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THE *DECKER* FORESTRY POLLUTION CASE: CONSTITUTIONAL RISKS WHEN COURTS USE *AUER* DEFERENCE TO BYPASS REGULATORY PROTECTIONS

MICHAEL TIERNEY*

Abstract: In *Decker v. Northwest Environmental Defense Center*, the Supreme Court upheld the EPA's interpretation of the agency's own regulation regarding exemption of channeled stormwater discharges from National Pollutant Discharge Elimination System permit requirements under the Clean Water Act. The Court deferred to the EPA's interpretation under the *Auer* doctrine, which dictates that an administrative agency's interpretation of its own regulation is entitled to deference unless the interpretation is plainly erroneous or inconsistent with the regulation. This Comment argues that *Auer* deference violates foundational separation of powers principles by allowing a governmental agency to both write and interpret the law. This power is inherently dangerous, and the ease with which it can be abused and manipulated does not bode well for the environment. Although administrative agencies possess specialized knowledge that can inform their decisionmaking, this knowledge should not give agencies a license to flaunt constitutional safeguards in the name of efficiency. The Supreme Court should have reached an opposite conclusion in *Decker* and should have used the case as an opportunity to overrule *Auer* because agencies should not be able to write and interpret the law simultaneously.

INTRODUCTION

The federally protected forests of the United States are a precious resource that provide timber for lumber and paper production, a habitat for native wildlife, and recreation areas for seasonal tourists.¹ Each of these capacities, however, is in potential conflict and requires a delicate balance of methods to control, cultivate, and preserve this diverse functionality.² A highly technical task such as this, though, is unsuited for the average forest enthusi-

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¹ Thomas Lundmark, *Methods of Forest Law-Making*, 22 B.C. ENVTL. AFF. L. REV. 783, 783 (1995).

² See *id.*; Lawrence Lee Budner, Note, *Is a Logging Road's Collected Runoff Exempt from NPDES Permitting?—Rethinking The EPA's "Silvicultural Rule,"* 40 B.C. ENVTL. AFF. L. REV. 197, 197 (2013) (“Forestland is the site of a theatre of conflicting human activities, some beneficial to forest ecosystems and others threatening.”).

ast.³ These concerns are therefore delegated to the more technically informed federal administrative agencies, which are in a better position to manage these complicated matters.⁴

The central question is whether these agencies always act in the best interests of whatever they oversee.⁵ If agencies do not act this way, the question becomes whether there is a way to challenge a particular agency decision such that a “second opinion” from the judicial branch may be warranted.⁶ As this Comment discusses, the answer in a very important aspect is largely no.⁷

The U.S. Forest Service (USFS) is tasked with protecting the health, diversity, and productivity of the nation’s forests.⁸ To aid itself in carrying out this responsibility, the USFS contracts with a number of private entities that engage in practices purportedly aimed at sustaining the nation’s forests.⁹ Many of these aims, the USFS claims, are met through the rather simple acts of forest thinning and removal of dead wood.¹⁰ This in turn gives rise to an opportunity for private, for-profit timber companies to become involved in the ecological preservation initiative.¹¹

Historically, most of the nation’s logging industry has been situated in the Pacific Northwest.¹² To gain access to the forests, timber companies build and maintain logging roads.¹³ These roads are contractually specified routes that run parallel to, or very near, riparian ecosystems.¹⁴ Because rainwater is plentiful along the coast of the Pacific Northwest, the logging industry must adapt to

³ ZYGMUNT J. B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 218 (Vicki Been et al. eds., 4th ed. 2010).

⁴ *Id.*

⁵ See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1245 (1968) (asking the question *quis custodiet ipsos custodes*—“Who will mind the minders themselves?”—when society delegates administrative powers to the government).

⁶ See *id.*

⁷ See *infra* notes 98–126 and accompanying text.

⁸ *Strategic Planning and Resource Assessment*, U.S. FOREST SERVICE, <http://www.fs.fed.us/plan/> (last modified Dec. 5, 2008), available at <http://perma.cc/89W9-HTQ9>.

⁹ See U.S. FOREST SERV., WATER QUALITY AND WETLANDS 3 (undated), available at <http://nrs.fs.fed.us/fmg/nfmg/docs/mn/WaterQ.pdf> and <http://perma.cc/RQ35-GFU2>.

