

ARTICLES

ENOUGH IS ENOUGH! STORMWATER DISCHARGED FROM  
MAN-MADE PIPES, DITCHES, AND CHANNELS ALONG  
LOGGING ROADS IS NOT NONPOINT SOURCE “NATURAL  
RUNOFF”

BY  
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*This Article introduces readers to the recent U.S. Supreme Court decision in Decker v. Northwest Environmental Defense Center, a Clean Water Act citizen suit seeking to limit discharges of heavily polluted stormwater from industrial logging roads in Oregon's Tillamook State Forest. The author explains the impetus for the litigation and how the Supreme Court and court of appeals decisions correct a longstanding error of law, finally opening a path for conservation-minded citizens to obtain better programs to protect water quality and aquatic species from logging road pollution.*

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## I. INTRODUCTION

This issue of *Environmental Law* focuses on the U.S. Supreme Court's recent decision in *Decker v. Northwest Environmental Defense Center (Decker)*,<sup>1</sup> a case that Chris Winter<sup>2</sup> and I filed on behalf of plaintiff Northwest Environmental Defense Center in September 2006. The history of the case chronicles our efforts to gain more protection for forested streams by eliminating a critical misconception about how the Clean Water Act<sup>3</sup> applies to logging roads and the timber industry. Specifically, the U.S. Environmental Protection Agency (EPA), the scientific community, conservation groups across the country, and even many timber companies recognize that logging roads use pipes, ditches, and channels to convey harmful pollution to streams. Most also acknowledge that discharges from any pipe, ditch, or channel qualify as "point source" discharges that are subject to section 402 of the Clean Water Act and the National Pollutant Discharge Elimination System (NPDES) permit program. Unfortunately, for over thirty years, state and federal agencies, the timber industry, and many timber companies have asserted that EPA regulations redefine stormwater discharges from pipes and ditches along logging roads as nonpoint source pollution that is categorically excluded from section 402 of the Act. That error prevented EPA and state water quality agencies from using the various tools in section 402, including NPDES permits, to address logging road pollution. Starting in 2005, and building on the work of others who worked on the issue before us, Chris Winter, Mark Riskedahl,<sup>4</sup> and I began an effort to right that wrong.

## II. LOGGING ROAD POLLUTION IS WIDESPREAD AND HARMFUL

Logging roads are a widespread and very significant source of water pollution.<sup>5</sup> To ensure that logging roads continue to function during wet weather, landowners and timber companies in the Pacific Northwest intentionally use pipes, ditches, and channels to move stormwater off the road and into streams.<sup>6</sup> Stormwater from logging roads is often heavily polluted with sediment generated by heavy logging trucks, which grind up gravel and other surface materials placed

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<sup>1</sup> *Decker*, 133 S. Ct. 1326 (2013).

<sup>2</sup> Chris Winter is a co-founder, co-Executive Director, and Staff Attorney at the Crag Law Center in Portland, Oregon. Mr. Winter was co-lead counsel for plaintiff NEDC in the *Decker* litigation.

<sup>3</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006).

<sup>4</sup> Mark Riskedahl is the Executive Director of the Northwest Environmental Defense Center in Portland, Oregon.

<sup>5</sup> DOUGLAS ENDICOTT, GREAT LAKES ENVTL. CTR., NATIONAL LEVEL ASSESSMENT OF WATER QUALITY IMPAIRMENTS RELATED TO FOREST ROADS AND THEIR PREVENTION BY BEST MANAGEMENT PRACTICES, FINAL REPORT 14 (2008), available at <http://wildearthguardiansresources.org/resources-database>.

