"TOUGH LAW" GETTING TOUGHER: A PROPOSAL FOR PERMITTNIG IDAHO'S LOGGING ROAD STORMWATER POINT SOURCES AFTER NORTHWEST ENVIRONMENTAL DEFENSE CENTER V. BROWN

CASENOTE

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"TOUGH LAW" GETTING TOUGHER: A PROPOSAL FOR PERMITTING IDAHO'S LOGGING ROAD STORMWATER POINT SOURCES AFTER NORTHWEST ENVIRONMENTAL DEFENSE CENTER V. BROWN

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I. INTRODUCTION

The man who moves a mountain begins by carrying away small stones.

—Chinese proverb

Life can be tough for an Idaho salmon.¹ It starts in the fish's natal stream where the challenge is surviving and growing large enough to begin the long journey to the Pacific. Of course, this assumes that stream is not running thick with sediment that smothers eggs or obscures prey.² Even after maturing, migrating hundreds of miles to the ocean, wandering the Pacific, and beginning the return—no small feat for an Idaho fish—turbid water may halt the final homecoming.³ And upon return to the natal stream, with every fiber of its being urging the fish to spawn, fine sediment or scouring flows may have eliminated suitable nesting sites.⁴ Life can indeed be hard for an Idaho salmon, especially when a poorly maintained logging road runs next to its home stream.⁵

Nor is life easy for a logging road. Roads are born from the landscape, and almost invariably drain into a stream. They might be paved, but more likely they are just engineered ribbons of silt, sand, and gravel. Either way, they spend their lives being beaten and torn apart. Passing trucks carrying heavy loads of timber pulverize their surfaces. And when the snow melts or the rain falls, stormwater may wash the pieces away, down the gully, and into the stream. To defend against this pieceby-piece disintegration, road designs often include drainage systems

See generally Theodore C. Bjornn & Dudley W. Reiser, Habitat Requirements for Salmonids in Streams, in Influences of Forest and Rangeland Management on SALMONID FISHES AND THEIR HABITAT, AMERICAN FISHERIES SOCIETY SPECIAL PUBLICATION 19, at 83 (William R. Meehan ed., 1991). As used here, "salmon" refers to fish species that are born in fresh water, migrate to and mature in the ocean, and ultimately return to fresh water to spawn. See id. at 83. Fish that follow this migratory pattern are "anadromous." Id. The various species of anadromous Pacific salmon (e.g., chinook and sockeye) are part of a larger family of fish, known as "salmonids," which includes salmon, trout, and char. Id. Not all salmonids are anadromous; different species and subspecies exhibit varying life histories. See id. Bull trout, for example, typically spawn in small, cold headwater streams where some remain (resident) while others move to larger rivers and lakes as they mature (migratory). Bruce E. Rieman et al., Does Wildfire Threaten Extinction for Salmonids? Responses of Redband Trout and Bull Trout Following Recent Large Fires on the Boise National Forest, 1995 Procs. Conf. on Wildfire & Threatened & Endangered Species & Habitats 47, 49. Regardless of life history, salmonids in fresh water share similar water quality and habitat needs. See generally Bjornn & Reiser, supra.

^{2.} Bjornn & Reiser, supra note 1, at 97, 133.

See id. at 85.

^{4.} See id. at 95–97. See also Danielle Tonina et al., Hydrological Response to Timber Harvest in Northern Idaho: Implications for Channel Scour and Persistence of Salmonids, 22 Hydrologic Processes 3223, 3231–34 (2008) (suggesting that increased runoff in logged watersheds can scour away gravels that salmonids rely on for spawning, which may in turn contribute to die-off in heavily logged areas).

^{5.} See generally Carl J. Cederholm et al., Cumulative Effects of Logging Road Sediment on Salmonid Populations in the Clearwater River, Jefferson County, Washington (1980).

with ditches to collect stormwater, culverts to drain the ditches, and channels to convey that drainage away.⁶ If not adequately drained, the passing seasons make easy work of these roads, each storm carving deeper furrows in their surfaces and further undermining their banks. Ultimately—and much to the distress of nearby salmon—stormwater will erode and carry the roads away grain by grain.

Life can also be hard for Idaho's loggers. Part of a proud silvicultural tradition, they labor deep in the woods to produce raw timber, a commodity as vital now as it was when the first wood structures were built millennia ago. They are good at it too—annually producing billions of board feet worth hundreds of millions of dollars. Beating the road as they go, they haul timber from the stump to the mill. But their industry is in severe decline due to economic forces far beyond their control. 8

Beset by these economic headwinds, loggers might feel as though their industry is being regulated out of existence. Whether harvesting timber on state, federal, or private land, they must be licensed, comply with requirements touching all aspects of their operations, and submit to continual compliance audits. Besides safely and efficiently producing lumber, they are legally required to protect forest productivity, water quality, and fish habitat by employing best management practices (BMPs) that meet or exceed state standards. Undaunted, the vast majority comply with these requirements. A healthy forest is a productive one after all. Yet, despite this culture of compliance, an unprecedented new federal requirement may soon compound the loggers' already considerable regulatory burden. This new burden is the result of a novel yet sound application of a "tough law" to a pernicious, if obscure, problem.

In the wake of the Ninth Circuit's recent decision in *Northwest Environmental Defense Center v. Brown (NEDC)*, the EPA may soon require National Pollution Discharge Elimination System (NPDES) permits for logging road stormwater discharges.¹⁴ The decision recognizes that timber hauling is an industrial activity that is tough on roads and

^{6.} See, e.g., IDAHO ADMIN. CODE r.20.02.01.040.02.d (2011) (requiring drainage systems "whenever reliance upon natural drainage would not protect the [road surface or adjacent slopes]").

^{7.} TODD A. MORGAN ET AL., INLAND NW. FOREST PRODS. RESEARCH CONSORTIUM, IDAHO'S FOREST PRODUCTS INDUSTRY: CURRENT CONDITIONS AND 2011 FORECAST 2 (Jan. 2011).

^{8.} Id. at 2-3.

^{9.} See generally Rules Pertaining to the Idaho Forest Practices Act, IDAHO ADMIN. CODE r.20.02.01 (2011).

 $^{10.\} Id.;$ Ara Andrea, Idaho Dep't of Lands, 2009 Idaho Forest Practices Year-End Report (2009); Idaho Dep't of Envil. Quality, Idaho 2008 Interagency Forest Practices Water Quality Audit (2009).

^{11.} See, e.g., Idaho Timber Harvesting Rules, IDAHO ADMIN. CODE r.20.02.01.030 (2011).

^{12.} ANDREA, *supra* note 10, at 9 (noting that 97.4% of inspected forestry operations satisfactorily complied with all applicable Forest Practices Rules).

^{13.} Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1375 (D.C. Cir. 1977).

^{14.} Nw. Envtl. Def. Ctr. v. Brown (NEDC), 640 F.3d 1063, 1085 (9th Cir. 2011), rev'g, 476 F. Supp. 2d 1188 (D. Or. 2007).

in turn tough on water quality and salmonid fish.¹⁵ It also reaffirms a fundamental point of administrative law: A regulation cannot be construed to allow that which is forbidden by statute.¹⁶ Even so, three lingering issues stand out: what kind of permit should be required, to which roads will it apply, and how will it account for these discharges' effects on Idaho's federally protected salmonid fish?

To comply with NEDC while minimizing the regulatory burden on logging operations, a general NPDES permit that comprehensively addresses potential effects on salmonids listed under the Endangered Species Act (ESA) should be developed. These measures are necessary for the permit to adequately protect listed salmonids without being administratively infeasible or unduly burdensome for loggers. Specifically, a general permit would obviate the need for delay-prone individual NPDES permits. In addition, new regulatory criteria for distinguishing logging roads from forest roads (which are generally unregulated) would provide a degree of certainty for loggers as they seek permits for existing operations or plan new ones. Lastly, a programmatic ESA consultation initiated by the EPA would comprehensively and uniformly insure that permitted discharges do not jeopardize listed species or adversely modify their critical habitat. Combined, these foundational polices would contribute to a legally adequate and practically feasible general permit for Idaho's logging road stormwater point sources.

With these considerations in mind, this comment analyzes NEDC and its ramifications in Idaho. It first reviews road-derived sediment pollution, its effects on salmonids, and its regulation under the Clean Water Act (CWA). Next, it analyzes NEDC to explain why the CWA, applicable EPA regulations, and longstanding precedents compelled the decision. Finally, it proposes solutions to three lingering policy questions: (1) whether logging roads should be covered by many individual permits or a single general permit; (2) whether current EPA regulations concerning roads associated with industrial activity would adequately define the new permit's scope; and (3) whether the permit's potential impacts on ESA-listed species would be best addressed by many narrowly-focused consultations or a comprehensive, programmatic consultation. These policy choices will dictate whether the permit can achieve the twin goals of preserving Idaho's silvicultural tradition while "restor[ing] and maintain[ing] the chemical, physical, and biological integrity" of its waters. 17

^{15.} Id. at 1067.

^{16.} Id. at 1080.

^{17. 33} U.S.C. § 1251(a) (2006).

II. SEDIMENT RUNOFF FROM ROADS, ITS IMPACTS ON SALMONIDS, AND THE CLEAN WATER ACT'S REGULATORY RESPONSE

At first, a salmonid fish, a logging road, and a logger might seem to have little in common. But, upon closer inspection, they are linked three times over. First and foremost, they share the landscape, which dictates the quality and abundance of timber as well as the health and productivity of salmonid habitat. The landscape also dictates the paths of least resistance for both roads and stormwater runoff. Second, because they share the climate, together they endure floods, fires, storms, and droughts—natural phenomena that may contribute sediment to waters already affected by logging. Finally, they share the law, which, after *NEDC*, may now tie the condition of the road or the fish to the logger's economic wellbeing. Although this connectedness precipitates conflicts, it is also the key to lasting solutions.

A. Roads as Sources of Sediment Pollution

Essential to modern life, paths to recreation, conduits of commerce, roads are also significant sources of water pollution both nationally and in Idaho. This is because stormwater can wash pollutants off roads and into nearby waterbodies. Emphasizing the ubiquity of this problem, the Ninth Circuit summarized this process thusly:

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 drive-ways 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.¹⁸

Consequently, road construction and use often requires tradeoffs. Even remote forest roads can exchange water quality and biodiversity for mobility and commerce. ¹⁹ Nevertheless, millions of miles of road criss-cross the country, ²⁰ and stormwater runoff from this vast network often flows into the nation's water bodies carrying substantial pollutant loads with it. This road runoff commonly contains sediment, nutrients,

^{18.} League of Wilderness Defenders/Blue Mts. Biodiversity Project v. Forsgren, 309 F.3d 1181, 1184 (9th Cir. 2002).

^{19.} U.S. FOREST SERV., PAC. NW. RESEARCH STATION, FOREST ROADS: A SYNTHESIS OF SCIENTIFIC INFORMATION 1 (Herman Gucinski et al. eds., 2001) [hereinafter FOREST ROAD SYNTHESIS].

^{20.} Highway Statistics 2008 Table HM-60, U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN. (Oct. 2009), http://www.fhwa.dot.gov/policyinformation/statistics/2008/hm60.cfm.

and heavy metals²¹—three of the nation's ten most common causes of water quality impairment.²²

Of those three pollutants, sediment might seem incongruously benign. But despite being a typically nontoxic and naturally occurring pollutant, sediment can have a wide variety of negative effects on both human and natural systems. Not only can excessive sediment loading in streams adversely affect salmonids (discussed in Part II.B *infra*), it can also harm human systems. Sediment pollution "increases water treatment costs," reduces water storage capacity by filling reservoirs, and "interferes with disinfection processes." Further, sediment particles can bind with and transport toxic pollutants such as heavy metals and pesticides. ²⁴ Thus, road-derived sediment can have a dual contaminating effect by transporting toxic pollutants while also filling or fouling reservoirs and treatment facilities.

Idaho is not isolated from these national trends.²⁵ In fact, sediment pollution stands out as the "biggest water quality problem in Idaho streams."²⁶ Sediment pollution violates the State's water quality standards when it "impair[s] designated beneficial uses."²⁷ By this metric, sediment negatively impacts 16,654 miles of rivers and streams statewide.²⁸ That is 27% of assessed streams and about half of all the impaired streams statewide.²⁹ The other common road-related pollutants, nutrients and metals, have a comparatively small impact.³⁰ Only thermal pollution even comes close to matching the miles of river affect-

25. Compare Idaho Causes of Impairment for Reporting Year 2010, Table in Idaho Water Quality Assessment Report, U.S. EPA, http://iaspub.epa.gov/waters10/attains_index.control?p_area=ID#causes (last updated May 4, 2012) [hereinafter Idaho Causes of Impairment], with Office Of Water, supra note 22, at 15.

^{21.} OFFICE OF WATER, U.S. EPA, EPA-841-F-95-008d, EROSION, SEDIMENT AND RUNOFF CONTROL FOR ROADS AND HIGHWAYS (1995), $available\ at\ http://water.epa.gov/polwas\ te/nps/runoff.cfm.$

^{22.} OFFICE OF WATER, U.S. EPA, NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, 2004 REPORTING CYCLE 11 (2009), available at http://www.epa.gov/owow/305b/2004report/2004 305breport.pdf.

^{23.} COMM. ON HYDROLOGIC IMPACTS OF FOREST MGMT. & WATER SCI. AND TECH. BD., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, HYDROLOGIC EFFECTS OF A CHANGING FOREST LANDSCAPE 72 (2008).

^{24.} Id.

^{26.} MIKE ROWE ET AL., IDAHO DEP'T OF ENVTL. QUALITY, GUIDE TO SELECTION OF SEDIMENT TARGETS FOR USE IN IDAHO TMDLS 1 (2003), available at http://www.deq.idaho.gov/media/528694-sediment_targets_guide.pdf.

^{27.} IDAHO ADMIN. CODE r.58.01.02.200.08 (2011).

^{28.} Idaho Causes of Impairment, supra note 25.

^{29.} Summary of Water Quality Assessments for Each Waterbody Type for Reporting Year 2010, Table in Idaho Water Quality Assessment Report, U.S. EPA, http://iaspub.epa.gov/waters10/attains_index.control?p_area=ID#wqs (last updated May 4, 2012). Notably, only 64% (61,925 miles) of Idaho's 96,391 stream miles have been assessed for water quality impacts. Id. As a result, the total amount of sediment-impaired waters in Idaho is unknown.

^{30.} Id. Nutrients impair 6,975 assessed miles (11% of the total), while combined heavy metals (zinc, cadmium, mercury, lead, arsenic, selenium, and copper) account for less than 514 miles (less than 1%). Id.

ed by sediment.³¹ Restoring water quality in Idaho's streams thus depends in large part on effectively managing sediment runoff from its roads—particularly its 23,000 miles of unpaved roads.³²

Given the foregoing, it is no surprise that Idaho's vast unpaved road network trades environmental values for recreational and commercial access to the State's forested interior. Building forest roads requires vegetation to be removed and replaced by a relatively impervious surface, which alters hydrologic processes in the affected area.³³ For example, studies in the Boise National Forest show that roads there yielded 51% more sediment than natural conditions whereas wildfire only increased yields by 12%.34 Further, forest roads often parallel isolated rivers and streams with few other anthropogenic sources of pollution.³⁵ Meanwhile those same isolated streams routinely support recreation and sensitive beneficial uses like salmonid spawning or cold water aquatic life, all of which are negatively impacted by excessive sediment runoff.³⁶ Nevertheless, the extensive road building and heavy traffic that accompanies remote industrial activities like logging often exacerbates the negative impact.³⁷ The valuable recreational, industrial, and emergency access afforded by Idaho's forest roads often comes at the cost of similarly valuable water quality and aquatic habitat.

Forest roads' potential to dramatically increase stormwater and sediment runoff to streams is of greatest concern.³⁸ Unlike natural groundcover, which tends to absorb or disperse rainwater and snowmelt, roads accelerate stormwater and sediment runoff.³⁹ This is because roads intercept, concentrate, and redirect water during storm and snowmelt events.⁴⁰ The effects of all that accumulated water are numerous: increased erosion on the road surface and the bare slopes adjacent to it (the road prism); changes to the shape, structure, and location of

35. IDAHO DIV. OF ENVTL. QUALITY, IDAHO NONPOINT SOURCE MANAGEMENT PLAN 37 (1999), available at http://www.epa.gov/region10/pdf/water/srf/cwsrf_idaho_nonpoint_plan 1999.pdf [hereinafter NONPOINT SOURCE MANAGEMENT PLAN].

