

THE STORMWATER CASES: A REVIEW

Sabrina Lohr-Schmidt*

<Abstract>

The “Stormwater Cases,” now pending before the Supreme Court, represent a challenge to the Environmental Protection Agency's longstanding Silvicultural Rule. If the Rule is invalidated and the Supreme Court decides that the Clean Water Act mandates National Pollution Discharge Elimination System permits for all ditches and culverts that drain stormwater from forest roads, the economic implications for both government and private industry are enormous. Although the law favors such a finding, the petitioners' strongest argument is that the nation cannot withstand the adverse economic impact that would result from upholding the Ninth Circuit's decision.

Key Words: Stormwater, runoff, Northwest Environmental Defense Center, Clean Water Act, Silvicultural Rule, agriculture, point source, nonpoint source, National Pollution Discharge Elimination System, forestry, Ninth Circuit

* Assistant Professor, Ajou University School of Law

I. Background
II. Arguments for and against upholding the Ninth Circuit's decision
III. Conclusion

I. Background

In 2006, the Northwest Environmental Defense Center sued both Oregon State and various lumber companies for violating the Clean Water Act. While the defendants prevailed at trial, Ninth Circuit ruled in favor of the NEDC upon appeal, holding that the defendants were required to obtain a National Pollution Discharge Elimination System (NPDES) permit for two public roads running through the Tillamook State Forest that the defendant companies use to conduct logging operations. Precipitation washes sediment from these roads into streams and rivers, harming the wildlife that live there.

The CWA forbids the discharge of pollutants from a “point source” into navigable U.S. waters except in cases where the polluter has successfully applied for an NPDES permit under Section 402 of the Act. A point source is defined as a “any discernable, 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... from which pollutants are or may be discharged.”¹⁾ The Act specifically exempts agricultural stormwater discharges and return flows from irrigated agriculture from the definition of point source.²⁾ In contrast, a “nonpoint source” describes pollution not traceable to one specific location or activity, but rather resulting from dispersed activities over large areas and thus difficult to regulate through individual permits.³⁾ In 1987

¹⁾ 33 USC Section 1362(14).

²⁾ An “agricultural return flow” refers to artificially applied water that is not consumed by plants or evaporation, and that eventually “returns” to an aquifer or surface water body, such as a lake or stream.

amendments to the CWA specifically mandated NPDES permitting for five categories of significant stormwater point source pollution, including runoff associated with “industrial activity.”⁴⁾

As the government authority chiefly responsible for administering the CWA, the Environmental Protection Agency promulgated the regulation known as the “Silvicultural Rule” in 1976. The EPA interpreted the CWA to mean that the only silvicultural activities for which polluters are required to obtain permits are those traceable to controlled water use by a person, in contrast to discharge from timber harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. Therefore, per the EPA's longstanding interpretation of the Silvicultural Rule, only pollution arising from “rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities” are point sources subject to the NPDES permit process.⁵⁾ After Congress amended the CWA in 1987, the EPA expanded its regulations to exempt all silvicultural activities except for the four previously defined under the Silvicultural Rule as point sources from being included under the definition of “industrial activity.”⁶⁾

The Ninth Circuit rejected the EPA's and the defendants' interpretation of both the CWA and the Silvicultural Rule, finding the intent of Congress to be unambiguous when considered in light of the plain language of the statute as well

³⁾ “The most common example of non-point source pollution is the residue left on roadways by automobiles. Small amount of rubber are worn off 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... 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.” *League of Wilderness Defenders v. US Forest Service*, 309 F.3d 1181, 1183 (9th Cir. 2012).

⁴⁾ See the EPA's website at <http://www.epa.gov/agriculture/lcwa.html>.

⁵⁾ 40 CFR 122.27. “The term [silvicultural point source] 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.” *Id.*

⁶⁾ See 40 CFR 122.26(b)(14).

as the legislative history of the CWA. The Ninth Circuit also rejected the EPA's definition of industrial activity, holding that logging is an industrial activity as that term is used in the amended section of the Act. By its own rules, the EPA applies stormwater permitting requirements to "immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility."⁷⁾ The preamble defines immediate access roads as those roads which are "exclusively or primarily dedicated for use by the industrial facility."⁸⁾ The roads at issue in this case fell within the definition of immediate access roads because not only were logging companies responsible for the roads' construction and maintenance, but also because if not for logging, the roads would not have been built at all.

