QUESTIONS REMAIN FOR THE TIMBER INDUSTRY AFTER SUPREME COURT'S DECISION IN *DECKER V. NORTHWEST ENVIRONMENTAL DEFENSE CENTER*

BY

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After the Ninth Circuit's decision in Northwest Environmental Defense Center v. Decker (NEDC v. Decker) *required Clean Water Act (CWA) permits for stormwater discharges from logging roads, the timber industry was placed in the difficult position of facing potential enforcement actions despite no practicably available permitting scheme. The Supreme Court's reversal of that decision, in* Decker v. Northwest Environmental Defense Center (Decker)*, provides reassurance to the timber industry, other landowners and agencies in the West and elsewhere. However, due to the limited scope of the Supreme Court's opinion, the timber industry still faces the potential for further regulation under the CWA "Phase II" stormwater program. This article discusses the* NEDC v. Decker *litigation, including its background and aftermath, underscores the practical difficulties in effectively regulating stormwater discharges from logging roads through the Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit program, and highlights several related issues that remain unresolved.*

I. INTRODUCTION

For nearly three years between the Ninth Circuit decision holding that Clean Water Act (CWA) permits were required for stormwater discharges from logging roads and the Supreme Court's ruling on the issue, the timber industry was placed in the uncomfortable position of facing potential enforcement actions despite the absence of an available or practicable permitting scheme.[1] The Supreme Court's reversal of the Ninth Circuit in *Decker v. Northwest Environmental Defense Center* (*Decker*)[2] provides substantial comfort to the timber industry, as well as landowners and state and federal agencies in the West and elsewhere in the United States.

However, due to the limited scope of the Supreme Court's opinion and the unusual eleventh-hour rulemaking by the Environmental Protection Agency (EPA), which was presumably intended to moot the issues on appeal, the timber industry and other stakeholders are not yet entirely out of the woods. Litigation regarding EPA's new rule is already underway and, although *Decker* certainly undermines the likelihood of that petition prevailing, the Supreme Court's decision not to address whether discharges from logging roads constitute "point sources" or interpret EPA's new rule leaves some uncertainty about the litigation's resolution. Additionally, EPA's new rule suggests the agency intends to move forward with additional rulemaking that would cover some types of logging or forest roads within the CWA's "Phase II" stormwater program. Although that program is generally less prescriptive than the "Phase I" program at issue in *Decker*, it could nevertheless layer additional regulatory requirements on an industry already subject to various types of state and local regulation.

This Article describes the odyssey of the *Decker* litigation, including its background and aftermath, and highlights the practical implications of regulating discharges from logging roads. In doing so, this Article describes the statutory and regulatory background to the Ninth Circuit's decision, the legislative and regulatory efforts to unwind that decision, the Supreme Court's reversal of the Ninth Circuit, and the epilogue to the Supreme Court decision, including several issues that remain unresolved.

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1 Clean Water Act, 33 U.S.C. § 1251 et seq. (1972); Nw. Envtl. Def. Ctr. v. Brown (*NEDC v. Brown*), 617 F.3d 1176 (9th Cir. 2010), *opinion withdrawn and superseded on denial of reh'g*, 640 F.3d 1063 (9th Cir. 2011), *rev'd and remanded sub nom.* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013). All references to the Ninth Circuit's decision are to the amended version.

2 *Decker,* 133 S. Ct. 1326 (2013). A separate petition, *Georgia-Pacific West v. NEDC*, NO. 11-347, was consolidated with *Decker*, both of which sought review of the Ninth Circuit's decision in *NEDC v. Brown*, 640 F.3d 1063 (9th Cir. 2011).

II. STATUTORY AND REGULATORY BACKGROUND

The CWA prohibits the discharge of a "pollutant" into waters of the United States from a "point source" without a permit, such as a National Pollutant Discharge Elimination System (NPDES) permit.[3] The CWA defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged."[4]

In 1987, faced with the prospect of overwhelming EPA and state agencies with processing and monitoring compliance for innumerable permits for stormwater discharges, Congress amended the CWA to provide a phased approach for addressing stormwater discharges through section 402(p) of the CWA.[5] Phase I covers enumerated sources of stormwater pollution, including stormwater "associated with industrial activity"[6]—a term the CWA does not define. The Phase II stormwater regulations apply to any additional stormwater discharges that EPA designates to protect water quality.[7] For such designated discharges, EPA need not require NPDES permits, but must "establish a comprehensive program" that "may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate."[8]

A. Development of EPA's Silvicultural Rule

EPA has excluded runoff from logging roads from the CWA's NPDES permitting scheme since that program was first established in the 1970s.[9] In 1973, one year after passage of the CWA, EPA issued regulations that categorically exempted several kinds of discharges from the NPDES program, including "[d]ischarges of pollutants from agricultural and silvicultural activities," but allowed regulation of point source discharges from any agricultural or silvicultural activity identified by EPA or a state as "a significant contributor of pollution."[10] A district court overturned this exemption as too broad, holding that EPA should have determined which agricultural and silvicultural activities were point and nonpoint sources and that EPA could not exempt from the NPDES program whole classes of what the statute defined as point sources.[11]

In 1976, EPA proposed a revised Silvicultural Rule, maintaining that "most water pollution related to silvicultural activities is nonpoint in nature."[12] EPA determined that only four activities associated with silvicultural operations—each relating to controlled water use by a person—would be considered point sources:

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3 Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(a), 1342 (2006).

4 *Id.* § 1362(14).

5 *Id.* § 1342(p) (2006).

6 *Id.* § 1342(p)(2)(B) (2006).

7 *Id.* § 1342(p)(5) (2006).

8 *Id.* § 1342(p)(6) (2006).

9 *Decker*, 133 S. Ct. 1326, 1331 (2013).

10 40 C.F.R. § 125.4(j) (1974).

11 Natural Res. Def. Council v. Train, 396 F. Supp. 1393, 1401–02 (D.D.C. 1975), *aff'd sub nom.* Natural Res. Def. Council v. Costle, 568 F.2d 1369 (D.C. Cir. 1977).