^{31.} $\it Id.$ Excessive temperature impairs about 17,900 or about 29% of assessed miles. $\it Id.$

^{32.} Highway Statistics 2008 Tables HM-51, U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN. (Oct. 2009), http://www.fhwa.dot.gov/policyinformation/statistics/2008/hm51.cfm.

^{33.} See generally FOREST ROAD SYNTHESIS, supra note 19.

^{34.} Id. at 31.

^{36.} Cold water aquatic life (98%) and salmonid spawning (54%) are the two most common designated uses for Idaho's 61,925 assessed stream miles. About 53% of the stream miles designated for cold water aquatic life, and 43% of the mileage designated for salmonid spawning, are impaired. *Individual Designated Use Support Idaho Rivers and Streams 2010*, Table in *Idaho Water Quality Assessment Report*, U.S. EPA, http://iaspub.epa.gov/waters10/attains_index.control?p_area=ID#wqs (last updated May 4, 2012).

^{37.} FOREST ROAD SYNTHESIS, supra note 19, at 14.

^{38.} E.g., Richard T.T. Forman & Lauren E. Alexander, Roads and Their Major Ecological Effects, 29 Ann. Rev. Ecological Systems 207, 216 (1998).

^{39.} Id. at 219.

^{40.} See Nat'l Council For Air & Stream Improvement Forest Watershed Task Grp., Forest Roads and Aquatic Ecosystems: A Review of Causes, Effects, and Management Practices 8 (2003), available at http://www.ncasi.org/Publications/Detail.asp x?id=2610.

drainage channels; and, the rerouting of runoff to overland paths it would not otherwise follow. ⁴¹ And because fine sediment (clay and silt) are more easily mobilized than coarser material (sand and gravel), even small amounts of precipitation—that would normally be absorbed by natural groundcover—can cause fine sediment to run off of roads. ⁴² The result is a profound reconfiguration of natural stormwater flow paths, which can contribute to increased sediment delivery to streams.

As a heavily travelled subset of forest roads, logging roads can be particularly problematic. Logging operations typically depend on roads for direct access to timber stands.⁴³ Access to new logging areas often requires new road construction, which results in new opportunities for increased sediment delivery to streams.⁴⁴ One study in central Idaho found that logging road-related landslides and surface erosion produced 770 times more sediment than undisturbed areas in comparable terrain.⁴⁵ Improved construction techniques, erosion control BMPs, and regular maintenance are thus necessary to reduce this staggering potential to exacerbate Idaho's sediment problem.⁴⁶ Unfortunately, these controls can be costly, especially in areas with high road densities.⁴⁷ Even so, these measures are increasingly important for ensuring the continued survival of Idaho's salmonids.

B. Sediment Pollution's Impact on Salmonids

Excessive sediment in streams can adversely affect salmonid eggs, juveniles, and adults alike. These effects are especially important in Idaho because five varieties of ESA-listed salmonid fish inhabit rivers and streams throughout the state. Listing determinations for these species uniformly cite logging practices and associated roads as "a major source of sediment to [salmonid] spawning streams." Highlighting the-

^{41.} Forest Road Synthesis, *supra* note 19, at 12, 16. However, "[t]he magnitude and relative dominance of . . . road erosion processes is driven by variations in climate, geology, physiography, road design, road construction, and road maintenance practices." Lee H. MacDonald & Drew B.R. Coe, *Road Sediment Production and Delivery: Processes and Management*. 2008 WORLD LANDSLIDE FORUM, at 385.

^{42.} MacDonald & Coe, supra note 41, at 385-86.

^{43.} FOREST ROAD SYNTHESIS, supra note 19, at 44.

^{44.} Id. at 14.

^{45.} Walter F. Megahan & Walter J. Kidd, U.S. Forest Serv., *Effect of Logging Roads on Sediment Production Rates in the Idaho Batholith* 14 (U.S. Department of Agriculture Research Paper INT-123, 1972).

^{46.} See FOREST ROAD SYNTHESIS, supra note 19, at 14.

^{47.} Id. at 30.

 $^{48. \}quad 50 \; \text{C.F.R.} \; \$ \; 17.44 \text{(w)}, \; 223.102 \text{(c)} (9) - (10), \; (22), \; 224.101 \text{(a)} \; (2011) \; \text{(listing bull trout, Snake River chinook salmon, and Snake River Basin steelhead trout as threatened and listing Snake River sockeye salmon as endangered).}$

^{49.} Listing Determinations for 27 ESUs of West Coast Salmonids, 69 Fed. Reg. 33,102, 33,153 (proposed June 14, 2004). See also Determination of Threatened Status for the Klamath River and Columbia River Distinct Population Segments of Bull Trout, 63 Fed. Reg. 31,647, 31,660 (June 10, 1998) ("[F]orestry activities that adversely affect bull trout and its habitat are primarily timber extraction and road construction, especially when impacting riparian areas.").

se concerns, a recent U.S. Forest Service survey of forest road science indicates that "salmonid[] . . . populations are negatively correlated with road density."⁵⁰

In addition to these general observations, road-derived sediment can have the following specific impacts on salmonids and their habitat:

- Increases in turbidity can affect the feeding and territorial behavior of fish.
- (2) Extremely high turbidities can delay upstream migration of salmonids.
- (3) Fine [sediment] in gravels can reduce salmonid embryo survival and/or emergence.
- (4) Fine [sediment] in gravels can reduce winter rearing habitat for fish by filling pools and reducing available cover.
- (5) Fine [sediment] in gravels can cause a reduction in the number of [bottom-dwelling] invertebrates available as food for adult salmonids.
- (6) Increases in peak flows[—due to more rapid stormwater runoff from roads and logged areas—]can affect the incubation environment for fish where small increases in scour depths might significantly affect many salmon spawning beds.⁵¹

Additionally, in affected streams, road-related sediment causes "chronic" impacts. ⁵² Unlike the episodic increases in sediment loads from wildfires, landslides, and other natural phenomena, road-related sediment loading is often sustained and long-term. ⁵³ Poorly maintained, recently built, or heavily travelled roads can cause steady, if not drastic, increases in sediment runoff to streams. ⁵⁴ Over time, chronically high sediment loads become increasingly problematic, as studies show that salmonid populations are less resilient to sustained habitat disturbances. ⁵⁵ Moreover, the chances for fish population recovery in affected

^{50.} FOREST ROAD SYNTHESIS, supra note 19, at 26.

^{51.} NAT'L COUNCIL FOR AIR AND STREAM IMPROVEMENT, *supra* note 40, at 28 (internal citations omitted); FOREST ROAD SYNTHESIS, *supra* note 19, at 25–26.

^{52.} Michael L. Murphy, NOAA Coastal Ocean Program, Forestry Impacts on Freshwater Habitat of Anadromous Salmonids in the Pacific Northwest and Alaska—Requirements for Protection and Restoration 38 (Decision Analysis Series No. 7, 1995); FOREST ROAD SYNTHESIS, supra note 19, at 12.

^{53.} MURPHY, supra note 52, at 38.

^{54.} See FOREST ROAD SYNTHESIS, supra note 19, at 12, 14.

^{55.} E.g., Rieman et al., supra note 1, at 55 (indicating that bull trout populations can quickly recover from intermittent or "pulse" disturbances such as wildfires, but are likely less resilient to chronic or "press" disturbances like mining, timber harvest, and roads); Bjornn & Reiser, supra note 1, at 119–120 (While "adult [salmonids] appear to be little affected by ephemerally high concentrations of suspended sediments that occur during most storms and episodes of snowmelt . . . , [j]uvenile salmonids tend to avoid streams that are chronically turbid, such as . . . those disturbed by human activities."). See also Naomi E. Detenbeck et al., Recovery of Temperate-Stream Fish Communities from Disturbance: A Review of Case Studies and Synthesis of Theory, 16 ENVTL. MGMT. 33, 44 (1992) (indicating that freshwater fish populations are better able to recover from intermittent disturbances).

streams diminish when infrequent yet intense disturbances like floods and wildfires compound these chronic effects.⁵⁶

But the effects of road-derived sediment are not only chronic, they are cumulative. Once sediment reaches a stream, it may travel, potentially accumulating in habitat miles downstream.⁵⁷ And road-derived sediment occurs in addition to sediment runoff from natural sources and other land use activities, all of which are regulated through voluntary measures.⁵⁸ Thus, road runoff into tiny headwater streams, once compounded by natural sediment runoff, can imperil salmonids in far-off rivers as they incubate, mature, forage, migrate, or spawn. Yet these cumulative effects may not be adequately controlled by the current voluntary regime.

This combination of cumulative and chronic impacts on water quality and aquatic habitat clearly warrants improved road management. Indeed, recent research in Idaho concludes: "[R]oad decommissioning would likely hold local benefits for aquatic ecosystems in terms of reducing detrimental fine sediment inputs." But if these benefits are to be realized without decommissioning roads utilized by logging operations, then perhaps a more stringent and enforceable regulatory scheme is necessary. Ultimately, however, the legal necessity of such actions depends on how the CWA applies to road runoff.

C. The Clean Water Act's Approach to Road-Derived Pollution

The CWA exists to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁶⁰ It seeks to achieve this lofty goal by requiring permits that limit or eliminate pollutant discharges from point sources. Yet, since the 1987 stormwater amendments, the law also recognizes the administrative difficulty of controlling stormwater point sources and now requires permits for only the

^{56.} Rieman, supra note 1, at 55.

^{57.} MURPHY, *supra* note 52, at 39.

^{58.} *Id.* at 48. The Idaho Forest Practices Rules include a strictly voluntary program that aims to address these kinds of cumulative watershed effects. IDAHO ADMIN. CODE r.20.02.01.031 (2010). Idaho is also developing a similar voluntary program of "fish friendly" road management measures designed to prevent adverse effects on ESA-listed salmonids in the Salmon and Clearwater watersheds. *See generally* IDAHO DEP'T OF LANDS, IDAHO FORESTRY PROGRAM FOR STATE AND PRIVATE TIMBERLANDS IN THE CLEARWATER AND SALMON RIVER BASINS (2009), *available at* http://www.idl.idaho.gov/eis/eis_index.html. The purpose of this program is to avoid jeopardizing listed salmonids and to ultimately provide legal protection for forestry activities that may harm ("take") those species. *Id.* at I.F-1. *See also* 16 U.S.C. § 1538(1)(B) (2006) (prohibiting "take" of ESA-listed species); *id.* at § 1539 (authorizing permits for incidental take of listed species).

^{59.} Jaime R. Goode, Charles H. Luce & John M. Buffington, Enhanced Sediment Delivery in a Changing Climate in Semi-Arid Mountain Basins: Implications for Water Resource Management and Aquatic Habitat in the Northern Rocky Mountains, 139–40 GEOMORPHOLOGY 1, 10 (2012) (synthesizing "data from central Idaho to explore (1) how sediment yields are likely to respond to climate change in semi-arid basins influenced by wild-fire, (2) the potential consequences for aquatic habitat and water resource infrastructure, and (3) prospects for mitigating sediment yields in forest basins").

^{60. 33} U.S.C. § 1251(a) (2006).

most problematic stormwater discharges. Specific stormwater discharge permitting requirements are spelled out in detailed regulations. One of these, the Silvicultural Rule, is at the center of the controversy over whether permits are required for logging road stormwater discharges. As detailed below, uncertainty over this rule's meaning has allowed logging road stormwater discharges to go unpermitted in the face of clear and contrary statutory commands.

1. The Critical Distinction Between "Point" and "Nonpoint" Sources

Despite its well-documented impacts on water quality in general and salmonids in particular, the CWA only regulates road-derived sediment discharged to jurisdictional waters from a point source. Section 301 of the Act prohibits "the discharge of any pollutant by any person" except in compliance with certain limited exceptions. ⁶¹ Sediment clearly is a "pollutant," and "any addition of any pollutant to navigable waters from any point source" constitutes a "discharge."

Congress broadly defined "point source." "[A]ny 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" qualifies. ⁶⁴ Recognizing the term's breadth, courts have applied this definition to an equally broad array of sources. ⁶⁵ Critically, courts have also recognized

^{61.} *Id.* § 1311(a). For the purposes of this comment, the most important exception is found in § 1342, which establishes the NPDES permit program for point source discharges.

^{62.} *Id.* § 1362(6) (listing as pollutants "rock," "sand," and "biological materials," all of which are components of sediment).

^{63.} Id. § 1362(12) (emphasis added). See also id. §1362(7) (defining "navigable waters" as "waters of the United States"); 40 C.F.R. § 122.2 (2011) (defining "waters of the United States" as waters that are navigable in fact, as well as their non-navigable tributaries). The subject of much litigation, "waters of the United States" includes not only waters that are navigable in fact, but also their relatively permanent tributaries. Rapanos v. United States, 547 U.S. 715, 739 (2006) (plurality opinion). Under the more stringent test articulated by Justice Scalia in the plurality opinion, pollutants must be added by a point source to a "relatively permanent, standing, or continuously flowing bod[y] of water" to violate section 301's discharge prohibition. Id. at 739. By contrast, Justice Kennedy would only require a "significant nexus" between the receiving waterbody and waters that are navigable in fact. Id. at 787 (Kennedy, J. concurring). Under either standard, point source effluent that dissipates on land would not violate the CWA. However, even non-navigable ephemeral tributaries like irrigation canals may still constitute "waters of the United States." E.g., U.S. v. Vierstra, 803 F. Supp. 1166 (D. Idaho 2011) (applying the Scalia and the Kennedy tests and finding that an irrigation canal, which only contained water for six to eight months each year, qualified as "waters of the United States" under both).

 $^{64.\ \ 33}$ U.S.C. $\$ 1362(14). Only two categories of point sources are excluded from this definition: agricultural stormwater discharges and return flows from irrigated agriculture. Id.

^{65.} E.g., Sierra Club v. Abaston Constr. Co., 620 F.2d 41 (5th Cir. 1980) (eroded mine spoil piles); Concerned Area Residents for the Env. v. Southview Farm, 34 F.3d 114 (2d Cir. 1994) (manure spreaders, drainage pipes, and drainage swales); League of Wilderness Defenders v. Forsgren, 309 F.3d 1181 (9th Cir. 2002) (aerial pesticide sprayers); N.C. Shell-

that the activity generating the pollutants is not determinative; rather, the presence or absence of a discrete conveyance decides the inquiry. ⁶⁶ By contrast, "nonpoint sources" are statutorily undefined but are generally understood to be sources of unconfined runoff from dispersed land use activities. ⁶⁷ Thus, *unconfined* sediment runoff from roads that is added to waters of the United States does not violate section 301's discharge prohibition, but the same runoff, when *confined*, might (see Part II.C.2, *infra*).

National Pollutant Discharge Elimination System (NPDES) permits are generally required for point source discharges. ⁶⁸ The permits prescribe effluent limitations, set monitoring schedules, and require control technologies to minimize or eliminate pollutants in such discharges. ⁶⁹ NPDES permits can cover an individual source or a general class of sources under common control, depending on the nature of the activities producing the discharge, the pollutants contained therein, and attributes of the receiving waterbody. ⁷⁰ Additionally, compliance with an NPDES permit is deemed compliance with section 301's discharge prohibition. ⁷¹ Although the authority to issue permits may be delegated to individual states, ⁷² the EPA retains that authority in Idaho. ⁷³ The Act therefore mandates permit-based controls for most point sources.

The CWA provides a variety of mechanisms for enforcing the prohibition against unpermitted point source discharges. The EPA enjoys broad investigatory and enforcement powers to ensure that permitted discharges comply with their permits and that parties responsible for

fish Growers Ass'n v. Holly Ridge Assocs., 278 F. Supp. 2d 654, 681 (E.D. N.C. 2003) (ditches, check dams, sediment traps, eroded gullies, and an entire construction site).

^{66.} E.g., Abaston Constr., 620 F.2d at 44–45; Trustees for Alaska v. EPA, 749 F.2d 549 (9th Cir. 1984); United States v. Earth Sciences Inc., 599 F.2d 368, 373 (10th Cir. 1978).

^{67.} *E.g.*, *Forsgren*, 309 F.3d at 1184, 1187–88 (explaining that "nonpoint source pollution 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."). *See also*, S. Rep. No. 92-414, at 98–99 (1971) (statement of Sen. Dole) ("Very simply, a nonpoint source of pollution is one that does not confine to one fairly specific outlet, such as a sewer pipe, a drainage ditch or a conduit.").