The Supreme Court has accepted the State of Oregon and private industry defendants' petition for a writ of certiorari, and it will hear oral arguments for the so-called "Stormwater Cases" this fall.⁹⁾

II. Arguments for and against upholding the Ninth Circuit's decision

1. The Ninth Circuit exceeded the scope of its review under the Clean Water Act

As part of the Clean Water Act, Congress has provided for two methods by which a citizen can bring a lawsuit under the CWA. The EPA's promulgation of rules and regulations (including NPDES approvals and denials) are subject to appellate review under 33 USC Section 1369(b)(1), as long as review is sought within 120 days of the challenged action. If review of an EPA action or rule "could have been obtained" under Section 1369(b), then that action or rule may

⁷⁾ See 40 CFR 122.26(b)(14).

⁸⁾ 40 CFR 122 Part II(B).

⁹⁾ The term "Stormwater Cases" refers to both *Decker v. NEDC* as well as the related case *Georgia-Pacific West v. Northwest Environmental Defense Center*, U.S., No. 11-347, with which it has been consolidated.

not be subjected to judicial invalidation in any other civil or criminal proceeding.¹⁰⁾ Citizens may also bring civil actions against a person or agency who has allegedly violated the an EPA regulation where the EPA itself has failed to do so.¹¹⁾

In its opinion, the Ninth Circuit stated that the Silvicultural Rule was ambiguous, and that Section 1369(b) therefore posed no bar to review where there exist potential regulatory interpretations that are “textually plausible but that the agency has not contemporaneously offered and may never adopt.”¹²⁾ The very problem with this argument is that “the “EPA’s construction was made [nearly] contemporaneously with the passage of the Act, and has been consistently adhered to since.”¹³⁾ As the National Alliance of Forest Owners pointed out in its amicus curiae brief:

The preamble to the proposed [Silvicultural] Rule declared that “ditches, pipes and drains that serve only to channel, direct, and convey non-point runoff from precipitation are not meant to be subject to the § 402 permit program.” 41 Fed. Reg. at 6,282. Responding to comments on the proposed rule, EPA ultimately emphasized that “[i]nsofar as [surface] drainage serves only to channel diffuse runoff from precipitation events, it should also be considered nonpoint in nature.” 41 Fed. Reg. at 24,711. ...[T]here was nothing obscure about the point at all. It was specified in the rulemaking and, for good measure, described as a reflection of EPA’s expressed approach to silvicultural (and agricultural) activities.

Decker v. Northwest Environmental Defense Center, Georgia-Pacific West, Inc. v. Northwest Environmental Defense Center, Amici Curiae Brief (National Alliance of Forest Owners, et al. in support of Petitioners), US Nos. 11-338, 11-347, p. 24 (2012).

¹⁰⁾ 33 USC 1369(b).

¹¹⁾ 33 USC 1365(a)(1).

¹²⁾ NEDC v. Brown, 640 F.3d 1063, 1068-69 (9th Circuit 2010).

¹³⁾ Nat’l Wildlife Fed’n v. Gorsuch, 693 F.2d 156, 167 (D.C. Cir. 1982).

The better argument on NEDC's behalf is that Section 1369(b) does not apply because the NEDC is seeking not to challenge any administrative action but rather to *enforce* EPA regulations where the EPA itself has failed to do so. In order to effectively evaluate NEDC's argument, the Ninth Circuit necessarily had to decide whether the CWA required the defendants to seek NPDES permits, and in order to answer that question the Ninth Circuit had to interpret the Silvicultural Rule itself. “[W]hen a court adopts a purposeful but permissible reading of a regulation [such as the Silvicultural Rule] to bring it into harmony with its view of the statute, the court does not run afoul of . . . Section 1369(b) because such judicial action is not a determination that the regulation as written is invalid.”¹⁴⁾

More importantly, Section 1369(b) applies only where a citizen wishes to challenge one of seven specific categories of administrative action—most often, a citizen would use it to challenge the issuance or denial of an NPDES permit.¹⁵⁾ The statute contains no language extending to cover all NPDES regulations,¹⁶⁾ and it is unclear on what grounds the petitioners are basing their argument that the promulgation of the Silvicultural Rule is an action that fell within one of the aforementioned seven categories.

2. The Ninth Circuit failed to accord the EPA's interpretation of the Silvicultural Rule due deference under Chevron

¹⁴⁾ Decker v. Northwest Environmental Defense Center, Georgia-Pacific West, Inc. v. Northwest Environmental Defense Center, Brief for Respondent, US Nos. 11-338, 11-347, p. 9 (2012).

