

No. 07-35266

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiff - Appellant,

AMERICAN FOREST & PAPER ASSOCIATION; OREGON FOREST INDUSTRY COUNCIL,

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

Defendants - Appellees.

STATE APPELLEES' PETITION FOR REHEARING
OR REHEARING EN BANC

Appeal from the United States District Court
for the District of Oregon

Continued...

JOHN R. KROGER
Attorney General
MARY H. WILLIAMS
Solicitor General
ERIN C. LAGESEN
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402

Attorneys for Appellees
Marvin Brown; Stephen Hobbs;
Barbara Craig; Diane Snyder; Larry
Giustina; William Heffernan;
William Hutchison; Jennifer Phillippi

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

 A. Statutory and regulatory background.....2

 B. Procedural background6

 C. *En banc* reconsideration is warranted because the panel decision conflicts with prior decisions of this court.8

 D. *En banc* reconsideration is warranted because the panel decision displaces a longstanding regulatory scheme, a result compelled by neither the CWA nor EPA’s regulations.....11

 E. Panel rehearing is warranted because the panel’s methodology for construing the EPA’s stormwater rule is analytically flawed.16

 E. Conclusion.....18

APPENDIX

 Opinion, *NEDC v. Brown, et al*..... A.P.P. 1

TABLE OF AUTHORITIES

Cases

American Mining Congress v. EPA,
965 F.2d 759 (9th Cir. 1992).....8, 10

Arizona Public Service Co. v. EPA,
562 F.3d 1116 (10th Cir. 2009).....16

Chevron, USA Inc. v. Natural Res. Def. Council,
467 U.S. 837 (1984).....1, 10

Environmental Defense Center, Inc. v. EPA,
344 F.3d 832 (9th Cir. 2003).....6, 9, 11, 18

North Carolina v. EPA,
531 F.3d 896 (D.C. Cir. 2008)16

Preminger v. Secretary of Veterans Affairs,
517 F.3d 1299 (Fed. Cir. 2008).....16

San Francisco Baykeeper v. Cargill Salt Division,
 481 F.3d 700 (9th Cir. 2007).....9, 10

Constitutional and Statutory Provisions

33 U.S.C. § 1288(b)(2)12
 33 U.S.C. § 1288(b)(2)(F)12
 33 U.S.C. § 1314(f).....12
 33 U.S.C. § 1342(p).....8, 9, 15
 33 U.S.C. § 1342(p)(1)3
 33 U.S.C. § 1342(p)(2)8
 33 U.S.C. § 1342(p)(2)-(4)3
 33 U.S.C. § 1342(p)(2)(B).....3, 4, 5
 33 U.S.C. § 1342(p)(5)3
 33 U.S.C. § 1342(p)(5)-(6)15
 33 U.S.C. § 1342(p)(6)3
 33 U.S.C. § 1362(14).....2, 8, 10
 Or. Rev. Stat. § 527.765(1).....13

Administrative Rules

40 C.F.R. § 122.....1
 40 C.F.R. § 122.26.....8, 16
 40 C.F.R. § 122.26(a)(9)(i)(A)-(B).....6
 40 C.F.R. § 122.26(b)16, 17
 40 C.F.R. § 122.26(b)(14) 4, 8, 9, 10, 17
 40 C.F.R. § 122.26(b)(14)(ii)4
 40 C.F.R. § 122.27 3, 5, 9, 10, 16, 17
 40 C.F.R. § 122.27(b)(1)4, 5
 Or. Admin R. § 629-625-0700.....13
 Or. Admin. R. § 629-624-0330.....13
 Or. Admin. R. § 629-625-0000(3).....13
 Or. Admin. R. § 629-625-0200(2).....13
 Or. Admin. R. § 629-625-0300(2).....13

Or. Admin. R. § 629-625-0600.....	13
Or. Admin. R. § 629-635-0100(7)(a)	14
Or. Admin. R. § 629-635-0110.....	14
Or. Admin. R. § 629-635-0130.....	14
Or. Admin. R. 629-625-0430.....	13
Or. Admin. R. Ch. 629, Div. 625.....	13
Or. Admin. R. Ch. 629, Div. 635.....	13
Or. Admin. R. Ch. 629, Div. 670.....	14