12 National Pollutant Discharge Elimination System & State Program Elements Necessary for Participation, 41 Fed. Reg. 6,281, 6,282 (proposed Feb. 12, 1976).

rock crushing, gravel washing, log sorting, and log storage facilities.[13] Any other silvicultural discharge, even if made through a "discernible, confined and discrete conveyance" such as a ditch or culvert, was considered a nonpoint source of pollutants.[14] EPA explained that "ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff from precipitation are not meant to be subject to the § 402 permit program."[15]

The current language of the Silvicultural Rule, changed slightly since 1976, limits "silvicultural point sources" 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."[16] Falling outside the definition are "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*."[17]

B. Factual and Procedural Background

At issue in *Decker* were two state-owned logging roads in Oregon's Tillamook State Forest.[18] Various timber companies use the roads to access logging sites and haul timber under contracts with Oregon.[19] The timber sales contracts designate specific routes for timber hauling and require the timber companies to maintain the roads and their associated stormwater collection systems, including ditches, culverts, and channels that collect and convey stormwater runoff from the roads to tributary streams and adjacent rivers.[20] An environmental group, Northwest Environmental Defense Center (NEDC), brought a citizen suit under the CWA alleging sediment discharges in stormwater from logging roads negatively impact aquatic life, such as salmon and trout, and as point sources require permits under the NPDES program.[21]

The District Court of Oregon dismissed NEDC's lawsuit, holding that the Silvicultural Rule exempted the discharges from the NPDES program. According to the district court,

> the fact that pollutants deposited on top of the roads during timber hauling end up being washed into the water bodies does not turn the road system with its associated ditches and culverts into a point source. The road/ditch/culvert system and timber

13 *Id.* (proposed rule); Application of Permit Program to Silvicultural Activities, 41 Fed. Reg. 24,709, 24,711 (June 18, 1976) (final rule); 40 C.F.R. § 124.85 (1976).

14 41 Fed. Reg. at 6,282.

15 *Id.*

16 40 C.F.R. § 122.27(b)(1) (2012).

17 *Id.* (emphasis added).

18 *Decker*, 133 S. Ct. 1326, 1333 (2013).

19 *Id.*

20 *Id.*

21 *NEDC v. Brown*, 640 F.3d 1063, 1066–67 (9th Cir. 2011).

hauling on it is a traditional dispersed activity from which pollution flowing into the water cannot be traced to single discrete sources.[22]

III. THE NINTH CIRCUIT'S DECISION

NEDC appealed the district court decision, arguing that the unpermitted stormwater discharges violate the CWA, despite the Silvicultural Rule.[23] The Ninth Circuit also addressed a second issue the district court elected not to: Whether and to what extent the Phase I program applies to stormwater runoff from logging roads.[24]

The Ninth Circuit agreed with NEDC, holding that discharges from the logging roads require compliance with an NPDES permit.[25] Although the court stopped short of expressly invalidating the Silvicultural Rule, it held the rule does not and cannot exempt runoff that is collected from logging roads and discharged from a ditch or culvert to jurisdictional waters.[26]

A. The Silvicultural Rule

In addressing the Silvicultural Rule, the Ninth Circuit's decision exhaustively reviewed the statutory definition of "point sources" under the CWA, case law interpreting the distinction between point and nonpoint sources, and the genesis and history of the Silvicultural Rule. According to the court, because "runoff is not inherently a nonpoint or a point source of pollution," the distinction between point and nonpoint source discharges turns not on the runoff itself, but on whether stormwater "is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus a point source discharge)."[27]

In the court's view, EPA's intent in the Silvicultural Rule was to focus on the "source of the pollutant" and not the mechanism of discharge, where "any natural runoff containing pollutants" from silvicultural activities is exempt "from the definition of point source, irrespective of whether, and the manner in which, the runoff is collected, channeled, and discharged into" jurisdictional water.[28] This approach, the court opined, directly conflicts with the statutory definition of "point source" under the CWA, and is therefore invalid.[29]

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22 *Nw. Envtl. Def. Ctr. v. Brown*, 476 F. Supp. 2d 1188, 1197 (D. Or. 2007) (citing *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002)).

23 *NEDC v. Brown*, 640 F.3d at 1066–67.

24 *Id.* at 1067. The Ninth Circuit's revised opinion, issued after rehearing, also explained that the court properly exercised jurisdiction over the case. According to the court, the 120-day limitation period in the citizen suit provision governing challenges to regulations did not apply because EPA's interpretation of the Silvicultural Rule was ambiguous until EPA had filed an amicus brief before the court. *Id.* at 1068–69. This aspect of the decision is worth a note in its own right, because it potentially has significant implications for when regulations are subject to review, whether under the CWA or other statutes with similar language. Additional information regarding this issue is addressed in a companion article. *See* Dan Mensher page 849.

25 *NEDC v. Brown*, 640 F.3d at 1087.

26 *Id.* at 1080.

27 *Id.* at 1071.

28 *Id.* at 1080.

29 *Id.*

Instead of striking down the Silvicultural Rule, however, the court determined the Rule is subject to a second interpretation that is consistent with the CWA, even though it neither "reflect[s] the intent of EPA" nor exempts the discharges at issue in the case.[30] Under the latter interpretation, the Rule "exempts natural runoff from silvicultural activities . . . but only as long as the 'natural runoff' remains natural."[31] In other words, the exemption no longer exists when the natural runoff is "channeled and controlled in some systematic way through a 'discernible, confined and discrete conveyance' and discharged into" jurisdictional waters.[32]

B. The Phase I Program

Having already held the discharges require NPDES permits, the court also evaluated the potential applicability of the Phase I program, an issue the district court did not address. The court stated that, while EPA has discretion regarding whether "to promulgate Phase II regulations requiring, or not requiring, permits for" discharges from relatively de minimis sources, EPA lacks discretion with respect to the entities that fall within the Phase I regulations.[33] Because Congress expressly required EPA to promulgate Phase I regulations to address "discharge[s] associated with industrial activity,"[34] the court held that if silvicultural activity is "industrial in nature," section 402(p) requires NPDES permits for industrial activity discharges.[35]

The court concluded that stormwater discharges from logging roads fall within the scope of EPA's Phase I regulations as "storm water discharge[s] associated with industrial activity," and therefore require compliance with the NPDES program.[36] The court based this ruling on a provision of EPA's regulations that specifies broad Standard Industrial Classifications (SIC)[37] categories of industries considered "industrial activities," one of which includes "logging," defined as "[e]stablishments primarily engaged in cutting timber and in producing . . . primary forest or wood raw materials . . . in the field."[38] The court also noted that EPA had defined "stormwater discharge associated with industrial activity" as including "immediate access roads . . . used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility."[39]

Oregon and the timber companies advanced several arguments attempting to distinguish the typical industrial activity contemplated by the Phase I regulations from logging roads that occur in vast, often remote areas, far from a true facility or

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30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 1083.

34 *Id.* (quoting Federal Water Pollution Control Act, 33 U.S.C. § 1342(p)(2)(B), 1342(p)(4)(A) (2006) (brackets in original).

35 *Id.*

36 *Id.*

37 *Id.* at 1083–84.

38 *Id.* at 1084 (quoting Occupational Safety & Health Admin., *SIC 2411*, https://www.osha.gov/pls/imis/sic_manual.display?id=538&tab=description (last visited Nov. 23, 2013)).

