No. _____

In the Supreme Court of the United States

DOUG DECKER, the Oregon State Forester, in his official capacity; JOHN BLACKWELL; SYBIL ACKERMAN; PETER HAYES; CALVIN MUKUMOTO; JENNIFER PHILLIPPI; GARY SPRINGER and STEVE WILSON, the members of the Oregon Board of Forestry, in their official capacities,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, an Oregon non-profit corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS 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 EPA's rules, even though EPA has determined that it is not industrial stormwater?

PARTIES TO THE PROCEEDING

Petitioners, who were defendants-appellees below, are the Oregon State Forester and the members of the Oregon Board of Forestry, in their official capacities. In accordance with Supreme Court Rule 35(3), petitioners have used the names of the persons currently holding those offices in the caption of this petition and in the petition itself.

Other interested parties are defendants-appellees below Georgia-Pacific West LLC, Hampton Tree Farms, Inc., Stimson Lumber Company, and Swanson Group, Inc; and intervenor defendants-appellees below American Forest and Paper Association, Oregon Forest Industries Council, and Tillamook County, Oregon. These parties are filing a separate certiorari petition.

Respondent, who was plaintiff-appellant below, is the Northwest Environmental Defense Center, an Oregon non-profit corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Doug Decker, the Oregon State Forester, John Blackwell, the chair of the Oregon Board of Forestry, and Sybil Ackerman, Peter Hayes, Calvin Mukumoto, Jennifer Phillippi, Gary Springer, and Steve Wilson, the members of the Oregon Board of Forestry, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2011).[1] It is included in the appendix to this petition. (Pet. App. 1-52). The opinion of the district court is reported. *Nw. Envtl. Def. Ctr. v. Brown*, 476 F. Supp. 2d 1188 (D. Or. 2007). It is included in the appendix. (Pet. App. 53-77).

JURISDICTION

The court of appeals filed its original opinion on August 17, 2010. The court of appeals denied rehearing and issued a superseding opinion on May 17, 2011. In Case No. 11A146, Justice Kennedy granted petitioners' application for an extension of time in which to file the petition for certiorari, allowing for the petition to be filed on or before September 14, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[1] The Ninth Circuit's original opinion was reported at 617 F.3d 1176 (9th Cir. 2010).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix to this petition. The pertinent statutory provisions involved are 33 U.S.C. § 1342(p); 33 U.S.C. § 1362(12) and (14); 33 U.S.C. § 1365(a) and (f); and 33 U.S.C. § 1369(b) (Pet. App. 78-87). The pertinent regulatory provisions are 40 C.F.R. § 122.26(a)(1) and (b)(14); and 40 C.F.R. § 122.27 (Pet. App. 88-96).

STATEMENT OF THE CASE

A. The regulation of stormwater runoff from logging roads under the Clean Water Act and EPA's silvicultural and stormwater rules.

1. Congress enacted the Clean Water Act to establish a uniform, nationwide system for protecting the waters of the United States.

Congress enacted the CWA in 1972. Its objective was to create a uniform system for protecting the waters of the United States from pollution**.** *See*, *e.g.*, *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (CWA's objective was "authorizing the EPA to create and manage a uniform system of interstate water pollution regulation."). Before the enactment of the CWA, protection of the waters was handled by individual states, leading to wide discrepancies in the levels of water protection across the country. *See* S. Rep. No. 92-414, at 1-11 (1971).

To accomplish its objective, Congress, among other things, created a permitting requirement for "point source" discharges, *i.e.*, discharges of pollutants through "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft . . . ." 33 U.S.C. § 1362(14). The permitting program for point source discharges is the National Pollutant Discharge Elimination System (NPDES) permitting program.

2. To implement the CWA, EPA adopted the silvicultural rule to identify which silvicultural activities require NPDES permits and which do not.

EPA promulgated rules to implement the NPDES permitting program, including rules clarifying when permits were and were not required. One of those rules was an early version of the current silvicultural rule.[2] It stated that, in general, *all* discharges connected to silvicultural activities—both point source and nonpoint source discharges—were exempt from the NPDES permit requirements. 40 C.F.R § 125.4(j) (1975). The United States District Court for the District of Columbia invalidated that rule in *Natural Res. Def. Council, Inc. v. Train*, 396 F. Supp. 1393 (D.D.C. 1975), *aff'd sub nom. Natural Res. Def. Coun-*

[2] "Silviculture" means "a phase of forestry that deals with the establishment, development, reproduction, and care of forest trees." *Webster's Third New Int'l Dictionary* at 2120 (unabridged ed. 1993).

cil, Inc. v. Costle, 568 F.2d 1369 (D.C. Cir. 1977). The court reasoned that EPA lacked authority "to exempt entire classes of point sources from the NPDES permit requirements." *Id.* at 1396.

Although the court invalidated the rule, it recognized that Congress had delegated to EPA the power to determine precisely what silvicultural activities constitute point sources subject to the NPDES permitting program: "it appears that Congress intended for the agency to determine, at least in the agricultural and silvicultural areas, which activities constitute point and nonpoint sources." *Id.* at 1401-1402.[3]

EPA promulgated a new silvicultural rule in 1976 to replace the invalidated one. Unlike the old rule, the new rule did not exempt all discharges from silvicultural activities from the permitting program. Instead, it defined what silvicultural activities were point sources and what were not, explaining that those activities resulting in discharges of runoff from "precipitation events" were nonpoint source activities. The rule further stated that only those silvicultural activities defined as point sources were subject to the NPDES permitting requirements. 40 C.F.R. § 124.85 (1976). Specifically, it provided that "silvicultural point source" did not "include nonpoint source activities inherent to silviculture such as . . . surface drain-

[3] The D.C. Circuit reiterated the same point on appeal: "We agree with the district court 'that the power to define point and nonpoint sources is vested in EPA and should be reviewed by the court only after opportunity for full agency review and examination.'" *Costle*, 568 F.2d at 1382 (quoting *Train*, 396 F. Supp at 1396).

age, and road construction and maintenance from which runoff results from precipitation events." *Id.*

The current version of the silvicultural rule is nearly identical to the rule promulgated in 1976. Last amended in 1980, it provides, in part:

> (a) *Permit requirement.* Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program.
>
> (b) *Definitions.*
>
> (1) *Silvicultural point source* means any discernible, confined 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. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233).

40 C.F.R. § 122.27. No one sought judicial review of the validity of the silvicultural rule when it was

promulgated in 1976, or when it was amended in 1980.

3. Congress adopted amendments to the CWA to address water pollution caused by stormwater.

In 1987, Congress amended the CWA to more effectively regulate water pollution caused by stormwater. In the amendments, Congress addressed both point source and nonpoint source discharges of stormwater.

With respect to point source discharges of stormwater, the amendments created a two-phase scheme for the development of NPDES permitting programs for those stormwater discharges. The amendments required EPA to develop permitting programs within a few years for five specific types of stormwater discharges ("Phase I") and prohibited EPA from requiring permits for other types of stormwater discharges ("Phase II") before October 1, 1994. 33 U.S.C. § 1342(p)(1), (p)(2)-(4) (2006). One of the five types of Phase I stormwater discharges is the category of "discharge[s] associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B). The amendments directed EPA to conduct a study to identify the types of stormwater discharges that were not Phase I discharges (*i.e.*, the Phase II discharges), 33 U.S.C. § 1342(p)(5), and to "establish a comprehensive program to regulate such designated sources." 33 U.S.C. § 1342(p)(6).

At the same time that it established its two-phase program to address stormwater discharges from point

source activities, Congress enacted 33 U.S.C. § 1329 to better guard against water pollution resulting from stormwater associated with nonpoint-source activities. Congress recognized that stormwater from nonpoint-source activities, including, among other things, runoff from logging roads and timber harvesting operations, caused a substantial amount of water pollution, undermining the objective of the CWA.[4] Congress further recognized that such water pollution resulting from nonpoint source activities is best regulated at a local level. To that end, 33 U.S.C. § 1329 requires states to develop management programs for

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[4] *See* 1 Env't & Natural Res. Pol'y Div., Cong. Research Serv., *A Legislative History of the Water Quality Act of 1987*, at 353 (statement of Mr. Bonker) (nonpoint program "targets one of the most significant, and most elusive, causes of water pollution: nonpoint source pollution from poor forestry and farming practices . . . .") [hereinafter *Legislative History of the Water Quality Act of 1987*]; 1 *id.* at 483 (statement of Mr. Durenberger) (nonpoint source program targets "runoff from farms and cities, construction sites and timber cutting operations"); 1 *id.* at 498 (statement of Mr. Simpson) ("For the first time we have included a provision in the Clean Water Act related to non-point source pollution that comes from farm lands, timber operations, and other sources of runoff which are not considered point-sources."); 2 *id.* at 639-41 (statement of Mr. Durenberger) (new nonpoint source program requires development of management programs to manage nonpoint source pollution, including that from silviculture; management practices for reducing runoff from silvicultural areas include "careful road placement, culverting, grassing of abandoned roads and skid trails).

nonpoint-source pollution and report to EPA on the best management practices used to reduce water pollution from nonpoint sources. *See generally* 33 U.S.C. § 1329.

4. EPA implemented the 1987 stormwater amendments by adopting the Phase I and the Phase II stormwater rules.

As required by the 1987 amendments, EPA promulgated additional rules to govern stormwater discharges. It first promulgated its Phase I rule to identify what stormwater discharges were subject to the Phase I permitting requirements. In the rule, EPA identified what activities qualify as "industrial activity" for purposes of the stormwater permitting requirements. Among other things, EPA specified that "[f]acilities classified as Standard Industrial Classification[] 24 (except 2434)" are "considered to be engaging in 'industrial activity'" under the rule. 40 C.F.R. § 122.26(b)(14)(ii). Logging and other wood products businesses are listed under Standard Industrial Classification 24.

Although the rule provides that activities identified in Standard Industrial Classification 24 fall within the definition of "industrial activity," EPA also states in the rule that not all activities listed in Standard Industrial Classification 24 qualify as "industrial activity" for the purpose of the Phase I stormwater rule. 40 C.F.R. § 122.26(b)(14)(ii). In particular, EPA excluded those silvicultural activities defined as "nonpoint source" activities in the silvicultural rule from the definition of "industrial activity":

> *Storm water discharge associated with industrial activity* means 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. *The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122*.

40 C.F.R. § 122.26(b)(14) (second emphasis added). EPA explained in the preamble to the Phase I regulations that the term "industrial activity" excludes those silvicultural activities defined to be nonpoint sources by 40 C.F.R. § 122.27: "the definition of 'storm water discharge associated with industrial activity' does not include sources that may be included under [Standard Industrial Classification] 24, but which are excluded under 40 CFR 122.27." 55 Fed. Reg. 47,990, 48,011 (Nov. 16, 1990).

The validity of the Phase I stormwater rule was challenged on judicial review under 33 U.S.C. § 1369 in *Natural Res. Def. Council v. EPA*, 966 F.2d 1292 (9th Cir. 1992). No one contested the validity of EPA's determination that those activities defined by the silvicultural rule as "nonpoint source silvicultural activities" were not "industrial activity." *See generally id.* The Ninth Circuit upheld the Phase I rule in most respects, but invalidated it to the extent that it exempted certain construction sites from the Phase I permit requirements. *Id.* at 1306.

EPA subsequently promulgated Phase II stormwater regulations. In them, EPA created permit re-

quirements for two additional types of stormwater discharges, but did not include stormwater discharges from logging roads (or any other silvicultural stormwater discharges) in those rules. 40 C.F.R. § 122.26(a)(9)(i)(A)-(B); *see also Envtl. Def. Ctr., Inc. v. EPA* (*EDC*), 344 F.3d 832, 842-43, 860-63 (9th Cir. 2003) (explaining development of Phase II rules). In 2003, on judicial review of the Phase II regulations, the Ninth Circuit directed EPA to evaluate further whether stormwater discharges from forest roads should be regulated under Phase II, holding that the 1987 amendments to the CWA triggered an obligation for the EPA to analyze forest roads in its program to protect water quality under § 402(p)(6) (the provision requiring Phase II regulation). *EDC*, 344 F.3d at 861-62. EPA has not responded to that remand order.

B. Plaintiff filed a citizen suit alleging that defendants are violating the CWA by discharging stormwater runoff from logging roads without NPDES permits, and the district court dismissed for failure to state a claim.

Plaintiff filed this action as a citizen suit under 33 U.S.C. § 1365. Plaintiff alleged that state defendants own or operate two logging roads (Trask Road and Sam Downs Road) in Tillamook County, Oregon, and that private defendants maintain and harvest timber along those two roads. (Pet. App. 56). Plaintiff further alleged that defendants are violating the CWA by discharging stormwater runoff from those logging roads without NPDES permits. (Pet. App. 56). Plaintiff contended that stormwater runoff from those logging roads is runoff "associated with industrial activity,"

as defined by 40 C.F.R. § 122.26(b)(14) that therefore requires a permit under EPA's Phase I rule and 33 U.S.C § 1342(p). (Pet. App. 56, 64-65; C.R. 7, First Amended Complaint 17-21).

Tillamook County, which owns and operates the Trask Road, intervened as a defendant in the case, as did the Oregon Forest Industries Council and the American Forest and Paper Association. Defendants and intervenor-defendants then moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). (Pet. App. 55-56). Defendants argued that EPA's silvicultural rule and stormwater rule each provide that stormwater runoff from logging roads does not require NPDES permits, even when the runoff is collected in roadside ditches and culverts and ultimately discharged into the waters of the United States. (Pet. App 66-67). EPA submitted an amicus brief explaining that its silvicultural rule and its stormwater rule mean that no NPDES permits are required for stormwater runoff from logging roads. (Pet. App. 56, 71-72; C.R. 44, United States Amicus Curiae Brief).

The district court granted the motion to dismiss. It ruled that the silvicultural rule, as interpreted by EPA, establishes that the stormwater discharges from logging roads alleged in the complaint do not require NPDES permits. (Pet. App. 71-72). The court did not address whether EPA's stormwater rule also operates to exclude from the NPDES permitting program the stormwater discharges alleged in the complaint. (Pet. App. 72). Plaintiff appealed.

C. The Ninth Circuit reversed, holding that stormwater runoff from logging roads that ultimately is discharged into the waters of the United States is a discharge "associated with industrial activity" that requires an NPDES permit whenever it is collected in roadside ditches and culverts.

On appeal, plaintiff asserted that stormwater discharges from logging roads are discharges "associated with industrial activity" under the stormwater rule, as it had in the district court; plaintiff also asserted that the rules were invalid to the extent that they provided that the alleged stormwater discharges from logging roads did not require NPDES permits. (Plaintiff-Appellant's Opening Br. 10-14, 27-28, 52-53; Plaintiff-Appellant's Reply Br. 31-35). EPA again submitted an amicus brief confirming its longstanding view that, under the silvicultural and stormwater rules, an NPDES permit is not required for stormwater discharges from logging roads. (United States Amicus Curiae Br. 28-32, Nov. 17, 2007).

The Ninth Circuit reversed the district court. It concluded that EPA's stormwater and silvicultural rules are invalid to the extent the rules specify that NPDES permits are not required for stormwater runoff from logging roads that is collected in ditches and culverts. *Nw. Envtl. Def. Ctr. v. Brown*, 617 F.3d 1176 (9th Cir. 2010). Defendants filed petitions for panel rehearing with a suggestion for rehearing en banc. While the petitions for rehearing were pending, the court requested that the parties respond to questions

about its jurisdiction to invalidate EPA's rules implementing the NPDES permitting program in a citizen suit. (Pet. App. 8). The United States submitted another amicus brief, arguing that 33 U.S.C. § 1369 usually would preclude the court from reviewing the validity of EPA's rules in a citizen suit, but that it did not do so in this case because, in the United States' view, plaintiff would not have been aware of EPA's interpretation of the challenged rules before EPA filed its amicus briefs in this case. (Pet. App. 8-10).