¹⁰ EXEC. OFFICE OF THE PRESIDENT, HEALTHY FORESTS: AN INITIATIVE FOR WILDFIRE PREVENTION AND STRONGER COMMUNITIES 3 (2002), available at http://www.fs.fed.us/projects/documents/HealthyForests_Pres_Policy%20A6_v2.pdf and <http://perma.cc/D3MC-KJ43>; see also Eric E. Huber, *Environmental Litigation and the Healthy Forests Initiative*, 29 VT. L. REV. 797, 800 (2005).

¹¹ *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1066–68 (9th Cir. 2011).

¹² *Seeing the Forest for the Trees: Placing Washington's Forests in Historical Context*, CTR. FOR THE STUDY OF THE PAC. NW., <https://www.washington.edu/uwired/outreach/cspn/Website/Classroom%20Materials/Curriculum%20Packets/Evergreen%20State/Section%20II.html> (last visited Mar. 1, 2014), available at <http://perma.cc/GDC6-KNB6>.

¹³ *Brown*, 640 F.3d at 1067.

¹⁴ *Id.*

obstacles imposed by the specific environment.¹⁵ In parts of Oregon, as much as 200 inches of precipitation can fall annually.¹⁶ Logging roads are therefore designed with “systems of ditches, culverts, and channels that collect and convey” rainwater (called “stormwater discharge” or “runoff”) away from the roads and into the adjacent rivers and streams.¹⁷

Although the roads remain navigable, these systems often result in an unintended consequence: Stormwater discharge containing a large amount of sediment pollution¹⁸ flows from the roads into the waterways, which devastates aquatic wildlife and the rivers’ life-sustaining resources.¹⁹

It seems intuitive that the Clean Water Act (CWA or “the Act”), which Congress passed to eliminate the discharge of pollutants and “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” should regulate these stormwater discharges.²⁰ Due to the way that the EPA, in partnership with the USFS and private timber companies, has defined and categorized these stormwater discharges, however, such discharges have been held outside the scope of CWA regulation.²¹ Moreover, this exemption is seemingly beyond meaningful judicial review.²²

When an administrative agency interprets its own promulgated regulation, the agency is believed to “speak[] as the legislature, and its pronouncement has the force of a statute.”²³ For this reason, an agency’s interpretation, no matter how controversial, receives judicial deference under the doctrine announced in *Auer v. Robbins*.²⁴ In effect, “*Auer* deference,” as it has come to be known, enables an agency to write and interpret the law simultaneously, which is a

¹⁵ See *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1333 (2013); *About Pacific Northwest Climate*, CLIMATE IMPACTS GRP., <http://cses.washington.edu/cig/pnwc/pnwc.shtml> (last visited Nov. 12, 2013), available at <http://perma.cc/HS87-7BX3>.

¹⁶ *Climate of Oregon*, W. REG’L CLIMATE CTR., <http://www.wrcc.dri.edu/narratives/oregon/> (last visited Nov. 12, 2013), available at <http://perma.cc/8CW9-FJBY>.

¹⁷ See *Brown*, 640 F.3d at 1067.

¹⁸ This pollution is made up of small rocks, sand, and dirt. *Id.*

¹⁹ See *Decker*, 133 S. Ct. at 1333; *Brown*, 640 F.3d at 1067; THOMAS C. BROWN & DAN BINKLEY, EFFECTS OF MANAGEMENT ON WATER QUALITY IN NORTH AMERICAN FORESTS 14 (1991), available at http://www.fs.fed.us/rm/value/docs/management_effects_forest_water_quality.pdf and <http://perma.cc/4MCN-T3Y3>.

²⁰ See 33 U.S.C. § 1251(a) (2006).

²¹ This practice dates back to 1973, when the EPA promulgated a series of regulations exempting several kinds of discharges from NPDES. See 40 C.F.R. § 125.4(j) (1975). The CWA delegates broad authority to the EPA to fill in the gaps and carry out the principle aims of the Act. See 33 U.S.C. § 1251(d).

²² See *Decker*, 133 S. Ct. at 1337.

²³ See *Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 386 (1932).

²⁴ *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). *Auer* deference is also sometimes called *Seminole Rock* deference, though the two are legally identical. Compare *Auer*, 519 U.S. at 461, with *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

power that potentially frustrates traditional democratic safeguards and the underlying constitutional framework.²⁵

In *Decker v. Northwest Environmental Defense Center*, the Supreme Court had an opportunity to revisit the rules of binding agency deference, specifically in connection with these unregulated stormwater discharges.²⁶ With a 7-1 majority (Justice Breyer did not participate),²⁷ the Court ruled overwhelmingly in favor of deferring to the EPA's interpretation of its own regulation, and the Court expressly affirmed both the *Auer* doctrine and the EPA's ability to exempt these destructive discharges from CWA regulation.