 $^{68.~~33~\}rm U.S.C.~\S~1342.$ Of course, NPDES permits are not required for the two agricultural discharge classes expressly excluded from the point source definition. $Id.~\S~1362(14).$ Additionally, permits are not required for "return flows from irrigated agriculture," certain stormwater discharges "from mining operations or oil and gas exploration," and various "discharges incidental to the normal operation of recreational vessels." $Id.~\S~1342(I);~33~\rm U.S.C.~\S~1342(r)$ (Supp. III 2009). The EPA Administrator also has discretion to determine whether to regulate stormwater discharged from sources other than those found to contribute to violations of water quality standards, sources found to be contributing significant amounts of pollutants to waters of the U.S., sources regulated under a permit prior to February 4, 1987, storm sewers serving fewer than 100,000 people, and discharges associated with industrial activities. 33 U.S.C. § 1342(p)(6).

^{69. 40} C.F.R. §§ 122.41, .44 (2011).

^{70.} See, e.g., id. § 122.26(c).

^{71. 33} U.S.C. §1342(k).

^{72.} Id. § 1342(b).

^{73.} See Idaho Dep't of Envil. Quality, National Pollutant Discharge Elimination System Program Review, Decision Analysis Report 4 (2001), available at http://www.deq.idaho.gov/water/prog issues/waste water/npdes primacy report1.pdf.

unpermitted discharges either obtain a permit or cease the offending activity. The Act also authorizes "any citizen [to] commence a civil action . . . against any person . . . alleged to be in violation of an effluent standard or limitation. Effluent standards and limitations not only include section 301's broad prohibition against unpermitted pollutant discharges, but also any NPDES permit issued under section 402. While there must already be a permitted discharge for citizen suits to be grounded in section 402, they may be based on section 301 when EPA or an authorized state fails to require a permit for an eligible point source. Thus, the CWA allows both EPA and private citizens to enforce the prohibition on unpermitted point source discharges.

In stark contrast, nonpoint source runoff is merely subject to monitoring and reporting requirements. States are responsible for assessing, periodically reporting on, and developing strategies to control nonpoint sources within their borders. However, the CWA includes no binding limitations on nonpoint source runoff. Instead nonpoint source controls, which are essentially land use controls, are matters of state law. For instance, Idaho's nonpoint source management plan sets forth goals, strategies, and voluntary measures for limiting nonpoint runoff from land use activities like agriculture, silviculture, and grazing. A federal grant program provides some limited financial incentives for compliance with these plans. But, unlike the public and private enforcement mechanisms available for point sources, nonpoint sources remain largely unregulated because the CWA does not include enforceable

^{74. 33} U.S.C. § 1319.

^{75.} Id. § 1365(a).

^{76.} Id. § 1365(f).

^{77.} Ass'n. to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1012-13 n.4 (9th Cir. 2002).

^{78. 33} U.S.C. § 1329.

^{79.} *Id. See also generally* Nonpoint Source Management Plan, *supra* note 35; Idaho Dep't of Envil. Quality, 2009 Performance and Progress Report, State of Idaho Nonpoint Source Management Program (2010).

^{80.} Idaho law mandates specific BMPs for activities such as timber harvesting and forestry-related road construction and maintenance. See IDAHO ADMIN. CODE r.20.02.01.030—.040 (2010). Audits conducted by the Idaho Department of Lands indicate high rates of compliance with these practices. ANDREA, supra note 10, at 17. However, the effectiveness of these BMPs is debatable in part because the audits do not assess water quality or aquatic habitat in the areas where BMPs are implemented. PHILIP S. COOK & JAY O'LAUGHLIN, IDAHO FOREST, WILDLIFE AND RANGE POLICY ANALYSIS GROUP, TOWARD SUSTAINABLE FOREST MANAGEMENT: PART II—THE ROLE AND EFFECTS OF TIMBER HARVESTING IN IDAHO 109—111 (2000), available at http://www.cnrhome.uidaho.edu/default.aspx?pid=69353.

^{81.} E.g., IDAHO DEP'T OF ENVTL. QUALITY, 2009 PERFORMANCE AND PROGRESS REPORT STATE OF IDAHO NONPOINT SOURCE MANAGEMENT PROGRAM 34 (discussing measures, such as fencing, to exclude livestock from streams and riparian vegetation plantings, to improve water quality in the Palouse River).

^{82.} See generally NONPOINT SOURCE MANAGEMENT PLAN, supra note 35.

^{83.} See 33 U.S.C. § 1329(h) (establishing grant program); IDAHO DEP'T OF ENVTL. QUALITY, supra note 79, at 7–8 (listing federally funded nonpoint source management projects in Idaho).

nonpoint source controls.⁸⁴ Therefore, the distinction between point and nonpoint sources is critically important because the regulatory requirements, available legal sanctions, and, in Idaho, the level of federal control all depend on how a source is categorized.

2. The 1987 Stormwater Amendments

Stormwater runoff defies easy categorization because it can flow from either point or nonpoint sources. As rain falls or snow melts the resultant stormwater may simply flow across the land surface as nonpoint runoff, or it may instead be captured and discharged by a discrete conveyance like a roadside ditch. Stormwater is also ubiquitous, with the potential to cause polluted runoff anywhere it rains. And it is exceedingly difficult to prevent this runoff from becoming polluted because it tends to pick up traces of whichever pollutants it encounters. Due to the ubiquity of the problem and the difficulty in classifying stormwater sources, EPA was slow to regulate stormwater discharges. Stormwater

Dissatisfied with the pace of stormwater regulation under the 1972 version of the CWA, ⁸⁶ Congress added section 402(p) in 1987 to specifically address stormwater point sources. ⁸⁷ The stormwater amendments created a phased system that required EPA to regulate more problematic stormwater sources first and then decide whether to regulate other sources later. ⁸⁸ This approach flowed from Congress's recognition that the 1972 version of the Act did not distinguish between major polluters like industrial and municipal stormwater sources and relatively harmless discharges from residential rain gutters and the like. ⁸⁹ Accordingly, Congress identified five classes of major stormwater discharges—including stormwater "discharge[s] associated with industrial activity"—to be addressed by EPA's so-called Phase I regulations. ⁹⁰ The

^{84.} See generally David Zaring, Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future, 20 HARV. ENVIL. L. REV. 515 (1996).

^{85.} Jeffrey M. Gaba, Generally Illegal: General Permits Under the Clean Water Act. 31 HARV, ENVIL, L. REV, 409, 429 (2007).

^{86.} See 132 Cong. Rec. 32,381 (Oct. 16, 1986) (statement of Sen. Stafford) ("EPA should have developed this [stormwater] program long ago. Unfortunately, it did not.").

^{87.} Water Quality Act of 1987, Pub. L. No. 100-4, sec. 405, § 402(p), 101 Stat. 7.

^{88.} See 133 Cong. Rec. 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.").

^{89.} See, e.g., 131 Cong. Rec. 19,850 (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. 15,657 (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.").

^{90. 33} U.S.C. §§ 1342(p)(1)–(2).

amendment directed EPA to study all other stormwater discharges and regulate them under the Phase II rules to the extent necessary to "protect water quality." Phase I sources must obtain NPDES permits to continue legally discharging whereas EPA has discretion to determine which stormwater sources must be regulated under Phase II "to protect water quality."

Because stormwater permits are now governed by section 402(p)'s specialized provisions, a two-part inquiry is necessary to determine whether an NPDES permit is required for a given stormwater source. Only "stormwater discharges" are subject to section 402(p), so the first question is whether the source at issue fits that definition. 93 While undefined in the CWA itself, EPA's implementing regulations define stormwater as "storm water runoff, snow melt runoff, and surface runoff and drainage."94 So, by definition, stormwater derives from diffuse, unconfined runoff, which is properly considered nonpoint.95 That is, unless it becomes a "discharge $\overline{\text{^{96}}}$ A discharge occurs when a point source adds pollutants to waters of the United States. 97 Hence, "stormwater discharge" denotes nonpoint runoff and drainage from rain and snowmelt that (a) picks up any pollutant, then (b) flows into any discrete conveyance (i.e., a point source), and (c) is then added to waters of the United States. 98 Thus, the first step in the analysis is to determine whether the stormwater in question is discharged from a point source.

Permits are only required for certain categories of stormwater discharges under section 402(p), so the second question is whether a particular discharge falls into one of the regulated categories. The distinction between Phases I and II is crucial to this analysis. If a discharge is not associated with one of the five Phase I categories, then the need for a permit depends on whether the EPA regulates the discharge under Phase II. ⁹⁹ For instance, the Phase II regulations require NPDES permits to control stormwater runoff from construction sites. ¹⁰⁰ Yet, forest roads, which are similar to construction sites in that they discharge sediment eroded from denuded areas, are not currently regulated under

^{91.} Id. §§ 1342(p)(5)-(6)

^{92.} *Id.* §§ 1342(p)(2), (6).

^{93.} See id. § 1342(p).

^{94. 40} C.F.R. § 122.26(b)(13) (2011).

^{95.} Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092, 1095 (9th Cir. 1998).

^{96.} See supra note 63 and accompanying text.

^{97. 33} U.S.C. §§ 1362(12), (16).

^{98.} *Id.* §§ 1311, 1362(7), (12), (14).

^{99.} Compare id. § 1342(p)(2) (requiring permits for the five Phase I categories), with id. § 1342(p)(5) (directing the EPA to study stormwater discharges not regulated under Phase I and identify methods to control them "to the extent necessary to mitigate impacts on water quality"), and id. § 1342(p)(6) (directing the EPA, in consultation with state and local officials and based on the results of the section 402(p)(5) studies, to issue Phase II regulations for discharges identified in the studies in order to "protect water quality"). See also Envtl. Def. Ctr. v. EPA, 344 F.3d 832 (9th Cir. 2003) (reviewing the EPA's 1999 Phase II rule).

^{100. 40} C.F.R. § 122.26(a)(9)(i)(B) (2012).

Phase II. ¹⁰¹ Still, forest roads may be regulated at some point in the future because the Agency retains residual authority to require permits for additional Phase II source categories when necessary to protect water quality. ¹⁰² In sum, section 402(p) only requires permits for stormwater discharges that are associated with industrial activity, fall into one of the other four Phase I categories, or are otherwise regulated under Phase II.

If stormwater resulting from an industrial or other regulated activity is added to waters of the United States by a discrete conveyance, then a NPDES permit is required.

3. The Silvicultural Rule

Until recently, NPDES permits were not required for stormwater runoff from logging roads because it was assumed to be either nonpoint source pollution (i.e., not a stormwater discharge) or exempt from the Phase I and II regulations. This assumption persisted notwithstanding the fact that EPA regulations identify logging as an industrial activity, and many logging roads are designed with ditches, culverts, and other conveyances that drain stormwater—and any entrained pollutants—into waters of the United States. Indeed, forest practices regulations in Idaho and elsewhere mandate such systems where stormwater cannot otherwise be adequately controlled. Still, it was believed—without verification one way or the other—that EPA's so-called Silvicultural Rule exempted such discharges from NPDES permitting.

The rule's history provides an important lesson about the EPA's regulatory authority under the CWA: The agency has no power to categorically exempt sources for which the Act itself requires permits. An

^{101.} Envtl. Def. Ctr., 344 F.3d at 860-63.

^{102.} *Id.* at 873. Notably, the stormwater regulations require permits for some discharges "composed entirely of stormwater." 40 C.F.R. §§ 122.26(a)(1)(ii), (a)(9). While regulated entities may be "legitimately concerned" this residual authority might allow the EPA to regulate truly unpolluted stormwater sources, so far the issue has not been tested in court. *Envtl. Def. Ctr*, 344 F.3d at 874 ("Whether a NPDES authority may impose permitting requirements on a discharger without an adequate finding of polluting activity is not yet ripe for judicial review."). As a practical matter, it is nearly impossible for a stormwater discharge to be completely free of pollutants since even miniscule amounts of sediment or biological material would render it a "discharge of pollutants." *See* 33 U.S.C. §§ 1362(6), (14).

^{103.} See, e.g., Nw. Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188, 1196–97 (D. Or. 2007).

^{104. 40} C.F.R. § 122.26(b)(14)(ii) (2011) (indicating stormwater is associated with industrial activity when discharged from facilities classified as Standard Industrial Classification 24, which includes logging); see also Description for SIC 2411: Logging, OCCUPATIONAL SAFETY & HEALTH ADMIN., http://www.osha.gov/pls/imis/sic_manual.display?id=538&tab=de scription (last visited May 4, 2012).

^{105.} See, e.g., Polluted Runoff (Nonpoint Source Pollution): Road Construction/Reconstruction Management Measure, U.S. ENVIL PROTECTION AGENCY, http://www.ep a.gov/owow/NPS/MMGI/Chapter3/ch3-2c.html (last updated Jan. 13, 2010); NONPOINT SOURCE MANAGEMENT PLAN, supra note 35, at 37.

^{106.} E.g., IDAHO ADMIN. CODE r.20.02.01.040.02.c-d (2010); Or. Admin R. 629-625-0330(6) (2010).

early version of the Silvicultural Rule attempted to create just such an exemption for any silvicultural discharge not "identified as a significant contributor of pollution."107 This exemption reflected EPA's judgment that runoff from logging roads and other silvicultural infrastructure would be "administratively difficult if not impossible" to regulate under the NPDES program. 108 Nevertheless, and despite EPA's contention 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,"109 the United States District Court for the District of Columbia and the D.C. Circuit both disagreed. 110 Both courts recognized that administrative feasibility concerns cannot justify shirking a clear statutory command—the point source permit requirement. Today, that requirement has been somewhat modified by the 1987 stormwater amendments, but the principle enunciated by the foregoing courts remains. Neither the Silvicultural Rule, nor any other regulation, can exempt stormwater point sources for which permits are required under either Phase I or II of the statute.

In its current form, the Silvicultural Rule requires NPDES permits for "silvicultural point sources," which are defined as:

[A]ny 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 . . . surface drainage, or road construction and maintenance from which there is natural runoff.¹¹¹

Though this or a substantially similar rule has been on the books since 1976,¹¹² it has received relatively little judicial scrutiny. In the Ninth Circuit, it is clear that the list of activities in the first sentence above is illustrative and does not exhaustively catalogue every possible point source that could result from silvicultural activities.¹¹³ In other words, the first sentence merely emphasizes that permits must be obtained for discrete conveyances associated with rock crushing, gravel washing, log sorting, or log storage; it does not exempt other, unmentioned conveyances from NPDES permitting. The second sentence is

108. 40 Fed. Reg. 56,932 (Dec. 5, 1975).

^{107. 40} C.F.R. § 125.4(j) (1975).

^{109.} Natural Res. Def. Council, Inc. v. Train, 396 F. Supp. 1393, 1395 (D.D.C. 1975).

^{110.} Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369 (D.C. Cir. 1977), $\it affg$ $\it Train$, 396 F. Supp. 1393.

^{111. 40} C.F.R. § 122.27 (2011) (emphasis added).

^{112.} Compare 40 C.F.R. § 124.85 (1976) with id. Note that the Costle and Train cases analyzed an earlier version of these regulations.

^{113.} League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181, 1188 (9th Cir. 2002) (analyzing and concluding that it is "clear that the [list of silvicultural point sources] is not exhaustive"). But see Newton Cnty Wildlife Ass'n v. Rogers, 141 F.3d 803, 810 (8th Cir. 1998) (concluding without analysis that the list defines a "narrow" class of silvicultural point sources).

more problematic because the rule uses the ambiguous term "natural runoff" to distinguish silvicultural point sources that need permits from nonpoint silvicultural activities that do not. "[N]atural runoff" does not appear in the text of the CWA, is not self-defining, and has not been publicly interpreted by EPA prior to the *NEDC* litigation. This ambiguity results in regulatory uncertainty because one cannot determine whether the rule applies to a particular source without knowing the meaning of "natural runoff."

One possible interpretation is that NPDES permits are not required for silvicultural activities that produce stormwater runoff regardless of whether that runoff is ultimately discharged to waters of the United States from a discrete conveyance. 114 Though plausible, this construction is incorrect because it amounts to an impermissible categorical exemption. As noted above, the Act requires permits for stormwater associated with industrial activity that is discharged from a point source. If a silvicultural activity such as timber hauling meets the regulatory definition of an industrial activity and, as is often the case, results in stormwater being discharged from a point source, then under *Costle* that activity cannot be exempted from NPDES. Therefore, the Silvicultural Rule would conflict with the CWA if given this construction.

There is another possible interpretation, however. By simply defining "natural runoff" as runoff not discharged from a point source, which happens to be the accepted definition of a nonpoint source, this alternate construction avoids the categorical exemption problem. Under this construction, stormwater running over the landscape would be considered exempt natural runoff unless and until it is captured and discharged from a discrete conveyance. Once captured, NPDES permits should be required for this silvicultural stormwater runoff unless it results from an activity not regulated under the Phase I or II stormwater rules. As explained further in Part III.C, *infra*, these two possible interpretations are critical to understanding the Ninth Circuit's holding in *NEDC*.