Other Authorities

41 Fed. Reg. 24, 709, 24, 710 (June 18, 1976).....	11
Fed. R. App. P. 35.....	1
Fed. R. App. P. 40.....	1
H.R. Rep. No. 92-911 (1972)	12
Leg. Hist. of Water Quality Act of 1987 (Vol. 2)	12
Senate Report 99-50 (May 14, 1985)	12

**STATE APPELLEES' PETITION FOR REHEARING
OR REHEARING EN BANC**

STATEMENT OF THE CASE

Pursuant to Fed. R. App. P. 35 and 40, respondent moves for panel rehearing or, in the alternative, rehearing *en banc*.¹ *En banc* rehearing is warranted because the panel decision conflicts with prior rulings of this court. Specifically, the ruling that stormwater runoff from the silvicultural activities identified in 40 C.F.R. § 122.27 (the “silvicultural rule”) is subject to regulation under the Environmental Protection Agency’s (EPA’s) Phase I stormwater rule is based on a faulty construction of EPA’s Phase I rule, fails to give EPA’s rule appropriate deference under *Chevron, USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), and conflicts with this court’s prior recognition that forest road runoff qualifies as Phase II runoff. *En banc* reconsideration also is warranted because the panel’s holding that stormwater runoff from logging roads qualifies as Phase I, rather than Phase II, stormwater will displace Oregon’s existing regulatory scheme for protecting its waters from pollution from such runoff. Because a proper construction of EPA’s stormwater rules allows for the preservation and improvement of that scheme, this court should allow *en banc* reconsideration to prevent the unnecessary displacement of it.

¹ In accordance with Circuit Rule 40-1(c), respondents-appellees have submitted a copy of the panel decision in the appendix to this petition.

Panel reconsideration is warranted because, in construing EPA's stormwater rules, the panel overlooked rules of law regarding the proper interpretation of agency rules; proper application of those rules precludes the conclusion that stormwater runoff from logging roads is regulated under EPA's Phase I rule and, at a minimum, requires that EPA be permitted, in the first instance, to evaluate whether and to what extent stormwater from logging roads should be regulated under its Phase I rule.

A. Statutory and regulatory background

The question in this case is whether the Clean Water Act (CWA) requires a National Pollutant Discharge Elimination System (NPDES) permit for stormwater runoff from forest roads used for logging and related silvicultural activities when that runoff is channeled into ditches and culverts and ultimately discharged into streams and rivers. The answer to that question requires an analysis of the CWA and the regulations EPA has promulgated to implement it.

Congress enacted the CWA in 1972. In the CWA, 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).

In 1987, Congress amended the CWA to address point source discharges of stormwater. The amendments created two phases of stormwater regulation. The amendments required EPA to develop permitting programs within a few years for five types of stormwater discharges (“Phase I”) and prohibited EPA from requiring permits for other stormwater discharges (“Phase II”) before October 1, 1994. 33 U.S.C. § 1342(p)(1), (p)(2)-(4). One of the five types of Phase I stormwater discharges was “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).

Pursuant to those congressional directives, EPA promulgated rules. After the CWA was enacted, but before it was amended in 1987 to address stormwater, EPA promulgated its silvicultural rule, 40 C.F.R. § 122.27. It makes discharges from silvicultural activities, with four specified exceptions, categorically exempt from the NPDES permitting requirements. It does so by defining those discharges as “nonpoint source” discharges:

“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.

