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Whether Logging Road Runoff Requires a Clean Water Act Permit: *Decker v. Northwest Environmental Defense Center*

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Summary

U.S. forests are crisscrossed by thousands of miles of logging roads. When it rains or snow melts, runoff from these roads can be environmentally harmful, so how to address this runoff under the Clean Water Act (CWA) has long been an issue.

On March 20, 2013, the Supreme Court in *Decker v. Northwest Environmental Defense Center* addressed one aspect of this issue: logging road runoff that is discharged into CWA-covered waters from ditches, culverts, or other channels. Such conveyances arguably make the runoff a “point source” under the CWA, which normally means that a permit under the act’s National Pollutant Discharge Elimination System (NPDES) is required. Special CWA provisions, however, exempt stormwater runoff, unless, as relevant here, it is “associated with industrial activity.” In *Decker*, the Supreme Court upheld 7-1 EPA’s long-standing reading of its Industrial Stormwater Rule that logging road runoff, even if channeled, is not “associated with industrial activity” and so does not require a NPDES permit. This reversed the Ninth Circuit and affirmed EPA’s view that logging road runoff is subject only to a requirement of best management practices.

In upholding EPA’s reading of its rule as exempting logging road runoff from the NPDES program, the Court observed that references in the Industrial Stormwater Rule suggest that its natural reading should be confined to traditional industrial buildings, and so does not extend to logging operations. Moreover, EPA had espoused this reading for a long time; it had not been adopted recently in response to this litigation. In light of these factors, the Court viewed the precept that courts owe deference to agency interpretations of their own rules as applying in full force. Finally, the state of Oregon had invested much effort in developing best management practices for stormwater runoff from logging roads, so EPA, as the Court saw it, could reasonably have concluded that further federal regulation would be unnecessary.

EPA’s response to the Ninth Circuit ruling was to amend the Industrial Stormwater Rule. The amended rule, issued in November 2012 three days prior to the oral argument before the Supreme Court, makes explicit the agency’s long-standing position that logging roads do not need CWA discharge permits for stormwater runoff. The Supreme Court opinion actually deals with EPA’s reading of the prior, less explicit version of the Industrial Stormwater Rule. The amended rule may or may not be resurrected on remand to the district court. For the moment, however, the status quo is unchanged: NPDES permits have never been required for logging road runoff, and they are not required as of now. EPA also is considering designating a subset of stormwater discharges from forest roads for regulation under flexible mechanisms available in the CWA, including non-permitting approaches, but the agency has not issued a proposal or announced a timetable for further action.

Congressional interest in responding to the Ninth Circuit ruling has been strong. Congress enacted temporary measures that barred EPA until September 30, 2013, from requiring a permit for stormwater runoff associated with silviculture activities. The 2013 farm bill reauthorization (H.R. 2642, P.L. 113-79) includes a provision stating that discharges resulting from specified silviculture activities shall not require CWA discharge permits.

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The public, private, and tribal forests of the United States are crisscrossed by thousands of miles of logging roads. When it rains or snow melts, the runoff from those roads can be environmentally harmful, depositing large amounts of sediment and other pollutants into streams and rivers. How, under the federal Clean Water Act (CWA),¹ should logging road runoff be addressed?

On March 20, 2013, the Supreme Court answered a key aspect of that question. In *Decker v. Northwest Environmental Defense Center*,² the Court held that EPA had permissibly construed a prior version of its Industrial Stormwater Rule to exempt stormwater runoff from logging roads that is channeled—that is, collected in ditches, culverts, or other channels—from the discharge permit scheme in the Clean Water Act (CWA). The decision below, by the Ninth Circuit, was reversed. That court had held that when water running off logging roads is channeled, CWA regulations require that a discharge permit be obtained.³ The Ninth Circuit decision had prompted immediate reaction in Congress, which enacted legislation barring EPA from requiring discharge permits for logging road runoff until September 30, 2013, and now has enacted permanent legislation to that effect (the 2013 farm bill, H.R. 2642, P.L. 113-79).⁴ As a measure of the interest in the case, 24 states and many county organizations and forestry trade associations filed amicus briefs asking the Supreme Court to reverse the Ninth Circuit decision.

