The U.S. Supreme Court in *Decker v. Northwest Environmental Defense Center* appeared to endorse the Environmental Protection Agency’s narrowing of the scope of activities generating stormwater runoff that require a discharge permit. This article describes the development of the regulatory framework governing stormwater runoff to help frame the context for the Court’s decision in *Decker* and considers the implications of the decision for the future of stormwater runoff regulation. Indeed, under *Decker*, the traditional factors in a point source analysis are now less important, the authors write. Even stormwater gathered in a discrete system of pipes and conveyances can be exempt from the National Pollutant Discharge Elimination System program. The Court has approved a balanced approach to protecting the nation's waterways, according to the authors.

**Rethinking the Point/Nonpoint Source Distinction: The Supreme Court Appears to Expand EPA’s Authority to Exempt Activities from NPDES Stormwater Permitting**

**I. Introduction**

On March 20, 2013, the U.S. Supreme Court reversed a U.S. Court of Appeals for the Ninth Circuit decision in *Decker v. Northwest Environmental Defense Center*, — U.S. —, 2013 BL 75128, 76 ERC 1001 (Mar. 20, 2013) (*Decker*), which had been combined with a second, similar case, *Georgia-Pacific West Inc. v. Northwest Environmental Defense Center* (U.S., Case No. 11-347). The question presented to the Court was whether National Pollutant Discharge Elimination System (NPDES) permits are required under the Clean Water Act for channeled stormwater runoff from logging roads into waters of the United States.

For 36 years, such questions have been primarily governed by two authorities. The first is the U.S. Court of Appeals for the District of Columbia Circuit’s 1977 decision in *Natural Resources Defense Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977) (*Costle*), which held that the Environmental Protection Agency did not have authority under the Clean Water Act to exempt categories of point sources from NPDES permitting requirements, because of the extremely broad definition of “point source.” The second is a set of 1987 amendments Congress made to the act in response to *Costle* which exempted much stormwater runoff from NPDES...
permitting, but retained the permit requirement for certain discharges such as those “associated with industrial activity.” In *Decker*, the Court has followed the trajectory of the 1987 amendments, further minimizing the definition of “point source” under the act and focusing on the reasonableness of EPA’s interpretation of the amendments and their related regulations. EPA has interpreted the “associated with industrial activity” language, directly and through regulations, as not applicable to some fairly broad categories of silvicultural activity such as temporary logging installations, harvesting of raw materials, and operations not directly related to an industrial plant, among others. The 7-1 majority in *Decker* upheld those interpretations, endorsing EPA’s authority to exempt certain kinds of channeled stormwater runoff in areas of industrial activity from NPDES permitting requirements.

This article first will describe the development of the regulatory framework governing stormwater runoff to help frame the context for the Court’s decision in *Decker*. We briefly review the factual and procedural history of the case, and then move on to a discussion of the Court’s conclusions and reasoning, touching on the jurisdictional issues addressed by the Court but focusing primarily on its use of Auer deference (*Auer v. Robbins*, 519 U.S. 452 (1997)) to grant EPA broader latitude in its determinations of which types of stormwater discharges are, and are not, exempt from NPDES permitting. The conclusion considers the implications the decision has for the future of stormwater runoff regulation.

**II. Development of the Regulatory Framework**

### A. The Federal Water Pollution Control Act (1972)


A fundamental tenet of the FWPCA is that “the discharge of any pollutant by any person shall be unlawful,” 33 U.S.C. § 1311(a), although as will be seen below, numerous exceptions have been created to this broad prohibition since the statute’s passage. One initial exception carved out in the FWPCA is for discharges made pursuant to a permit obtained for a “point source discharge” via the National Pollutant Discharge Elimination System, or NPDES. 33 U.S.C. § 1342. The FWPCA defined a “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 may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture. 33 U.S.C. § 1362(14).

### B. Regulations Creating Categorical Exemptions (1973)

In 1973, EPA promulgated regulations seeking to exempt from NPDES certain categories of discharges believed to be less impactful in order to reduce the number of permits EPA was required to process. The FWCPA did not expressly grant EPA such power; rather, EPA believed it had the implicit authority to do so in order to prevent the NPDES program from becoming “administratively difficult if not impossible, given Federal and State resource levels.” 40 Fed. Reg. 56,932 (Dec. 5, 1975). Exempted categories included, among others, storm sewer runoff unaffected by industrial or commercial activity and discharges from agricultural and silvicultural activities.