39 *Id.* (quoting 40 C.F.R. § 122.26(b)(14)(ii) (2011) (alteration omitted)).

industrial plant.[40] The court rejected these arguments, concluding that "collected runoff constitutes a point source discharge of stormwater 'associated with industrial activity' under the terms of section 502(14) and section 402(p)."[41] First, according to the court, which relied on EPA's preamble to the Phase I rule, logging roads qualify as "immediate access roads," because they are "roads which are exclusively or primarily dedicated for use by the industrial facility."[42] The court asserted that although logging roads are "often used for recreation, . . . that is not their primary use."[43] Further, the court asserted that logging companies do more than build and maintain the roads and their drainage systems pursuant to contracts with the State.[44] "Logging is also the roads' *sine qua non*: If there were no logging, there would be no logging roads."[45] Finally, the court opined that EPA should be able to "effectively and relatively expeditiously" adapt the "closely analogous NPDES permitting process for stormwater runoff from other kinds of roads" to a general permit for stormwater discharges from logging roads.[46]

IV. IMPACTS TO AND REACTIONS FROM THE TIMBER INDUSTRY

Not surprisingly, the Ninth Circuit's decision drew sharp criticism from the timber industry in the West—which is directly subject to the Ninth Circuit's ruling—and other stakeholders across the United States fearing extension of that ruling to other jurisdictions. The Ninth Circuit's legal conclusion that ditches, culverts, and other means of channeling runoff from logging roads qualify as "point sources" within CWA jurisdiction appeared logical to the court, but lacked context regarding the intent and purpose for such improvements.[47] Many of these improvements have been put in place to comply with long standing best management practices (BMPs) developed and revised by state agencies to limit erosion and pollutant discharges to water bodies.[48] By complying with these BMPs and protecting the future uses of such roads—many of which serve a variety of nontimber interests, including recreation—such roads became subject to additional regulation under the CWA.

In the wake of the Ninth Circuit's decision, during which no general permits had been developed to address runoff from logging roads, the industry remained exposed to potential enforcement actions, including citizen suits.[49] Faced with the

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40 *Id.* at 1084.

41 *Id.* at 1085.

42 *Id.* at 1084 (quoting National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 48,009 (Nov. 16, 1990)).

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.* at 1087.

47 *Id.* at 1080–81.

48 *See, e.g.*, Brief for Society of American Foresters et al. as Amici Curiae Supporting Petitioners at 20–21, *Decker*, 133 S. Ct. 1326 (2013) (NOS. 11-338, 11-347) [hereinafter SAF Amicus Brief]; OR. ADMIN. R. 629.625.0300 (2013) (providing design requirements for Oregon forest roads, including stream crossing structures and drainage systems); WASH. ADMIN. CODE § 222-24-030(6) (2003) (mandating installation of drainage structures concurrently with forest roads construction in Washington).

49 *See* U.S. FOREST SERV., IMPLICATIONS OF DECISION IN *NEDC V. BROWN* TO SILVICULTURAL ACTIVITIES ON NATIONAL FOREST SYSTEM LAND (2010), *appended to* Brief of American Forest

daunting possibility of needing individual permits for thousands of miles of roads and tens of thousands of culverts, landowners and timber operators also evaluated the potential for extending coverage to these logging roads through existing general permits for other activities. As discussed below, however, none of these permitting schemes, which focus on point source discharges at established facilities, suitably address stormwater runoff on thousands of miles of logging roads across broad areas of land.

The Ninth Circuit's assurance that a permitting system governing forest road runoff under the NPDES program could be achieved "expeditiously" provided little comfort to an industry intimately familiar with the monumental effort of such a program and the impracticality of ensuring compliance with permits under that program.[50] For example, according to some estimates, compliance with the Ninth Circuit decision would require at least "750,000 permit applications, based on the number of tree harvests, 5 million permit applications, based on the number of affected landowners, or 264 million new point source discharges requiring permits," based on the estimated number of water conveyances, such as ditches and culverts.[51] The U.S. Forest Service (USFS) estimated it would be required to obtain over 400,000 permits for the 378,000 miles of logging roads under USFS jurisdiction, and that the permitting process could take more than a decade.[52] In comparison, the entire NPDES program currently regulates approximately 450,000 facilities, mostly through general permits.[53] Adding logging roads to the mix would radically expand the program, adding to the burden on the understaffed and underfunded state agencies implementing the program.[54]

Resource Council et al. as Amici Curiae in Support of Petitioners, *Decker*, 133 S. Ct. 1326 (2013) (NOS. 11-338, 11-347) [hereinafter AFRC Amicus Brief].

50 *NEDC v. Brown*, 640 F.3d at 1087.

51 Brief for Pacific Legal Foundation et al. as Amici Curiae Supporting Petitioners at 15, *Decker*, 133 S. Ct. 1326 (2013) (NOS. 11-338, 11-347) [hereinafter PLF Amicus Brief].

52 U.S. FOREST SERV., *supra* note 49.

53 EPA, ANNUAL NONCOMPLIANCE REPORT (ANCR) CALENDAR YEAR 2011: A SUMMARY OF REVIEWS, VIOLATIONS, AND ENFORCEMENT RESPONSES AT INDIVIDUALLY PERMITTED NON-MAJOR DISCHARGERS UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PROGRAM 4 (2013).

54 PLF Amicus Brief, *supra* note 51, at 15–17 (citing EPA, EPA-833-R-01-001, PROTECTING THE NATION'S WATERS THROUGH EFFECTIVE NPDES PERMITS: A STRATEGIC PLAN 1 (2001)); *see also* Brief for National Association of Counties et al. as Amicus Curiae Supporting Petitioners at 11, *Decker*, 133 S. Ct. 1326 (2013) (NOS. 11-338, 11-347) [hereinafter NAOC Amicus Brief] (describing the Ninth Circuit decision as imposing a "prohibitive cost burden" on Oregon counties that can only be met "if they divert funding from other essential services"); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-883, EPA–STATE ENFORCEMENT PARTNERSHIP HAS IMPROVED, BUT EPA'S OVERSIGHT NEEDS FURTHER ENHANCEMENT 7 (2007) ("Overall funding to regions and authorized states increased from 1997 through 2006, but these increases did not keep pace with inflation and the growth in enforcement responsibilities." It then states that both EPA and state officials told the GAO that they are finding it difficult to respond to new requirements while carrying out their previous responsibilities.); ROBERT L. GLICKSMAN & YEE HUANG, CENTER FOR PROGRESSIVE REFORM, FAILING THE BAY: CLEAN WATER ACT ENFORCEMENT IN MARYLAND FALLING SHORT 13–14 (2010), *available at* http://www.progressivereform.org/articles/MDE_Report_1004FINALApril.pdf
(noting that while federal funding for state NPDES programs has declined in real terms over the past few decades "in large measure because of budget deficits at the federal level[,] [i]n recent years, states have been unable or unwilling to make up these shortfalls, creating a major challenge for state enforcement programs.").