This report gives the statutory and regulatory background of *Decker*, describes the Supreme Court decision, lays out some legal and programmatic implications of the decision, and describes congressional response.

Statutory and Regulatory Background

Clean Water Act. Congress enacted the modern version of the CWA in 1972,⁵ adding regulatory teeth to a statute first enacted in 1948. As amended in 1972, the CWA prohibits the “discharge of any pollutant,” defined as “any addition of any pollutant to navigable waters from any point source”—unless, among other exemptions, one has a discharge permit.⁶ Discharge permits are issued under the National Pollutant Discharge Elimination System created by CWA Section 402, hence are known popularly as NPDES permits.⁷ NPDES permits are issued by EPA or, far more often, by a state agency under an EPA-approved state program, and impose effluent standards and other conditions on the discharger.⁸

To reiterate, NPDES permits are required only for *point sources* of water pollution, defined by the CWA as “any discernible, confined, and discrete conveyance, including ... any pipe, ditch,

¹ 33 U.S.C. §§1251-1387.

² 133 S. Ct. 1326 (2013).

³ *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011).

⁴ See last section of this report (“Congressional Consideration”).

⁵ P.L. 92-500.

⁶ The prohibition of unpermitted discharges is in CWA §301(a), 33 U.S.C. §1311(a). The definition of “discharge of any pollutant” is at CWA §502(12), 33 U.S.C. §1362(12).

⁷ 33 U.S.C. §1342. See generally *Arkansas v. Oklahoma*, 503 U.S. 91, 101-103 (1992).

⁸ EPA is the permitting authority in four states (Idaho, Massachusetts, New Hampshire, and New Mexico) plus the District of Columbia, and generally on tribal lands and in the U.S. territories.

channel....”⁹ They are not required for “nonpoint sources” of pollution, which the CWA does not define though the term is understood to mean pollution that comes from many diverse sources caused by rainfall or snowmelt moving over and through the ground. The legal issue in the *Decker* litigation is whether logging road runoff channeled through ditches, culverts, or channels falls under the point source definition, and, if so, whether the resulting NPDES permit requirement is circumvented by any other provision in the CWA or EPA regulations.

EPA’s Silvicultural Rule. In 1976, EPA attempted by rule to distinguish silvicultural activities deemed silvicultural point sources subject to NPDES permits from silvicultural nonpoint sources not subject to such permits, but rather governed by state management programs. In this “Silvicultural Rule” (last amended in 1980),¹⁰ EPA defined the phrase “silvicultural point source” as:

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 ... thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, *or road construction and maintenance from which there is natural runoff.*¹¹

As is evident, the rule lists four silvicultural activities that EPA deems point sources (rock crushing, gravel washing, log sorting, and log storage facilities) and determines that stormwater runoff from roads and road maintenance is a nonpoint source discharge outside the permitting process. Though the italicized phrase does not explicitly extend to road runoff that is *channeled* before reaching jurisdictional waters, that is how EPA interpreted it in the *Decker* litigation.

Clean Water Act Stormwater Amendments and EPA Regulations. The final item of pertinent law was added in 1987 when Congress, recognizing the special difficulties posed by stormwater runoff, amended the NPDES section of the CWA.¹² New CWA Section 402(p)¹³ established a two-phase process for regulating stormwater discharges from point sources—commonly called Phase I and Phase II. Phase I requires NPDES permits for five listed categories of stormwater discharges, including “[a] discharge associated with industrial activity.”¹⁴ EPA defines “discharge associated with industrial activity” to include:

[f]or the categories of industries identified in this section ... stormwater discharges from ... immediate access roads ... used or traveled by carriers of raw materials.... The following categories of facilities are considered to be engaging in “industrial activity” ...: ... Facilities classified as Standard Industrial Classifications 24 [lumber and wood products] (except 2434).¹⁵

⁹ CWA §502(14); 33 U.S.C. §1362(14).

¹⁰ 40 C.F.R. §122.27.

