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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST ENVIRONMENTAL
DEFENSE CENTER,

No.:

Petitioner,

**PETITION FOR REVIEW
AND
CORPORATE DISCLOSURE
STATEMENT**

v.

LISA P. JACKSON, Administrator, and
the U.S. ENVIRONMENTAL
PROTECTION AGENCY,

Respondents.

Pursuant to Section 509(b) of the Federal Water Pollution Control Act, 33 U.S.C. § 1369(b), the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioner Northwest Environmental Defense Center hereby petitions this Court for review of the following final rule signed by Respondent Lisa P. Jackson, Administrator of the U.S. Environmental Protection Agency, on November 30, 2012: Revisions to Stormwater Regulations to Clarify that an NPDES Permit is not Required for Stormwater Discharges from Logging Roads (RIN: 2040-AF42) (77 Fed. Reg. 72,970 (December 7, 2012)) (Attachment A).

This is a protective appeal. Petitioner is respondent in two cases presently on appeal to the U.S. Supreme Court, *Doug Decker, et al., v. Northwest Environmental Defense Center*, case number 11-338, and *Georgia-Pacific West, Inc., et al., v. Northwest Environmental Defense Center*, case number 11-347. Both cases are appeals of this Court's decision in *Northwest Environmental Defense Center v. Brown, et al.*, 640 F.3d 1063 (9th Cir. 2011), and both cases present the question whether Section 509(b) of the Clean Water Act, 33 U.S.C. § 1369(b), governs challenges to EPA rules that exempt stormwater discharges from the Clean Water Act's National Pollutant Discharge Elimination System permit requirement. In both cases Petitioner herein, Northwest Environmental Defense Center, contends that such rules are not subject to 33 U.S.C. § 1369(b).

Petitioner files this protective appeal in case it is determined that the aforementioned final rule is subject to challenge in a court of appeals pursuant to 33 U.S.C. § 1369(b)(1). In that event, this Petition for Review is timely filed, within 120 days of the November 30, 2012 action of the Administrator, and venue is proper because Petitioner resides within this Circuit. *See* 33 U.S.C. § 1369(b)(1).

Petitioner’s Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner Northwest Environmental Defense Center hereby certifies that it has no parent companies and that no publicly held corporations own 10 percent or more of the Petitioner.

DATED this 4th day of January, 2013.

Respectfully submitted,

/s/ Christopher G. Winter

Christopher G. Winter
CRAG LAW CENTER

Paul A. Kampmeier
WASHINGTON FOREST LAW CENTER

*Of Attorneys for Petitioner Northwest
Environmental Defense Center*

PROOF OF SERVICE

I hereby certify that on January 4, 2013, I electronically filed the foregoing PETITION FOR REVIEW AND CORPORATE DISCLOSURE STATEMENT and this PROOF OF SERVICE with the Clerk of the Court for the United States Court of Appeals in the Ninth Circuit using the appellate CM/ECF system.

I further certify that on January 4, 2013, I served true and correct copies of the PETITION FOR REVIEW AND CORPORATE DISCLOSURE STATEMENT and this PROOF OF SERVICE by U.S. Postal Service Certified Mail with Return Receipt on each of the following:

LISA P. JACKSON, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

ENVIRONMENTAL PROTECTION
AGENCY
Correspondence Control Unit,
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Respectfully submitted,

/s/ Christopher G. Winter

Christopher G. Winter
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*Of Attorneys for Petitioner Northwest
Environmental Defense Center*

Disclaimer

The EPA Administrator, Lisa P. Jackson, signed the following final rule on 11/30/2012, and EPA is submitting it for publication in the *Federal Register* (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's FDsys website (<http://www.gpo.gov/fdsys/search/home.action>) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQ-OW-2012-0195. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR 122.26

[EPA-HQ-OW-2012-0195; FRL-]

RIN: 2040-AF42

Revisions to Stormwater Regulations to Clarify that an NPDES Permit is not Required for Stormwater Discharges from Logging Roads.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: The EPA is revising its Phase I stormwater regulations to clarify that stormwater discharges from logging roads do not constitute stormwater discharges associated with industrial activity and that a National Pollutant Discharge Elimination System (NPDES) permit is not required for these stormwater discharges.

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The record for this rulemaking is available for inspection and copying at the Water Docket, located at the EPA Docket Center (EPA/DC), EPA West 1301 Constitution Avenue NW, Washington, DC 20004. The record is also available via the EPA Dockets at <http://www.regulations.gov> under docket number EPA-HQ-OW-2012-0195.