The court denied the petitions for rehearing, but vacated its original opinion and issued a superseding opinion in which it again reversed the judgment of the district court. (Pet. App. 4). The Ninth Circuit first addressed whether it had jurisdiction to review the validity of EPA's silvicultural and stormwater rules in this citizen suit. (Pet. App. 8-10). Recognizing that 33 U.S.C. § 1369 ordinarily provides the exclusive avenue for challenging the validity of EPA's rules implementing the NPDES permitting system, the court nonetheless held 33 U.S.C. § 1369 did not preclude it from reviewing the validity of EPA's silvicultural and stormwater rules. (Pet. App. 8-10). The court reasoned that before EPA filed its amicus briefs in this case, plaintiff could not have known that EPA interpreted its rules to exclude from the NPDES permitting program stormwater discharges from logging roads and their associated ditches and culverts. (Pet. App. 9). Plaintiff thus could not have sought review of EPA's rules when they were promulgated. (Pet. App. 9). As a result, the court concluded that the challenge to EPA's rules could proceed in this citizen suit, and

did not have to be brought in a judicial review proceeding under 33 U.S.C. § 1369. (Pet. App. 8-10).

Next, the court addressed whether the silvicultural rule established that the stormwater discharges from logging roads alleged in the complaint did not require NPDES permits. The court recognized that EPA interprets the silvicultural rule to exclude stormwater discharges from logging roads from the NPDES permitting system even when that water is collected and channeled in roadside ditches and culverts. (Pet. App. 36). It also acknowledged that EPA's interpretation of the rule is reasonable. (Pet. App. 36, acknowledging that EPA's interpretation of its silvicultural rule is one of two "possible" interpretations). However, it concluded that the rule, as interpreted by EPA, is invalid, and thus does not excuse defendants from obtaining NPDES permits for the stormwater discharges alleged in the complaint.[5] (Pet. App. 36-37).

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[5] The court initially stated that it did not need to determine affirmatively what the silvicultural rule meant, reasoning that if the rule means what EPA says it means, then it is invalid, but if the rule means what plaintiff contends it means, it does not exempt runoff from logging roads from the NPDES permitting program if that runoff is collected in ditches and culverts. (Pet. App. 36-37). However, the court subsequently acknowledged that it was invalidating EPA's rules, by observing that courts previously had invalidated similar EPA rules, and by recognizing that "[u]ntil now, EPA has acted on the assumption that NPDES permits are not required for discharges of pollutants from ditches, culverts, and channels that collect

The court next addressed whether NPDES permits were required for stormwater discharges from logging roads under EPA's stormwater rule and 33 U.S.C. § 1342(p). It concluded that permits are required, rejecting EPA's contrary interpretations of the rule and statute. (Pet. App. 42-47). In so doing, the court employed an unclear interpretive methodology. The court did not analyze whether EPA reasonably interpreted its stormwater rule when it concluded that the silvicultural activities defined as "nonpoint source silvicultural activities" in the silvicultural rule did not constitute "industrial activity" under the stormwater rule. (*See generally* Pet. App. 42-47). The court also did not analyze whether it was reasonable for EPA to construe the undefined phrase "industrial activity" in 33 U.S.C. § 1342(p) to exclude stormwater from logging road maintenance, construction, and drainage. (*See generally* Pet. App. 42-47). The court did not attempt to determine what Congress intended by the phrase "industrial activity." (*See generally* Pet. App. 42-48). Instead, the court appears to have reasoned as follows:

- EPA's silvicultural rule is invalid to the extent it excludes stormwater runoff from logging roads from the NPDES permitting program when that runoff is collected in roadside drainage ditches and culverts;

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stormwater runoff from logging roads," and stating that it expected EPA to "expeditiously" establish a permitting system. (Pet. App. 48-52).

- Because of the invalidity of the silvicultural rule, EPA's stormwater rule is invalid to the extent that it states that discharges excluded from the NPDES permit program under the silvicultural rule do not qualify as "industrial activity"; therefore
- Those silvicultural activities defined as "nonpoint source silvicultural activities" in the silvicultural rule necessarily constitute "industrial activity" under the stormwater rule and 33 U.S.C. § 1342(p) because

  (1) 40 C.F.R. § 122.26(b)(14) references Standard Industrial Classification 24;

  (2) logging is one of the activities listed in Standard Industrial Classification 24;

  (3) When the invalid reference to the silvicultural rule is excised from 40 C.F.R. § 122.26(b)(14), then all activities listed in Standard Industrial Classification 24, including logging, are "industrial activity" under both 40 C.F.R. § 122.26 and 33 U.S.C. § 1342.

(Pet. App. 42-48).

On the basis of that reasoning, the court held that stormwater discharges from logging roads are discharges "associated with industrial activity" under 40 C.F.R. § 122.26(b)(14) and 33 U.S.C. § 1342 that require Phase I stormwater permits. (Pet. App. 48).

The court concluded by pointing out other cases in which courts had invalidated NPDES permitting

rules, and by summarizing its expectations of how non-party EPA should respond to its decision:

> Until now, EPA has acted on the assumption that NPDES permits are not required for discharges of pollutants from ditches, culverts, and channels that collect stormwater runoff from logging roads. EPA has therefore not had occasion to establish a permitting process for such discharges. But we are confident, given the closely analogous NPDES permitting process for stormwater runoff from other kinds of roads, that EPA will do so effectively and relatively expeditiously.

(Pet. App. 48-52).

REASONS FOR GRANTING THE PETITION

The petition should be granted for four reasons.

First, the Ninth Circuit's ruling that it had jurisdiction to review plaintiff's challenge to the validity of EPA's silvicultural rule and stormwater rule in a citizen suit creates a circuit split; other circuits have held that challenges to the validity of EPA's rules must be brought exclusively under 33 U.S.C. § 1369. That jurisdictional ruling warrants review now because it undermines Congress's primary objective in enacting the CWA: establishing a uniform system for protecting the nation's waters. Allowing EPA's permitting rules to be invalidated in citizen suits to which EPA is not party creates a significant risk of conflicting decisions on the validity of those rules, which will result in inconsistent permitting requirements across the country.

Second, the Ninth Circuit's ruling displaces the longstanding system for regulating pollution caused by stormwater runoff from logging roads. The court's ruling will require affected states to shift from regulating logging-road stormwater under state forest practices acts to yet-to-be designed NPDES permitting programs. Designing the new permit required by the Ninth Circuit's decision will consume a substantial amount of state resources, especially in light of the fact that EPA need not take action in response to the decision. Because Congress did not intend to require the regulatory shift mandated by the Ninth Circuit, the petition should be granted to ensure that limited governmental resources are preserved for the purpose of protecting the country's waters in the manner Congress intended, rather than expended developing a permitting program that Congress did not intend.

Third, the Ninth Circuit's methodology for construing EPA's stormwater rule conflicts with this Court's established methodology for the interpretation of regulations. The petition should be granted because the Ninth Circuit's failure to adhere to this Court's methodology caused it to interpret the stormwater rule incorrectly, and to create a permit requirement that EPA did not intend.

Fourth, the Ninth Circuit's methodology for reviewing EPA's interpretation of 33 U.S.C. § 1342(p) conflicts with this Court's decision in *Chevron v. Natural Res. Def. Council*. Had the Ninth Circuit adhered to *Chevron*, it would have interpreted the CWA differently. Because the CWA, when interpreted un-

der *Chevron*, effectuates Congress's intent, and because the CWA, as interpreted by the Ninth Circuit, conflicts with that intent, the petition should be granted.

A. The Ninth Circuit's jurisdictional ruling creates a circuit split and should be reviewed because it undermines Congress's objective of establishing a uniform system for protecting the nation's waters.

The petition should be granted because the Ninth Circuit's ruling that a court has jurisdiction in a citizen suit to invalidate an EPA rule implementing the NPDES permitting program creates a circuit split. The court's ruling conflicts with the rulings of other circuits that the judicial review provisions of 33 USC § 1369 provide the exclusive mechanism for review of the validity of EPA's rules implementing the NPDES permitting system.

33 U.S.C. § 1369(b)(1)(E) and (F) provide that the Courts of Appeals have jurisdiction to review "the Administrator's action . . . in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [and] in issuing or denying any permit under section 1342 of this title." 33 U.S.C. § 1369(b)(2) further specifies that "Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement."

As this Court and the Courts of Appeals (including the Ninth Circuit) have recognized, those provisions confer jurisdiction on the Courts of Appeals to review the validity of EPA's regulations implementing the NPDES permitting system. *E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977); *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011); *Nat'l Cotton Council v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009); *Maier v. EPA*, 114 F.3d 1032, 1037-38 (10th Cir. 1997); *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992); *Natural Res. Def. Council v. EPA*, 673 F.2d 400 (D.C. Cir. 1982); *Cent. Hudson Gas and Elec. Corp. v. EPA*, 587 F.2d 549 (2d Cir. 1978). More significantly, other circuits have held that where the Courts of Appeals would have jurisdiction to review an EPA regulation under 33 U.S.C. § 1369, that jurisdiction is exclusive. *Maier*, 114 F.3d at 1037-38; *Natural Res. Def. Council v. EPA*, 673 F.2d 400 (D.C. Cir. 1982); *Cent. Hudson Gas and Elec. Corp.*, 587 F.2d 549. In other words, as both the Tenth Circuit and the Third Circuit have explained in construing the near-identical review provisions of the Clean Air Act, when a citizen seeks to challenge the adequacy of the standards promulgated by EPA, the citizen must seek judicial review of those standards in a circuit court of appeals, and cannot challenge their validity in a citizen suit. *United Steelworkers v. Oregon Steel Mills, Inc.*, 322 F.3d 1222, 1225-26 (10th Cir. 2003); *Del. Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 265 (3rd Cir. 1991). That is because the purpose of a citizen suit is to *enforce* EPA standards, not invalidate them. *Del. Valley Citizens Council*, 932 F.2d at 265; *see also* 33 U.S.C. § 1365

(explaining that citizen suit may be brought to enforce EPA's requirements under the CWA). Put yet another way, when a citizen's complaint is that EPA, through its NPDES regulations, is not administering the CWA properly, the citizen must seek judicial review of EPA's regulations under 33 U.S.C. § 1369. By contrast, when a citizen does not contest EPA's regulations, but wants to enforce them against a regulated party, a citizen suit is proper.

Notwithstanding other circuits' recognition that 33 U.S.C. § 1369 provides the exclusive mechanism for reviewing the validity of EPA's rules administering the NPDES permitting system, the Ninth Circuit held that it had jurisdiction to review plaintiff's challenge to the validity of EPA's rules in a citizen suit, even though EPA was not a party, and even though the court had no rulemaking record before it on which to evaluate the bases for EPA's rulemaking choices.[6]

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[6] The Ninth Circuit concluded that the fact that plaintiff could not have known how EPA interpreted its rules before EPA filed its amicus briefs in this case permitted plaintiff to bypass the exclusive jurisdictional provisions of 33 U.S.C. § 1369. (Pet. App. 8-10). That ruling confuses the issue of the proper *timing* of a challenge to the validity of EPA's regulations with the issue of proper *forum* for reviewing the validity those regulations. *Natural Res. Def. Council v. EPA*, 673 F.2d at 404 (distinguishing between timing of rule challenges and forum for rule challenges). Thus, even if the Ninth Circuit is correct that plaintiff could not have brought its challenge earlier, plaintiff is not excused from bringing its challenge under 33 U.S.C. § 1369. Rather, plaintiff was required to seek review of EPA's rules under 33 U.S.C. § 1369 once it became aware

By so holding, the court created a circuit split as to the exclusivity of jurisdiction under 33 U.S.C. § 1369.

Although the Ninth Circuit is the only circuit to rule that 33 U.S.C. § 1369 does not provide the exclusive mechanism for challenging the validity of EPA's NPDES permitting rules, the ruling warrants review now. That is because it poses a significant threat to the accomplishment of Congress's objective in promulgating the CWA. By holding that EPA's rules may be invalidated in citizen suits in which EPA need not, and often is not, a party, the Ninth Circuit has created a system in which the validity of EPA's NPDES permitting rules will vary by judicial district and/or circuit. That holding undermines Congress's primary objective in enacting the CWA: establishing a uniform system for protecting the waters of the United States. *Arkansas v. Oklahoma*, 503 U.S. at 110 (CWA's objective was "authorizing the EPA to create and manage a uniform system of interstate water pollution regulation.").

Because EPA was not a party to this citizen suit, EPA need take no action in response to the court's invalidation of its rules. As the United States itself explained in the amicus brief it submitted in response to the Ninth Circuit's jurisdictional questions:

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of the grounds for challenge. 33 U.S.C. § 1369(b)(1) (allowing for review of EPA's actions outside of 120-day period based "on grounds which arose after the 120th day."); *Maier*, 114 F.3d at 1036-39 (citizens may seek review of EPA's NPDES rules under 33 U.S.C. § 1369 based on new information obtained outside of original 120-day review period).

> Although the United States filed *amicus* briefs at the district court and appellate court levels to provide its views to the Court on important matters of interpreting the CWA and associated regulatory provisions, the United States is not a party to this action. As such, any relief afforded to NEDC in this case must be limited to the parties and applicable only to the specified discharges before the Court, and cannot directly bind EPA, a non-party.

(United States Amicus Br. 3 n.1, Feb. 10, 2011).

If the rules had been invalidated on judicial review under 33 U.S.C. § 1369, EPA necessarily would have had to engage in rulemaking to address the court's ruling. The court would have remanded the rules to EPA to correct the identified deficiencies, and Oregon and other interested and affected parties across the nation would have the opportunity to participate in that rulemaking process. That process is not required to occur here. As a result, Oregon and other regulated parties in the Ninth Circuit remain in regulatory limbo, while waiting to see whether EPA will opt to engage in some kind of rulemaking to address the Ninth Circuit's ruling. Meanwhile, EPA's rules remain valid in all but the states in the Ninth Circuit, meaning that NPDES permits are required for stormwater runoff from logging roads only in the western states.

That patchwork system of regulation is not what Congress intended in enacting the CWA. And it can be avoided if challenges to EPA's NPDES permitting regulations are reviewable exclusively under 33

U.S.C. § 1369, in a proceeding to which EPA will always be a party. As the D.C. Circuit has explained:

> National uniformity . . . is best served by initial review in a court of appeals. All petitions may be consolidated in one court . . . . [If review were allowed to proceed in the district courts], there would be a real possibility . . . that several different district courts would proceed to review the NPDES-related [regulations], with the attendant risk of inconsistent decisions initially and on appeal.

Natural Res. Def. Council v. EPA, 673 F.2d at 405 n.15 (citations omitted) (outlining the rationale for requiring review of EPA's NPDES regulations in the courts of appeal under 33 U.S.C. § 1369(b)(1), including the fact that doing so promotes uniformity in the administration of the NPDES program). The petition should be granted to ensure that Congress's objective of uniformity in the water protection laws is not thwarted by the Ninth Circuit's ruling that the validity of EPA's regulations can be determined district by district.

B. The Ninth Circuit's ruling that stormwater discharges from logging roads require NPDES permits displaces the longstanding scheme for regulating runoff.

The Ninth Circuit's decision displaces the longstanding regulatory scheme in place for protecting the country's waters from pollution associated with stormwater runoff from logging roads. Implementing the shift from the current scheme to the one man-

dated by the Ninth Circuit will consume a substantial amount of resources. Because Congress did not intend to mandate the shift, this Court should grant the petition to preserve the scheme intended by Congress.