¹⁵⁾ (A) promulgating any standard of performance under section 1316 of this title [national standards of performance], (B) making any determination pursuant to section 1316(b)(1)(C) of this title, (C) promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 [Toxic and pretreatment effluent standards] of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l) of this title.” 33 USC Section 1369(b).

¹⁶⁾ Id. at 23-24.

Chevron determines what standard of review should be applied by a court to a government agency's interpretation of a statute it is charged with administering by mandating a two step analysis by the reviewing court. Step one requires the court to employ the traditional tools of statutory construction to determine whether Congress has unambiguously spoken as to the precise question at issue. If the court determines that the statute is unambiguous, then the expressed intent of Congress controls. However, if the statute is silent or ambiguous with regard to this issue, the court must then determine if the EPA's interpretation of the Silvicultural Rule is based on a permissible construction of the CWA. If so, then the agency interpretation controls.¹⁷⁾ However, if the EPA's construction of the statute is impermissible, then the reviewing court is not bound to defer to the EPA's interpretation of the CWA.

From the plain language of the Act, it seems quite clear that the CWA meant ditches and channels—such as those at the heart of the Stormwater Cases—to be considered point sources.¹⁸⁾ Furthermore, statements made during the deliberations leading up to the creation of the CWA make it quite clear that “if a man-made drainage, ditch, flushing system or other such device is involved and if measurable waste results and is discharged into water, it is considered a point source.”¹⁹⁾ However, the issue in these cases may be more properly construed as whether or not under the CWA Congress intended to grant the EPA the power to define silvicultural sources as point or nonpoint. The EPA's interpretation of the CWA was not mandated by Congress but rather adopted based on the EPA's rulemaking authority under Section 501(a) of the CWA.²⁰⁾ However, Congress did not manifest express intent *not* to allow the EPA to define silvicultural sources as it did, thus rendering the Act ambiguous with regard to this issue.²¹⁾ Proceeding to the second

¹⁷⁾ *NEDC v. Brown*, 640 F.3d 1063, 1068 (9th Circuit 2010).

¹⁸⁾ A point source is “any discernable, confined and discrete conveyance, including ... any pipe, ditch, channel, tunnel, [or] conduit... from which pollutants are or may be discharged.” 33 USC Section 1362(14).

¹⁹⁾ 117 Cong. Rec. 38816 (Nov. 2, 1971)

²⁰⁾ *Environmental Protection Information Center v. Pacific Lumber Co.*, 2003 US Dist. Lexis 25734, *39 (N.D. Cal. 2003).

²¹⁾ *Id.*

step of *Chevron* analysis, the Silvicultural Rule is only based on a permissible interpretation of the CWA if it supplements rather than controverts the definition of “point source” under 33 USC 1362. The Silvicultural Rule may not redefine existing point sources as nonpoint sources and still stand.²²⁾ Where the elaborate water runoff systems such as those at issue in this case involve surface drainage from which there is natural runoff,” the Silvicultural Rule may properly control.²³⁾ However, where the runoff system uses manmade conduits and channels, it is trumped by the very clear definition of point source contained in 33 USC 1362(14).²⁴⁾

The National Governors' Association moreover argues that *Chevron* should apply based not on objective factors but rather that the courts should grant the EPA's construction of the CWA deference because the Silvicultural Rule limits the reach of the CWA and therefore prevents the Act from intruding into areas traditionally regulated by state and local governments.²⁵⁾ The amici state that where an agency interprets an ambiguous statute as expanding federal jurisdiction, the *Chevron* doctrine should not be applied because it diverges from the principles of federalism, but where the agency interpretation of an ambiguous statute limits federal jurisdiction, *Chevron* deference should be applied because it converges with the principles of federalism.²⁶⁾ To support this contention, the amici rely chiefly on *Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers* (“SWANCC”)²⁷⁾ and *Rapanos v. United States*.²⁸⁾ In both of these cases the Supreme Court refused to extend *Chevron* deference to the agency interpretation at issue absent a clear showing that Congress intended to upset the longstanding balance of state and federal power. However, it does not logically follow that the

22) Id. at *45.

23) Id. at *49.

24) Id. at *49-50,

25) *Decker v. Northwest Environmental Defense Center, Georgia-Pacific West, Inc. v. Northwest Environmental Defense Center, Amici Curiae Brief* (National Governors' Association, et al. in support of Petitioners), US Nos. 11-338, 11-347, p. 16 (2012).

26) Id. at 17-18.

27) 531 US 159 (2001).

28) 547 US 715 (2006).