The Natural Resources Defense Council (NRDC) challenged the 1973 regulations as inconsistent with Section 1362(14), and a district court agreed in *Natural Resources Defense Council v. Train*, 396 F. Supp. 1393 (D.D.C. 1975). The court held that the regulations exempted entire categories of point sources from NPDES, which EPA did not have the discretion to do under the language of the FWPCA’s point source definition. The most that EPA could do was to clarify the definitions of point and nonpoint sources in a way that remained consistent with the FWPCA. *Id.* at 1395-96.

While the case was on appeal, EPA promulgated revised regulations (see Section II.C., infra), but the D.C. Circuit did not address the revised regulations—only the 1973 scheme. In 1977, the D.C. Circuit upheld the District Court’s decision (see *Costle*, 568 F.2d at 1383). The court stated that EPA’s arguments that, without categorical exemptions, the NPDES program would be infeasible and administratively overwhelming were of no avail, because Congress had intended the FWPCA to be a “tough” law, and had not abandoned the permit requirement during the legislative process even in the face of infeasibility arguments. *Id.* at 1375.

### C. The Revised Regulation and Current Silvicultural Rule (1976)

During the *Train/Costle* appeal process in 1975 and 1976, EPA carried out a rulemaking process for a revised regulation governing agricultural and silvicultural stormwater runoff, seeking to exempt much of that runoff from the NPDES permitting system. EPA did so based on its belief that:

> most rainfall runoff is more properly regulated under section 208 of the FWPCA [a section not requiring NPDES permits], whether or not the rainfall happens to collect before flowing into navigable waters. Agricultural and silvicultural runoff, as well as runoff from city streets, frequently flows into ditches or is collected in pipes before discharging into streams. EPA contends that most of these sources are nonpoint in nature and...
To achieve this end, EPA crafted the regulation, now known as the Silvicultural Rule, to more specifically define the term “point source” in the silvicultural context. The current rule, which is essentially the same as the version promulgated in 1976, defines a “silvicultural point source,” i.e. a point source requiring a NPDES permit, as:

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. The term 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 which there is natural runoff. 40 C.F.R. § 122.27(b)(1).

D. Amendments to the Clean Water Act (1987)

In the subsequent 10 years, EPA continued to have difficulty applying the Clean Water Act regulatory framework, particularly NPDES permitting, to stormwater runoff. (See Decker, 2013 BL 75128, at “2, citing Natural Resources Defense Council v. EPA, 966 F.2d 1292, 1295-96 (9th Cir. 1992).) As a result, Congress in 1987 passed several amendments to the act dealing with stormwater discharges.

The amendments were codified in 33 U.S.C. § 1342(p) (alternatively known as Clean Water Act Section 402(p)), which established a two-tiered approach to stormwater discharge regulation. Section 402(p) attempts to first address those stormwater discharges most likely to cause pollution (§§ 402(p)(1)-(4), also known as “Phase 1”), and then requires EPA to study all other stormwater discharges and to subsequently issue regulations governing such discharges (§§ 402(p)(5)-(6), also known as “Phase 2”).

Section 402(p)(1) exempts discharges composed entirely of stormwater from NPDES permitting, and Section 402(p)(2) exempts four specific categories from 402(p)(1), meaning that discharges falling into those categories would require NPDES permits. The specific exemption discussed in Decker is Section 402(p)(2)(B), “[a] discharge associated with industrial activity,” a phrase which was not defined in the amendments. There is also a fifth provision, Section 402(p)(2)(E), which gives EPA the discretion to require a NPDES permit for a stormwater discharge, although that discretion is not without limit. EPA can require a permit for such a discharge only if it finds that the discharge “contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.” 33 U.S.C. § 1342(p)(2)(E).

E. Regulations Pursuant to the 1987 Amendments (1990)

As required by Section 402(p)(4)(A), in 1990 EPA adopted regulations to effect the new stormwater permitting requirements and exemptions in Sections 402(p)(1)-(2). The regulations defined the term “discharge associated with industrial activity” in what has become known as the Industrial Stormwater Rule:

the 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. 40 C.F.R. § 122.26(b)(14) (2006).

The latter sentence refers to the Silvicultural Rule (see Section II.C., supra), indicating that EPA did not intend for the Industrial Stormwater Rule to alter the Silvicultural Rule’s revised definitions of silvicultural point sources (requiring NPDES permits) and nonpoint sources (exempt from NPDES).