Because stormwater runoff from logging roads long has been viewed as nonpoint source pollution—both by EPA and by Congress—states have invested substantial resources in determining how best to manage that runoff through best management practices, rather than through permitting programs. Oregon, for example, through its Forest Practices Act and the regulations promulgated thereunder, has established an extensive scheme to protect the waters of the state from pollution connected to stormwater runoff from logging roads. Specifically, the Oregon legislature directed the Oregon Board of Forestry, in consultation with the Oregon Environmental Quality Commission, to establish best management practices to protect Oregon's waters from pollution caused by forest operations Or. Rev. Stat. § 527.765(1). In accordance with those directives, and the overarching scheme of the CWA, the Board of Forestry promulgated administrative rules establishing best management practices for logging road construction and maintenance in order to protect water quality, fish, and wildlife. Or. Admin. R. 629-625-0000(3); *see generally* Or. Admin. R. ch. 629, div. 625. The rules provide standards for locating, building, maintaining, and using roads used for logging—and their associated draining structures—to minimize the amount of sediment delivered to the waters of the state by the precipitation-based runoff that passes over those roads. Or. Admin. R. 629-625-0200(2); Or. Admin. R.

629-625-0300(2); Or. Admin. R. 629-624-0330; Or. Admin. R. 629-625-0430; Or. Admin. R. 629-625-0600; Or. Admin R. 629-625-0700.

In addition to the logging road rules, the Board of Forestry also has promulgated specific water protection rules. Or. Admin. R. ch. 629, div. 635. Those rules serve "to ensure through the described forest practices that, to the maximum extent practicable, non-point source discharges of pollutants resulting from forest operations do not impair the maintenance and achievement of water quality standards." Or. Admin. R. 629-635-0100(7)(a). The rules require ongoing monitoring and evaluation of the effectiveness of the practices, Or. Admin. R. 629-635-0110, and require, at least in some circumstances, written plans for conducting operations near the waters of the state. Or. Admin. R. 629-635-0130. Finally, the rules contain an enforcement scheme, requiring the state forester to investigate and inspect forest operators for compliance with those rules, and authorizing the forester to initiate enforcement actions. Or. Admin. R. ch. 629, div. 670.

The Ninth Circuit's decision—without even discussing the current regulatory scheme for stormwater runoff from logging roads in Oregon or elsewhere—displaces that scheme, substituting it with a yet-to-be-designed permitting program to address logging road stormwater runoff.[7] To address that displace-

[7] The Ninth Circuit's decision expressly acknowledges that the NPDES permitting system, in its current form, has not been designed to address stormwater runoff from logging roads, given EPA's longstanding belief that

ment in Oregon, the Oregon Department of Environmental Quality, which operates the NPDES permitting program in Oregon, will have to design a new NPDES permit for logging-road stormwater, a process that will take a substantial amount of time. That process also poses a risk of the wasted expenditure of limited state resources. Because EPA has not promulgated rules establishing a permit for stormwater discharges from logging roads, if Oregon has to design a permit in the absence of action by EPA, it risks creating one which ultimately does not meet EPA standards, should EPA eventually decide to create an NPDES permit for stormwater from logging roads.

Congress did not mandate that result. Instead, it gave EPA the discretion to regulate stormwater runoff from logging roads in a way that would preserve or build upon existing state forest practices acts, rather than requiring that EPA regulate logging-road stormwater under the NPDES permitting program. If anything, the history of the 1987 amendments indicates that Congress anticipated that stormwater runoff from logging roads would continue to be addressed, for the most part, through locally designed best-practices programs and the newly established nonpoint-source-pollution program.

The Ninth Circuit nonetheless has required the stormwater runoff from logging roads be regulated under the NPDES permitting program. Implementing that shift in regulation will take a substantial

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NPDES permits are not required for discharges associated with most silvicultural activities. (Pet. App. 52).

amount of time and monetary resources at a time when state resources, in Oregon and elsewhere, are limited. The petition should be granted to prevent the needless expenditure of resources toward an objective that Congress did not intend.

C. The Ninth Circuit's ruling that stormwater discharges from logging roads are stormwater discharges associated with industrial activity under EPA's stormwater rule conflicts with this Court's established methodology for interpreting administrative rules.

The Ninth Circuit disregarded this Court's prescribed methodology for interpreting agency rules when it construed EPA's stormwater rule to require NPDES permits for stormwater runoff from logging roads. The petition should be granted because the Ninth Circuit's failure to adhere to the proper interpretive methodology led it to construe EPA's rule to mean the opposite of what the rule says, and what EPA intended.

This Court has held that a reviewing court must accept an agency's interpretation of its own regulation, even when that interpretation is presented in an amicus brief, provided that interpretation is not plainly erroneous, inconsistent with the regulations, or that there is some reason to suspect that the proposed interpretation does not reflect the agency's reasoned judgment. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, __ U.S. __, 131 S. Ct. 2254, 2260-61, 180 L. Ed. 2d 96 (2011); *Chase Bank USA, N.A. v. McCoy*, 562 U.S. __, 131 S. Ct. 871, 880, 178 L. Ed. 2d 716 (2011).

Here, EPA submitted amicus briefs in the district court and the Ninth Circuit explaining that it interprets its stormwater rule to exclude from the definition of "industrial activity" those activities defined to be nonpoint-source silvicultural activities in the silvicultural rule. (*See* United States Amicus Br. 28-31, Nov. 15, 2007). That is a reasonable (if not the only reasonable) interpretation of the stormwater rule. The rule expressly states that the term "industrial activity" does not include any activity that is excluded from the NPDES permitting program under the Part 122 regulations, and the preamble to the Phase I rule reiterates that EPA did not intend to require Phase I permits for stormwater runoff from the silvicultural activities defined to be nonpoint-source activities by the silvicultural rule. As a result, if it had followed this Court's precedent, the Ninth Circuit would have been required to accept EPA's interpretation of its Phase I rule. In particular, the Ninth Circuit would have been required to accept EPA's interpretation of 40 C.F.R. § 122.26 to mean that stormwater runoff from logging roads is not runoff "associated with industrial activity."

But the Ninth Circuit rejected EPA's interpretation of 40 C.F.R. § 122.26(b)(14). In so doing, it did not even attempt to undertake the analysis mandated by this Court. Rather, having concluded that EPA's silvicultural rule is invalid, the Ninth Circuit took it upon itself to rewrite EPA's stormwater rule to eliminate that rule's reference to the silvicultural rule, without seeking to ascertain whether EPA would have written the rule differently had EPA known of the Ninth Circuit's concerns about the silvicultural

rule. As a result, the Ninth Circuit strayed far from a court's primary objective in rule interpretation: giving effect to the intent of the promulgating agency. The petition should be granted to compel the Ninth Circuit to employ the methodology used by this Court when it construes administrative rules.

D. The Ninth Circuit's ruling that stormwater discharges from logging roads are discharges associated with industrial activity under 33 U.S.C. § 1342(p) conflicts with this Court's established methodology for reviewing an agency's interpretation of a statute that it administers.

The Ninth Circuit's determination that stormwater discharges from logging roads are discharges "associated with industrial activity" under 33 U.S.C. § 1342 conflicts with *Mayo Foundation for Med. Educ. & Research v. United States*, __ U.S. __, 131 S. Ct. 704, 711, 178 L. Ed. 2d 588 (2011), and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). Rather than deferring to EPA's reasonable determination that stormwater discharges from logging roads are not discharges "associated with industrial activity," the Ninth Circuit substituted its own definition of "industrial activity" for that adopted by EPA. That is exactly what *Chevron* prohibits. The petition should be granted to enforce the Ninth Circuit's compliance with this Court's well-established rules for reviewing an agency's interpretation of the statute it implements.

Congress did not define the term "industrial activity" in 33 U.S.C. § 1342(p), and the statute does not otherwise indicate whether timber cultivation and harvesting, and the maintenance of logging roads, qualify as "industrial" activities. Because the term is not subject to a single, precise definition, EPA had the power and responsibility to define its scope. *Mayo Found. for Med. Educ. & Research*, 131 S. Ct. at 711 (agency had power to determine whether medical residents were students within meaning of statute that did not specifically define the term "student"); *Chevron U.S.A. Inc.*, 467 U.S. at 843-44 ("'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)); 2 *A Legislative History of the Water Quality Act of 1987*, at 879 (statement of Mr. Roe) ("In the case of discharges from industrial sites, EPA is directed to identify within 1 year those classes and categories that are required to apply for a permit."); *cf. Arkansas v. Oklahoma*, 503 U.S. at 110 (Congress's point in enacting the CWA was to "authorize[e] the *EPA* to create and manage a uniform system of interstate water pollution regulation." (emphasis supplied)). The task for a reviewing court is thus to determine (1) how EPA has defined industrial activity; and (2) whether that definition is reasonable. *Chevron U.S.A. Inc.*, 467 U.S.at 843-44.

As outlined above, EPA defined "industrial activity" in 40 C.F.R. § 122.26(b)(14). In so doing, it expressly excluded those silvicultural activities classi-

fied as nonpoint sources by 40 C.F.R. § 122.27 from the definition of "industrial activity." The activities thus excluded from the definition of "industrial activity" include: "activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff." 40 C.F.R. § 122.27(b)(1). The terms of EPA's rules, as well as EPA's amicus briefs, make the agency's intent clear.

Further, EPA's interpretation of the statutory term "industrial activity" to exclude the maintenance of logging roads and the other "non-point source silvicultural activities" identified in 40 C.F.R. § 122.27 is reasonable. It is not implausible to view the growing and cutting of trees, and the maintenance of the roads needed to grow and harvest trees, as non-industrial. The legislative history of the 1987 amendments suggests that Congress did not view most silvicultural activities as industrial. Rather, Congress viewed industrial activities to be those that are "directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 1 *A Legislative History of the Water Quality Act of 1987*, at 529, 538; 2 *id.* at 665. And, as noted above, Congress frequently discussed the need to regulate runoff associated with forest practices and logging roads under the new nonpoint-source management program established by 33 U.S.C. § 1329. Had Congress intended to *mandate* that EPA treat logging-road stormwater runoff as industrial stormwater, there would have been little reason for it to discuss so ex-

tensively the need to regulate logging-road runoff under the nonpoint-source management program.

The Ninth Circuit nevertheless concluded that stormwater runoff from logging roads is runoff "associated with industrial activity" under 33 U.S.C. § 1342(p). In reaching that conclusion, the court did not ask whether EPA's contrary determination was reasonable. The court did not even ask whether Congress intended to require that stormwater runoff from logging roads be treated as stormwater "associated with industrial activity" under 33 U.S.C. § 1342(p). Instead, the court defined the term itself, without attempting to ascertain either EPA's or Congress's intent. That conflicts with *Chevron*. *Chevron U.S.A. Inc.*, 467 U.S. at 842 (court of appeals erred by adopting "static judicial definition" of term that Congress intended for EPA to define). The petition should be granted to ensure that the Ninth Circuit adheres to this Court's established methodology for reviewing agency interpretations of the statutory provisions that they administer. That, in turn, will ensure the proper effectuation of Congress's intent in enacting 33 U.S.C. § 1342(p), which, after all, is the essential objective of statutory interpretation. *Chevron*, 467 U.S. at 843-44 & 843 n.9 (observing that Court's objective in interpreting a statute is to effectuate congressional intent).

CONCLUSION

The Ninth Circuit's decision conflicts with the decisions of this Court and of other circuits, thwarts the intent of Congress in enacting the CWA and the intent of EPA in administering it, displaces the long-

standing scheme for regulating water pollution caused by logging road runoff, and creates untenable conflict and confusion for both the state agencies charged with administering the NPDES permitting program and for regulated parties. The petition for certiorari should be granted.

Respectfully submitted,
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Attorney General of Oregon
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Solicitor General
ERIN C. LAGESEN
Assistant Attorney General
Counsel for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, an Oregon non-profit corporation,

Plaintiff-Appellant,

and

OREGON FOREST INDUSTRY COUNCIL; AMERICAN FOREST & PAPER ASSOCIATION,

Intervenors,

v.

MARVIN BROWN, Oregon State Forester, in his official capacity; STEPHEN HOBBS; BARBARA CRAIG; DIANE SNYDER; LARRY GIUSTINA; WILLIAM HEFFERNAN; WILLIAM HUTCHISON; JENNIFER PHILLIPPI, (members of the Oregon Board of Forestry, in their official capacities); HAMPTON TREE FARMS, INC., an Oregon domestic business corporation; STIMSON LUMBER COMPANY, an Oregon domestic business

No. 07-35266

D.C. No. CV-06-01270-GMK

ORDER WITHDRAWING OPINION AND DENYING REHEARING AND OPINION

corporation; GEORGIA-PACIFIC WEST INC., an Oregon domestic business corporation; SWANSON GROUP, INC., an Oregon domestic business corporation; TILLAMOOK COUNTY,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

Argued and Submitted
November 19, 2008—Portland, Oregon

Filed May 17, 2011

Before: William A. Fletcher and Raymond C. Fisher, Circuit Judges, and Charles R. Breyer,* District Judge.

Opinion by Judge William A. Fletcher

COUNSEL

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* The Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

Per A. Ramfjord, Louis A. Ferreira, J. Mark Morford, STOEL RIVES LLP, Portland, Oregon, for defendants-appellees Hampton Tree Farms, Inc., Stimson Lumber Co., Georgia-Pacific West, Inc. and Swanson Group, Inc.

Per A. Ramfjord, Louis A. Ferreira, J. Mark Morford,

STOEL RIVES LLP, Portland, Oregon, for intervenor Oregon Forest Industries Council; Ellen B. Steen, CROWELL & MOORING, Washington, D.C. for intervenor American Forest and Paper Association; and William K. Sargent, Tilamook, Oregon, for intervenor Tillamook County.

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Bradford T. McLane, US DEPARTMENT OF JUSTICE, Washington, D.C., William C. Carpenter, Eugene, Oregon, for the amici-curiae.

Michael R. Lozeau and Douglas J. Chermack, LOZEAU DRURY LLP, Oakland, California; Sharon Buccino, NATURAL RESOURCES DEFENSE

COUNCIL, Washington, D.C., Sharon E. Duggan, LAW OFFICES OF SHARON E. DUGGAN, for amicus curiae NATURAL RESOURCES DEFENSE COUNCIL, INC., and the ENVIRONMENTAL PROTECTION INFORMATION CENTER in support of the plaintiffs-appellants.

ORDER

This court's opinion filed August 17, 2010, and reported at 617 F.3d 1176, is withdrawn, and is replaced by the attached Opinion.

With the filing of the new opinion, the panel has voted unanimously to deny the petitions for rehearing. Judges Fletcher and Fisher have voted to deny the petitions for rehearing en banc, and Judge Breyer so recommends.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc, filed October 5, 2010, are DENIED.

No further petitions for rehearing or rehearing en banc will be accepted.

OPINION

W. FLETCHER, Circuit Judge:

Northwest Environmental Defense Center ("NEDC") brings suit against the Oregon State Forester and members of the Oregon Board of Forestry in their official capacities (collectively, "State Defendants") and against various timber companies ("Timber Defendants," and collectively with State Defendants, "Defendants"). NEDC contends that Defendants have violated the Clean Water Act ("CWA") and its implementing regulations by not obtaining permits from the Environmental Protection Agency ("EPA") for stormwater — largely rainwater — runoff that flows from logging roads into systems of ditches, culverts, and channels and is then discharged into forest streams and rivers. NEDC contends that these discharges are from "point sources" within the meaning of the CWA and that they therefore require permits under the National Pollutant Discharge Elimination System ("NPDES").

The district court concluded that the discharges are exempted from the NPDES permitting process by the Silvicultural Rule, 40 C.F.R. § 122.27, promulgated under the CWA to regulate discharges associated with silvicultural activity. The district court did not reach the question whether the discharges are exempted by amendments to the CWA made in 1987. We reach both questions and conclude that the discharges require NPDES permits.

I. Background

NEDC contends that discharges from systems of ditches, culverts, and channels that receive stormwater runoff from two logging roads in the Tillamook State Forest in Oregon are point source discharges under the CWA. The roads are the Trask River Road, which runs parallel to the South Fork Trask River, and the Sam Downs Road, which runs parallel to the Little South Fork of the Kilchis River. The roads are owned by the Oregon Department of Forestry and the Oregon Board of Forestry. They are primarily used by the Timber Defendants to gain access to logging sites and to haul timber out of the forest. The Timber Defendants use the roads pursuant to timber sales contracts with the State of Oregon. These contracts designate specific routes for timber hauling and require that the Timber Defendants maintain the roads and their associated stormwater collection systems.