40 C.F.R. § 122.27(b)(1).

After 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 so doing, EPA identified what activities qualify as “industrial activity” for purposes of the stormwater permitting requirements. It generally adopted the “Standard Industrial Classifications” (“SIC”) to identify what activity qualified as “industrial activity,” but expressly excluded some activities identified in the SIC from the definition of “industrial activity” for purposes of 33 U.S.C. § 1342(p)(2)(B). 40 C.F.R. § 122.26(b)(14)(ii). In particular, EPA excluded those silvicultural activities previously designated 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, procession, 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) (emphasis added). In the preamble to the Phase I regulations, EPA reiterated that the term “industrial activity” in 33 U.S.C. §

1342(p)(2)(B) excludes those silvicultural activities defined to be nonpoint sources by 40 C.F.R. §122.27:

Two commenters stated that SIC 241 should be excluded in that logging is a transitory operation which may occur on a site for only 2-3 weeks once in a 20-30 year period. It was perceived that delays in obtaining permits for such operations could create problems in harvest schedule and mill demand. This commenter stated that runoff from such operations should be controlled by BMPs in effect for such industries and that such a permit would not be practical and would be cost prohibitive.

EPA agrees with the commenter that this provision needs clarification. The existing regulations at 40 CFR 122.27 currently define the scope of the NPDES program with regard to silvicultural activities. 40 CFR 122.27(b)(1) defines the term “silvicultural point source” to mean any 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. Section 122.27(b)(1) also excludes certain sources. 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 industrial activity” does not include sources that may be included under SIC 24, but which are excluded under 40 CFR 122.27. Further, EPA intends to examine the scope of the NPDES silvicultural regulations at 40 CFR 122.27 as it relates to storm water discharges in the course of two studies of storm water discharges required under section 402(p)(5) of the CWA.

55 Fed. Reg. 47,990, 48,011 (Nov. 16, 1990).

EPA subsequently promulgated Phase II stormwater regulations. In them, EPA created permit requirements for two additional types of stormwater discharges, but did not include silvicultural discharges in those rules. 40 C.F.R.

122.26(a)(9)(i)(A)-(B); *see also Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 842-43, 860-63 (9th Cir. 2003) (*EDC*). In 2003, on judicial review of the Phase II regulations, this court 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 completed its response to that remand order.

B. Procedural background

Plaintiff initiated this action under the CWA, alleging that stormwater discharges from two forest roads violate the CWA because private defendants, who conduct logging operations along those roads, and governmental defendants who are “responsible” for those roads, have not obtained NPDES permits for those stormwater discharges. Specifically, plaintiff alleges “Every day on which there is 0.12 inches of precipitation or more at the Trask River Road, stormwater lands on or near the Trask River Road and is collected in man-made roadside ditches, conveyed via man-made roadside ditches, channels, culverts and other mechanisms at locations identified in the Notice Letter, and then added to unnamed streams and the South Fork Trask River, which are tributary to the Trask River and Tillamook Bay.” (E.R. 17). Plaintiff further alleges that on days in which “there is 0.12 inches of precipitation or

more at the Sam Downs Road, stormwater lands on or near the Sam Downs Road” and likewise “is collected in man-made roadside ditches, conveyed via man-made roadside ditches, channels, culverts and other mechanisms” and “then added to unnamed streams and the Little South Fork of the Kilchis River, which are tributary to the Kilchis River and Tillamook Bay.” (E.R. 17).

Plaintiff additionally alleges that both roads are logging roads, on which private defendants conduct timber hauling. (E.R. 6-7). Plaintiff further avers that state defendants are responsible for ensuring that logging roads comply with the CWA. (E.R. 18-19). Plaintiff then contends that the discharges violate the CWA because defendants have not obtained NPDES permits for them. (E.R. 20-21).

Defendants, supported by EPA as *amicus curiae*, moved to dismiss the complaint on the ground that the allegations fail to state a claim for two independent reasons. First, the alleged stormwater discharges do not require permits because EPA’s silvicultural rule provides that such discharges do not require permits. Second, the alleged stormwater discharges do not require permits because EPA has concluded that the discharges do not qualify as Phase I stormwater discharges, and EPA has not opted to regulate them under Phase II.

The district court dismissed the complaint, ruling that EPA’s silvicultural rule exempts the alleged discharges from NPDES permit requirements. A panel

of this court reversed. The panel reasoned that EPA could not, consistent with the CWA, exempt silvicultural discharges from NPDES permitting requirements, if those discharges qualified as “point source” discharges under the terms of 33 U.S.C. § 1362(14). It further reasoned that EPA, by rule, affirmatively had concluded that silvicultural stormwater discharges, like those alleged in the complaint, qualified as Phase I stormwater discharges, *i.e.* discharges “associated with industrial activity” within the meaning of 40 C.F.R. § 122.26(b)(14) and 33 U.S.C. § 1342(p). The panel reversed the judgment of the district court, and remanded the case for further proceedings.