¹¹ *Id.* at §122.27(b) (emphasis added).

¹² P.L. 100-4.

¹³ 33 U.S.C. §1342(p).

¹⁴ CWA §402(p)(2)(B); 33 U.S.C. §1342(p)(2)(B).

¹⁵ 40 C.F.R. §122.26(b)(14). This regulation is part of EPA’s overall Phase I stormwater regulations promulgated in 1990, 55 Fed. Reg. 47,990 (November 16, 1990).

Phase II directs EPA to conduct a study of stormwater discharges not covered by Phase I, and then “establish a comprehensive program to regulate such designated sources.”¹⁶ The program “may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.”¹⁷ Phase II is a more flexible regulatory authority than Phase I: EPA is authorized to require NPDES permits for discharges under Phase II, but is not required to do so.

Supreme Court Decision

The *Decker* case, originally styled *Northwest Environmental Defense Center v. Brown*, was filed in federal district court by NEDC against Oregon state officials and timber companies, under the CWA citizen suit provision.¹⁸ The suit claimed that the defendants violated the CWA by not obtaining NPDES permits for stormwater runoff that flows from two state-owned logging roads in the Tillamook State Forest into ditches, culverts, and channels and thence into streams and rivers. NEDC argued that sending the runoff through such ditches, culverts, and channels creates point sources of pollutant discharge, triggering the NPDES permit requirement, and that nothing in the CWA exempts logging road runoff categorically.¹⁹

In 2007, the district court dismissed the environmental group’s complaint on the ground that under EPA’s Silvicultural Rule, runoff from logging operations does not constitute a point source.²⁰ As a nonpoint source, such runoff required no NPDES permit. On appeal, the Ninth Circuit in 2011 reversed.²¹ On a preliminary jurisdictional issue, the court found the suit to have been properly filed in the district court as a citizen suit. On the merits, the court rejected the state’s and timber companies’ two arguments—that EPA’s Silvicultural Rule, as construed by EPA, exempts logging road runoff collected in ditches, culverts, and channels from the NPDES permit requirement, and, alternatively, that the 1987 stormwater amendments to the CWA exempt such discharges. In short, channeled logging road runoff, in the Ninth Circuit’s view, requires a NPDES permit.

On March 20, 2013, with the case renamed *Decker v. Northwest Environmental Defense Center*, the Supreme Court reversed again on the permit question.²² Before the Court was the version of EPA’s Industrial Stormwater Rule addressed by the decisions below—that is, before the agency amended it on November 30, 2012,²³ three days prior to oral argument. The Court held that EPA’s interpretation of the rule to exempt discharges of channeled stormwater runoff from logging roads from the NPDES permit scheme was a permissible one.

¹⁶ CWA §402(p)(6); 33 U.S.C. §1342(p)(6). EPA’s overall Phase II stormwater regulations were promulgated in 1999. 64 Fed. Reg. 68,722 (December 8, 1999).

¹⁷ CWA §402(p)(6); 33 U.S.C. §1342(p)(6).

¹⁸ CWA §505; 33 U.S.C. §1365.

¹⁹ Defendants did not contest that the sediment discharged by the ditches, culverts, and channels constituted “pollutants.”

²⁰ 476 F. Supp. 2d 1188 (D. Or. 2007).

²¹ 640 F.3d 1063 (9th Cir. 2011).

²² 133 S. Ct. 1326 (2013).

²³ EPA, *Revisions to Stormwater Regulations to Clarify That an NPDES Permit is Not Required for Stormwater Discharges from Logging Roads*, 77 Fed. Reg. 72,970 (December 7, 2012). The revisions were signed by the EPA Administrator on November 30, 2012.

At the outset, the Court brushed aside two jurisdictional issues. First, the Court agreed with the Ninth Circuit that use of the CWA citizen suit provision was proper here. NEDC's claim, in the Court's view, sought to enforce its permissible reading of the Silvicultural Rule, and citizen enforcement is precisely the function of citizen suits. The suit was not an effort to challenge the rule, initial jurisdiction over which lies solely in the circuit courts of appeal. Second, the Court found the claim not to have been mooted by EPA's November 2012 amendment to the rule. A live controversy still existed, ruled the Court, as to whether the timber companies might be held liable for unlawful discharges under the pre-amendment version of the rule before the Court.

