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Editor's Note: In this issue, Christopher Winter of the Crag Law Center summarizes a recent Ninth Circuit Court of Appeals decision addressing Clean Water Act permitting requirements for the discharge of stormwater from logging roads.

We have reproduced the entire article below. Any opinions expressed in this article are those of the author alone. For those you prefer to view the article in PDF format, a copy will be posted on the Section's website: <http://www.osbenviro.homestead.com/>.

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Northwest Environmental Defense Center v. Brown,
__ F.3d __ (9th Cir. 2010), 2010 WL 322105 (Aug. 17, 2010) (No. 07-35266)
(“*NEDC v. Brown*”)

The Ninth Circuit Issues Important Ruling on Stormwater, Logging Roads and Clean Water Act Permits

By Christopher Winter¹

The United States Court of Appeals for the Ninth Circuit recently issued a long anticipated decision clarifying the status of stormwater discharges from logging roads under the Clean Water Act. In *NEDC v. Brown*, the Ninth Circuit held that point source discharges of stormwater from logging roads require National Pollution Discharge Elimination System (“NPDES”) permits. In doing so, the Ninth Circuit rejected arguments that the discharges are exempt from permitting pursuant to a regulation known as the “Silvicultural Rule” and/or section 402(p) of the Clean Water Act. The Court also provided clear guidance to the Environmental Protection Agency (“EPA”) and the states on how to implement an effective and efficient permit program for logging roads through the Clean Water Act’s general permit structure.

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Logging Roads, Sediment and the Tillamook State Forest

The case filed by Portland, Oregon based non-profit Northwest Environmental Defense Center (“NEDC”) involves the discharge of polluted stormwater from two logging roads in the Tillamook State Forest in Northwest Oregon – the Trask River Road and the Sam Downs Road, which is in the Kilchis River Watershed. The logging roads include systems of pipes, ditches, and culverts that collect and route stormwater from the road surface directly into rivers and streams, often times immediately adjacent to salmon spawning and rearing habitat. NEDC filed the case against Marvin Brown, the Director of the Oregon Department of Forestry (“ODF”), ODF, and the Oregon Board of Forestry as the owner or operator of the roads at issue. ODF offers timber sales on state-owned forestland to private contractors, and those companies then enter into timber sale contracts obligating them to maintain the haul routes and comply with all applicable legal requirements. NEDC also named the private logging companies that maintain that Trask River and Sam Downs Roads as defendants in the action.

Prior to filing the case, NEDC catalogued the location of point sources on the two roads at issue, sampled stormwater during numerous rain events, and documented the level of sediment-related pollution in the discharge. In the sixty-day notice letter required by the Clean Water Act, NEDC set forth the results of those sampling activities, which documented total suspended solid concentrations as high as 3400 mg/L and turbidity levels as high as 3600 NTU, which were as high as 971 times over background.² In practical terms, opaque tributaries of muddy water flow from the road system during rain events directly into rives and streams, often times immediately adjacent to salmon spawning and rearing areas.

The high levels of sediment and turbidity documented by NEDC are indicative of the problems posed by sediment-laden stormwater from logging roads. Sediment associated with logging is a well-documented threat to water quality throughout the West and more specifically in the Tillamook State Forest. In 2000, the Environmental Protection Agency found that sediment associated with logging activities was the fifth leading source of water quality impairment to rivers and streams nationwide.³ Across the West, roads are the leading source of sediment from logging activities.⁴ Moreover, timber hauling significantly increases the amount of sediment generated and therefore discharged into the neighboring stream system, as gravel is repeatedly laid on top of the road surface and then ground into fine sediment by log trucks.⁵

² Oregon’s water quality standard for turbidity sets a limit of a ten percent cumulative increase in natural stream turbidities, as compared to a control point immediately upstream of the turbidity causing event. OAR 340-041-0036. NEDC collected control samples and compared those to in-stream samples below the discharge locations.

³ USPEA. *National Water Quality Inventory: 2000 Report*. EPA-841-R-02-001 (August, 2002).

⁴ Megahan, W.F. and G.L. Ketheson. 1996. *Predicting downslope travel of granitic sediments from forest roads in Idaho*. *Water Resources Bulletin* 32(2): 371-81.

⁵ Reid, L.M. and T. Dunne. 1984. *Sediment Production from Forest Road Surfaces*. *Water Resources Research*, Vol. 20, No. 11: 1753-1761.