C. *En banc* reconsideration is warranted because the panel decision conflicts with prior decisions of this court.

The panel’s holding that stormwater runoff from logging roads qualifies as stormwater “associated with industrial activity” under 40 C.F.R. § 122.26, and thus qualifies as Phase I stormwater discharges, conflicts with this court’s prior decisions in several ways. This court previously has recognized that Congress delegated to EPA a wide range of discretion to determine what activities qualify as “industrial activity” under 33 U.S.C. § 1342(p)(2). *American Mining Congress v. EPA*, 965 F.2d 759, 765 (9th Cir. 1992). This court also has held that where, as here, Congress “grants to an agency the authority to elucidate the meaning of a statutory provision,” the court cannot substitute its own construction of the statutory term for the agency’s reasonable

interpretation. *San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700, 705 (9th Cir. 2007) (citing *Chevron*, 467 U.S. at 844). And in *EDC v. EPA*, this court recognized—at least implicitly—that EPA reasonably concluded that stormwater runoff from logging roads and other silvicultural activities is covered by Phase II, rather than Phase I, of the stormwater rules, by remanding to EPA to further analyze stormwater runoff from logging roads and to determine how best to regulate it under the Phase II rules. *EDC*, 344 F.3d at 860-63. If the only reasonable reading of 33 U.S.C. § 1342(p) is that such runoff necessarily constitutes Phase I runoff, the remand in *EDC* would have been pointless.

Here, as outlined above, EPA interpreted “industrial activity” for purposes of 40 C.F.R. 122.26(b)(14) to exclude those silvicultural activities classified as nonpoint sources by 40 C.F.R. § 122.27. The text of 40 C.F.R. § 122.26(b)(14) plainly evidences EPA’s intent to make that exclusion, and the preamble to the Phase I rule unambiguously reiterates that intent. Moreover, EPA’s interpretation of the term “industrial activity” to exclude stormwater runoff from logging roads is a reasonable one, given the latitude Congress gave to EPA to define “industrial activity,” and the unique nature of silvicultural activities. Yet the panel decision rejects EPA’s interpretation of the statutory term “industrial activity” without even evaluating the reasonableness of that interpretation. Although the panel’s analysis is unclear, its reasoning appears to

be as follows: (a) EPA acted impermissibly in promulgating the silvicultural rule to the extent that the rule categorically defines silvicultural discharges that qualify as “point sources” under 33 U.S.C. § 1362(14) to be “nonpoint sources”; (b) because the silvicultural rule is invalid to the extent it exempts certain silvicultural point source discharges from the NPDES permit program, EPA’s specification in 40 C.F.R. 122.26(b)(14) that discharges excluded from the NPDES permit program under the silvicultural rule do not qualify as “industrial activity” is ineffective; therefore (c) EPA necessarily intended those silvicultural activities that it attempted to exempt from the NPDES permit program to qualify as “industrial activity” for the purposes of Phase I because 40 C.F.R. 122.26(b)(14) references SIC 24, and logging is one of the activities listed in SIC 24.

That analysis is flawed and conflicts with prior decisions of this court in several distinct ways. First, it conflicts with this court’s conclusion in *American Mining Congress* that Congress delegated to EPA (thus not to the courts) the power to interpret the term “industrial activity.” It conflicts with this court’s decision in *San Francisco Baykeeper* (and the Supreme Court’s decision in *Chevron*) because it substitutes the court’s interpretation of “industrial activity” to include the silvicultural activities categorized as nonpoint sources by EPA in 40 C.F.R. § 122.27 for EPA’s reasonable interpretation of “industrial activity” to exclude those activities. And it

conflicts with this court's implicit recognition in *EDC* that forest road runoff is a Phase II stormwater discharge, rather than a Phase I discharge. *En banc* reconsideration is warranted to address and redress those conflicts.

