

## **WILL THE SILVICULTURAL EXEMPTION SURVIVE? AN UPDATE ON NORTHWEST ENVIRONMENTAL DEFENSE CENTER V. BROWN**

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The U.S. Supreme Court is mulling whether to review *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011). It may be “the most significant judicial holding to directly (and negatively) impact private and public forest landowners, operators, managers and their collective economic activities.” Thomas Gould, *Judicial Regulation and Killing Jobs: The Ninth Circuit’s Forest Roads’ Decision—Waving Goodbye to Science-Based BMPs and More than 35 Years of Regulatory Precedent*, EVERGREEN MAG. (Feb. 2, 2012), available at <http://ow.ly/9nmbz>.

Although review by the Supreme Court is usually a long shot, the chances it would review *Brown* were much improved when the U.S. Solicitor General agreed to the Court’s request to weigh in. If the U.S. Supreme Court decides to grant certiorari, it will be determining, first, whether the Ninth Circuit had proper subject matter jurisdiction to hear the case and, second, whether a Clean Water Act (CWA) permit is required for ditches that collect natural runoff from forest roads.

### **Background**

The Northwest Environmental Defense Center (NEDC) brought suit against the Oregon State Forester, members of the Oregon Board of Forestry in their official capacities, and various timber companies (defendants). The NEDC argued that the system of ditches, culverts, and channels that collected stormwater on two forest roads—owned by the Oregon Department of Forestry and the Oregon Board of Forestry—required National Pollutant Discharge Elimination System (NPDES) permits. The defendants contended that the timber roads and their associated natural stormwater systems fell under the Environmental Protection Agency’s (EPA) silvicultural rule categorical exemption and were therefore exempt from the NPDES permitting process. In the alternative,

the defendants argued that the 1987 amendments to the CWA allowed such an exemption.

The CWA requires a NPDES permit for the discharge of any pollutant into the waters of the United States from a “point source.” 33 U.S.C. §§ 1311(a), 1342. The CWA defines a “point source” to be “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel [or] conduit . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). While the CWA does not define what a “nonpoint source” is, the CWA does exempt “agricultural stormwater discharges and return flows from irrigated agriculture” from the definition of “point source.” *Id.* EPA promulgated a rule in 1976 that categorically exempted certain silvicultural activities from the definition of “point source,” commonly known as the “silvicultural rule.” The silvicultural rule limits silvicultural point source activities to “rock crushing, gravel washing, log sorting, or log storage facilities which are in connection with silviculture activities and from which pollutants are discharged. . . .” 40 C.F.R. § 124.85 (1976). Specifically enumerated in the silvicultural rule as nonpoint sources are “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.” *Id.*

### **Procedural Posture**

The district court sided with the defendants, concluding that the timber road runoff collected into a system of ditches, culverts, and conduits and discharged into waters of the United States were exempt from NPDES permit requirements under the silvicultural rule. *Nw. Env’tl Def. Center v. Brown*, 476 F. Supp. 2d 1188 (D. Or. 2007). The district court did not address whether the 1987 amendments to the CWA allowed such an exemption. The district court ultimately dismissed the NEDC’s complaint for failure to state a claim. The NEDC appealed to the Ninth Circuit. The Ninth Circuit reversed, issuing two opinions on this case. The first opinion, issued in August 2010, addressed the validity of the silvicultural rule. In May

2011, the court denied the petitions for rehearing and rehearing en banc but issued a revised opinion. This second opinion was substantially the same as the August 2010 opinion, but it *suaspon*te addressed subject matter jurisdiction. Although the parties did not dispute jurisdiction, the court addressed the issue. The case was appealed to the U.S. Supreme Court. The Court has not granted or denied certiorari. It has, however, asked the U.S. Solicitor General to weigh in on the issue. In late May, the solicitor general recommended against review. According to the Solicitor General, the Ninth Circuit should have deferred to EPA's longstanding interpretations of the Clean Water Act and the Silvicultural Rule. Even so, the Solicitor General recommended against review because of efforts by Congress and EPA to address the practical effects of the Ninth Circuit's decision.

### **Subject Matter Jurisdiction**

The Ninth Circuit's revised opinion specifically addressed subject matter jurisdiction, unlike the original opinion. The court was concerned because it held on the merits that the silvicultural rule was ambiguous, with no discussion of jurisdiction. 640 F.3d at 1068.