The Industrial Stormwater Rule goes on to state that certain categories of “facilities” are “considered to be engaging in ‘industrial activity,’ ” including “[f]acilities classified as Standard Industrial Classification[] 24” (with one exception that does not apply here). 40 C.F.R. § 122.26(b)(14)(ii). Under this classification system used by federal agencies, section 24 covers industries involved in lumber and wood products, including logging. See Decker, 2013 BL 75128, at “2-3.

Finally, the Industrial Stormwater Rule further specifies that certain stormwater discharges associated with an industrial facility covered by the Rule (in other words, discharges in addition to those generated by the facility itself) would also require a NPDES permit: “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.” 40 C.F.R. § 122.26(b)(14).

III. Decker Factual Background and Procedural Posture

A. District Court Ruling

The two cases combined in Decker arose out of stormwater runoff from two logging roads in Oregon’s Tillamook State Forest. The roads are owned by the Oregon Department of Forestry and the Oregon Board of Forestry, and are used and maintained by Georgia-Pacific West and other logging and paper companies to transport harvested timber from the forest. The roads were built with a system of roadside ditches, culverts and channels to collect and convey stormwater runoff to nearby rivers. The runoff frequently contains large amounts of road-based sediment which is carried into the rivers.

In 2006, the Northwest Environmental Defense Center (NEDC) brought suit in federal court against the companies using and maintaining the roads as well as against various state and local officials, alleging that the runoff from the roads at issue discharged into two waterways of the United States, the South Fork Trask
River and the Little South Fork Kilchis River, and as a result a NPDES permit was required under the Clean Water Act. The NEDC presented evidence that the dirt, sand, and crushed gravel sediment was harmful to fish and other aquatic organisms.

The District Court dismissed the action for failure to state a claim, holding that permits were not required for this type of runoff under the act.


In Northwest Environmental Defense Center v. Brown, 640 F.3d 1063 (9th Cir. 2011) (overruled in Decker), the Ninth Circuit reversed the District Court, determining that the relevant statutes and regulations unambiguously did require permits for logging road stormwater runoff, despite EPA’s conclusion to the contrary. In doing so, the Ninth Circuit effectively inserted itself into the stormwater runoff regulatory framework by making two substantive determinations on issues raised by the case.

First, the court looked at the definition of “point source” in Section 1362(14) (see Section II.A, supra) and concluded that Congress “did not provide the EPA Administrator with discretion to define the statutory terms” regarding point sources and nonpoint sources. Brown, 640 F.3d at 1072. As a result, the court found fault with EPA’s attempt, via the Silvicultural Rule, to make a point/nonpoint source determination based on the “source” of the stormwater runoff: “Section [1362](14) says nothing, either explicitly or implicitly, about the source of the water contained in the discharge.” Id. at 1076-77. Instead, the court found that pursuant to the statute, the factor determining whether a runoff source was point or nonpoint was whether the stormwater was allowed to run off naturally (nonpoint) or whether it was collected in a man-made system of conveyances (point). In the instant cases, because there was a man-made collection system, the discharges at issue were unambiguously a point source.

According to the court, only Congress, not EPA, can create exemptions for certain point sources from NPDES permitting, and while Congress had done so in 1977 for agricultural irrigation, it had never done so for silvicultural discharges. Brown, 640 F.3d at 1073 (citing 33 U.S.C. § 1342). In the next part of its analysis, therefore, the court was wary of any “interpretation” by EPA that could in fact be characterized as creating an exemption.

In that analysis, the court took up EPA’s construction of the “discharge associated with industrial activity” language of Section 402(p)(2)(B). The court first looked at the legislative history of the 1987 amendments, and concluded that Congress had not “approved of, or acquiesced in,” the Silvicultural Rule. Brown, 640 F.3d at 1081. The court then reviewed EPA’s regulations interpreting Section 402(p)(2)(B), and itself interpreted all of the relevant language such as “industrial activity” and “facilities” very broadly. As a result, the court held that the runoff at issue did fall within the “industrial activity” exemption, meaning that a NPDES permit was required. The court concluded by quoting from an earlier case it had decided:

‘if [logging] activity is industrial in nature, and EPA concedes that it is [see Standard Industrial Classification 2411], EPA is not free to create exemptions from permitting requirements for such activity.’ The reference to the Silvicultural Rule in 40 C.F.R. § 122.26(b)(14) does not, indeed cannot, exempt such discharges from EPA’s Phase I regulations requiring permits for discharges ‘associated with industrial activity.’ Brown, 640 F.3d at 1085 (quoting Natural Resources Defense Council v. EPA, 966 F.2d 1292, 1306 (9th Cir. 1992)).