D. *En banc* reconsideration is warranted because the panel decision displaces a longstanding regulatory scheme, a result compelled by neither the CWA nor EPA's regulations

En banc reconsideration also is warranted because the panel decision displaces a longstanding, cooperative federal-state scheme for regulation of silvicultural runoff. Because of that significant consequence, and because the panel decision is not plainly correct, this court should allow *en banc* rehearing to evaluate this important issue.

As EPA explained in the amicus brief it submitted in this appeal, EPA long ago determined that silvicultural runoff "is best addressed by the states" through best management practices, rather than through the federal NPDES permit program. (U.S. Amicus Br 18). *See also* 41 Fed. Reg. 24,709, 24,710 (June 18, 1976) ("EPA recognizes that numerous forest practices acts, State environmental programs, and local ordinances are excellent sources of effective regulation and does not intent to disrupt or supplant such regulation."). EPA's silvicultural rule effectuated that determination by categorically exempting silvicultural discharges from the NPDES permitting program by defining such discharges as "nonpoint source" pollution for purposes of the CWA. EPA's treatment of silvicultural discharges is consistent with Congress's express

recognition, in several CWA provisions, that states are the optimal regulators of silvicultural discharges. For example, 33 U.S.C. § 1314(f) requires the EPA to promulgate “guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants” and to identify ways to control pollution caused by “agricultural and silvicultural activities, including runoff from fields and crops and forest lands.” 33 U.S.C. § 1314(f). Likewise, 33 U.S.C. § 1288(b)(2) requires EPA to assist *states* in developing ways to manage silviculture-related nonpoint source pollution. It must help the states in developing “a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution * * * and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources.”

33 U.S.C. § 1288(b)(2)(F).²

² Legislative history also evidences Congress’s recognition that the states should regulate silvicultural runoff through best management practices. For example, the House Report to the 1972 Act stated that “[t]he Committee . . . expects the Administrator to be most diligent in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from *such nonpoint sources as agricultural and silvicultural activities*.” H.R. Rep. No. 92-911, at 109 (1972) (emphasis added). Additionally, in amending the CWA in 1987, Congress expressly recognized that silvicultural roads and related culverts are nonpoint sources. As explained in the Senate Report for S. 1128, an early version of the 1987 amendment, Congress intended for “best management practices” to be used in “reducing runoff from . . . silvicultural areas (*e.g.*, careful road placement, *culverting*, grassing of abandoned roads and skid trials).” Leg. Hist. of Water Quality Act of 1987 (Vol. 2) 1420, 1456; Senate Report 99-50 at 35-36 (May 14, 1985) (emphasis added).

Consistent with the Congress's and EPA's recognition of states' roles in regulating silvicultural runoff, Oregon, 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. Ch. 629, Div. 625; Or. Admin. R. § 629-625-0000(3). 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. § 629-625-0330; 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 panel decision that stormwater runoff from logging roads is subject to regulation under EPA’s Phase I rule, if it stands, will displace this regulatory scheme, substituting it with a yet-to-be-designed federal permitting program to address logging road stormwater runoff.³ By contrast, a ruling that EPA reasonably concluded that stormwater runoff from logging roads is Phase II, rather than Phase I, stormwater would help ensure the preservation of Oregon’s

³ The panel decision expressly acknowledges that NPDES permitting system, in its current form, has not been designed to address the stormwater runoff from logging roads, given EPA’s longstanding belief that NPDES permits are not required discharges associated with most silvicultural activities. (Slip Op 12040)

regulatory scheme, even if the panel is correct that EPA's silvicultural rule is impermissible. That is because under Phase II, Congress empowered EPA to take into account the particular nature of the stormwater runoff at issue and work with states to establish and improve upon plans to manage that stormwater. 33 U.S.C. § 1342(p)(5)-(6). In other words, if EPA is correct that stormwater runoff from forest roads is Phase II runoff, rather than Phase I runoff, then EPA is free to work with Oregon and other states to maintain and improve upon existing state schemes for managing forest road stormwater runoff, rather than substituting for them a federal permitting program that was not created to address this unique type of natural runoff.