Both of the logging roads were designed and constructed with systems of ditches, culverts, and channels that collect and convey stormwater runoff. For most of their length, the roads are graded so that water runs off the road into ditches on the uphill side of the roads. There are several ways these ditches then deliver water into the adjacent rivers. At intervals, the ditches empty into "cross-drain" culverts that cross under the roads. Where the roads are close to the rivers, these culverts deliver the collected stormwater into the rivers. Where the roads are at some distance from the rivers, the roadside ditches connect to culverts under the roads that deliver the collected stormwater into channels, and these channels then

discharge the stormwater into the rivers. When tributary streams cross under the roads, the roadside ditches deliver the collected stormwater into these streams. These streams then carry the collected stormwater to the rivers.

The stormwater runoff that flows off the roads and through these collection systems deposits large amounts of sediment into streams and rivers. This sediment adversely affects fish — in particular, salmon and trout — by smothering eggs, reducing oxygen levels, interfering with feeding, and burying insects that provide food.

Timber hauling on the logging roads is a major source of the sediment that flows through the stormwater collection systems. Logging trucks passing over the roads grind up the gravel and dirt on the surface of the road. Small rocks, sand, and dirt are then washed into the collection system and discharged directly into the streams and rivers. NEDC alleged in its complaint that it sampled stormwater discharges at six points along the Trask River Road and five points along the Sam Downs Road where the Defendants use ditches, culverts, and channels to collect and then discharge stormwater runoff. Each sample contained significant amounts of sediment.

None of the Defendants has sought or received NPDES permits for these discharges into the streams and rivers. NEDC brought suit under the citizen suit provision of the CWA, 33 U.S.C. § 1365(a), which provides that "any citizen may commence a civil action on his own behalf . . . against any person" alleged to be in violation of the CWA. NEDC claims that Defen-

dants have violated the CWA by not obtaining NPDES permits. On March 1, 2007, the district court dismissed NEDC's complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. NEDC has timely appealed.

II. Subject Matter Jurisdiction

In the original version of our opinion, we did not discuss our subject matter jurisdiction. None of the parties to the suit had raised an objection to subject matter jurisdiction. In an amicus brief, however, the United States had contended that the challenged Silvicultural Rule was unambiguous and that, as a consequence, citizen-suit jurisdiction under 33 U.S.C. § 1365(a) was improper. Instead, the United States had argued, the suit should have been brought under 33 U.S.C. § 1369(b). A defect in subject matter jurisdiction is, of course, not waivable.

Without discussing subject matter jurisdiction, we held on the merits that the Silvicultural Rule is ambiguous. After we published our opinion, one of our colleagues asked us to discuss our subject matter jurisdiction. We asked for supplemental briefing. In light of our holding that the Rule is ambiguous, the United States now concedes, in a second amicus brief, that we have subject matter jurisdiction under § 1365(a). We agree with the United States.

A citizen can bring a suit under § 1365(a) against any person, including the United States, who is alleged to be in violation of "an effluent standard or limitation" under the CWA. A citizen suit may be brought against a person or entity illegally discharg-

ing a pollutant into covered waters without an NPDES permit. *Id* at § 1365(f)(6). Suits under § 1365, however, are limited by the CWA's judicial review mechanism at § 1369(b). Section 1369(b) provides for the review of various actions of the EPA Administrator, including the promulgation of effluent standards, prohibitions, or limitations, as soon as those actions take place. *Id.* at § 1369(b)(I). Such suits must be brought within 120 days from the date of the Administrator's "determination, approval, promulgation, issuance or denial," unless the basis for the suit arose more than 120 days after the agency action. *Id* Any action that could have been brought under § 1369(b) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." *Id* at § 1369(b)(2).

The basis for NEDC's challenge to the Silvicultural Rule arose more than 120 days after the promulgation of the Rule. As we discuss in greater detail below, the Silvicultural Rule is susceptible to two different readings. Under one reading, the Rule does not require permits for silviculture stormwater runoff. Under this reading, the Rule is inconsistent with the CWA and hence invalid. Under the other reading, the Rule requires permits for the runoff and is consistent with the CWA. The United States adopted the first reading of the Silvicultural Rule for the first time in its initial amicus brief in this case. Until the United States filed that brief, there was no way for the public to know which reading of the Silvicultural Rule it would adopt. As the government states in its second amicus brief to us,

> At the time an ambiguous regulation is promulgated . . . the public cannot reasonably be expected to challenge potential regulatory interpretations that are textually plausible but that the agency has not contemporaneously offered and may never adopt. Indeed, a rule encouraging such challenges to hypothetical interpretations would likely only foster unnecessary litigation.

Because the Silvicultural Rule was subject to two readings, only one of which renders the Rule invalid, and because the government first adopted its interpretation of the Rule in its initial amicus brief in this case, this case comes within the exception in § 1369(b)(1) for suits based on grounds arising after the 120-day filing window. Section 1369(b) therefore does not bar a citizen suit challenging EPA's Silvicultural Rule interpretation first adopted in its initial amicus brief in this case. We thus have subject matter jurisdiction under 33 U.S.C. § 1365(a).

III. Standard of Review

We review de novo a district court's dismissal under Rule 12(b)(6). *Knievel* v. *ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). We accept as true all of NEDC's allegations of material facts and we construe them in the light most favorable to *NEDC*. *Id.* We review de novo the district court's interpretation of the CWA and its implementing regulations. *League of Wilderness Defenders/Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002). We defer to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous, incon-

sistent with the regulation, or based on an impermissible construction of the governing statute. *Auer v. Robbins,* 519 U.S. 452, 457, 461-62 (1997). We review EPA's interpretations of the CWA under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). At *Chevron* step one, if, employing the "traditional tools of statutory construction," we determine that Congress has directly and unambiguously spoken to the precise question at issue, then the "unambiguously expressed intent of Congress" controls. *Id.* at 843. At *Chevron* step two, if we determine that the statute is "silent or ambiguous with respect to the specific issue," we must determine whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843. An agency interpretation based on a permissible construction of the statute controls. *Id.* at 844.

IV. Discussion

NEDC contends that stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels, and is then delivered into streams and rivers, is a point source discharge subject to NPDES permitting under the CWA. Defendants, however, contend that the Silvicultural Rule exempts such runoff from the definition of point source discharge, and thus exempts it from the NPDES permitting process. Alternatively, Defendants contend that the 1987 amendments to the CWA and regulations implementing those amendments exempt such runoff from the definition of point source discharge and from the permitting process. We discuss, in turn, the definition of point source discharge,

the Silvicultural Rule, and the 1987 amendments to the CWA.

A. Definition of Point Source Discharge

[1] In 1972, in the Federal Pollution Control Act ("FWPCA"), Congress substantially revised federal law governing clean water. Pub. L. No. 92-500, 86 Stat. 816 (1972). In 1977, the statute was renamed the Clean Water Act ("CWA"). Pub. L. No. 95-217, 91 Stat. 1566 (1977). Congress enacted the FWPCA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by replacing water quality standards with point source effluent limitations. 33 U.S.C. § 1251(a); *Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998). Section 301(a) of the Act provides that, subject to certain exceptions, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311 (a). One of these exceptions is a point source discharge authorized by a permit granted pursuant to the NPDES system under § 402 of the Act. 33 U.S.C. § 1342. The combined effect of §§ 301(a) and 402 is that "[t]he CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit." *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003); *see also Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1010 (9th Cir. 2008). "Pollutants" include "rock" and "sand." 33 U.S.C. § 1362(6). Defendants do not contest that sediment discharges from logging roads constitute pollutants within the meaning of the CWA.

[2] "It is well settled that the starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 56 (1987). Section 502(14) of the Act defines "point source" as

> any *discernible, confined and discrete conveyance,* including but not limited to *any pipe, ditch, channel, tunnel, conduit,* well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (emphasis added). The term "nonpoint source" is left undefined.

[3] Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source as defined by § 502(14). As we wrote in *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002):

> Although nonpoint source pollution is not statutorily defined, it is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits. The most common example of nonpoint source

> pollution is the residue left on roadways by automobiles. Small amounts of rubber are worn off of the tires of millions of cars and deposited as a thin film on highways; minute particles of copper dust from brake linings are spread across roads and parking lots each time a driver applies the brakes; drips and drabs of oil and gas ubiquitously stain driveways and streets. When it rains, the rubber particles and copper dust and gas and oil wash off of the streets and are carried along by runoff in a polluted soup, winding up in creeks, rivers, bays, and the ocean.

However, when stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a "discernable, confined and discrete conveyance" of pollutants, and there is therefore a discharge from a point source. In other words, runoff is not inherently a nonpoint or point source of pollution. Rather, it is a nonpoint or point source under § 502(14) depending on whether it is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus a point source discharge).

Our caselaw has consistently recognized the distinction between nonpoint and point source runoff. In *Natural Resources Defense Council v. California Department of Transportation*, 96 F.3d 420, 421 (9th Cir. 1996), we were asked to enforce an already-issued NPDES permit requiring a state agency using

storm drains "to control polluted stormwater runoff from roadways and maintenance yards[.]" In *Natural Resources Defense Council v. EPA ("NRDC v. EPA")*, 966 F.2d 1292, 1295 (9th Cir. 1992), we wrote, "This case involves runoff from diffuse sources that eventually passes through storm sewer systems and is thus subject to the NPDES permit program." In *Trustees for Alaska v. EPA*, 749 F.2d 549 (9th Cir. 1984), we explicitly agreed with a decision of the Tenth Circuit, *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1978). We wrote:

> The [Tenth Circuit] observed that Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants. Such runoff could not be traced to any identifiable point of discharge. The court concluded that point and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by *whether the pollution reaches the water through a confined, discrete conveyance.* Thus, when mining activities release pollutants from a discernible conveyance, they are subject to NPDES regulation, as are all point sources.

749 F.2d at 558 (emphasis added) (internal citation omitted). Finally, in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003), we wrote: "Storm sewers are established point sources subject to NPDES permitting requirements . . . . Diffuse runoff, such as rainwater that is *not* channeled through a point source, is considered nonpoint source pollution

and is not subject to federal regulation." *Id.* at 841, 842 n.8 (emphasis added) (internal citations omitted).

The clarity of the text of § 502(14), as well as our caselaw, would ordinarily make recourse to legislative history unnecessary. The "unambiguously expressed intent of Congress" controls. *Chevron*, 467 U.S. at 842-43. However, because EPA relied on the legislative history of the FWPCA in promulgating the Silvicultural Rule at issue in this case, we recount some of that history as background to our analysis of the Rule.

The FWPCA established "distinctly different methods to control pollution released from point sources and that traceable to nonpoint sources." *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002). The Senate Committee elected to impose stringent permitting requirements only on point sources because "[t]here is no effective way as yet, other than land use control, by which you can intercept [nonpoint] runoff and control it in the way that you do a point source. We have not yet developed technology to deal with that kind of a problem." 117 Cong. Rec. 38825 (Nov. 2, 1971) (statement of Sen. Muskie).

The House and Senate committees made clear that the term "point source" was not to be interpreted narrowly. "By the use of the term 'discharge of pollutants' this provision [§ 402] covers any addition of any pollutant to navigable waters from any point source." H.R. Rep. No. 92-911, at 125 (1971). The Senate Committee Report instructed that

> the [EPA] Administrator should not ignore discharges resulting from point sources other than pipelines or similar conduits . . . . There are many other forms of periodic, though frequent, discharges of pollutants into the water through point sources such as barges, vessels, feedlots, trucks and other conveyances.

S. Rep. No. 92-414, at 51 (1971). Senator Dole explained his understanding of the distinction as it related to the problem of agricultural pollution:

> Most of the problems of agricultural pollution deal with non-point sources. Very simply, a non-point source of pollution is one that does not confine its pollution discharge to one fairly specific outlet, such as a sewer pipe, a drainage ditch or a conduit; thus, a feed-lot would be considered to be a non-point source as would pesticides and fertilizers.

S. Rep. No. 92-414, at 98-99 (1971) (Supplemental Views of Sen. Dole).

Congress did not provide the EPA Administrator with discretion to define the statutory terms. Senator Randolph, the Chairman of the Senate Committee, explained, "We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives [for] administrators to follow." 117 Cong. Rec. 38805 (Nov. 2, 1971). Senator Muskie, another major proponent of the legislation, clarified that EPA would provide "[g]uidance with respect to the identification of 'point sources' and 'non-

point sources.'" 117 Cong. Rec. 38816 (Nov. 2, 1971). However, "[i]f a man-made drainage, ditch, flushing system or other such device is involved and if measurable waste results and is discharged into water, it is considered a 'point source.'" *Id.*

[4] Congress also sought to require permits for any activity that met the legal definition of "point source," regardless of feasibility concerns. For example, Congressman Roncalio of Wyoming proposed an amendment to exempt irrigated agriculture from the NPDES permit program because it was "virtually impossible to trace pollutants to specific irrigation lands, making these pollutants a nonpoint source in most cases." 118 Cong. Rec. 10765 (Mar. 29, 1972). Opponents objected that the amendment would exclude large point source polluters simply because the channeled water originally derived from irrigated agriculture. Congressman Waldie explained:

> In California there is a vast irrigation basin that collects all the waste resident of irrigation water in the Central Valley and places it in a drain— the San Luis Draining—and transport[s] it several hundreds of miles and then dumps it into the San Joaquin River which flows into the estuary and then into San Francisco Bay. It is highly polluted water that is being dumped in waters already jeopardized by pollution.
>
> Will the gentleman's amendment establish that as a nonpoint source pollution or will it come under the point source solution discharge?

Id. Congressman Roncalio responded that his amendment would not require permitting for this type of activity – that is, that it would redefine these agricultural point sources as nonpoint source pollution. His amendment was then rejected on the House floor. *See id.*

Congress eventually adopted a statutory exemption for agricultural irrigation in 1977, five years after the passage of the FWCPA. *See* CWA § 402(1), 33 U.S.C. § 1342(1) ("The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a pemit."); CWA § 502(14), 33 U.S.C. § 1362(14) ("This term does not include return flows from irrigated agriculture."). Congress did so to alleviate EPA's burden in having to issue permits for every agricultural point source. "The problems of permitting every discrete source or conduit returning water to the streams from irrigated lands is simply too burdensome to place on the resources of EPA." 123 Cong. Rec. 38956 (Dec. 15, 1977) (statement of Rep. Roberts). Congress did not, however, grant EPA the discretion to exempt agricultural discharges from the general statutory definition of point source discharges. Rather, Congress exempted such discharges by amending the statute. Congress has never granted a similar statutory exemption for silvicultural discharges from the general definition of point source discharges.

Despite the foregoing, Defendants contend that stormwater runoff from logging roads that is collected

in a system of ditches, culverts, and channels, and is then discharged into streams and rivers, is a nonpoint source discharge. Defendants contend that the Silvicultural Rule exempts such discharges from the definition of point source discharge contained in § 502(14), and therefore from the NPDES permitting system. Alternatively, Defendants contend that the 1987 amendments to the CWA exempted such discharges from the permitting system. We discuss defendants' two contentions in turn.

B. The Silvicultural Rule

1. Adoption of the Rule

In 1973, one year after the passage of the FWPCA, EPA promulgated regulations categorically exempting several kinds of discharges from the NPDES permit program. Exempted discharges included discharges from storm sewers composed entirely of storm runoff uncontaminated by industrial or commercial activity, discharges from relatively small animal confinement facilities, discharges from silvicultural activities, and irrigation return flow from point sources where the flow was from less than 3000 acres. The exemption for discharges from silvicultural activities provided:

> The following do not require an NPDES permit:
>
> . . .
>
> (j) Discharges of pollutants from agricultural and silvicultural activities, including irrigation return flow and runoff from orchards, cultivated crops, pastures, rangelands, and for-

> est lands, except that this exclusion shall not apply to the following:
>
> . . .
>
> (5) Discharges from any agricultural or silvicultural activity which have been identified by the Regional Administrator of the Director of the State water pollution control agency or interstate agency as a significant contributor of pollution.