<sup>6</sup> See, e.g., KEITH MILLS, OR. DEP'T OF FORESTRY, FOREST ROADS, DRAINAGE, AND SEDIMENT DELIVERY IN THE KILCHIS RIVER WATERSHED 4–5, 12 (1997), available at [www.oregon.gov/odf/privateforests/docs/kilchis.pdf](http://www.oregon.gov/odf/privateforests/docs/kilchis.pdf) (citing studies indicating that 25% to 75% of forest road drainage directly enters streams and rivers).

on the roads to facilitate industrial logging and timber hauling.<sup>7</sup> According to an EPA-commissioned report, “forestry-related sediment is a leading source of water quality impairment to rivers and streams nationwide.”<sup>8</sup> Further, EPA recognizes that “up to 90% of the total sediment production from forestry operations” comes from logging roads and stream crossings.<sup>9</sup> According to EPA, “[s]tormwater discharges from logging roads, especially improperly constructed or maintained roads, may introduce significant amounts of sediment and other pollutants into surface waters and, consequently, cause a variety of water quality impacts.”<sup>10</sup>

Important ecological, economic, and social consequences stem from the sediment discharged from logging roads. Ecologically, fine and coarse-grained sediment loading degrades water quality and adversely affects fish, other aquatic species, and their habitat.<sup>11</sup> Sedimentation affects streams by reducing pool depth, altering substrate composition, reducing interstitial space, and causing braiding of channels,<sup>12</sup> all of which can adversely impact salmon and trout. Stream crossings also often prevent migrating fish from reaching spawning grounds.<sup>13</sup>

*Although EPA’s Stormwater Rule Appeared to Require NPDES Permits for Logging Roads, Many Incorrectly Viewed Stormwater From Pipes and Ditches Along Logging Roads as Nonpoint Source “Natural Runoff”*

Until EPA amended it last year, EPA’s Stormwater Rule clearly appeared to require NPDES permits for point source stormwater discharges associated with industrial logging.<sup>14</sup> Generally speaking, the Clean Water Act requires NPDES permits for stormwater discharges that are 1) from point sources and 2) associated with an industrial activity listed in EPA’s Stormwater Rule.<sup>15</sup> The Clean Water Act defines the term “point source” to mean “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch [or] channel . . . from which pollutants are, or may be discharged.”<sup>16</sup> And before listing the industries subject to the NPDES permit requirement, EPA’s Stormwater Rule states: “The following categories of facilities are considered to be engaging in ‘industrial activity’ for purposes of [this regulation] . . .” The Stormwater Rule then included Standard Industrial Classification (SIC) 2411 (entitled “Logging”) on the list of

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<sup>7</sup> Brief for Respondent at 6, *Decker*, 133 S. Ct. 1326 (2013) (Nos. 11-338, 11-347).

<sup>8</sup> ENDICOTT, *supra* note 4, at 2 (citing EPA’s 2000 and 2002 National Water Quality Inventories).

<sup>9</sup> *Id.* at 9; EPA, GUIDANCE SPECIFYING MANAGEMENT MEASURES FOR SOURCES OF NONPOINT POLLUTION IN COASTAL WATERS 3–5 (1993), *available at* [http://water.epa.gov/polwaste/nps/czara/upload/czara\\_chapter3\\_forestry.pdf](http://water.epa.gov/polwaste/nps/czara/upload/czara_chapter3_forestry.pdf).

<sup>10</sup> Notice of Intent to Revise Stormwater Regulations to Specify That an NPDES Permit Is Not Required For Discharges From Logging Roads, 77 Fed. Reg. 30,473, 30,476 (May 23, 2012) (codified at 40 C.F.R. § 122.26(b)(14)(ii) (2013)).

<sup>11</sup> ENDICOTT, *supra* note 4, at 16 (explaining effects of turbidity and sedimentation on aquatic species).

<sup>12</sup> BRUCE E. RIEMAN & JOHN D. MCINTYRE, U.S. FOREST SERV., DEMOGRAPHIC AND HABITAT REQUIREMENTS FOR CONSERVATION OF BULL TROUT 6 (1993), *available at* [http://www.fs.fed.us/rm/pubs\\_int/int\\_gtr302.pdf](http://www.fs.fed.us/rm/pubs_int/int_gtr302.pdf).

<sup>13</sup> U.S. FOREST SERV., INFLUENCES OF FOREST AND RANGELAND MANAGEMENT ON SALMONID FISHES AND THEIR HABITATS 301 (William R. Meehan ed., American Fisheries Society 1991).

<sup>14</sup> See 40 C.F.R. § 126.26(b)(14) (2010).

