Decker v. Northwest Environmental Defense Center: Auer Deference; "Enough Is Enough"[1]

I. INTRODUCTION

The Clean Water Act (CWA or Act)[2] protects the integrity of our nation's most vital natural resource. Under this Act, individuals, corporations, and governments must acquire National Pollutant Discharge Elimination System (NPDES) permits in order to discharge pollution legally from any point source into navigable bodies of water within the United States.[3] Navigating the language of the Act, the Environmental Protection Agency's (EPA) implementing regulations, and court precedent to determine what requires a permit can be a labyrinthine undertaking.

The petitioner, Decker,[4] had a contract with the state of Oregon to harvest timber in the Tillamook State Forest and used the state roads for its logging operations.[5] When it rained, water discharged from the logging roads through ditches and culverts into nearby water bodies.[6] Evidence suggested that stormwater runoff discharged from logging roads into navigable water bodies through channels along logging routes could be harmful to a variety of aquatic life.[7]

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1. Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part).
2. *See* 33 U.S.C. §§ 1251-1387 (2006).
3. *Id.* § 1311(a).
4. Decker, the State Forester of Oregon, as well as other state and local government officials and logging and paper-products operations were originally named as defendants in the suit. *Decker*, 133 S. Ct. at 1333. For the purpose of this Note, all of the petitioners will be referred to as "Decker."
5. *See id.*
6. *Id.*
7. *Id.*

Northwest Environmental Defense Center (NEDC) filed suit under the Act's citizen-suit provision, 33 U.S.C. § 1365, claiming that Decker should have obtained NPDES permits before causing stormwater runoff discharges into two Oregon rivers.[8] Decker argued that NEDC did not have jurisdiction under § 1369(b) of the Act or, in the alternative, that amendments issued by the EPA to the Industrial Stormwater Rule made the case moot.[9] The Act exempted all stormwater discharge from the permitting scheme except for discharges "associated with industrial activity," as defined in the EPA's Industrial Stormwater Rule.[10] The principle issue in this case was whether the language of the Industrial Stormwater Rule required Decker to obtain an NPDES permit for stormwater discharges associated with their logging operations.[11] In interpreting its own regulation, the EPA sided with Decker, asserting that the Industrial Stormwater Rule did not require NPDES permits for the discharges at issue in this case.[12] NEDC argued that the EPA's interpretation of this regulation was erroneous.[13]

The United States District Court for the District of Oregon dismissed this action for failure to state a claim, finding that the ditches, channels, and culverts through which the stormwater drained were not point sources for the purpose of NPDES permitting.[14] On appeal, the United States Court of Appeals for the Ninth Circuit reversed and held for NEDC on three grounds.[15] First, "the District Court had subject-matter jurisdiction under § 1365," because the limitations to judicial review did not apply to the case.[16] Second, the conveyances of stormwater runoff at issue in the case qualified as point sources under the Act.[17] Finally, despite the EPA's assertion to the contrary, the discharges at issue in the case were "associated with industrial activity" and therefore required NPDES permitting.[18] In response to the Ninth Circuit's decision, the EPA issued amendments to the Industrial Stormwater Rule three days before oral arguments for this case began in

8. *Id.*
9. *Id.* at 1334-35.
10. *Id.* at 1336 (quoting 33 U.S.C. § 1342(p)(2)(B) (2006) (internal quotation marks omitted)); *see* 40 C.F.R. § 122.26(b)(14) (2012) (amended 2013).
11. *Decker*, 133 S. Ct. at 1330, 1336.
12. *Id.* at 1336-37.
13. *Id.*
14. *Id.* at 1333.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 1333-34.

the Supreme Court of the United States.[19] The amendments limit the types of facilities whose stormwater discharges are subject to the NPDES permitting scheme.[20] On review, the Supreme Court *held* (1) that the CWA did not bar the suit from being heard on appeal, (2) the EPA's amendment to the Industrial Stormwater Rule did not make the case moot, and, (3) in deference to the EPA's interpretation of the Industrial Stormwater Rule, Decker did not need an NPDES permit to discharge the stormwater at issue.[21] *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1335-36, 1338 (2013).