40 C.F.R. § 125.4 (1975). The Natural Resources Defense Council challenged the regulations as inconsistent with the statute. *See Natural Res. Def. Council v. Train*, 396 F. Supp. 1393 (D.D.C. 1975).

EPA defended the challenged regulations on the ground "that the exempted categories of sources are ones which fall within the definition of point source but which are ill-suited for inclusion in a permit program." *Id.* at 1395. The district court wrote that EPA has authority to clarify by regulation the definition of nonpoint and point source discharges, but only so long as its regulations comply with the statutory text. *Id.* at 1395-96. In the court's view, the challenged regulations categorically exempted "entire classes of point sources from the NPDES permit requirements." *Id.* at 1396. The court therefore held that the regulations were fatally inconsistent with the definition contained in § 502(14), writing "that the Administrator [of the EPA] cannot lawfully exempt point sources discharging pollutants from regulation under NPDES." *Id.* at 1402.

EPA appealed to the D.C. Circuit. While the appeal was pending, EPA grudgingly promulgated revised regulations. For example, in soliciting public comment on a proposal for a "system for separate agricultural and silvicultural storm sewers" rule in December 1975, EPA wrote:

> In promulgating the [earlier] regulations EPA
>
> stated its belief that while some point sources within the excluded categories may be significant contributors of pollution which should be regulated consistent with the purposes of the FWPCA, it would be administratively difficult if not impossible, given Federal and State resource levels, to issue individual permits to all such point sources. . . . Essentially, these [earlier] regulations providing for exemptions were based on EPA's view (*a view which it continues to maintain* is *correct*) that most sources within the exempted categories present runoff-related problems not susceptible to the conventional NPDES permit program including effluent limitations. *EPA's position was and continues to be* that most rainfall runoff is more properly regulated under section 208 of the FWPCA [which does not require NPDES permits], whether or not the rainfall happens to collect before flowing into navigable waters. Agricultural and silvicultural runoff, as well as runoff from city streets, frequently flows into ditches or is collected in pipes before discharging into streams. EPA contends that most of these

> sources are nonpoint in nature and should not be covered by the NPDES permit program.

40 Fed. Reg. 56932 (Dec. 5, 1975) (emphasis added).

[5] Two months later, in February 1976, EPA proposed a revised Silvicultural Rule and solicited public comment. EPA wrote,

> [T]he Agency has carefully examined the relationship between the NPDES permit program (which is designed to control and eliminate discharges of pollutants from discrete point sources) and water pollution from silvicultural activities (which tends to result from precipitation events). It has been determined that most water pollution related to silvicultural activities is nonpoint in nature.

41 Fed. Reg. 6282 (Feb. 12, 1976).

EPA continued:

> Those silvicultural activities which are specified in the regulations (rock crushing, gravel washing, log sorting and log storage facilities), and are thus point sources, are subject to the NPDES permit program. Only those silvicultural activities that, as a result of controlled water used by a person, discharge pollutants through a discernible, confined and discrete conveyance into navigable waters are required to obtain a § 402 pollution discharge permit.

Id. This passage provides EPA's central criterion for distinguishing between silvicultural point and nonpoint sources. EPA proposed to characterize dis-

charges of pollutants through a discernible, confined and discrete conveyance as point source discharges only when they were "a result of controlled water used by a person." Under this criterion, the proposed rule named as point source discharges only those related to "rock crushing, gravel washing, log sorting, [and] log storage facilities." *Id.* 6283 (Proposed Rule); 41 Fed. Reg. 24711 (Jun. 18, 1976) (Final Rule); 40 C.F.R. § 124.85 (1976). Any other silvicultural discharge of pollutants, even if made through a discernible, confined and discrete conveyance, was considered a nonpoint source of pollutants. In effect, this meant that any natural runoff containing pollutants was not a point source, even if the runoff was channeled and controlled through a "discernible, confined and discrete conveyance" and then discharged into navigable waters.

In its "response to comments" accompanying the final version, EPA provided more general criteria by which to distinguish nonpoint from point sources of pollution. It wrote:

> Basically, nonpoint sources of water pollution are identified by three characteristics:
>
> (i) The pollutants discharged are induced by natural processes, including precipitation, seepage, percollation [sic], and runoff;
>
> (ii) The pollutants discharged are not traceable to any discrete or identifiable facility; and
>
> (iii) The pollutants discharged are better controlled through the utilization of best man-

> agement practices, including process and planning techniques.
>
> In contrast to these criteria identifying nonpoint sources, point sources of water pollution are generally characterized by discrete and confined conveyances from which discharges of pollutants into navigable waters can be controlled by effluent limitations. It is these point sources in the silviculture category which are most amenable to control through the NPDES permit program.

41 Fed. Reg. 24710 (Jun. 18, 1976). EPA specifically noted that the single criterion for point sources—resulting from "controlled water used by a person"—was underinclusive. EPA pointed out that some point source discharges take place "regardless of any [prior] contact with water," such as discharges of wood chips and bark directly into navigable water. *Id.*

[6] However, the actual text of the final version of the Silvicultural Rule was little changed from the version proposed in February. *See* 41 Fed. Reg. 24711 (Jun. 18, 1976). The revised Rule provided in pertinent part:

> Silvicultural activities.
>
> (a) Definitions. For the purpose of this section:
>
> (1) The term "silvicultural point source" means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicul-

> tural activities and from which pollutants are discharged into navigable waters of the United States.
>
> Comment: This term does not include nonpoint source activities inherent to silviculture such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, and road construction and maintenance from which runoff results from precipitation events.

40 C.F.R. § 124.85 (1976). Even though there was no longer a single criterion for identifying point source discharges, the same four activities were specified as producing point source discharges—rock crushing, gravel washing, log sorting and log storage. *Id.* And even though there were now three general criteria for identifying nonpoint sources, the effect of the Rule was to treat all natural runoff as nonpoint pollution, even if channeled and discharged through a discernible, confined and discrete conveyance.

In comments accompanying the proposed Silvicultural Rule in February 1976, EPA provided, in concise form, its justification for the Rule. It wrote:

> Technically, a point source is defined as a "discernible, confined and discrete conveyance, including but not limited to any pipe, ditch [or] channel * * *" (§ 502(14) of the FWPCA) and includes all such conveyances. However, a proper interpretation of the FWPCA as ex-

> plained in the legislative history and supported by the [district] court in *NRDC v. Train* is that not every "ditch, water bar or culvert" is "means [sic] to be a point source under the Act [FWCPA]." It is evident, therefore, that ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff from precipitation are not meant to be subject to the § 402 permit program.

41 Fed. Reg. 6282 (Feb. 12, 1976). A sentence-by-sentence analysis shows the weakness of EPA's justification.

In the first sentence, EPA wrote that "[t]echnically, a point source is defined as a 'confined and discrete conveyance, including but not limited to any pipe, ditch, [or] channel.'" The words quoted by EPA in this sentence were a direct (though partial) quotation of the statutory definition of "point source" contained in § 502(14) of the FWPCA. EPA's choice of the word "technically" is somewhat odd and even misleading; perhaps EPA hoped that the word would diminish the force of the statutory definition. But whatever its motive, EPA would have been more accurate if it had written "textually" instead of "technically."

In the second sentence, EPA wrote that "a proper interpretation of the FWCPA as explained in the legislative history and supported by the court in *NRDC v. Train* is that not every 'ditch, water bar or culvert' is 'mean[t] to be a point source under the Act [FWCPA].'" EPA was putting words into the district court's mouth. The district court did not hold that

"not every 'ditch, water bar or culvert' is 'meant to be a point source.'" Rather, the court wrote only that the plaintiff in the case, NRDC, had not made that argument. *See Train,* 396 F. Supp. at 1401 ("NRDC does not contend that every farm ditch, water bar, or culvert on a logging road is properly meant to be a point source under the Act."). Further, and more important, everyone understands that a "ditch, water bar or culvert" *that does not discharge into navigable waters* is not a point source. But the regulation does not exempt only such ditches water bars or culverts. Instead, it categorically exempts collected runoff from silviculture, whether or not there is a discharge into navigable waters.

[7] Finally, in the last sentence EPA wrote, "It is evident, therefore, that ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff from precipitation are not meant to be subject to the § 402 permit program." The text of § 502(14), quoted in the first sentence of the paragraph, is flatly inconsistent with this statement. Under § 502(14), a pollutant comes from a point source if it is collected and discharged through ditches, pipes, channels, and similar conveyances. Section 502(14) says nothing, either explicitly or implicitly, about the source of the water contained in the discharge. Further, even though not every "ditch, water bar, or culvert" is a point source within the meaning of the statute, it hardly follows that a system of ditches, pipes and channels that collects "controlled water used by a person" and discharges it into a river is a point source, while an identical system that collects and discharges natural precipitation is not.

[8] After EPA promulgated the revised Silvicultural Rule, the Court of Appeals for the D.C. Circuit affirmed the district court's disapproval of the 1973 regulations, including the original Silvicultural Rule. *Natural Res. Def. Council v. Costle,* 568 F.2d 1369 (D.C. Cir. 1977). The court did not review the revised Silvicultural Rule promulgated in 1976. The court held that EPA did not have the authority categorically to exempt point source discharges. It wrote:

> Under the EPA's interpretation the Administrator would have broad discretion to exempt large classes of point sources from any or all requirements of the FWCPA. This is a result that the legislators did not intend. Rather they stressed that the FWCPA was a tough law that relied on explicit mandates to a degree uncommon in legislation of this type.

Id. at 1375.

The court responded to EPA's argument that a literal interpretation of the FWCPA's definition of "point source" "would place unmanageable burdens on the EPA":

> There are innumerable references in the legislative history to the effect that the Act is founded on the "basic premise that a discharge of pollutants without a permit is unlawful and that discharges not in compliance with the limitations and conditions for a permit are unlawful." *Even when infeasibility arguments were squarely raised, the legislature declined to abandon the permit requirement.*

Id. at 1375-76 (emphasis added). The court concluded:

> The wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402. Courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute.

Id. at 1377.

[9] Although the D.C. Circuit did not address the revised Silvicultural Rule in its opinion, its reasoning is no less applicable to the new version of the Rule. The court concluded that EPA docs not have the authority to "exempt categories of point sources" from the permitting requirements of § 402. This is so even if EPA contends that the literal terms of the statute would place "unmanageable burdens" on the agency. The FWCPA was a "tough law" that EPA was not at liberty to ignore.

2. The Revised Silvicultural Rule

The current text of the revised version of the Silvicultural Rule is different in only minor respects from the version promulgated in 1976. In pertinent part, the current version provides:

> (b) *Definitions.* (1) *"Silvicultural point source"* means any discernible, confined 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. The term does not include nonpoint source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burnng, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.

40 C.F.R. § 122.27.

The text of the CWA distinguishes between point and nonpoint sources depending on whether the pollutant is channeled and controlled through a "discernible, confined and discrete conveyance." CWA § 502(14), 33 U.S.C. § 1362(14). The Silvicultural Rule, by contrast, categorically distinguishes between the two types of discharges depending on the source of the pollutant. Under the Rule, "silvicultural point source" discharges are those discharged through "discernible, confined and discrete conveyance[s]," but only when they are direct discharges of wood chips, bark, and the like, or discharges resulting from 'controlled water used by a person." *See* 41 Fed. Reg. 24710 (Jun. 18, 1976); 41 Fed. Reg. 6282 (Feb. 12, 1976). All other discharges of "natural runoff" are nonpoint sources of pollution, even if such discharges are channeled and controlled through a "discernible, confined and discrete conveyance."

A nonexhaustive list of silvicultural point source discharges under the Rule includes discharges "related to rock crushing, gravel washing, log sorting, [and] log storage facilities." A nonexhaustive list of

silvicultural nonpoint sources of pollution under the Rule includes "silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance."

[10] The original Silvicultural Rule, which was struck down by the district court in *Train* and on appeal in *Costle,* categorically exempted all discharges from silvicultural activities. The current Rule categorically exempts all discharges from silvicultural activities resulting from natural runoff. The categorical exemption in the current Rule is somewhat smaller than the exemption in the original Rule, but it is a categorical exemption nonetheless. Indeed, in a later rulemaking proposal EPA specifically characterized it as a categorical exemption. *See* 64 Fed. Reg. 46058, 46077 (Aug. 23, 1999) ("Currently, runoff from [the list of "non-point source silvicultural activities"] is categorically excluded from the NPDES program."). The question before us is whether the categorical exemption from the NPDES permit program in the current Rule is based on a permissible interpretation of § 502(14).

We have dealt with the Silvicultural Rule once before. In *League of Wilderness Defenders/Blue Mountain Diversity Project v. Forsgren ("Forsgren")*, 309 F.3d 1181 (9th Cir. 2002), several environmental groups sued to enjoin unpermitted aerial spraying of insecticide to combat the Douglas Fir Tussock Moth. Some of the insecticide was sprayed onto the surface of streams. Plaintiffs contended that the aerial spray-

ing was a discharge from a point source requiring an NPDES permit. Relying on the Silvicultural Rule and on two letters and a guidance document from EPA, the Forest Service took the position that the spraying was not a point source discharge, and that a permit was therefore not required. We disagreed with EPA and the Forest Service.

The core of the EPA and Forest Service argument was that "pest . . . control" was one of the activities listed in the Silvicultural Rule as not constituting a point source discharge. We wrote:

> The Forest Service's argument fails because the statute itself is clear and unambiguous. The statutory definition of point source, "any discernible, confined and discrete conveyance, including but not limited to any . . . vessel," 33 U.S.C. § 1362(14), clearly encompasses an aircraft equipped with tanks spraying pesticide from mechanical sprayers directly over covered waters. The Forest Service cannot contravene the will of Congress through its reading of administrative regulations.

Forsgren, 309 F.3d at 1185-86.

We pointed out that the Rule characterized a pest control discharge as nonpoint only when it was "silvicultural pest control *from which there is natural runoff*." *Id.* at 1186 (emphasis in original). If pest control activity resulted in natural runoff, that runoff was not a point source discharge under § 502(14). But it was undisputed in *Forsgren* that aerial spraying of pesticide into streams was not "natural runoff." We

had no occasion to rule on, and did not discuss, whether silvicultural activities from which there is natural runoff *that is channeled, controlled, and discharged through a "discernible, confined and discrete conveyance"* is a point source under § 502(14).

[11] We emphatically "reject[ed] thc Forest Service's argument that the EPA has the authority to 'refine' the definitions of point source and nonpoint source pollution in a way that contravenes the clear intent of Congress as expressed in the statute." *Id.* at 1190. We wrote:

> We agree with the D.C. Circuit that the EPA has some power to define point source and nonpoint source pollution where there is room for reasonable interpretation of the statutory definition. However, the EPA may not exempt from NPDES permit requirements that which clearly meets the statutory definition of a point source by "defining" it as a nonpoint source. Allowing the EPA to contravene the intent of Congress, by simply substituting the word "define" for the word "exempt," would turn *Costle* on its head.

Id. We now reach the question not reached or discussed in *Forsgren* — whether discharge of natural runoff becomes a point source discharge when it is channeled and controlled through a "discernible, confined and discrete conveyance" in a system of ditches, culverts, and channels. We conclude that it does.

[12] In our view, the answer to the question before us is as clear as the answer to the questions pre-

sented in *Costle* and in *Forsgren.* The CWA prohibits "the discharge of any pollutant by any person" without an NPDES permit. 33 U.S.C. § 1311(a). The term "discharge of a pollutant" means "*any* addition of any pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12)(A) (emphasis added). A "point source" is

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C § 1362(14). The definition in no way depends on the manner in which the pollutant arrives at the "discernible, confined and discrete conveyance." That is, it makes no difference whether the pollutant arrives as the result of "controlled water used by a person" or through natural runoff.