Prior to *NEDC*, no federal appeals court had considered whether it was a violation of the CWA to build, maintain, or use a logging road drainage system without an NPDES permit. This situation persisted despite the fact that sediment-laden runoff discharged from such systems causes significant problems for salmon, their habitat, and water quality generally. As a result, logging road stormwater discharges remained unregulated while EPA, pursuant to a Ninth Circuit remand, considered the broader question of whether forest road stormwater dis-

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 $^{114.\,}$ Nw. Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188, 1197–98 (D. Or. 2007). But see N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., 278 F. Supp. 2d 654, 681 (E.D. N.C. 2003) (When "ditches [are] specifically designed to concentrate and accelerate the flow of stormwater . . . [i]t is difficult to imagine how drainage from such a network could be deemed 'natural runoff' for purposes of the [Silvicultural Rule]."); Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 2003 WL 25506817, at *15 (N.D. Cal. 2003).

charges should be regulated under Phase II.¹¹⁵ And so unpermitted ditches, channels, and culverts draining industrial logging roads continued to discharge stormwater laden with sediment and other pollutants into waters of United States, even as NPDES permits were required for similar conveyances discharging identical pollutants (e.g., MS4s and industrial access roads).¹¹⁶ Logging road drainage systems were simply assumed to be categorically exempt, and the EPA, perhaps attending to more pressing pollution problems, did nothing to discourage that assumption. This inconsistent stormwater regulatory regime was thus ripe for upheaval.

III. NORTHWEST ENVIRONMENTAL DEFENSE CENTER V. BROWN: CALLING A POINT SOURCE A POINT SOURCE

On May 17, 2011, a three-judge Ninth Circuit panel handed down its unanimous decision in *Northwest Environmental Defense Center v. Brown*, portending a dramatic shift in the regulatory approach to logging road stormwater point sources. The complaint sought to either enjoin or require NPDES permits for sediment-polluted stormwater discharges into Oregon's South Fork Trask and Little South Fork Kilchis Rivers. After concluding that it had subject matter jurisdiction and scrutinizing the CWA, the Silvicultural Rule, and other applicable EPA regulations, the court held that NPDES permits are required for stormwater discharged from ditches, channels, and culverts that drain logging roads.

In other words, the issue before the court was whether the Silvicultural Rule applied and thereby exempted logging road stormwater runoff discharged from discrete conveyances from the Act's permitting requirements. These road drainage systems, the court explained, were clearly point sources, to which the Silvicultural Rule did not apply and thus were not exempt from the NPDES program. And, because EPA's own regulations classify timber hauling as an industrial activity, the Phase I stormwater provisions required NPDES permits for such discharges. Not only does this suggest a substantial number of previously unregulated point sources may now be violating the CWA, it also creates a regulatory vacuum because it is not yet clear how these sources would be permitted.

A. Case Background

With an abundance of timber, unstable soil, and rain, Oregon's Tillamook State Forest was ripe for legal conflict over logging road runoff. At the heart of this conflict are two rivers—the Trask and Kilchis—and two roads—the Trask River and Sam Downs Roads. In the rivers'

^{115.} Envtl. Def. Ctr. v. EPA, 344 F.3d 832, 860–63 (9th Cir. 2003) (directing the EPA to either include forest roads in the Phase II regulations or "reject them on the basis of valid reasons that are adequately set forth to permit judicial review.").

^{116. 40} C.F.R. § 122.26(a).

forested headwaters, "road building, clear cutting, and other timber harvest activities[] have tended to increase the rate of landslides . . . [and] the storm runoff rate." This trend is especially problematic because the area's soils and steep slopes already produce relatively high rates of natural erosion. Further, storms are by no means rare there; both watersheds annually receive upwards of 100 inches of precipitation. This rainy and erosion-prone landscape thus set the stage for conflict between the loggers working the uplands and the fish species inhabiting the rivers.

Increased stormwater runoff in these watershed has significant ecological consequences. Both the Trask and Kilchis watersheds are home to a variety of sensitive salmonids. These include five types of anadromous fish: steelhead and sea-run cutthroat trout plus chum, chinook, and coho salmon. ¹²⁰ This diversity is under siege, however, as four of these five species are in decline. ¹²¹ Moreover, each is listed as either a "sensitive species" by the State of Oregon or a "threatened species" under the ESA. ¹²² Unsurprisingly, excessive fine sediment runoff in their home watersheds is a key concern for these imperiled fish. ¹²³ Indeed, the stakes in this litigation could not have been higher for the salmonids living in the Trask and Kilchis Rivers.

But, in addition to supporting salmonids, these watersheds also sustain an economy reliant on timber harvesting. As in Idaho, timber sales on Oregon's state forestlands provide local employment opportunities as well as revenue for local schools and governments.¹²⁴ By one estimate, every million board feet of timber harvested in and around the Trask and Kilchis watersheds creates 24 jobs and \$1.2 million in personal income.¹²⁵ For 2011, the Oregon Department of Forestry projects that almost 20 million board feet will be harvested from 1,300 acres in the two watersheds.¹²⁶ So, just one year's harvest provides roughly 480 jobs and \$20 million in personal income. And with timber harvested from nearly 15,000 acres since 2001, both watersheds have greatly con-

^{117.} U.S. EPA, TILLAMOOK BAY NATIONAL ESTUARY PROJECT, TILLAMOOK BAY ENVIRONMENTAL CHARACTERIZATION: A SCIENTIFIC AND TECHNICAL SUMMARY 5-30 (1998) [hereinafter TILLAMOOK BAY CHARACTERIZATION] (internal citations omitted). See also Technical Amendment to Financial Assistance Requirements for the National Estuary Program, 59 Fed. Reg. 61,124 (Nov. 29, 1994) (including Tillamook Bay in the National Estuary Program)

^{118.} OR. DEP'T OF FORESTRY, NORTHWEST OREGON STATE FORESTS MANAGEMENT PLAN FINAL PLAN 2-50 (2010) [hereinafter Nw. Or. Forest Plan].

^{119.} TILLAMOOK BAY NATIONAL ESTUARY PROJECT, TRASK WATERSHED ASSESSMENT 22 (Bruce Follansbee ed., 1998); TILLAMOOK BAY NATIONAL ESTUARY PROJECT, KILCHIS WATERSHED ANALYSIS 21 (Bruce Follansbee & Ann Stark eds., 1998).

^{120.} TILLAMOOK BAY CHARACTERIZATION, supra note 117, at 3-2.

^{121.} Id. at 3-3.

^{122.} NW. OR. FOREST PLAN, *supra* note 118, at E-10, E-46 to -47.

^{123.} *Id.* at 2-36.

^{124.} Id. at 2-76.

^{125.} Id. at 2-75

^{126.~} Or. Dep't of Forestry, Tillamook District 2011 Annual Operations Plan 16–22, app. at tbl.A-1 (2010).

tributed to Tillamook County's otherwise weak economy.¹²⁷ But this economic boon comes at a price, one that was largely ignored until a few fateful rainy days in 2006.

B. The District Court Case

Unremarkably, less than an inch of rain fell on the forests surrounding Tillamook, Oregon on April 14, 2006. ¹²⁸ Even so, samples collected from road drainage points along the Trask River and Sam Downs Roads during this storm soon formed the foundation for the complaint in *NEDC*. ¹²⁹ At the time, both the roads and their stormwater drainage systems were used and maintained by various timber companies pursuant to timber sales contracts with the State of Oregon. ¹³⁰ Tellingly, the samples indicated levels of total dissolved solids and turbidity (i.e., sediment) many times greater than those in the adjacent South Fork Trask and Little South Fork Kilchis Rivers. ¹³¹ That muddy water was strong evidence that these drainage systems were discharging stormwater and sediment pollution into waters of the United States. Because a modest spring rain fell on two roads in the Tillamook State Forest, four timber companies, the Oregon State Forester, and each member of the Oregon Board of Forestry were allegedly violating the CWA. ¹³²

In its citizen suit against these defendants, the Northwest Environmental Defense Center (NEDC) raised three claims for relief. Two alleged ongoing violations of CWA sections 301(a) and 402 stemming from unpermitted discharges of "pollutants and/or industrial stormwater from point sources" along the Trask River and Sam Downs Roads

128. Weather Station History: Hwy 101 Tillamook, Tillamook, OR, Weather Underground,

^{127.} Id. at 13.

http://www.wunderground.com/weatherstation/WXDailyHistory.asp?ID=KORTILLA6&mont h=4&day=14&year=2006 (last visited May 4, 2012).

^{129.} See Notice of Intent to File Suit under the Clean Water Act from Paul A. Kampmeier, Wash. Forest Law Center, and Chris Winter, Cascade Res. Advocacy Grp., to Marvin Brown, Or. Dep't of Forestry, et al. (June 19, 2006).

^{130.} First Amended Complaint ¶ 5, Nw. Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188 (D. Or. 2007) (No. 06-1270-KI).

^{131.} Notice of Intent to File Suit, supra note 129, at 8, 10.

^{132.} Two groups of Defendants are named in the complaint. One group, hereinafter referred to as the "State Defendants," includes Marvin Brown, Oregon State Forester, in his official capacity; and, Stephen Hobbs, Barbara Craig, Diane Snyder, Larry Giustina, Chris Heffernan, William Hutchison, and Jennifer Phillippi, members of the Oregon Board of Forestry, in their official capacities. The second group, hereinafter referred to as the "Timber Defendants," includes Hampton Tree Farms, Incorporated, an Oregon domestic business corporation; Stimson Lumber Company, an Oregon domestic business corporation; Georgia-Pacific West, Incorporated, an Oregon domestic business corporation; and, Swanson Group, Incorporated, an Oregon domestic business corporation. Additionally, two timber industry groups, the Oregon Forest Industries Council, an Oregon nonprofit corporation and the American Forest and Paper Association, a Delaware nonprofit corporation intervened. Nw. Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188 (D. Or. 2007). Tillamook County later joined the Ninth Circuit appeal as a Defendant. Nw. Envtl. Def. Ctr. v. Brown (NEDC), 640 F.3d 1063 (9th Cir. 2011).

into waters of the United States. 133 The third claim further alleged ongoing violations of sections 301(a) and 402 for the defendants' failures to apply for NPDES permits. 134 In effect, these claims advanced two alternative arguments. First, ditches, channels, and culverts conveying polluted stormwater are point sources that, without an NPDES permit, violate section 301(a). 135 Second, logging and associated timber hauling are industrial activities that violate the CWA without a Phase I industrial stormwater permit under section 402(p). ¹³⁶ To remedy these alleged violations, NEDC requested civil penalties; litigation costs; a declaration that the defendants had violated the CWA; and, a host of injunctions requiring the defendants to obtain NPDES permits for the discharges, remediate environmental damage caused by the discharges, and provide NEDC with any reports submitted in connection with the permits. 137 Critically, however, the complaint did not mention the Silvicultural Rule or ask either explicitly or implicitly for its invalidation; it simply alleged that these unpermitted industrial stormwater discharges violated the CWA.

The defendants responded with motions to dismiss for failure to state a claim upon which relief could be granted. 138 The State Defendants asserted NEDC did not have standing. In particular, they argued that NEDC was merely advancing a "generic" grievance, that it failed to identify a specific member injured by the discharges, and that it failed to satisfy the procedural requirements for a CWA citizen suit. 139 The Timber Defendants did not contest standing, instead attacking NEDC's complaint on the merits. In short, both groups presented a layered defense, arguing first that the sources in question resulted from nonpoint runoff for which no permit is required. 140 And even if the sources were deemed to be point sources, they argued that the discharges were not "associated with industrial activity," and were therefore not subject to mandatory permitting under Phase I.141 Finally, if the discharges were associated with industrial activity, the defendants contended that the EPA's Silvicultural Rule expressly and categorically excluded them from NPDES. 142

^{133.} First Amended Complaint, supra note 130, ¶¶ 85, 89.

^{134.} Id. ¶ 92.

^{135.} *Id.* ¶¶ 67–68, 85.

^{136.} *Id.* ¶¶ 51–53, 76.

^{137.} *Id.* ¶¶ A–H.

^{138.} See FED. R. CIV. P. 12(b)(6).

^{139.} Memorandum in Support of State Defendants' Motion to Dismiss at 2–3 Nw. Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188 (D. Or. 2007) (No. 06-1270-KI) [hereinafter State's 12(b)(6) Motion].

^{140.} *Id.* at 7; Memorandum in Support of Forest Products Defendants' Motion to Dismiss at 7 Nw. Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188 (D. Or. 2007) (No. 06-1270-KI) [hereinafter Timber Defendants' 12(b)(6) Motion].

^{141.} State's 12(b)(6) Motion, *supra* note 139, at 7–8; Timber Defendants' 12(b)(6) Motion, *supra* note 140, at 13–14.

^{142.} State's 12(b)(6) Motion, *supra* note 139, at 9; Timber Defendants' 12(b)(6) Motion, *supra* note 140, at 15–16.

The United States District Court for the District of Oregon agreed with the defendants and dismissed NEDC's claim with prejudice. But, in doing so, it found that NEDC alleged facts sufficient to support representational standing and to satisfy the CWA's requirements for a citizen suit. 143 NEDC's substantive claims did not fare so well, however. Considering first whether the discharges were regulated under the Act's stormwater provisions, the court characterized the sediment-laden flows into the Trask and Kilchis Rivers as "natural runoff." 144 This characterization proved determinative because, according to the court, "forestry roads from which there is natural runoff are nonpoint sources of pollution."145 Accordingly, it deemed the logging roads' industrial character irrelevant and found that the Silvicultural Rule exempted the sources from regulation under both Phases I and II. 146 The court then dismissed the section 301 claim because, it reasoned, stormwater sources not regulated under Phase I or II do not violate section 301's discharge prohibition. 147 In sum, the district court's entire analysis boiled down to the conclusion that these sources were nonpoint because the Silvicultural Rule said so.

Oddly, the district court paid little attention to the CWA's point source definition. According to that definition, point sources are distinguished from nonpoint sources by the presence of a discrete conveyance, not whether they carry "natural runoff." By overlooking this crucial point, the court failed to analyze whether the case involved unpermitted stormwater point sources, as NEDC alleged. Furthermore, the court never analyzed whether logging road stormwater discharges are associated with industrial activity because its analysis ended with the conclusion that the case involved activities from which there was natural runoff. By fixating on the Silvicultural Rule, the court got the stormwater analysis backward and failed to recognize that EPA regulations cannot categorically exempt industrial stormwater point sources from NPDES. The district court's dismissal thus paved the way for the Ninth Circuit's *de novo* review with all the complaint's factual allegations construed in the light most favorable to NEDC.

C. The Ninth Circuit Appeal

On appeal, the Ninth Circuit unanimously and correctly resolved three issues in favor of the plaintiffs: (1) whether the court had subject matter jurisdiction over NEDC's complaint, (2) whether the Silvicultural Rule applies to logging road runoff that is captured by discrete convey-

^{143.} Nw. Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188, 1191-93 (D. Or. 2007).

^{144.} Id. at 1197.

^{145.} Id. at 1195.

^{146.} *Id.* at 1197.

^{147.} *Id.* at 1199.

^{148. 33} U.S.C. § 1362(14) (2006).

^{149.} See Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

^{150.} See, e.g., Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005).

ances and discharged into waters of the United States, and (3) whether timber hauling on the roads in question qualifies as an industrial activity. The last two questions were answered in a decision issued in August 2010.¹⁵¹ The court did not address—nor did the parties raise—the jurisdictional question in the original appeal. Then, in response to the defendants' petitions for rehearing and a "colleague['s] request that the panel discuss the issue," the panel withdrew the 2010 opinion and issued a revised opinion.¹⁵² The May 17, 2011 opinion preserved the original's central holding and analysis, explained the court's jurisdiction, and foreclosed any possibility of rehearing or rehearing *en banc*. The following sub-parts examine the court's reasoning.

1. Jurisdiction by Way of Exception

To start, the *NEDC* court addressed the threshold issue of subject matter jurisdiction. As noted in Part II.C.1, *supra*, the CWA permits private citizens to sue any person illegally discharging pollutants into waters of the United States without a permit. ¹⁵³ NEDC's complaint is constructed in this fashion, simply alleging that the defendants illegally added sediment and other pollutants to waters of the United States from industrial stormwater discharges without the necessary permits. ¹⁵⁴

The jurisdictional question nevertheless arose because the defendants argued that their activities only produce "natural runoff" that the Silvicultural Rule exempts from permitting. In response, NEDC argued that the rule is inapplicable because it would be invalid if read as categorically exempting point sources for which the CWA plainly requires permits. The defendants characterized—and the court analyzed—this as a direct challenge to the validity of the Silvicultural Rule, a claim that must comply with the Act's special judicial review provisions. Is a constant of the second provisions.