FOR FURTHER INFORMATION CONTACT: For further information on this notice, you may contact Jeremy Bauer, EPA Headquarters, Office of Water, Office of Wastewater Management via email at bauer.jeremy@epa.gov or telephone at 202-564-2775.

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SUPPLEMENTARY INFORMATION:

I. General Information

A. Applicability

This action does not impose requirements on any entity. The action clarifies the status of stormwater discharges from logging roads. Those with an interest in such discharges may be interested in this action. If you have questions regarding the applicability of this rule, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. Copies of this Document and other Information

This document is available for download at <http://www.epa.gov/npdes/stormwater/forestroads> or under docket EPA-HQ-OW-2012-0195.

II. Background

A. Purpose

The EPA is promulgating this final rule to address the stormwater discharges identified under *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011) (*NEDC*).

The final rule clarifies that, for the purposes of assessing whether stormwater discharges are “associated with industrial activity,” the only facilities under SIC code 2411 that are “industrial” are: rock crushing, gravel washing, log sorting, and log storage. This clarifies, contrary to the Ninth Circuit’s decision in *NEDC*, that discharges of stormwater from silviculture facilities other than the four specifically named silviculture facilities identified above do not require an NPDES permit.¹

¹This rulemaking responds to the uncertainty created by the Ninth Circuit’s holding in *NEDC* that certain channeled discharges of stormwater from logging roads constitute point source discharges, bringing them within the Section 402 NPDES permitting framework. This final rule, by clarifying what constitutes a discharge “associated with

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B. Statutory Authority and Regulatory History

The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a). To that end, the Act provides that the discharge of any pollutant by any person shall be unlawful, except in compliance with other provisions of the statute. Generally, the Act provides for a permit program for the addition to waters of the United States of a pollutant from a point source, defined as "any 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." 33 U.S.C. 1362(14). In 1987 Congress amended the Clean Water Act by adding section 402(p), that created a temporary moratorium on NPDES permits for stormwater discharges, except for certain listed categories, and gave the EPA discretion to designate other stormwater discharges for regulation. 33 U.S.C. 1342(p).

For the initial phase, section 402(p)(1) created a temporary moratorium on NPDES permits for stormwater discharges from point sources except for those listed in section 402(p)(2), which includes discharges for which a permit had already been issued; discharges from large municipal separate storm sewer systems; and "industrial discharges." Congress did not define industrial discharges, allowing the EPA to define the term. For subsequent phases, section 402(p)(5) directs the EPA to conduct studies, in consultation with the states, for "identifying those stormwater discharges or classes of stormwater discharges for which permits are not required"; "determining to the maximum extent practicable, the nature and extent of pollutants in such discharges"; and "establishing procedures and methods to control stormwater discharges to the extent necessary to

industrial activity," makes clear that such discharges do not require NPDES permits even if they are point source discharges. We note that the Supreme Court has granted review of the *NEDC* case for the October 2012 term.

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mitigate impacts on water quality.” Section 402(p)(6) directs the Agency to issue regulations, in consultation with state and local officials, based on such studies. The section allows the EPA flexibility in issuing regulations to address designated stormwater discharges where appropriate and does not require the use of NPDES permits or any specific regulatory approach. Specifically, the section states that the regulations “shall establish priorities, establish requirements for state stormwater management programs, and establish expeditious deadlines” and may include “performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.” 33 U.S.C. § 1342(p)(6). This flexibility is unique to stormwater discharges and is different than the treatment of stormwater discharges listed in section 402(p)(2)(B) of the Act, which requires a permit for a stormwater discharge “associated with industrial activity.”

Prior to the 1987 Amendments, there were numerous questions regarding the appropriate means of regulating stormwater discharges within the NPDES program due to the water quality impacts of stormwater, the variable nature of stormwater, the large number of stormwater discharges, and the limited resources of permitting agencies. The EPA undertook numerous regulatory actions, which resulted in extensive litigation, in an attempt to address these unique discharges.

The EPA’s Silvicultural Rule (40 CFR 122.27) predates the 1987 amendments to the Clean Water Act that created section 402(p) for stormwater controls. The Agency defined silvicultural point source as part of the Silvicultural Rule to specify which silvicultural discharges were to be included in the NPDES program. The rule defines silvicultural point source to mean 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

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from which pollutants are discharged into waters of the United States” and further explains that “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.”