On the merits, recall that the CWA requires timber companies to have NPDES permits for channeled logging road runoff only if the discharges are, in the words of the CWA, "associated with industrial activity"—as that phrase is defined in EPA's Industrial Stormwater Rule. EPA had long interpreted this rule definition not to reach logging road runoff, and the Supreme Court concluded 7-1 in *Decker* that EPA's interpretation of its rule was a permissible one.²⁴ The rule's references suggested to the Court that its natural reading was confined to traditional industrial buildings, and so did not extend to logging operations. Moreover, EPA had espoused this reading for a long time; it had not been adopted recently in response to this litigation. In light of these factors, the Court viewed the precept that courts owe deference to agency interpretations of their own rules as applying in full force.²⁵ Finally, the state of Oregon had invested much effort in developing best management practices for stormwater runoff from logging roads, so EPA, as the Court saw it, could reasonably have concluded that further federal regulation would be unnecessary.

Accordingly, the Supreme Court reversed the Ninth Circuit and remanded the case.

Aftermath. On August 30, 2013, the Ninth Circuit in turn vacated the decision of the district court and remanded to that court for proceedings consistent with the Supreme Court's opinion.²⁶ In the remand order, the Circuit noted that the Supreme Court expressly disavowed ruling on its holding that channeled stormwater runoff constitutes a CWA "point source," and therefore, in the Circuit's view, left it intact. This may be important to the district court's ruling if that court turns its attention to the *amended* stormwater rule now in effect (see "EPA's Response" below).²⁷ A joint motion to dismiss has been filed by the defendants, but has not yet been ruled on.

Legal and Policy Implications

According to data reported by states to EPA, silviculture and related activities, including forest and logging roads, are among the top 12 probable sources of impairment for rivers, streams, and coastal shorelines in the United States. Improperly designed or maintained forest roads can affect watershed integrity through three primary mechanisms. First, they can intercept water falling as rainfall directly on road surfaces as well as subsurface water moving underground. Second, they

²⁴ Justice Kennedy wrote the opinion of the Court, with Justice Scalia the sole dissenter. Justice Breyer recused himself.

²⁵ This principle of general judicial deference to an agency's reading of its own rules is often cited to the Supreme Court's decision in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), and is thus referred to as "*Auer* deference."

²⁶ 728 F.3d 1085 (9th Cir. 2013).

²⁷ After the August 30, 2013, remand order of the Ninth Circuit, NEDC sought voluntary dismissal of its separate petition for review of the amended Industrial Stormwater Rule in the Circuit, which was granted on November 14, 2013.

can concentrate flow on the road surface and in adjacent ditches and channels. And third, they can divert surface and subsurface water from unaltered flow paths. Impacts from these processes will vary and often may be negligible, but they can include increased loading of sediment, suspended solids, and turbidity; altered streamflow; pollution from chemicals associated with forest roads; and impaired aquatic habitat. The majority of such impacts may be attributed to a relatively small subset of forest roads and often a small portion of those roads, according to EPA.²⁸

Since *Decker* affirmed EPA's reading of a version of the Phase I stormwater regulations no longer in effect, no agency response will be necessary. In any event, the rule as amended in November 2012 clarifies that stormwater discharges from logging roads do not constitute stormwater discharges "associated with industrial activity" and, accordingly, that a NPDES permit is not required. For the purpose of assessing whether stormwater discharges are "associated with industrial activity," the only facilities that are industrial, as pertinent here, are rock crushing, gravel washing, log sorting, and log storage.

Notwithstanding, a few legal observations about the Supreme Court ruling can be made.

First, since *Decker* affirmed EPA's interpretation of its rule to exempt channeled logging road runoff from NPDES permit requirements, the amended rule's clearer statement of that same exemption is unlikely to offer any fresh ground for judicial challenge. As noted above, however, a petition for review of the amended rule has been filed.