Plaintiffs seeking to invalidate regulations that implement the CWA must comply with additional procedures in the Act's special judicial review provisions. This is because such plaintiffs seek "[r]eview of the [EPA] Administrator's . . . promulgat[ion of] an[] effluent limitation." Unlike the broad right to bring citizen suits under section 505,

^{151.} Nw. Envtl. Def. Ctr. v. Brown, 617 F.3d 1176 (9th Cir. 2010), withdrawn and replaced by 640 F.3d 1063 (2011).

^{152.} Nw. Envtl. Def. Ctr. v. Brown (NEDC), 640 F.3d 1063, 1068 (9th Cir. 2011).

^{153. 33} U.S.C. §§ 1365(a)(1), (f)(1) (2006).

^{154.} First Amended Complaint, supra note 130, ¶¶ 1–6.

^{155.} State's 12(b)(6) Motion, supra note 139, at 8; Timber Defendants' 12(b)(6) Motion, supra note 140, at 13–14.

^{156.} Plaintiff's Memorandum in Opposition to the Industry Defendants' and Defendant-Intervenors' FRCP 12(b)(6) Motion to Dismiss at 12-14, Nw. Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188 (D. Or. 2007) (No. 06-1270-KI).

^{157.} Joint Reply in Support of Petition for Rehearing or Rehearing En Banc by Defendants-Appellees and Intervenors-Appellees at 11 Nw. Envtl. Def. Ctr. v. Brown, 617 F.3d 1176 (9th Cir. 2010), *withdrawn and replaced by* 640 F.3d 1063 (2011) (No. 07-35266).

^{158. 33} U.S.C. § 1369(b)(1).

section 509's judicial review mechanism limits private citizens' ability to contest rules implementing the CWA. A suit challenging rules for the NPDES permit process must be brought within 120 days of the rules' promulgation. Section 509(b) provides the only exception to this time limit, allowing a later challenge when it "is based solely on grounds which arose after such 120th day. This exception serves two salutary purposes: (a) it preserves citizens' right to question an ambiguous regulation until the agency adopts an interpretation and (b) it avoids unnecessary litigation over plausible but hypothetical interpretations of ambiguous regulations. Though the case arguably was not a challenge to the Silvicultural Rule's validity, the Ninth Circuit nonetheless analyzed it as such and found that the exception applies.

This is because both the applicability and validity of the Silvicultural Rule depend on the meaning of "natural runoff." Even though the Silvicultural Rule had been on the books for decades, the EPA had not offered an interpretation of this ambiguous term until the *NEDC* litigation. In an amicus brief to the District Court, EPA argued for the first time that the rule's exemption for natural runoff applies to logging road runoff even when it is channeled by and discharged from a point source. As noted above, a rule that required citizens to challenge within 120 days every ambiguous administrative rule—even rules the agency has not publicly interpreted—would strain scarce judicial resources by fostering unnecessary litigation. The better approach is to allow a citizen suit challenging the rule once the agency offers its interpretation. In its amicus brief to the Ninth Circuit, the EPA admitted as much and indicated that its belated interpretation of the Silvicultural Rule provided grounds for invoking the section 509(b) exception. 163

The panel agreed with the EPA. Although it did not necessarily have to treat NEDC's claim as a challenge to the Silvicultural Rule's validity, doing so gave the court more freedom to explain why the rule would be invalid under the defendants' proffered construction. The panel also recognized that section 509 does not bar every challenge that misses the initial 120-day deadline. And, importantly, it construed the CWA's judicial review provisions in a way that discourages wasteful preenforcement challenges premised on an ambiguous regulation's hypothetical meaning. Thus, the court's conclusion was supported not only by a sound application of the CWA's citizen suit provisions to the case but also by due reluctance to foster unnecessary litigation.

^{159.} *Id.*

^{160.} Id

^{161.} Nw. Envtl. Def. Ctr. v. Brown (*NEDC*), 640 F.3d 1063, 1069 (9th Cir. 2011), quoting United States' Amicus Curiae Brief of the United States Responding to the Court's Questions of October 21, 2010, at 7 Nw. Envtl. Def. Ctr. v. Brown, 617 F.3d 1176 (9th Cir. 2010), withdrawn and replaced by 640 F.3d 1063 (2011) (No. 07-35266).

^{162.} United States' Amicus Curiae Brief at 11 Nw. Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188 (D. Or. 2007) (No. 3:06-CV-01270).

^{163.} Amicus Curiae Brief of the United States Responding to the Court's Questions of October 21, 2010, at 7 Nw. Envtl. Def. Ctr. v. Brown, 617 F.3d 1176 (9th Cir. 2010), withdrawn and replaced by 640 F.3d 1063 (2011) (No. 07-35266).

2. Definition Trumps Deference

Reaching the merits, the court considered whether the Silvicultural Rule should be read to exempt silvicultural stormwater runoff that is collected by and discharged from discrete conveyances. It phrased the first question as whether "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." If so, then the next inquiry was whether the Silvicultural Rule applies to—and thus exempts—such discharges from NPDES. Key to these analyses was the familiar two-step standard for reviewing an agency's statutory interpretations, 165 which the court summarized as follows:

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. 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. An agency interpretation based on a permissible construction of the statute controls. ¹⁶⁶

NEDCs central holding—that "stormwater runoff from logging roads . . . collected by and then discharged from a system of ditches, culverts, and channels is a point source"—is the inescapable result of applying Chevron to the CWA. By contrasting the statutory "point source" definition "with Ninth Circuit case law defining "nonpoint source," the court highlighted the critical distinction between the two. ¹⁶⁸ Point sources collect runoff in a discrete conveyance, whereas nonpoint sources allow the runoff to "dissipate[] in a natural and unimpeded manner." Ditches, channels, and culverts collect, confine, and ultimately convey runoff and are therefore point sources. Given that the "point source" definition is purposefully broad, it should come as no surprise that logging road drainage systems are within its scope. ¹⁷⁰

^{164.} NEDC, 640 F.3d at 1069.

^{165.} See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

^{166.} NEDC, 640 F.3d at 1069 (citations omitted).

^{167. &}quot;The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14) (2006).

^{168.} *NEDC*, 640 F.3d at 1070–71 (quoting League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1184, 1184 (9th Cir. 2002)).

^{169.} Id. at 1070.

^{170.} See supra Part II.C.1.

Such definitional clarity is usually enough to end a *Chevron* analysis. Even so, the CWA's legislative history lends additional weight to the conclusion that Congress intended "point source" to be interpreted broadly. According to Senator Muskie, a major backer of the legislation, the term encompassed more than a factory's effluent pipes. Indeed, the Senate Committee Report directed the EPA to "not ignore discharges resulting from point sources other than pipelines or similar conduits. The court used this uncharacteristically clear legislative history to bolster its textual analysis. It was therefore correct for the court to conclude that neither the CWA nor its legislative history justifies labeling logging road stormwater drainage systems as nonpoint sources.

But does the Silvicultural Rule apply to logging road drainage systems in a way that exempts these point sources from the CWA's permit program? The answer to this question also rests on a durable, widely accepted principle: The EPA may not allow by regulation that which is plainly forbidden by statute. With regard to point sources, *Natural Resources Defense Council v. Train* articulated this principle nearly forty years ago. ¹⁷⁵ Considering EPA regulations purporting to exempt silvicultural discharges, MS4s, and other point sources from the NPDES permitting program, the *Train* court emphasized "that the [EPA] Administrator cannot lawfully exempt point sources discharging pollutants from regulation." ¹⁷⁶ Consequently, if a logging road's drainage system fits the statutory point source definition—and qualifies as a regulated stormwater discharge—no EPA regulation can exempt it from the NPDES program.

The D.C. Circuit affirmed this axiom in *Natural Resources Defense Council v. Costle.*¹⁷⁷ In that case, the EPA argued the exemptions at issue in *Train* were necessary to avoid the extraordinary administrative burden imposed by an "intolerable permit load."¹⁷⁸ With a nod to fundamental separation of powers principles, the D.C. Circuit declined to "manufacture . . . a revisory power inconsistent with the clear intent of the" CWA.¹⁷⁹ Administrative infeasibility has never been an acceptable basis for exempting whole categories of point sources. And so the point source issue in *NEDC* was not a matter of deference to the EPA's exper-

^{171.} Technically, the court was analyzing the Federal Water Pollution Control Act's legislative history; that act was renamed the Clean Water Act in 1977. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977).

^{172. 117} CONG. REC. 38,816 (Nov. 2, 1971) ("If a manmade drainage, ditch, flushing system or other such device is involved and if measureable waste results and is discharged into water, it is considered a 'point source.").

^{173.} S. REP. No. 92-414, at 49 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3717.

^{174.} Nw. Envtl. Def. Ctr. v. Brown (NEDC), 640 F.3d 1063, 1071–73 (9th Cir. 2011).

^{175. 396} F. Supp. 1393 (D.D.C. 1975).

^{176.} *Id.* at 1402 (reviewing 40 C.F.R. § 125.4 (1975)).

^{177. 568} F.2d 1369 (D.C. Cir. 1977).

^{178.} Id. at 1381.

^{179.} Id. at 1377.

tise; it was instead a matter of deference to Congress and the plain language of an intentionally "tough law." ¹⁸⁰

The holdings in *Train* and *Costle* demonstrate, contrary to the defendants' arguments, that the Silvicultural Rule cannot modify the point source definition. Consonant with bedrock principles of administrative law, this has been understood by the EPA, if not the regulated community, for almost four decades. Only Congress may craft exemptions to the point source definition, and it rarely uses that power. In fact, only two classes of point sources—both agricultural—have been excluded from the general definition in the four decades since the CWA was enacted. While the propriety of these exclusions is debatable given agriculture's well-known water quality impacts, it is indisputable that the point source definition admits no other exceptions. Is In light of this settled principle, the Ninth Circuit correctly recognized that the EPA's Silvicultural Rule does not, and cannot, exempt categories of discharges that otherwise meet the point source definition.

Again, it is important to recognize that the Silvicultural Rule can be read two ways. If read to exempt runoff not discharged from one of the four classes of "silvicultural point sources" regardless of whether that runoff was collected by a discrete conveyance, the Rule would accord with the EPA's intent to avoid an expansive, difficult-to-administer permit program.¹⁸⁴ However, this construction would conflict with the statutory definition of "point source" by conditioning the permit requirement on the source of the pollutants rather than the presence or absence of a discrete conveyance. 185 Because of this conflict with the plain language of the statute, the EPA's intent is not due deference. 186 Had the panel adopted this interpretation, it would have ignored clear statutory language and decades of settled law concerning the breadth of the point source definition in favor of real but legally irrelevant concerns over administrative feasibility. Though this interpretation would have preserved the regulatory status quo for logging road drainage systems, it would also, incongruously, allow the EPA to achieve what was forbidden in both Train and Costle: a categorical exemption for a whole class of point sources.

^{180.} Id. at 1375

^{181.} Clean Water Act of 1977, Pub. L. No. 95-217, sec. 33(b), \S 502(14), 91 Stat. 1566 (amending the definition of "point source" to exclude "return flows from irrigated agriculture") (codified as amended at 33 U.S.C. \S 1362(14) (2006)); Water Quality Act of 1987, Pub. L. No. 100-4, sec. 503, \S 502(14), 101 Stat. 7 (amending the definition of "point source" to exclude "agricultural stormwater discharges") (codified as amended at 33 U.S.C. \S 1362(14) (2006)).

^{182.} See Zaring, supra note 84, at 520–21; U.S. EPA, PROTECTING WATER QUALITY FROM AGRICULTURAL RUNOFF (2005), available at http://www.epa.gov/owow/nps/Ag_Runoff_Fact Sheet.pdf.

^{183.} Nw. Envtl. Def. Ctr. v. Brown (*NEDC*), 640 F.3d 1063, 1080 (9th Cir. 2011).

^{184.} See 41 Fed. Reg. 6,282 (Feb. 12, 1976).

^{185.} Id.

^{186.} See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("[R]egulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

On the other hand, if the Rule were read to only exempt "natural runoff" unconfined by a point source, then it would be consistent with the statute and the case law. This second reading avoids exempting classes of point sources but has little practical effect since NPDES permits have never been required for "non-point . . . natural runoff." Thus, this construction simply parrots the CWA—silvicultural point sources need permits, but silvicultural activities that merely produce unconfined natural runoff do not. This construction could therefore be viewed as rendering the rule superfluous, a result that should be avoided. Yet such regulatory restatements of statutory principles are common and do not render the regulations superfluous—they simply amplify important statutory principles in the implementing regulations. The Silvicultural Rule can thus be construed in a way that avoids the categorical exemption problem without running afoul of the general rule barring superfluity.

Ultimately, the panel did not have to choose one of these interpretations. Had it done so, it would have gone beyond the relief requested in NEDC's complaint, which asked for injunctive and declaratory relief related to permits, not a determination of the Silvicultural Rule's validity. That relief only depends on the rule's applicability to this particular set of facts.

Accordingly, the panel simply found that the Rule was inapplicable to this set of facts. ¹⁹¹ This holding comports with *Chevron*'s time-honored standard for reviewing an agency's regulations in the light of an unambiguous statutory directive. Moreover, longstanding precedents that prohibit the EPA from excluding point source categories from NPDES bolster the decision. While this leaves the Silvicultural Rule in a "precarious state," there is scant indication that Congress intended otherwise. ¹⁹² Instead, the panel's careful reading of the CWA, in light of its legislative history, demanded the conclusion that the Silvicultural Rule does not apply to silvicultural runoff once it enters ditches, channels, and culverts and is discharged into waters of the United States. In sum, the logging road drainage systems in question were clearly stormwater point sources.

^{187.} See 40 C.F.R. § 122.27(b)(1) (2011).

^{188.} Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1018-19 (9th Cir. 2002) (quoting Rainsong Co. v. FERC, 151 F.3d 1231, 1234 (9th Cir. 1998) ("[C]onstructions which render regulatory provisions superfluous are to be avoided.").

^{189.} Compare 40 C.F.R. \$ 122.2 with 33 U.S.C. \$ 1362 (2006) (both defining, among other terms, "discharge," "pollutant," and "point source").

^{190.} First Amended Complaint, supra note 130, ¶¶ A-H.

^{191.} Nw. Envtl. Def. Ctr. v. Brown (NEDC), 640 F.3d 1063, 1080 (9th Cir. 2011).

^{192.} Andrew King, Northwest Environmental Defense Center v. Brown: *Delivering the Back Cuts? The Ninth Circuit Leaves the Silvicultural Rule in the Balance*, 24 Tul. Envil. L.J. 159, 171 (2010).

3. Hauling Timber on Logging Roads Is an Industrial Activity

After deciding these sources were stormwater discharges, the court considered whether they where regulated under the Phase I or II stormwater rules. Unlike the previous statutory issue, this analysis ultimately turned on the regulatory definition of a "stormwater discharge associated with industrial activity." When confronted with such questions, courts traditionally look to the regulation's plain language to discern its meaning and only give weight to the agency's intent when it is clearly expressed in a public notice that accompanies the rulemaking process. ¹⁹⁴ If it is clearly expressed, courts will defer to the agency's interpretation of ambiguous regulatory language "unless plainly erroneous or inconsistent with the regulation."

But before the NEDC panel analyzed the substance of the CWA stormwater provisions, it briefly considered whether Congress tacitly approved the Silvicultural Rule when it passed the 1987 CWA amendments. While congressional acquiescence has been the basis for upholding some longstanding agency regulations, "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."196 Justifiably skeptical, courts look for "overwhelming evidence of acquiescence."197 The U.S. Supreme Court has found such evidence when Congress was both aware of the regulation and left the relevant portion of the statute unchanged. 198 By contrast, the legislative history of the 1987 CWA amendments never mentions the Silvicultural Rule even though Congress was comprehensively revamping the stormwater provisions to which it pertains. 199 Hence, there is no indication that Congress was aware of the Rule even as it changed the relevant portion of the statute. Thus, the NEDC court rightly dismissed any suggestion that Congress tacitly approved the Silvicultural Rule.

Beginning its industrial activity analysis, the court noted that the Phase I regulations expressly incorporate the Silvicultural Rule. 200 The reference was intended to exclude all sources exempted by the Rule from the definition of "storm water discharge associated with industrial activity." Even so, this provision cannot exclude the sources at issue in NEDC for two reasons.

^{193. 40} C.F.R. § 122.26 (b)(14) (defining "storm water discharge associated with industrial activity").