II. BACKGROUND

Since its enactment by Congress in 1972, the CWA has undergone a lengthy process of refinement and clarification to determine which categories of discharge should require NPDES permitting.[22] Originally, the Act required NPDES permits for discharges of pollution from "any point source into the navigable waters of the United States."[23] However, the debut of the Act elicited such a high volume of permit applications that the EPA struggled to process them all.[24] This prompted the agency to issue "regulations exempting certain types of point-source discharges from the NPDES permitting scheme" in an attempt to ease the burden on those processing the permits.[25] However, in 1977 the United States Court of Appeals for the District of Columbia found that the CWA did not give the EPA the statutory authority to make such exemptions.[26] The EPA argued "administrative infeasibility" to process such a vast number of permits, but the court was not persuaded.[27] The court found that to allow the EPA to make such exemptions would revise the original meaning of the statute, a power not within the purview of the EPA.[28]

Remaining motivated to reduce the volume of permit applications, the EPA went on to refine the definition of point source by issuing a series of regulations.[29] Those regulations included the Silvicultural Rule, which stated, "*Silvicultural point source* means any discernible, confined

19. *Id.* at 1332.
20. *Id.*
21. This Note will only address the merits of the case, not the mootness or jurisdictional issues because they are considered to be well settled.
22. *Decker*, 133 S. Ct. at 1331-33.
23. *Id.* at 1331 (citing 33 U.S.C. § 1311(a) (2006)).
24. *Id.*
25. *See id.*
26. Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1379 (1977).
27. *Id.* at 1373, 1379.
28. *Id.* at 1382-83.
29. *Decker*, 133 S. Ct. at 1331.

and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States."[30] This rule clearly required permitting for logging related point source discharges.[31] However, Congress passed some exemptions to the Silvicultural Rule.[32] In 1987, Congress responded to the EPA's challenges in managing the abundance of permit applications by exempting "most 'discharges composed entirely of stormwater'" from the NPDES permitting regime.[33]

Still, any stormwater discharges "associated with industrial activity" continued to require permits.[34] As the statute did not define the term "associated with industrial activity," the EPA wrote the Industrial Stormwater Rule to elucidate which stormwater discharges qualified.[35] This Rule described discharge "associated with industrial activity" as "the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant."[36] The Industrial Stormwater Rule further qualified the term, noting, "[F]acilities classified as Standard Industrial Classificatio[n] 24 are considered to be engaging in industrial activity for purposes of paragraph (b)(14)."[37] Classification 24 includes industries in the business of "Lumber and Wood Products."[38] However, in November 2012, the EPA issued another amendment to the Industrial Stormwater Rule limiting the facilities within Classification 24 that should be considered to be "associated with industrial activity."[39]

The level of deference courts give to administrative agencies varies depending on what the agency is interpreting. In the case of *Auer v. Robbins*, the Supreme Court held that it would defer to a regulatory body's interpretation of its own rule, unless that reading was "plainly

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30. *Id.* (quoting 40 C.F.R. § 122.27(b)(1) (2013)).
31. *Id.*
32. *Id.* at 1331-32.
33. *Id.* at 1332 (quoting 33 U.S.C. § 1342(p)(1) (2006)).
34. *Id.* (citing 33 U.S.C. § 1342(p)(2)(B)).
35. *Id.*
36. *Id.* (quoting 40 C.F.R. § 122.26(b)(14) (2012) (internal quotation marks omitted) (amended 2013)).
37. *Id.* (quoting 40 C.F.R. § 122.26(b)(14) (internal quotation marks omitted)). The *Standard Industrial Classification Manual* is used by federal agencies to categorize different types of firms. *See id.*
38. *Id.* (citing OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STANDARD INDUSTRIAL CLASSIFICATIONS MANUAL 107 (1987)).
39. *Id.*

erroneous or inconsistent with the regulation."[40] In a similar case, *Skidmore v. Swift*, the Court held that agency rulings, interpretations, and opinions can be used by the courts for guidance but are not controlling upon those courts.[41]

III. THE COURT'S DECISION

In the noted case, the Supreme Court reversed the Ninth Circuit's decision, finding that the EPA's interpretation of the Industrial Stormwater Rule merited deference; Decker did not require an NPDES permit for the logging related stormwater discharge at issue.[42] The EPA's reading of the Industrial Stormwater Rule favored the position held by Decker.[43] Accordingly, the Supreme Court approached the merits of this case predisposed to side with Decker.[44]