Second, the Supreme Court's approval of a citizen suit here effectively allowed the use of a citizen suit to challenge EPA's interpretation of a regulation promulgated 36 years ago. Arguably, this opens the door for citizen-suit challenges to other long-standing agency regulations in the right circumstances. Most of EPA's statutes bar petitions for review of the agency's regulations when filed more than a certain number of days (60, 90, or 120) after the regulation is promulgated, unless based on grounds arising after the deadline. These judicial review deadlines are separate from citizen-suit authorities. But according to *Decker*, a citizen suit asserting a violation of an agency rule is acceptable long after those deadlines when based on a permissible reading of an ambiguous statute, even though such reading is different than the agency's. In this circumstance, the citizen suit may require the court to resolve which interpretation, the citizen plaintiff's or the agency's, is correct. Arguably this is a form of judicial review, but without the customary deadline.

Third, the Supreme Court in *Decker* was unmoved by an amicus brief urging it to reconsider the doctrine that courts generally should defer to an agency's interpretation of its own rules.²⁹ The Court's majority opinion reaffirms this long-established deference principle. And indeed, in another decision two months later, the Court affirmed its first cousin: that courts should defer to agency interpretations of the *statutes* they administer—in that case, even when those interpretations relate to the scope of an agency's jurisdiction.³⁰ For the moment, then, judicial deference to federal agencies in these contexts appears to be alive and well. In *Decker*, however, Justice Scalia in dissent called for doing away with deference to agency interpretation of rules

²⁸ EPA, *Notice of Intent to Revise Stormwater Regulations to Specify That an NPDES Permit is not Required for Stormwater Discharges from Logging Roads and to Seek Comment on Approaches for Addressing Water Quality Impacts from Forest Road Discharges*, 77 Fed. Reg. 30,473, 30,476 (May 23, 2012) (hereinafter *Notice of Intent*).

²⁹ See note 25 *supra* and accompanying text.

³⁰ *City of Arlington, Texas v. Federal Communications Comm'n*, 133 S. Ct. 1363 (2013).

and two other Justices indicated that reconsideration of such deference might be warranted, even if not in the present case. Parenthetically, it was Justice Scalia’s view that NEDC’s reading of the pre-amendment Industrial Stormwater Rule was the fairest one, and that had there been no deference principle, the Court’s decision should have gone in the environmental group’s favor.

As an aside, *Decker* is not the only CWA case decided by the Supreme Court in its 2012-2013 term. In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, the Court held that water flowing from a natural portion of a river covered by the CWA, through a man-made improvement constructed as part of a municipal separate storm sewer system, into a lower natural portion of the same river, is not a “discharge” into that lower portion under the act.³¹ For that reason, it requires no NPDES permit. There are other parallels between *Decker* and *Los Angeles*: both cases (1) were brought by an environmental group or groups; (2) sought to require NPDES permits in a circumstance occurring frequently nationwide; (3) were decided by the Ninth Circuit in favor of the environmental group or groups; and (4) were decided by the Supreme Court against the environmental group or groups.³²

EPA’s Response

Had the Supreme Court not reversed the Ninth Circuit, EPA would have faced the challenge of developing a mechanism to manage the large number of logging roads that could have become subject to permits—estimated to potentially be hundreds of thousands of sources. The agency likely would have chosen to do so through the mechanism of an NPDES general permit. General permits cover categories of point sources having common elements and that discharge the same types of wastes. General permits allow the permitting authority to provide timely permit coverage and to allocate resources efficiently, especially where there is potentially a large number of permittees, thus minimizing the regulatory burden on permit seekers and permit issuers. EPA may also issue permits on a case-by-case basis taking into account local environmental conditions (called an individual permit). Both general and individual permits are issued for no more than five years and may be renewed thereafter. The statute allows EPA to authorize qualified states to administer the NPDES program; 46 states have been so authorized. EPA issues discharge permits in the remaining jurisdictions.³³

In the four decades since the CWA was enacted, the universe of NPDES permittees has increased from fewer than 100,000 to nearly 1 million sources. Currently, individual NPDES permits regulate approximately 46,000 facilities nationwide, while the remainder are regulated by general permits. EPA has increasingly used the general permit mechanism, especially as new categories of dischargers have become subject to NPDES permit requirements, either through statutory or

³¹ 133 S. Ct. 710 (2013).