<sup>15</sup> See *id.* §§ 122.26(a)(1)(ii), (a)(9)(i), (b)(14).

<sup>16</sup> Federal Water Pollution Control Act, 33 U.S.C. § 1362(14) (2006).

industries that require NPDES permits for stormwater discharges.<sup>17</sup> To eliminate doubt, the preamble to the rule states: “EPA intends that the list of applicable SICs will define and identify what industrial facilities are required to apply.”<sup>18</sup>

Notwithstanding those requirements, when we started our work in 2005, timber companies and landowners were not obtaining NPDES permits for their logging road pollution. EPA was also not regulating logging roads despite a 2003 court of appeals decision requiring EPA to evaluate whether it should be doing so.<sup>19</sup> Consequently, logging roads were a widespread and chronic source of water pollution that was degrading water quality and harming aquatic species.

The crux of the problem was EPA’s Silvicultural Rule.<sup>20</sup> EPA first promulgated the Silvicultural Rule in 1976 after a federal district court rejected EPA’s attempt to exclude point-source discharges of stormwater associated with logging activities from the NPDES permit program.<sup>21</sup> The Silvicultural Rule requires NPDES permits for “silvicultural point sources” and it defines that term by listing four facilities—rock crushing, gravel washing, log sorting, and log storage facilities—that are subject to the NPDES permit requirement.<sup>22</sup> The rule then explains that 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*.”<sup>23</sup>

The problem for NEDC was that many had misconstrued EPA’s Silvicultural Rule to mean that all stormwater from logging roads—even stormwater discharged from pipes, ditches, and channels—was nonpoint source “natural runoff.” That interpretation of the rule was contrary to the statutory definition of point source, as well as relevant case law.<sup>24</sup> More importantly, that view excluded logging road

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<sup>17</sup> See 40 C.F.R. § 122.26(b)(14)(ii) (1991) (requiring NPDES permits for stormwater discharges associated with industries within Standard Industrial Classification 24, which includes SIC 2411—“Logging”).

<sup>18</sup> National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 48,011 (Nov. 16, 1990).

<sup>19</sup> In 2003, the U.S. Court of Appeals for the Ninth Circuit remanded EPA’s Phase II Stormwater Rule and required EPA to “consider in an appropriate proceeding Petitioners’ contention that [33 U.S.C. § 1342(p)(6)] requires EPA to regulate forest roads.” *Env’tl. Def. Ctr. v. EPA*, 344 F.3d 832, 863 (9th Cir. 2003). EPA has not yet finally responded to that remand order, presumably because for much of the time since then, EPA has taken the position that stormwater discharges from pipes, ditches, and channels along logging roads are nonpoint source “natural runoff.”

<sup>20</sup> 40 C.F.R. § 122.27 (2012).

<sup>21</sup> *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1379 (D.C. Cir. 1977).

<sup>22</sup> 40 C.F.R. § 122.27(a), (b)(1) (2013).

<sup>23</sup> *Id.* § 122.27(b)(1) (emphasis added).

<sup>24</sup> See *Nw. Env’tl. Def. Ctr. v. Brown (Brown)*, 640 F.3d 1063, 1068–69, 1080 (9th Cir. 2011), *overruled by Decker*, 133 S. Ct. 1326 (2013); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1189–90 (9th Cir. 2002) (holding that 40 C.F.R. § 122.27 is not an NPDES exemption for point source pesticide discharges associated with forestlands); *Env’tl. Prot. Info. Ctr. v. Pac. Lumber Co.*, No. 01-2821, 2003 WL 25506817, at \*15 (N.D. Cal. Oct. 14, 2003) (holding that 40 C.F.R. § 122.27 does not exempt stormwater drainage ditches associated with forestlands from the NPDES permit requirement); *N.C. Shellfish Growers Ass’n v. Holly Ridge Assoc.*, 278 F. Supp. 2d 654, 681 (E.D.N.C. 2003) (holding that 40 C.F.R. § 122.27 is not an NPDES permit exemption for stormwater drainage ditches associated with forestlands); see also *Driscoll v. Adams*, 181 F.3d 1285, 1287, 1291 (11th Cir.

