Cross-posted at CPRBlog.

This coming Monday, Dec. 3, the U.S. Supreme Court will hear oral argument in the logging roads case. The case involves two consolidated petitions, Decker v. Northwest Environmental Defense Center and Georgia Pacific v. Northwest Environmental Defense Center , both challenging the same decision of the Ninth Circuit, Northwest Environmental Defense Center v. Brown, 640 F.3d 1063 (9th Cir. 2011). (Decker is brought on behalf of the state of Oregon, which owns the land and roads in question, Georgia Pacific on behalf of timber operators who hold logging rights on the land.) The narrow issue is whether the Ninth Circuit was right to hold that NPDES permits were required for stormwater runoff from Oregon logging roads channeled through ditches and conduits to navigable waters. The broader issues are the extent to which EPA has the discretion to narrow the scope of "point sources" subject to federal regulation, and the availability of citizen suits to enforce the CWA.

I think it's likely the Ninth Circuit decision will be reversed, but I expect a narrow decision. With the recusal of Justice Breyer (whose brother sat by designation on the Ninth Circuit panel), the best environmental interests can reasonably hope for is a 4-4 deadlock if they can bring Justice Kennedy around. I don't think that will happen. (To the extent that Justice Kennedy deserves his reputation for sensitivity to the views of the states, note that 31 states have signed on to an amicus brief in support of petitioners and of course Oregon is a petitioner.)

Petitioners make three arguments: first, that runoff from ditches and culverts associated with logging roads is not point source pollution; second, that even if it is not all point source pollution requires an NPDES permit; and third, that the lower courts did not have jurisdiction to hear this suit. My guess is that they will win on the second argument, lose on the third, and that the court may duck the first. If I'm right, the Court's decision won't radically undermine the CWA, but it will leave EPA with a great deal of discretion to decide what to do about logging road pollution. Whatever the outcome in the Supreme Court, it's crucial that EPA take its mission of restoring and maintaining the integrity of the nation's waters seriously, and recognize the importance of dealing with logging roads and other "unconventional" pollution sources to achieving that mission.

After the jump, more on issues to watch at the oral argument.

I think the Court will quickly reject the jurisdictional argument, which seems to be an afterthought even for petitioners. They claim this suit is effectively an action to invalidate

the Silvicultural Rule, and therefore had to be brought in the Court of Appeals within 120 days of EPA's adoption of the Rule. That argument is just wrong. Although both the US and petitioners seem to think that any challenge to any CWA regulation has to go to the Court of Appeals, that's not what the CWA provides. Instead, it lists seven types of EPA decisions subject to this special review requirement. 33 USC § 1369(b)(1). Rules excluding sources from the NPDES program aren't on the list. Just last month, the Eleventh Circuit held that it didn't have original jurisdiction to review EPA's water transfer rule, which also creates an exemption from the NPDES program. Friends of the Everglades v. US EPA (11th Cir. 10/26/2012). Expect the Supreme Court to agree in this case.

The merits are more complicated.

The CWA makes a key distinction between "point source" and "nonpoint source" pollution. Point source pollution is unlawful unless the source has an NPDES permit. Permits are typically issued by the states, but must meet federal standards and are subject to federal oversight. Permits must incorporate feasibility-based effluent limitations set by EPA for categories of sources and and additional limits needed to meet water quality standards. Nonpoint source pollution, by contrast, is not federally regulated. There are some provisions of the CWA that encourage states to deal with nonpoint sources, but ultimately decisions about how aggressively to tackle that problem are left to state authorities. In the 40 years since the CWA's passage, most states have done little about nonpoint source pollution.

Exactly where the line between point and nonpoint sources falls is therefore a critical question, both for sources which might have to curb their pollution if they fall on the point source side of that line and for the CWA's ability to achieve its goal of restoring and maintaining the integrity of the nation's waters. The statute defines "point source" broadly as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Initially, EPA sought to exclude from the NPDES program all discharges "from agricultural and silvicultural activities," including those it acknowledged met the definition of point sources, from the NPDES requirement. The DC Circuit shot that down, writing that "the EPA Administrator does not have authority to exempt categories of point sources" from the NPDES permit requirements. NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977). The *Costle* court did not, however, address the precise line between point and nonpoint sources. EPA subsequently tried that angle, adopting the "Silvicultural Rule," which defines a "silvicultural point source" as "any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities" and classifying other

silvicultural operations including "road construction and maintenance from which there is natural runoff" as nonpoint sources.

