E – OUTLOOK

ENVIRONMENTAL HOT TOPICS AND LEGAL UPDATES

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Decker v. NEDC, 568 U.S. _____ (2013)

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A business lawyer's job is to get a good result for the client(s) and the March 20, 2013 Supreme Court Opinion in *Decker v. Northwest Environmental Defense Center* ("NEDC"), 568 U.S. ____, 2013 WL 1131708 (2013) is an excellent result for all of the defendants in the case. It is an emphatic 7-1 decision, rejecting the proposition that trucking logs over rural roads requires haulers to have the same type of industrial stormwater permits that a sawmill or factory has for its manufacturing operations. From a client perspective, Per Ramfjord and his team at Stoel Rives LLP and Tim Bishop and his team at Mayer Brown LLP deserve nothing but high praise for securing for their clients this reversal of the Ninth Circuit Court of Appeals, and vindication of the summary judgment ruling of U.S. District Court for the District of Oregon Judge Garr King. Although this decision brings finality for the parties, for lawyers and Supreme

Court followers generally, the Court's opinion raises many issues to cogitate on both now and going forward. Some of those issues are the subject of this case note.

Legislative Framework

To summarize the issues before the Court and its ruling, one needs to understand just a handful of statutory and regulatory provisions. The Clean Water Act ("CWA") requires National Pollutant Discharge Elimination System ("NPDES") permits for discharges from point sources into the navigable waters of the United States. See 33 U.S.C. §§1311(a), 1362(12). One of the Environmental Protection Agency's ("EPA") implementing regulations, the Silvicultural Rule, specifies that a few logging-related discharges are point sources, but that harvesting operations from which there is natural runoff are not. 40 CFR §122.27(b)(1). 33 U.S.C. §1342(p)(1) exempts from permitting discharges composed entirely of stormwater unless the discharge is "associated with industrial activity." §1342(p)(2)(B). Under the EPA's Industrial Stormwater Rule, the term "associated with industrial activity" covers only discharges "from any conveyance that is used for collecting and conveying stormwater and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 CFR §122.26(b)(14).

Disposition

Respondent NEDC filed a citizen suit under 33 U.S.C. §1365, alleging that the defendants had not obtained NPDES permits before discharging stormwater runoff into two Oregon rivers. The District Court dismissed the action for failure to state a claim, concluding that NPDES permits were not required under the CWA and the Silvicultural Rule. The Ninth Circuit reversed, holding that the conveyances were point sources under the Silvicultural Rule and that the discharges were "associated with industrial activity" under the Industrial Stormwater Rule.

Just before oral argument at the Supreme Court, the EPA issued a final rule amending the Industrial Stormwater Rule, with the goal of clarifying that the NPDES permit requirement applies only to logging operations involving rock crushing, gravel washing, log sorting, and log storage facilities, which are all activities listed as point sources in the Silvicultural Rule.

The Supreme Court reversed the Ninth Circuit. It held: (1) that 33 USC §1369(b), governing challenges to agency actions, is not a jurisdictional bar; (2) the EPA's recent amendment to the Industrial Stormwater Rule does not make the case moot; (3) the Silvicultural Rule is ambiguous as to whether stream-side ditches and culverts are point sources; and (4) the preamendment version of the Industrial Stormwater Rule, as

permissibly construed by the EPA, exempts discharges of channeled stormwater runoff from logging roads from the NPDES permitting scheme.

Jurisdiction

In order to get to the merits, the Court had to find both that it and the courts below had jurisdiction, and that the case was not moot as a result of the subsequent EPA rulemaking. The jurisdictional question was whether NEDC's original claim was properly one for citizen-suit enforcement under Section 1365 of the CWA, or whether it should have fallen under Section 1369 governing review of rules, in which case it would likely have been time-barred and certainly filed in the wrong court. The Court decided that EPA's Silvicultural Rule, from which EPA argued discharges from logging road ditches are not point-source discharges and therefore are not subject to NPDES stormwater permits, was sufficiently ambiguous that it was proper for NEDC to claim that EPA had improperly interpreted or applied the rule. So what happens if in the future, if EPA makes a new final decision saying that CWA permits are not required for some new activity—say rural landing sites for returning intergalactic vehicles? Is that decision subject to review in the Court of Appeals under Section 1369, or not until the first instance of such a facility being constructed and used, at which point it would be subject to a citizen suit in District Court for CWA enforcement under Section 1365? This issue is actually a "live one" right now because even though NEDC successfully argued

to the Supreme Court that the citizen suit was a proper avenue of challenge of the old Industrial Stormwater Rule, NEDC has now challenged EPA's new amended Industrial Stormwater Rule, discussed below, in the Ninth Circuit, under Section 1369.

