

## Client Alert

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March 20, 2013

# Supreme Court Confirms EPA's Interpretation That Logging Roads Do Not Require NPDES Permits

By **Chris Carr** and **Shaye Diveley**

In a 7-1 decision overruling the Ninth Circuit, the U.S. Supreme Court today upheld the Environmental Protection Agency's ("EPA") long-standing interpretation that stormwater run-off from logging roads are exempt from NPDES permitting requirements.

In *Decker v. Northwest Environmental Defense Center*, U.S. No. 11-338 (March 20, 2013), the Court concluded that under the Clean Water Act, 33 U.S.C. §1342(p)(2)(B), timber operators would be required to secure an NPDES permit for only for those stormwater discharges "associated with industrial activity." The Court held that the EPA's interpretation of the definition of "industrial activity" in its Industrial Stormwater Rule (40 CFR §122.26(b)(14)) to exclude logging roads from NPDES permitting was reasonable under the Act and under the deference afforded to agencies interpreting their own regulations. The EPA interpreted "industrial activity" as referring to traditional industrial buildings such as factories and associated sites, as well as other relatively fixed facilities. The Court also recognized that the EPA's interpretation must be viewed against the background of the extensive state regulatory regimes that impose best practices to manage stormwater runoff from logging roads.

The EPA made this interpretation clear in its amended Industrial Stormwater Rule (40 C.F.R. § 122.26(b)(14)(ii)), which limited industrial activities subject to the NPDES program to "rock crushing, gravel washing, log sorting, or log storage facilities" and excluded "all other types of silviculture facilities." The amended rule was issued just three days before the oral argument in the case. The United States argued that the amended rule mooted the case. The Court disagreed, concluding that the Northwest Environmental Defense Center could possibly seek some remedial relief if violations of the former rule were proven. As a result, despite the EPA's best efforts to moot the case, the Court, reflecting the malleability of the mootness doctrine, reached the merits to overturn the Ninth Circuit in yet another environmental case.

The immediate practical implication of the decision is likely a return to the status quo before the Ninth Circuit created havoc by holding that every logging road needs an NPDES permit. Aided by the clarification provided in the EPA's amended rule and the Court's recognition of the robust state regimes for managing runoff from logging roads, timber companies should have substantially more regulatory certainty for their operations.

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