^{194.} Safe Air for Everyone v. EPA, 488 F.3d 1088, 1097–98 (9th Cir. 2007).

^{195.} Auer v. Robbins, 519 U.S. 452, 461 (1997) (citation omitted).

^{196.} Girouard v. United States, 328 U.S. 61, 69 (1946).

 $^{197.\;}$ Solid Waste Agency of N. Cook C
nty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 169, n.5 (2001).

^{198.} $See \, NLRB \, v. \, Bell \, Aerospace \, Co., \, 416 \, U.S. \, 267, \, 274–75 \, (1974).$

^{199.} Nw. Envtl. Def. Ctr. v. Brown (*NEDC*), 640 F.3d 1063, 1081–82 (9th Cir. 2011).

^{200.} Id. at 1083 (discussing 40 C.F.R. § 122.26(b)(14) (2011)).

^{201. 55} Fed. Reg. 47,990, 48,011 (Nov. 16, 1990) ("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.").

First, as noted above, the Rule would be invalid to the extent that it categorically excludes sources that meet the statutory definition of a point source. Similar to a purported exemption for construction sites in earlier Phase I regulations, the Silvicultural Rule cannot pluck logging road drainage systems from the industrial discharge category if they otherwise qualify. Therefore, the point sources at issue in *NEDC* could only be exempt from the Phase I permitting requirements if they were not associated with industrial activity, as defined in the EPA's Phase I rules.

Second, timber hauling on logging roads plainly qualifies as an industrial activity under the Phase I rules. Congress required the EPA to issue permits for all stormwater discharges "associated with industrial activity,"203 and it intended the term to be broadly defined. 204 Accordingly, the EPA's regulations define "industrial activity" based on an operation's Standard Industrial Classification (SIC).²⁰⁵ SIC 2411 includes any operation "primarily engaged in cutting timber and in producing . . . primary forest or wood raw materials . . . in the field."206 Any establishment included in SIC 2411 is a facility engaged in industrial activity.²⁰⁷ In addition, "immediate access roads . . . used or travelled by carriers of raw materials . . . used or created by the facility" are also part of that industrial activity.²⁰⁸ Reading the plain language of these regulatory provisions together, the court rightly concluded that stormwater discharges from immediate access roads used to haul timber (i.e., logging roads) are associated with industrial activity. 209 And because the rules unambiguously indicate that logging is an industrial activity, the court did not need to discern whether the agency intended to regulate logging operations.

But what qualifies as an "immediate access road"? The term also is not self-defining, so the court looked to an EPA interpretation that accompanied the Phase I rules. The EPA interpreted "immediate access

^{202.} Compare Natural Res. Def. Council, Inc. v. EPA, 966 F.2d 1292, 1306 (9th Cir. 1992) ("[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.") with NEDC, 640 F.3d at 1083–84.

^{203. 33} U.S.C. \S 1342(p)(4)(A) (2006) ("[T]he Administrator . . . *shall* issue or deny [permits for discharges associated with industrial activity, and] . . . such permit[s] *shall* provide for compliance as expeditiously as practicable.") (emphasis added).

^{204. 133} CONG. REC. 985 (Jan. 8, 1987) (statement of Rep. Hammerschmidt) ("[A] discharge is 'associated with industrial activity' if it is directly related to manufacturing, processing or raw materials storage areas at an industrial plant."). In its Phase I rule, EPA took this definition one step further by listing areas, such as immediate access roads, directly related to the industrial processes mentioned in the legislative history. 55 Fed. Reg. 47,990, 48,007 (Nov. 16, 1990).

^{205.} See 40 C.F.R. § 122.26(b)(14) (2011).

^{206.} Description for SIC 2411: Logging, OCCUPATIONAL SAFETY & HEALTH ADMIN., http://www.osha.gov/pls/imis/sic_manual.display?id=538&tab=description (last visited May 4, 2012).

^{207. 40} C.F.R. § 122.26(b)(14)(ii).

^{208.} Id. § 122.26(b)(14).

 $^{209. \}quad \text{Nw. Envtl. Def. Ctr. v. Brown } \textit{(NEDC)}, 640 \text{ F.3d } 1063, 1084-85 \text{ (9th Cir. } 2011).$

road" as including haul roads "exclusively or primarily dedicated for use by the industrial facility."210 However, the EPA did "not expect facilities to submit permit applications for discharges from public access roads such as state, county, or federal roads . . . which happen to be used by the facility."211 Additionally, the EPA interprets "industrial facility" to be more than a typical industrial plant or factory; "facility" has a broader meaning that also encompasses timber harvest sites, landfills, mines, and construction sites. 212 So, while these interpretations indicate that roads exclusively or primarily dedicated to timber hauling are associated with industrial activity, they also suggest that permits will not be required for logging roads that are also public access roads. That apparent exemption for public roads is problematic in this case because the State of Oregon owns both the Sam Downs and Trask River Roads.²¹³ But, given that timber hauling on logging roads is an industrial activity and that Congress mandated permits for all stormwater discharges associated with industrial activities, was it appropriate for the EPA to differentiate between private and public roads?

This raises the issue of whether the EPA reasonably interpreted "immediate access roads" in its own regulation. The general rule is one of deference "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."214 The CWA's stormwater provisions provide no basis for distinguishing public from private industrial activity, and elsewhere the Act expressly requires federal facilities to comply with all applicable permit requirements.²¹⁵ An exemption for public roads might therefore be considered an impermissible construction of the governing statute. Yet the court never acknowledged or analyzed the EPA's intended public road exemption despite citing the sentence immediately preceding it in the Federal Register Notice for the Final Phase I Rule. 216 Rather, it seemed to conclude, without explanation, that distinguishing "immediate access roads" on the basis of ownership would impermissibly exclude public logging roads from a statutory scheme that demands their inclusion.

By the court's reckoning, the Phase I permit requirement must extend to stormwater discharges from all roads built and maintained for the purpose of accessing and hauling raw materials from logging sites. ²¹⁷ Whether public or private, a permit is required if logging is the road's

^{210.} National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 48,009 (Nov. 16, 1990).

^{211.} Id.

 $^{212. \}quad \textit{Id.}; \, 40 \text{ C.F.R. } \S \, \, 122.26 (b) (14) (iii), \, (v), \, (x).$

^{213.} NEDC, 640 F.3d at 1067.

^{214.} *Id.* at 1069 (citing Auer v. Robbins, 519 U.S. 452, 457, 461–62 (1997)).

^{215.} See 33 U.S.C. § 1323(a) (2006).

^{216.} Compare NEDC, 640 F.3d at 1084, with National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. at 48,009 (Nov. 16, 1990).

^{217.} NEDC, 640 F.3d at 1084.

"sine qua non." While this formulation contradicts the EPA's intent to exclude public roads, it comports with Auer v. Robbins by refusing to construct the regulatory language in a way that conflicts with the governing statute. Because the statute provides no basis for a public/private road distinction, concerns over administrative efficiency cannot justify creating such a distinction in an implementing regulation. Thus, the Ninth Circuit carefully walked the line between its obligation to defer to agency intent in appropriate circumstances and the constitutional imperative of enforcing Congress's unambiguously expressed will.

This delicate path lead the court to conclude that timber hauling qualifies as an industrial activity according to the plain language of the EPA's Phase I regulations. But it declined to manufacture an exemption for public logging roads when there was no statutory basis for one. The roads in question were built to serve logging operations and the timber defendants were contractually obligated to maintain them for the duration of the timber sale regardless of whether they were privately or publicly owned. And so the court correctly concluded that the Sam Downs and Trask River Roads were immediate access roads primarily dedicated to an industrial activity, and were thus subject to mandatory NPDES permitting.²¹⁹

D. Case Summary

By holding that the drainage systems along the Trask River and Sam Downs Roads were point sources associated with industrial activity, *NEDC* presages a sea change in the way logging roads are regulated under the CWA. A new permit requirement would likely drive up timber production costs, as logging operations assess their sources, apply for permits, and comply with permit requirements. In addition, the switch to permitting logging road drainage systems raises the specter of citizen suits to enforce permits. These issues, combined with lingering uncertainty over the scope of the permit requirement, obviously cause concern for logging operations, regulatory agencies, and governments that rely on timber sales revenues.

NEDCs potentially sweeping impact is tempered by two additional statutory requirements, however. First, the logging road runoff must be discharged into waters of the United States. Point sources that simply drain onto a slope without reaching waters of the United States would not require permits. Thus, it is not the case that every ditch or culvert draining every logging road in the nation would have to be permitted under NEDC. Second, the road must be associated with industrial activity, which, according to the EPA, means that it must be an immediate access road for a regulated activity. In NEDC the first requirement was uncontested and the second was met after the court applied the facts alleged by NEDC to the text of the EPA's stormwater regulations. But it

^{218.} Id.

^{219.} See id. at 1085.

remains to be seen how these issues would be resolved in different factual settings.

Furthermore, one can only speculate about the NPDES permit requirements at this point. They may be very similar to the familiar BMPs mandated by existing state forest practice rules. If so, there would be relatively little disruption to logging operations beyond the time and effort necessary to obtain the permit, an administrative burden shared by almost every major industry. This is because the permit requirement based on BMPs would mimic a regulatory regime that already has high rates of compliance. Assuming that culture of compliance continues once the new permitting scheme is in place, there is no reason to believe logging operations would suddenly be plagued by citizen suits alleging permit violations. In short, the ruling may not have as large an impact as some might fear.

Nevertheless, the Ninth Circuit's decision remains controversial, prompting two separate efforts to overturn it. As of May 2012, the United States Supreme Court is considering both the State and timber defendants' petitions for writs of certiorari. There is also proposed legislation in both houses of Congress that would exclude "a discharge resulting from the conduct of *any* silvicultural activity" from the NPDES permit program. Both efforts merit in-depth analyses; however, they are still evolving as of the time of this writing, and any effort to summarize them at this time would thus be incomplete.

Suffice it to say that the foregoing case analysis demonstrates that the Ninth Circuit correctly decided an issue of first impression for the federal appellate courts—whether stormwater channeled by and discharged from logging road drainage systems was "natural runoff" within the meaning of the Silvicultural Rule. Hence, there is no circuit split on this issue. It is also unclear that this case presents a question of great national importance because the logging industry represents a small portion of the national economy (two percent)²²² and the impact of the permit requirement on that industry is not yet known. The Supreme Court often denies certiorari in cases where such factors are absent.²²³ On the other hand, the Court has requested the Solicitor General's opinion on the matter, suggesting that the petitions piqued the Court's in-

^{220.} See generally Oregon's Petition for Writ of Certiorari, Decker v. Nw. Envtl. Def. Ctr., No. 11-338 (U.S. Sept. 13, 2011), 2011 WL 4352279; Timber Defendant's Petition for Writ of Certiorari, Georgia-Pacific West, Inc. v. Nw. Envtl. Def. Ctr., No. 11-347 (U.S. Sept. 13, 2011), 2011 WL 4352287.

 $^{221.\,}$ Silviculture Regulatory Consistency Act, H.R. 2541, S. 1369, 112th Cong. $\S~2~(2011)$ (emphasis added).

 $^{222.\,}$ James L. Howard, USDA, U.S. Timber Production, Trade, Consumption, and Price Statistics 1965 to 2005, at 15 (2007).

^{223.} SUP. Ct. R. 10. See also Timothy S. Bishop & Jeffrey W. Sarles, Petitioning and Opposing Certiorari in the U.S. Supreme Court, FINDLAW.COM (1999), http://library.findlaw.com/1999/Jan/1/241457.html. See also The Statistics, 125 HARV. L. REV. 362, 369 tbl.II(B) (2011) (noting that, during the 2010 Term, the Court granted review in only 4.7% of the 1,618 petitions in appellate cases considered).

terest.²²⁴ Even if certiorari was granted, it is also unclear at this point which issues will be before the Court, how the Solicitor General will weigh in, and how the parties will brief their positions. Without this information, additional analysis is premature.

The prospects for the legislative effort are similarly unclear. Simultaneously introduced in both houses with bipartisan support, the bill would add discharges from "any silvicultural activity" to the list of point source discharges for which permits are not required. 225 Given that the Ninth Circuit's statutory analysis forecloses such an option for the EPA, a legislative fix would be the proper response if Congress wished to preserve the status quo for logging operations. Far from ensuring regulatory consistency, however, an exemption for discharges from any silvicultural activity could eviscerate the entire silvicultural stormwater permitting program. As in the Silvicultural Rule, the bill's list of silvicultural activities—introduced with "such as"—is illustrative, not exhaustive, and could easily be read to include activities that are currently regulated as silvicultural point sources. 226 Indeed, the NEDC court took a similar tack when it read the Rule's list of silvicultural point sources, concluding that the illustrative list left open the possibility of a permit requirement for sources not specified in the Rule.

With petitions for certiorari pending and both bills still in committee, there is ample opportunity for the case to be overruled. The Solicitor General's opinion, if supportive of the petitioners' view that the Ninth Circuit failed to defer to longstanding EPA policy, could convince the Court to take the case; although that would be contrary to representations in the EPA's amicus brief to the Ninth Circuit. ²²⁷ It also remains to be seen whether legislators are willing to grant an expansive new CWA exemption just to overrule a case concerning a considerably narrower class of sources. Still, a legislative, rather than regulatory, exemption appears to be the only way to un-ring the *NEDC* bell. Rather than pon-

^{224.} See Lawrence Hurley, Justices Ask Obama Admin to Weigh in on Pollution Permitting for Logging Roads, E&E Publishing, LLC (Dec. 12, 2011), http://www.eenews.net/public/Greenwire/2011/12/12/3.

^{225.} In relevant part, the bill would amend section 402(l) of the CWA with the following language: "The Administrator shall neither require a permit under this section, nor directly or indirectly require any State to require a permit under this section, for a discharge resulting from the conduct of any silvicultural activity, such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road use, construction, and maintenance, from which there is runoff." H.R. 2541; S. 1369. Section 402(l) also contains NPDES exemptions for "agricultural return flows" and "stormwater runoff from oil, gas, and mining operations." 33 U.S.C. § 1342(l) (2006).

^{226.} H.R. 2541; S. 1369.

^{227.} Amicus Curiae Brief of the United States Responding to the Court's Questions of October 21, 2010, at 10 n.5, Nw. Envtl. Def. Ctr. v. Brown, 617 F.3d 1176 (9th Cir. 2010), withdrawn and replaced by 640 F.3d 1063 (2011) (No. 07-35266) ("The first time EPA expressed in an official document its interpretation that 'natural runoff' would include runoff that is channeled, ditched or culverted into man-made structures was in its amicus brief in this matter."). This position clearly undercuts the petitioners' contention that it was EPA's longstanding policy to exclude logging road drainage systems from NPDES.

dering these uncertain efforts further, the remainder of this comment presents a third way forward.

IV. A PROPOSAL FOR PERMITTING LOGGING ROAD STORMWATER DISCHARGES IN IDAHO

The *NEDC* court acknowledged its decision would create a substantial new regulatory burden for logging operations. ²²⁸ Some amici estimate the permit requirement will implicate tens of thousands of individual logging road stormwater point sources (hereinafter referred to as "*NEDC* sources"). ²²⁹ Citing the hundreds of thousands of logging road miles on federal lands, commentators agree the decision will have huge ramifications for those who own, or haul timber on, these routes. ²³⁰

Initial estimates for Idaho lend credence to these concerns. Although statewide figures are unavailable, the Idaho Department of Lands estimates that nearly 8,800 culverts drain more than 2,500 miles of haul roads on certain state lands north of the Salmon River. And the story is no different on private lands. One timber company estimates that, on average, between two and five culverts drain each mile of its Idaho road network, which covers more than 6,000 miles. Even if these two estimates included all the *NEDC* sources in the state, permits would be required for more than 10,000 individual discharges draining thousands of miles of road. Simply put, *NEDC*s permit requirement could impact an enormous number of sources across the Ninth Circuit and would easily extend to thousands of individual sources in Idaho alone.

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^{228.} Nw. Envtl. Def. Ctr. v. Brown (NEDC), 640 F.3d 1063, 1086-87 (9th Cir. 2011).

^{229.} Brief of Assn. of Or. Cntys. et al. in Support of Panel Rehearing or Rehearing En Banc at 10 Nw. Envtl. Def. Ctr. v. Brown, 617 F.3d 1176 (9th Cir. 2010), withdrawn and replaced by 640 F.3d 1063 (2011) (No. 07-35266) (estimating that the Oregon county road system includes over 4,800 miles of "primary logging road" with approximately 20,000 associated culverts); Brief of Amicus Curiae Am. Forest Indus. Council in Support of Appellee's Petition for Rehearing En Banc to Reverse this Panel Decision at 6 Nw. Envtl. Def. Ctr. v. Brown, 617 F.3d 1176 (9th Cir. 2010), withdrawn and replaced by 640 F.3d 1063 (2011) (No. 07-35266) (explaining that over 10,000 culverts are present in fish bearing streams on federal lands in Washington and Oregon).

