

# Fact Sheet

## Revisions to Stormwater Regulations to Clarify that an NPDES Permit is not Required for Stormwater Discharges from Logging Roads

### Summary

The U.S. Environmental Protection Agency (EPA) has announced that it has revised its Phase I stormwater regulations to clarify that stormwater discharges from logging roads do not constitute stormwater discharges associated with industrial activity and that a National Pollutant Discharge Elimination System (NPDES) permit is not required for these stormwater discharges. In *Northwest Environmental Defense Center v. Brown*, (NEDC) 640 F.3d 1063 (9th Cir. 2011), a citizen suit was filed alleging violations of the Clean Water Act for discharging stormwater from ditches alongside two logging roads in state forests without a permit. The court held that because the stormwater runoff from the two roads in question is collected by and then discharged from a system of ditches culverts and channels, there was a point source discharge of industrial stormwater for which an NPDES permit is required. The EPA did not intend for logging roads to be regulated as industrial facilities. However, in light of the NEDC decision, the EPA is revising 40 CFR 122.26(b)(14) to clarify the Agency's intent.

### Background

The objective of the Clean Water Act is to restore and maintain the chemical, physical and biological integrity of the nation's waters. To that end, the Act provides that the discharge of any pollutant by any person shall be unlawful, except in compliance with other provisions of the statute.

Generally, the Act provides for a permit program for the discharge of a pollutant from a point source, defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding

operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. 1362(14).

In 1987, Congress amended the Clean Water Act with the addition of section 402(p), directing the EPA to take a structured and phased approach for addressing stormwater discharges. For the initial phase (Phase I), the EPA was directed to develop regulations requiring permits for certain discharges including large municipal separate storm sewer systems and "industrial discharges." Congress did not define industrial discharges but allowed the EPA to define the term. For the subsequent phases (such as Phase II), the EPA is

required, in consultation with the states, to study stormwater discharges for which permits are not required under Phase I, the nature and extent of pollutants in such discharges, and approaches for addressing them. Section 402(p)(6) of the CWA allows the EPA flexibility in issuing regulations to address designated stormwater discharges and does not require the use of NPDES permits. This flexibility of 402(p)(6) is unique to stormwater discharges and is different than the treatment of stormwater discharges addressed under Phase I, which requires NPDES permits for industrial stormwater discharges.

### **Silvicultural Rule**

Prior to the 1987 amendments, the EPA promulgated the Silvicultural Rule in which the Agency defined “silvicultural point source” to specify which silvicultural discharges were to be included in the NPDES program. The rule defines silvicultural point source to mean any “discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States” and further explains that “[t]he term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.”

### **Phase I Rule**

In 1990, the EPA promulgated the Phase I stormwater regulations, requiring permits for large municipal separate storm sewer systems and stormwater “discharges associated with industrial activity.”

The Clean Water Act did not define the term “storm water discharges associated with industrial activity.” The Phase I regulation defines the term to include stormwater discharges from, as relevant here, certain facilities identified by reference to their Standard Industrial Classification (SIC) codes. The Agency specified in the Phase I rule that the term does not include discharges from facilities or activities excluded from the NPDES program elsewhere in the Agency’s regulations, such as the Silvicultural Rule.

Under the Silvicultural Rule, the EPA had specified which silvicultural discharges are included in the NPDES permit program. When the EPA promulgated the Phase I regulations, the Agency intended to regulate those same “silvicultural point source[s]” under the Phase I rule (i.e., rock crushing, gravel washing, log sorting, and log storage facilities) and to exclude from the Phase I regulation stormwater runoff from other silvicultural activities.

### **Phase II Rule**

On December 8, 1999, the EPA promulgated the Phase II stormwater regulations to address stormwater discharges from small municipal separate storm sewer systems and construction sites that disturb one to five acres based on a review of the nature of

stormwater discharges from municipal and industrial facilities that were not already regulated under the Phase I regulation.

### ***Northwest Environmental Defense Center v. Brown***

In *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011), a citizen suit alleged violations of the Clean Water Act for discharges of stormwater from ditches alongside two logging roads in state forests without a permit. The court held that because the stormwater runoff from the two roads in question is collected by – and then discharged from – a system of ditches, culverts and channels, it is a point source discharge of industrial stormwater for which an NPDES permit is required. Both the timber industry and the State of Oregon filed petitions requesting that the Supreme Court review the Court of Appeals’ decision in *NEDC*. On June 25, 2012, the United States Supreme Court granted petitions to review the case. The Supreme Court oral argument date is December 3, 2012.

### **Revisions to Phase I**

The EPA did not intend for logging roads to be regulated as industrial facilities. However, in light of *NEDC*, the EPA is revising 40 CFR 122.26(b)(14) to clarify the Agency’s original intent. The revision more clearly limits Phase I applicability to those silvicultural activities related to “rock crushing, gravel washing, log sorting, and log storage facilities.”

### **Future Efforts to Manage Stormwater from Forest Roads**

The EPA continues to review available information on the water-quality impacts of stormwater discharges from forest roads, which include logging roads, as well as existing practices to control those discharges. The EPA believes that stormwater discharges from forest roads, including logging roads, should be evaluated under section 402(p)(6) of the Clean Water Act because the section allows for a broad range of flexible approaches that are better suited to address the complexity of forest road ownership, management, and use.

### **For further information about this notice, please write to:**

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For additional information on this notice or to view or download the complete text of the *Federal Register* notice, please visit: <http://www.epa.gov/npdes/stormwater/forestroads>.