

Supreme Court Holds No Clean Water Act Permit Needed for Logging Roads

By Christopher B. Clare / Apr 01, 2013

In a victory for the logging industry, the Supreme Court, in a 7-1 decision, reversed a 2011 Ninth Circuit ruling [1] on March 20, 2013, and upheld a long-standing Environmental Protection Agency ("EPA") policy that allows the timber industry to utilize logging roads without obtaining National Pollutant Discharge Elimination System ("NPDES") permits for "point source discharges."

Writing for the majority in *Decker v. Northwest Environmental Defense Center*, [2] Justice Kennedy emphasized that the Court must defer to an agency's interpretation of its own regulations and found that EPA reasonably interpreted its "Industrial Stormwater Rule" [3] to exclude logging roads from NPDES permitting requirements.

Following passage of the Clean Water Act, EPA issued its "Silvicultural Rule" [4] to help more precisely define what types of discharges qualified as "point source" discharges (and therefore required NPDES permits). Under the Silvicultural Rule, logging-related discharges are point source discharges absent a statutory exemption. However, this was typically understood to control discharges from sawmills and other traditional logging facilities. Congress statutorily exempted most stormwater discharges from NPDES requirements, [5] but still required NPDES permits for stormwater discharges "associated with industry activity." [6]

However, Congress failed to define "industrial activity," and EPA subsequently adopted the Industrial Stormwater Rule to clarify what activities would be considered "industrial." Included among the listed industrial activities are "facilities" classified by EPA as a certain Standard Industrial Classification (SIC), and logging industry facilities are among those categorized as such.

Plaintiff in the initial suit, the Northwest Environmental Defense Center ("NEDC"), sued EPA for not regulating stormwater runoff from logging roads, arguing that logging is an "industrial activity" and therefore, by definition, a point source discharge requiring NPDES permits. EPA, however, argued that the rule only intended to regulate "traditional" industrial sources like sawmills. EPA also cited the Industrial Stormwater Rule's applicability only to "facilities" and "establishments." Such language, the EPA argued, indicated that NPDES requirements were only meant to apply to more "fixed and permanent" logging-related operations, not roads.

Justice Kennedy also found it compelling that the Industrial Stormwater Rule limits industrial discharges to those related to "manufacturing, processing or raw materials storage areas at an industrial plant." Based on this language and the references to "facilities" and "establishments" cited by the EPA, the Court agreed that one could rationally interpret the regulations to only require NPDES permits for more "traditional industrial buildings." The Court also noted the EPA's historical practice of exempting logging roads from NPDES permitting requirements and made reference to state regulations which could have rendered federal NPDES requirements duplicative or counterproductive.

The Court's decision upholds EPA's decades-long practice of exempting logging roads from NPDES permits, and the logging industry appears to be on sound footing for the future, even though the dispute has moved into a second phase. EPA, in an attempt to avoid a Supreme Court ruling by making the case moot, issued a final rule last December which clarifies that logging roads do not require NPDES permits. [7] Hoping to keep their fight alive in the event that the Supreme Court ruled in EPA's favor, the NEDC has already filed a petition with the Ninth Circuit challenging the new rule. [8] However, in light of the Supreme Court's holding that NPDES permits were not required for logging roads, even without a clarifying rule, it is unclear how NEDC can successfully challenge EPA's rule confirming this longstanding practice.

For more information concerning National Pollutant Discharge Elimination System permitting requirements or any Clean Water Act issues, please contact Robert Andersen (202.772.0924 or randersen@clarkhill.com), Kenneth von Schaumburg (202.772.0904 or kvonschaumburg@clarkhill.com), John Sheehan (202.572.8665 or jsheehan@clarkhill.com), Christopher Clare (202.572.8671 or cclare@clarkhill.com), or your Environmental, Energy and Natural Resources attorney at Clark Hill.

[1] *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011).

[2] Case No. 11-338, 568 U.S. ___ (2013).

[3] 40 C.F.R. § 122.26(b)(14).

[4] 40 C.F.R. § 122.27.

[5] 33 U.S.C. § 1342(p)(1).

[6] 33 U.S.C. § 1342(p)(2)(B).

[7] The Supreme Court actually acknowledged this new rule but ultimately determined the case was not moot.

[8] Northwest Environmental Defense Center v. Jackson, Case No. 13-70057.