C. EPA Rule Amendment in Response to Ninth Circuit Ruling (2012)


As the Supreme Court noted in its opinion, the amendment “bring[s] within the NPDES permit process only those logging operations that involve the four types of activity (rock crushing, gravel washing, log sorting, and log storage facilities) that are defined as point sources by the explicit terms of the Silvicultural Rule.” Decker, 2013 BL 75128, at *3.

IV. The Court’s Analysis

A. Jurisdictional Issues

The petitioners argued that the suit was barred by Section 1369(b) of the Clean Water Act, which is the exclusive remedy for judicial review of certain actions taken by the Administrator of the EPA and has a short statute of limitations. The Court disagreed, however, determining that subject matter jurisdiction was proper under the Clean Water Act’s citizen-suit provision, 33 U.S.C. § 1365(a), because it was a “claim to enforce what is at least a permissible reading of the Silvicultural Rule,” rather than an “effort . . . to challenge the Silvicultural Rule [itself].” Decker, 2013 BL 75128, at *5.

B. Requirement of a NPDES Permit for Channeled Logging Road Stormwater Runoff

The Court described the conflict it needed to address by stating that NPDES permits were required for the runoff at issue if the discharges were “associated with industrial activity” (§ 402(p)(2)(B)), as that phrase is defined in the Industrial Stormwater Rule (40 C.F.R.

4 Industry Group 241 is defined as “Logging.”

5 See 231 DEN A-12, 12/3/12.

6 Because of the adoption of the 2012 amendment to the Industrial Stormwater Rule discussed in Section III.C above, the petitioners and the United States asserted that the action was now moot. The Court disagreed for two reasons: first, because the facts and record of these cases “provide[d] no occasion to interpret the amended regulation,” as they were based entirely on the prior version; and second, because the violators remained potentially liable for violations of the earlier version of the rule, even if the rule was now different. Decker, 2013 BL 75128, at *6. Based on that same reasoning, the Court determined that it would assess the case under the pre-amendment version of the rule rather than the amended version.
§ 122.26(b)(14)). If the discharges were not thus “associated,” they fell within the general exemption for stormwater runoff created by the 1987 amendments (§ 402(p)(1)), and were lawful even without a NPDES permit. By framing the question in this manner, the Court narrowed the question presented to a fairly straightforward assessment of the reasonableness of EPA’s interpretation of its regulation. This is in contrast to the Ninth Circuit’s exhaustive analysis of the entire stormwater runoff regulatory framework. See Section III.B, supra.

1. NEDC’s Claims and the Court’s Responses

As a threshold matter, the Court noted that contrary to NEDC’s assertion, the term “industrial activity” in the amended statute was not unambiguous, because it was not otherwise defined in the statute and has multiple meanings. Consequently, it required interpretation by EPA.

The Court next addressed NEDC’s claim that EPA’s regulation attempting to define covered “industrial activity,” the Industrial Stormwater Rule, unambiguously required a NPDES permit for the runoff at issue, because logging is an industry within Standard Industrial Classification 24, and the runoff was from “access roads . . . used or traveled by carriers of raw materials” for that industry. 40 C.F.R. § 122.26(b)(14). The Court again disagreed, finding EPA’s alternative interpretation of the language reasonable. EPA emphasized words in the regulation like “facilities” and “establishments” in asserting that the regulation’s intent was to cover runoff associated with “more fixed and permanent” industrial sites rather than “temporary, outdoor logging installations.” Decker, 2013 BL 75128, at *7-8. The Court also pointed out that the Rule purported to cover runoff from roads “directly related to manufacturing, processing or raw materials storage areas at an industrial plant,” and that it was reasonable for EPA to conclude that roads being used for transport of harvested raw materials did not fall within that definition. In addition, NEDC argued that other parts of the Rule did cover sites that were less permanent or “industrial plant”—like such as mines, landfills, and construction sites. Again the Court simply stated that EPA’s conclusion that such facilities tend to be more fixed permanent, and traditionally industrial, and a timber-harvesting operation was less so, was reasonable.

