Northwest Environmental Defense Center v. Brown: Delivering the Back Cuts? The Ninth Circuit Leaves the Silvicultural Rule in the Balance

I. OVERVIEW OF THE CASE

Oregon's Tillamook State Forest (Tillamook) is a productive timber range supporting several logging operations.[1] Two logging roads cut through Tillamook, providing the local silviculture industry access to logging sites and a means to haul timber out of the forest.[2] Both roads feature a system of ditches, culverts, and channels that convey stormwater runoff to either the South Fork Trask River or the Little South Fork of the Kilchis River, sometimes via intermediary streams.[3] This runoff is laden with nontoxic pollutants, primarily sediment and small rocks, which adversely affect aquatic life upon entering the rivers and streams—smothering roe, reducing oxygen levels, interfering with feeding, and burying insects that provide food for fish.[4] The roads and associated stormwater collection systems are maintained by logging companies pursuant to their timber sales contracts with the State of Oregon.[5]

The Northwest Environmental Defense Center (NEDC) brought suit in the United States District Court for the District of Oregon against Oregon State Forester Marvin Brown, members of the Oregon Board of Forestry, and several logging companies (collectively Defendants) operating in Tillamook, claiming that the logging roads' stormwater discharge systems were point sources under the Clean Water Act (CWA or Act), and therefore, Defendants were in violation of the CWA by failing to obtain discharge permits under the National Pollutant

1. *See* Nw. Envtl. Def. Ctr. v. Brown, 617 F.3d 1176 (9th Cir. 2010).
2. *Id.* at 1179.
3. *Id.*
4. *Id.* at 1180.
5. *Id.* at 1179.

Discharge Elimination System (NPDES).[6] The district court dismissed NEDC's suit after concluding that the discharge systems were exempt from NPDES permitting requirements under the Silvicultural Rule, which designates discharges associated with silvicultural activities that result from natural runoff as nonpoint source discharges, effluents that do not require NPDES permits.[7] On appeal, the United States Court of Appeals for the Ninth Circuit *held* that the Silvicultural Rule does not exempt polluted stormwater runoff that is discharged from logging roads into streams and rivers through a discernable, confined, and discrete conveyance system from NPDES permitting requirements. *Northwest Environmental Defense Center v. Brown*, 617 F.3d 1176 (9th Cir. 2010).

II. BACKGROUND

In 1948, Congress passed the Federal Water Pollution Control Act (FWPCA), establishing a cohesive national policy addressing the control of water pollution.[8] Issues arose relating to enforcement and rulemaking authority, to which Congress responded in 1972 by amending the FWPCA to form the CWA, a comprehensive statute intending to restore and maintain the "chemical, physical, and biological integrity of the Nation's waters."[9] To realize this goal, the CWA imposed a general prohibition against the discharge of any pollutant by any person into navigable waters.[10] A discharge is defined as the "addition of any pollutant to navigable waters from any point source."[11]

Congress intended the FWPCA, and the CWA as its subsequent construction, to be a tough law enforced in spite of the bureaucratic difficulties inherent to the addition of significant administrative responsibilities.[12] Compounding these difficulties are the "precise standards and definite guidelines on how the environment should be protected" provided by the Act.[13] Congress provided a rigid framework

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6. Nw. Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188, 1191 (D. Or. 2007).

7. *Id.* at 1197.

8. Act of June 30, 1948, 62 Stat. 1155.

9. 33 U.S.C. § 1251(a) (2006); *see* EPA v. State of California, 426 U.S. 200, 202 (1976) (noting the mistaken focus of FWPCA standards on the tolerable effects rather than the preventable causes of water pollution, and the awkward character of the shared responsibility for promulgating FWPCA standards).

10. 33 U.S.C. § 1311(a).

11. *Id.* § 1362(12).

12. *See, e.g.*, Natural Res. Def. Council v. Costle, 568 F.2d 1369, 1375 (D.C. Cir. 1977) (highlighting legislative history demonstrating Congress's intention that "the FWPCA was a tough law that relied on explicit mandates to a degree uncommon in legislation" of a similar kind).

