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# Decker v. Northwest Environmental Defense Center

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*Decker v. Northwest Environmental Defense Center*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1326, 185 L. Ed. 2d 447 (2013).

David A. Bell

## I. ABSTRACT

In *Decker v. Northwest Environmental Defense Center*<sup>1</sup> (“*Decker*”), the United States Supreme Court considered whether the Clean Water Act (“CWA”) and its implementing regulations require states and industry to obtain permits for stormwater runoff from ditches and culverts built as part of logging roads. The Court determined that the Rule exempts discharges of “channeled stormwater” from logging roads under the CWA.

## II. INTRODUCTION

Northwest Environmental Defense Center (NEDC) brought an action against Oregon timber officials and timber companies alleging that they violated the CWA by discharging polluted stormwater from logging road ditches into two Oregon rivers without obtaining National Pollution Discharge Elimination System (NPDES) permits.<sup>2</sup> The NEDC invoked the CWA’s citizen suit provision, 33 U.S.C. § 1365, naming as defendants logging companies as well as state and local governments.<sup>3</sup> The suit alleged that defendants (here, petitioners) caused discharges of sediment-laden stormwater runoff into the South Fork Trask River and the Little South Fork Kilchis River in the Oregon State Forest.<sup>4</sup> NEDC alleged that defendants failed to obtain the required NPDES permits for these discharges in violation of the CWA.<sup>5</sup> Defendants, with the United States as *amicus curiae*, argued that the EPA’s interpretation of its regulations and NPDES requirements (which exempted the discharges) was permissible under the CWA.<sup>6</sup>

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<sup>1</sup> *Decker v. Northwest Environmental Defense Center*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1326, 185 L. Ed. 2d 447 (2013).

<sup>2</sup> *Id.* at 1333.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

### **III. FACTUAL AND PROCEDURAL BACKGROUND**

Congress passed the Clean Water Act in 1972 to maintain the integrity of the “Nation’s waters.”<sup>7</sup> The CWA requires individuals, corporations, and governments to secure NPDES permits prior to “discharging pollution from any point source into the navigable waters of the United States.”<sup>8</sup>

At issue in the case is the whether the natural runoff from rain, or “stormwater,” that collects and drains from logging roads is an industrial stormwater discharge requiring an NPDES permit.<sup>9</sup> When the CWA was passed, it required the EPA to regulate water discharges that involve “industrial activity.”<sup>10</sup> Thus, the EPA wrote the “Industrial Stormwater Rule.”<sup>11</sup> In the rule, the EPA created a list of industries whose stormwater discharges would be regulated under the title “Standard Industrial Classification 24.”<sup>12</sup> The dispute in *Decker* centers around two issues: 1) whether logging is an industrial activity, and 2) whether logging was included as part of the “Standard Industrial Classifications 24” under EPA’s industrial stormwater rule.<sup>13</sup>

In September 2006, NEDC filed suit in the United States District Court for the District of Oregon. NEDC brought suit under the citizen provision of the CWA, 33 U.S.C. § 1365(a), which provides that “any citizen may commence a civil action on his own behalf ... against any person” alleged to be in violation of the CWA. The lawsuit named as defendants the Oregon State Forester, the Oregon Board of Forestry, and several logging companies that used the roads including Stimson Lumber Company and Georgia Pacific.<sup>14</sup> The complaint alleged that defendants discharged channeled stormwater without proper NPDES discharge permits, in

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<sup>7</sup> 86. Stat. 816, 33 U.S.C. § 1251(a).

<sup>8</sup> *Decker*, 133 S. Ct. at 1331 (citation omitted).

<sup>9</sup> *Id.* at 1332.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063, 1067 (9th Cir. 2011).

violation of the CWA.<sup>15</sup>

The Oregon District Court dismissed the case for failure to state a claim, finding that the alleged discharges were not industrial pollution and therefore did not require NPDES permits.<sup>16</sup> The Court of Appeals for the Ninth Circuit reversed this decision, finding that the discharges were from an industrial activity and not exempt from the NPDES permitting system and defendants were in violation of the CWA.<sup>17</sup>

### **III. ANALYSIS**

#### **A. The Court has Proper Jurisdiction**

The Court found that respondents NEDC properly established jurisdiction for this suit under 33 U.S.C. § 1365(a) of the CWA which “authorizes private enforcement of the provisions of the [the Clean Water Act]” and its implementing regulations.<sup>18</sup> Before the Court, petitioners argued that the suit was barred by 33 U.S.C. § 1369(b), a separate provision of the CWA that provides for judicial review of implementing regulations. That review is limited to challenging implementing regulations within 120 days of the Administrator’s action.<sup>19</sup> The Court found that the Court of Appeals was correct in finding that this exclusive jurisdiction was not applicable, agreeing that “citizen suit” standing was proper against an alleged discharger by a citizen who sought to enforce the CWA.<sup>20</sup> Specifically, the Court noted that the action was within the scope of § 1365 of the CWA because NEDC’s suit did not challenge the Silvicultural Rule, but sought to enforce a permissible reading of that rule.<sup>21</sup>

#### **B. The EPA’s Proposal of a New Rule Does Not Make the Issue Moot.**

Just prior to oral arguments, the EPA proposed a new regulation to amend and clarify the

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<sup>15</sup> *Decker*, 133 S. Ct. at 1333.