pollution from section 402 of the Act and the NPDES permit program, which have been wildly effective at reducing harmful water pollution,<sup>25</sup> and instead left the problem to state nonpoint source pollution programs that are largely ineffective and unenforceable.<sup>26</sup> To get an effective handle on logging road pollution, we needed to eliminate the misconception that the Silvicultural Rule redefined all stormwater from logging roads as nonpoint source pollution—we needed to persuade a judge that stormwater discharged from pipes, ditches, and channels along logging roads was a man made, point source discharge, not nonpoint source “natural runoff.”

### III. THE LAWSUIT AND COURT PROCEEDINGS

We focused on the Tillamook State Forest in Oregon after learning that logging roads used to haul timber out of that forest often use pipes and ditches to dump heavily polluted stormwater into streams inhabited by threatened coho salmon. As alleged in NEDC’s first amended complaint, the State of Oregon owns the Tillamook State Forest and manages it as a working forest to produce revenue from the harvest and sale of timber.<sup>27</sup> All of the defendants participate in the logging operations that take place.<sup>28</sup> The members of the Oregon Board of Forestry set policy for the Oregon Department of Forestry, the agency that manages logging activities and logging roads in the Tillamook State Forest.<sup>29</sup> The Oregon State Forester supervises the Department and administers its timber sale and state forest programs.<sup>30</sup> The four timber company defendants purchase timber from the state; harvest timber in the Tillamook State Forest; haul timber on logging roads that are specifically designated in timber sale contracts as timber hauling routes; and maintain those roads to facilitate the logging activities that take place.<sup>31</sup>

After documenting egregious water pollution from logging roads in the Tillamook, we filed a Clean Water Act citizen suit to enforce EPA’s Stormwater Rule. NEDC alleged that the logging roads discharge from pipes, ditches, and channels; that stormwater from those conveyances is a point source discharge; that EPA’s Silvicultural Rule only excludes nonpoint sources from the NPDES permit program; that EPA’s Stormwater Rule requires point source stormwater discharges

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1999) (holding that discharges of collected and channeled stormwater associated with timber harvest are subject to the NPDES permit requirement).

<sup>25</sup> William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 542–43 (2004) (praising effectiveness of the NPDES program and ability of the program to achieve results “without causing any significant harm to the economy in terms of employment or growth or investment”).

<sup>26</sup> EPA and the National Oceanic and Atmospheric Administration have repeatedly refused to approve Oregon’s coastal nonpoint source pollution control program, in part because Oregon’s forest practices rules, including the rules concerning logging roads, do not protect water quality. See 16 U.S.C. § 1455b (2006); Agreed Order Dismissing APA Claims Without Prejudice at 2, Nw. Env’tl. Advocates v. Locke, No. 09-00017 (D. Or. Sept. 28, 2010); NAT’L OCEANIC & ATMOSPHERIC ADMIN., FINDINGS FOR THE OREGON COASTAL NONPOINT PROGRAM (1998), available at <http://coastalmanagement.noaa.gov/nonpoint/docs/findor.txt>.

<sup>27</sup> See Plaintiff’s First Amended Complaint at 7, 18, *Brown*, 476 F. Supp. 2d 1188 (D. Or. 2007) (No. 06-1270).

<sup>28</sup> *Id.* at 6–8.

<sup>29</sup> *Id.* at 3, 18–19.

<sup>30</sup> *Id.* at 6–7.

<sup>31</sup> *Id.* at 7–8.

associated with industrial logging to be authorized by an NPDES permit; that logging roads used to haul timber are associated with industrial logging; that the defendants had no permits for the discharges; and that the defendants were therefore in violation of the Clean Water Act.<sup>32</sup>

As we predicted, the defendants moved to dismiss the lawsuit, arguing primarily that EPA's Stormwater Rule incorporated the Silvicultural Rule and that the Silvicultural Rule categorically defined all stormwater from logging roads as nonpoint source "natural runoff." The defendants contended in the alternative that even if the stormwater was a point source discharge, and even though the Stormwater Rule lists "logging" as the regulated industrial activity, EPA's Stormwater Rule only required NPDES permits for discharges associated with rock crushing, gravel washing, log sorting, and log storage facilities. EPA submitted an amicus brief to the district court that echoed both arguments and supported the defendants.