13. *Id.* (quoting 117 Cong. Rec. 38,805 (1971)).

through the unambiguous statute, within which the EPA would promulgate regulations, and expected the EPA to stay within these boundaries.[14]

The Act exempts certain discharges from the prohibition, including agricultural stormwater discharges and return flows from irrigated agriculture.[15] It additionally provides that prohibited discharges are permissible as long as the discharge is regulated pursuant to an NPDES permit.[16] NPDES permits "place limits on the type and quantity of pollutants" that can be discharged.[17] The permits function as the mechanism of agency enforcement of the CWA;[18] any discharge not exempted by the CWA is unlawful without an NPDES permit.[19]

Discharges not expressly exempted within the language of the CWA require an NPDES permit if the discharge constitutes a "point source." A point source is defined in the Act as:

> [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. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.[20]

Discharges falling outside this definition are known as nonpoint source discharges and do not require NPDES permits.[21] The CWA does not define "nonpoint source," but in practice the term is understood to identify pollution arising from "dispersed activities over large areas" that are "not traceable to any discrete source."[22] To illustrate this concept, the Ninth Circuit identified rubber and copper residue left on highways by automotive traffic as an example of nonpoint source pollution, and noted that nonpoint source pollution is the largest source of water pollution in the United States.[23] The primary considerations in determining whether a discharge is a point source is the extent to which discharge is controlled

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14. *See, e.g.*, *id.*
15. 33 U.S.C. § 1362.
16. *See id.* §§ 1311(a), 1342(a).
17. Natural Res. Def. Council v. EPA, 542 F.3d 1235, 1238-39 (9th Cir. 2008) (quoting S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102 (2004).
18. Jeffery M. Gaba, *Generally Illegal: NPDES General Permits under the Clean Water Act*, 31 HARV. ENVTL. L. REV. 409, 410 (2007).
19. 33 U.S.C. § 1311(a).
20. *Id.* § 1362(14) (emphasis added).
21. League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181, 1183 (9th Cir. 2002).
22. *Id.* at 1184.
23. *Id.*

and the extent to which the discharge system is a conveyance of a pollutant.[24] The source of the discharge and the type of pollutants ferried by the discharge have no effect on the discharge's classification as a point source subject to the NPDES permitting process. Instead, the determination is based on "whether the pollution reaches the water through a confined, discrete conveyance."[25]

The CWA instructed the EPA to create a permitting system for all point source discharges of stormwater, but, more than ten years after passage of the Act, the EPA had yet to establish any such system.[26] Congress acknowledged that the difficulty was caused at least in part by the large number of stormwater discharges that qualified as point sources.[27] To alleviate this administrative burden, Congress passed the 1987 Stormwater Amendments to the CWA, which established a two-tiered process for stormwater permitting in which stormwater discharges that were major contributors of pollutants were to be addressed first in Phase I regulations, and less damaging sources were left to later Phase II regulations that would be promulgated following agency study.[28] Congress identified stormwater discharges subject to Phase I regulations as discharges with respect to which an NPDES permit had been issued before February 4, 1987, discharges from municipal separate storm sewer systems serving a population of 100,000 or more, discharges for which the EPA or state determines contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States, and discharges associated with industrial activity.[29] A stormwater discharge associated with industrial activity means any "discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant."[30]

After the passage of the FWPCA, the EPA promulgated regulations exempting certain categories of discharges from the requirements of the NPDES permit program.[31] These discharges fell within the definition of

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24. *See, e.g.*, S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004).

25. Trustees for Alaska v. EPA, 749 F.2d 549, 558 (9th Cir. 1984).

26. Nw. Envtl. Def. Ctr. v. Brown, 617 F.3d 1176, 1194 (9th Cir. 2010).

27. *Id.* (citing 131 Cong. Rec. 19,846, 19,850 (July 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.")).

28. *Id.*

29. 33 U.S.C. § 1342(p)(2)(b) (2006).

30. 40 C.F.R. § 122.26(b)(14) (2006).

31. *Brown*, 617 F.3d at 1184.

point source but were determined by the EPA to be ill-suited for the NPDES program, primarily because of the difficulty in issuing individual permits to each discharge.[32]

Among the exemptions was the Silvicultural Rule, which in its originally proposed form exempted all discharges associated with silvicultural activities from NPDES permitting requirements, except those identified by administrative personnel as a significant contributor of pollution.[33] The rule was attacked almost immediately as an unjustified exercise of EPA discretion.[34] This broad exemption for silvicultural activities was invalidated by the Unites States Court of Appeals for the District of Columbia Circuit in *Natural Resources Defense Council v. Costle*.[35] The court held that the EPA administrator does not have the authority to remove entire classes of discharges from the statutory definition of point source, as such an action would be directly adverse to the Act's intent.[36] Instead, the court concluded that EPA discretion was limited to shaping regulations "not inconsistent with the clear terms of the Act."[37]

The EPA revised the Silvicultural Rule in an attempt to conform to the *Costle* holding, identifying specific silviculture activities that qualify as point sources subject to NPDES permit requirements and activities that are nonpoint sources.[38] The relevant portion of the current Silvicultural Rule reads:

> *Silvicultural point source* means 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. *The 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*.[39]

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32. National Pollutant Discharge Elimination System, 40 Fed. Reg. 56,932 (Dec. 5, 1975).

