

LEGAL UPDATES

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Stormwater From Roads May Be Point Source Discharges

UPDATE - Reversed by SCOTUS in 2013

In March 2013, the U.S. Supreme Court reversed and remanded this case, finding reasonable both EPA's interpretation of the statutory term "associated with industrial activity," and its practice of exempting logging roads from NPDES permitting by construing the Industrial Stormwater Rule to reach only discharges from conveyances used to collect and convey storm water and that are "directly related to manufacturing, processing or raw materials storage areas at an industrial plant" (and not conveyances which are "'directly related' only to the harvesting of raw materials").

On August 17, 2010, the Court of Appeals for the Ninth Circuit invalidated an attempt to exempt certain stormwater discharges from National Pollutant Discharge Elimination System (NPDES) permitting requirements by regulation. While the challenge in *Northwest Environmental Defense Center v. Brown* related specifically to stormwater runoff from logging roads, the court's opinion makes clear that runoff from industrial activities must be covered under an NPDES permit if, at any time prior to entering waters of the United States, it has been collected in man-made structures, such as roadside ditches, culverts and channels.

In *NEDC v. Brown*, the plaintiff alleged that the Oregon State Forester, members of the Oregon Board of Forestry and various timber companies had violated the Clean Water Act by failing to obtain NPDES permit coverage for stormwater discharges from two state-owned logging roads in Oregon's Tillamook State Forest, which are used and maintained by the timber companies. The district court dismissed the suit after concluding that these discharges were exempt from NPDES permitting under the EPA's Silvicultural

Rule. The Ninth Circuit found that stormwater flowing from these roads into forest streams and rivers through a system of ditches, culverts and channels was "point source" pollution and neither the Silvicultural Rule nor the 1987 amendments to the Clean Water Act exempted such discharges from the NPDES permit program.

The court's analysis began with the statutory definition of point source and case law regarding point and nonpoint sources. The difference between the two depends on whether the stormwater runoff was allowed to run off naturally, and thus a nonpoint source, or was collected, channeled and discharged through a system of ditches, culverts, channels and similar conveyances, and thus a point source. Because stormwater from the logging roads was collected and discharged to forest rivers and streams from a system of ditches, culverts and channels, the runoff was no longer natural runoff exempt from NPDES permitting as nonpoint source pollution. Although this conclusion was clear from the statute and case law, the court also analyzed the legislative history of the point source provisions and exemptions, the Silvicultural Rule and the 1989 amendments to the Clean Water Act.

As evidenced by the preamble to the final Silvicultural Rule, EPA intended this rule to distinguish between point and nonpoint sources, based on the source of the pollutant (specific activities) rather than on whether the stormwater was discharged from a discrete conveyance. The court concluded that the effect of the Silvicultural Rule was to "treat all natural runoff as nonpoint pollution, even if channeled and discharged through a discernible, confined, and discrete conveyance."

Rather than invalidating the Silvicultural Rule as a whole, the court invalidated only that reading of the rule that treated *collected* stormwater as a nonpoint source of pollution. The court concluded that reading the current Silvicultural Rule to treat all Silvicultural (forestry) stormwater discharges as nonpoint sources created a categorical exemption from NPDES permitting by refining the definition of "point source," something the EPA had no authority to do. Reading the regulation as providing that natural runoff is exempt until such time as it is channeled and controlled in some systematic way, the court determined that, under such a reading, the Silvicultural Rule did not exempt the stormwater discharges from the logging roads from the definition of "point source discharge" in this case. The logging road discharges were also not otherwise exempted.

Certain discharges of stormwater associated with industrial activities, including logging, require a permit. The permitting rules define those discharges as including discharges from immediate access roads and rail lines used to service an industrial plant (transport of raw materials, manufactured goods, waste material, or by-products used or created by the plant). "Immediate access roads" was explained in the preamble to the Phase I stormwater regulations to mean roads which are exclusively or primarily dedicated for use by the industrial facility. Although the logging roads were not used exclusively by the logging companies (because they were also used for recreation), the court

determined that logging roads were immediate access roads as they were built and maintained by the timber companies for logging activities.

In light of the statutory definition and case law regarding point sources, the court's reading of the Silvicultural Rule, and the absence of any other Clean Water Act exemption. The court concluded that discharges from the logging road drainage system were subject to the NPDES permitting requirement.

What This Means To You

Industrial facilities with access roads or rail lines that are exclusively or primarily dedicated for use by the facility, whatever their length and despite their concurrent use by others, must treat discharges from collection systems associated with those roads or rail lines as point source discharges under the facility's discharge permit, even if the EPA has treated these discharges as nonpoint source discharges in the past.

Take time to review your stormwater permits and pollution prevention plans and ensure that any private access road used to service your industrial facility has been evaluated for potential point source discharges. If your facility is engaged in the industrial activities for which a discharge permit is required and runoff from your private access roads enters ditches, canals, culverts, channels or other collection and conveyance systems, and discharges into waters of the United States (creeks, rivers, wetlands, etc.), those discharges are subject to the NPDES permitting requirement and may be subject to periodic inspection and sampling under the discharge permit.

Contact Info

If you would like further information or need assistance in reviewing your NPDES permit coverage, please contact your Husch Blackwell attorney or one of the attorneys listed below.

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