In these discussions, the Court consistently used language that appears to indicate a broader grant of authority to EPA under the Clean Water Act than had previously been understood after Costle. Rather than seeing EPA’s interpretations as categorical exemptions from NPDES barred by Costle, as the Ninth Circuit did, the Supreme Court instead viewed EPA’s actions as permissible constructions of the relevant statutes and regulations. Several examples are illustrative. The Court stated that “[i]t was reasonable for the agency to conclude that the conveyances at issue are ‘directly related’ only to the harvesting of raw materials, rather than to ‘manufacturing,’ ‘processing,’ or ‘raw materials storage areas.’” Decker, 568 U.S. at *8 (emphasis added). The Court also noted that “a reasonable interpretation of the regulation could still require the discharges to be related in a direct way to operations ‘at an industrial plant’ in order to be subject to NPDES permitting.” Id. (emphasis added). In addition, the inclusion of “more fixed and permanent” activities which “have a closer connection to traditional industrial sites” in the Industrial Stormwater Rule “need not be read to mandate that all stormwater discharges related to these activities fall within the rule,” and “[t]he regulation’s reach may be limited by the requirement that the discharges be ‘directly related to manufacturing, processing or raw materials storage areas at an industrial plant.’” Id. (emphasis added).

The Court therefore appears to be endorsing EPA’s narrowing of the scope of stormwater runoff-generating activities covered by the 1987 “associated with industrial activity” amendment to the Clean Water Act. This would seem to provide support for certain silvicultural and, potentially, construction or other operations seeking to exempt projects, or portions of projects, from the NPDES permitting process. This is particularly significant in light of the nature of the runoff in Decker: “a system of ditches, culverts, and channels that discharge the water into nearby rivers and streams,” “often containing large amounts of sediment, in the form of dirt and crushed gravel from the roads,” which “can harm fish and other aquatic organisms.” Decker, 2013 BL 75128, at *4.

2. Auer Deference

Because the Court concluded that EPA’s interpretation of the Industrial Stormwater Rule as not covering channeled stormwater runoff from logging roads was reasonable, it was compelled to extend “Auer deference” to EPA. Auer deference is the principle that a court should defer to an agency interpreting its own regulation “unless that interpretation is ‘plainly erroneous or inconsistent with the regulation.’” Auer v. Robbins, 519 U.S. 452, 461 (1997). Given the above analysis, the Court concluded that EPA’s interpretation was not plainly erroneous or inconsistent. (If the test is met, a court exercises independent judgment without deference to the agency.)

The Court concluded by holding that EPA’s construction of the pre-amendment Industrial Stormwater Rule as not applicable to channeled stormwater runoff from logging roads is therefore permissible. As a result, it did not reach the logging companies’ alternative argument that the man-made stormwater conveyance system along the roads is not a point source under Section 1362(14) of the Clean Water Act. See Decker, 2013 BL 75128, at *9.

V. Conclusion

The Court’s final statement quoted in Section IV.B.2 above – that it did not have to reach the point/nonpoint source question – is a clear departure from the Ninth Circuit’s analysis of the case, which first determined that the discharge at issue was a point source simply because it was channelized. Because the Supreme Court went straight to the 1987 “associated with industrial activity” amendment and related regulations in its analysis, it implicitly approved EPA’s methodology of having

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7 Lower courts have already begun to take notice of the Court’s use of this kind of language. The Ninth Circuit, which was reversed in Decker on this very issue, recently cited the “reasonably could conclude” language favorably in holding that runoff from telephone poles was not “associated with industrial activity.” See Ecological Rights Foundation v. Pacific Gas and Electric Company, 2013 BL 925282013 at *8-9 (9th Cir., April 3, 2013). See also 69 DEN A-14, 4/10/13.
the stormwater exemptions be the determining factor in its NPDES permitting analysis, rather than focusing primarily on whether the discharge was a point source. This methodology is reinforced by the fact that the amendments gave EPA the authority to apply the “catch-all” provision of Section 402(p)(2)(E) on a case-by-case basis to require NPDES permits for impactful runoff that otherwise would escape NPDES regulation.

Indeed, under Decker, the traditional factors in a point source analysis are now less important. Even stormwater gathered in a discrete system of pipes and conveyances can be exempt from NPDES. Nor does sediment load or potential impact to aquatic life render channelized stormwater runoff automatically subject to NPDES. Rather, EPA has subjected to NPDES only runoff from certain kinds of economic activity—namely, runoff from “more fixed and permanent” activities with a “closer connection to traditional industrial sites” and from activities “directly related” to operations “at an industrial plant.” The Court found this approach to be rational, and a reasonable interpretation of the Clean Water Act. This conclusion is consistent with the 1987 amendments Congress made to the Clean Water Act, which provided an accommodation to EPA’s long-maintained position that the NPDES program was unmanageable if a NPDES permit was required for every pipe in America carrying stormwater runoff to waters of the United States. In Decker, the Supreme Court has approved this balanced approach to protecting the nation’s waterways.

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