ODF has also documented the problems posed by the extensive road network in the Tillamook State Forest. The rivers and streams of the Tillamook support populations of the Oregon coast coho (*Oncorhynchus kisutch*), which is listed as threatened under the Endangered Species Act, focusing attention on the impacts of ODF's road system on aquatic habitat.⁶ A 1998 report commissioned by ODF found that between 25 and 31 percent of the forest roads surveyed drained directly to the stream system.⁷ In 1997, ODF found that 25 percent of the road system in the Kilchis River watershed, at issue in the case, was clearly delivering sediment to streams and that an additional 14 percent of the road system was possibly delivering sediment. ODF catalogued 459 different discharge points along 219,757 feet of surveyed road.⁸ Data also indicated that road density in the Trask River Watershed was well above recommended maximum levels of 2 miles of road per square mile.⁹

Sedimentation has a number of well-studied impacts on water quality and stream geomorphology, which cause harm to aquatic species such as the Oregon coast coho. Excess sediment contributes to channel simplification, including loss in the depth, frequency, and quality of pools and off-channel habitat critical for rearing salmon. Sediment also fills in spawning grounds, reducing egg to fry survival rates, and increased turbidity can impair feeding activities, clog gills and damage habitat for macroinvertebrates that provide prey for salmonids.

The Clean Water Act, Industrial Storm Water and the Silvicultural Exemption

The Clean Water Act prohibits the discharge of any pollutant into the waters of the United States without a NPDES permit. 33 U.S.C. §§ 1311; 1342. The term "discharge of a pollutant" is defined to mean the "addition of any pollutant to navigable waters from any point source * * *." 33 U.S.C. § 1362(12). Congress defined "point source" to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, [or] channel * * *." 33 U.S.C. § 1362(14). In contrast to point sources, a NPDES permit is not required for non-point source pollution.

⁶ The National Marine Fisheries Service ("NMFS") recently reconfirmed the listing as part of a status review of the Oregon coast coho. 75 Fed. Reg. 29489 (May 26, 2010). NMFS stated that it was:

unable to conclude that the state forest management plans will provide OC coho salmon habitat that is capable of supporting populations that are viable during both good and poor marine conditions. It is likely that some OC coho salmon habitat on state forests will be maintained in its current degraded state, some habitat will be further degraded, and habitat in areas that are not being harvested will recover.

75 Fed. Reg. at 29,500

⁷ Skaugset, A. and M. Allen. 1998. *Forest Road Sediment and Drainage Monitoring Project Report for Private and State Lands in Western Oregon*. OSU Forest Engineering Department.

⁸ Oregon Department of Forestry. 1997. *Forest Roads, Drainage, and Sediment Delivery in the Kilchis River Watershed*. Prepared by Keith Mills, P.E.

⁹ Tillamook Bay National Estuary Project. 1998. *Trask Watershed Assessment*.

Under the original statutory framework of the 1972 Clean Water Act, stormwater discharged through a point source was subject to NPDES permitting requirements. *Nat. Res. Defense Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). In 1973, early in the history of the Clean Water Act, EPA attempted to exempt by regulation point source discharges associated with industrial and commercial separate storm sewer systems as well as silvicultural activities. *Id.* at 1372. The U.S. Court of Appeals for the District of Columbia Circuit overturned EPA's regulation, holding that the agency did not have discretion to exempt categories of point sources from the NPDES program. *Id.* at 1375. EPA argued that the sheer number of stormwater and silvicultural points sources made it "infeasible" to administer such a program. *Id.* at 1377. In the opinion authored by Judge Leventhal, the D.C. Circuit rejected this argument, stating that EPA could issue general permits that cover categories of point source discharges. *Id.* at 1381.

In 1987, Congress amended the Clean Water Act to address specifically stormwater pollution and establish an orderly process for bringing these discharges within the scope of the NPDES program. Pub. L. No. 100-4, 101 Stat. 7 (1987). Section 402(p), 33 U.S.C. § 1342(p), established a tiered approach to permitting stormwater discharges from point sources. Congress designated five specific sources of stormwater under Phase I, which were required to apply for permits by 1990. 33 U.S.C. § 1342(p)(1)-(2). The Phase I sources included discharges "associated with industrial activity." *Id.* § 1342(p)(2)(B).

