deference, an application of Justice Scalia’s fairest reading approach dictates that the CWA and its accompanying regulations plainly require NPDES permitting for the roads.²⁶²

As Justice Scalia illustrates, when considered based on whether “what the petitioners did . . . [was] proscribed by the fairest reading of the regulations,” the requirement for permitting and CWA violations for failure to acquire permits becomes clear.²⁶³ First, the roads are unambiguously point source discharges under the CWA’s plain language²⁶⁴ because they control stormwater runoff “through a series of pipes, ditches, and channels.”²⁶⁵ Under this simple CWA application, the Silvicultural Rule does not exempt the roads as natural runoff.²⁶⁶ Second, the Industrial Stormwater Rule applies, requiring NPDES under the 1987 Stormwater Amendments’ Phase I point source discharge control scheme.²⁶⁷ This

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ See *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1336-39 (2013).

²⁶² *Id.* at 1342-44 (Scalia, J., concurring in part and dissenting in part). It has been suggested the Supreme Court, in abandoning *Auer* deference, should or probably would adopt the “one-bite” regulatory interpretation rule followed by the Third, Fifth, and Sixth Circuits. *The Supreme Court 2012 Term: Leading Cases: Federal Statutes and Regulations: Clean Water Act – Decker v. Northwest Defense Center*, 127 HARV. L. REV. 328, 335 (2013). Under this approach, an agency is provided a limited opportunity to clarify regulations’ meaning after promulgation. *Id.*

²⁶³ See *Decker*, 133 S. Ct. at 1342-44 (Scalia, J., concurring in part and dissenting in part).

²⁶⁴ 33 U.S.C. § 1362(14) (2008) (defining a “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, and conduit”).

²⁶⁵ *Decker*, 133 S. Ct. at 1342 (Scalia, J., concurring in part and dissenting in part).

²⁶⁶ *Id.* at 1342-43 (citing 33 U.S.C. § 1362(14); 40 C.F.R. § 122.27(b)(1)).

²⁶⁷ *Id.* at 1343-44.

includes the transportation of raw materials, such as logs, within its defined activities associated with industrial activity, and, consequently, falls under Phase I if the transportation is for a covered industrial activity.²⁶⁸ Under SIC 24 Industry Group 2411, logging, is considered an industrial activity.²⁶⁹ Both the Sam Downs Road and Trask River Road require NPDES permits because they are used for a covered associated activity by a covered industry.²⁷⁰ Therefore, absent application of *Auer* deference, all of the United States' forest roads with comparable point source discharges, or discharging stormwater runoff controlled by manmade irrigation systems into navigable waters, would require NPDES permits.

B. The Financial Consequences of Requiring NPDES Permits for All Comparable Forest Roads Would be Astronomical

Previously discussed cost estimates for implementing an NPDES permitting program on a national scale for all eligible forest roads put the total expense well into the billions of dollars. Annual implementation costs have been predicted to be as high as \$2 billion for southern states²⁷¹ and between \$654-\$883 billion for the Northwest, while initial permitting alone might cost between \$100 million and \$1 billion in northeastern and lake states.²⁷² Moreover, for inexperienced and/or smaller firms, compliance is expected to be even more expensive.²⁷³ On the whole, NPDES permitting could mean a net per harvest sales reduction in southern timber harvesting operations between nineteen percent for entities working larger tracts and seventy-one percent for smaller tracts.²⁷⁴ Implementation would also be expensive for state governments. Washington State, for instance, predicted "all 55,000 miles of its eligible roads" would require approximately one permit per mile, at an average processing cost of \$2,800 per permit.²⁷⁵

Additionally, legal expenses and civil liability would push total expenditures even higher, as citizen suits allow courts to award penalties, equitable relief, and litigation costs to the prevailing or substantially prevailing party.²⁷⁶ The CWA also provides for civil penalties up to

²⁶⁸ *Id.* at 1343 (citing 40 C.F.R. § 122.26(b)(14)).

²⁶⁹ *Id.* (citing *Industry Group 241: Logging*, *supra* note 105).