^{230.} King, supra note 192, at 169; Mark A. Ryan, Ninth Circuit Upends the CWA Applecart, 25 A.B.A. J. NAT. RES. & ENV'T 50, 50 (Winter 2011).

^{231.} E-mail from Ara Andrea, Service and Regulatory Program Manager, Idaho Dep't of Lands (Mar. 4, 2011, 11:48 PST) (on file with author). These estimates only include roads on State lands in the Kootenai Valley, Priest Lake, Pend Oreille Lake, St. Joe, and Clearwater Supervisory Areas. *Id.*

^{232.} Interview with Terry Cundy, Silviculture, Wildlife, and Environment Manager, Potlatch Forest Holdings, Inc., in Moscow, Idaho (Oct. 21, 2010).

^{233.} This is a highly unlikely assumption because several other large private timber companies operate in Idaho and logging also occurs on federal lands. Estimates for sources on these lands are currently unavailable but are likely to be similar in terms of the number of culverts per mile. This is because every logging road in Idaho is governed by the State's Forest Practices Rules. See generally Memorandum of Understanding Implementing the Nonpoint Source Water Quality Program in the State of Idaho (Feb. 14, 2008).

Assuming that logging road stormwater drainage systems continue to be recognized as point sources associated with industrial activity, Idaho's logging roads will be subject to an unprecedented level of federal regulation. Because Idaho lacks authority to issue NPDES permits, the EPA would suddenly face the challenge of permitting thousands of newly regulated sources. This shift to federally administered NPDES permits displaces Idaho's traditional regulatory control over silvicultural runoff. And despite the somewhat analogous permitting processes for MS4s and stormwater discharges associated with other industrial activities, 234 NEDC sources raise thorny policy questions. This is especially true in Idaho where the frequent connections between salmonids, roads, and loggers demand a systematic approach. 235

In crafting a permit for *NEDC* sources, the EPA should initially focus on three practical considerations. First, Idaho's loggers are already reeling from a depressed housing market.²³⁶ Consequently, long permitting delays that halt harvests could drive some out of business, eliminating needed jobs and reducing state tax revenue in the process. Second, as the defendants noted in the case, timber hauling occurs on mixed-use forest roads (e.g., roads also used for recreational access).²³⁷ Because it is uncertain how the EPA would distinguish unregulated forest roads from logging roads, it is difficult to anticipate where and when a permit would be required. Third, some of Idaho's *NEDC* sources discharge to streams inhabited by ESA-listed salmonids, and others may indirectly or cumulatively affect fish and habitat far downstream. Since the EPA cannot permit discharges that are likely to jeopardize listed fish, ESA consultations would be necessary to insure all permitted *NEDC* sources avoid that result.²³⁸

The following sections detail policy solutions for each of these issues. The intent of these recommendations is to make permitting more administratively efficient and reduce the burden on individual permittees. Of course, the efforts to permit *NEDC* sources implicate myriad other considerations that are outside the scope of this comment.²³⁹ Nev-

^{234.} See, e.g., U.S. EPA, REGION 10, PERMIT NO. IDS-0208185, AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM FOR ADA COUNTY HIGHWAY DISTRICT (2009), available at http://yosemite.epa.gov/r10/water.nsf/NPDE S+Permits/Current+ID1319 [hereinafter Ada Cnty. MS4 Permit]. See also U.S. EPA, NPDES, MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITIES pt. 2.1.2 (2008) [hereinafter MSGP].

^{235.} See Ryan, supra note 230.

^{236.} MORGAN, supra note 7, at 2.

^{237.} Nw. Envtl. Def. Ctr. v. Brown (NEDC), 640 F.3d 1063, 1084 (9th Cir. 2011).

^{238.} See 16 U.S.C. § 1536(a) (2006).

^{239.} The following is a brief sample of issues that will need to be resolved before a single permit can be issued: Who must obtain the permits? What kind of BMPs would the permit require? How would BMP effectiveness be monitored? What level of National Environmental Policy Act review would be necessary? What level of tribal consultation would be necessary? How would the permits address impacts in streams with Total Maximum Daily Loads for sediment? What conditions might Idaho place on the permit pursuant to the certification required under section 401 of the CWA? And how would Idaho's ambient water quality standards interact with the permit?

ertheless, if *NEDC* remains good law, these three threshold policy questions should be addressed early in the permit development process.

A. Individual or General Permits?

At the outset of the permitting process, the EPA would have to determine whether to regulate Idaho's *NEDC* sources under individual or general NPDES permits. Fortunately, the EPA can choose the most administratively feasible permit.²⁴⁰ The Agency should take advantage of that flexibility to ensure that *NEDC* sources can be permitted without undue delay.

This is important because permitting delays could postpone timber harvests. Long waits would create a dilemma whereby loggers would either risk enforcement actions by operating without a permit or produce nothing while awaiting a permit. Either alternative raises the potential for harsh economic consequences. As a result, logging activity would likely decline—at least in the short run. But even a short-lived decline in timber production could impact mill operations dependent upon a steady supply of freshly cut timber. ²⁴¹ In the worst case, long permitting delays could cripple Idaho's forest products industry by freezing logging activity statewide. Therefore, a streamlined permit process is not just desirable but essential for the industry to survive the current downturn.

NPDES permits come in two varieties: individual and general. Individual permits are most often issued for discrete facilities such as wastewater treatment plants, mines, or industrial plants. Discrete stormwater sources, such as MS4s, also discharge pursuant to individual permits. In contrast, general permits typically cover point source discharges from land-use activities such as concentrated animal feeding operations, aquaculture facilities, and stormwater discharges associated with industrial activities. In fact, the Multi-Sector General Permit (MSGP) is the EPA's primary tool for regulating stormwater discharges associated with industrial activity.

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 $^{240.\}quad See$ Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1377–80 (D.C. Cir. 1977).

^{241.} See MORGAN, supra note 7, at fig.4 (displaying similar, declining trends both in timber harvest and lumber produced by mills). See also Brief of Amicus Curiae Am. Forest Indus. Council in Support of Appellee's Petition for Rehearing En Banc to Reverse this Panel Decision at 9–10 Nw. Envtl. Def. Ctr. v. Brown, 617 F.3d 1176 (9th Cir. 2010), withdrawn and replaced by 640 F.3d 1063 (2011) (No. 07-35266) (describing potential for NPDES permitting delays to reduce logging activity and cause a cascading loss of jobs due to effects on mill production).

^{242.} See generally, U.S. EPA, Current NPDES Permits in Idaho, http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/Current+ID1319 (last visited May 4, 2012).

^{243.} See, e.g., ADA CNTY. MS4 PERMIT, supra note 234.

^{244.} See generally, U.S. EPA, Idaho General Permits, http://yosemite.epa.gov/r10/WATER.NSF/NPDES+Permits/General+NPDES+Permits#IDAHO%20GENERAL%20PER MITS (last visited May 4, 2012). See Gaba, supra note 85, for a detailed treatment of general permits and issues surrounding their use.

^{245.} See MSGP, supra note 234, at pt. 1.1.1.

One important difference between individual and general permits is their application processes. Individual permit applications are necessarily detailed, requiring site-specific data including location, flow estimates, and effluent characteristics. ²⁴⁶ Just filing a complete application may require both legal and technical assistance, and, once submitted, processing and approval by the EPA takes additional time. In Idaho, for instance, it takes at least one year to obtain an individual NPDES permit. ²⁴⁷

Unsurprisingly, this highly technical process, coupled with limited EPA staff and other pressing needs, leads to delays. According to a 2009 assessment, the EPA was 204 permits behind its internal goal of having ninety percent of Idaho's individual permits current. ²⁴⁸ In other words, more than 200 facilities were discharging to waters of the state under expired permits. That backlog represents more than half of all the permits issued in the state at the time of the 2009 report. ²⁴⁹ Obviously, a massive influx of new permit applications would not make this process any faster.

By contrast, general permits like the MSGP provide coverage through a more streamlined process. Eligible stormwater discharges may be authorized under the MSGP by (1) selecting, designing, installing, and implementing BMPs; (2) developing a Stormwater Pollution Prevention Plan; and, (3) submitting a Notice of Intent (NOI) to the EPA.²⁵⁰ If the EPA approves the NOI, then the discharge may usually commence within thirty days subject to monitoring and reporting requirements.²⁵¹ While this process also requires some initial preparation and planning, it is usually quicker than the process for individual permits.

The *NEDC* court recognized general permits as a mechanism capable of reducing some of the administrative burden its decision would impose. ²⁵² It stated that the EPA could "effectively and relatively expeditiously" establish a permitting procedure for *NEDC* sources based on analogous procedures for other roads. ²⁵³ More recently, the EPA's Assistant Regional Counsel for Idaho, writing on his own behalf, found it "unlikely" that individual permits would be required. ²⁵⁴ Instead, he sug-

^{246. 40} C.F.R. § 122.21(h) (2011).

^{247.} Telephone Interview with Dave Tomten, Idaho NPDES Coordinator, U.S. EPA, Region 10 (Feb. 23, 2011).

^{248.} U.S. EPA, PERMIT STATUS REPORT FOR NON-TRIBAL MAJOR INDIVIDUAL, MINOR INDIVIDUAL, AND NON-STORMWATER GENERAL PERMIT COVERED FACILITIES (2009), http://www.epa.gov/npdes/pubs/grade_all.pdf.

^{249.} Id

^{250.} MSGP, *supra* note 234, at pt. 1.3.1. Stormwater Pollution Prevention Plans document the specific BMPs used by the permittee to control stormwater discharges; they must be prepared before an NOI is submitted. *Id.* at pt. 5.

^{251.} *Id.* at pts. 1.3.2, 6–7.

^{252.} Nw. Envtl. Def. Ctr. v. Brown (NEDC), 640 F.3d 1063, 1087 (9th Cir. 2011).

^{253.} Id.

^{254.} Ryan, *supra* note 230, at 51.

gested the MSGP could be used to permit NEDC sources in the short term.²⁵⁵

A general permit makes good sense given the time-consuming application process for individual permits and the EPA's current backlog. In fact, many of Idaho's loggers could probably obtain immediate coverage for their logging roads under the MSGP because it already applies to log handling operations included in SIC 2411. For the longer term, however, the EPA should develop more specialized MSGP provisions with BMPs, monitoring, and NOI procedures for logging roads. Although the details of such procedures are beyond the scope of this comment, they should account for the fact that logging operations are transient, remote, and seasonal. But even if the MSGP can cover Idaho's *NEDC* sources, it remains to be seen where permits will be necessary and how potential effects on ESA-listed salmonids will be addressed.

B. Forest Road or Logging Road?

Another threshold policy question is: For which roads will permits be required? The answer is not obvious for several reasons. First, timber harvests in Idaho are both seasonal and relatively temporary operations: once the trees are cut or deep snow falls, timber hauling ends. More generally, forest roads originally built to facilitate timber harvesting may subsequently be adapted to other uses such as recreation. Additionally, roads drained by ditches, culverts, and channels can still discharge polluted stormwater regardless of whether they are used for industrial activity. All of this could make non-industrial stormwater sources hard to distinguish. In light of these complications, when and where does a road used for timber hauling stop being associated with industrial activity?

According to the EPA and the *NEDC* court, the answer depends on whether a given road is an "immediate access road" that is "exclusively or primarily dedicated" for use by a logging operation.²⁵⁹ If it is, then it is a logging road, and any stormwater discharges from it are regulated

256. MSGP, *supra* note 234, at tbl.D-1. *See also* Ryan, *supra* note 230, at 51 ("[MSGP Sector A3] is very general, and compliance with it may not differ greatly from current Best Management Practices employed by most logging road owners.")

^{255.} Id.

^{257.} FOREST ROAD SYNTHESIS, supra note 19, at 65. See also Potlatch Corp., Recreation Permits: Policies and Regulations, http://recreation.potlatchcorp.com/id/PoliciesAndRegulations.asp (last visited May 4, 2012) (allowing year-round public recreational access to Potlatch's roads in Idaho unless closed or otherwise restricted); Idaho Dept. of Commerce, ATV Riding, VISITIDAHO.ORG, http://www.visitidaho.org/atv-riding/ (last visited May 4, 2012) ("Miles of trails and old logging roads entice the ATV enthusiast to ride in Idaho.").

^{258.} Rates of sediment delivery are "closely correlated to traffic volume on unpaved roads." FOREST ROAD SYNTHESIS, *supra* note 19, at 14. This indicates that traffic volume rather than traffic type is the more important consideration for unpaved roads. At this point, however, the CWA distinguishes road-related stormwater discharges on the basis of traffic type (e.g., industrial). In the future, this concern over traffic volume could be grounds for regulating all forest roads. *See* Envtl. Def. Ctr. v. EPA, 344 F.3d 832, 860–63 (9th Cir. 2003).

 $^{259. \}quad \text{Nw. Envtl. Def. Ctr. v. Brown } (\textit{NEDC}), 640 \text{ F.3d } 1063, 1084 \text{ (9th Cir. 2011)}.$

under Phase I. If is not, then it is a forest road, which could be regulated under Phase II depending on the EPA's response to the Ninth Circuit's remand in *Environmental Defense Center v. EPA*. But, because NEDC alleged facts sufficient to prove the Trask River and Sam Downs Roads were primarily dedicated to logging, the panel had no occasion to announce a general rule distinguishing logging roads from forest roads. Consequently, the ultimate scope of *NEDC*s permit requirement rests on the untested and highly uncertain distinction between logging roads and forest roads.

This is troublesome because all logging roads are forest roads, but not all forest roads are logging roads. One way to slice it would be to declare that a logging road is any road currently used to haul timber. After all, logging is the relevant industrial activity, and it follows that a road ceases to be associated with that activity once the timber hauling ends. While this formulation clearly defines the permit requirement's duration, it says nothing about where a forest road ends and a logging road begins—unless every inch of road from stump to mill would be considered a logging road. Alluringly simple as it may be, such an expansive interpretation is unworkable in light of the regulatory requirement that the roads be "immediate." ²⁶¹

Only "immediate access roads . . . travelled by carriers of raw materials" are associated with industrial activity and subject to permitting under Phase I. ²⁶² In *NEDC*, the timber defendants raised this issue when they argued the roads in question were not sufficiently close to a logging operation to be associated with an industrial activity. ²⁶³ The panel considered the argument but dodged the question, explaining that the roads' proximity to the harvest sites was not a dispositive factor because they were built, maintained, and used for logging. ²⁶⁴ These factors indicated the discharges were from roads primarily dedicated to timber hauling notwithstanding other uses and distance from the harvest site. Thus, the court concluded "immediate" meant more than just the "immediate area of the site where the logging takes place." ²⁶⁵ This construction was enough to decide the case, but it sheds no light on an otherwise ambiguous regulatory phrase for future cases, the EPA, or the regulated community.

Under *NEDC*, immediate access roads include more than those connected to a logging operation "without intervening space." But if interpreted to mean any road used for timber hauling, "immediate"

 $^{260.\}quad 344$ F.3d 832, 862–63 (9th Cir. 2003) (remanding to EPA the question of whether to regulate stormwater discharges from forest roads under Phase II). EPA has not taken final action on this remand.

^{261. 40} C.F.R. § 122.26(b)(14) (2011).

^{262.} Id. (emphasis added).

^{263.} NEDC, 640 F.3d at 1084.

^{264.} Id

^{265.} Id

 $^{266.\;}$ Webster's Third New International Dictionary of the English Language, Unabridged 1129 (1993).

would have no meaning at all. So some spatial limit on the permitting requirement is necessary. And the ultimate question becomes: How far from the stump should this permit requirement extend?

A working definition that clarifies the meaning of "immediate" in the logging road context would be helpful for the EPA, permittees, and reviewing courts alike. This could be provided in a guidance document that lists the factors the EPA would use to define which forest roads are associated with industrial activity. The following factors, all of which were weighed by the *NEDC* court, provide a framework for the analysis: (a) original purpose for construction, (b) proximity to logging activity, (c) nature and extent of traffic, and (d) entity charged with maintaining the road.