33. 40 C.F.R. § 125.4 (1974).

34. *See* Natural Res. Def. Council v. Train, 396 F. Supp. 1393 (D.D.C. 1975) *aff'd sub nom.* Natural Res. Def. Council v. Costle, 568 F.2d 1369 (D.C. Cir. 1977).

35. 568 F.2d 1369 (D.C. Cir. 1977).

36. *Id.* at 1382.

37. *Id.*

38. *See* 40 C.F.R. § 122.27 (2006).

39. *Id.* (emphasis added).

While promulgating the revised rule, the EPA emphasized the motivation for previously exempting the entire class of silvicultural discharges: its belief that it would be "administratively difficult if not impossible . . . to issue individual permits to all" silvicultural stormwater discharges.[40] Additionally, the EPA stated that only silvicultural activities that discharge pollutants "as a result of controlled water use by a person" are point sources subject to NPDES permits,[41] a position evidenced by the rule's classification of discharges that result from natural runoff as nonpoint sources.[42]

Inherent to any analysis of EPA regulations is an examination of an agency's authority to interpret a statute. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the United States Supreme Court defined the permissible scope of a federal agency's interpretation of a statute which it administers.[43] The Court established a two-part test in *Chevron*, requiring that a court first determine whether "Congress has directly spoken to the precise question at issue" in unambiguous language. If it has, then an agency is barred from promulgating a regulation contravening that intent.[44] Under the second prong of the test, if the statute is silent or ambiguous to the specific issue, the court determines whether the agency's interpretation is "based on a permissible construction of the statute."[45] If the agency's interpretation is sufficiently reasonable and therefore permissible, the court must defer to the agency's interpretation.[46] The ambiguity of a specific provision is determined within the full context of the statute, not through an examination of the provision in isolation.[47]

In *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, the Ninth Circuit maintained the Silvicultural Rule's classification of silvicultural discharges resulting from natural runoff as nonpoint sources.[48] Reading the Silvicultural Rule as conforming to the

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40. National Pollutant Discharge Elimination System, 40 Fed. Reg. 56,932 (Dec. 5, 1975).

41. National Pollutant Discharge Elimination and State Program Elements Necessary for Participation, 41 Fed. Reg. 6281, 6282 (Feb. 12, 1976).

42. *See* 40 C.F.R. § 122.27. In *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, the Ninth Circuit determined that the phrase "from which there is natural runoff" modified all the activities listed as nonpoint sources by the Silvicultural Rule, not just the final activity listed, road construction and maintenance. 309 F.3d 1181, 1185 (9th Cir. 2002).

43. 467 U.S. 837 (1984).

44. *Id.* at 842-43.

45. *Id.*

46. *Id.* at 843.

47. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 121 (2000).

48. 309 F.3d 1181, 1186 (9th Cir. 2002).

CWA definition of point source, the court held that aerial pesticide sprays to control arboreal pests were point source discharges subject to NPDES permit requirements, because they did not result from natural runoff.[49] While the court did not question the validity of the Silvicultural Rule, it clearly stated that the EPA does not have the authority to "'refine' the definitions of point source and nonpoint source pollution in a way that contravenes the clear intent of Congress as expressed in the [CWA]."[50] Notably, the court also determined that the rule's list of silvicultural activities whose stormwater discharges constitute a silvicultural point source—rock crushing, gravel washing, log sorting, or log storage facilities—is not exhaustive.[51]