In Oregon alone there are over 4,800 miles of primary logging roads and some 20,000 cross-culverts potentially requiring individual permits.[55] The National Association of Counties (NAOC) conservatively estimated that processing permits for the culverts would cost Oregon counties at least $56 million, while the federal government was expected to face even steeper costs to issue permits for the thousands of road miles and culverts located on federal lands.[56] In a time of tight budgetary constraints, this steep financial burden had the potential to result in fewer open and maintained logging roads, negatively impacting various timber and agricultural businesses, reducing tax revenue, and impeding recreational pursuits.[57]

The implications and practicability of expanding the NPDES program, traditionally designed to address end-of-pipe discharges from discrete "industrial facilities," into areas that have historically been viewed as nonpoint sources covering broad geographical regions has been a subject of litigation and concern from stakeholders for some time. Recently, for example, the timber industry and other governmental and private stakeholders raised many of these concerns in the wake of a Sixth Circuit ruling, in a consolidated case, holding that pesticide applications over forest lands and elsewhere require NPDES permits.[58] Despite early momentum in Congress, the Sixth Circuit's decision stands and permitting programs addressing pesticide applications are underway.[59] On the back of this decision and the subsequent expansion of the NPDES program, the Ninth Circuit's conclusion that logging roads—which are owned and used by multiple parties for a variety of purposes across thousands of miles of unoccupied territory—are "associated with industrial activity" appeared to many stakeholders as both judicial overreach and bad policy.[60]

The potential impracticalities of expanding the NPDES program to address runoff over large geographical areas are manifold. Among other things, stakeholders have expressed concern that the staples of the NPDES program—requiring "treatment at the point of discharge and monitoring of the final effluent to meet specified permit limits"—are poorly suited to the context of logging roads, where often "there is no distinct source of sediment, and no single landowner or forest manager is in a position to control what happens to the water or to operate a treatment process prior to the stormwater entering a stream."[61] Further, the pollutant load in logging roads' stormwater runoff is "generally low, is difficult to monitor, and varies over time depending on the stage and nature of the silvicultural activity,"[62] and water quality impacts are usually greatest in the first two to three

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55 NAOC Amicus Brief, *supra* note 54, at 14.

56 *Id.* at 17–18.

57 *Id.* at 11–20.

58 Nat'l Cotton Council of Am. v. EPA, 553 F.3d 927, 929 (6th Cir. 2009). *See* Meline MacCurdy, *Pesticide Use Near U.S. Waters Falls Within NPDES Permitting Program*, http://www.martenlaw.com/newsletter/201111016-pesticide-regulation-near-water#_ftn2 (last visited Nov. 23, 2013).

59 *See* MacCurdy, *supra* note 58.

60 *See* SAF Amicus Brief, *supra* note 48, at 32 ("In contrast to the proven effectiveness of BMPs, the NPDES permitting system is ill-suited to address the environmental impacts associated with forest road runoff. Unlike the end-of-pipe problem for which NPDES permitting was designed, forest road runoff is generally characterized by contribution from diffuse sources of low loads of natural pollutants, and, as such, it does not fit the NPDES permitting model.").

61 *Id.* at 16.

62 *Id.* at 17.

years of silvicultural activity and diminish quickly thereafter.[63] Given the intermittent nature of timber harvesting activities, the industry was also concerned that monitoring requirements would be extended beyond the period of active use, posing a logistical nightmare for companies or land management agencies trying to monitor sediment or other discharges over hundreds or thousands of remote logging roads.[64]

Moreover, even if the regulatory burden, compliance concerns, and costs were manageable, many stakeholders expressed doubt that the efforts would result in water quality improvements.[65] The substantial differences in forest conditions—including climate and geography—across the United States limit the effectiveness of a national program for controlling runoff from forest lands that is at root (if not at the result) a nonpoint source.[66] In contrast, state and local controls can, if properly designed and implemented, address the idiosyncrasies of geographical areas.[67]

Jurisdictions and agencies with forestry expertise have attempted to address these considerations by developing, implementing, and enforcing the use of various BMPs to control such runoff. BMPs can be "structural (e.g., installation of drainage ditches and coverage of the road surface with gravel or mulch)," or "operational (e.g., restrictions on road use or other activities during storm events and maintenance of a minimum buffer width between ongoing silvicultural activities and neighboring streams)."[68]

When properly applied, BMPs can be highly effective in protecting water quality by limiting erosion from logging roads.[69] According to the Society of American Foresters (SAF), watershed-based studies have demonstrated the effectiveness of existing BMPs in reducing erosion and other impacts of the timber industry.[70] For example, one study showed that "reconstruction of forest roads with BMPs lowered the sediment yield, as compared to pre-BMP roads, by 70 percent."[71] Similarly, another study found that "including a continuous berm at a road's edge could lead to a 99 percent reduction in sediment loss."[72] SAF explained that:

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63 Christopher J. Anderson & B. Graeme Lockaby, *The Effectiveness of Forestry Best Management Practices for Sediment Control in the Southeastern United States: A Literature Review*, 35 S.J. APPLIED FORESTRY 170, 173 (2011).

64 AFRC Amicus Brief, *supra* note 49, at 9–10.

65 *See, e.g.*, SAF Amicus Brief, *supra* note 48, at 8.

66 NAOC Amicus Brief, *supra* note 54, at 4.

67 *See id.*; *see also* OR. ADMIN. R. 629-625-0000 to 629-625-0700 (2013) (addressing logging road construction and maintenance in Oregon's Forest Practices Rules).

68 SAF Amicus Brief, *supra* note 48, at 18–19.

69 *Id.* at 28.

70 *See id.* at 26, 28 (citing Elizabeth M. Toman & Arne E. Skaugset, *Designing Forest Roads to Minimize Turbid Runoff During Wet Weather Use*, PROC. OF THE FOURTH CONF. ON WATERSHED MGMT TO MEET WATER QUALITY STANDARDS & TMDLS (Am. Soc'y of Agric. & Biological Eng'rs, 2007)).

71 *Id.* at 28 (citing Mark S. Riedel & James M. Vose, *Collaborative Research and Watershed Management for Optimization of Forest Road Best Management Practices*, INT'L CONF. OF ECOLOGY & TRANSP. PROC. 148, 148, 156 (2003).

72 *Id.* at 29 (citing T.W. Appelboom et al., *Management Practice for Sediment Reduction from Forest Roads in the Coastal Plain*, 45 TRANSACTIONS AM. SOC'Y AGRIC. ENG'RS 337, 343 (2002)).

