

# Public Land and Resources Law Review

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Volume 0 *Case Summaries 2010-2011*

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## Northwest Environmental Defense Center v. Brown

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### Recommended Citation

Whisenand, Dave (2013) "Northwest Environmental Defense Center v. Brown," *Public Land and Resources Law Review*: Vol. 0 , Article 3.

Available at: <https://scholarship.law.umt.edu/plrlr/vol0/iss1/3>

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***Northwest Environmental Defense Center v. Brown*, 617 F.3d 1176 (9th Cir. 2010).**

**Dave Whisenand**

**I. INTRODUCTION**

The United States Court of Appeals for the Ninth Circuit decided *Northwest Environmental Defense Center v. Brown* in August 2010.<sup>157</sup> The plaintiff in this case, Northwest Environmental Defense Center (NEDC), is an Oregon non-profit corporation who sued under the citizen suit provision of the Clean Water Act (CWA).<sup>158</sup> The defendants were: Marvin Brown in his official capacity as Oregon State Forester, members of the Oregon Board of Forestry in their official capacities, Hampton Tree Farms Inc., Stimson Lumber Company, Georgiapacific West Inc., Swanson Group Inc., and Tillamook County, who were all involved to some degree in either logging the areas at issue or maintaining the access roads.<sup>159</sup>

The issue presented was whether runoff from logging roads delivered to streams through ditches, channels, and culverts constituted point source discharge subject to the National Pollutant Discharge Elimination System (NPDES).<sup>160</sup> The court held that natural runoff becomes point source discharge subject to the NPDES when channeled through “discernible, confined and discrete conveyance[s]”<sup>161</sup> such as ditches, culverts, and channels.<sup>162</sup> Accordingly, the court reversed the district court’s dismissal and remanded for further proceedings to determine whether CWA violations occurred.<sup>163</sup>

**II. FACTUAL BACKGROUND**

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<sup>157</sup> *Northwest Environmental Defense Center v. Brown*, 617 F.3d 1176 (9th Cir. 2010).

<sup>158</sup> *Id.* at 1180 (citing 33 U.S.C. § 1365(a) (2006)).

<sup>159</sup> *Id.* at 1179.

<sup>160</sup> *Id.* at 1181.

<sup>161</sup> *Id.* at 1181 (citing 33 U.S.C. § 1362(14)).

<sup>162</sup> *Id.* at 1197.

<sup>163</sup> *Id.*

The roads at issue were the Trask River Road, parallel to the South Fork Trask River, and the Sam Downs Road, parallel to the Little South Fork of the Kilchis River. Both roads were located in Western Oregon and owned by the Oregon Department of Forestry and the Oregon Board of Forestry.<sup>164</sup> Timber sales contracts with the State of Oregon allowed timber companies to use the roads to access logging sites and haul timber out of the forest.<sup>165</sup> The contracts provided the Oregon Board of Forestry was responsible for maintaining these roads and their stormwater collection systems.<sup>166</sup> Both roads were “designed and constructed with systems of ditches, culverts, and channels” that directed runoff to streams.<sup>167</sup>

Runoff from forest roads used for logging is a major contributor of sediment to streams, rivers, and lakes.<sup>168</sup> Timber hauling grinds up gravel and rocks found on logging roads, which is then directed by the road runoff collection systems to nearby streams and rivers.<sup>169</sup> Sediment adversely affects fish, such as salmon and trout, by “smothering eggs, reducing oxygen levels, interfering with feeding, and burying insects that provide food.”<sup>170</sup>

### **III. PROCEDURAL BACKGROUND**

At the district court, the plaintiff alleged that the defendants’ maintenance of roads and runoff systems caused large amounts of sediment to be deposited in both the South Fork Trask River and the Little South Fork of the Kilchis River.<sup>171</sup> The plaintiff argued that the runoff systems associated with these roads acted as point sources by directing sediment to rivers and that this violated the CWA because none of the defendants had NPDES permits.<sup>172</sup> The district

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<sup>164</sup> *Id.* at 1179.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1180.

<sup>169</sup> *Id.* at 1179.