We fought the motions to dismiss based on the allegations in the complaint, but the district court ultimately agreed with the defendants and dismissed the lawsuit, concluding that the Silvicultural Rule categorized the defendants' "road/ditch/culvert" system as nonpoint source pollution.<sup>33</sup> The district court did not rule on the defendants' alternative argument that EPA's Stormwater Rule did not require NPDES permits for stormwater discharges from industrial logging roads.

A unanimous panel of the court of appeals reversed the district court judgment. After determining that the Silvicultural Rule was ambiguous, the court declined to construe that rule as an NPDES permit exemption for discharges from pipes, ditches, and channels because, as the court stated, "[i]f the Rule is read in this fashion, it is inconsistent with § 502(14) [33 U.S.C. § 1362(14), the statutory definition of "point source"] and is, to that extent, invalid."<sup>34</sup> Instead, the court construed the rule as exempting only natural runoff from nonpoint sources, holding that "the exemption ceases to exist as soon as the natural runoff is channeled and controlled in some systematic way through a 'discernible, confined and discrete conveyance' and discharged into the waters of the United States."<sup>35</sup>

Turning to the Stormwater Rule, the court recognized that by incorporating the Silvicultural Rule into the Stormwater Rule, EPA intended "to exempt from the definition of 'discharges associated with industrial activity' any activity that is defined as a nonpoint source in the Silvicultural Rule."<sup>36</sup> The court refused to import into the Stormwater Rule a construction of the Silvicultural Rule that exempted point source discharges, however, because the court had already determined that the "reference to the Silvicultural Rule in 40 C.F.R. § 122.26(b)(14) does not . . . exempt such discharges from EPA's Phase I regulations[.]"<sup>37</sup> The court therefore held that neither the Silvicultural Rule nor the Phase I Stormwater Rule exempt from the NPDES permit requirement any

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<sup>32</sup> *Id.* at 2–4.

<sup>33</sup> *Brown*, 476 F. Supp. 2d 1188, 1197 (D. Or. 2007).

<sup>34</sup> *Brown*, 640 F.3d 1063, 1080 (9th Cir. 2011).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1083.

<sup>37</sup> *Id.* at 1085.

stormwater that is collected and channeled in ditches, channels, and conduits along logging roads before being discharged into rivers and streams.<sup>38</sup>

Dissatisfied with that result, the defendants sought rehearing or rehearing en banc.<sup>39</sup> Reviving an argument that EPA made for the first time on appeal, and that EPA later repudiated in response to the petitions for rehearing, the defendants contended for the first time that NEDC's appeal was a challenge to the Silvicultural Rule that was barred by section 509(b)(2), a section of the Act that prohibits review of certain EPA orders during enforcement actions. The panel voted unanimously to deny rehearing, and not a single judge requested a vote on whether to rehear the case en banc. The court of appeals then issued a revised opinion holding that section 509(b)(2) did not bar NEDC from contesting the regulatory interpretations offered by EPA in its amicus brief and reiterating the court's holding that EPA's rules require NPDES permits for stormwater discharges from pipes, ditches, and channels along logging roads used to haul timber.

The defendants successfully petitioned for writs of certiorari. Three days before oral argument at the Supreme Court, EPA amended its Stormwater Rule "to clarify that for the purposes of defining stormwater discharges associated with industrial activity, the only activities under [Standard Industrial Classification] code 2411 [Logging] that are 'industrial' are rock crushing, gravel washing, log sorting, and log storage."<sup>40</sup> The Supreme Court then reversed the court of appeals, concluding it was appropriate to defer to EPA's contention that the pre-amendment version of the Stormwater Rule only required NPDES permits for stormwater discharges associated with rock crushing, gravel washing, log sorting, and log storage facilities.<sup>41</sup> Recognizing that NEDC wished to continue the case by pursuing claims under the amended rule, the Supreme Court remanded the case for further proceedings consistent with its opinion.<sup>42</sup>