Supreme Court would also extend Chevron deference to an agency interpretation that limits federal jurisdiction. It is true that the Court upheld such an agency regulation in *National Association of Home Builders v. Defenders of Wildlife*,²⁹⁾ but in that case its analysis was unconcerned with the principles of federalism.

The Clean Water Act was enacted with the dual goals of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the nation's waters,” and also to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution... [and] to plan the development... of land and water resources.”³⁰⁾ In creating the CWA, Congress clearly envisioned a partnership between federal, state, and local governments in controlling water pollution.³¹⁾ The petitioners' amici argue that because “Congress has authorized state and local governments to regulate nonpoint sources of pollution, there is no basis for the Ninth Circuit's concern that silvicultural stormwater runoff will be unregulated and the CWA's goals impaired unless such runoff is held to be a point source discharge subject to regulation under the NPDES.”³²⁾ However, just because Congress has granted the states authority to regulate stormwater runoff does not mean state governments will in reality be diligent about doing so.

The adequacy of state forestry guidelines and enforcement is widely variable. Washington state has adopted a habitat conservation plan across 9.3 million acres and 60,000 miles of streams on forest lands within the states which expanded buffer zones around rivers, and created a new program to improve forest roads and culverts. In contrast, conservation measures in Oregon state are largely left up to the discretion of private landowners. States and rural counties that rely on timber revenue to fund public services will often look the other way when it comes to enforcement.³³⁾ According to fishery scientist Chris Frissell, even when

²⁹⁾ 551 US 644 (2007).

³⁰⁾ 33 USC Section 1251(a-b).

³¹⁾ Decker v. Northwest Environmental Defense Center, Georgia-Pacific West, Inc. v. Northwest Environmental Defense Center, Amici Curiae Brief (National Governors' Association, et al. in support of Petitioners), US Nos. 11-338, 11-347, p. 9 (2012).

³²⁾ Id. at p. 9-10.

³³⁾ Joshua Zaffos, “Oregon ignores logging road runoff, to the peril of native fish.” High

state-created guidelines are strict, they are often not enforced until projects are underway and it is too late to prevent harm. The federal NPDES review process mandates a more thorough review of polluter activity.³⁴⁾

3. Runoff from forest roads constitutes an “agricultural stormwater discharge” which is expressly exempted from the definition of point source discharge under the Clean Water Act

The petitioners and their amici have also argued that silviculture is in reality just a type of agriculture, as it involves the harvest and processing of plants. From that argument it follows that the “agricultural stormwater discharge” point source exception also includes silvicultural stormwater discharges, and it would be strange for Congress to exempt agricultural activities from the definition of “point source” but not do the same for silvicultural activities.³⁵⁾ However, a deeper analysis of the differences between the two fields as well as court precedent renders this reasoning unpersuasive.

Agriculture and silviculture are fundamentally different activities. Whereas silviculture involves the periodic harvest of wild trees, the term agriculture refers to the care and nurture of domesticated species of plants and animals.³⁶⁾ Moreover, silviculture and agriculture cause environmental harm in different ways. Erosion due to rainfall on croplands is not a significant threat to the environment.³⁷⁾

Country News, June 23, 2012.

³⁴⁾ Id.

³⁵⁾ Decker v. Northwest Environmental Defense Center, Georgia-Pacific West, Inc. v. Northwest Environmental Defense Center, Amici Curiae Brief (National Governors Association, et al. in support of Petitioners), US Nos. 11-338, 11-347, p. 10 (2012).

³⁶⁾ This is not to say that agriculture cannot involve raising trees as crops, but the issue in this case is silviculture involving naturally occurring forests.

³⁷⁾ A study examining gully erosion from agricultural regions in the Pacific Northwest made the following findings:

[T]he sediment load directly from ephemeral gullies in the Potlatch subbasins is relatively small representing only 2.3 to 7.7 percent of the total surface sediment load. While these percentages may change somewhat due to climatic weather conditions (particularly rain-on-snow events), the average sediment yields from ephemeral gullies found in this particular watershed do not represent significant amounts of soil loss compared to the USDA tolerance value.