In 1990, following the 1987 amendments that directed the Agency to develop regulations requiring permits for large municipal separate storm sewer systems and stormwater “discharges associated with industrial activity,” the EPA promulgated the Phase I stormwater regulations. (55 FR 47990, November 16, 1990). The EPA defined in the Phase I regulations “storm water discharge associated with industrial activity” which is not defined by the Act. In describing the scope of the term “associated with industrial activity,” several members of Congress explained in the legislative history that the term applied if a discharge was “directly related to manufacturing, processing or raw materials storage areas at an industrial plant.” (Vol. 132 Cong. Rec. H10932, H10936 (daily ed. October 15, 1986); Vol. 133 Cong. Rec. H176 (daily ed. January 8, 1987)). The Phase I rule clarified the regulatory definition of “associated with industrial activity” by adopting the language used in the legislative history and supplementing it with a description of various types of areas (e.g., material handling sites, sites used for the storage and maintenance of material handling equipment, etc.) that are directly related to an industrial process and to industrial facilities identified by the EPA. The supplemental language in the Phase I rule also includes the term “immediate access road.” The EPA considers “immediate access roads” to refer to roads which are exclusively or primarily dedicated for use by the industrial facility. *See* 55 Fed. Reg. 47990, 48009 (Nov. 16, 1990). These “immediate access roads” do not include public access roads that are state, county, or federal roads such as highways or Bureau of Land

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Management roads which happen to be used by the facility. *See id.* The Phase I regulation defines the term “storm water discharge associated with industrial activity” to include stormwater discharges from facilities identified in the rule by standard industrial classification or “SIC” code at 40 CFR 122.26(b)(14). The Phase I regulation included in the definition of that term SIC code 24 (Lumber and Wood Products) which includes 2411 (logging), but the Agency also had specified in the Phase I rule that the term does not include discharges from facilities or activities excluded from the NPDES program under other parts of the EPA’s regulations, including the Silvicultural Rule. As discussed above, the EPA had previously specified under the Silvicultural Rule which silvicultural discharges were to be included in the NPDES program (40 CFR 122.27). The EPA intended to regulate those same “silvicultural point source[s]” under the Phase I rule (i.e., rock crushing, gravel washing, log sorting, and log storage facilities) and to exclude from the Phase I regulation stormwater runoff from other silvicultural activities. For the “silvicultural point source[s]” (i.e., rock crushing, gravel washing, log sorting, and log storage facilities) regulated under the Phase I rule, the term “storm water discharge associated with industrial activity” includes “immediate access roads” (40 CFR 122.26(b)(14)(ii)). Unlike “immediate access roads” associated with industrial facilities, many logging roads have multiple uses, including recreation and general transportation, and commonly extend over long distances (i.e.; may not provide “immediate access” to an industrial site). The intent of the EPA in this rulemaking is that the NPDES program requirements be implemented with regard to “immediate access roads” in the same way they were implemented prior to the decision by the Ninth Circuit.

In developing the second phase of stormwater regulations, the EPA submitted to Congress in March 1995 a report that presented the nature of stormwater discharges from municipal and industrial facilities that were not already regulated under the Phase I regulations (U.S.

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Environmental Protection Agency, Office of Water. 1995. Storm Water Discharges Potentially Addressed by Phase II of the National Pollutant Discharge Elimination System Storm Water Program: Report to Congress. Washington, D.C. EPA 833–K–94–002). On December 8, 1999, the EPA published the Phase II stormwater regulations to address stormwater discharges from small municipal separate storm sewer systems and construction sites that disturb one to five acres. (64 FR 68722, December 8, 1999). The EPA retains the authority to designate additional stormwater discharges for regulation at a later date under either CWA section 402(p)(2)(E) or 402(p)(6).

The Phase II regulations for stormwater controls were challenged in *Environmental Defense Center v. US EPA*, 344 F.3d 832 (9th Cir. 2003) (*EDC v. EPA*). In that case, petitioners contended that the EPA arbitrarily failed to regulate discharges from forest roads under the Phase II rule. The court held that the EPA failed to consider the petitioners’ comments and remanded the issue to the EPA “so that it may consider in an appropriate proceeding Petitioner’s contention that § 402(p)(6) requires the EPA to regulate forest roads. The EPA may then either accept Petitioners’ arguments in whole or in part, or reject them on the basis of valid reasons that are adequately set forth to permit judicial review.” *Id.* at 863.