The CWA need not be read to require total displacement of existing state regulatory schemes. As explained above, 33 U.S.C. § 1342(p) reasonably can be read to treat logging road stormwater runoff as Phase II, rather than Phase I runoff—a reading that would allow EPA to require improvements to existing state regulation of silvicultural stormwater runoff. This court should allow rehearing *en banc* to ensure that existing state regulation of silvicultural stormwater, as enhanced by EPA in promulgating new Phase II regulations for forest logging roads, is not unnecessarily displaced by an erroneous panel decision.

E. Panel rehearing is warranted because the panel's methodology for construing the EPA's stormwater rule is analytically flawed.

Alternatively, panel rehearing is appropriate because, in concluding that EPA rules designate stormwater discharges from logging roads as discharges "associated with industrial activity," the panel overlooked the proper methodology for construing an agency rule when a portion of that rule has been deemed invalid. Where a portion of a rule has been deemed invalid, a court cannot simply excise that portion from the rule, and treat the balance of the rule as independently operative, as the panel decision does here. Rather, having invalidated 40 C.F.R. § 122.27 (and 40 C.F.R. § 122.26(b), to the extent 122.26(b) references 122.27), the panel should have analyzed whether 40 C.F.R. § 122.26 was severable from 40 C.F.R. § 122.27. That is, the panel should have assessed whether 40 C.F.R. § 122.26 can operate independently from its incorporated references to the silvicultural rule, and whether "the circumstances indicate the agency would have adopted the regulation even without the faulty provision." *Arizona Public Service Co. v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009); *see also North Carolina v. EPA*, 531 F.3d 896, 926 (D.C. Cir. 2008) (discussing severability of regulations); *Preminger v. Secretary of Veterans Affairs*, 517 F.3d 1299, 1310 (Fed. Cir. 2008) (same).⁴

⁴ State defendants could not locate a decision by this court addressing severability of administrative rules.

Here, 40 C.F.R. § 122.26(b) is not severable from its reference to 40 C.F.R. § 122.27 because it is unclear that EPA would have enacted it in the form that it did, had it known that its reference to 40 C.F.R. § 122.27 was invalid. In promulgating 40 C.F.R. § 122.26(b), EPA referred to the silvicultural activities listed in pre-existing 40 C.F.R. § 122.27 as a mechanism for identifying what particular SIC 24 activities do not qualify as “industrial activity” for purposes of Phase I. Had EPA known that the silvicultural rule was invalid, and that it could not effectively exclude logging activities from the definition of “industrial activity” by referencing the silvicultural rule in the Phase I rule, EPA may have adopted a different mechanism for excluding those activities from the definition “industrial activity,” perhaps by excluding SIC 241, as commenters on the Phase I rule suggested, and as EPA did with other SIC provisions. *See generally* 40 C.F.R. § 122.26(b)(14) (excluding activities identified in specified SIC provisions from definition of “industrial activity”).

Because it is unclear how EPA would have structured its Phase I rule if it was improper for EPA to refer to the silvicultural rule in it, the panel decision incorrectly concludes that the silvicultural activities defined as nonpoint sources by 40 C.F.R. § 122.27 are subject to regulation under Phase I. Rather, having concluded that deficiencies in the silvicultural rule call into question EPA’s decision to exclude stormwater runoff from logging roads from Phase I regulation, the panel should have remanded the case to the district court with

directions to abate the case pending rulemaking action by EPA to address the regulatory deficiencies identified by the panel decision and the issues remanded to EPA by this court in *EDC v. EPA*. Panel rehearing is warranted to correct this oversight.

E. Conclusion

The panel decision sets aside a longstanding regulatory scheme in a manner that conflicts with prior decisions of this court, and that relies on analytically-flawed methodology for construing the EPA's rules. For those reasons, *en banc* or panel rehearing is warranted.