Where significant erosion of farmland does take place, it is usually due to wind rather than water.³⁸⁾ Issues relating to agricultural pollution are focused on the contamination of runoff and groundwater due to the accumulation waste products and toxins such as nitrates and pesticides.³⁹⁾

In the mountainous terrain where silvicultural operations most often take place, the effect of runoff from impervious road surfaces is “often insignificant compared with the conversion of slow moving groundwater to fast moving surface water at cutbanks by roads. Surface water is then carried by roadside ditches, some of which connect directly to streams while others drain to culverts with gullies incised below their outlets.”⁴⁰⁾ In other words, the most significant harm to the environment from forest roads comes not from chemical transport, but from sediment deposits. Forest roads are often unpaved and heavy rains result in landslides that deposit sediment directly into streams and rivers. According to Mary Ann Madej, “Road cuts and drainage structures, such as culverts, can disrupt natural drainage patterns. Stream crossings fail when culverts plug with sediment or wood, or are too small to convert storm discharge. In these cases, the road fill at the stream crossing may be removed by erosion. Drainage structures can divert streams out of their natural course onto unchannelled hillslopes when the structures fail to function properly.”⁴¹⁾ For example, in the Redwood Creek catchment of northern coastal California, clearcut logging with tractor yarding as well as widespread construction of haul roads and smaller skid roads resulted in extensive ground disturbance and large swaths of bare soil. 77% of the erosion in the area

Michael E. Barber, Robert L. Mahler, Ephemeral gully erosion from agricultural regions in the Pacific Northwest, USA, *Annals of Warsaw University of Life Sciences - SGGW Land Reclamation* No 42 (1), 2010: 23 - 29, page 27.

³⁸⁾ EPA Website on “Soil Preparation,” <http://www.epa.gov/oecaagct/ag101/cropsoil.html>.

³⁹⁾ Elizabeth Covalla, *Managing Agricultural Water Impacts* (available at <http://wingolog.org/writings/water/html/e497.html>).

⁴⁰⁾ *Roads and their major ecological effects*, Richard T.T. Forman and Lauren E. Alexander (Annu. Rev. Ecol. Syst. 1998)

⁴¹⁾ Mary Ann Madej, *Erosion and Sediment Delivery Following Removal of Forest Roads* (2001) (available at http://www.krisweb.com/biblio/redwood_usgs_madej_2001_erosionandsediment.pdf).

could be attributed to resulting road fill failures, and 74% of this erosion spilled into local streams.⁴²⁾ Levels of suspended sediment in the waters of harvested areas were 10 times that of the level of unharvested areas within the same region.⁴³⁾

In addition to the fundamental differences between agriculture and silviculture, court analysis of the agricultural stormwater runoff exception explains why the wording of the exception cannot also be read to cover all stormwater discharges from forest roads. Although the term “agricultural” is not defined by the Clean Water Act and no court has ever ruled on the question of whether silviculture is indeed equivalent in meaning to the term “agriculture” within the scope of the CWA, it is clear that courts do not consider all activities related to raising crops and livestock to be “agricultural.” *Concerned Area Residents for the Environment v. Southview Farms*⁴⁴⁾ involved liquid manure spreading at a dairy farm. The manure operations were largely performed through the use of storage lagoons with a capacity of approximately six-to-eight million gallons of liquid cow manure. This manure would then be spread on crop fields in an area separate from where the cows were kept. On rainy days, the manure was observed mixing with runoff and discharging through a pipe on the property into a local stream. While the court agreed that agricultural stormwater run-off has always been considered nonpoint source pollution exempt from the Clean Water Act, it defined the real issue as “not whether the discharges occurred during rainfall or were mixed with rain water run-off, but rather, whether the discharges were the result of precipitation. Of course, all discharges eventually mix with precipitation run-off in ditches or streams or navigable waters so the fact that the discharge might have been mixed with run-off cannot be determinative.”⁴⁵⁾ Rather, the runoff did not qualify as a nonpoint source of pollution because the jury had reason to believe that the

42) Id.

43) Id.

44) 34 F.3d 114 (2nd Cir. 1994).

45) Id. at 39.

run-off was “primarily caused by the over-saturation of the fields rather than the rain and that sufficient quantities of manure were present so that the run-off could not be classified as 'stormwater.’”⁴⁶⁾

The reasoning from *Concerned Area Residents for the Environment* can easily be applied to stormwater discharges carrying heavy loads of sediment from forest road fills, at least on a case-by-case basis. Where sediment is present in the stormwater in such great amounts that the runoff can no longer be classified as “stormwater,” then according to this analysis the conveyance by which the polluted water is delivered is no longer exempt from the definition of “point source.”