More recently, in *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011) (*NEDC*), a citizen suit was filed alleging violations of the Clean Water Act for discharging stormwater from ditches alongside two logging roads in state forests without a permit. The court held that because the stormwater runoff from the two roads in question is collected by and then discharged from a system of ditches, culverts and channels, there was a point source discharge of industrial stormwater for which an NPDES permit is required. As discussed above, the Agency specified in the Phase I rule that the term “storm water discharge

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associated with industrial activity” does not include discharges from facilities or activities excluded from the NPDES program under other parts of the EPA’s regulations, including the aforementioned Silvicultural Rule. The EPA intends through this regulation to more clearly limit Phase I applicability to only those silvicultural facilities that are “rock crushing, gravel washing, log sorting, and log storage facilities.”

In response to the partial remand under *Environmental Defense Center, Inc. (EDC) v. US EPA*, 344 F.3d 832 (9th Cir. 2003), the Agency continues to review available information on the water-quality impacts of stormwater discharges from forest roads, which include logging roads as discussed above, as well as existing practices to control those discharges and is considering a range of options to address such discharges, which could include designating a subset of stormwater discharges from forest roads for regulation under the Agency’s section 402(p) rulemaking authority. The EPA believes that the broad range of flexible approaches under section 402(p)(6) may be well suited to address the complexity of forest road ownership, management, and use.

In the interim, the EPA notes that Congress has directed that permits are not required for stormwater discharges for logging roads. Under the continuing resolution passed in September, 2012, until March 27, 2013, the Administrator may not require an NPDES permit or directly or indirectly require any state to require a permit, for discharges of stormwater runoff from roads, the construction, use, or maintenance of which are associated with silvicultural activities.

III. EPA’s Proposed Revisions and Public Comments Received on Proposed Rule

A. Proposed Revisions

The EPA proposed to revise 40 CFR 122.26(b)(14)(ii) to clarify that for the purposes of defining stormwater discharges associated with industrial activity, the only activities under SIC

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code 2411 that are “industrial” are rock crushing, gravel washing, log sorting, and log storage.

This revision does not remove any existing exemptions. Though the existing language in 40 CFR 122.26(b)(14)(ii) exempts SIC code 2434, wood kitchen cabinets, the wood kitchen cabinets category remains covered in a separate subsection. *See id.* at 122.26(b)(14)(xi) (listing “Facilities covered under Standard Industrial Classifications 20, 21, 22, 23, 2434 . . .” as engaging in industrial activity for purposes of the industrial stormwater regulations).

B. Public Comments

The EPA received 85 comment letters on its “Notice of Proposed Revisions to Stormwater Regulations to Clarify That an NPDES Permit is not Required for Stormwater Discharges From Logging Roads” (77 FR 53834, September 4, 2012). The Agency had previously announced its plan to propose these revisions in an earlier notice, “Notice of Intent to Revise Stormwater Regulations To Specify That an NPDES Permit is Not Required for Stormwater Discharges From Logging Roads and To Seek Comment on Approaches for Addressing Water Quality Impacts From Forest Road Discharges” (77 FR 30473, May 23, 2012). While the EPA has reviewed and is considering the comments received in response to the May 23 Notice of Intent, the Agency explained in its September 4 proposal that the EPA is not developing responses to those comments as part of this rulemaking.

The EPA has reviewed and considered all of the comments received on the proposed revisions. Many commenters expressed support for the EPA’s proposal. Most agreed with the objective to clarify the applicability of Phase I stormwater regulations but some suggested alternate language or approaches to reach that objective. For example, some suggested that the EPA simply state in its regulations that stormwater discharges from logging roads do not require

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a NPDES permit. Others recommended that the EPA assert that logging roads are nonpoint sources and therefore would not require a NPDES permit.

The EPA believes that the final language clarifies the applicability of Phase I stormwater regulations to stormwater discharges from logging roads. The final language indicates explicitly which facilities are included in the definition of stormwater discharges “associated with industrial activity” (i.e., “Facilities classified within Standard Industrial Classification 24, Industry Group 241 that are rock crushing, gravel washing, log sorting, or log storage facilities operated in connection with silvicultural activities”). Moreover, the final language further explains that “not included are all other types of silvicultural facilities.”