A concurrence by Chief Justice Roberts, however, opened the door to future challenges.²⁸ Chief Justice Roberts noted that "serious questions" had been raised about the correctness of *Auer* that "go[] to the heart of administrative law."²⁹ With *Decker* as a textbook example, this Comment argues that *Auer* deference, the precedent that ultimately produced the majority decision in *Decker*, violates foundational separation of powers principles by allowing a governmental agency that has promulgated a regulation great flexibility in subsequently interpreting and re-interpreting that law.³⁰ Not only is this situation inherently dangerous, but the ease with which this power can be abused does not bode well for environment.³¹ Although administrative agencies possess a significant amount of specialized knowledge that can inform their decisionmaking, this knowledge should not allow them to flaunt constitutional safeguards in the name of efficiency.³² The Supreme Court should have reached an opposite conclusion in *Decker* and should have used *Decker* as an opportunity to overrule *Auer*, because agencies should not be able to write and interpret the law simultaneously.³³ Problematic constitutional issues arise when courts subsequently grant excessive deference to an agency interpret-

²⁵ See John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 618 (1996) (arguing that *Seminole Rock* leaves an agency free to write a law and then "say what the law is" through its authoritative interpretation of its own regulations); Noah Hall, *Deferring to EPA's Interpretation of Its Own Rules, Supreme Court Holds That Logging Road Runoff Pollution Is Exempt from Clean Water Act Regulation*, GREAT LAKES L. (Aug. 31, 2013), <http://www.greatlakeslaw.org/blog/2013/03/deferring-to-epas-interpretation-of-its-own-rules-supreme-court-holds-that-logging-road-runoff-pollu.html>, available at <http://perma.cc/V9C5-A4ZC> (asserting that *Auer* deference allows an agency to make and interpret the law without public participation or meaningful judicial review).

²⁶ See *Decker*, 133 S. Ct. at 1337–38.

²⁷ *Id.* at 1338.

²⁸ See *id.* at 1338–39 (Roberts, C.J., concurring).

²⁹ *Id.*

³⁰ See *infra* notes 98–127 and accompanying text.

³¹ See *infra* notes 98–127 and accompanying text.

³² See *infra* notes 98–127 and accompanying text.

³³ See *infra* notes 98–127 and accompanying text.

ing—and re-interpreting—regulations that the agency may have issued many years, and different Administrations, in the past.³⁴

I. FACTS AND PROCEDURAL HISTORY

In *Decker*, the Supreme Court faced the issue of whether discharges of channeled stormwater runoff flowing from two logging roads in Oregon's Tillamook State Forest could be legally exempted from CWA regulation.³⁵ The CWA requires a party to apply for and obtain National Pollutant Discharge Elimination System (NPDES)³⁶ permitting to legally discharge stormwater runoff that is "associated with industrial activity" through a "point source"³⁷ into the navigable waters of the United States.³⁸ In September 2006, the Northwest Environmental Defense Center (NEDC) filed suit in the U.S. District Court for the District of Oregon to challenge the EPA's exemption of these destructive stormwater discharges.³⁹

According to NEDC, the discharged stormwater was unquestionably "associated with industrial activity" given the heavy machinery and large logging trucks that were essential in its creation.⁴⁰ NEDC alleged that the large timber company Georgia-Pacific West, as well as certain government officials, had failed to obtain necessary NPDES permits to discharge the stormwater runoff.⁴¹ NEDC claimed that the defendants had violated the law by failing to obtain these permits.⁴²

The claimed "point sources" at issue (the logging ditches, culverts, and channels) are graded such that for most of their length, water runs off into the narrow ditches on the sides.⁴³ At certain points, these ditches empty into "cross-drain" culverts, which pass below the roads and carry the runoff underground until disposal.⁴⁴ Where the roads pass near riparian systems, however, the discharge can be dumped wherever is convenient.⁴⁵

³⁴ See *infra* notes 98–127 and accompanying text.

³⁵ 133 S. Ct. at 1333.

³⁶ NPDES is a permitting program whereby polluters must apply for and receive permits to make individual pollution discharges. See 33 U.S.C. § 1342 (2006). NPDES functions as an exception to the general ban on pollutant discharges in the CWA. See *id.* § 1311(a).

³⁷ The CWA defines "point source" as "any 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 operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362(14).

³⁸ *Decker*, 133 S. Ct. at 1333.