³² Numerous Ninth Circuit decisions favoring the “environmental” side in a suit have been reversed by the Supreme Court. *See, e.g.*, *Natural Resources Defense Council, Inc. v. Winter*, 555 U.S. 7 (2008) (voiding preliminary injunction upheld by Ninth Circuit requiring Navy to prepare environmental impact statement on sonar training exercises, owing to alleged harm to marine mammals); *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004) (reversing Ninth Circuit ruling that Federal Motor Carrier Safety Administration violated National Environmental Policy Act by not evaluating environmental effects of cross-border operations of Mexican motor carriers); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996) (reversing Ninth Circuit holding that citizen suit provision in Resource Conservation and Recovery Act can be used to recover hazardous waste cleanup costs where waste no longer presents endangerment at time of suit); and *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) (reversing Ninth Circuit holding that fully developed mitigation plan and worst case analysis were required in environmental impact statement).

³³ *See* note 8 *supra*.

regulatory modification or as a result of judicial rulings.³⁴ Importantly, an EPA general permit provides coverage for authorized discharges only where EPA is the NPDES permitting authority. For discharges in NPDES-authorized states, in most cases, state (or in some cases sub-state regional) authorities issue permits that typically are modeled on the EPA general permit.

However, even before the Supreme Court's ruling, EPA indicated that it would not begin development of a general permit in response to the Ninth Circuit ruling.

Initially, in July 2011, EPA indicated to a Member of Congress that the existing stormwater Phase II Multi-Sector General Permit (MSGP) for discharges associated with industrial activities is available to logging road operators who want NPDES permit coverage.³⁵ The MSGP covers stormwater discharges from approximately 4,100 industrial facilities in 29 sectors. It allows permit holders to select their own methods for reducing discharges to meet narrative effluent limitations and could apply to groups of roads. EPA's statement was intended to alleviate industry's and states' practical concerns about permitting. However, the MSGP is only available in states where EPA is the permitting authority; other states would need to make available a similar general permit.

In a May 23, 2012, *Federal Register* notice, EPA announced regulatory options that were then under consideration.³⁶ First, the agency said that it would "move expeditiously" to propose a revision to the Phase I stormwater rules, discussed above, to specify that stormwater discharges from logging roads are not included in the definition of stormwater discharge associated with industrial activity, which governs Phase I regulated activities. The agency presented this proposal on August 24, 2012, and finalized it without change on November 30, 2012. As expected, the rule is intended to get around the Ninth Circuit ruling by specifying that logging roads do not need CWA pollution discharge permits for stormwater runoff. The language, EPA said, clarifies the agency's long-standing intent that logging roads should not be regulated as industrial facilities.³⁷

Second, EPA said that the agency is considering designating a subset of stormwater discharges from forest roads under CWA Section 402(p)(6), the authority for the Phase II stormwater program.³⁸ As described previously, Section 402(p)(6) allows for a broad range of regulatory and non-regulatory approaches as to which stormwater discharges, if any, should be designated and do not require the use of NPDES permits. Thus, EPA might determine that regulation is appropriate for a subset of stormwater discharges from forest roads, such as roads used for logging, or might address discharges based on the contribution of the discharge to water quality problems. Before proceeding, EPA plans to study the impacts of stormwater discharges from forest roads, available management approaches, and the effectiveness of existing management programs, so no timetable for further action was announced. In the November 2012 rule, EPA indicated that the range of flexible approaches available under Section 402(p)(6) may be well-suited to address the complexity of forest road ownership, management, and use.

³⁴ EPA developed general permits in response to two court rulings in the last decade—one involving pesticide discharges, *National Cotton Council v. U.S. EPA*, 553 F.3d 927 (6th Cir. 2009), and one involving discharges incidental to the normal operation of vessels, *Northwest Environmental Advocates v. U.S. EPA*, 537 F.3d 1006 (9th Cir. 2008)—that together added nearly 435,000 permittees to the NPDES universe.

