Environmental Law & Property Rights

Ninth Circuit Amends the Clean Water Act . . . or Does It?

*By Mark C. Rutzick**

Introduction

Images of Northwoods logging giant Paul Bunyon have faded for most Americans, but the cable TV hit series "Ax Men" has now revived the hardscrabble persona of the modern American logger—early-rising men who perilously cut down large trees on steep hillsides deep in a thick forest, and then use large and dangerous machines to lift logs onto a waiting truck.

The U.S. commercial forests where these loggers toil have a surprisingly diverse ownership. The largest forestland owner in the country is Uncle Sam. Insurance companies and other long-term investors own millions of acres of trees that they manage for shareholders. Large private lumber, plywood, and paper firms hold great tracts of forestland, and thousands of "mom and pop" owners hold small non-industrial timber tracts. In addition, many states own large commercial forests dedicated to funding public education. All these forest owners use loggers to harvest trees, and use log truckers to move the timber to a commercial facility.

The U.S. Court of Appeals for the Ninth Circuit surprised all of these landowners, loggers, and truckers, and the Environmental Protection Agency (EPA), in August 2010 when a three-judge panel overruled thirty-seven years of history and EPA regulation to rule, in a case brought against the Oregon Department of Forestry, that future logging activities on all land—public and private—will in most circumstances require a National Pollutant Discharge Elimination System (NPDES) permit under Section 402 of the CWA[1]—a permit the EPA does not currently require and has no present capability to issue.[2]

What is the connection between logging and clean water? Logging may produce debris and loosened soil as the trees are cut down and removed. When it next rains, the rainwater (known as "stormwater") will carry the debris and soil downhill. At some point, the stormwater runoff encounters a road. Most forest roads are built with an engineered system of culverts, drains, and ditches to collect stormwater so it does not pool on the road or cause a failure of the road surface and possible landslides. The stormwater runs into, and then out of, these conveyances. In most cases, the water discharges across the forest floor and sinks into the ground; in other cases, it may eventually carry some amount of debris and soil into a stream or other water body.

The NPDES permit system is limited to water releases from a "point source," such as a sewer or drainage pipe from a factory. The stormwater runoff process could not fall under the NPDES system at all were it not for the culverts, drains, and ditches, which have some characteristics of a point source.

To support this unprecedented ruling expanding EPA regulatory authority, the Ninth Circuit panel (Circuit Judges William Fletcher of San Francisco and Raymond Fisher of Los Angeles and District Judge Charles Breyer of San Francisco) had to effectively invalidate a thirty-seven year old EPA regulation specifically exempting logging activities from the NPDES system, as well as a 1990 rule incorporating the earlier exemption. The ruling was procedurally unusual in at least four respects: the panel threw out the EPA regulations although the plaintiffs did not challenge their validity; EPA was not a party to the case; the court did not have the rulemaking administrative record before it; and the court was only reviewing a dismissal at the pleading stage under Fed.R.Civ.P. 12(b)(6) rather than a ruling on the merits.

The 1973 EPA Silvicultural Rule, amended only slightly in the intervening thirty-seven years, simply reads: "The following do not require an NPDES permit: . . . (j) Discharges of pollutants from agricultural and silvicultural activities . . . ." Silvicultural activities are defined by regulation to mean "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."[3] The Silvicultural Rule was adopted just one year after Congress enacted the Clean Water Act (CWA) (amendments to the Federal Water Pollution Control Act[4]), and followed legislative intent expressed in the House Report to the 1972 Act, which referred to "such nonpoint sources as agricultural and silvicultural activities."[5]

The Ninth Circuit ruled that "stormwater runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is a point source discharge for which an NPDES permit is required."[6] The panel seems to have interpreted the CWA to preclude EPA from exempting any point source from the NPDES system, and then found that road culverts, drains and ditches are a point source. On that basis, the panel determined that an interpretation of the Silvicultural Rule that exempts discharges out of road culverts, drains, and ditches from the NPDES system – i.e., the interpretation consistently applied by EPA for thirty-seven years—is unlawful. The panel then suggested an alternative interpretation of the Silvicultural Rule based on the concluding phrase "from which there is natural runoff" that would not exempt any point source from the NPDES system (and also, though not noted by the court, would leave the Silvicultural Rule with no meaning). The court concluded: "Under either reading, we hold that the Silvicultural Rule does not exempt from the definition of point source discharge under § 512(14)

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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."

To invalidate the Silvicultural Rule, the panel also had to reach an issue the district court had not addressed, whether Congress's 1987 major stormwater runoff amendments to the CWA had provided an alternative exemption for silvicultural activities, and whether a 1990 EPA regulation reaffirming the Silvicultural Rule was valid. The court rejected both statutory arguments.