We agree with the analysis of the district court in *Environmental Protection Information Center v. Pacific Lumber Co.* ("*EPIC*"), 2003 WL 25506817 (N.D. Cal.). Relying on *Forsgren*, Judge Patel concluded that stormwater runoff from logging roads that was collected in a system of ditches, culverts, and channels, and then discharged into protected water, was a point source discharge requiring an NPDES permit. After an extensive analysis, the district court wrote:

> The water runoff system this action addresses is an elaborate and extensive one. Blending a

> variety of drainage methods, the system covers a substantial amount of land and addresses a significant amount of water. Where this runoff system involves "surface drainage[ ] or road construction from which there is natural runoff," section 122.27 [the Silvicultural Rule] may control. But where the system utilizes the kind of conduits and channels embraced by section 502(14), section 122.27 does not control: It cannot control, for one, because section 502(14) of the CWA trumps section 122.27's operation, as EPA may not alter the definition of an existing "point source." And it cannot control, for another, because section 122.27's own terms are unsatisfied; once runoff enters a conduit like those listed in section 502(14), the runoff ceases to be the kind of "natural runoff" section 122.27 expressly targets. In this latter context, section 122.27 does not—and cannot—absolve silvicultural businesses of CWA's "point source" requirements.

Id. at *15 (internal citations omitted).

As pointed out by the district court in *EPIC*, there are two possible readings of the Silvicultural Rule. The first reading reflects the intent of EPA in adopting the Rule. Under this reading, the Rule exempts all natural runoff from silvicultural activities such as nursery operations, site preparation, and the other listed activities from the definition of point source, irrespective of whether, and the manner in which, the runoff is collected, channeled, and discharged into protected water. If the Rule is read in this fashion, it

is inconsistent with § 502(14) and is, to that extent, invalid.

[13] The second reading does not reflect the intent of EPA, but would allow us to construe the Rule to be consistent with the statute. Under this reading, the Rule exempts natural runoff from silvicultural activities such as those listed, but only as long as the "natural runoff" remains natural. That is, the exemption ceases to exist as soon as the natural runoff is channeled and controlled in some systematic way through a "discernible, confined and discrete conveyance" and discharged into the waters of the United States.

[14] Under either reading, we hold that the Silvicultural Rule does not exempt from the definition of point source discharge under § 512(14) stormwater runoff from logging roads that is collected and channeled in a system of ditches, culverts, and conduits before being discharged into streams and rivers.

C. 1987 Amendments to the CWA

Defendants contend in the alternative that even if the discharges from a system of ditches, culverts, and channels are point source discharges within the meaning of § 502(14), and even if the Silvicultural Rule does not exempt such discharges from § 502(14), the discharges are nonetheless exempt from the permitting process because of the 1987 amendments to the CWA. Defendants made this contention in the district court, but that court did not decide the question.

We can affirm the decision of the district court on any ground supported by the record, even one not relied on by that court. *Thompson v. Paul*, 547 F.3d 1055, 1058-59 (9th Cir. 2008). Defendants urge us, if we hold that the Silvicultural Rule does not exempt the discharges, to affirm the district court based on the 1987 amendments. No factual development is necessary given that the district court dismissed under Rule 12(b)(6). The parties have briefed the question in this court. We therefore reach the question.

1. Congressional Approval or Acquiescence

As a threshold matter, we consider whether, in adopting the 1987 amendments to the CWA, Congress *sub silentio* approved of, or acquiesced in, the Silvicultural Rule. We conclude that Congress did not.

In some instances, congressional re-enactment of statutes can be persuasive evidence of approval of longstanding administrative regulations promulgated under that statute. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974), the Court wrote, "[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *See also Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 846 (1986) (quoting and paraphrasing *Bell Aerospace).* But this case is very different from *Bell Aerospace*

and *Schor*. First, in both *Bell Aerospace* and *Schor*, the legislative histories made clear that when Congress re-enacted the statutes at issue it was well aware of the existing administrative interpretation of the statutes. Here, by contrast, there is no indication that Congress was aware of the Silvicultural Rule when it adopted the 1987 amendments. There is no mention of, or even allusion to, the Rule anywhere in the legislative history of the amendments. Second, in both *Bell Aerospace* and *Schor,* the relevant portions of the statutes at issue were reenacted essentially without change. Here, as we explain below, the 1987 amendments fundamentally changed the statutory treatment of stormwater discharges. Third, the language of the original and the re-enacted statutes in both *Bell Aerospace* and *Schor* was readily susceptible to the administrative interpretations of those statutes. Here, by contrast, the relevant statutory language is flatly inconsistent with the Silvicultural Rule.

In other instances, congressional action or inaction can constitute acquiescence in an existing regulation. The Supreme Court has cautioned strongly against finding congressional acquiescence. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 162 (2001), it wrote, "Although we have recognized congressional acquiescence to administrative interpretations of a statute in some circumstances, we have done so with extreme care." After discussing a case in which there had been congressional hearings on the precise issue, and in which thirteen bills had been introduced in unsuccessful attempts to overturn the regulation, the Court

wrote, "Absent such overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation." *Id.* at 169-70, n.5. Here, there is no evidence whatsoever of congressional acquiescence in the Silvicultural Rule, let alone "overwhelming evidence."

2. The 1987 Stormwater Amendments

[15] Congress amended the CWA in 1987 to deal specifically with stormwater discharges. Pub. L. No. 100-4, 101 Stat. 7 (1987). Congress added § 402(p) to the CWA, establishing a "phased and tiered approach" to NPDES permitting of stormwater discharges. *See* 55 Fed. Reg. 47994 (Nov. 16, 1990) (describing 33 U.S.C. § 1342(p)). Section 402(p) fundamentally redesigned the CWA's approach to stormwater discharges.

Under the framework created by the FWCPA in 1972, EPA was required to establish a permitting system for all point source discharges of stormwater. Senator Durenberger explained that the Conference Bill that would become the 1987 amendment focused on stormwater point sources.

> The [FWPCA] of 1972 required all point sources, including stormwater dischargers, to apply for NPDES permits within 180 days of enactment by 1973. Despite this clear directive, EPA has failed to require most stormwater point sources to apply for permits which would control the pollutants in their discharge.

132 Cong. Rec. 32380, 32400 (Oct. 16, 1986). Senator Stafford, the Chairman of the Committee on Environment and Public Works reiterated, "EPA should have developed this [stormwater] program long ago. Unfortunately, it did not." 132 Cong. Rec. 32381 (Oct. 16, 1986).

Congress recognized that EPA's difficulties stemmed in part from the large number of stormwater sources falling within the definition of a point source. *See, e.g.,* 131 Cong. Rec. 19846, 19850 (Jul. 22, 1985) (statement of Rep. Rowland) ("Under existing law, the [EPA] must require [NPDES] permits for anyone who has stormwater runoff on their property. What we are talking about is potentially thousands of permits for churches, schools, residential property, runoff that poses no environmental threat[.]"); 131 Cong. Rec. 15616, 15657 (Jun. 13, 1985) (Statement of Sen. Wallop) ("[EPA regulations] can be interpreted to require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source. . . . Requiring a permit for these kinds of stormwater runoff conveyance systems would be an administrative nightmare.").

In § 402(p), adopted as part of the 1987 amendments, Congress required NPDES permits for the most significant sources of stormwater pollution under so-called "Phase I" regulations. *See* 133 Cong. Rec. 983, 1006 (Jan. 8, 1987) (statement of Rep. Roe) ("[Section 402(p)] establishes an orderly procedure which will enable the major contributors of pollutants to be addressed first, and all discharges to be ulti-

mately addressed in a manner which will not completely overwhelm EPA's capabilities."). Section 402(p) lists five categories of stormwater discharges, including discharges "associated with industrial activity," that are covered in Phase I. 33 U.S.C. § 1342(p)(2)(B). NPDES permits are required for all five categories of discharges. *Id.* §§ 1342(p)(l)-(2). A permit was required for such discharges by 1990. *Id.* § 1342(p)(4)(A).

All remaining stormwater discharges are to be covered by "Phase II" regulations. During Phase II, EPA is to study stormwater discharges not covered by Phase I and to issue regulations based on its study. *Id.* § 1342(p)(5)-(6). In 1999, EPA promulgated a Phase II regulation requiring NPDES permits for discharges from small municipal storm systems and small construction sites. We upheld most of that regulation in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003), and remanded for further proceedings. EPA has not yet responded to the remand.

Stormwater discharges from churches, schools and residential properties, through rain gutters or otherwise, and from other relatively de minimus sources, are covered under Phase II rather than Phase I. It is within the discretion of EPA to promulgate Phase II regulations requiring, or not requiring, permits for such discharges.

3. Phase I Stormwater Regulations

In 1990, EPA promulgated "Phase I" regulations for the storm water discharges specified in § 402(p).

55 Fed. Reg. 47990 (Nov. 16, 1990); 40 C.F.R. § 122.26. For discharges "associated with industrial activity," which require NPDES permits, EPA's regulations provide:

> Storm water discharge associated with industrial activity means 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. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122.

40 C.F.R. § 122.26(b)(14). The last sentence of this regulation refers to the Silvicultural Rule, thereby purporting to exempt from the definition of "discharges associated with industrial activity" any activity that is defined as a nonpoint source in the Silvicultural Rule. *See id.*

The preamble to the Phase I regulations makes clear EPA's intent to exempt nonpoint sources as defined in the Silvicultural Rule from the permitting program mandated by § 402(p). The preamble provides:

> The definition of discharge associated with industrial activity does not include activities or facilities that are currently exempt from permitting under NPDES. EPA does not intend to change the scope of 40 CFR 122.27 in this rulemaking. Accordingly, the definition of "storm water discharge associated with indus-

> trial activity" docs not include sources . . . which are excluded under 40 CFR 122.27.

55 Fed. Reg. 47990, 48011 (Nov. 16, 1990).

[16] In the 1987 amendments, Congress exempted many stormwater discharges from the NPDES permitting process. However, Congress made clear in § 402(p) that it did not exempt "discharges associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B). Indeed, Congress specifically mandated that EPA establish a permitting process for such discharges. *See* 33 U.S.C. § 1342(p)(4)(A) ("[T]he Administrator *shall* establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) ["discharge[s] associated with industrial activity"] and (2)(C)." (emphasis added)). In *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992), we struck down a part of EPA's Phase I regulations exempting point source discharges from construction sites of less than five acres. We wrote, "[I]f construction activity is industrial in nature, and EPA concedes that it is, EPA is not free to create exemptions from permitting requirements for such activity." *Id* at 1306. Similarly, if silvicultural activity is "industrial in nature," § 402(p) requires that discharges from such activity obtain NPDES permits.

[17] Industries covered by the Phase I "associated with industrial activity" regulation are defined in accordance with Standard Industrial Classifications ("SIC"). The applicable (and unchallenged) regulation provides that facilities classified as SIC 24 are among "those considered to be engaging in 'industrial activity.'" 40 C.F.R. § 122.26(b)(14)(ii). It is undisputed

that "logging," which is covered under SIC 2411 (part of SIC 24), is an "industrial activity." SIC 2411 defines "logging" as "[e]stablishments primarily engaged in cutting timber and in producing . . . primary forest or wood raw materials . . . in the field."

The regulation further defines the term "stormwater discharge associated with industrial activity" as follows:

> For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; *immediate access roads* and rail lines *used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility;* material handling sites; . . . .

40 C.F.R. § 122.26(b)(14)(ii) (emphasis added).

The Timber Defendants contend that logging roads are not "immediate access roads" because they are not confined to the immediate area of the site where the logging takes place. We disagree. The Timber Defendants misunderstand the meaning of the term "immediate" as it is used in the regulations. The preamble to the Phase I regulations provides that "immediate access roads" means "roads which are exclusively or primarily dedicated for use by the industrial facility." 55 Fed. Reg. 47990, 48009 (Nov. 16, 1990).

The Timber Defendants also contend that logging roads are not "primarily dedicated" for use by the logging companies. Again, we disagree. We recognize

that logging roads are often used for recreation, but that is not their primary use. Logging companies build and maintain the roads and their drainage systems pursuant to contracts with the State. Logging is also the roads' *sine qua non*: If there were no logging, there would be no logging roads.

Finally, the Timber Defendants contend that, even if the logging industry is classified by the Phase I rule and SIC 2411 as industrial, the logging sites are not "industrial facilities" because they are not typical industrial plants. Therefore, according to the Timber Defendants, any roads serving logging sites cannot be the "immediate access roads" covered by this rule. We continue to disagree. The definition of a "facility" engaging in "industrial activity" is very broad. The applicable Phase I rule provides that many industrial facilities beyond traditional industrial plants "are considered to be engaging in 'industrial activity,'" including mines, landfills, junkyards, and construction sites. 40 C.F.R. § 122.26(b)(14)(iii), (v), (x).

EPA's comments to the Phase I rules explain the breadth of the definition:

> In describing the scope of the term "associated with industrial activity", several members of Congress explained in the legislative history that the term applied if a discharge was "directly related to manufacturing, processing or raw materials storage areas at an industrial plant."

55 Fed. Reg. at 48007. However, EPA stated that it was not limiting the coverage of the rule to discharges referenced in this legislative history. It explained:

> Today's rule clarifies the regulatory definition of "associated with industrial activity" by adopting the language used in the legislative history and supplementing it with a description of various types of areas that are directly related to an industrial process (*e.g.,* industrial plant yards, immediate access roads and rail lines, drainage ponds, material handling sites, sites used for the application or disposal of process waters, sites used for the storage and maintenance of material handling equipment, and known sites that are presently or have been in the past used for residual treatment, storage or disposal).

Id.

[18] We therefore hold that the 1987 amendments to the CWA do not exempt from the NPDES permitting process stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels, and is then discharged into streams and rivers. This collected runoff constitutes a point source discharge of stormwater "associated with industrial activity" under the terms of § 502(14) and § 402(p). Such a discharge requires an NPDES permit. As we explained in *NRDC v. EPA*, 966 F.2d at 1306, "if [logging] activity is industrial in nature, and EPA concedes that it is [*see* SIC 2411], EPA is not free to create exemptions from permitting requirements for such activity." The reference to the Silvicultural Rule

in 40 C.F.R. § 122.26(b)(14) does not, indeed cannot, exempt such discharges from EPA's Phase I regulations requiring permits for discharges "associated with industrial activity."

4. Effect of Remand in *Environmental Defense Center, Inc. v. EPA*

In *Environmental Defense Center*, 344 F.3d at 863, in 2003 we remanded to EPA a portion of its Phase II stormwater regulations to allow EPA to consider, *inter alia,* whether stormwater discharges from logging roads should be included in Phase II regulations. Amicus United States suggests that we delay ruling on the question whether stormwater discharges from logging roads must obtain permits under § 402(p)—that is, under Phase I regulations — until EPA has responded to the remand. We have just held that § 402(p) provides that stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels is a "discharge associated with industrial activity," and that such a discharge is subject to the NPDES permitting process under Phase I. Whether EPA might, or might not, provide further regulation of stormwater runoff from logging roads in its Phase II regulations does not reduce its statutory obligation under § 402(p). We therefore see no reason to wait for EPA's action in response to our remand in *Environmental Defense Center*.

D. Summary

In some respects, we are sympathetic with EPA. When the FWCPA was passed in 1972, EPA was faced with a near-impossible task. The breadth of the

definition of point source discharge contained in § 502(14) meant that EPA was suddenly required to establish an administrative system under which enormous numbers of discharges would be subject to a new and untested permitting process. Faced with this task, EPA exempted several large categories of point source discharges from the process in order to avoid the burden imposed by the breadth of the definition contained in § 502(14).