In 1990, EPA implemented the Phase I stormwater regulations, which identify industrial activities subject to permitting requirement according to Standard Industrial Classification ("SIC") codes. 55 Fed. Reg. 47990 (Nov. 16, 1990). The regulations unambiguously include facilities classified as SIC 24, which includes logging under SIC 2411, as those engaged in industrial activity. 40 C.F.R. § 122.26(b)(14)(ii). The regulation provides:

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 reference to Part 122 includes the "silvicultural exemption" at 40 C.F.R. § 122.27. The exemption provides that the term "silvicultural point source" "does not include non-point source silvicultural activities such as * * * surface drainage, or road construction and maintenance from which there is natural runoff." 40 C.F.R. § 122.27(b). In issuing this regulation, EPA attempted to exempt from the NPDES program certain discharges associated with silvicultural activities by defining them as non-point source. *See* 64 Fed. Reg. 46058, 46077 (Aug. 23, 1999) (stating that non-point source silvicultural activities are "categorically excluded from the NPDES program").

The District Court Proceedings

Before the District Court, defendants and defendant-intervenors filed a motion to dismiss pursuant to Federal Rule of Appellate Procedure 12(b)(6). Defendants argued “that the timber harvesting activities and use of the logging roads fall within” the silvicultural exemption and “thus require no permit.” *NEDC v. Brown*, 476 F. Supp. 2d 1188, 1195 (D. Or. 2008).¹⁰ Defendants also argued that runoff from logging roads that is channeled through pipes, ditches and culverts is still “natural runoff” and therefore a non-point source. *Id.*¹¹

The District Court granted the motion to dismiss, focusing on the activities that generated the pollutants. *Id.* at 1197. The court held that activities such as road construction and maintenance “are not point sources when the natural runoff flows into the waters of the United States.” *Id.* Regarding the ditches and pipes used by ODF to channel stormwater, the District Court stated:

* * * 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 dispersed activity from which pollution flowing into the water cannot be traced to single discrete sources.

Id.

The Court of Appeals Opinion

In a unanimous opinion authored by Judge William A. Fletcher, the Ninth Circuit Court of Appeals reversed the District Court and remanded the case for further proceedings. The court first held that the pipes, ditches and culverts associated with logging roads are point sources pursuant to the statutory definition and that EPA lacked authority to exempt these sources from the NPDES program by regulation. The court also addressed the Phase I regulations and held that the discharges at issue are “associated with industrial activity” and therefore require a permit pursuant to Section 402(p) of the Clean Water Act.

With respect to the point source issue, the Court looked both at the statutory language (including an in-depth discussion of the legislative history) as well a prior Ninth Circuit case interpreting the silvicultural exemption. *League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002). The court held that “runoff is

¹⁰ The State of Oregon argued that NEDC lacked standing, which the District Court rejected. *Id.* at 1192. The State did not appeal this portion of the District Court’s ruling. The State also argued that NEDC could not maintain a citizen suit because the state agency had determined that a permit was not required. The District Court also rejected this argument, *id.* at 1193, and the State again elected not to appeal this issue.

¹¹ Defendants also argued that the activities at issue do not fall within the scope of the Phase I regulation as discharges “associated with industrial activities.” *Id.* at 1197. The District Court did not reach this issue.

not inherently a nonpoint or point source of pollution.” *NEDC v. Brown*, 2010 WL 3222105 at *4. The determination hinges on whether the storm water is allowed to “run off naturally (and is thus 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).” *Id.* The court clarified that it is not the type of pollution generating activity that defines the source as either point or non-point. Instead, it is the ultimate means of conveyance that determines whether the discharge is regulated by the NPDES program. Enforcing the statutory definition of “point source,” the court held that “Congress did not provide the EPA Administrator with discretion to define the statutory terms.” *Id.* at *5.

Having reaffirmed the statutory definition of point source and Congressional intent on the matter, the court then turned to the silvicultural exemption. The court included an exhaustive discussion of the regulatory history and EPA’s intent as expressed in the preamble to the numerous incarnations of the rule. The court again upheld the statutory definition of point source and ruled that EPA could not, by rule, redefine a point source as a non-point source. Based on this analysis, the Court held that the 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 rivers and streams.” *Id.* at *14.

Finally, the Court also addressed defendants’ arguments under the Phase I regulations that these discharges are not “associated with industrial activity.” 40 C.F.R. § 122.26(b)(14). The District Court did not reach this issue below, granting the motion to dismiss solely on the grounds that these activities were non-point source and therefore not implicated by the Phase I regulations or section 402(p) of the Clean Water Act. On appeal, however, the timber industry parties invited the court to affirm on alternative grounds not relied upon by the District Court. *Id.* at *14 (citing *Thompson v. Paul*, 547 F.3d 1055, 1058-59 (9th Cir. 2008)). The court accepted the invitation to review the Phase I issues but ultimately rejected the arguments of the timber industry defendants.

