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Supreme Court Rejects Environmental Group's Challenge to Longstanding Forest Road Water Regulations

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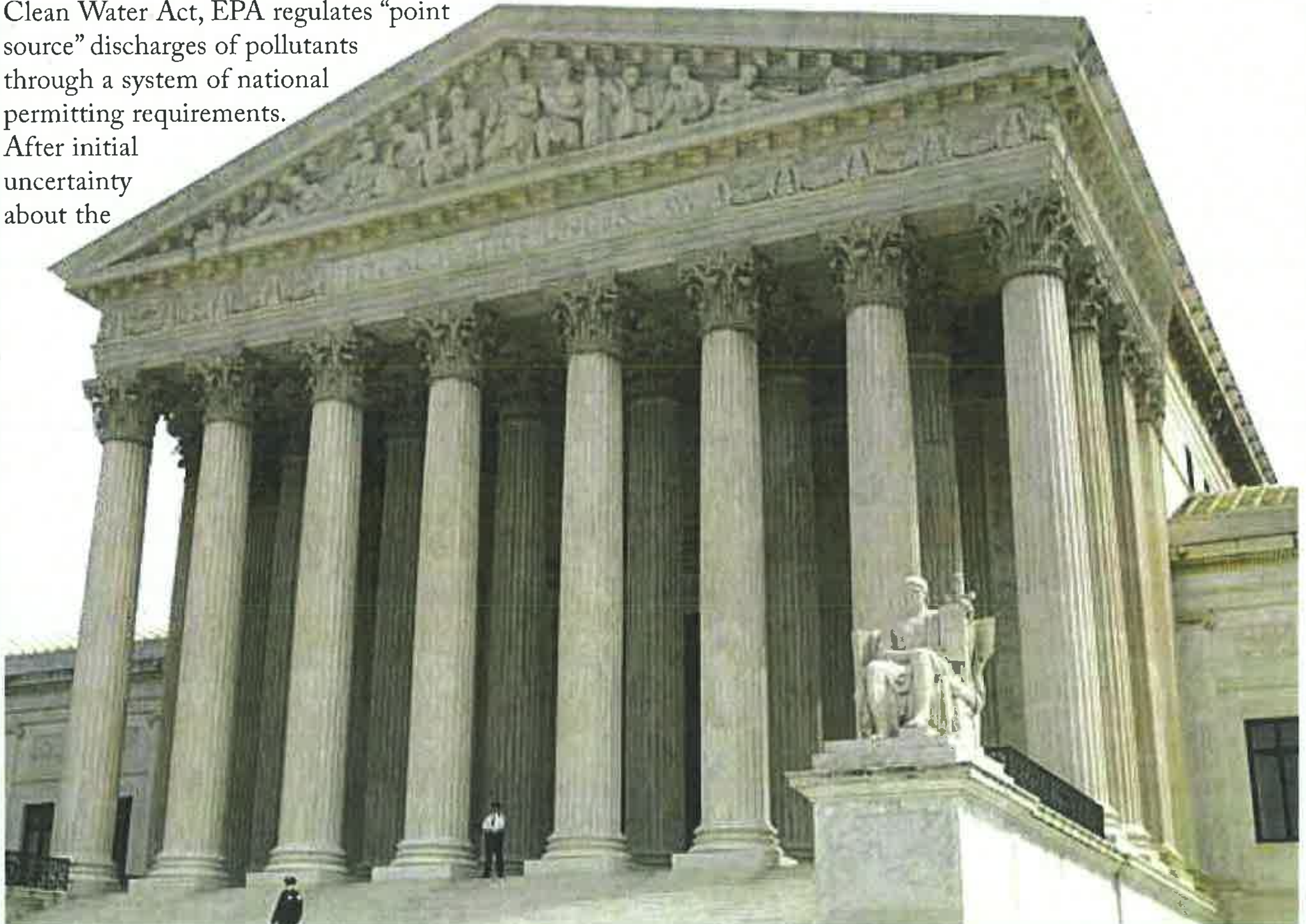
In a significant victory for states and the forest and paper products industry, the Supreme Court rejected an environmental group's challenge to Environmental Protection Agency (EPA) regulations on forest road stormwater runoff in a March 20 decision called *Decker v. Northwest Environmental Defense Center*. An environmental group had tried to persuade the Supreme Court to require potentially millions of costly federal Clean Water Act permits over the nation's vast network of forest roads. But agreeing with the industry defendants (whom we represent), Oregon, 31 other states, the federal government, and numerous trade associations, the Supreme Court ruled that the Clean Water Act and EPA regulations do not require federal permitting.