Mootness

After finding it had jurisdiction, the Court had to decide that the case was not moot. This issue arose because three days before the Court heard oral argument, EPA finalized its amendment to the Industrial Stormwater Rule, which stated more emphatically that log hauling was not generally subject to CWA permitting. The amendment superseded the rule in question before the Court. The State of Oregon and EPA argued for mootness, but both NEDC and the timber company defendants argued that the issue was still alive, due primarily to the possibility of penalties for past practices. The Court decided the case was not moot. It seemed to want to try to put an end to the primary question before it, whether under the old rule or the new, since NEDC made it clear at oral argument that if it prevailed, it would continue to fight under both the old rule on remand, and the new rule on review. It is important to note that the Court did not rule on the merits of whether penalties could actually be imposed when there was no continuing violating conduct (assuming the new rule is ultimately upheld). So that issue is alive for another day. If activity is determined in a citizen suit

to be a violation of a regulation that is subsequently changed, are penalties still available for the purely past time period when the activity constituted a violation?

The Silvicultural Rule

The Silvicultural Rule, 40 CFR §122.27, defines timber harvesting operations "from which there is natural runoff" as a non-point source. EPA interpreted such operations to include those where runoff is channeled through haul-road ditches and culverts. NEDC said this definition only applied to sheet flow, and that runoff channeled through stream-side ditches and culverts were, by Statute, point sources. The Court simply decided that the Silvicultural Rule was ambiguous. It did not decide whether channeled runoff can lawfully be considered by EPA to be a non-point source. The Court raised the question of whether EPA's interpretation is consistent with the CWA statute, but the Court did not answer that question. So the question of whether or not discharges from stream-side ditches and culverts are or are not point sources remains an issue for another day.

The Industrial Stormwater Rule

Whether or not discharges are point sources, they are only required to be permitted if they are associated with an industrial activity. EPA has consistently held that log hauling does not occur at industrial "facilities" or "establishments" which are much more permanent sites than outdoor timber handling operations outside the

confines of mills. The Court acknowledged that EPA requires NPDES permits for stormwater associated with some other types of outdoor activities including mining, landfills, and large construction sites, but the Court thought it was reasonable for EPA to conclude that those activities tend to be relatively fixed and permanent, as compared to log hauling.

Relying on *Auer v. Robbins,* 519 U.S. 452, 117 S.Ct 905, (1997), the Court determined that EPA's interpretation of its own regulation should be upheld unless it was plainly erroneous. The Court bolstered this conclusion in this case by noting that EPA did not develop this interpretation post hoc—it has consistently interpreted this rule in this manner for decades, and that the State of Oregon has made an extensive effort to develop best practices to regulate stormwater runoff from logging roads—a subject matter in which the State has considerable expertise.

Deference

Justices Roberts, Alito, and Scalia signaled strongly that they do not like, and intend someday to overturn, the *Auer* standard of giving deference to an agency for interpretation of its own regulations unless the interpretation is plainly erroneous. Both the timber industry defendants, and a group of law professors headed up by Jim Huffman of Lewis and Clark Law School, had anticipated this issue and argued in briefs that no matter what you think of *Auer*, this case was not a good one to use as a

tool to overturn it. This argument appeared to hold sway with Justices Roberts and Alito who, in concurrence, simply gave notice that *Auer* is grounded, in their opinion, on sinking sand. Justice Scalia, adopting somewhat unfamiliar territory for him by siding with an environmentalist organization, wrote a dissent saying it was long past time for the *Auer* standard to go. Although an executive branch agency may be a good check and balance in interpreting a statute enacted by the legislative branch, there is no basis for such an agency to be granted deference in interpreting a rule that it legislates itself. (One might wonder whether Scalia would have dissented in this case had he been the swing vote.)

In sum, although this case represents a resounding victory for EPA, the State of Oregon, and the timber industry, it leaves many legal issues of administrative and environmental law to be wrestled with in the future.

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