Under § 1365(a) of the CWA, a citizen can bring suit against any person alleged to be in violation of "an effluent standard or limitation" under the CWA. This includes persons illegally discharging pollutants into jurisdictional waters without a NPDES permit. However, § 1369(b) places limitations on suits that challenge the validity of an action taken by the EPA administrator, including the promulgation of effluent standards, prohibitions, or limitations, determinations, approvals, issuance, or denial. Such suits must be brought within 120 days from the date of the administrator's action unless the basis for the suit arose more than 120 days after the agency action. 33 U.S.C. § 1369(b)(1). Despite the silvicultural rule being on the books since 1976, the court determined that this case came within the § 1369(b)(1) exception. The court reasoned that since the silvicultural rule was susceptible to two different readings, there was no way for the public to know which reading EPA would adopt. According to the court, EPA's filing of its initial amicus

brief first put the public on notice for which reading it would adopt. The court was silent on the 30-plus years of EPA's interpretation of the silvicultural rule.

### **Silvicultural Rule Validity**

The Ninth Circuit agreed with NEDC, holding that any runoff collected in a ditch, culvert, or the like, regardless of its origin, is a point source. After a thorough review of the statutory definition of "point source" under the CWA, the court looked to case law to determine the distinction between nonpoint and point source runoff. In one case cited, the Ninth Circuit had adopted the Tenth Circuit's view 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.*" 640 F.3d at 1071. Relying on another Ninth Circuit case, the court 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.*

The Ninth Circuit also reviewed the legislative histories of the CWA and the silvicultural rule. It found that the term "point source" was not to be interpreted narrowly and that Congress did not provide EPA with discretion to define any statutory terms. The court mentioned that Congress added a statutory exemption to the NPDES permitting system for agricultural irrigation in 1977 and that no similar exemption has been created for silviculture. In reviewing the history of the silvicultural rule, the court noted that the original version of the rule was found invalid by the D.C. Circuit Court. The D.C. Circuit Court held that "the EPA Administrator does not have the authority to exempt categories of point sources from the [NPDES] permit requirements. . . ." 640 F.3d at 1077, *citing Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

While the D.C. Circuit Court was reviewing the silvicultural rule, EPA amended it. In 1976, EPA justified its final version of the silvicultural rule—only slightly different from today's rule—by stating that a

proper interpretation of the CWA's legislative history and supporting case law showed that not every ditch or the like was meant to be a point source under the CWA. According to EPA, ditches that served only to convey nonpoint runoff from precipitation were not intended to be subject to the NPDES permitting program. The Ninth Circuit flatly rejected EPA's justification, stating that "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." The court also applied the D.C. Circuit Court's reasoning used in striking down the initial version of the rule, concluding that EPA did not have the authority to "exempt categories of point sources from the [NPDES] permit requirements. . . ." 640 F.3d at 1077.

The Ninth Circuit found the silvicultural rule subject to two possible readings: one valid and one invalid. The first reading is a reflection of EPA's intent in adopting the rule. Under this reading, it exempts all natural runoff from silvicultural activities "irrespective of whether, and the manner in which, the runoff is collected, channeled, and discharged into protected water." 604 F.3d 1080. The court held that this reading is inconsistent with the CWA. The CWA distinguishes between point and nonpoint sources depending on whether the pollutant is channeled and controlled through a "discernible, confined and discrete conveyance." In contrast, the silvicultural rule categorically distinguishes between discharges depending on the source of the pollutant. The court held that the definition of "point source" 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." 640 F.3d at 1079. The court concluded that the silvicultural rule, as EPA interpreted it, was not a permissible interpretation of the CWA.

The second reading "does not reflect the intent of EPA, but would allow [the court] to construe the Rule to be consistent with the statute." *Id.* Under this reading,

natural runoff remains exempt from the NPDES permitting process so long as it remains natural. According to the court, "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." *Id.* Under either reading, the court held, the rule does not exempt the timber road stormwater runoff that is collected into a system of ditches, culverts, and conduits from the NPDES permitting system.

### **1987 Amendments to the CWA**

Even if the discharges were point sources, the defendants argue that the 1987 amendments to the CWA approved of the silvicultural rule by failing to revise or repeal it. Because Congress never mentioned or alluded to the rule in the legislative history, the court held that Congress was not aware of the rule during the amendment process. Thus, the court reasoned, Congress could not have assented to the rule. 640 F.3d at 1081.