³⁹ *Id.*

⁴⁰ See *id.* at 1336.

⁴¹ *Id.* at 1333.

⁴² *Id.*

⁴³ *Brown*, 640 F.3d at 1067.

⁴⁴ *Id.*

⁴⁵ *Id.*

NEDC claimed that the plain language of the Act and subsequent EPA regulations specify that channeled logging road runoff is a type of discharge requiring a NPDES permit.⁴⁶ The EPA disagreed and contended that it had never interpreted logging road runoff as requiring NPDES permits.⁴⁷ The EPA, citing its interpretations of the Silvicultural Rule, claimed that no permit was necessary because that agency read the rule to exempt logging road runoff as not “associated with industrial activity.”⁴⁸ The district court agreed with the EPA, concluded that the ditches, culverts, and channels were not point sources, and ultimately dismissed the action.⁴⁹ The U.S. Court of Appeals for the Ninth Circuit reversed.⁵⁰

The Ninth Circuit held that although the Silvicultural Rule was ambiguous on whether the ditches, culverts, and channels at issue were point sources “associated with industrial activity,” they must be deemed as such to give meaning to the CWA’s broad definition of “point source.”⁵¹ The Ninth Circuit then held that because the Industrial Stormwater Rule,⁵² another regulation relevant to the case at bar, referenced a series of categories classifying firms by the different types of business activities in which they engage, the discharges at issue were inherently “associated with industrial activity” within the meaning of the Industrial Stormwater Rule because of how the rule classified and discussed the logging and timber industries.⁵³ The Industrial Stormwater Rule was held unambiguous on this point.⁵⁴ Thus, the Ninth Circuit ruled that the discharges were from point sources and therefore not exempt from the NPDES permitting scheme.⁵⁵

The Supreme Court granted certiorari, and three days before oral arguments, the EPA issued an amendment to the Industrial Stormwater Rule and attempted to distinguish, and therefore exempt, purely logging and tree-falling activities from CWA jurisdiction.⁵⁶

⁴⁶ See *Decker*, 133 S. Ct. at 1333; Brief for Law Professors as Amicus Curiae on the Propriety of Administrative Deference in Support of Respondent at 14–15, *Decker*, 133 S. Ct. 1326 (Nos. 11-338 and 11-347).

⁴⁷ See *Decker*, 133 S. Ct. at 1331–32; Brief for the United States as Amicus Curiae at 11–12, *Decker*, 133 S. Ct. 1326 (Nos. 11-338 and 11-347).

⁴⁸ See *Decker*, 133 S. Ct. at 1331–32.

⁴⁹ *Id.* at 1333.

⁵⁰ *Brown*, 640 F.3d at 1087.

⁵¹ *Decker*, 133 S. Ct. at 1333.

⁵² This rule is an EPA regulation defining which stormwater discharges are “associated with industrial activity.” See 40 C.F.R. § 122.26(b)(14) (2013).

⁵³ *Decker*, 133 S. Ct. at 1334.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

II. LEGAL BACKGROUND

A. *The Separation of Powers*

In the years leading up to the ratification of the U.S. Constitution, state governments behaved in ways that led many Americans to conclude that “we the people” were capable of the same tyranny and excess that inspired the Revolution.⁵⁷ Thus, by 1787, not wanting to risk recreating the same system from which they had just achieved independence, Americans knew that if left unchecked, even representative government could result in tyranny concentrated in the national legislature.⁵⁸ As James Madison wrote, “dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”⁵⁹ To provide for these precautionary measures, the Constitution metes power in three largely independent branches of government: the legislative, executive, and judicial departments.⁶⁰

Consistent with these concerns, the Framers took special care to limit Congress’s absolute control over the legislative process by ensuring that each of the other two branches were provided with significant influence on how the Nation’s laws were enacted.⁶¹ For example, the Framers created the Presidential veto to override any potential excesses of Congress. Moreover, to protect the executive branch the Framers mandated that the electoral process be done by electors, rather than members of Congress.⁶²

The Framers limited the legislature’s influence on the judiciary by ensuring that permanent federal judges “shall hold their Offices during good Behavior, and shall receive . . . a Compensation which shall not be diminished during their Continuance in Office.”⁶³ This created an incentive for the judiciary to maintain a meaningful balance within the system so that Congress could not simply dominate the courts, a problem which had arisen in several in state

⁵⁷ See FORREST McDONALD, *NOVUS ORDO SECLORUM* 143–83 (1985); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73, 74 (Max Farrand ed., 1966) (remarks of James Madison that “[e]xperience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex”); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 76 (Gouverneur Morris “concur[ed] in thinking the public liberty in greater danger from Legislative usurpations than from any other source”); MANNING, *supra* note 25, at 640; THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961) (arguing that “legislative usurpations . . . by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations”); THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether . . . hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”).