#### *What Did the Supreme Court Do With the Point Source Issue?*

The Supreme Court specifically declined to reach the point source issue even though it was central to the litigation for nearly seven years.<sup>43</sup> By declining to rule

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<sup>38</sup> *Id.* at 1087. The court of appeals also refused to import the defendants' interpretation of the Silvicultural Rule into the Phase I regulation because it found that doing so would bring the Phase I rule into conflict with the statute. Specifically, the Act requires NPDES permits for stormwater discharges associated with industrial activity, and because EPA clearly designated logging as an industrial activity, that construction would bring the regulation into conflict with the statute by exempting some stormwater discharges associated with industrial activity from the NPDES permit requirement. *Id.* at 1083 (citing 33 U.S.C. §§ 1342(p)(2)(B), (4)(A) (2012); *Natural Res. Def. Council v. EPA*, 966 F.2d 1292, 1306 (9th Cir. 1992)).

<sup>39</sup> *Id.* at 1066.

<sup>40</sup> Revisions to Stormwater Regulations to Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads, 77 Fed. Reg. 72,970, 72,972 (Dec. 7, 2012).

<sup>41</sup> *Decker*, 133 S. Ct. 1326, 1338 (2013).

<sup>42</sup> *Id.* at 1335, 1338 ("Respondent NEDC continues to press its claim that petitioners' discharges are unlawful under both the amended regulation and the earlier version. The instant cases provide no occasion to interpret the amended regulation.").

<sup>43</sup> *Id.* at 1335 ("For jurisdictional purposes, it is unnecessary to determine whether NEDC is correct in arguing that only its reading of the Silvicultural Rule is permitted under the Act."); *Id.* at 1338 ("[T]here is no need to reach petitioners' alternative argument that the conveyances in question are not

on the issue, however, the Court left intact the Ninth Circuit's ruling that "when stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a 'discernible, confined and discrete conveyance' of pollutants, and there is therefore a discharge from a point source."<sup>44</sup> The Supreme Court also left intact the Ninth Circuit's ruling "... that the Silvicultural Rule does not exempt from the definition of point source discharge under § 512(14) stormwater runoff from logging roads that is collected and channeled in a system of ditches, culverts, and conduits before being discharged into streams and rivers."<sup>45</sup>

But the *Decker* decision does much more than leave the court of appeals' point source rulings intact; three other elements of the decision confirm that the Court agreed the stormwater discharges at issue are from point sources. First, the Supreme Court resolved the appeal under EPA's Stormwater Rule after recognizing that only stormwater discharges from point sources require NPDES permits under that rule. The Court stated: "A central provision of the Act is its requirement that individuals, corporations, and governments secure [NPDES] permits before discharging pollution from any point source into the navigable waters of the United States."<sup>46</sup> The Court also stated: "Under the Act, petitioners were required to secure NPDES permits for the discharges of channeled stormwater runoff *only if the discharges were 'associated with industrial activity'* . . . ."<sup>47</sup> By resolving the appeal under EPA's Stormwater Rule, the Court acknowledged that channeled stormwater along logging roads is a point source discharge potentially subject to the NPDES permit requirement.

Second, in its discussion of the Silvicultural Rule, the Court noted "that the statute did not give the EPA 'authority to exempt categories of point sources from the permit requirements' of the Act," and that "[i]t is a basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they are promulgated.'"<sup>48</sup> In light of the Act's unequivocal statement that any pipe, ditch, or channel is a point source, the decision suggests that the Court agreed that the Silvicultural Rule could not be construed as redefining pipes, ditches, and channels along logging roads as nonpoint sources of pollution.

Third, the Court again suggested its agreement with NEDC when it framed the point source issue in terms of the statutory language rather than the language of the Silvicultural Rule. In reiterating that it was not ruling on the point source issue, the Court stated that "there is no need to reach petitioners' alternative argument that the

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'pipe[s], ditch[es], channel[s], tunnel[s], conduit[s],' or any other type of point source within the Act's definition of the term.") (citing 33 U.S.C. § 1362(14) (2006)).