Recognizing the burden on EPA, as well as on some of the entities subject to the NPDES permitting requirement, Congress subsequently narrowed the definition of point source discharge by providing specific statutory exemptions for certain categories of discharges. For example, in 1977, Congress exempted return flows from irrigated agriculture to alleviate the EPA's burden in having to permit "every source or conduit returning water to the streams from irrigated lands," which was what the text of the statute had required. 123 Cong. Rec. 38949, 38956 (Dec. 15, 1977) (Statement of Rep. Roberts); *see* CWA §§ 402(*l*), 502(14), 33 U.S.C. §§ 1341(*l*), 1362(14). Then in 1987, ten years later, Congress comprehensively revised stormwater regulation. It did so in part because the existing broad definition of point source discharge risked creating an "administrative nightmare" for the EPA. 131 Cong. Rec. 15616, 15657 (Jun. 13, 1985) (Statement of Sen. Wallop). It also did so in part because under the existing definition a vast number of de minimus stormwater sources, many of which posed no environmental threat, required NPDES permits. As part of the 1987 amendments, Congress enacted § 402(p), which gives discretion to EPA to exclude from

the permitting process de minimus sources of storm-water pollution.

However, in cases where Congress has not provided statutory exemptions from the definition of point source, federal courts have invalidated EPA regulations that categorically exempt discharges included in the definition of point source discharge contained in § 502(14). The most directly relevant example is *Costle,* in which the D.C. Circuit invalidated the original version of the Silvicultural Rule which had exempted all discharges from silvicultural activities. Other examples include *National Cotton Council of America v. EPA*, 553 F.3d 927, 940 (6th Cir. 2009) (invalidating EPA rule exempting pesticide residue from permitting requirements because "the statutory text of the Clean Water Act forecloses the EPA's Final Rule"); *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155, 1164 & n.4 (9th Cir. 2003) (refusing to grant deference to EPA's approval of Montana's permitting program that exempted groundwater pollutants from permitting requirements because "[o]nly Congress may amend the CWA to create exemptions from regulation"); *NRDC v. EPA*, 966 F.2d 1292, 1304-06 (9th Cir. 1992) (holding arbitrary and capricious EPA rule exempting various types of light industry and construction sites of less than five acres from permitting requirements). Not all examples involve invalidation of recently promulgated regulations. In *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008), we invalidated an EPA regulation that exempted sewage discharges from vessels from the

permitting process. In that case, the invalidated EPA regulation had been on the books since 1973.

Congress intentionally passed a "tough law." *Costle,* 568 F.2d at 1375. But Congress did not intend that the law impose an unreasonable or impossible burden. Congress has carefully exempted certain categories of point source discharges from the statutory definition. For those discharges that continue to be covered by the definition, the permitting process is not necessarily onerous, either for EPA or for an entity seeking a permit. For example, in appropriate circumstances a discharge may be allowed under a "general permit" requiring only that the discharger submit a "notice of intent" to make the discharge. As we explained in *Natural Resources Defense Council v. EPA*, 279 F.3d 1180, 1183 (9th Cir. 2002):

> NPDES permits come in two varieties: individual and general. An individual permit authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication process. *See* 40 C.F.R. §§ 122.21, 124.1-124.21, 124.51-124.66. General permits, on the other hand, are issued for an entire class of hypothetical dischargers in a given geographical region and are issued pursuant to administrative rulemaking procedures. *See id.* §§ 122.28, 124.19(a). General permits may appropriately be issued when the dischargers in the geographical area to be covered by the permit are relatively homogenous. *See id* § 122.28(a)(2). After a general permit has been issued, an entity that believes it is

> covered by the general permit submits a "notice of intent" to discharge pursuant to the general permit. *Id.* § 122.28(b)(2). A general permit can allow discharging to commence upon receipt of the notice of intent, after a waiting period, or after the permit issuer sends out a response agreeing that the discharger is covered by the general permit. *Id.* § 122.28(b)(2)(iv).

Until now, EPA has acted on the assumption that NPDES permits are not required for discharges of pollutants from ditches, culverts, and channels that collect stormwater runoff from logging roads. EPA has therefore not had occasion to establish a permitting process for such discharges. But we are confident, given the closely analogous NPDES permitting process for stormwater runoff from other kinds of roads, that EPA will be able to do so effectively and relatively expeditiously.

Conclusion

For the foregoing reasons, we conclude that stormwater runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is a point source discharge for which an NPDES permit is required.

We therefore **REVERSE** the district court's grant of Defendants' motion to dismiss, and we **REMAND** to the district court for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, an Oregon nonprofit corporation,

Plaintiff,

vs.

MARVIN BROWN, Oregon State Forester, in his official capacity; STEPHEN HOBBS; BARBARA CRAIG; DIANE SNYDER; LARRY GIUSTINA; WILLIAM HEFFERNAN; WILLIAM HUTCHISON; JENNIFER PHILLIPPI, members of the Oregon Board of Forestry, in their official capacities; HAMPTON TREE FARMS, INC., an Oregon domestic business corporation; GEORGIA-PACIFIC WEST INC., an Oregon domestic business corporation; and SWANSON GROUP, INC., an Oregon business corporation,

Defendants.

OREGON FOREST INDUSTRIES COUNCIL, an Oregon

Civil Case No. 06-1270-KI

OPINION AND ORDER

nonprofit corporation; and
AMERICAN FOREST AND
PAPER ASSOCIATION, a
Delaware nonprofit corpora-
tion,

Intervenors,

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KING, Judge:

Plaintiff Northwest Environmental Defense Center ("NEDC") brings this action under the Clean Water Act ("CWA") concerning discharges of stormwater from ditches alongside logging roads in the Tillamook State Forest. NEDC seeks to require defendants to obtain National Pollutant Discharge Elimination System ("NPDES") permits, which NEDC contends are required by the CWA in this situation. Before the court are State Defendants' (Marvin Brown, Oregon State Forester, and members of the Oregon Board of Forestry, Stephen Hobbs, Barbara Craig, Diane Snyder, Larry Giustina, Chris Heffernan, William Hutchison, and Jennifer Phillippi) Motion to Dismiss (#16) and Forest Products Defendants' (timber com-

panies Hampton Tree Farms, Inc., Stimson Lumber Company, Georgia-Pacific West, Inc., and Swanson Group, Inc., along with intervenors Oregon Forest Industries Council and American Forest and Paper Association) Motion to Dismiss First Amended Complaint (#21). The United States filed an amicus curiae brief. For the reasons below, I dismiss the First Amended Complaint.

ALLEGATIONS

The logging roads at issue in the Tillamook State Forest are the Trask River Road, running along the South Fork Trask River, and the Sam Downs Road, running along the Little South Fork of the Kilchis River. Ditches, channels, and culverts associated with logging roads often deliver collected stormwater into existing streams and rivers. The stormwater, polluted with sediment and other pollutants, degrades water quality and adversely impacts aquatic life. The discharges on these two roads are not authorized by NPDES permits. The State Defendants own and control the logging roads. The Forest Product Defendants haul timber on the roads and are contractually obligated to maintain the roads. According to NEDC, defendants violated the CWA by discharging pollutants and/or industrial stormwater from point sources along the Trask River Road and Sam Downs Road to waters of the United States without NPDES permits.

LEGAL STANDARDS

A motion to dismiss under Rule 12(b)(6) will only be granted if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his com-

plaint which would entitle him to relief." Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005) (internal quotation omitted). Normally, the review is limited to the complaint, and all allegations of material fact are taken as true and viewed in the light most favorable to the non-moving party. Id. The court is not required to accept "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 972 (9th Cir. 2004), cert. denied, 544 U.S. 974 (2005). The court may also review a document extrinsic to the complaint if the authenticity of the document is not contested and the document is integral to the claims. Fields v. Legacy Health System, 413 F.3d 943, 958 n.13 (9th Cir. 2005). A second exception is that a court may take judicial notice of matters of public record. Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001).

DISCUSSION

I. Standing

The State Defendants contend that NEDC has not sufficiently alleged facts to maintain its representational standing.

NEDC alleges that it is a nonprofit corporation with the mission to protect and conserve the environmental and natural resources of the Pacific Northwest. Its members derive aesthetic, recreational, and other benefits from Oregon's waterways, including the rivers and tributaries near the Trask River Road and Sam Downs Road. NEDC members use and enjoy the Trask and Kilchis rivers, and their

tributary waters, for fishing and other recreational activities. NEDC alleges that it has at least one member who is injured by defendants' discharge of pollutants and stormwater.

The State Defendants contend that this allegation is generic and insufficiently concrete and particularized to satisfy standing requirements because the allegation does not identify any specific members. NEDC argues that its allegations are sufficient, specifically, that it does not need to identify a particular member in the complaint but can provide that information during discovery in a manner designed to protect the privacy interest of its members.

> An organization has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organizations's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Individual members would have standing in their own right under Article III if "they have suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical, . . . the injury is fairly traceable to the challenged action of the defendant; and . . . it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Laidlaw, 120 S. Ct. at 704 (citing Lujan v. Defenders of Wildlife, 504

U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

Ecological Rights Foundation v. Pacific Lumber Co., 230 F.3d 1141, 1147 (9th Cir. 2000) (some internal citations omitted). The "injury in fact" requirement in environmental cases is met if an individual "adequately shows that she has an aesthetic or recreational interest in a particular place, or animal, or plant species and that that interest is impaired by a defendant's conduct." Id.

Here, the assertion of CWA protection for the rivers and tributaries near the logging roads is germane to NEDC's purpose. There is also no argument by defendants that an individual member's participation in the suit is necessary. The dispute centers on whether an individual member has suffered an "injury in fact." The general allegation is that individual NEDC members use the two rivers for recreation and at least one member has been injured by the discharges.

Most of the cases cited by defendants, including Ecological Rights, hash out this issue in a motion for summary judgment when there is an evidentiary record, typically in the form of a declaration from an individual member explaining their particular use of the area and injury suffered by the environmental harm. Because this is a motion to dismiss, there is no such declaration. I agree with NEDC that its allegations are sufficient for standing purposes. In particular, it does not appear beyond doubt that NEDC can prove no set of facts in support of its complaint which would entitle it to relief. In a case which survives a motion to dismiss, a particular member can be identi-

fied during discovery and the issue raised again in a motion for summary judgment if defendants still believe that standing does not exist. I acknowledge that the court in Arbor Hill Concerned Citizens Neighborhood Ass'n v. City of Albany, New York, 250 F. Supp. 2d 48 (N.D.N.Y. 2003), concluded differently and granted a motion to dismiss for lack of standing based on a citizen group's complaint with similar general environmental allegations but no individual members identified. I am unpersuaded by Arbor Hill's analysis.

I conclude that the allegations concerning standing are sufficiently pled and do not need to be proven for a particular individual until the summary judgment stage of the proceeding.

II. Viability of a Citizen Suit

The State Defendants contend that NEDC fails to satisfy the CWA's procedural prerequisites to a citizen suit under 33 U.S.C. § 1365.

Under the CWA, a citizen may bring an action against any person "who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator of a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(1).

NEDC contends that its allegations that defendants discharged pollutants or industrial stormwater without a valid NPDES permit fall within the statutory limits of a citizen suit. NEDC notes that the CWA definition of effluent standard or limitation includes an unlawful act under § 1311(a). 33 U.S.C. § 1365(f)(1). Section 1311(a), in turn, makes it unlawful

to discharge any pollutant except in compliance with the NPDES permit required by § 1342, among other things. NEDC thus argues that a citizen suit to enforce an "effluent limitation" can be based on allegations that the defendant is discharging without an NPDES permit. NEDC also relies on Ass'n to Protect Hammersly, Eld and Totten Inlets v. Taylor Resources, 299 F.3d 1007 (9th Cir. 2002) [hereinafter APHETI], to argue that citizens may bring suit to require a permit.

Based on NEDC's argument, the State Defendants note that NEDC neither asserts a violation of an order nor identifies a standard allegedly violated. Thus, the issue is limited to whether NEDC properly identified an effluent limitation that has been violated. Briefly, the State Defendants contend that Congress did not require permits for all stormwater dischargers and the EPA has determined that regulatory action is not needed. The State Defendants rely on 33 U.S.C. § 1342(p), contending that it expressly excludes any point source stormwater discharges at issue here from coverage under the NPDES program until such time as EPA decides to regulate them.

The State Defendants distinguish APHETI because it concerned a discharge from aquaculture, which is not expressly addressed in the CWA, unlike the stormwater at issue here. Furthermore, the State Defendants contend that NEDC's quote from APHETI was on the issue of whether citizen suits are "stop gaps," precluded in areas in which federal or state regulation is active. The State Defendants contend that issue is irrelevant to the case here.

In APHETI, a citizen group brought suit contending that a mussel-harvesting company operating in Puget Sound violated the CWA by discharging pollutants, namely the biological materials emitted from the mussels, without an NPDES permit. The state agency that administered the NPDES permit program had determined that a permit was not required. The court allowed the citizen suit to continue, stating:

> Although the EPA or an authorized state agency may be charged with enforcement of the Clean Water Act, neither the text of the Act nor its legislative history expressly grants to the EPA or such a state agency the exclusive authority to decide whether the release of a substance into the waters of the United States violates the Clean Water Act.

Id. at 1012.

I see nothing distinguishing the case before me that makes this statement any less true. I conclude that NEDC is not barred from bringing this citizen suit.

III. NPDES Permit Requirement

A. Statutory and Regulatory Background

Section 301(a) of the CWA prohibits the discharge of any pollutant into the waters of the United States except in compliance with several provisions, including NPDES permits. 33 U.S.C. § 1311; 33 U.S.C. § 1342. NPDES requirements are violated if a defendant discharges a pollutant to navigable waters from a point source. Headwaters, Inc. v. Talent Irrigation

Dist., 243 F.3d 526, 532 (9th Cir. 2001). A few definitions:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(6).

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14).

The CWA was amended in 1987 to add Section 402(p), which enacted a two-phase regulatory program for stormwater. Phase I imposed a general moratorium on the issuance of NPDES permits to discharges composed entirely of stormwater until October 1, 1994. 33 U.S.C. § 1342(p)(1). Five categories of stormwater discharges were excepted from the moratorium and are known as Phase I discharges. 33 U.S.C. § 1342(p)(2).

Phase I discharges include: (1) a discharge for which a permit was issued before February 4, 1987; (2) a discharge associated with industrial activity; (3) a discharge from a municipal separate storm sewer system serving a population of 250,000 or more; (4) a discharge from a municipal separate storm sewer system serving a population between 100,000 and 250,000; and (5) a discharge for which EPA or the state determines contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. Id. Phase I discharges require NPDES permits. 33 U.S.C. § 1342(p)(3).

Section 402(p) also directed EPA to study stormwater discharges, the extent of pollutants in them, and methods to control them to the extent necessary to mitigate impacts on water quality. EPA was required to issue regulations to designate stormwater discharges, other than the Phase I discharges, and to establish a program to regulate them as necessary to protect water quality. 33 U.S.C. § 1342(p)(5)-(6). These are known as Phase II discharges. In 1999, EPA issued the final Phase II stormwater regulations which designated two additional categories of stormwater discharges that required NPDES permits: (1) municipal separate storm sewer systems (MS4s) serving less than 100,000 people; and (2) construction sites that disturb one to five acres of land. 40 C.F.R. § 122.26(a)(9)(I).

B. NEDC's Theories of Liability

NEDC has two theories of liability. The first theory is that the discharges at issue are regulated un-

der Phase I as point source stormwater discharges associated with industrial activity, namely facilities within Standard Industrial Classification ("SIC") 24 (lumber and wood products) and SIC 2411 (logging). Because the Ninth Circuit held that the silvicultural regulation, 40 C.F.R. § 122.27, does not exempt point source discharges from the NPDES program, and since no other exclusions from the Phase I rule apply, NEDC argues that defendants must obtain NPDES permits for the point source discharges along their haul routes.

NEDC's alternative theory notes that the Ninth Circuit recently invalidated, as applied to forest roads, the NPDES permit exemption for unregulated stormwater discharges codified at 40 C.F.R. § 122.26(a)(9)(I). According to NEDC, this means that any discharge of pollutants from the forest roads at issue remain subject to and prohibited by Section 301(a) unless authorized by an NPDES permit.