<sup>170</sup> *Id.* at 1180.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

court concluded that the Environmental Protection Agency's (EPA) Silvicultural Rule, because promulgated under the CWA, exempted discharge associated with logging activities from the NPDES permitting process, and thus did not reach the question of whether the 1987 amendments to the CWA statutorily exempted discharge associated with logging from the CWA.<sup>173</sup> Accordingly, the district court dismissed the plaintiff's suit for failure to state a claim upon which relief could be granted.<sup>174</sup> Plaintiffs timely appealed to the Ninth Circuit Court of Appeals.<sup>175</sup>

#### **IV. ANALYSIS**

##### **A. The Silvicultural Rule**

Reviewing de novo, the court looked at the history of the Silvicultural Rule.<sup>176</sup> The EPA promulgated the Silvicultural Rule shortly after Congress passed the Federal Water Pollution Control Act (FWPCA), which later became the Clean Water Act.<sup>177</sup> The FWPCA imposed stringent permitting requirements on point sources.<sup>178</sup> The Silvicultural Rule categorically exempted several kinds of discharges, including discharges from silvicultural activities.<sup>179</sup>

The Silvicultural Rule was first challenged in *Natural Resources Defense Council v. Train*; the plaintiff claimed the definition of a silvicultural point source was impermissible because it was inconsistent with the statutory definition.<sup>180</sup> The district court in *Natural Resources Defense Council* concluded the EPA had the authority to clarify by regulation, but could not promulgate regulations that were inconsistent with the statutory definition of a point source.<sup>181</sup> While appeal was pending, the EPA revised the Silvicultural Rule to define specific

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<sup>173</sup> *Id.* at 1179 (citing 40 C.F.R. § 122.27 (2010)).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1180.

<sup>176</sup> *Id.* at 1180, 1184

<sup>177</sup> *Id.* at 1181.

<sup>178</sup> *Id.* (citing Pub. L. No. 92-500, 86 Stat. 816 (1972)).

<sup>179</sup> *Id.* at 1184-1185.

<sup>180</sup> *Id.* at 1185 (citing *Natural Res. Def. Council v. Train*, 396 F. Supp 1393 (D.D.C. 1975)).

<sup>181</sup> *Id.* (citing *Natural Res. Def. Council v. Train*, 396 F. Supp 1393 (D.D.C. 1975)).

activities as silvicultural point sources.<sup>182</sup> Under this revision, runoff from all other silvicultural activities, even when directed via channels, culverts, and ditches, were considered non-point sources.<sup>183</sup>

Congress amended the CWA in 1987 to address stormwater discharge.<sup>184</sup> This amendment established a tiered approach to NPDES permits and allowed the EPA to identify the most significant stormwater discharges and require permits for these discharges under “Phase I”<sup>185</sup> regulations.<sup>186</sup> The EPA promulgated “Phase I” stormwater regulations in 1990.<sup>187</sup> The “Phase I” regulations identified five significant discharge sources, including one relevant to this case: discharge “associated with industrial activity.”<sup>188</sup> However, the EPA still purported to exclude any discharge previously excluded under the Silvicultural Rule from “Phase I” regulations.<sup>189</sup>

The court next analyzed the EPA’s interpretation of the CWA definition of point source discharge.<sup>190</sup> The court held that the Silvicultural Rule was an impermissible interpretation of the CWA because it created a category of silvicultural non-point sources that under the statutory definition are point sources.<sup>191</sup> The court reasoned that by statute, natural runoff becomes point source discharge when directed by “discernible, confined, and discrete conveyance[s]” through a system of ditches, culverts, and channels to a stream or river.<sup>192</sup> In making this determination,

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<sup>182</sup> *Id.* (citing 41 Fed. Reg. 6282 (Feb. 12, 1976)).

<sup>183</sup> *Id.* at 1186.

<sup>184</sup> *Id.* at 1193.

<sup>185</sup> *Id.* at 1193-1194. “Phase I” stormwater regulations were issued by the EPA in 1990 targeting discharge “associated with industrial activity.” All remaining stormwater discharges were to be covered by “Phase II” regulations and EPA was to issue these regulations based on their study of unregulated stormwater discharges. “Phase II” regulations were promulgated in 2006. *Id.*

<sup>186</sup> *Id.* at 1193.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* (citing 33 U.S.C. § 1342(p)(2)(B)).

<sup>189</sup> *Id.* (citing 55 Fed. Reg. 47990, 48011 (Nov. 16, 1990)).

<sup>190</sup> *Id.* at 1189-1190.

<sup>191</sup> *Id.* at 1190.