A. The Majority Opinion

The Court began its discussion of the merits by addressing NEDC's assertion that the term "associated with industrial activity" in the CWA unambiguously covered stormwater discharge from logging roads.[45] NEDC claimed that, independent of the specifications of the EPA's Industrial Stormwater Rule, the term "associated with industrial activity" covered the discharge at issue in this case.[46] Looking to definitions of the words "industry" and "industrial" in the Oxford English Dictionary, the Court noted that "industry" could be either general or specific.[47] Some specific definitions of industry may not include the logging activities at issue in this case.[48] The statute did not define the terms within it, so the Court remained unconvinced that Congress did not intend a narrow reading of the word industry.[49]

The Court went on to entertain NEDC's next argument, which asserted that the preamendment version of the Industrial Stormwater Rule unambiguously required NPDES permits for the stormwater

40. 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (internal quotation marks omitted)).
41. 323 U.S. 134, 140 (1944).
42. *See Decker*, 133 S. Ct. at 1338.
43. *Id.* at 1336-37.
44. *See id.* at 1337.
45. *Id.* at 1336.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*

discharge at issue.[50] Indeed, the rule included "storm water discharges from . . . immediate access roads . . . used or traveled by carriers of raw materials."[51] Still, the question remained as to whether the discharge at issue here was a "category of industry," as defined by the rule.[52] The earlier version of the rule said "facilities classified as Standard Industrial Classification 24" qualified as engaging in industrial activity for purposes of the rule; logging was one of the industries within that category.[53] The Court found this argument to be, if not convincing, at least "more plausible" than NEDC's first assertion.[54]

After making note of NEDC's argument, the Court moved on to weigh the EPA and Decker's counterargument.[55] The EPA asserted that the Standard Industrial Classification was only included in the Industrial Stormwater Rule to illustrate types of "traditional" industry that would qualify under the rule.[56] It argued that the language of the regulation suggested that it should apply to more permanent types of industrial structures as opposed to the outdoor timber harvesting operations at issue in this case.[57] The EPA illustrated this point by highlighting the classification and regulation's use of language such as "facilities" and "establishments," suggesting that these words imply a level of permanence to the facilities that qualify under the rule that outdoor timber harvesting facilities do not possess.[58]

The Court agreed that the language of the regulation supported these inferences made by the EPA and went on to further illustrate the EPA's point.[59] The Court noted that the rule required discharges to be "directly related to manufacturing, processing or raw materials storage areas at an industrial plant."[60] Again, the Court relied on the Oxford English Dictionary to elucidate the terminology of the Rule,[61] finding that a reasonable reading of the regulation might not consider logging

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50. *Id.*
51. *Id.* (quoting 40 C.F.R. § 122.26(b)(14) (2006) (internal quotation marks omitted)).
52. *Id.*
53. *Id.* at 1332 (citing 40 C.F.R. § 122.26(b)(14)).
54. *Id.* at 1336.
55. *Id.* at 1336-37.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1337.
60. *Id.* (quoting 40 C.F.R. § 122.26(b)(14) (2012) (internal quotation marks omitted) (amended 2013)).
61. *Id.* ("Manufacturing" is defined as "mak[ing] (something) on a large scale using machinery," and "processing" is defined as "perform[ing] a series of mechanical or chemical operations on (something) in order to change or preserve it." (quoting NEW OXFORD AMERICAN DICTIONARY 1066, 1392 (3d ed. 2010) (internal quotation marks omitted))).

facilities to be "directly related to manufacturing, processing or raw materials storage areas at an industrial plant."[62] Finally, this argument was buttressed by the Court's approval of an interpretation of the rule that required all discharges to be related to the operations at an "industrial plant," allowing that the term "industrial plant" could reasonably be interpreted to modify the preceding clauses of the sentence.[63] The Court found the EPA's narrow, exclusive reading of the Industrial Stormwater Rule to be sufficiently reasonable, requiring deference from the Court according to the precedent set forth in *Auer*.[64]