United States v. Frezzo Brothers, Inc. is also instructive. The petitioners in that case operated a mushroom growing business which also produced mushroom compost for growing the mushrooms. On six different occasions, rainwater mixed with material from the compost tank, which then discharged through a separate drainage system into a creek.⁴⁷⁾ The court reasoned that although mushroom growing is a type of farming, the production of the mushroom compost was an activity preliminary to farming rather than farming itself. In other words, the court considered the runoff from the compost to be separate from the agricultural process and therefore subject to discharge regulation. The court also considered the fact that the compost had a purpose independent of mushroom production (it was sold to other mushroom growers for profit) to be significant.⁴⁸⁾ Likewise, the construction of forest roads can be argued to have a purpose independent of silviculture--forest roads serve the nonsilvicultural function of providing public access to forest lands for recreation.

Although the term “agriculture” is not defined within the CWA, it is defined under the Fair Labor Standards Act, which like the CWA contains an exemption for certain activities relating to agriculture.⁴⁹⁾ The FLSA defines agriculture as

⁴⁶⁾ Id. at 40.

⁴⁷⁾ 546 F.Supp. 713, 21.

⁴⁸⁾ Id. at 23.

⁴⁹⁾ Employers are not required to pay overtime to employees performing “agricultural” activities within the scope of the FLSA.

including “farming in all its branches,” including the “cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities ... and any practice performed by a farmer or on a farm as an incident to or in conjunction with such farming operations... .”⁵⁰⁾ Under the FLSA, activities such do not fall under the definition of “primary agriculture” unless they are performed for the purpose of producing a specific agricultural or horticultural commodity.⁵¹⁾ Applying the same definition of “agricultural” to the construction of forest roads, it is easy to see that the construction of forest roads could not be considered “agriculture” because they are built not for the purpose of producing a specific agricultural product, but primarily to access a product that already exists and secondarily to provide public access to forest lands. “ Road construction is not ”cultivation and tillage of the soil,“ but rather falls under a class of operations which are merely preliminary, preparatory, or incidental to the operations whereby commodities are actually produced and thus does not come within the scope of the definition of agriculture.⁵²⁾ http://www.dol.gov/WHDOpinion/FLSA/2005/2005_01_11_11_FLSA_BrushEradication.htm

III. Conclusion

Though there are strong legal arguments to be made for both sides, a purely objective approach favors the NEDC. The EPA promulgated the Silvicultural Rule despite acknowledging that “some point sources within the excluded categories are significant sources of pollution that should be regulated under the CWA,” because it would be difficult given government resources to issue individual permits to all

⁵⁰⁾ 29 CFR 780.144

⁵¹⁾ 29 CFR 780.117(a)

⁵²⁾ US Department of Labor, Hour and Wage Division, FLSA 2005-11 (January 11, 2005) (available at http://www.dol.gov/WHDOpinion/FLSA/2005/2005_01_11_11_FLSA_BrushEradication.htm)

such point sources. 40 Fe. Reg. 56932. This directly contravenes Congressional intent in creating the CWA.⁵³⁾

However, one cannot ignore the fact that upholding the Ninth Circuit's interpretation of the Clean Water Act may result in significant negative effects on local and state governments as well as timber-related industries. This is perhaps the most compelling argument for reversing the Ninth Circuit's decision, though it does not relate to a strict and logical interpretation of the CWA. There are 386,000 miles of forest roads on federal lands alone, not to mention those contained on land owned by state and local governments (24% of the total forests in the U.S.). Obtaining an NPDES permit is a time-consuming process which can take up to five years. Because the "operator" of the industrial facility producing the pollutant is required to obtain the NPDES permit for each point source contained on his or her property, in most cases it would be the government owning the land that winds up bearing the cost of obtaining the permit. In other cases, it would be the operator of the logging facility. In addition to requiring years to complete, the process of obtaining a permit is an expensive one. This burden would inevitably be passed on to taxpayers, reduce public revenue from lumber operations, and discourage the construction of new roads, reducing public access to forest lands. Additionally, the increased costs for private operators would deliver a heavy blow to what is already an ailing industry, driving up the prices of logging-related products and forcing employers to slash jobs.⁵⁴⁾ Should the new

53) "There are innumerable references in the legislative history to the effect that the Act is founded on the basic premise that a discharge of pollutants without a permit is unlawful and that discharges not in compliance with the limitations and conditions for a permit are unlawful. Even when infeasibility arguments were...raised, the legislature declined to abandon the permit requirement." Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1375-76 (D.C.Cir.1977).