The 1987 CWA amendments created a two-phase regulatory system for stormwater runoff. Phase I was to address major industrial point source polluters. Phase II was to address other point source dischargers. EPA responded to the amendments with a regulation affirming that silvicultural activities are not an industrial activity and remain exempt from Phase I regulation under the Silvicultural Rule.[7]

The panel found that the 1987 amendments *require* EPA to regulate silvicultural discharges, and that EPA's 1990 regulatory exemption was not valid. In particular, the panel focused on 33 U.S.C. § 1342(p)(2)(B), where Congress stated that it was not exempting "discharges associated with industrial activity." The panel found this provision dispositive based on the following logic:

> Industries covered by the Phase I "associated with industrial activity" regulation are defined in accordance with Standard Industrial Classifications ("SIC"). The applicable (and unchallenged) regulation provides that facilities classified as SIC 24 are among "those considered to be engaging in 'industrial activity.' " 40 C.F.R. § 122.26(b)(14)(ii). It is undisputed that "logging," which is covered under SIC 2411 (part of SIC 24), is an "industrial activity." SIC 2411 defines "logging" as "[e]stablishments primarily engaged in cutting timber and in producing . . . primary forest or wood raw materials . . . in the field."

The panel needed, and took, another step to reach its conclusion: silvicultural runoff can be regulated only if it constitutes "storm water discharge associated with industrial activity." The panel found that it does, citing language in the EPA regulation defining the term "stormwater discharge associated with industrial activity" in part to mean "storm water discharges from industrial plant yards; 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; material handling sites; . . . ."[8] On its face, this rule would seem to exclude roads that are not immediate to a logging site. The panel determined, however, that "immediate access roads" does not mean roads near the work site, as the common meaning of the term would imply. Rather, quoting the preamble to the 1990 EPA rule, the panel believed the phrase means "roads which are exclusively or primarily dedicated for use by the industrial facility."[9] However, the panel did not comment on EPA's explanation in 1990 that immediate access roads did not include "public access roads such as state, county, or federal roads such as highways or [Bureau of Land management] roads which happen to be used by the facility."[10]

In addition to disregarding the plain words of the regulation, the panel committed a more basic interpretative error: it failed to read the entire definition of "storm water discharge associated with industrial activity" that appears in 40 C.F.R. § 122.26(b)(14)(ii), and therefore failed to give the regulation an interpretation that is consistent with its plain meaning. The opening sentence of the definition, not quoted by the court, states that the phrase means "the 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*." (Emphasis added). Silvicultural activities in the woods do not occur "at an industrial plant." Therefore, nothing that occurs in connection with silvicultural activities in the woods can constitute "stormwater discharge associated with industrial activity" regardless of how access roads are included in an industrial activity.

Even if the "industrial plant" requirement and the exclusion of public roads is ignored, and the panel's construction of "immediate access roads" is accepted, yet another step is still required to find regulatory coverage: the logging roads must be "primarily dedicated" for use by the loggers who perform the "industrial activity." Although the panel was reviewing a dismissal based on a Fed.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim, which normally assumed all pleaded facts and inferences to be true and does not provide a record for factual determinations, the panel made what appears to be an essentially factual determination of that question:

> We recognize that logging roads are often used for recreation, but that is not their primary use. Logging companies not only build and maintain the roads and their drainage systems pursuant to contracts with the State. Logging is also the roads' *sine qua non*: If there were no logging, there would be no logging roads.

The panel did not cite any record authority for these factual assertions; there was no record to which the court could cite. The panel had no information about the actual uses of any road located on state-owned forest land in Oregon—either for transport of logs, recreation, or any other purpose. Nor did the panel have any information about the reasons the Oregon Forestry Department chooses to build roads on its forest lands. In practice many forest land roads are used to transport logs for a few weeks every fifty years, and are used by thousands of hikers, fishers, and hunters throughout every intervening year. There is no clear basis on which such a road can be considered "primarily dedicated" to logging.

The panel's impression that "logging companies" will "build . . . the roads and their drainage systems pursuant to contracts with the State" is also contrary to industry practice. The panel was apparently not aware that in practice few if any "logging companies" build roads used to remove logs from the woods. Most "logging companies" are in reality small outfits with no more than a few dozen loggers that do nothing except cut trees, and then pull cut timber onto a landing and from there onto a logging truck. Most loggers never sign a contract to purchase the cut timber. The purchaser of a state or federal timber sale contract is almost invariably a manufacturer that will process or resell the wood, and who subcontracts with the

logger to cut the timber and separately contracts with a log trucking firm to transport the logs to a processing facility. In markets starved for raw timber, these facilities may be up to 200 miles distant from the source of the logs.

The panel's equally evident belief that logging companies will "maintain" the roads and drainage systems for years or decades after completing a timber-removal operation is equally ungrounded in fact. Industry practice is that rarely if ever does a timber sale contract require the purchaser, or the logger, or the log trucker, to maintain a road for years or decades after the sale is completed. That duty falls upon the landowner, who, after all, owns the road after it is built.