In 2003, one year after the *Forsgren* decision, the United States District Court for the Northern District of California addressed the Silvicultural Rule in *Environmental Protection Information Center v. Pacific Lumber Co.*[52] In a case strikingly similar to the noted case, the court ruled that stormwater runoff from logging roads that is conveyed to water through a culvert and ditch system cannot be removed from the definition of point source by the Silvicultural Rule.[53] With some hesitation and in express deference to Ninth Circuit precedent in *Forsgren*, the court found that the Silvicultural Rule was in harmony with the CWA definition of point source, maintaining the rule's "natural runoff" distinction for nonpoint source discharges.[54] However, this harmony exists only to the extent that the Silvicultural Rule does not interfere with the CWA, meaning that the rule operates only in a small gap in which uncontrolled runoff flows from its discharge source to the water, never entering any discrete conveyance addressed within the CWA definition of point source.[55] The court established that natural stormwater runoff ceases to be natural the moment it enters a conveyance system, and it is therefore beyond the scope of the Silvicultural Rule and a point source under the CWA.[56]

III. THE COURT'S DECISION

In the noted case, the Ninth Circuit began its decision with a careful analysis of the CWA definition of point source, emphasizing the role that

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49. *Id.*
50. *Id.* at 1190.
51. *Id.* at 1188.
52. No. C 01-2821 MHP., 2003 WL 25506817 (N.D. Cal. Oct. 14, 2003).
53. *Id.* at *15.
54. *Id.* at *14.
55. *Id.* at *15.
56. *Id.*

control plays in distinguishing a point source subject to NPDES permitting from a nonpoint source.[57] The court noted Ninth Circuit precedent stating that a stormwater discharge is a nonpoint source when it "runs off and dissipates in a natural and unimpeded manner."[58] The discharge becomes a point source when runoff is controlled—channeled or collected—in a manner that impedes the natural course of the stormwater, like the discharge systems in Tillamook.[59] The court emphasized that the type of pollutant carried by a discharge and the activity causing the discharge are irrelevant in determining whether a discharge is a point source or nonpoint source under the CWA.[60]

The court also examined the legislative history of the FWPCA, as the act enabling the CWA, to determine Congress's understanding of a "point source." The court noted Congress's intention that the term "point source" apply to a broad range of discharges and, citing the definitive nature of the statutory guidelines, concluded that Congress did not grant the EPA Administrator the discretion to define statutory terms.[61]

The court then addressed the first of the defendants' arguments, that the Silvicultural Rule exempts controlled logging road runoff from the CWA definition of point source, therefore exempting it from NPDES permitting requirements. In a conclusion that ultimately dictated its holding, the court highlighted the EPA's failure to properly distinguish a point source from a nonpoint source by mistakenly emphasizing the "natural" source of the pollutant.[62] The focus is properly placed on the conveyance of the pollutant—whether it is channeled and controlled—consistent with the CWA definition of point source.[63]

The court then addressed the rule's exemption of all silvicultural discharges resulting from a "natural runoff," which on its face appeared to violate the *Costle* prohibition on EPA-created categorical exemptions.[64] Applying *Chevron*, the court examined whether this categorical exemption was based on a permissible interpretation of the CWA definition of point source. The court found the rule incompatible with the clear language of the CWA, failing *Chevron*'s threshold question.[65]

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57. Nw. Envtl. Def. Ctr. v. Brown, 617 F.3d 1176, 1182 (9th Cir. 2010).
58. *Id.* at 1181 (citing League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181, 1184 (9th Cir. 2002)).
59. *Id.* at 1182.
60. *Id.*
61. *Id.* at 1183.
62. *Id.* at 1189.
63. *Id.*
64. *Id.*
65. *Id.* at 1190.

Again, the exemption's focus on the character of the source, "natural runoff," proved fatal when compared to the CWA's unambiguous reliance on conveyance as the determinative factor. The court hesitated to invalidate completely the Silvicultural Rule under *Chevron*, instead offering an interpretation of the rule not raised by the defendants in which naturally occurring runoff was exempt from permitting requirements if the runoff remained "natural," that is, either uncontrolled or channeled in any systematic way.[66]

Next, the court considered the defendants' second argument, that even if the Silvicultural Rule was inapplicable, the discharges at Tillamook were nonetheless exempt from the NPDES permitting process under the 1987 Stormwater Amendments to the CWA.[67] First, the court rejected the proposition that Congress gave *sub silencio* approval to the Silvicultural Rule by reenacting the CWA, citing precedent holding that *sub silencio* approval occurs only when both Congress is well aware of the administrative statutory interpretation to be continued after reenactment and the relevant statute is reenacted essentially without change, neither of which applied in the present case.[68]

Moving to the nature of the defendants' claim, the court examined the 1990 EPA Phase I stormwater regulations, which were promulgated in accordance with the 1987 Stormwater Amendments. The court found that collected stormwater runoff from the logging roads constituted a point source discharge "associated with industrial activity" under Phase I regulations and was therefore a discharge requiring an NPDES permit.[69] While the Phase I preamble specifically exempted discharges governed by the Silvicultural Rule from its regulations, the court noted that logging is defined as an "industrial activity" under the Standard Industrial Classifications[70] and is therefore subject to Phase I permitting requirements for discharges associated with industrial activity.[71] The court analyzed congressional intent, stressing the fact that Congress exempted many stormwater discharges from Phase I requirements, but

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66. *Id.* at 1191.