54) "The collapse in the U.S. housing market in 2006 followed by a 'Great Recession' in the U.S. (December of 2007 to June of 2009)... led to the U.S.'s worst housing and wood products market conditions since the 1930s Great Depression. U.S. housing starts were 554,000 in 2009. This is the lowest level in over 50 years, with only a slight increase in 2010 and 2011. Wood product prices and outputs of the wood and paper products industries fell dramatically during the recession and ensuing slow recovery. This 'Great Recession' and aftermath have had immediate and large impacts on the forest products industry, employment, and regional, and local economies. To illustrate,

rule be implemented, National Association of Forest Owners has predicted a yearly cost of \$654 million for private forest owners in California, Oregon, Washington, Idaho and Montana alone.⁵⁵⁾ In the southern United States, NAFO estimates that 33,000 to 183,000 timber harvests operations would be required to renew their NPDES forest road permits each year, to a cumulative annual cost of between \$420 million to \$4 billion (not including additional costs to timber landowners resulting from litigation and permit challenges). The costs of preparing, implementing, and monitoring NPDES forest roads permit would in turn decrease net timber sales returns by 19% for larger harvest tracts of 80 acres, and 71% for average size forest tracts of 32 acres typical of smaller forest owners.⁵⁶⁾ Costs for the state governments are also expected to mount, as the 46 states that administer their own NPDES permits will be responsible for overseeing the large amounts of studies that must be performed before each permit is issued.⁵⁷⁾

U.S. softwood lumber consumption and production were at record high levels in 2005, but by 2009 had fallen by 50% and 43%, respectively. Softwood lumber consumption and production during 2009 and 2010 were at their lowest levels since the late 1940s. Other major sectors such as paper were not as severely impacted as softwood lumber, but experienced declines in output, production value, and employment...

Between 2005 and 2009, over 1.1 million jobs have been lost in six forestry, forest products, and related sectors of the U.S. economy. Three primary sectors in the forestry and forest products industries are forestry & logging (North American Industrial Classification System; NAICS 113), wood manufacturing (NAICS 332), and paper manufacturing (NAICS 321) which lost 14,631, 218,677, and 89,507 jobs, respectively, for a total of 322,805 primary sector jobs. Related sectors include furniture and related manufacturing (NAICS 337), residential construction (NAICS 3261), and furniture retail (NAICS 422) which lost 208,908, 388,725, and 138,065 jobs, respectively, for a total of 735,767 related sector jobs. These six sectors do not fully represent the scope of job losses associated with the U.S. forest sector, but provide a sense of the magnitude of the impact on the nation's forest industry and related work force. By comparison, employment in the transportation equipment manufacturing group (including automotive industry) declined by 25% over the same period (440,000 workers)."

C.W. Woodwall, An overview of the forest products sector downturn in the United States. *Forest Products Journal*, Vol. 61 Issue 8 (Nov. 2011).

⁵⁵⁾ Joshua Zaffos, "Oregon ignores logging road runoff, to the peril of native fish." *High Country News*, June 23, 2012.

⁵⁶⁾ Frederick Cabbage and Robert Abt, *Potential Administrative and Economic Impacts of NPDES Permit Requirements for Forest Roads in the South* (report prepared for NAFO), p. 3 (available at <http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-South1.pdf>).

At the same time, one should consider that these projected costs are still speculative. Furthermore, even assuming that NAFO's projections are correct, one must also consider the cost to the environment of leaving timber operations poorly regulated. It will be up to the Supreme Court, and ultimately Congress, to balance these competing considerations when interpreting or revising the Clean Water Act.

투고일자 2012.10.26, 심사일자 2012.11.23, 게재확정일자 2012.11.26

⁵⁷⁾ The administrative costs for state agencies to run the regulatory programs would also cost millions of dollars per year in large states, and as much as \$1 million per year in small states.

[REFERENCE LIST]

Statutes and Administrative Regulations

The Clean Water Act, 33 USC Sections 1251(a-b).1362, 1365, 1369

29 CFR 780.117, 780.144

40 CFR 122 Part II, 122.6, 122.27

Cases

Concerned Area Residents for the Environment v. Southview Farms, 34 F.3d 114
(2nd Cir. 1994)

Environmental Protection Information Center v. Pacific Lumber Co., 2003 US Dist.
Lexis 25734, *39 (N.D. Cal. 2003)

League of Wilderness Defenders v. US Forest Service, 309 F.3d 1181 (9th Cir.
2012)

National Association of Home Builders v. Defenders of Wildlife, 551 US 644
(2007)

National Environmental Defense Center v. Brown, 640 F.3d 1063 (9th Circuit
2010)

Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1375-76
(D.C.Cir.1977)

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982)

Rapanos v. United States, 547 US 715 (2006)

Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers,
531 US 159 (2001)

United States v. Frezzo Brothers, Inc., 546 F.Supp. 713 (E.D. 1982)

Other

*Decker v. Northwest Environmental Defense Center, Georgia-Pacific West, Inc. v.
Northwest Environmental Defense Center*, Brief for Respondent, US Nos.
11-338, 11-347 (2012)

Decker v. Northwest Environmental Defense Center, Georgia-Pacific West, Inc. v.