<sup>44</sup> See *Brown*, 640 F.3d at 1070–71; see also *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 508 (2013) (citation omitted).

<sup>45</sup> See *Brown*, 640 F.3d at 1080.

<sup>46</sup> *Decker*, 133 S. Ct. at 1331 (citing 33 U.S.C. §§ 1311(a), 1362(12) (2006); *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976)).

<sup>47</sup> *Decker*, 133 S. Ct. at 1336 (quoting 33 U.S.C. § 1342(p)(2)(B) (2006)) (emphasis added). The Supreme Court's use of the term "discharge" to describe channeled stormwater from logging roads confirms the point. Under the Act, "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants," 33 U.S.C. § 1362(16) (2006), both of which the Act defines as "any addition of any pollutant to navigable waters *from any point source* . . ." (emphasis added). In other words, by definition the term "discharge" refers to pollution from a "point source."

<sup>48</sup> *Decker*, 133 S. Ct. at 1331, 1334 (quoting *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (1977); *United States v. Larionoff*, 431 U.S. 864, 873 (1977)).

conveyances in question are not ‘pipe[s], ditch[es], channel[s], tunnel[s], conduit[s],’ or any other type of point source within the Act’s definition of the term.”<sup>49</sup> But the defendants did not argue they were not using pipes, ditches, and channels to discharge stormwater; rather, they acknowledged that the roads utilized those sources, but asserted that the Silvicultural Rule categorized them as nonpoint sources of pollution. By re-framing the issue in terms of the statutory definition of point source, the Court suggested that to win the issue, the defendants would have needed to demonstrate that they did not use pipes and ditches to discharge stormwater, not merely that the stormwater was associated with an activity listed in the Silvicultural Rule as producing nonpoint source pollution.

The Supreme Court’s decision in *Decker* recognizes that logging road pollution is not categorically excluded from EPA’s Stormwater Rule or the NPDES permit program. Although the defendants sought a ruling that the discharges were merely nonpoint source natural runoff under the Silvicultural Rule, and although the district court ruled for the defendants on that very point, the Supreme Court did not hold that the Silvicultural Rule defines all stormwater from logging roads as nonpoint source runoff. Instead, the Supreme Court acknowledged but explicitly declined to rule upon NEDC’s claim that the defendants’ stormwater discharges are unlawful even under the amended Stormwater Rule.<sup>50</sup> The Supreme Court was clear: “The amended regulation will determine whether from this point forward NPDES permits will be required for the stormwater discharges at issue.”<sup>51</sup> By remanding so that NEDC can pursue those claims, the Supreme Court recognized that some stormwater pollution from logging roads may be subject to the NPDES permit requirement in EPA’s Stormwater Rule.

#### IV. WHERE DO THINGS STAND NOW?

Now, more than eight years after we started our work, we can say we have probably succeeded in accomplishing one of our primary goals. On August 30, 2013, the U.S. Court of Appeals for the Ninth Circuit issued a published opinion confirming that the U.S. Supreme Court did not disturb its point source rulings and remanding the case to the district court.<sup>52</sup> Unless Congress intervenes, the Ninth Circuit’s recent ruling means that the question is no longer whether the discharges are exempt from the NPDES permit program, but how EPA and the states will use the various Clean Water Act tools available to them to reduce water pollution, minimize the sediment pollution that is eliminating salmon and trout habitat across the West, and protect community drinking water supplies. There are a variety of options under section 402 of the Act—EPA has already suggested its interest in developing a Phase II program to address forest and logging roads—but none of them were available when pipes, ditches, and channels along logging roads were nonpoint sources of “natural runoff.”

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<sup>49</sup> *Decker*, 133 S. Ct. at 1338 (citing 33 U.S.C. § 1362(14) (2006)).

<sup>50</sup> *Id.* at 1335.

<sup>51</sup> *Id.* at 1333.

<sup>52</sup> *Decker*, No. 07-35266, 2013 WL 4618311, at \*2 (9th Cir. Aug. 30, 2013) (order for remand to district court following Supreme Court decision).