

11-338 DECKER, ET AL. V. NORTHWEST ENVTL. DEFENSE CENTER

DECISION BELOW: 640 F3d 1063

LOWER COURT CASE NUMBER: 07-35266

QUESTION PRESENTED:

(1) Congress has authorized citizens dissatisfied with the Environmental Protection Agency's (EPA's) rules implementing the Clean Water Act's (CWA's) National Pollutant Discharge Elimination System (NPDES) permitting program to seek judicial review of those rules in the Courts of Appeals. See 33 U.S.C. § 1369(b). Congress further specified that those rules cannot be challenged in any civil or criminal enforcement proceeding. Consistent with the terms of the statute, multiple circuit courts have held that if a rule is reviewable under 33 U.S.C. § 1369, it is exclusively reviewable under that statute and cannot be challenged in another proceeding.

Did the Ninth Circuit err when, in conflict with those circuits, it held that a citizen may bypass judicial review of an NPDES permitting rule under 33 U.S.C. § 1369, and may instead challenge the validity of the rule in a citizen suit to enforce the CWA?

(2) In 33 U.S.C. § 1342(p), Congress required NPDES permits for stormwater discharges "associated with industrial activity," and delegated to EPA the responsibility to determine what activities qualified as "industrial" for purposes of the permitting program. EPA determined that stormwater from logging roads and other specified silvicultural activities is non-industrial stormwater that does not require an NPDES permit. See 40 C.F.R. § 122.26(b)(14).

Did the Ninth Circuit err when it held that stormwater from logging roads is industrial stormwater under the CWA and EPS's rules, even though EPA has determined that it is not industrial stormwater?

CONSOLIDATED WITH 11-347 FOR ONE HOUR ORAL ARGUMENT. JUSTICE BREYER TOOK NO PART.

CERT. GRANTED 6/25/2012