Morgan Lewis

alert

environmental lawflash

March 26, 2013

No Permits Required for Channeled Stormwater Discharges from Logging Roads

Supreme Court ruling gives deference to EPA's interpretation of its own regulations.

On March 20, the U.S. Supreme Court ruled in the consolidated cases of *Decker v. Northwest Environmental Defense Center* and *Georgia-Pacific West, Inc. v. Northwest Environmental Defense Center*,[1] holding that discharges of stormwater from logging roads are exempt from the Clean Water Act's (the Act's) National Pollutant Discharge Elimination System (NPDES) permitting scheme and giving deference to the Environmental Protection Agency's (EPA's) interpretation of its own regulations under *Auer v. Robbins*.[2] In reversing the U.S. Court of Appeals for the Ninth Circuit, the Court found that EPA's interpretation of the Industrial Stormwater Rule was a permissible one, noting that it need not be the only or best interpretation to prevail.

Background

The Act requires, among other things, NPDES permits for point source discharges into the navigable waters of the United States. In *Decker*, an environmental organization filed suit in the U.S. District Court for the District of Oregon against certain companies involved in logging and paper-products operations as well as various state and local governments and officials. The action was brought under the Act's citizen-suit provision and alleged that the discharges of stormwater from logging roads through ditches, culverts, and channels into two waterways required NPDES permits and that the failure to acquire such permits constituted a violation of the Act.

The district court dismissed the action for failure to state a claim, concluding that the ditches, culverts, and channels associated with the logging roads were not "point sources" under the Act and therefore were not subject to NPDES permitting requirements. In so holding, the district court interpreted the stormwater discharges to be "natural runoff" and therefore excluded from the definition of "point source" under the Silvicultural Rule.[3]

The Ninth Circuit reversed the district court opinion, holding that the conveyances from logging roads were point sources under the Silvicultural Rule and that such discharges were "associated with industrial activity" under the Industrial Stormwater Rule.[4] Further, in response to a jurisdictional question raised in an amicus brief, the Ninth Circuit found that section 1369(b) of the Act, which divests the district courts of jurisdiction to hear challenges to agency actions, did not apply and that the case was properly brought under the citizen-suit provision of the Act.

The Supreme Court granted certiorari. Days before oral argument, however, EPA published an amended Industrial Stormwater Rule in response to the Ninth Circuit's decision that would have exempted the activity at issue from NPDES permitting requirements.[5] The amended Industrial Stormwater Rule clarifies that the NPDES permit requirement only applies to four types of logging operations (i.e., rock crushing, gravel washing, log

1. *Decker v. Nw. Envtl. Def. Ctr.*, Nos. 11-338 and 11-347 (U.S. Mar. 20, 2013), *available at* http://www.supremecourt.gov/opinions/12pdf/11-338_kifl.pdf.

2. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

3. 40 C.F.R. § 122.27(b)(1).

4. 40 C.F.R. § 122.26(b)(14).

5. 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) (to be codified at 40 C.F.R. pt. 122).

sorting, and log storage), and, therefore, discharges of stormwater from any other type of silviculture facilities do not require an NPDES permit.

Supreme Court Ruling

The Supreme Court, in a 7–1 vote, reversed and remanded the Ninth Circuit opinion, holding that EPA's determination that discharges of channeled stormwater runoff from logging roads are exempt from NPDES permit requirements was a reasonable interpretation of its regulations and deference is accorded to that interpretation.

In addressing the jurisdictional questions raised, the Court agreed with the Ninth Circuit that the exclusive jurisdiction mandate under section 1369 of the Act, governing challenges to certain agency actions, did not apply to this citizen suit. The Court reasoned that suits against alleged violators seeking to enforce "what is at least a permissible reading" of an ambiguous regulation are within the scope of the citizen-suit provision of the Act.[6] The Court further held that the amended Industrial Stormwater Rule did not make the cases moot, as the earlier version of the regulation may still serve as a basis for imposing penalties for unlawful discharges prior to the amendment.

As to the merits, the Court accorded *Auer* deference to the EPA's interpretation of the Industrial Stormwater Rule because it found EPA's interpretation of the earlier version of the Industrial Stormwater Rule to be reasonable, relying on the "well established" principle that "an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail."[7] The Court further reasoned that *Auer* deference was appropriate here because there was no evidence to suggest that EPA's current interpretation is a change from prior practice (EPA had a long-standing practice of not requiring NPDES permits for stormwater discharges from logging roads) or a litigation position.

Implications

This case clarifies and narrows the original jurisdiction of the Court of Appeals under section 1369(b) of the Act to the specific EPA actions listed therein, overruling prior Courts of Appeals decisions construing section 1369 to include, and thereby limit, review of all NPDES program regulations. In essence, plaintiffs were able to bring their case in district court by casting their claim not as a challenge to EPA's interpretation of the regulation, which could only be heard by the Court of Appeals, but rather as a citizen suit that aimed to compel EPA to act in accordance with plaintiff's interpretation of the regulation. This case also reaffirms the great latitude given to agencies in interpreting their own regulations, even when such interpretation requires ignoring a better or fairer reading of the statute and regulations. Notably, however, Justice Scalia's opinion concurring in part and dissenting in part, as well as the concurring opinion of Chief Justice Roberts and Justice Alito, suggest that at least some members of the Court are ready to reconsider the level of deference accorded to agencies interpreting their own regulations where that issue is properly raised and argued before the Court.

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Dallas
Allyson N. Ho 214.466.4180 aho@morganlewis.com

Philadelphia
Victoria W. Hollinger 215.963.5206 vhollinger@morganlewis.com

6. *Decker*, slip op. at 8.
7. *Id.* at 14.

Princeton
Christopher J. McAuliffe 609.919.6619 cmcauliffe@morganlewis.com

San Francisco
Thomas M. Peterson 415.442.1344 tmpeterson@morganlewis.com

Washington, D.C.
Ronald J. Tenpas 202.739.5435 rtenpas@morganlewis.com

Now Available: *Environmental eDeskbook*

This eDeskbook is designed to be an up-to-date reference tool for people encountering environmental issues and the regulatory framework established to protect the environment. The eDeskbook provides quick access to current contact information, articles, environmental regulations, noteworthy calendar items, and other environmental resource materials. View the *Environmental eDeskbook* at environmentaldeskbook.morganlewis.com.

About Morgan, Lewis & Bockius LLP

With 24 offices across the United States, Europe, and Asia, Morgan Lewis provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labor and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. Our international team of lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists—more than 1,600 legal professionals total—serves clients from locations in Almaty, Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Moscow, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.