Respectfully submitted,

JOHN R. KROGER
Attorney General
MARY H. WILLIAMS
Solicitor General

/s/ Erin C. Lagesen

ERIN C. LAGESEN
Assistant Attorney General

Attorneys for Defendants-Appellees
Marvin Brown; Stephen Hobbs;
Barbara Craig; Diane Snyder;
Larry Giustina; William Heffernan;
William Hutchison; Jennifer Phillippi

APPENDIX

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

Defendants-Appellees.

No. 07-35266
D.C. No.
CV-06-01270-GMK
OPINION

12000

NEDC v. BROWN

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 August 17, 2010

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

Opinion by Judge William A. Fletcher

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

NEDC v. BROWN

12003

COUNSEL

Paul A. Kampmeier, WASHINGTON FOREST LAW CENTER, Seattle, Washington; Christopher Winter, CASCADE RESOURCES ADVOCACY GROUP, Portland, Oregon, for the plaintiff-appellant.

Louis A. Ferreira, STOEL RIVES LLP, Portland, Oregon; Ellen B. Steen, CROWELL & MORING, Washington, D.C., for the intervenors.

Marc Abrams, Erin C. Lagesen, Richard D. Wasserman, OFFICE OF THE OREGON ATTORNEY GENERAL, Salem, Oregon; Louis A. Ferreira, J. Mark Morford, Per Albert Ramfjord, STOEL RIVES LLP, Portland, Oregon;

12004

NEDC v. BROWN

William K. Sargent, Tillamook, Oregon, for the defendants-appellees.

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

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

12006

NEDC v. BROWN

— 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 Defendants 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. 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, inconsistent 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.

III. 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 Water Pollution Control Act ("FWPCA"), Congress substantially revised federal law gov-

12008

NEDC v. BROWN

erning 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. Env'tl. 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

12010

NEDC v. BROWN

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 storm-water 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

12012

NEDC v. BROWN

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 'nonpoint 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 "vir-

tually 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(*l*), 33 U.S.C. § 1342(*l*) ("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 permit."); 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 agricul-

12014

NEDC v. BROWN

tural 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 forest 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

12016

NEDC v. BROWN

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 the 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 discharges 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

12018

NEDC v. BROWN

(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, percolation [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 management 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 silvicultural 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

12020

NEDC v. BROWN

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 explained 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 non-point 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

12022

NEDC v. BROWN

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 does 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 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.

40 C.F.R. § 122.27.

The text of the CWA distinguishes between point and non-point sources depending on whether the pollutant is channeled and controlled through a “discernible, confined and discrete

12024

NEDC v. BROWN

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 spraying 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

12026

NEDC v. BROWN

(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] the 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 presented in *Costle* and in *Forsgren*. The CWA prohibits “the discharge of any pollu-

tant 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

12028

NEDC v. BROWN

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

12030

NEDC v. BROWN

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 re-enacted 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

12032

NEDC v. BROWN

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 ultimately 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)(1)-(2). Such discharges were required to apply for a permit 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:

12034

NEDC v. BROWN

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 industrial activity” does 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 not only 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

12036

NEDC v. BROWN

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).

12038

NEDC v. BROWN

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 stormwater 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 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

12040

NEDC v. BROWN

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

NEDC v. BROWN

12041

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.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the state appellees' Petition for Rehearing or Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more and contains 4,186 words.

DATED: October 5, 2010

/s/ Erin C. Lagesen

ERIN C. LAGESEN

Assistant Attorney General

Attorney for Defendants-Appellees
Marvin Brown; Stephen Hobbs;
Barbara Craig; Diane Snyder;
Larry Giustina; William Heffernan;
William Hutchison; Jennifer Phillippi

ECL:blt/2284400

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2010, I directed the State Appellees' Petition for Rehearing or Rehearing En Banc to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Marcia Berman
Sheila M. Lieber
U.S. Department of Justice
20 Massachusetts Avenue N.W.
Washington, DC 20530

/s/ Erin C. Lagesen

ERIN C. LAGESEN
Assistant Attorney General

Attorney for Defendants-Appellees
Marvin Brown; Stephen Hobbs;
Barbara Craig; Diane Snyder;
Larry Giustina; William Heffernan;
William Hutchison; Jennifer Phillippi

ECL:blt/2284400