Congress codified part of the *Costle* rule in 1977, specifically excluding return flows from irrigated agriculture from the definition of point sources but rejecting a timber industry request for a broad silviculture exemption. In 1987 it provided more relief for agriculture, excluding "agricultural stormwater discharges" from the definition. 33 U.S.C. § 1362(14). At the same time, Congress added to the CWA a specific provision dealing with municipal and industrial stormwater discharges. 33 U.S.C. § 1342(p). That provision expressly brings some point source stormwater discharges, including those "associated with industrial activity," within the scope of the NPDES program. It directs EPA to decide whether to regulate other sources, and if so how.

On the merits, petitioners first argue that the Ninth Circuit should have deferred to EPA's determination in the Silvicultural Rule that channeled stormwater associated with logging roads is nonpoint source pollution. The US agrees, and also offers a half-hearted assertion that the Ninth Circuit was both required to accept EPA's interpretation of the Silvicultural Rule *and* foreclosed from evaluating whether that interpretation was consistent with the statute, but it's not really pushing that argument.

If the Court were to buy the claim that the statute allows EPA to read logging road stormwater systems out of the definition of point sources, that would mean not only that logging roads don't need NPDES permits but also that EPA could potentially narrow the statutory scope of the NPDES program in other ways. I think that outcome is unlikely, because it's so inconsistent with the statutory text. Petitioners rest their argument on the presence of the word "discrete" in the statutory definition. They are right that the pollution inputs to these stormwater systems are not "discrete" in the sense of being identifiable to a single parcel of land or the acts of a single person, but that's not relevant to the definition. The statute requires that the *conveyances* be discrete, not the pollution. In any case, the definition expressly sets out pipes and ditches as examples of point sources. Petitioners' construction would seem to exempt *any* stormwater discharge from NPDES permitting, which is flatly inconsistent with the 1987 stormwater amendment. I don't think the Court will go there. It can easily duck this issue, and likely will do so.

Second, petitioners argue that EPA's regulations implementing the stormwater provision validly exempt logging roads from the NPDES program. This is a stronger argument, and is vigorously supported by the US. I expect a majority of the justices to agree with petitioners and the US that the statutory term "associated with industrial activity" is ambiguous. Although the text of EPA's stormwater rule isn't exactly clear on this question, I think the

majority will also agree that it's close enough for EPA's interpretation to get deference.

If the Court reverses the Ninth Circuit on this basis, it will send EPA back to where it was 10 years ago. In 1999, EPA issued its "Phase II" stormwater rule. Several environmental groups challenged EPA's failure to regulate stormwater discharges from logging roads through that rule. In Environmental Defense Center v. EPA, 344 F.3d 832 (9th Cir. 2003), the Ninth Circuit rejected EPA's claim that the Silvicultural Rule prevented it from regulating forest roads under the stormwater amendment and directed EPA to consider such regulation. EPA has stalled for 10 years. Now in the Supreme Court the US is arguing that the stormwater rule is the right venue for dealing with runoff from logging roads. A decision of the Court agreeing with that interpretation won't be all bad, so long as the agency follows through.

This is where the proposed rulemaking EPA is apparently poised to announce comes in. The agency said last summer that it intended both to clarify that stormwater runoff from logging roads is not "associated with industrial activity" *and* "to determine if additional Agency action is necessary" under the CWA's stormwater provision. The agency reportedly sent a proposed rule to the White House for review earlier this month. Greenwire reported today that it is expected to be finalized tomorrow.

If EPA takes its promise to look into regulating logging roads seriously, its determination that logging roads don't have to be regulated under the NPDES program won't necessarily be problematic. But it's past time for the agency to get down to business. More than a dozen years ago, EPA concluded that forest roads are a major source of sediment pollution. This year, it acknowledged that stormwater discharges from improperly designed or constructed logging roads are harmful to dozens of aquatic species. It's time to get down to business. If the NPDES program isn't the way to deal with the problems caused by logging roads, EPA should offer a better alternative. And if the Ninth Circuit's decision has finally prodded EPA into action, it will have served an important purpose even if the Supreme Court ultimately reverses.