> BMPs are effective and efficient because they are tailored to local conditions in individual States. A host of local conditions influence the choice of BMPs, including: forest conditions (e.g., size, type, and harvesting and regeneration methods); topography; soil erodibility and infiltration characteristics; precipitation amount, intensity, and form (e.g., snow); and forest ownership (i.e., industrial, private, state government, or federal government).[73]

BMPs govern the design of modern logging roads to control erosion and limit sediment runoff to nearby streams.[74] Instead of being simply a flat surface, "a forest road is designed in light of local conditions, including the slope on which it sits, which in turn dictates the type of road drainage structures that will be needed, including, as appropriate, culverts, ditches, waterbars, dips, and other drainage structures to manage and control rainfall flows."[75] Such drainage structures reduce the impacts of erosion in degrading road surfaces and reduce the discharge of sediment into rivers and streams.[76]

BMP implementation rates throughout the country are estimated at 89%.[77] Given the high rate of compliance with the "over 150 state laws nationwide that address non-point source pollution from silviculture,"[78] NPDES permitting requirements for logging roads presented the timber industry with a significant additional regulatory burden without an assurance that such burden would improve water quality in the nation's rivers and streams.

V. THE AFTERMATH OF THE NINTH CIRCUIT'S DECISION

In the wake of the Ninth Circuit's ruling, stakeholders moved to unwind—or at least blunt the impact of—the decision. Congress initially developed momentum toward an amendment to the CWA, placing a temporary moratorium on implementation of the Ninth Circuit's decision,[79] and multiple bills were introduced to overturn the decision by codifying the Silvicultural Rule as an amendment to the CWA.[80] All of the bills, however, stalled in Congress.

A. Appeals to the Supreme Court

While Congress considered amendments to the CWA to resolve the Ninth Circuit's decision, the defendants and intervenor-defendants, along with various amici including states and industry groups, filed petitions for a writ of certiorari with the Supreme Court. The petitions focused on the following issues: 1) The

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73 *Id.* at 22.

74 *Id.* at 32.

75 *Id.* at 20.

76 *See* SAF Amicus Brief*, supra* note 48, at 7 ("BMPs are an effective and efficient approach to manage stormwater runoff in areas where silvicultural activities have occurred, including runoff from forest roads, ditches, and culverts.").

77 George G. Ice et al., *Trends for Forestry Best Management Practices Implementation*, 108 J. FORESTRY 267, 271 (2010).

78 PLF Amicus Brief, *supra* note 51, at 11 (citing Pamela J. Edwards & Gordon W. Stuart, *State Survey of Silviculture Nonpoint Source Programs: A Comparison of the 2000 Northeastern and National Results,* 19 N. J. APPLIED FORESTRY 122 (2002)).

79 *See* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 1046, 1047 (2011).

80 S. 1369, 112th Cong. (2011).

Ninth Circuit did not give required *Chevron* deference to EPA's interpretation of its own regulations; 2) the Ninth Circuit's decision conflicts with rulings from other circuit courts, which have affirmed EPA's treatment of channeled forest road runoff as a nonpoint source that is not subject to NPDES permitting; and 3) the impacts of *NEDC v. Brown* on parties that own, manage, and use logging roads present issues of great national importance.[81]

Instead of deciding whether to grant certiorari in December 2011, the Supreme Court first invited the Solicitor General to file a brief expressing the views of the United States.[82] The United States took that opportunity to issue a notice of intent to revise its stormwater regulations specifying that NPDES permits are not required for stormwater discharges associated with logging roads, and then, a day later, to submit a brief to the Supreme Court encouraging the denial of certiorari, largely on that basis.

B. EPA Rulemaking

On May 23, 2012, EPA issued a notice stating its intent to "expeditiously" propose revisions to its Phase I stormwater regulations "to specify that stormwater discharges from logging roads are not stormwater discharges 'associated with industrial activity.'"[83] Although EPA no doubt intended this notice to influence the Court's decision regarding whether to accept review of the Ninth Circuit's decision—a point that it made clear in its amicus brief before the Court—EPA nevertheless published its proposed rule[84] despite the Supreme Court's decision to grant review.

EPA's proposed rule was intended to clarify that stormwater discharges from logging roads do not fall within the Phase I stormwater regulations. In particular, the proposed rule specified that the only facilities under the SIC "logging" category (SIC 2411) of "industrial," and thus subject to the Phase I regulations, are "rock crushing, gravel washing, log sorting, and log storage."[85] According to the preamble to the proposed rule, logging roads also differ from the "immediate access roads" covered by the Phase I regulations because logging roads have "multiple uses, including recreation and general transportation, and commonly extend over long distances."[86]

The United States' amicus brief to the Supreme Court argued that EPA's revisions to its regulations "would render moot petitioners' objections to the court of appeals' conclusion that such discharges are subject to NPDES permitting requirements under the current regulatory scheme," and potential grievances with

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81 *See* Brief for the States of Arkansas et. al. as Amici Curiae Supporting Petitioners at 1–2, *Decker*, 133 S. Ct. 1326 (2013) (NOS. 11-338, 11-347) (arguing that the suit should have been viewed as a direct challenge to the Silvicultural Rule itself).

82 Lawrence Hurley, *Justices Ask Obama Admin to Weigh in on Pollution Permitting for Logging Roads*, GREENWIRE, Dec. 12, 2011, http://www.eenews.net/stories/1059957530 (last visited Nov. 23, 2013).

83 Revisions to Stormwater Regulations: NPDES Permit is Not Required for Stormwater Discharges from Logging Roads, etc., 77 Fed. Reg. 30,473, 30,473 (proposed May 23, 2012).

84 Notice of Proposed Revisions to Stormwater Regulations to Clarify that an NPDES Permit Is Not Required for Stormwater Discharges from Logging Roads, 77 Fed. Reg. 53,834, 53,837 (Sept. 4, 2012).

85 *Id.*

86 *Id.* at 53,836.