⁵⁸ See MANNING, *supra* note 25, at 640.

⁵⁹ THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

⁶⁰ See U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

⁶¹ *Id.* art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

⁶² See MANNING, *supra* note 25, at 640–42.

⁶³ See *id.* (quoting U.S. CONST. art. III, § 1).

governments.⁶⁴ In summary, these provisions ensured that power was not consolidated into one branch of government.⁶⁵

Finally, within the legislature itself, bicameralism and presentment are the chief safeguards of liberty because each inherently protects the deliberative process.⁶⁶ Bicameralism and presentment force the Senate and House of Representatives to act together, promote caution and deliberation, and at times produce “conflicts, confusion, and discordance” to “assure full, vigorous, and open debate on the great issues affecting the people.”⁶⁷

The aims of the constitutional framework are to foster deliberation and ensure meaningful checks and balances within the overall system, and these same strictures equally animate the behavior of government agencies.⁶⁸

B. The Clean Water Act and Implementing Regulations

In 1948, Congress passed the Federal Water Pollution Control Act (FWPCA) to establish a national framework to regulate water pollution.⁶⁹ In 1977, Congress significantly amended the FWPCA and renamed it the Clean Water Act (CWA), to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁷⁰ These amendments established new technology-based effluent limits and delegated to the EPA the authority to promulgate and enforce effluent regulations consistent with the purposes of the CWA.⁷¹

Subject to express limited exceptions, § 301(a) of the CWA states that “the discharge of any pollutant by any person shall be unlawful.”⁷² Reinforcing this point, the congressional record indicates that the CWA was to be much stronger than the previous version of the program under the FWPCA: a Senate report states that § 301 “clearly establishes that the discharge of pollutants is

⁶⁴ *See id.*; *see also* *INS v. Chadha*, 462 U.S. 919, 961–62 (1983) (Powell, J., concurring) (arguing that the Constitution’s separation of powers was intended to prevent “the exercise of judicial power” by the legislative branch).

⁶⁵ *See Chadha*, 462 U.S. at 961–62 (Powell, J., concurring).

⁶⁶ *See* MANNING, *supra* note 25, at 649.

⁶⁷ *See id.*; *see also* *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

⁶⁸ *See* MANNING, *supra* note 25, at 654.

⁶⁹ Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251–1357 (2006)).

⁷⁰ Clean Water Act of 1977, 33 U.S.C. §§ 1251–1357 (2006).

⁷¹ *Id.* §§ 1251(d), 1311; *see* *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1371–72 (D.C. Cir. 1977) (summarizing the statutory goals of the FWPCA and CWA amendments).

⁷² 33 U.S.C. § 1311(a). The CWA defines the “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source [or] . . . any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft.” *Id.* § 1362(12); *see also* Budner, *supra* note 2, at 202.

unlawful.”⁷³ Acting as a fundamental exception to § 301’s pollution discharge prohibition, however, the CWA allows individuals, corporations, and governments seeking to discharge pollution “associated with industrial activity” through a “point source” to do so only if they secure a NPDES permit.⁷⁴

When the CWA took effect, the EPA struggled to process many permit applications from a large number of owners and operators of statutorily-defined point sources throughout the country that were required to register their discharges.⁷⁵ To ease this burden, the EPA issued new regulations carving out exceptions from the NPDES permitting scheme.⁷⁶ In 1977, however, the U.S. Court of Appeals for the D.C. Circuit held that these exempting regulations were beyond the scope of authority delegated by the Act and forced the agency back to the drafting table.⁷⁷ The EPA then issued new regulations to better define which categories of discharges actually qualified as point sources from the outset.⁷⁸

The timber and logging industries were among those businesses targeted by the new categories, the so-called Silvicultural Rule spelling out that a “*Silvicultural point source* [is] any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States.”⁷⁹ The rule further states that “[t]he term [silvicultural point source] does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from where there is *natural runoff*.”⁸⁰

In 1987, to ease the permitting burden further for the EPA, Congress adopted stormwater-related amendments to the CWA.⁸¹ These amendments exempted most “discharges composed entirely of stormwater” from the NPDES permitting scheme, but still required permits for stormwater discharges “associated with *industrial activity*.”⁸² The statute did not define “industrial

⁷³ See S. REP. NO. 92-414, at 42 (1971), reprinted in 1972 U.S.C.A.N. 3668, 3709. The FWP-CA provided a less comprehensive discharge policy allowing for a certain level of pollutant disposal, but the aim of § 301 of the CWA, according to the Senate Report, is to underscore the idea that “no one has the right to pollute.” *Id.*

⁷⁴ *Decker*, 133 S. Ct. at 1330 (quoting 33 U.S.C. § 1342(p)(2)(B)).