Ultimately, the Court's willingness to entertain the EPA's interpretation of the Industrial Stormwater Rule reflects the low level of scrutiny the Court applies to agency interpretations of their own regulations.[65] The Court affirmed that it would defer to an agency's interpretation of its own regulation unless that reading was plainly erroneous.[66] In this case, the Court found that the EPA met that low burden.[67] Furthermore, the Court found it important to note that the EPA's reading of the regulation was not inconsistent with past practice, nor was it a stance adopted by the agency in response to litigation.[68]

B. Justice Scalia's Dissent

In his dissent, Justice Scalia underscored flawed reasoning behind the *Auer* precedent and advocated for its demise.[69] He highlighted two commonly cited justifications for deference to agencies in the interpretation of regulations, arguing that both rely on fundamental misunderstandings of the role of regulatory bodies in the law.[70]

First, Justice Scalia said that some cases justify deference to agencies on the premise that the agency will hold "special insight" into the "intent" the agency had when the regulation was drafted.[71] He argued that the underlying notion that courts should seek to discover the intent of the drafters is a false notion.[72] Courts cannot be bound to seek out an

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62. *Id.* (quoting 40 C.F.R. § 122.26(b)(14) (2012) (internal quotation marks omitted) (amended 2013)).
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1337-38.
69. *See id.* at 1339 (Scalia, J., concurring in part and dissenting in part).
70. *Id.* at 1340.
71. *Id.*
72. *Id.*

unexpressed patina on the law.[73] Rather, they should be bound only by what the law actually says.[74]

The second justification Justice Scalia found in case law was a reverence for agency expertise.[75] The idea is that agencies have expert knowledge of proper regulation of technical programs.[76] Justice Scalia argued that while it is true that agencies are experts in their respective fields, their expertise justifies allowing regulatory bodies to *write* regulations.[77] It does not mean that the same bodies should interpret those regulations.[78] Rather, interpretation of law is the explicit domain of the Court.[79] Allowing an agency to do both undermines the principal of separation of powers.[80] Further, if too much deference is given to agencies when interpreting their rules, they are incentivized to write vague rules, knowing they will be able to clarify according to context when issues arise in court.[81] In a flippant but cogent remark, Justice Scalia closed his dissent by saying, "It is time for us to presume . . . that an agency says in a rule what it means, and means in a rule what it says there."[82]

IV. ANALYSIS

While the Supreme Court's holding in this case is consistent with the controlling precedent, perhaps, as Justice Scalia posited in his dissent, it is time to reconsider the precedent itself. The gymnastic reasoning done by the EPA to justify its reading of the Industrial Stormwater Rule was "reasonable" under *Auer*, but it exemplifies the dangers of affording too much latitude to agencies in interpreting their own regulations. In the interest of preserving the boundaries between the three branches of government, the Court should have reconsidered the precedent in *Auer*, following the arguments given by Justice Scalia in his dissent, and reverted to the more conservative level of deference laid out in the case of *Skidmore*.[83]

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73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* (citing Marbury v. Madison, 5 U.S. 137, 177 (1803)).
80. *Id.* at 1341.
81. *Id.*
82. *Id.* at 1344.
83. *See* Skidmore v Swift, 323 U.S. 134, 140 (1944).

In *Skidmore* the court took a modest approach to agency readings of regulations. Whereas in *Auer* the Court effectively handed over its power to interpret regulations to regulatory bodies, barring only aberrant and "erroneous" readings,[84] in *Skidmore*, the Court looked to agencies to lend expertise and insight only as means of persuasion in weighing the merits of the case.[85] In *Skidmore*, the Court held:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[86]

This approach offers due respect to agency expertise while eliminating the incentive for agencies to write vague regulations knowing that they can later refine their meaning in court.

Under *Skidmore*, this case would likely have drawn a different outcome based on the merits of the EPA's interpretation of the Industrial Stormwater Rule. Here, the EPA issued a particularly unnatural reading of its regulation. Asserting that the Industrial Stormwater Rule was meant to include only "traditional" industrial sources of discharge, the EPA pointed to decontextualized uses of words such as "establishment" and "facility," arguing that the use of those words somehow indicated to the reader that industry implied something more permanent than the timber harvesting operations at issue in this case.[87] However, the use of the word "establishment" in the Standard Industrial Classification conflicts with this argument. There, "Classification 2411" is described as "establishments primarily engaged in cutting timber," which is precisely the type of industry at issue in this case.[88] All the while, "logging" is plainly listed within the Standard Industrial Classifications list referred to in the rule, unequivocally including it among those industries that require NPDES permits.[89] In this interpretation, the EPA reached to supplant supposed implicit meaning with the stated, explicit language of the rule.