The Ninth Circuit also held that the 1987 amendments fundamentally changed statutory treatment of stormwater discharges and that the relevant statutory language was "flatly inconsistent with the Silvicultural Rule." *Id.* The court determined that the 1987 amendments were added to help EPA eventually address all stormwater point sources. They recognized, however, that the major contributors should be regulated first and minor sources should be studied first. It is within EPA's discretion to regulate *de minimis* sources like rain gutters of churches, schools, and residential properties.

The 1987 amendments added § 402(p), which established a tiered approach to permit stormwater discharges. Phase I required the major contributors to obtain their NPDES permits first. Among the major contributors are those "associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B). EPA regulations defined which industrial activities required NPDES permits, stating, "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.” 40 C.F.R. § 122.26(b)(14). The court noted that while this regulation states “directly related to manufacturing, processing or raw materials storage areas at an industrial plant,” EPA has stated that it would not limit the definition to just those practices.

Accordingly, EPA expanded the definition to “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 . . .).” 55 Fed. Reg. 47,990, 48,007 (Nov. 16, 1990). The EPA regulation defining which industrial activities require NPDES permits goes on to provide: “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). This exclusion refers to the silvicultural rule. Again, the court points to congressional intent, stating that “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.” 640 F.3d at 1083.

The Standard Industrial Classification (SIC) defines the industries covered by the Phase I “associated with industrial activity” regulation. It was undisputed that logging was considered an industrial activity. The court rejected the argument that logging sites are not “industrial facilities” because they are not typical industrial plants. The court held that the definition of “facility” is very broad and includes timber roads. Therefore, the court held that the reference to the silvicultural rule in the EPA regulations defining which industrial activities require NPDES permits cannot exempt such discharges from the Phase I regulations requiring permits for discharges “associated with industrial activity.”

### **Review Before the U.S. Supreme Court**

Forest owners and managers should be concerned about whether the *Brown* decision stands. If it does, then EPA will be forced to develop a NPDES permit

program. This program will probably not be able to appreciate local conditions as well as the science-based Best Management Practices that states and the forestry industry have developed at great cost over time. *See Gould, supra*. Ironically, the Ninth Circuit’s opinion may lead to less clean water. *Id.*

EPA seems to have recognized this in its recent regulatory proposal. EPA recently responded to the Ninth Circuit decision with a notice of intent to exempt logging roads from permits under the Clean Water Act. 77 Fed. Reg. 30473. This exemption will relieve owners and operators of logging roads from having to comply with NPDES permit requirements. EPA plans to address the broader category of forest roads by studying their water quality impacts further and holding public meetings this summer. EPA is requesting comments by June 22, 2012 on approaches for regulating forest road stormwater discharges; EPA is especially interested in learning about the current best management practice programs across the country. These comments will help EPA determine its regulatory approach to forest roads.

The U.S. Supreme Court appears likely to review *Brown*, the solicitor general’s recommendation notwithstanding. The Court may wish to rule on the substance of *Brown*, since the opinion seems to be in conflict with the decisions of courts in other jurisdictions. Other courts have affirmed EPA’s regulation that forest roads are nonpoint sources that do not require NPDES permits. *See Sierra Club v. Martin*, 141 F.3d 803 (8th Cir. 1998); *Newton Cnty. Wildlife Assoc. v. Rogers*, 71 F. Supp. 2d 1268, 1303 (N.D. Ga. 1999). If it takes up the case, the Court will be leery of allowing a challenge to an agency’s long-standing statutory interpretation (of over 30 years).

Even if the Court strikes down the *Brown* opinion, it might not go so far as to explicitly affirm the validity of the silvicultural rule. It may not be willing to overlook the procedural issues in *Brown* to get to the merits of the case. The Roberts Court has emphasized restraint in its holdings, adhering to a philosophy of judicial minimalism. *See, e.g., William J. Rinner, Roberts Court Jurisprudence and Legislative Enactment*

*Costs*, 118 YALE L.J. (Pocket Part 177) (2009), <http://thepocketpart.org/2009/03/31/rinner.html>. This suggests that, if it takes up the case, the Court may dispense with it on subject matter jurisdiction. This would still be helpful to the forest industry, but it may make for uncertainty because EPA might feel the need to develop a rule that is on stronger footing. EPA's recent regulatory proposal appears to have been developed with this in mind.

If the Court decides not to review *Brown*, or if it affirms the Ninth Circuit's opinion, Congress may be willing to take up the issue. Bills have been introduced that could solve the issue. *See* Gould, *supra*. For now, Congress has stayed the effect of this controversial decision through its Omnibus Appropriations Bill until October 1, 2012. *Id.*

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