²⁷⁰ *Id.*

²⁷¹ See COBBAGE & ABT, *supra* note 46.

²⁷² See *Economic Impacts of NPDES Permit Requirement*, *supra* note 52, at n.1 (explaining the Northeast and Lake States estimated implementation costs on include initial permitting).

²⁷³ See COBBAGE & ABT, *supra* note 46.

²⁷⁴ *Id.*

²⁷⁵ See Miller, *supra* note 16.

²⁷⁶ 33 U.S.C. § 1365(a) (2006) (allowing district courts to assess civil penalties and "enforce such an effluent standard or limitation"); *Id.* § 1365(d) (allowing awards of litigation costs "to any prevailing or substantially prevailing party," and equitable relief); *Id.* § 1365(e) (preserving any other applicable common law or statutory party rights).

\$25,000 per-day per violation.²⁷⁷ If NEDC had prevailed and the Supreme Court ruled NPDES permits were required, assuming an assessment of maximum penalties and all requested relief, the Defendants' financial burden is astronomical. Civil penalties for just one CWA violation on the Sam Downs Road and Trask River Road, respectively, for the litigation's duration would total \$59,325,000 per road.²⁷⁸ NEDC, as the prevailing party, would also be entitled to nearly seven years of litigation expenses, including attorney's fees,²⁷⁹ plus its requested "environmental-remedial costs to alleviate harms attributed to . . . past discharges."²⁸⁰

Finally, the CWA creates criminal liability for either knowing or negligent violations as well.²⁸¹ Where the government demonstrates the necessary elements for either, any responsible corporate officer could face criminal fines and/or potentially lengthy imprisonment.²⁸²

C. Implementation Costs & Legal Expenses Would Devastate an Already Financially Fragile Logging Industry

As mentioned above, in recent decades the private logging industry has steadily declined. From 2003 to 2012 the number of private logging establishments dropped twenty-five percent,²⁸³ and logging capacity has also fallen twenty-five percent since 2009.²⁸⁴ Over the past two decades, domestic production of wood products is down across the board, with drops in some areas even exceeding twenty-five percent.²⁸⁵ Higher costs, lower demand, global competition, and increasing regulations, often carrying

²⁷⁷ 33 U.S.C. § 1319(d) (2014).

²⁷⁸ The action was filed on September 20, 2006, and the Court issued its opinion on March 20, 2013. See First Amended Complaint, *supra* note 3; see also *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013). Assuming the Court's opinion ended the litigations, it continued for a total of 2,373 days, which, at 33 U.S.C. § 1319(d)'s maximum of \$25,000 per day per violation penalty, makes the maximum civil penalty \$59,325,000 per violation. 33 U.S.C. § 1319(d).

²⁷⁹ 33 U.S.C. § 1365(d) ("The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party....").

²⁸⁰ See *Decker*, 133 S. Ct. at 1335; see also First Amended Complaint, *supra* note 3, at VII:B.

²⁸¹ See 33 U.S.C. § 1319(c).

²⁸² See *id.*; see also *United States v. Pruett*, 681 F.3d 232, 242 (5th Cir. 2012) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000)) ("We must therefore conclude that [a negligent CWA violation under 33 U.S.C.] § 1319(c)(1)(A) requires only proof of ordinary negligence."); *United States v. Hopkins*, 53 F.3d 533, 541 (2d Cir. 1995) ("Under [33 U.S.C.] § 1319(c)(2)(A), the government was required to prove that Hopkins [(the defendant)] knew of the nature of his acts and performed them intentionally, but was not required to prove he knew that those acts violated the Clean Water Act, or any particular portion of that law, or the regulatory permit issued.").

²⁸³ See *Databases, Tables & Calculators by Subject*, *supra* note 31.

²⁸⁴ See *Agriculture: Forestry*, *supra* note 21.