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84. *See Decker*, 133 S. Ct. at 1339-40 (Scalia, J., concurring in part and dissenting in part).
85. *Skidmore*, 323 U.S. at 140.
86. *Id.*
87. *Decker*, 133 S. Ct. at 1336-37.
88. OFFICE OF MGMT. & BUDGET, *supra* note 38, at 107.
89. *Decker*, 133 S. Ct. at 1344 (Scalia, J., concurring in part and dissenting in part).

The next justification for the EPA's exclusion of the discharges at issue here is a reading of the phrase "directly related to manufacturing, processing or raw materials storage areas in an industrial plant" in the Industrial Stormwater Rule.[90] As Justice Scalia points out in his dissent, standards of textual interpretation include a rule called the rule of last antecedent.[91] That rule asserts that a limiting clause or phrase should typically only be read to modify the word or phrase immediately preceding it.[92] Accordingly, in the phrase at issue here, "industrial plant" should only be read to modify "raw materials storage," unless, as Justice Scalia notes, other elements of the text suggest that it should be interpreted otherwise.[93] No such indications exist in the text.[94]

The EPA advocated for a limited reading of the Industrial Stormwater Rule, yet, the language of the rule appears to propose the opposite. In listing types of discharges to be included in the rule, the rule uses the phrase "the term includes, but is not limited to," suggesting that the term "stormwater discharge associated with industrial activity" should be read expansively.[95] The EPA seems to be grasping at straws to find a way out of this natural interpretation of the rule.

Ultimately, strong deference to agency interpretations of regulations can not only lead to confusing and unnatural readings of regulations as it did in this case, but also blur the lines between the roles of the branches of government and lead to hasty rule interpretation. It is certainly a basic principle of American democracy that each sovereign yet linked branch of government balances the power of the others. However, the Supreme Court weakened that principle when it afforded regulatory bodies the power to not only enact law, but to interpret it as well. The Court also incentivized agencies to write vague regulations, knowing that they would be able to clarify as issues arose in court. The power and duty of regulatory bodies is to clarify the law written by Congress.[96] If given the power to interpret its own regulations, a regulatory body is afforded the right to upend that duty and clarify only when challenged in court. This discourages considered forethought in regulating and favors reactionary, circumstantial afterthought.

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90. *Id.* at 1337 (majority opinion) (quoting 40 C.F.R. § 1226.26(b)(14) (2012) (amended 2013)).
91. *See id.* at 1343 (Scalia, J., concurring in part and dissenting in part).
92. *Id.*
93. *Id.* at 1343-44.
94. *Id.* at 1344.
95. 40 C.F.R. § 122.26(b)(14) (2012) (amended 2013).
96. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

Under *Skidmore*, the Court would likely look to the EPA's reasoning as an element in its consideration of the meaning of the CWA and the Industrial Stormwater Rule. Without the heavy deference for the EPA's reading afforded by *Auer*, the Court would have to look to the best reading of the text. In this case, the natural reading is also the best reading because it remains consistent with the rules of textual interpretation. The natural reading of the text leads to the conclusion that Decker needed an NPDES permit for the discharges at issue. Under *Skidmore*, the Court would have not only preserved the boundaries between the three branches of government but also would have arrived at the natural conclusion and affirmed the judgment of the Ninth Circuit.

V. CONCLUSION

While the Supreme Court arrived at the correct conclusion according to precedent, the Court should have reconsidered *Auer*. This case exemplifies the problems associated with too much deference for agency interpretations of its own regulations. Here, the EPA issued an unnatural interpretation of the Industrial Stormwater Rule to which the Court deferred. This not only infringes upon the separation of powers but also abrogates the purpose of regulation by allowing regulatory bodies to avoid clarifying statutory language.

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