"the ultimate outcome of EPA's rulemaking process" could be addressed through judicial review.[87]

With uncharacteristic speed, EPA released its final rule less than three months after issuing the proposed rule—only days before oral argument.[88] Consistent with the notice of intent, EPA's final rule revised the Phase I stormwater regulations to exclude logging roads from the Phase I program.[89] EPA also stated that because stormwater discharges from logging roads could fall within the Phase II program, EPA would consider appropriate regulatory approaches to these discharges as EPA:

> continues to review available information on the water-quality impacts of stormwater discharges from forest roads [including logging roads], as well as existing practices to control those discharges and is considering a range of options to address such discharges, which could include designating a subset of stormwater discharges from forest roads for regulation under the Agency's section 402(p) rulemaking authority.[90]

VI. THE SUPREME COURT

Immediately before EPA published its proposed rule, the petitioners filed their merits briefs before the Supreme Court, arguing that the Ninth Circuit failed to defer properly to EPA's determination that NPDES permits were not required.[91]

The petitioners asserted that EPA's interpretation in the Silvicultural Rule that runoff from logging roads is not a "point source" is entitled to deference given the ambiguity in the statute.[92] Moreover, even if logging road runoff is a point source, according to the petitioners, it is not "associated with industrial activity" under EPA's interpretation of that phrase in its Phase I regulations—an interpretation that is deserving of deference—and is therefore excluded from the NPDES program.[93] The petitioners argued the Phase I rule explicitly carved out discharges from facilities or activities covered by the Silvicultural Rule and that logging roads are not "immediate access roads," as the Ninth Circuit concluded, because they are neither "within" nor "at facilities."[94] Indeed, according to the petitioners, logging roads are "used for a wide range of activities" including timber operations, but also recreation, fire protection, and transportation.[95] Additionally, the petitioners pointed

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87 Brief for United States as Amicus Curiae Supporting Petitioners at 18, *Decker*, 133 S. Ct. 1326 (2013) (NOS. 11-338, 11-347), [hereinafter U.S. Amicus Brief].

88 Revisions to Stormwater Regulations to Clarify that an NPDES Permit is Not Required for Stormwater Discharges from Logging Roads, 77 Fed. Reg. 72,970 (Dec. 7, 2012) (codified at 40 C.F.R. 122.26 (2013).

89 *Id.* at 72,973.

90 *Id.* at 72,972.

91 Brief for Petitioner at 18, *Decker*, 133 S. Ct. 1326 (2013) (NO. 11-338). The petitioners also argued that the lower courts did not have jurisdiction over the lawsuit, because the suit should have been viewed as a direct challenge to the Silvicultural Rule and the Phase I Stormwater Rule in an enforcement proceeding, the time for which is long past under the CWA's 120-day statute of limitations. *Id.* at 13.

92 *Id.* at 21–22.

93 *Id.* at 9–10.

94 Reply Brief for Petitioners at 7, Georgia-Pacific W., Inc. v. NEDC, 133 S. Ct. 1326 (2013) (NO. 11-347). Cases 11-338 and 11-347 were consolidated on June 25, 2012. Georgia-Pacific W., Inc. v. NEDC, 133 S. Ct. 23 (2012).

95 Brief for Petitioners at 41, Georgia-Pacific West, Inc., Hampton Tree Farms, Inc., Stimson Lumber Co., Swanson Grp., Inc., American Forest & Paper Ass'n, Or. Forest Industries Council, &

out the costs and uncertainty that would result from upholding the Ninth Circuit decision—both to stakeholders and regulators—as well as the undesirable invasion of traditional state authority over nonpoint source discharges.[96]

A. The United States' Amicus Brief

The United States filed an amicus brief in support of the petitioners on the same day the proposed rule was published in the Federal Register, largely tracking the petitioners' argument that the Ninth Circuit failed to defer to EPA's reasonable interpretation of the CWA in the Silvicultural Rule, as well as the agency's interpretation of the scope of its own Phase I regulations.[97]

Consistent with the tenor and purpose of EPA's proposed rule, the United States's brief attempted to provide a shortcut for the Court by focusing on EPA's Phase I regulations. The United States argued the Supreme Court did not need to determine whether discharges from logging roads constitute "point sources" at all, because under EPA's reasonable interpretation of its own regulations, such discharges are not subject to permitting requirements in the Phase I program.[98] The United States rejected the Ninth Circuit's holding that the pertinent discharges are "associated with industrial activity," and asserted that a decision to this effect "would be the soundest and most straightforward way of deciding th[e] case."[99] The United States did, however, deviate from industry petitioners by arguing that the lower courts properly exercised jurisdiction over the lawsuit.[100] According to the United States, the Ninth Circuit did not invalidate EPA's Phase I regulations, but rather interpreted them, albeit erroneously.[101] The United States also asserted that the Ninth Circuit offered a permissible interpretation of the Silvicultural Rule to "bring it into harmony with the" Ninth Circuit's view of the CWA, even though the Ninth Circuit failed to afford EPA appropriate deference in doing so.[102]

B. Other Amicus Briefs

By the time the Court heard oral argument, twenty-two amici had submitted briefs, the vast majority of which supported the petitioners.[103] Among the amici supporting the petitioners were the U.S. Chamber of Commerce, American Farm Bureau Federation, National Governors Association, National Association of Counties, National Conference of State Legislatures, thirty states, national, regional, and state forestry trade associations, the Pacific Legal Foundation, forest land owners, and numerous other organizations and associations that represent companies and families that depend on forests and rangelands. The majority of the

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Tillamook Cnty. v. NEDC, 133 S. Ct. 1326 (2012) (No. 11-347) (cases 11-338 and 11-347 consolidated on June 25, 2012) (internal quotation marks omitted).

96 *See id.* at 28, 46.

97 *See generally* U.S. Amicus Brief, *supra* note 87.

98 *See id.* at 12, 14, 20.

99 *Id.* at 14.

100 *Id.* at 11.

101 *Id.* at 14–15.

102 *Id.* at 10 (citation omitted).

103 *Decker,* 133 S. Ct. 1326, 1338 (2013) (Roberts C.J., concurring).

amici underscored the petitioners' arguments regarding the validity of the Silvicultural Rule and the Phase I stormwater regulations and the lack of deference afforded to EPA regarding those rules.[104]

C. Oral Argument and Supplemental Briefing

The late arrival of EPA's final rule perplexed and clearly frustrated the Supreme Court during oral argument. Chief Justice Roberts chided the Deputy Solicitor General for blindsiding the Court with the final rule instead of letting the Court know in early November that the rule had been submitted to the Office of Management and Budget for final approval.[105] The Justices focused the majority of their questions on what the Court's proper role should be in the wake of the EPA rule, particularly given that the petitioners could still face penalties, attorney's fees, and potential injunctive relief for past activities that are now consistent with CWA regulations.[106]

To assist the Court's determination of whether and to what degree the Court should address the merits of the cert petitions, the parties submitted supplemental briefing in January 2013 that was limited to the impact of EPA's rule on the case.[107] The respondent argued that the Court should either dismiss the case as improvidently granted, thereby allowing the lower courts to grapple with the impact of the EPA rule, or, in the alternative, affirm the Ninth Circuit.[108] The respondent argued that it retained prospective relief because the new rule did not categorically exempt all logging roads from the NPDES program, and retroactive relief, because a valid claim existed for past violations notwithstanding the new rule.[109] Decker and EPA urged the Court to determine that the issue of whether the Ninth Circuit failed to defer to EPA's interpretation of its prior rule was moot in light of EPA's new Phase I rule, but disagreed regarding whether the Court should nonetheless address the Ninth Circuit's statutory interpretation of "point source" in this context.[110] While Decker believed the Court could yet resolve that issue, EPA