To give some background to the lawsuit, under the Clean Water Act, EPA regulates "point source" discharges of pollutants through a system of national permitting requirements. After initial uncertainty about the regulation of stormwater under this regime, Congress in 1987 amended the Clean Water Act to provide that only certain types of stormwater discharges require permitting, including discharges "associated with industrial activity." In its 1990 stormwater regulations that implemented this law, EPA indicated that precipitation runoff from forest roads that collects in ditches or culverts before reaching streams and other waterways is not an "industrial" discharge. EPA explained that, instead of national permitting, silvicultural stormwater was most effectively regulated by the states using best management practices—just as it had been since the 1970s.

An environmental group, Northwest Environmental Defense Center (NEDC), filed suit against the State of Oregon and a number of forest and paper products companies that use forest roads in Oregon. NEDC claimed that the defendants were



violating the Clean Water Act and EPA regulations by discharging runoff from forest roads without water permits. The district court threw out the lawsuit, deciding that permits were not necessary under EPA's regulations. But a federal court of appeals reinstated NEDC's lawsuit by ruling that EPA's decades-old regulations should be reinterpreted in a manner that EPA had never intended and that the defendants and states across the nation had never expected.

In its 7-1 decision in *Decker*, the Supreme Court overturned that ruling. The Supreme Court held that the statutory term "associated with industrial activity" does not "encompass outdoor timber harvesting" and road use in connection with it. The Court also ruled that, under a long-established doctrine in administrative law, the Court should defer to EPA's understanding that its own regulations do not define forest road stormwater runoff to be "associated with industrial activity." The Court explained that EPA had reasonably interpreted its own regulations to mean that permitting is required only for "traditional industrial buildings such as factories and associated sites, as well as other relatively fixed facilities," not for timber-harvesting operations.

The Court pointed out that Oregon, like other states (31 of which filed a friend-of-the-court brief in support of the defendants), had developed "a comprehensive set of best management practices to manage stormwater runoff from logging roads," using its "considerable expertise" in this area. And Congress in the Clean Water Act had given EPA "express instructions" to work with state and local officials "to alleviate stormwater pollution by developing the precise kind of best management practices Oregon has established here." Given this effective state regulation directed to particular local circumstances, EPA was entitled to conclude "that further federal regulation in this area would be duplicative and counterproductive."

This victory for states and forest-based businesses was decisive and avoided an outcome that could have been crippling. NEDC had alleged that the defendants violated the Clean Water Act, which could have brought heavy penalties. And its attempt to require permits for all forest roads would have been inordinately costly. Obtaining *one* Clean Water Act permit can require years of work and thousands of dollars. The permitting process demands public hearings and comments, extensive water sampling and testing, effluent limitations, strict technological standards, extensive monitoring, and the treatment of pollutants, and once a permit is issued, the Clean Water Act allows environmental groups to sue for violations of its terms. The Supreme Court's decision averts these dire consequences.

The Supreme Court's decision also should sound the death knell to environmentalists' challenges to EPA's *amended* forest road regulations. The business day before oral argument, EPA revised the regulation at issue in *Decker* to further clarify that channeled stormwater runoff from forest roads is not "associated with industrial activity." NEDC has filed a lawsuit to have the amended regulation declared invalid. But the Supreme Court's decision in *Decker* held in no uncertain terms that the Clean Water Act allows EPA to classify forest road stormwater runoff as not associated with industrial activity. The Court also recognized that the "purpose of the amended regulation" is to exempt the stormwater runoff from permitting, and even the sole dissenting opinion, from Justice Scalia, explained that EPA's amended regulation "vividly illustrated" that permitting is not required.

The victory in the Supreme Court is a result of a tremendous, broad-based coalition seeking to promote sensible forestry and water regulations. The business defendants, 32 states, and an assortment of forestry and nonforestry trade groups together asked the Supreme Court to uphold the regulations that have governed forest water management for decades. And to its credit, EPA and the Obama administration did not waver from its longstanding interpretations of those regulations. While a dispute like this should have been resolved in industry's favor long before it reached the Supreme Court, it is comforting to know that the rule of law and sensible water management regulation prevailed in the end.

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