<sup>16</sup> *Id.*

<sup>17</sup> *Northwest*, 640 F.3d at 1085.

<sup>18</sup> *Decker*, 133 S. Ct. at 1333.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

Industrial Stormwater Rule.<sup>22</sup> Petitioners, joined by the United States as *amicus curiae*, argued that this amendment made this case moot because it removed the controversy regarding the language in the Rule.<sup>23</sup> The Court disagreed finding that “a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.”<sup>24</sup> Finding that the CWA contains retroactive remedies for NEDC’s allegations, the Court determined that “under these circumstances, the cases remain live and justiciable” because the possibility of some remedy is real.<sup>25</sup>

### **C. Whether Logging Constitutes Industrial Activity.**

Because NEDC had properly established jurisdiction and their claim was still alive, the Court reviewed the merits of the arguments. Specifically, the Court determined that “under the [CWA], petitioners were required to secure NPDES permits for discharges of channeled stormwater only if they were “associated with industrial activity,” 33 U.S.C. § 1342(p)(2)(B).”<sup>26</sup>

NEDC argued that the CWA term “associated with industrial activity” “unambiguously covers discharges of channeled stormwater runoff from logging roads.”<sup>27</sup> The Court dismissed this argument noting that the terms “industrial” and “industry” are related to business activity or more specifically, the processing of raw materials or manufacture of goods “in factories.”<sup>28</sup> The Court gave closer consideration to NEDC’s second argument that the “the Industrial Stormwater Rule unambiguously required a permit for the discharges.”<sup>29</sup> There, the Court noted NEDC’s point that NPDES permits are required for the categories of industries that discharge stormwater

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<sup>22</sup> *Id.*

<sup>23</sup> *Decker*, 133 S. Ct. at 1335.

<sup>24</sup> *Id.* (citing *Knox v. Service Employees Int’l*, 567 U.S. \_\_\_, 132 S. Ct. 2277, 2287 (2012)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (citation omitted).

<sup>28</sup> *Decker*, 133 S. Ct at 1335.

<sup>29</sup> *Id.*

from access roads in the transport of raw materials.<sup>30</sup> But “this raises the question of whether logging is a categor[y] of industr[y]” that is identified in the Code of Federal Regulations [specifically, the industrial stormwater rule.]<sup>31</sup> NEDC alleged that “logging” is in the regulation list at “Standard Industrial Classification 24.”<sup>32</sup> Therefore, they argued, NPDES permits are required for the stormwater discharges related to industrial use of these roads.

EPA countered this argument concluding that the regulation and Standard Industrial Classification 24 were intended to “regulate traditional industrial sources such as sawmills” and other fixed facilities.<sup>33</sup>

While the Court entertained NEDC’s argument, it ultimately found that “[t]he regulation’s reach may be limited by the requirement that the discharges be directly related to manufacturing, processing, or materials storage areas at an industrial plant.”<sup>34</sup> Further, the Court took one step further by noting that “[w]hen an agency interprets its own regulation, the Court, as a general rule, defers to it “unless that interpretation is ‘plainly erroneous or inconsistent with the regulation.’”<sup>35</sup> According *Auer* deference, the Court found that “[t]he EPA’s interpretation is a permissible one”.<sup>36</sup> The Court determined that the agency had been consistent in its rule that logging activities were not industrial and did not require NPDES permits--and that the definition was not a “*post hoc* justification adopted in response to litigation.”<sup>37</sup>

#### **IV. CONCLUSION**

The Court found that the EPA permissibly construed the Industrial Stormwater Rule finding that the Rule exempts discharges of “channeled stormwater” from logging roads from the

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<sup>30</sup> *Id.* at 1336. (*citing* 40 C.F.R. § 122.26(b)(14) (2006)).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (*citing* Brief for Amicus Curiae 24-25).

<sup>34</sup> *Decker*, 133 S. Ct. at 1337. (*citing* 40 C.F.R. § 122.26(b)(14)).

<sup>35</sup> *Id.* (*citing Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1338.

NPDES permit process.<sup>38</sup> This determination is a significant victory for the states and industry as the fines and regulations on logging roads that may have resulted would have carried enormous costs.

On a final note, there is a point of interest regarding *Auer*<sup>39</sup> deference to federal agency rulemaking. The *Decker* concurrence and dissent gave a clear indication from three members<sup>40</sup> of the Court that it may be time to dispense with deference to agency rulemaking. In the words of Justice Scalia, (quoting Justice Thomas) “[e]nough is enough” with *Auer* deference.<sup>41</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *Auer v. Robbins*, 519 U.S. 452 (1997); *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

<sup>40</sup> The concurrence by Justice Roberts and Alito, and the lengthy dissent by Justice Scalia clearly indicate readiness to dispense with agency deference.

<sup>41</sup> *Decker*, 133 S. Ct. at 1339.