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104 Several amici, including the Chamber of Commerce, focused on the impropriety of allowing jurisdiction, in part highlighting that allowing jurisdiction in this instance would propagate uncertainty regarding the validity of regulations that have long been in place and that could now plausibly be subject to challenge. The National Alliance of Forestry Owners and other similarly situated organizations noted that the impact of the Ninth Circuit decision could extend well beyond the CWA because numerous other "federal statutes limit judicial review of agency rules to suits against the agency in particular venues, subject to specific filing deadlines," including the Clean Air Act, Surface Mining Control and Reclamation Act (SMCRA), Safe Drinking Water Act, Resource Conservation and Recovery Act, and others. Brief for National Alliance of Forestry Owners et al. as Amicus Curiae Supporting Petitioners at 21, *Decker*, 133 S. Ct. 1326 (2013) (NOS. 11-338, 11-347) [hereinafter NAFO Amicus Brief]. Thus, agency "interpretations" of regulations enacted under these various statutes could potentially be subject to challenge under the Ninth Circuit decision.

105 Transcript of Oral Argument at 19–20, *Decker*, 133 S. Ct. 1326 (2013) (NOS. 11-338, 11-347).

106 *Id.* at 26–30, 40.

107 *See* Supplemental Brief for Petitioners, *Decker*, 133 S. Ct. 1326 (2013) (NO. 11-347); Supplemental Brief for the United States as Amicus Curiae Supporting Petitioners, *Decker*, 133 S. Ct. 1326 (2013) (NOS. 11-338, 11-347); Supplemental Brief for Respondent, *Decker*, 133 S. Ct. 1326 (2013) (NOS. 11-338, 11-347).

108 Supplemental Brief for Respondent *supra* note 107, at 13.

109 *Id.* at 3.

110 *Compare* Petitioner's Reply Brief at 24–25, *Decker*, 133 S. Ct. 1326 (2013) (NO. 11-338) (arguing that the court should defer to EPA's interpretation of "point source" and reverse the Ninth

urged the Court to allow lower courts to address it during review of EPA's new rule.[111] Georgia-Pacific West, Inc. and other members of the timber industry argued that the new EPA rule did not moot the case and that, even if the Court declined to address the merits, it should nevertheless vacate and remand the Ninth Circuit's decision.[112]

D. The Supreme Court's Opinion

In an opinion written by Justice Kennedy, the Supreme Court reversed the Ninth Circuit's decision, largely following the shortcut that the United States set out in its amicus brief.[113] The Court did not address whether the discharges at issue were from "point sources" under the CWA and the Silvicultural Rule, instead holding that the stormwater discharges were not "associated with industrial activity" and therefore did not fall within the Phase I stormwater regulations.[114] In doing so, the Court did not reach the scope or validity of the new EPA rule, instead extending deference to EPA's interpretation that its prior Industrial Stormwater Rule did not cover the discharges at issue.[115]

The Court began its opinion by concluding that the new EPA rule did not moot the cert petitions because the Court retained the ability to grant effectual relief over a live controversy "regarding whether petitioners may be held liable for unlawful discharges under the earlier version of the Industrial Stormwater Rule."[116] The Court also acknowledged that NEDC purported to have potential claims under the new rule, but that, nonetheless, even the past rule might afford NEDC the opportunity to pursue penalties, attorney fees, and injunctive relief for past discharges.[117]

The merits portion of the opinion, in which all but Justice Scalia joined,[118] analyzed whether to defer to EPA's interpretation that the prior Phase I regulations did not reach the respondents' stormwater discharges.[119] The Court summarily rejected NEDC's argument that the statutory phrase—"associated with industrial

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Circuit), *with* Supplemental Brief for the United States as Amicus Curiae Supporting Petitioners *supra* note 107, at 1, 8–9 (NOS. 11-338, 11-347) (arguing that the case should be dismissed as moot and that EPA's interpretation of "point source" should be addressed in a separate suit).

111 *Compare* Petitioner's Reply Brief *supra* note 110 at 24–25 (requesting that the Supreme Court reverse the Ninth Circuit's interpretation of "point source"), *with* Supplemental Brief for the United States as Amicus Curiae Supporting Petitioners *supra* note 107, at 4–5 (arguing that dispute regarding EPA's interpretation of "point source" would be best resolved in a separate challenge to the amendment itself).

112 Supplemental Brief for Petitioners *supra* note 107, at 1, 9.

113 Supplemental Brief for the United States as Amicus Curiae Supporting Petitioners *supra* note 107, at 2–3.

114 *Decker*, 133 S.Ct. 1326, 1337 (2013).

115 *Id.*

116 *Id.* at 1335. The Court also concluded that the lower courts properly exercised jurisdiction over the case, concluding that the Ninth Circuit "was correct to rule that the exclusive jurisdiction mandate" in CWA section 1369(b) did not apply, because it "does not bar a district court from entertaining a citizen suit under § 1365 when the suit is against an alleged violator and seeks to enforce an obligation imposed by the Act or its regulations." *Id.* at 1334. According to the Court, NEDC's claim did not challenge an existing rule; it sought enforcement under a permissible reading of a rule. *Id.*

117 *Id.* at 1335.

118 *Id.* at 1330, 1338–39 (noting Justice Breyer took no part in the decision of the case).

119 *Id.* at 1337.

activity"—unambiguously covered discharges of channeled stormwater runoff from logging roads.[120] The Court opined that the terms "industrial" and "industry" can have multiple meanings, covering either "business activity in general," or a more limited meaning of "economic activity concerned with the processing of raw materials and manufacture of goods in factories"—the latter of which does not "necessarily encompass outdoor timber harvesting."[121]

The Court viewed NEDC's second argument as "more plausible"—that EPA's prior Industrial Stormwater Rule unambiguously required permits for the discharges at issue by requiring permits for stormwater discharges from "immediate access roads . . . used or traveled by carriers of raw materials" for particular categories of industries.[122] The Court evaluated each party's interpretation of whether "logging" qualifies as a "category of industry" subject to the provision.[123]

Ultimately, the Court sided with EPA's assertion that the relevant SIC code was meant to refer to "traditional industrial sources such as sawmills."[124] The Court found traction in the definition of discharges "associated with industrial activity" as discharges "'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.'"[125] According to the Court, EPA reasonably concluded 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.'"[126] The Court rejected NEDC's assertion that the rule elsewhere required NPDES permits for stormwater associated with other outdoor activity, such as mining, landfills, and large construction sites, because EPA could reasonably conclude that those types of activities "tend to be more fixed and permanent than timber-harvesting operations are and have a closer connection to traditional industrial sites."[127]

