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Enough is Enough! Stormwater Discharged From Man-Made Pipes, Ditches, and Channels Along Logging Roads is Not Nonpoint Source "Natural Runoff" 757
Paul Kampmeier

This Article introduces readers to the recent U.S. Supreme Court decision in *Decker v. Northwest Environmental Defense Center*, a Clean Water Act citizen suit seeking to limit discharges of heavily polluted stormwater from industrial logging roads in Oregon's Tillamook State Forest. The author explains the impetus for the litigation and how the Supreme Court and court of appeals decisions correct a longstanding error of law, finally opening a path for conservation-minded citizens to obtain better programs to protect water quality and aquatic species from logging road pollution.

On Judicial Review Under the Clean Water Act in the Wake of *Decker v. Northwest Environmental Defense Center*: What We Now Know and What We Have Yet to Find Out 767
Allison LaPlante and Lia Comerford

Judicial review under the Clean Water Act (CWA) is confusing and messy. Circuits are split on the scope of the CWA's direct judicial review provision, section 509, and any given circuit's own precedent is sometimes difficult to reconcile internally. Litigants are filing challenges to Environmental Protection Agency (EPA) decisions in the district courts and simultaneously "protectively" filing the same challenges in the courts of appeals. And defendants in citizen enforcement actions that implicate a regulatory regime are attempting to cast the litigation as direct challenges to EPA rules, time-barred under CWA section 509(b)'s strict 120-day period. Last term the United States Supreme Court had the opportunity, in *Decker v. Northwest Environmental Defense Center* (*Decker*), to provide guidance regarding the scope of section 509(b). While the Court addressed the

"jurisdictional" issues, concluding that section 509(b) presented no bar to the Court's hearing the case, its opinion raised more questions than it answered. This Article explores the jurisdictional issues in *Decker* and the evolution—or perhaps more accurately described as sideways development—of the case law on section 509(b), and argues for a narrow interpretation of section 509 that stays true to the statute's text. This outcome would give effect to the precision with which Congress spoke when drafting this statutory provision, and it would avoid many significant consequences that would otherwise flow from an expansive interpretation, as evidenced by *Decker* itself.

Questions Remain for the Timber Industry After Supreme Court's Decision in *Decker v. Northwest Environmental Defense Center* 827
Meline G. MacCurdy and Daniel L. Timmons

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.

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Daniel Mensher

One of the central issues at stake in *Decker v. NEDC* was whether logging operations and their related road systems fell within EPA's "Industrial Stormwater Rule." In deciding that they did not, the Supreme Court invoked *Auer v. Robbins* to defer to EPA's interpretation of its rule. While deference to agency interpretations of regulations is not new and has garnered little academic interest, what makes *Auer* deference particularly troubling in Decker is that EPA offered its interpretation for the first time in an amicus brief in *Decker*. This is problematic for several reasons, including that this application of *Auer* essentially allows an agency to change its regulations without going through any public process at all, as Justice Scalia, the lone dissenting Justice in *Decker*, explained.

The question is, without *Auer*, what should courts do with agency interpretations of their regulations? In this Article, I suggest that the rationales for deferring to agency interpretations of statutes provide a sensible way to shape deference to regulatory interpretations. As a result, I conclude that a flexible, sliding scale approach to weighing agency regulatory interpretations would be a fairer, more logical, and legally defensible approach.

State Environmental Policy Innovations: North Carolina's Clean Smokestacks Act..... 881
Richard N. L. Andrews

An important and longstanding limitation of the federal Clean Air Act was its failure to assure cleanup of the hundreds of old coal-fired electric power plants that were built prior to the 1970s, most of which were "grandfathered" and thus continued to operate. In 2002, North Carolina enacted an unusually innovative state-level solution to this problem: a permanent, year-round cap on overall NO_x and SO_2 emissions from each of its two major utilities, stringent enough to require cleanup or retirement of all forty-five of their coal-fired units. Using the leverage of this law, North Carolina also brought legal actions against its principal upwind source (TVA) and the EPA, leading to a similar cleanup commitment by TVA and a federal judicial decision to assure protection of downwind states under EPA's Clean Air Interstate Rule.

This Article documents the history of how the Clean Smokestacks Act was developed and enacted, its implementation and consequences, and the lessons it offers for other environmental law and policy initiatives. In contrast to the gridlocked adversarial politics of the federal Congress in recent years, it provides an example of a case in which stakeholders with different interests were able to negotiate a compromise solution that provided benefits to each participant, as well as major benefits to the public. It also represents a reversal of the more familiar pattern of environmental federalism: In this case a state initiative capped emissions within its own borders more stringently than federal requirements, and leveraged this commitment with legal pressures to achieve similar results from out-of-state upwind sources and the federal government.

Preserving Perpetuity?: Exploring the Challenges of Perpetual Preservation in an Ever-Changing World..... 941
Jess R. Phelps

One of the earliest examples of the uses of history is recorded by Aesop in the story of the Fox and the Lion. The Fox, as most of us remember, was invited to dinner by the Lion—a signal honor. Upon arriving at the appointed hour, the Fox observed that the footprints in the dust before the den, made by previous visitors on similar occasions, pointed only inward. The Fox read the history and stood the Lion up.

COMMENT

Seeing the Forest for the Trees: Regulating Carbon Dioxide Emissions from Bioenergy Production Under the Clean Air Act… 989
Ameilia Reiver Schlusser

Greenhouse gas emissions from new and modified major stationary sources are currently regulated under the Prevention of Significant Deterioration (PSD) program of the Clean Air Act. In 2011, EPA issued a final rule exempting stationary sources of biogenic CO_2 emissions from regulation under the Clean Air Act for a period of three years. In this Deferral Rule, EPA asserted that a permanent exemption may be warranted if the agency determines that biogenic emissions have a negligible impact on net atmospheric carbon concentrations. The D.C. Circuit vacated the Deferral Rule in 2013, on the grounds that the administrative law doctrines invoked by the agency failed to legally justify the temporary exemption. However, the court explicitly refrained from deciding whether the Clean Air Act grants EPA authority to permanently exempt sources of biogenic CO_2 emissions from regulation under the PSD program. This Note considers whether the statute provides EPA with sufficient discretion to permanently exempt biogenic emissions from regulation, and concludes that the agency does not have authority to issue a permanent exemption in this context because the Clean Air Act does not permit EPA to consider the net atmospheric impact of a regulated air pollutant when determining whether a source's emissions trigger PSD program requirements. However, EPA may have discretion to consider the net impacts of biogenic emissions when establishing the emissions limitations imposed on a specific source.