Finally, the panel's implicit belief that all the stormwater runoff carrying residue of a logging operation ends at a "logging road" is also incorrect. From local roads stormwater runoff continues downhill regardless of what lies below, and may next enter a conveyance at a state general use road or even a federal interstate highway, both of which commonly transport logging trucks traveling from forest to mill.

The panel's mistaken understanding of actual forest industry practices (and its lack of a record on which to base any findings in that area) undermines its core holding that an NPDES permit is required for a logging operation. The key question is: who must get the permit? Not the loggers in the woods who cut down the trees. They don't own any logs, trucks or roads, and while they may initiate the sediment runoff, they themselves don't discharge anything from a point source. Not the log truckers who haul the logs on the roads. They own neither logs nor roads, did not initiate the runoff, and do not discharge anything from a point source. Not the manufacturing concern that purchased the contractual right to remove the logs from the woods. That firm does not own the roads immediately by the logging site, may not own any road between the logging site and its manufacturing plant, and discharges nothing from any point source.

Then how about the road owner, in this case the state of Oregon? To be sure, it owns the culverts, drains, and ditches built on state forest lands, and therefore can be said to "discharge" everything that comes out of any of those conveyances. But a culvert, drain, or ditch is the ultimate "common carrier" of everything that enters it at the uphill end and thereafter quickly leaves it, unchanged in any respect, at the downhill end. These conveyances carry material released naturally, material released by activity on private land or federal land above the culvert, and material released by other road users unrelated to logging operations. A culvert owner cannot prevent or control an uphill release of sediment by a third party or by natural process, and has no ability to alter and little ability to control what enters (and leaves) its culverts, ditches, and drains. There is no practical value to forcing a road owner to obtain an NPDES permit for logging runoff—which is precisely why EPA has exempted these conveyances from NPDES permitting for a third of a century.

Ironically, the most likely result of requiring road owners to obtain NPDES permits for culverts, drains, and ditches would be to encourage the elimination of the conveyances altogether. Where a logging road lacks culverts, drains, and ditches, there is no point source and no NPDES permit can be required even under this controversial decision. Yet state and federal wildlife agencies strongly encourage the installation of such conveyances to improve fish habitat in forested areas.

The *Northwest Environmental Defense Center v. Brown* case is not over. The defendants and intervening interests have petitioned for rehearing and rehearing en banc, and the panel has shown some awareness of the evident legal deficiencies in its ruling. The court directed the plaintiffs to respond to the petitions and also to address the following jurisdictional questions:

> 1. Can a suit challenging EPA's interpretation of its regulations implementing the Clean Water Act's permitting requirements be brought under the Act's citizen suit provision, 33 U.S.C. § 1365(a)?
>
> 2. Must a suit challenging EPA's decision to exempt the discharge of a pollutant from the Clean Water Act's permitting requirements be brought under the Act's agency review provision, 33 U.S.C. § 1369(b)?[11]

The plaintiffs' response tellingly admits that the panel had no power to make findings of fact, and asserts (without reference to the opinion) that the panel only assumed allegations in the complaint to be true (even though the complaint has no allegations as to most of the material factual issues).[12] Ironically, the plaintiffs themselves urge the panel to recognize the factual nature of the legal definition of an immediate access road.[13]

If the panel fails to correct its own errors, en banc review is not out of the question, and if necessary a petition for certiorari to the Supreme Court may well receive favorable consideration. The final chapter has not been written in *Northwest Environmental Defense Center v. Brown*.

Endnotes

1 33 U.S.C. §1342.

2 Nw. Envtl. Defense Ctr. v. Brown, No. 07-35266 (Aug. 17, 2010).

3 40 C.F.R. § 122.27.

4 Pub. L. No. 92-500, 86 Stat. 816 (1972).

5 H. Rep. No. 92-911 at 109 (1972).

6 Nw. Envtl. Defense Ctr. v. Brown, No. 07-35266 (Aug. 17, 2010).

7 40 C.F.R. § 122.26(b)(14).

8 *Id.* § 122.26(b)(14)(ii).

9 55 Fed. Reg. 47,990, 48,009 (Nov. 16, 1990).

10 *Id.* at 48,009.

11 Order, Nw. Envtl. Defense Ctr. v. Brown, No. 07-35266 (October 21, 2010).

12 Plaintiffs' Response to Rehearing Petitions, Nw. Envtl. Defense Ctr. v. Brown, No. 07-35266, at 23 (Dec. 13, 2010) ("But the panel opinion's discussion of logging roads does not equate to a finding of fact. Furthermore, the panel was well within its authority to assume that the facts alleged are true and that NEDC therefore stated a claim upon which relief can be granted.").

13 *Id.* at 28 ("The inquiry focuses on how the road is currently used and not simply whether it is publicly owned.").