Having concluded the Phase I regulations are subject to multiple interpretations, the Court cited the "well established" rule that "an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation."[128] In no doubt aided by information in multiple amicus briefs, the Court observed that EPA's interpretation of its rule—and its treatment of logging road runoff—"exists against a background of state regulation with respect to stormwater runoff from logging roads," such as Oregon's "extensive effort to develop a comprehensive set of best practices to manage stormwater runoff from logging roads."[129] As a result, EPA could have determined, based on its "broad discretion" that the CWA affords to EPA "in the realm of

120 *Id.* at 1336 (citing Federal Water Pollution Control Act, 33 U.S.C. § 1342 (2006)).
121 *Id.*
122 *Id.* (citing 40 C.F.R. § 122.26(b)(14) (2006)).
123 *Id.* at 1336–37.
124 *Id*. at 1336 (internal quotation marks, and citation, and emphasis omitted).
125 *Id.* at 1337 (quoting 40 C.F.R. § 122.26(b)(14) (2006)).
126 *Id*. at 1337 (citations omitted).
127 *Id*.
128 *Id*. (internal quotation marks and citation omitted).
129 *Id*. at 1338.

stormwater runoff," that "further federal regulation in this area would be duplicative or counterproductive."[130] The Court concluded that the prior version of EPA's Industrial Stormwater Rule, "as permissibly construed by the agency, exempts discharges of channeled stormwater runoff from logging roads from the NPDES permitting scheme," and declined to address whether the conveyances at issue constitute point sources.[131]

VII. POTENTIAL IMPLICATIONS

For obvious reasons, the Supreme Court's decision to overturn the Ninth Circuit provided substantial relief to the timber industry. By concluding that stormwater runoff from logging roads does not require NPDES permits, the Supreme Court appeared to return regulation of this industry to state authorities.[132] But the future role of EPA in regulating stormwater runoff from logging roads—and forest roads generally—remains uncertain. The limited focus of the Supreme Court's decision and its relationship to EPA's new rule leaves several questions unanswered.

Shortly after the Supreme Court issued its decision, NEDC filed a motion with the Ninth Circuit requesting the court to release a new opinion reversing the district court's conclusion that logging roads are nonpoint sources under the Silvicultural Rule.[133] On August 30, 2013, the Ninth Circuit granted this request in a three-paragraph decision, holding the Court "left intact" its conclusion that discharges from "a system of ditches, culverts, and channels" into a water body constitutes "a discharge from a point source."[134] The Ninth Circuit also held that, although the Supreme Court reversed the aspects of the Ninth Circuit's decision "based on the preamendment" Phase I regulations, the Court did not address EPA's new rule.[135] The Ninth Circuit remanded the case to the district court without providing guidance regarding how to resolve the case "consistent with the Supreme Court's opinion."[136]

The Ninth Circuit's most recent decision provides a platform for NEDC to argue, in its ongoing challenge to EPA's new Phase I rule, that discharges from certain types of logging roads require CWA permits notwithstanding EPA's new rule. NEDC has choreographed aspects of this argument in briefing and oral argument before the Supreme Court. In supplemental briefing before the Supreme Court, filed after oral argument, NEDC argued that even if EPA's new rule "reject[s] the Ninth Circuit's decision insofar as a it can be read to hold that *all* logging roads are associated with industrial activity," it leaves open the possibility that *some* logging roads could qualify as "immediate access roads" for industrial activities.[137] NEDC also contends EPA's new rule did not specifically address

130 *Id.*

131 *Id.*

132 *Id.* at 1331.

133 Plaintiff-Appellant's Motion for Entry of an Order Reversing the Judgment of the District Court and Remanding this Case with Instructions at 10, Nw. Envtl. Def. Ctr. v. Decker, No. 07-35266 (9th Cir. Aug. 30, 2013).

134 Nw. Envtl. Def. Ctr. v. Decker, No. 07-35266 (9th Cir. Aug. 30, 2013).

135 *Id.*

136 *Id.*

137 Supplemental Brief for Respondent *supra* note 107, at 2.

"what it means to be 'associated with' a given industrial activity," or otherwise conclude that logging roads can never be "associated with" industrial activity, such as "sawmills or other logging facilities."[138] At this time, the petitioner's appeal of the new EPA rule is stayed until October 17, 2013.[139]

With the decision now back in the hands of the district court, the parties will likely be asked to brief the district court on how to move forward. Interpretation of EPA's new rule could be featured in that dispute. During oral argument before the Supreme Court, NEDC suggested it would pursue "forward-looking relief" from the defendants below, in part because "the new rule simply violates the statute" and because the new rule does not necessarily cover the discharges at issue.[140]

Setting aside how litigation regarding EPA's new rule will be resolved, EPA will presumably move forward with addressing whether and how stormwater runoff from logging and other forest roads is subject to potential regulation under EPA's Phase II program. In Federal Register notices regarding the new Phase I rules, EPA has stated it is assessing whether and how to address logging roads within Phase II.[141] Depending on the breadth of this rulemaking, the timber industry could grapple with guidance and BMPs that conflict with state-specific requirements. While EPA "believes that the broad range of flexible approaches under section 402(p)(6) may be well suited to address the complexity of forest road ownership, management, and use,"[142] it remains to be seen how any Phase II regulations may impact the timber industry.

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138 *Id.* at 1–2. *See also* Transcript of Oral Argument *supra* note 105, at 35–45.

139 Nw. Envtl. Defense Ctr. v. EPA, No. 13-70057 (9th Cir. July 22, 2013) (order granting stay).

140 *See* Transcript of Oral Argument *supra* note 105, at 31); *see also id.* at 35–45.

141 Notice of Intent to Revise Stormwater Regulations to Specify that an NPDES Permit is Not Required for Stormwater Discharges from Logging Roads and to Seek Comment on Approaches for Addressing Water Quality Impacts from Forest Road Discharges, 77 Fed. Reg. 30,473, 30,474 (May 23, 2012); Notice of Proposed Revisions to Stormwater Regulations to Clarify that an NPDES Permit is not Required for Stormwater Discharges from Logging Roads, 77 Fed. Reg. 53,834, 53,836 (Sept. 4, 2012) ("[T]he Agency continues to review available information on the water-quality impacts of stormwater discharges from forest roads, which include logging roads as discussed above, as well as existing practices to control those discharges and is considering a range of options to address such discharges, which could include designating a subset of stormwater discharges from forest roads for regulation under the Agency's section 402(p) rulemaking authority.").

142 77 Fed. Reg. at 53,836.

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