Together, these factors account for a road's association with industrial activity in terms of both time and space. To some extent, a road's original purpose accounts for past impacts in the area, and it may also indicate the road's current primary purpose. The proximity to logging allows for a spatial limitation in cases where the other factors are equivocal. The nature and extent of traffic accounts for varying levels of industrial and nonindustrial use, potentially indicating the road's current primary use. Finally, as noted in *NEDC*, the entity in charge of maintaining the road may also point to the road's current purpose.²⁶⁷

Applied to the roads in *NEDC*, these factors weighed in favor of a permit. The roads were originally built to access logging operations and to facilitate timber hauling from active logging sites. ²⁶⁸ The roads were maintained by timber companies and were only incidentally used for other purposes. ²⁶⁹ Their proximity to the timber defendants' operations was more equivocal, though not well explained in the case. In total, these factors indicate the Sam Downs and Trask River Roads were associated with industrial activity. While the more ambiguous "immediate access road" standard was enough for the panel's purposes, these factors can provide a more principled basis for distinguishing logging roads from forest roads in future cases.

For example, consider the following hypothetical road segments. Assume they all are located in equivalent terrain, unpaved, and produce stormwater discharges.

- (1) A road built as the sole access for an area harvested two years ago. It also accesses another area that will be harvested after the spring thaw. The planned harvest is two miles away. While a timber company is obligated to maintain it, this road is not currently used for timber hauling.
- (2) A road identical to Road One except that no new harvests are planned and, overall, the road receives little traffic because a locked gate blocks most recreational access.

269. Id

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^{267.} NEDC, 640 F.3d at 1067, 1084.

^{268.} Id

- (3) A road originally built to access a now-closed mine but that is now the sole access to an active timber harvest located five miles away. The U.S. Forest Service maintains it in good condition. It is used for timber hauling and, to a lesser extent, to access a popular campground.
- (4) A road that was built to connect two towns, and is heavily travelled by equal amounts of logging and nonindustrial traffic. It provides the sole access to a spur road serving an active timber harvest fifteen miles distant. The local county government is responsible for its maintenance.

Based on the four factors, Roads Two and Four would not require a Phase I stormwater permit. Roads One and Two are quite similar but differ in terms of traffic and proximity to current or planned harvest activity. Road Two is not proximate to any planned logging whereas Road One will soon be used to access a planned harvest. This contrast is meant to underscore that permits should be required for merely dormant logging roads but not for retired logging roads. To the extent a road serves a reasonably certain future industrial purpose, an NPDES permit should be required.

Road Three presents a more clear-cut example of a road associated with industrial activity. Although it was not built for logging, it is now the only access for a logging operation. As in *NEDC*, proximity does not weigh heavily in this case because the road is evidently dedicated to an ongoing industrial use. Likewise, its Forest Service maintenance and nonindustrial traffic are less significant in light of that evident purpose. Consequently, a Phase I permit would be necessary. This could change once the harvest ends, however. Because its primary purpose would then be recreational access, a permit would no longer be necessary once the road becomes a general-purpose forest road.²⁷⁰ In this way, roads can lose their association with industrial activity despite a history of industrial use.

Finally, Road Four would not require a permit because timber hauling is merely incidental to its primary purpose. Because it was built to connect two towns, this road serves an extant nonindustrial purpose apart from logging. And the road will continue to serve that purpose after the harvest ends. Also, the county's maintenance responsibility bolsters the conclusion that this is a general-purpose forest road. Finally, the fact that a separate spur road is used to access the harvest site makes this road further removed from the harvest activity than the previous examples. This attenuated connection to the logging operation, combined with the other factors, suggests that the stormwater discharges from Road Four are not associated with industrial activity.

These examples show that a factor-based approach could lend a greater degree of certainty to the permitting process. The decision to require a Phase I permit will depend on each road's particular attrib-

^{270.} An alternative and more stringent approach would be to require permits until the day the road is obliterated. This seems unnecessary so long as the permit requirement continues for as long as logging-road-related impacts persist.

utes. But the analytical process would be clearer if it explicitly focused on four readily identifiable characteristics rather than a vague regulatory standard. In effect, the factors would define an analytical framework for distinguishing logging roads from forest roads. Over time, and if consistently applied, these factors could provide a clearer definition of a logging road than the "exclusively or primarily dedicated" standard employed in *NEDC*. A factor-based approach could thus benefit both the regulated community and the EPA by allowing them to anticipate the scope of *NEDC*s permit requirement.

C. Individual or Programmatic Endangered Species Act Consultations?

A third crucial policy choice involves the ESA. The ESA requires interagency consultation for NPDES permits to "insure [permitted discharges are] not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of habitat of such species."271 This is a weighty procedural requirement in Idaho. First, listed salmonid species are present statewide in nearly every major watershed, and sediment-laden stormwater discharges are known to adversely affect these species and their habitat. 272 Second, because the EPA would issue NEDC source permits in Idaho, consultation would be necessary to some extent. That could be a tall order because, as discussed below, sediment can flow from a discharge point to far-off habitat. Finally, consultation is further complicated because two separate agencies, the NOAA Fisheries Service (NMFS) and the Fish and Wildlife Service (FWS) (collectively, "the Services"), have jurisdiction over Idaho's salmonids. 273 Where consultation is necessary, the policy question is whether individual permittees or the EPA should be responsible for it.

If the existing MSGP is used to permit Idaho's *NEDC* sources, the consultation burden is on the permittee. In accordance with the ESA, the MSGP is only available for discharges that "will not adversely affect any [ESA-listed] species . . . and will not result in the adverse modification or destruction of habitat that is federally-designated as 'critical habitat' under the ESA."²⁷⁴ Consequently, would-be permittees must carefully evaluate whether listed species or critical habitat are present, and if so, follow specific procedures to demonstrate all necessary consultation is concluded.²⁷⁵ Some logging operations in Idaho may have completed these procedures for other stormwater discharges already covered by the MSGP. To the extent those other discharges affect the same areas as their *NEDC* sources, these operations may be able to avoid this

 $^{271. \}quad 16 \; U.S.C. \; \S \; 1536(a)(2) - (3) \; (2006).$

^{272.} See supra notes 48-59 and accompanying text.

^{273.} NMFS has jurisdiction over Idaho's three listed anadromous fish species: steel-head trout, chinook salmon, and sockeye salmon. See 50 C.F.R. $\S\S$ 223.102, 224.101 (2011). FWS has jurisdiction over listed resident fish including bull trout. See $id.\S$ 17.44.

^{274.} MSGP, supra note 234, at pt. 1.1.4.5.

^{275.} See id. at app. E.

issue altogether by demonstrating another valid certification already covers the road discharges.²⁷⁶ Still, other operations may face a considerable consultation burden in addition to the NOI itself.

Critically, the MSGP requires permittees to consider potential impacts on listed species and critical habitat within a discharge's "action area." This includes "all areas to be affected directly or indirectly by the stormwater discharges . . . and not merely the immediate area involved in these discharges and activities." Depending on a sediment source's location and yield, the action area for its stormwater discharges could encompass the entire downstream watershed. This is because sediment travels when suspended in a sufficiently strong current. Thus, discharges to small headwater tributaries devoid of listed species or critical habitat may nonetheless be subject to ESA consultation because of their cumulative effect on downstream species or habitats.

Applying the action area concept to *NEDC* sources would benefit listed salmonids. This is because any source potentially affecting such species or their habitat would be subject to consultation. The Services may in turn require "reasonable and prudent" measures to insure the discharge does not jeopardize listed species or adversely modify their habitat.²⁷⁹ And, because the action area for a single source could be quite large, these additional protective measures could be mandated for activities well outside the designated critical habitat.

Unfortunately for loggers, the action area concept is a potential source of both liability and uncertainty. For illustration, consider that 8,772 stream miles throughout North and Central Idaho are now designated as critical bull trout habitat.²⁸⁰ While this is only about seven percent of the total stream mileage in Idaho, the habitat includes all major rivers draining Idaho's most productive timberlands.²⁸¹ Combined discharges from upland logging roads could conceivably cause cumulative

^{276.} A party may satisfy the MSGP's ESA provisions by certifying (a) no listed species or critical habitat are present in the action area; (b) consultation has already been concluded; (c) the activity is already covered by an incidental take permit pursuant to ESA section 10; (d) coordination that resulted in a written authorization from NMFS and/or FWS has been concluded; (e) the discharge is consistent with the determination that the MSGP will not adversely affect listed species or critical habitat; or, (f) another valid certification already addresses the discharge's potential to affect listed species or critical habitat in the action area. *Id.* at app. E.2.

^{277.} Id. at app. E.1.

^{278.} Id.

^{279. 16} U.S.C. §§ 1536(b)(3)(A), (b)(4)(A) (2006).

^{280.} Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for Bull Trout in the Coterminous United States, 75 Fed. Reg. 63,898, 63,937, 69,973 (Oct. 18, 2010).

^{281.} Bull trout critical habitat is found in major drainages throughout Central and North Idaho. *Id.* at 63,975. These same watersheds produce the majority of the State's cut timber. *Compare* IDAHO DEP'T OF LANDS, FY 09 LARGE SALES HARVEST RECAP (July 08, 2009), http://www.idl.idaho.gov/bureau/ForestMgt/upd070909/fy09_large-sales-harvest_recap_vol_val.pdf (showing that North and Central Idaho Supervisory Areas produce the most timber), *with* IDAHO DEP'T OF LANDS, SUPERVISORY AREAS (Apr. 19, 2011), http://gis1.idl.idaho.gov/GIS%20Website/publishedmaps/IDL_Supervisory_Areas.pdf (map displaying extent of IDL's supervisory areas).

adverse effects on critical habitat well outside the harvested watersheds. And, because permittees must assess both the direct and indirect effects of their discharges, the presence of bull trout in the lower reaches of a harvested watershed may trigger the consultation requirement.

In practice, such indirect effects could be extremely difficult to analyze. The analysis is so challenging because it is difficult to separate the effects of sediment discharged from a particular *NEDC* source from the effects of sediment runoff from forest roads, unrelated land-use activities, or natural processes. Yet permittees who fail to adequately assess the indirect impacts of their discharges could be subject to a range of penalties under both the CWA²⁸² and the ESA.²⁸³ Consequently, there would be a strong incentive for prospective permittees to consult even if listed species or their critical habitat are far from their discharge point. And when one considers indirect effects from sediment discharges in tributaries, the consultation burden could actually be much greater than the 8,772 miles of bull trout critical habitat initially suggests.

Therefore, logging operations throughout bull trout country would need to simultaneously conduct similar ESA consultations to obtain MSGP coverage. The scope and complexity of this problem only grows when other potentially affected species are considered.²⁸⁴ As the number and complexity of the consultations grow, so too does the cost and the potential to delay permitting.²⁸⁵ Yet each consultation would analyze the same questions: Will sediment-laden stormwater discharges adversely affect listed salmonids or their habitat? And if so, which reasonable and prudent measures are necessary to minimize the impact? From an efficiency standpoint, a comprehensive approach is desirable. One such approach would be to shift the consultation burden from the permittees to the EPA.

To assess how *NEDC* source discharges might affect listed species and critical habitat, the EPA could initiate programmatic ESA consultations with the Services. NMFS and FWS periodically conduct programmatic consultations for federal programs that result in multiple actions with similar impacts. ²⁸⁶ Rather than evaluating each action's localized

^{282.} See MSGP, supra note 234, at app. B.1 (penalties for MSGP violations); 33 U.S.C. § 1319 (EPA enforcement actions); id. at § 1365(a)(1) (citizen suits for unauthorized discharges and discharges in violation of a permit).

^{283. 16} U.S.C. § 1538. See also 50 C.F.R. § 17.31(a) (2011) (applying the ESA's take prohibition to threatened species—such as bull trout—under FWS jurisdiction).

^{284.} See 50 C.F.R. §§ 226.205, .212 (listing many of the same rivers and streams occupied by bull trout as designated critical habitat for Snake River steelhead trout, spring/summer chinook salmon, fall chinook salmon, and sockeye salmon).

^{285. 16} U.S.C. § 1536(b)(1)(B) (establishing a 90-day limit on consultations subject to indefinite extension in some circumstances).

^{286.} See generally U.S. FISH & WILDLIFE SERV., BIOLOGICAL OPINION: EFFECTS OF 16 VERTEBRATE CONTROL AGENTS ON THREATENED AND ENDANGERED SPECIES (1993), available at http://www.fws.gov/sacramento/ES/Consultation/Programmatic-Consultations/es_consultation_programmatic-consultations.htm; NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES ACT-SECTION 7 FORMAL CONSULTATION BIOLOGICAL AND CONFERENCE OPINION AND MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT ESSENTIAL FISH HABITAT CONSULTATION: STREAM CROSSING STRUCTURE REPLACEMENT AND REMOVAL

effects, these consultations examine the entire program's potential to affect listed species and critical habitat. While such consultations can be long, complex, and litigious, ²⁸⁷ they also comprehensively address the proposed federal action's foreseeable effects. This typically produces two desirable results: protection from ESA "take" liability and a list of "reasonable and prudent" non-discretionary measures designed to mitigate adverse effects. ²⁸⁸ These measures are often expressed as BMPs or monitoring requirements and apply to all actions considered in the consultation. ²⁸⁹ Thus, a programmatic consultation for *NEDC* sources could provide both uniform take protection and uniform BMPs for all permitted discharges that might affect listed species or habitat.

This programmatic consistency would provide a number of benefits. Foremost, it would set the effluent limitations necessary to insure permitted *NEDC* sources do not jeopardize listed species or adversely modify their habitat. Also, it would allow all permittees to satisfy the MSGP's eligibility criteria for discharges potentially affecting listed species. ²⁹⁰ Lastly, to the extent permittees fully implement the reasonable and prudent measures identified in the consultation, it would protect them from ESA take liability. Of course, this won't happen overnight, and in the short run some amount of individual consultation might be necessary. In the long run, however, programmatic consistency would benefit both loggers and salmonids.

V. CONCLUSION

In the wake of *NEDC*, EPA-issued NPDES permits may soon be required for stormwater discharged from the ditches, channels, and culverts that drain Idaho's logging roads. The case answers two important questions for Idaho's logging operations. First, it holds that road drainage systems are point sources when they collect, convey, and discharge stormwater and pollutants into waters of the United States. Second, it recognizes that such discharges are associated with industrial activity when they drain a logging operation's immediate access roads. These are probably not the answers loggers wanted, but they are answers—notwithstanding the Silvicultural Rule—compelled by durable precedent and the CWA itself. That uncommonly tough law admits few exceptions and is well settled even if its regulatory progeny are not.

But, despite its well-founded legal conclusions, *NEDC* says nothing about how this new permit program should be implemented. In Idaho, that means the EPA could face a daunting array of policy decisions. Yet legal and practical considerations constrain the agency's discretion. On

ACTIVITIES, SNAKE AND CLEARWATER RIVER BASINS, 170601 & 170603, IDAHO (2006), available at https://pcts.nmfs.noaa.gov/pls/pcts-pub/pcts_upload.summary_list_biop?p_id=32283.

^{287.} See, e.g., Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059 (9th Cir. 2004).

^{288.} E.g., NAT'L MARINE FISHERIES SERV., supra note 286, at 74–81.

^{289.} Id. at 78-81.

^{290.} See MSGP, supra note 234, at pt. 1.1.4.5, Criterion B.

one hand, the EPA should recognize that long delays risk livelihoods, rural economies, and a long silvicultural tradition. On the other, it must also insure permitted discharges do not jeopardize ESA-listed species or adversely modify their critical habitat. In taking the first critical steps toward regulating *NEDC* sources, the agency must therefore walk a fine line between statutory adequacy and regulatory overkill.

Three early policy choices are essential in this regard. First, the EPA should adopt a streamlined general permit process to help logging operations avoid potentially ruinous permitting delays. To this end, the existing MSGP provisions for log handling and storage facilities may facilitate immediate permit coverage while the EPA tailors new provisions for logging roads. Next, the Agency should clarify where and when the permit requirement applies by distinguishing logging roads from forest roads on the basis of four factors: original purpose, proximity to current or expected logging activity, nature and extent of traffic, and the entity charged with maintaining the road. Unlike the more ambiguous standards applied in the case, these factors spell out identifiable characteristics that will allow both the EPA and the regulated community to more readily anticipate the permit's scope. Finally, the EPA should initiate a programmatic consultation covering each ESA-listed species and all critical habitat likely to be affected by permitted discharges. Although it will undoubtedly take time and necessitate some individual consultations in the short term, this systematic approach would benefit both loggers and salmonids in the long-term.

The process will not be easy, nor will it be instantaneous. The EPA faces a mountainous regulatory task. But, like the man who moves a mountain, the EPA should begin by moving three key policy stones. If carefully set, these policies would provide the foundation for an statutorily adequate and administratively feasible logging road stormwater permit. In this way, the product of a tough law can benefit Idaho's water quality and its imperiled salmon without unduly burdening its storied timber industry.

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