⁷⁵ *Id.* at 1331 (noting the difficulties that the EPA faced regarding the new permitting responsibilities); see also *Costle*, 568 F.2d at 1372–73.

⁷⁶ *Decker*, 133 S. Ct. at 1331.

⁷⁷ *Costle*, 568 F.2d at 1377.

⁷⁸ *Decker*, 133 S. Ct. at 1331.

⁷⁹ 40 C.F.R. § 122.27(b)(1) (2013).

⁸⁰ *Id.* (emphasis added).

⁸¹ *Decker*, 133 S.Ct at 1331–32.

⁸² *Id.* at 1332 (quoting 33 U.S.C. § 1342(p)(2)(B) (2006)) (emphasis added).

activity,” and the EPA, quick to seize upon this purported ambiguity, adopted a new regulation known as the Industrial Stormwater Rule.⁸³ The Rule specified discharges “associated with industrial activity” as “the discharge from any conveyance that is used for collecting and conveying stormwater and that is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant.”⁸⁴

Importantly, the rule further specified that “[f]or the categories or industries identified in this section, the term includes, but is not limited to, storm water discharge from . . . *immediate access roads and rail lines used or traveled by carriers of raw materials*, manufactured products, waste materials, or by-products used or created by the facility”⁸⁵ Three days before the Supreme Court was to hear oral arguments in *Decker v. Northwest Environmental Defense Center*, the EPA issued its final version of an amendment to the Industrial Stormwater Rule that attempted to distinguish, and therefore exempt, purely logging and tree falling activities.⁸⁶

C. Auer Deference

The judicial principle known as *Auer* deference influences the Supreme Court to defer to an agency’s interpretation of its own regulations “unless [that] interpretation is ‘plainly erroneous or inconsistent with the regulation.’”⁸⁷ In *Auer v. Robbins*, a lieutenant and several police sergeants sued their respective commissioners for overtime pay under the Fair Labor Standards Act of 1938 (FLSA).⁸⁸ The commissioners argued that the sergeants were “bona fide executive, administrative, or professional” employees as defined in the FLSA and therefore exempted from these overtime pay requirements.⁸⁹ Under regulations set by the Secretary of Labor, the overtime pay exemption applied to employees paid on a minimum “salary basis” and required that their compensation not be reduced due to potential changes in the “quality or quantity of the work performed.”⁹⁰ The officers claimed that they did not satisfy this standard because, under the terms in the police manual, their pay could theoretically be reduced as a disciplinary infraction.⁹¹ In a unanimous decision written by Justice Scalia, the Supreme Court agreed with the district court and the U.S. Court of Ap-

⁸³ *Id.*

⁸⁴ *Id.* (quoting 40 C.F.R. § 122.26(b)(14) (2013)).

⁸⁵ *Id.* (emphasis added).

⁸⁶ *Id.* at 1333.

⁸⁷ *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct 871, 880 (2011) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Sometimes *Auer* deference is referred to as *Seminole Rock* deference. *Decker*, 133 S. Ct. at 1339.

⁸⁸ *Auer*, 519 U.S. at 455.

⁸⁹ *Id.*

⁹⁰ *Id.* at 456 (quoting 29 C.F.R. § 541.118(a) (1996)).

⁹¹ *Id.* at 459–60.

peals for the Eighth Circuit, and found that the sergeants and lieutenant did not qualify for overtime pay.⁹² Because “the salary-basis test [was] a creature of the Secretary’s own regulations,” his interpretation of it “[was], under [the Court’s] jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation.”⁹³

Auer deference is founded, purportedly, on one of two articulated assumptions.⁹⁴ The first is that, as the drafter of a certain regulation, an agency will have special insight into its proper implementation and enforcement.⁹⁵ An agency is therefore accorded deference on this premise.⁹⁶ The second assumption is that an agency possesses special expertise in administering its complex and highly technical regulatory program.⁹⁷ Although *Auer* deference has governed judicial review of this form of regulatory interpretation, several Supreme Court justices have raised questions about the wisdom of continuing to apply this deferential standard.⁹⁸