67. *Id.* at 1191-92.

68. *Id.* at 1192 (citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986)).

69. *Id.* at 1195.

70. *Id.*; *see Standard Industrial Classifications: 2411 Logging*, DEP'T OF LABOR, http://www.osha.gov/pls/imis/sic_manual.display?id=538&tab=description (last visited Oct. 12, 2010).

71. *Brown*, 617 F.3d at 1194.

specifically included stormwater discharge from industrial activity in the statute.[72]

The court rejected the defendants' arguments that the logging roads were beyond the scope of activities associated with industrial activity because the roads were not "immediate access roads" to industrial activities.[73] In concluding that the logging roads were "immediate access roads" to the logging sites, the court emphasized that immediacy is measured not by proximity to the industrial facility, but rather according to the use of the road, whether the road is "exclusively or primarily dedicated for use by the industrial facility."[74]

In its conclusion, the court sympathized with the EPA, thereby acknowledging the administrative burden placed on the agency by its holding. However, the court again deferred to congressional intent.[75] Congress knowingly passed a tough law in the CWA, and selected specific discharges for exemption in recognition of the difficulty inherent to enforcing such a broad directive.[76] However, Congress created no statutory exemption that could give rise to the Silvicultural Rule.[77]

IV. ANALYSIS

The immediate question raised by the Ninth Circuit's holding in the noted case is whether it invalidated the Silvicultural Rule. While the court paid lip service to Ninth Circuit holdings in *Forsgren* and *Pacific Lumber Co.*, the principal foundation for its decision followed the more than thirty-year-old D.C. Circuit holding in *Costle*.[78] *Costle* unequivocally prohibited the EPA from exempting entire categories of discharges from the definition of point source through the Silvicultural Rule, characterizing the regulation as an exercise of agency power beyond that delegated by Congress, and, in fact, directly conflicting with the CWA statute that it was ordered to administer.[79] The *Costle* logic—invalidation from overreach—would apply here to invalidate the current Silvicultural

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72. *Id.*

73. *Id.* at 1195.

74. *Id.* (quoting National Pollutant Discharge Elimination System Permit Application Regulators for Storm Water Discharges, 55 Fed. Reg. 47,990, 48,009 (Nov. 16, 1990)).

75. *Id.* at 1196-97.

76. *Id.* at 1196.

77. *Id.* at 1197.

78. *Id.* (stating that *Costle* was the "most directly relevant example" of Congress invalidating an EPA regulation attempting to exempt entire categories of discharges).

79. *See* Natural Res. Def. Council v. Costle, 568 F.2d 1369, 1375-77 (D.C. Cir. 1977) (showing that the Silvicultural Rule was conflicting to the extent that it violated the specific nature of the CWA's orders to the EPA).

Rule, just as the *Costle* holding invalidated the original Silvicultural Rule.[80]

Even if the holding is read to maintain the slim window of Silvicultural Rule jurisdiction identified in *Pacific Lumber Co.*—exempting stormwater runoff that follows a natural course without interference from NPDES requirements[81]—the impact on the EPA and timber companies owning or operating logging roads will be substantial. Prior to the Clinton-era moratorium on new construction, there were approximately 400,000 miles of logging roads on federal lands in the United States.[82] Stormwater drainage systems are essential features of these roads, preventing the roads from washing out during rainstorms. Under the court's ruling, each controlled stormwater discharge that is conveyed from a logging road to a stream or river would be subject to the CWA for the first time. Companies that long believed these roads were beyond the boundaries of the CWA will need to manage their discharges to comply with NPDES permit requirements. And the EPA will finally face the "administrative nightmare" it has tried to avoid for almost forty years.[83]

At their core, many of the defendants' arguments channel EPA concerns about its capability to administer effectively individual NPDES permits for logging roads. Starting with the passage of the CWA, the EPA has consistently stated its belief that large-scale stormwater discharges were better regulated by systems not requiring NPDES permits.[84] The court couched this hesitance as a result of the significant burden imposed on the agency by the broad definition of point source.[85] This reluctance to establish an operable permitting system for stormwater discharges manifested itself in various exemption rules addressing specific industries and discharges, many of which were ultimately invalidated by federal courts in holdings similar to the noted case.[86]

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80. *Id.* at 1377.

81. Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., No. C 01-2821 MHP., 2003 WL 25506817, at *15 (N.D. Cal. Oct. 14, 2003).

82. John H. Cushman, Jr., *U.S. To Suspend Road Building in Many National Forest Areas*, N.Y. TIMES, Jan. 10, 1998, at A1.

83. *Brown*, 617 F.3d at 1193 (internal citations omitted).

84. 40 Fed. Reg. 56,932 (Dec. 5, 1975).

85. *Brown*, 617 F.3d at 1196.

86. *See* N. Plains Res. Council v. Fidelity Exploration and Dev. Co., 325 F.3d 1155, 1164 (9th Cir. 2003) (stating that the EPA does not have the authority to approve a Montana permitting program that exempts groundwater pollutants from permitting requirements); Natural Res. Def. Council v. EPA, 966 F.2d 1292, 1304-06 (9th Cir. 1992) (invalidating an EPA rule exempting certain light industry discharges from the definition of "discharges associated with industrial activity" subject to Phase I regulations under the 1987 storm water amendments to the CWA).

Almost forty years after the passage of the CWA, the EPA has yet to retreat from this position, as evidenced by its efforts to maintain the Silviculture Rule by shaping the exemptions to conform to federal decisions.[87] This lasting opposition to regulate silvicultural stormwater discharge is striking when compared with the EPA's intent to enforce aggressively stormwater regulations in other areas. In outlining its enforcement strategy for 2011-2013, the agency identified municipal stormwater discharge as a primary focus of administrative action.[88] Additionally, the EPA recently issued broad rules for the permitting of stormwater discharges arising from construction and development projects that the EPA estimates will affect 82,000 businesses.[89] Viewing the establishment of these rules against the agency's long fought resistance to silvicultural stormwater regulation, it is possible to accept that the EPA has legitimate doubts about the feasibility of installing an NPDES permitting program for silvicultural stormwater runoff.

It remains to been seen whether the court's confidence that the EPA will be able to "effectively and relatively expeditiously" establish a permitting system for logging road runoff will be reflected in EPA behavior on the ground.[90] One wonders whether congressional concessions similar to the 1987 Stormwater Amendments to the CWA will be required to unfasten the EPA from the nexus of a "tough law" and infeasibility in the near future.

V. CONCLUSION

In the noted case, the Ninth Circuit held that the Silvicultural Rule does not exempt polluted stormwater runoff that is discharged from logging roads into streams and rivers through a discernable, confined, and discrete conveyance system from NPDES permitting requirements.[91] The court found the rule's exemptions inconsistent with the CWA definition of point source, because the rule distinguished point source discharges from nonpoint source discharges by whether the discharge resulted from human use.[92] This conflicted with the CWA's focus on the conveyance of a pollutant, not the source or quality of a pollutant, as the determining factor in identifying a point source discharge subject to the

87. *Brown*, 617 F.3d at 1184-90.

88. *National Enforcement Initiatives for Fiscal Years 2011—2013*, EPA, http://www.epa.gov/compliance/data/planning/initiatives/initiatives.html (last visited Nov. 8, 2010).

89. Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category, 74 Fed. Reg. 62,996, 63,023 (Dec. 1, 2009).

90. *Brown*, 617 F.3d at 1198.

91. *See, e.g.*, *id.*

92. *Id.* at 1183.

NPDES permitting procedure.[93] Under *Chevron*, in the face of unambiguous congressional intent, the conflicting silvicultural exemption was void.[94] Finding additional support for closing the silvicultural loophole, the court labeled the exemption of natural runoff an exemption of an entire category of discharge, which is prohibited in precedent.[95] While the court did not expressly invalidate the Silvicultural Rule, it restricted the rule's application to stormwater runoff that reaches water through a purely natural course, which, unless elaborated upon, appears to remove silvicultural runoff that encounters any nonnatural control from the protections of the exemption. Future decisions are needed to clarify the precarious state of the Silvicultural Rule.

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93. *Id.*
94. *Id.* at 1182.
95. *Id.* at 1188.

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