²⁸⁵ See UNITED STATES CENSUS BUREAU, *supra* note 32.

greater compliance costs, appear to be driving the industry's decline.²⁸⁶ In 2010, fifty-one percent of private logging entities did not report a profit, recording either a loss or revenue neutral year,²⁸⁷ demonstrating the industry's perilous financial position.

As a whole, the logging industry is very poorly prepared for the potential costs of a nationwide NPDES permit requirement for all domestic forest roads with Phase I point source discharges. This is particularly true for highly localized, smaller logging operations, which make up a majority of the industry,²⁸⁸ because they are unlikely to possess the large surpluses of cash or liquidity necessary to meet new expenditures associated with NPDES permitting programs. Furthermore, experts predict even higher costs for smaller tract operators and inexperienced and/or understaffed businesses, which would compound the problems small entities face.²⁸⁹ An opposite disposition in *Decker*, with the Supreme Court abandoning *Auer* deference, requiring NPDES permits for similar forest roads, and imposing their associated costs on the logging industry, would undercut an already shrinking sector of the economy. Moreover, given business model demographics and current financial strain, this may have even pushed private logging over the edge, demolishing all but a few particularly strong operations and substantially destroying nearly one million jobs.²⁹⁰

VII. CONCLUSION

The *Decker* litigation and the Supreme Court's decision were crucial for both environmental groups and private logging. For champions of the environment, a positive disposition held the potential to impose a uniform standard for all domestic forest roads utilizing Phase I point sources that discharge pollutants into innumerable streams and rivers across the country. Still, the Court's ultimate decision against logging road NPDES permit requirements was perhaps more significant for private timber harvesting operations because the consequences of implementing a national permitting scheme, demonstrated by the monumental cost estimates, might have shut down the industry almost entirely.

²⁸⁶ See GOERGEN ET AL., *supra* note 34, at 13 (discussing the impact of higher fuel and equipment costs); see also *id.* at 19 (discussing the cost of federal regulation); *Hard Times Hit U.S. Hardwood Lumber Industry: Changing Consumer Tastes, Construction Downturns Have Slashed Demand*, *supra* note 39 (a drop in new housing starts from 2005 to 2011 reduced demand); Bowe, *supra* note 40 (domestic paper product consumption is down, reducing demand); *Agriculture: Forestry*, *supra* note 21 (China is an emerging and strong global competitor); Newman, *supra* note 41 (Brazil, Russia, and China are expected to be important players over the next five years).

²⁸⁷ See GOERGEN ET AL., *supra* note 34, at 13.

²⁸⁸ See *Logging in the US: Market Research Report*, *supra* note 27.

²⁸⁹ See COBBAGE & ABT, *supra* note 46.

²⁹⁰ See *Agriculture: Forestry*, *supra* note 21.

Auer deference, the doctrine underlying the Court's decision and rescue of private logging, as Justice Scalia's dissent illustrates, is an unconstitutional violation of the Constitution's fundamental separation of powers principles. By allowing agencies to interpret the regulations they promulgate, administrative deference facilitates the consolidation of the powers of three federal branches of government into one centralized executive organization, and violates the power division described in the Federalist Papers and the Constitution. On a deeper, more interesting level, *Auer* deference is unconstitutional because the Court's creation and perpetuation of the doctrine implicitly grants agencies quasi-judicial Article III interpretive powers. In doing so, the federal judiciary infringes upon congressional control over federal court jurisdiction, unconstitutionally violating the separation of powers.

Despite this, the Court's impermissible adherence to the doctrine produced more concrete benefits overall. Deference played a central role in the *Decker* Court's holding. As Justice Scalia's fairest reading analysis demonstrates, without it, NPDES permitting would have been required for forest road Phase I point source discharges. Piling the overwhelming costs on an already severely strained economic sector would have decimated the U.S. domestic logging industry that is uniquely dominated by small businesses. While the importance of environmental protection and conservation should not be understated, destruction of the industry would also mean the loss of approximately one million jobs, which are sorely needed in today's economy. Consequently, the unconstitutional exercise of *Auer* deference saved a valuable sector of the United States' economy, demonstrating that the *Decker* decision ultimately benefited society.

