

Supreme Court Holds Runoff from Logging Roads Does Not Require an NPDES Permit

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On March 20, 2013, the Supreme Court held in *Decker v. Northwest Environmental Defense Center* that NPDES permits are not required for channeled stormwater runoff from logging roads. The case arose when an environmental group filed suit under the Clean Water Act's citizen suit provision against Georgia-Pacific West, the State of Oregon, and others alleging that they had failed to obtain required NPDES permits before discharging stormwater runoff from logging roads through ditches, culverts, and channels into two Oregon rivers. The Court concluded that Clean Water Act § 1369(b), which governs challenges to agency actions, did not jurisdictionally bar the suit, and EPA's amendments to the Industrial Stormwater Rule right before oral argument did not render the case moot.

The Court held that EPA's interpretation of Clean Water Act § 402(p)(2)(B) in the Industrial Stormwater Rule to exclude channeled stormwater runoff from logging roads from discharges "associated with industrial activity," and therefore from NPDES permitting requirements, was reasonable. The Court deferred to EPA's interpretation of its regulations under *Auer v. Robbins*, finding that the language of the Industrial Stormwater Rule supported EPA's position that "the regulation does not cover temporary, outdoor logging installations," such as those at issue in the case, because they are "'directly related' only to the harvesting of raw materials," and not to manufacturing, processing, or raw materials storage areas at an industrial plant, which are subject to NPDES permitting. Justice Kennedy authored the 7-1 decision, while Justice Roberts filed a separate concurrence and Justice Scalia filed a partial concurrence and partial dissent.

Although the Court's decision in *Decker* is a narrow one, Chief Justice Roberts and Justice Scalia hinted at potential future broader implications in their separate opinions. Chief Justice Roberts, joined by Justice Alito, stated that he has "serious questions" about the correctness of *Auer*, which held that courts will defer to an agency's interpretation of its own ambiguous regulation unless it is plainly erroneous or inconsistent with the regulation. Further, Justice Scalia announced that he no longer supports *Auer* deference (despite the fact that he authored the *Auer* opinion) because it "encourages agencies to be 'vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures.'" Although Chief Justice Roberts, Justice Alito, and Justice Scalia are in the minority in their ambivalence (or in Justice Scalia's case, disavowal) of *Auer*, if other Justices join their sentiments, the Court could overrule *Auer*, causing a major shift in the way courts interpret ambiguous regulations.

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