Legal Planet colleague Holly Doremus did an excellent job last week of previewing today's U.S. Supreme Court arguments in *Decker v. Northwest Environmental Defense Center*, a potentially important case involving the scope of USEPA's point source permit jurisdiction under the Clean Water Act. But given the results of those arguments and a major, late-breaking regulatory development similarly anticipated in Holly's recent post, it looks like the *Decker* case–at least in its current form–will end not with a bang, but with a whimper.

This past Friday, the U.S. Environmental Protection Agency issued new regulations "clarifying" that stormwater discharges from logging roads are not subject to NPDES permit requirements under the Clean Water Act. That, of course, is precisely the issue in the *Decker* case. In its website notice announcing the new rule, EPA expressly noted the fact that the Ninth Circuit Court of Appeals had disagreed with the Agency's prior interpretation of the Clean Water Act's permit requirements, and that the purpose of the newly-promulgated regulation was to "clarify the Agency's intent" as it relates to the logging roads at issue in *Decker*.

The parties duly communicated the new regulations to the Supreme Court justices late Friday afternoon, and that development wound up dominating the Court arguments this morning.

Chief Justice Roberts began the proceedings by wryly congratulating counsel for the logging industry and State of Oregon "on getting nearly all of the relief you were looking for in the form of the new rule." The Chief Justice was not nearly as polite when the Deputy Solicitor General began his argument on behalf of USEPA (as amicus supporting the industry and Oregon petitioners). Were you as surprised as we were, asked Roberts, that the rule was issued on Friday? After the government's lawyer revealed that he, too, had only learned of the new regulation on Friday, the Chief Justice mused that 875 pages of merits briefing in

the case had been rendered largely irrelevant, and that the Court could have postponed the *Decker* arguments until April if it had known in advance that the new rule was coming–presumably to allow supplemental briefing on the effect on the case of the late-breaking EPA regulation.

As it was, the arguments the justices heard today were very different from those that counsel were undoubtedly preparing as recently as last week. Rather than the issues Holly so ably summarized in last week's post, the advocates (and justices) focused on what the Court should do in light of the new EPA regulation.

Counsel for petitioners logging industry and Oregon urged the justices to reverse the Ninth Circuit's unfavorable decision on the ground that the lower court erred in failing to apply the USEPA's Silvicultural Rule. But the justices seemed unwilling to adopt that suggestion, finding–in the words of Justice Kagan–that as of last Friday the Court is dealing with a very different regulation.

The Solicitor General, by contrast, argued that the best course would be for the Court to dismiss the case as moot, and presumably vacating the Ninth Circuit opinion in the process. However, the SG indicated that it would also be appropriate for the Court to remand the case to the Ninth Circuit to address the mootness question in the first instance.

Counsel for the environmental group respondent proposed yet a third option to the Court: to dismiss the petition for certiorari as improvidently granted. But that led to a series of questions from the justices as to what such a dismissal would mean for past and future proceedings in the lower federal courts. It appeared that a working majority of the justices, for example, were uncomfortable with the prospect of the Ninth Circuit opinion in *Decker* remaining in effect. In the course of his response to the justices' questions, moreover, the environmentalists' counsel made it clear that a legal challenge to the new EPA regulation would be forthcoming, on the ground that it is contrary to the statutory provisions of the Clean Water Act.

Following this morning's arguments, it seems obvious that the Northwest Environmental Defense Center will not preserve its win in the Ninth Circuit. But it's almost equally unlikely that the timber industry and Oregon will obtain the reversal on the merits that they had been fervently seeking from the Supreme Court. More likely, the Court will wind up disposing of the *Decker* case on procedural grounds, without issuing a substantive decision. And that, ironically, will vindicate the Solicitor General's original recommendation to the Court–ignored by the justices–that the *Decker* case was not cert-worthy in the first place.