- Northwest Environmental Defense Center, *Amici Curiae Brief* (National Governors Association, et al. in support of Petitioners), US Nos. 11-338, 11-347 (2012)
- Decker v. Northwest Environmental Defense Center, *Georgia-Pacific West, Inc. v. Northwest Environmental Defense Center, Amici Curiae Brief* (National Alliance of Forest Owners, et al. in support of Petitioners), US Nos. 11-338, 11-347, p. 24 (2012)
- 117 Cong. Rec. 38816 (Nov. 2, 1971)
- Joshua Zaffos, “Oregon ignores logging road runoff, to the peril of native fish.” *High Country News*, June 23, 2012.
- Michael E. Barber, Robert L. Mahler, Ephemeral gully erosion from agricultural regions in the Pacific Northwest, USA, *Annals of Warsaw University of Life Sciences - SGGW Land Reclamation* No 42 (1), 2010: 23 - 29, page 27.
- EPA Website on “Soil Preparation,” <http://www.epa.gov/oecaagct/ag101/cropsoil.html>.
- Elizabeth Covalla, *Managing Agricultural Water Impacts* (available at <http://wingolog.org/writings/water/html/e497.html>).
- Roads and their major ecological effects, Richard T.T. Forman and Lauren E. Alexander (*Annu. Rev. Ecol. Syst.* 1998)
- Mary Ann Madej, *Erosion and Sediment Delivery Following Removal of Forest Roads* (2001) (available at http://www.krisweb.com/biblio/redwood_usgs_madej_2001_erosionandsediment.pdf).
- US Department of Labor, Hour and Wage Division, *FLSA 2005-11* (January 11, 2005) (available at http://www.dol.gov/WHD/opinion/FLSA/2005/2005_01_11_11_FLSA_BrushEradication.htm)
- C.W. Woodwall, An overview of the forest products sector downturn in the United States. *Forest Products Journal*, Vol. 61 Issue 8 (Nov. 2011).
- Frederick Cubbage and Robert Abt, *Potential Administrative and Economic Impacts of NPDES Permit Requirements for Forest Roads in the South* (report prepared for NAFO), p. 3 (available at <http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-South1.pdf>).

<국문초록>

폭우 소송

Sabrina Lohr-Schmidt*

미국 대법원에 계류 중인 “폭우 소송”은 미국 환경보호청(Environmental Protection Agency)의 오랫동안 유지된 임업규칙에 도전하고 있다. 2006년, Northwest Environmental Defense Center는 Oregon 주와 목재회사 등을 상대로 연방수질법(Clean Water Act)위반을 이유로 소를 제기하였다. 제9 순회법원은 그의 판단에서, 연방수질법과 미국 환경보호청의 임업규칙에 관한 기존의 해석을 부정하는 결정을 한다. 연방수질법 그리고 환경보호청의 기존의 해석을 거부한 이러한 판단은 그러한 근거가 가히 부당하다고 볼 수만은 없겠으나, 당해 지역과 주정부 그리고 관련된 목재 산업에 상당한 부정적인 효과를 야기하게 된다. 만약 동 규칙이 현행법과 합치하지 않으며 산림도로에서 흐르는 모든 폭우의 배수로에 연방수질법의 국가오염방출제거시스템 허가제를 적용해야 한다는 판시를 대법원이 내린다면, 이로 인한 민·관의 경제적 부담은 엄청날 것으로 예상된다. 비록 법률 해석상 그러한 판결이 유리하다고 할지라도 원고의 가장 강력한 주장은 하급법원의 판결을 인정하여 발생한 경제적 피해가 너무 크다는 것이다. 즉 개인 사업자의 증가된 비용은 목재 관련 제품의 가격 상승을 야기할 것이고 결국 고용주는 고용인의 감원을 강요받게 될 것이다. 따라서 Oregon 주와 사기업 등의 상고청원(petition for a writ of certiorari)을 수락한 대법원의 결정을 주목한다.

주제어 : 폭우, 방출, 서북부 환경보전센터, 연방수질법, 임업규칙, 농업, 점오염원, 비점오염원, 국가오염방출제거시스템, 산림, 제9 순회법원

* 아주대학교 법학전문대학원 조교수