Recognizing that EPA has already defined logging (SIC code 2411) as an industrial activity, the Court stated that it is “undisputed” that logging falls within the statutory definition of industrial activity. *Id.* at *17. The court then went on to analyze whether the discharges at issue in this case were “associated with industrial activity.” *Id.* (citing 40 C.F.R. § 122.26(b)(14)(ii)).

The court first rejected the timber defendants’ arguments that logging roads are not “immediate access roads” as used in the regulatory language because they are not confined to the immediate areas where logging takes place. *Id.* The court referred to the preamble to the regulation, which discusses “immediate access road” as including those “which are exclusively or primarily dedicated for use by the industrial facility.” *Id.* (citing 55 Fed. Reg. 47990, 48009 (Nov. 16, 1990)). The court also rejected the timber defendants’ argument that these roads are not “primarily dedicated” for use by the logging company. *Id.* Judge Fletcher noted that the logging companies “not only build and maintain the roads and their drainage systems pursuant to contracts with the State. Logging is also the roads’ *sin qua non*: If there were no logging, there

would be no logging roads.” *Id.* at *17.¹² Finally, the court rejected the argument that logging sites are not “industrial facilities” because they are not typical industrial plants. The court held that the definition of “facility” is intentionally broad and includes operations beyond traditional industrial plants, including mines, landfills, junkyards and construction sites. *Id.* at *18 (citing 40 C.F.R. § 122.26(b)(14)(iii), (v), (x)).

In concluding its opinion, the Ninth Circuit responded to the arguments of EPA and the timber industry regarding the potential administrative burden related to permitting stormwater from logging roads. *Id.* at *20. Noting that “Congress intentionally passed a ‘tough law,’” the court encouraged EPA to move forward with a permitting regime. *Id.* (citing *Costle*, 568 F.2d at 1375). Just as the *Costle* court did more than 30 years earlier, Judge Fletcher called out the general permit program as a possible solution and stated that “the permitting process is not necessarily onerous.” *Id.* EPA has successfully implemented storm water permit programs for large and small municipalities (which include extensive road networks), many categories of industrial facilities (including their roads) and construction sites as small as 1 acre in size (including associated roads). The Court made a point of stating that “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.” *Id.*

Conclusion – Is the Sky Falling or is it Just Rain?

Throughout the litigation, the timber defendants have argued strenuously that their industry and the agencies may collapse under the weight of the NPDES program, an argument repeated numerous times in the past by other industries faced with new regulatory programs. In fact, however, EPA, the states and the regulated community have decades of experience in designing and implementing effective and efficient permitting programs for many different kinds of roads and industrial activities. The timber industry must now adhere to the same standards as a multitude of other businesses throughout the Country – namely they must get permits prior to discharging polluted stormwater through point sources into waters of the United States. Almost 35 years ago, the D.C. Circuit Court in *Costle* ruled that EPA could not exempt point sources (including logging roads) from the NPDES program, and yet until now EPA and the states have steadfastly refused to require permits for logging roads. It is little wonder then that sediment associated with logging was the fifth leading cause of water quality impairment nationwide as of 2000.

One possible outcome is for the timber industry, EPA, and Oregon to appeal, criticize the decision, and cover their heads as the sky falls earthward. Of course, the Court has left unanswered certain questions as to how a permit program would be structured (e.g. whether ODF or the timber sale purchasers apply for coverage). Those issues were never presented in this litigation, and the Court would have been well outside its authority in addressing every uncertainty in the upcoming permitting process. The decision, however, is well reasoned, faithfully implements the clearly expressed will of Congress, and adheres to decades of judicial precedent from the Ninth Circuit and other appellate courts across the country.

¹² NEDC included these facts as allegations in its complaint, and the Ninth Circuit was required to “accept as true all of NEDC’s allegations of material facts” and to “construe them in the light most favorable to NEDC.” *Id.* at *2 (citing *Knievel v. ESPN*, 393 F.2d 1068, 1072 (9th Cir. 2005)).

The bottom line is that the timber industry as well as state and federal landowners now face significant liability for their extensive networks of logging roads. Avoidance tactics will not address that liability, nor will they result in any on-the-ground improvements to water quality and aquatic habitat, the true interests of the public interest stakeholders in this process. In reality, this case deals with little more than rain, an issue that has been addressed successfully time and time again by industry and the EPA. Now is the time for the public, industry, EPA and the state agencies to come together and find a solution in the form of an effective, efficient and lawful permitting program that provides enforceable protections for water quality and beneficial uses.

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