III. ANALYSIS

In *Decker v. Northwest Environmental Defense Center*, the Supreme Court held that the Clean Water Act (CWA) and its implementing regulations do not require NPDES permits before channeled stormwater runoff from logging roads can be discharged into the navigable waters of the United States.⁹⁹ The Court reversed the U.S. Court of Appeals for the Ninth Circuit and ruled in favor of deferring to the EPA’s interpretation of its own regulation.¹⁰⁰

Judicial deference based on the Court’s holding in *Auer v. Robbins* allows an administrative agency both to write and interpret the law.¹⁰¹ Although *Auer* deference can promote judicial economy, it also enables the federal government to do precisely what the Framers strived to keep it from doing: consoli-

⁹² *Id.* at 462–63.

⁹³ *Id.* at 461 (internal quotation marks omitted).

⁹⁴ *Decker*, 133 S. Ct. at 1340 (Scalia, J., dissenting); see also Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449, 1454–58 (2011).

⁹⁵ See *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 151 (1991) (stating “that the power authoritatively to interpret its own regulations is a component of the agency’s delegated lawmaking powers”).

⁹⁶ See *id.*

⁹⁷ See, e.g., *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (affording deference to administrative regulations regarding the implementation of the Medicare provisions of the Social Security Act).

⁹⁸ See, e.g., *Decker*, 133 S. Ct. at 1339 (Scalia, J., dissenting); *Talk America, Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2265 (2011) (Scalia, J., concurring); *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 102 (1995) (O’Connor, J., dissenting); *Thomas Jefferson Univ.*, 512 U.S. at 518 (Thomas, J., dissenting).

⁹⁹ *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1337–38 (2013).

¹⁰⁰ *Id.*

¹⁰¹ See *id.* at 1341 (Scalia, J., dissenting).

dating all the power of the government into one of its branches.¹⁰² Ever since *Marbury v. Madison*, it has been “emphatically the province and duty of the Judicial Department to say what the law is,” but the *Auer* doctrine, by dictating that a reviewing court must usually defer to an agency’s own interpretation of its regulation, essentially frustrates this duty.¹⁰³ Moreover, this deferential principle is dangerous because it allows an administrative agency to say what the law is, even though Congress might have intended otherwise.¹⁰⁴

This danger was on display during the course of the *Decker*.¹⁰⁵ The Supreme Court should have reached an opposite conclusion in *Decker* and should have used *Decker* as an opportunity to overrule *Auer*, because agencies should not be able to write and interpret the law simultaneously.¹⁰⁶ Although administrative agencies possess a significant amount of specialized knowledge that can inform their decisionmaking, this knowledge should not allow agencies to flaunt constitutional safeguards.¹⁰⁷

For example, the CWA expressly prohibits the discharge of pollution through a point source into the navigable waters of the United States without a NPDES permit.¹⁰⁸ The statute is also relatively clear: A point source generally encapsulates “[a]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit.”¹⁰⁹ According to the most basic application of this definition, it would seem that the stormwater discharges in *Decker* fall within the definition’s purview: The stormwater was channeled through human-made pipes and ditches, carrying with it human-made pollutants from human-made forest roads.¹¹⁰ Relying on the Silvicultural Rule’s exception of “natural runoff,” however, the EPA exempted the stormwater discharges in *Decker* because it defined these discharges as “natural.”¹¹¹

These “natural” discharges contain massive amounts of human-made sediment pollution, namely pulverized gravel, rocks, and woodchips. Thus, such pollution is anything but “natural” and should be regulated as the CWA provides.¹¹² Justice Kennedy wrote for the majority that “[i]t is well established that an agency’s interpretation need not be the only possible reading of a regu-

¹⁰² See MANNING, *supra* note 25, at 639–41.

¹⁰³ See 5 U.S. 137, 177 (1803).

¹⁰⁴ See *Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting).

¹⁰⁵ See *id.* at 1337 (majority opinion).

¹⁰⁶ See *id.* at 1341 (Scalia, J., dissenting).

¹⁰⁷ See *id.*

¹⁰⁸ *Id.* at 1337 (majority opinion) (quoting 33 U.S.C. § 1342(p)(2)(B) (2006)).

¹⁰⁹ 33 U.S.C. § 1362(14).

¹¹⁰ See *Decker*, 133 S. Ct. at 1342–43 (Scalia, J., dissenting).