<sup>192</sup> *Id.* at 1190-1191 (citing 33 U.S.C. § 1362(14)).

the court relied, in part, on the analysis in *Environmental Protection Information Center v. Pacific Lumber Co.* (EPIC).<sup>193</sup> Specifically, the court agreed with the EPIC court that the statutory definition of a point source trumps the regulatory definition.<sup>194</sup> As a result, the court held that if discharge is collected and channeled through a system of ditches, channels, and culverts, it is point source discharge requiring a NPDES permit.<sup>195</sup>

## **B. 1987 Amendments to the CWA**

The district court did not reach the defendants' claim that the 1987 amendments to the CWA prevented the NPDES program from applying to stormwater discharge associated with silvicultural activity.<sup>196</sup> Based on the 1987 amendments to the CWA, the defendants presented two arguments:<sup>197</sup> (1) that Congress approved of the Silvicultural Rule by choosing not to revise it; and, (2) that "Phase I" stormwater regulations did not apply to the roads at issue because they did not fit the regulatory definition of "associated with industrial activity."<sup>198</sup>

The court first addressed the defendants' congressional approval through acquiescence argument.<sup>199</sup> For a court to find Congress approved through acquiescence, there must be "overwhelming evidence" that it was Congress' intent to approve the specific existing regulation.<sup>200</sup> The court distinguished this case from instances of Congressional approval through acquiescence by reasoning that, in this case, the 1987 CWA amendments resulted in fundamental changes to the statutory treatment of stormwater regulation, and the regulation was

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<sup>193</sup> *Id.* at 1191 (see *Envtl. Prot. Info. Ctr. v. Pacific Lumber Co.*, 2003 WL 25506817 (N.D. Cal. Oct. 14, 2003)).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 1191-1192.

<sup>197</sup> *Id.* at 1194-1195.

<sup>198</sup> *Id.* at 1195.

<sup>199</sup> *Id.* at 1191.

<sup>200</sup> *Id.* at 1193 (citing *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 162 (2001)).

clearly inconsistent with the statutory language.<sup>201</sup> In summary, the court did not find any evidence whatsoever that Congress intended to approve of the Silvicultural Rule.<sup>202</sup>

The court then addressed the defendants' claim that the logging roads did not fall within the regulatory definition of discharge associated with industrial activity.<sup>203</sup> The court relied on *Natural Resources Defense Council v. Environmental Protection Agency* in concluding that when logging activity is industrial in nature, the EPA cannot create exemptions to statutorily required permits, and thus, the 1987 amendments to the CWA do not preclude NPDES permit requirements from applying to these roads.<sup>204</sup> The court recognized these logging roads were often used for recreation, but concluded their primary use was clearly for logging.<sup>205</sup> The court also concluded that "immediate access roads" included roads such as the logging roads in this case because they were "exclusively or primarily" dedicated to industrial use.<sup>206</sup> Finally, the court disposed of the defendants' argument that the logging industry should not be classified as an industrial use. In doing so, it referenced the broad approach of the "Phase I" regulations that include many industrial facilities beyond traditional industrial plants, such as mines, junkyards, and construction sites.<sup>207</sup>

### **C. Effect of Remand in *Environmental Defense Center, Inc. v. EPA***

Despite suggestion by amicus United States that the Ninth Circuit should delay this decision until EPA responded to remand in *Environmental Defense Center, Inc. v. EPA* by promulgating "Phase II" regulations applicable to discharge from logging roads, the court

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<sup>201</sup> *Id.* at 1191.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 1194-1995.

<sup>204</sup> *Id.* at 1195-1996 (see *Nat. Resources Def. Council v. Env'tl. Protec. Agency*, 966 F.2d 1292, 1306 (9th Cir. 1992)).

<sup>205</sup> *Id.* at 1195.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 1195-1996 (citing 40 C.F.R. § 122.26(b)(14)(iii), (v), (x) (2010)).

concluded that EPA's promulgation of "Phase II" regulations did not lessen its statutory obligation.<sup>208</sup> Thus, the court saw no reason to wait for EPA's response before remanding.

## **V. CONCLUSION**

Sediment delivered to streams and rivers from logging roads represents one of the largest threats to trout and salmon preservation in the Pacific Northwest. This decision may be the first step toward applying CWA regulations to logging roads. In holding that the EPA cannot categorically exclude silvicultural discharges from the statutory definition of a point source, the court has created a precedent that can be used to expand the application of the NPDES program and require the EPA to account for significant sources of pollution that have previously been ignored. However, the defendants still have the opportunity to request rehearing *en banc* from the Ninth Circuit, or possibly review by the U.S. Supreme Court. Without an *en banc* reversal, this case will go back to the district court to determine whether the alleged violations occurred. Regardless of the district court's decision, precedent has now been set that discharge from logging roads that is channeled through a runoff system constitutes a point source.

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<sup>208</sup> *Id.* at 1196 (citing *Environmental Defense Center, Inc v. EPA*, 344 F. 3d 832, 863 (9th Cir. 2003)).