³⁵ Nancy K. Stoner, Acting Ass't Administrator for Water, U.S. EPA, letter to Hon. Kurt Schrader, July 1, 2011, available at <http://orsierraclub.files.wordpress.com/2011/07/07-01-11-letter-from-epa-to-moc.pdf>.

³⁶ See *Notice of Intent*, note 28 *supra*.

³⁷ See note 23 *supra*.

³⁸ 33 U.S.C. §1342(p)(6).

Following EPA's August 24, 2012, release of the proposed rule to nullify the Ninth Circuit ruling, some timber interest groups urged the agency to withhold a final version of the regulation until the Supreme Court ruled on the matter. The National Alliance of Forest Owners said that a final rule prior to a Supreme Court decision would cause legal confusion that could provide opportunities for taking the issue back to the Ninth Circuit.³⁹ EPA disagreed with this view, stating that the November 30, 2012, rule would end any uncertainty created by the Ninth Circuit's holding. By reaffirming the agency's long-standing regulatory position, the new rule cancels out any on-the-ground impact of the Ninth Circuit's decision, according to EPA.⁴⁰

Congressional Consideration

EPA's announced intention, following the Ninth Circuit decision, to move quickly to revise the Phase I stormwater regulations was in part a response to strong congressional concern about implications of the decision for silvicultural activities throughout the United States. Following the circuit court ruling in 2011, a number of Members opposed to it urged the agency to defend its existing regulations "in all appropriate proceedings and by taking the steps necessary to limit the scope of this ruling to the extent possible."⁴¹

The issue of permits for logging roads has drawn legislative interest in the 112th and 113th Congresses. First, Congress enacted a temporary measure in the Consolidated Appropriations Act, 2012 (P.L. 112-74), with a provision that barred EPA from requiring a permit for stormwater runoff associated with silvicultural activities until September 30, 2012. Congress twice extended this moratorium, until January 15, 2014, in P.L. 113-6 and P.L. 113-46.

Second, companion bills were introduced in the 113th Congress, H.R. 2026 and S. 971, to amend the CWA to exempt the discharges of any silvicultural activity (not just those associated with logging roads) from CWA permitting requirements.⁴²

A provision similar to H.R. 2026/S. 971 for a permanent NPDES permit exemption for silvicultural activities was included in H.R. 2642, the 2013 farm bill that the House passed on July 11, 2013. The final farm bill, enacted in February 2014 (P.L. 113-79), includes a provision similar but not identical to the House-passed language. Section 12313 of the final bill states that no CWA NPDES permit shall be required for a discharge of runoff from specified silviculture activities (such as nursery operations, thinning, prescribed burning, or pest and fire control) that are conducted in accordance with standard industry practice. It also states that discharges from silvicultural activities are not exempted from permitting requirements under CWA Section 404 (the act's dredge and fill permit program), existing permitting requirements under Section 402, or from any other federal law.

³⁹ National Alliance of Forest Owners, "NAFO to EPA: Withhold Final Rulemaking Until SCOTUS Renders Decision," August 28, 2012, available at <http://nafoalliance.org/featured/nafo-to-epa-withhold-final-rulemaking-until-scotus-renders-decision/>.

⁴⁰ *Revisions*, 77 Fed. Reg. at 72,973.

⁴¹ Rep. Kurt Schrader et al., letter to Administrator Lisa Jackson, May 23, 2011, available at <http://agriculture.house.gov/pdf/letters/BMPLetter110523.pdf>.

⁴² H.R. 2026 was approved by the House Transportation and Infrastructure Committee in October 2013. Similar bills were introduced in the 112th Congress, H.R. 2541 and S. 1369.

The provision leaves EPA authority to take measures regarding silviculture activities if future circumstances demonstrate the need to do so, for example, pursuant to CWA Section 402(p)(6) (see “EPA’s Response” above). However, the legislation precludes any program adopted by EPA under CWA Section 402(p)(6) for the specified silvicultural activities from citizen enforcement action under CWA Section 505.

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