¹¹¹ See *id.* at 1332–33 (majority opinion).

¹¹² See *id.* at 1343 (Scalia, J., dissenting).

lation—or even the best one—to prevail.”¹¹³ In summary, the EPA interpreted the law to say something contrary to what the law’s natural language denoted, and because EPA made this determination, the Supreme Court, following *Auer*, held that the EPA’s reading prevailed.¹¹⁴

Another example of *Auer* deference eliding traditional democratic safeguards relates to the definition of “industrial activity”: By virtue of the 1987 amendments to the CWA, point sources composed entirely of stormwater are exempted from the NPDES permitting scheme.¹¹⁵ Stormwater discharges “associated with industrial activity,” however, are still subject to NPDES permitting.¹¹⁶ With the Industrial Stormwater Rule, the EPA attempted to define what “associated with industrial activity” meant.¹¹⁷ The agency claimed that through its published definition, logging is generally exempted from NPDES regulation.¹¹⁸ As Justice Scalia noted in his dissent in *Decker*, however, the regulation sets out eleven “categories of industries,” and regarding those industries, discharges are “industrial” if they come from sites used for the “transportation” of “any raw material.”¹¹⁹

Logging roads are used primarily to gain access to and remove timber from the forest.¹²⁰ Furthermore, the EPA has interpreted its regulation to indicate that timber cutting is exempted because it is not “directly related to manufacturing, processing or raw materials storage areas at an industrial plant.”¹²¹ One of the eleven categories of industry, however, is “[f]acilities classified as Standard Industrial Classifications 24 (except 2434).” Standard Industrial Classification 24 in turn provides at the top, “Logging” —defined as “[e]stablishments primarily engaged in cutting timber.”¹²² Again, essentially because the EPA stated otherwise, despite the plain language of the EPA’s own regulatory scheme the Court held that NPDES permits are not required for channeled stormwater discharges because the logging industry is not an industrial activity.¹²³

When an agency promulgates a regulation, the agency should be required to abide by what the plain language of the regulation actually says.¹²⁴ If the agency wishes the regulation to say otherwise, it could alter the regulation

¹¹³ *Id.* at 1337 (majority opinion).

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *Id.* at 1332 (referring to 33 U.S.C. § 1342(p) (2006)).

¹¹⁷ *See* 40 C.F.R. § 122.26(b)(14) (2013).

¹¹⁸ *See id.*

¹¹⁹ *See Decker*, 133 S. Ct. at 1343 (Scalia, J., dissenting).

¹²⁰ *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1067 (9th Cir. 2011).

¹²¹ *See Decker*, 133 S. Ct. at 1343 (Scalia, J., dissenting) (quoting 40 C.F.R. § 122.26(b)(14)(ii)).

¹²² *Id.* (quoting the Department of Labor Standard Industrial Classifications Manual); *see also Occupational Safety & Health Administration*, DEP’T OF LABOR, http://www.osha.gov/pls/imis/sic_manual.html (last visited Feb. 17, 2014), available at <http://perma.cc/GEA3-6C2J>.

¹²³ *See Decker*, 133 S. Ct. at 1337.

¹²⁴ *See id.* at 1341 (Scalia, J., dissenting).

through the rulemaking process.¹²⁵ A government agency should not be able to write a law one way and interpret it in another way.¹²⁶ The danger of this possibility is exacerbated by the principle of *Auer* deference, which limits the ability of courts to stop such abuse within the system.¹²⁷ As Montesquieu explained, “[w]hen legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.”¹²⁸

CONCLUSION

Through *Auer* deference, a federal agency essentially has the power both to write and interpret the law. Although administrative agencies possess a significant amount of specialized knowledge that can enhance their decisionmaking, this knowledge should not provide agencies with a license to flaunt constitutional safeguards. The Supreme Court in *Decker v. Northwest Environmental Defense Center* reversed the U.S. Court of Appeals for the Ninth Circuit and deferred to the EPA’s interpretation of its own stormwater discharge regulations, but the Court should have reached an opposite conclusion and should have overruled *Auer v. Robbins*. Agencies should not be able to write and interpret the law simultaneously. Congress sought to protect the integrity of the nation’s waters through the Clean Water Act, one of the most important pieces of environmental legislation. As *Decker* illustrates, an administrative agency, through manipulation of language and purported ambiguities in its own regulations, can flout and recraft the law without meaningful judicial review.

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¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 6, at 157 (Anne Cohler et al. eds. & trans., 1989) (1768).