C. Application of Section 402(p) to Stormwater Discharges on Forest Roads

Section 402(p) requires an NPDES permit for discharges associated with industrial activity, one of the so-called Phase I discharges. 33 U.S.C. § 1342(p)(2)(B).

In 1980, EPA promulgated the current silvicultural[1] point source regulation defining those silvicul-

[1] Silviculture: a branch of forestry dealing with the development and care of forests. Merriam-Webster's Online Dictionary (Jan. 8, 2007), http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=silvicultural.

tural activities that constitute point sources and those that constitute nonpoint sources.

> Silvicultural point source means any discernible, confined 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. The term does not include nonpoint source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233).

40 C.F.R. § 122.27(b)(1).

Defendants contend that the timber harvesting activities and use of the logging roads fall within this exception and thus require no permit. They also note that timber harvesting operations are expressly defined to be a nonpoint source activity in the regulation. Defendants contend that League of Wilderness Defenders v. Forsgren, 309 F.3d 1181 (9th Cir. 2002), supports the proposition that natural runoff includes runoff channeled by forest roads.

NEDC contends that Forsgren limited the scope of the permit exemption in 40 C.F.R. § 122.27(a) to cases in which there is natural runoff or nonpoint source pollution, which NEDC argues is not the case for the forest roads at issue.

Defendants dispute NEDC's interpretation of Forsgren and contend that in finding that the regulatory list of silvicultural point sources is not exhaustive and that the aerial discharges in question were point sources, the court did not invalidate the portion of the regulation classifying runoff from harvesting operations, surface drainage and road construction and maintenance as nonpoint sources.

The State Defendants contend that the logging roads do not qualify as point sources under the reasoning in Forsgren. They argue that Forsgren rejected the contention that every road is a point source requiring an NPDES permit because of the residue left on the roads by vehicles which mixes with the stormwater. Instead, Forsgren supports the argument that forestry roads from which there is natural runoff are nonpoint sources of pollution.

NEDC contends that it has alleged that the "ditches, culverts, channels, pipes and other mechanisms" on both roads are point sources. According to NEDC, the State Defendants unpersuasively stretch dicta found in Forsgren, a case about the aerial application of pesticides.

In Forsgren, plaintiffs contended that the United States Forest Service violated the CWA by instituting an aerial insecticide spraying program over national

forest lands without obtaining an NPDES permit. All agreed that the aerial spraying program met all elements of the definition for point source pollution. The Forest Service relied on the silvicultural exemption, arguing that the aerial spraying was a silvicultural pest control activity, defined by the silvicultural exemption as a nonpoint source. Id. at 1182-85. The court explained:

> Although nonpoint source pollution is not statutorily defined, it is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits. The most common example of nonpoint source pollution is the residue left on roadways by automobiles. . . . When it rains, the rubber particles and copper dust [from brake linings] and gas and oil wash off of the streets and are carried along by runoff in a polluted soup, winding up in creeks, rivers, bays, and the ocean. Nonpoint source pollution of this kind is the largest source of water pollution in the United States, far outstripping point source pollution from factories, sewage plants, and chemical spills.

Id. at 1184.

The court reasoned that the statutory definition of point source was unambiguous and that the Forest Service "cannot contravene the will of Congress through its reading of administrative regulations." Id. at 1185-86. The court applied the modifying phrase,

"from which there is natural runoff," to all the activities listed in the sentence. Thus, it held that "the regulation excludes from the definition of point source pollution only those silvicultural pest control activities *from which there is natural runoff*, rather than *all* silvicultural pest control activities." Id. at 1186 (emphasis in the original). The court also noted that "nonpoint source pollution involves runoff that picks up scattered pollutants and washes them into water bodies." Id. Applying this interpretation to the spraying program, the court concluded: "Because discharging pesticide from aircraft directly over covered waters has nothing to do with runoff, it is not a nonpoint source activity." Id. at 1187.

Turning to the first sentence in the silvicultural exemption, the court held that the four activities listed (rock crushing, gravel washing, log sorting, or log storage facilities) are not an exhaustive list of point source activities associated with silviculture. Id. at 1188. In conclusion, the court held that the aerial spraying program was a point source that required an NPDES permit. Id.

Forsgren is clearly controlling here. Some of the cases cited by the parties are not persuasive because they are pre-Forsgren and consider the list of point sources in the exemption to be exhaustive. See Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 810 (8th Cir. 1998); O'Aha'Ino v. Galiher, 28 F. Supp. 2d 1258, 1261 (D. Haw. 1998). Another case, North Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs., 278 F. Supp. 2d 654, 681 (E.D.N.C. 2003) ("The . . . Tract contains an extensive network of seventeen

ditches specifically designed to concentrate and accelerate the flow of stormwater from the Tract. It is difficult to imagine how drainage from such a network could be deemed 'natural runoff . . . .'"), makes a brief statement without analysis and thus lacks persuasive power.

Based on Forsgren, we know that the term silvicultural point source does not include nonpoint source silvicultural activities of harvesting operations from which there is natural runoff, surface drainage from which there is natural runoff, and road construction and maintenance from which there is natural runoff. NEDC alleges that the point source activities are the building and maintenance of the forest roads and the hauling of timber on the roads. Under § 122.27(b)(1) as interpreted by Forsgren, those activities are not point sources when the natural runoff flows into the waters of the United States. We also know from Forsgren that "nonpoint source pollution involves runoff that picks up scattered pollutants and washes them into water bodies." Id. at 1186. Thus, the fact that pollutants deposited on top of the roads during timber hauling end up being washed into the water bodies does not turn the road system with its associated ditches and culverts into a point source. The road/ditch/culvert system and timber hauling on it is a traditional dispersed activity from which pollution flowing into the water cannot be traced to single discrete sources. See id. at 1184. The activities complained of here are a far cry from the act complained of in Forsgren, namely, spraying pesticide from an airplane.

NEDC also relies on Environmental Protection Information Center v. Pacific Lumber Co., No. C01-2821-MHP (N.D. Cal. Oct. 14, 2003) [hereinafter EPIC], to argue that the exemption in 40 C.F.R. § 122.27 cannot encompass things which fall within the statutory definition of point source. NEDC also contends that EPIC holds that water collected by the timber company's stormwater system was not natural runoff from nonpoint source silvicultural activities. Based on EPIC and Forsgren, NEDC argues that 40 C.F.R. § 122.27 does not exempt from the NPDES permit requirement any point source discharge of stormwater associated with silvicultural activities because polluted stormwater that is collected and conveyed to rivers and streams is not natural runoff but rather a point source discharge requiring an NPDES permit.

The United States contends that EPIC was wrongly decided when the court declined to defer to the EPA's interpretation of its regulations. An agency's interpretation of its own ambiguous regulation is controlling unless the interpretation is "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905 (1997).

I reviewed EPIC and its statement that

> the type of "harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff" identified in section 122.27 cannot encompass the ditches, culverts, channels, and gullies otherwise deemed 'point sources' under section 502(14). Such ditches and culverts fall within

> section 502(14)'s "point source" category, and section 122.27 cannot alter or modify this definition.

Id. at 19-20 (internal citations omitted). I am unconvinced, however, and believe that EPIC was wrongly decided. It contradicts Forsgren's explanation of traditional sources of nonpoint source pollution.

Because I conclude that the silvicultural exemption applies, there is no need to address the parties' arguments about whether there is a Phase I discharge associated with industrial activity. I dismiss the § 402(p) claim.

D. Application of Section 301(a) to Stormwater Discharges on Forest Roads

NEDC argues that if the discharges here are not regulated by Section 402(p), 33 U.S.C. § 1342(p), and the Phase I rules, then the discharges require a permit under Section 301, 33 U.S.C. § 1311. NEDC bases this argument on Environmental Defense Center v. EPA, 344 F.3d 832 (9th Cir. 2003) [hereinafter EDC], cert. denied, 541 U.S. 1085 (2004) contending that the Ninth Circuit rejected EPA's attempt to exempt forest roads from regulation. According to NEDC:

> Since the apparent exemption for forest roads was at the heart of what EPA was told to reconsider, the Phase II exemption does not and cannot exempt stormwater discharges from forest roads from the NPDES permit requirement until EPA has addressed the remand.
>
> . . . .

> . . . Since the moratorium expired on October 1, 1994, and since EPA has not issued a valid Phase II exemption for stormwater discharges from forest roads, those discharges remain subject to Section 301(a)'s general prohibition on the "discharge of pollutants."

Pl.'s Opp'n to Industry's Mot. to Dismiss at 27-28.

Defendants contend that in EDC, the court rejected the contention that EPA was required to designate forest roads as sources of stormwater pollution and remanded the issue of whether all stormwater discharges required NPDES permits on procedural, not substantive, grounds. According to Defendants, the remand did not create a regulation but instead restored the status quo, which was no regulation of stormwater on forest roads.

In EDC, the Ninth Circuit consolidated three cases which raised 22 constitutional, statutory, and procedural challenges to the Phase II stormwater rule EPA issued in October 1999. In part, Petitioners contended that EPA arbitrarily failed to regulate forest roads under the Phase II rule despite clear evidence of the need for pollution control of the stormwater drainage from those roads. Id. at 860-61. EPA raised several procedural arguments but "[did] not seriously address the merits of Petitioners' objections." Id. at 862. The court held:

> Having concluded that the objections of the Environmental Petitioners are not time-barred, and that we have jurisdiction to hear them, but that EPA failed to consider those objections on

> the merits, we remand this issue to the EPA, so that it may consider in an appropriate proceeding Petitioners' contention that § 402(p)(6) requires EPA to regulate forest roads. EPA may then either accept Petitioners' arguments in whole or in part, or reject them on the basis of valid reasons that are adequately set forth to permit judicial review.

Id. at 863. In conclusion, the court noted its remand of the forest road issue as well as two other issues and stated: "We affirm all other aspects of the Phase II rule against the statutory, administrative, and constitutional challenges raised in this action." Id. at 879.

For the most part, the Ninth Circuit affirmed the Phase II rule. The remand was for limited purposes. The Phase II rule did not set up exemptions, it named additional areas requiring NPDES permits. It does not follow from the Ninth Circuit holding in EDC that permits are now required for forest roads while the EPA addresses Petitioners' objections about the lack of regulation on the merits.

This interpretation of the regulatory scheme has been followed in other courts. In Conservation Law Foundation v. Hannaford Bros. Co., 327 F. Supp. 2d 325 (D. Ver. 2004), the court held that a shopping plaza owner did not violate § 301(a) for failing to obtain an NPDES permit for stormwater discharge off the parking lot. Id. at 331-32. The plaintiff contended that § 301(a)'s prohibition on all stormwater discharges without permits again became law once the

permit moratorium expired on October 1, 1994. The court stated:

> [Plaintiff] may be correct that upon the expiration of the permit moratorium all stormwater discharges without permits were in violation of § 301(a). This is because EPA did not issue the Phase II rules until December 8, 1999 and they did not become effective until February 7, 2000. Thus, it could be argued that during the more than five-year period between the end of the moratorium and the effective date of the Phase II rules, all stormwater discharges without a permit, including the Burlington Plaza, were subject to the permit requirement and were violating § 301(a).
>
> The court need not address this question, however. As discussed, the plain language of § 402(p) authorizes EPA to issue regulations designating which stormwater discharges are to be regulated and which are to be left unregulated. When those Phase II regulations went into effect, a stormwater discharge left unregulated fell into compliance with § 402(p) unless EPA or an authorized state agency later exercised its residual designation authority to require an NPDES permit for that discharge. A stormwater discharge that complies with § 402(p) does not violate § 301(a).

Id. at 331 (internal citation omitted).[2]

Accordingly, the motion to dismiss the § 301(a) claim is granted.

IV. Amendment

NEDC seeks leave to amend its complaint if I grant the motion to dismiss but does not explain what additional facts can be alleged. I can think of none that will change this analysis and conclude that any amendment is futile.

CONCLUSION

Plaintiff's Request for Judicial Notice (#47) is granted.[3] State Defendants' Motion to Dismiss (#16) and Forest Products Defendants' Motion to Dismiss First Amended Complaint (#21) are granted.

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[2] I realize that NEDC alleges that the stormwater discharges are Phase I discharges and the plaintiff in Hannaford did not make a similar allegation. NEDC's allegation, however, is a legal conclusion and not an allegation of a material fact that I must accept as true.

[3] Several parties requested judicial notice of several exhibits without drawing objection. I grant all such requests. Plaintiff objected to Exhibits 2 through 4 filed by the Forest Product Defendants. The exhibits are portions of briefs filed by the United States in other cases. The Forest Product Defendants relied on the exhibits as evidence of the position of the federal agency charged with interpreting the CWA. Because the United States filed an amicus curiae brief in this action, I will rely on that as the statement of the agency's position and decline to take judicial notice of Exhibits 2 through 4.

IT IS SO ORDERED.

Dated this 1st day of March, 2007.

/s/ Garr M. King

Garr M. King

United States District Judge

33 U.S.C. § 1342(p)

. . . . .

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a sig-

nificant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers —

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable including management practices, control techniques and system, design and engineering methods, and such other provision as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expedi-

tiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of —

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph

(5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

33 U.S.C. § 1362

. . . . .

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

. . . . .

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1365

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf —

> **(1)** against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> **(2)** against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

. . . . .

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limita-

tion or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section l345(d) of this title.

33 U.S.C. § 1369(b)

. . . . .

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (a) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314*(l)* of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial re-

view in any civil or criminal proceeding for enforcement.

40 C.F.R. § 122.26

(a) *Permit requirement*. (1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

. . . . .

(ii) A discharge associated with industrial activity (see § 122.26(a)(4));

. . . . .

(9)(i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

(A) The discharge is from a small MS4 required to be regulated pursuant to § 122.32;

(B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

(C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern; or

(D) The Director, or in States with approved NPDES programs either the Director or the

EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(ii) Operators of small MS4s designated pursuant to paragraphs (a)(9)(i)(A), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with §§ 122.33 through 122.35. Operators of non-municipal sources designated pursuant to paragraphs (a)(9)(i)(B), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with paragraph (c)(1) of this section.

(iii) Operators of storm water discharges designated pursuant to paragraphs (a)(9)(i)(C) and (a)(9)(i)(D) of this section shall apply to the Director for a permit within 180 days of receipt of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter).

. . . . .

(14) *Storm water discharge associated with industrial activity* means 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. The term does not include discharges from facilities or

activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material handling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. Industrial facilities (including industrial facilities that are federally, State, or

municipally owned or operated that meet the description of the facilities listed in paragraphs (b)(14)(i) through (xi) of this section) include those facilities designated under the provisions of paragraph (a)(1)(v) of this section. The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):

(i) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are exempted under category (xi) in paragraph (b)(14) of this section);

(ii) Facilities classified as Standard Industrial Classifications 24 (except 2434), 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323),33, 3441, 373;

(iii) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under 40 CFR 434.11(1) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or

treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations; (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim);

(iv) Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under subtitle C of RCRA;

(v) Landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described under this subsection) including those that are subject to regulation under subtitle D of RCRA;

(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093;

(vii) Steam electric power generating facilities, including coal handling sites;

(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(l4) (i)-(vii) or (ix)-(xi) of this section are associated with industrial activity;

(ix) Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program under 40 CFR part 403. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with section 405 of the CWA;

(x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

(xi) Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221-25;

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40 C.F.R. § 122.27

(a) *Permit requirement*. Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program.

(b) Definitions. (1) *Silvicultural point source* means any discernible, confined 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. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and Part 233).

(2) *Rock crushing and gravel washing facilities* means facilities which process crushed and broken stone, gravel, and riprap (See 40 CFR Part 436, Subpart B, including the effluent limitations guidelines).

(3) *Log sorting and log storage facilities* means facilities whose discharges result from the holding of unprocessed wood, for example, logs or roundwood with

bark or after removal of bark held in self-contained bodies of water (mill ponds or log ponds) or stored on land where water is applied intentionally on the logs (wet decking). (See 40 CFR Part 429, Subpart I, including the effluent limitations guidelines).