Many commenters suggested that the EPA delay finalizing the rule until after the Supreme Court rules on *Decker v. Northwest Environmental Defense Center*, No. 11-388, and *Georgia-Pacific West v. Northwest Environmental Defense Center*, No. 11-347. Some suggested that the Agency should have sought relief from the Supreme Court or Congress. The EPA disagrees with these commenters because today’s action ends any uncertainty created by the Ninth Circuit’s holding in *NEDC* administratively by clarifying what constitutes a discharge “associated with industrial activity” in connection with silvicultural activities. By moving to finalize this rule expeditiously, the EPA is providing the regulatory certainty needed in the wake of the Ninth Circuit’s decision and is reaffirming the EPA’s long-standing regulatory position regarding the applicability of stormwater regulations to logging roads. In doing so, this final rule cancels out any on-the-ground impact of the Ninth Circuit’s decision. Further, the EPA actions are consistent with *amicus curiae* briefs filed by the United States Department of Justice (DOJ) on May 24 and again on September 4, which described to the public and to the Supreme Court the

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administrative steps that the EPA would take to clarify “expeditiously” that an NPDES permit is not required for stormwater discharges from logging roads.

Some commenters disagreed with the EPA’s proposal, asserting that at least a subset of stormwater discharges from logging roads is truly industrial in nature and that those discharges should require NPDES permits. The EPA clarifies the applicability of Phase I stormwater regulations to stormwater discharges from logging roads and the Agency’s rationale in section II.B of this preamble. As the EPA notes, the Agency did not intend logging roads themselves to be regulated as industrial facilities and its view has not changed since EPA first issued the Phase I stormwater rule. The EPA is revising that rule to clarify the Agency’s original intent.

Some commenters asserted that the water quality impacts of stormwater discharges from logging roads and other forest roads are well-documented and suggested that the Agency should regulate them. Other commenters pointed to existing programs and suggested that a national regulation is unnecessary. Some asserted that existing state, federal, and tribal programs are insufficient to protect water quality. Others commented that the Agency already has all of the information it needs in order to regulate stormwater discharges from forest roads and suggested that if information gaps remain, the Agency should specify what information is needed and indicate on what schedule that information will be collected.

The EPA is not proposing new regulations for stormwater discharges from forest roads, including logging roads, at this time. While the EPA has not developed a specific schedule for addressing stormwater discharges from forest roads, the Agency notes that, in response to the partial remand under *EDC v. US EPA*, the Agency continues to review available information on the water quality impacts of stormwater discharges from forest roads, which include logging roads, as well as existing practices to control those discharges and is considering a range of

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options to address such discharges, which could include designating a subset of stormwater discharges from forest roads for regulation under the Agency's section 402(p) rulemaking authority. The EPA believes that the broad range of flexible approaches under section 402(p)(6) may be well-suited to address the complexity of forest road ownership, management, and use.

IV. Final Rule

The EPA has made no revisions to the proposed rule. The EPA is revising 40 CFR 122.26(b)(14)(ii) to clarify that for the purposes of defining stormwater discharges associated with industrial activity, the only activities under SIC code 2411 that are "industrial" are rock crushing, gravel washing, log sorting, and log storage. This revision does not remove any existing exemptions. Though the existing language in 40 CFR 122.26(b)(14)(ii) excepts SIC code 2434, wood kitchen cabinets, the wood kitchen cabinets category remains covered in a separate subsection. *See id.* at 122.26(b)(14)(xi) (listing "Facilities covered under Standard Industrial Classifications 20, 21, 22, 23, 2434 . . ." as engaging in industrial activity for purposes of the industrial stormwater regulations.)

As discussed in this preamble, the EPA did not intend logging roads themselves to be regulated as industrial facilities, but, in light of *NEDC*, the EPA is modifying 40 CFR 122.26(b)(14) to clarify the Agency's intent. The EPA believes that stormwater discharges from forest roads, including logging roads, should be evaluated under section 402(p)(6) of the Clean Water Act because the section allows for a broad range of flexible approaches, including non-permitting approaches, that may be better suited to address the complexity of forest road ownership, management, and use.

V. Economic Impact

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The final rule clarifies existing regulations and does not impose new regulatory requirements.

As a result this action has no economic, public health, or environmental impacts.

VI. Statutory and Executive Order Review

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563:

Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action.” Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden as it serves only to clarify existing regulations. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (40 CFR 122.26) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. and has assigned OMB control number 2040-0004. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For

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purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) a small business "as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201;" (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This rule will not impose any requirements on small entities. Rather, the rule clarifies that stormwater discharges from logging roads do not constitute stormwater discharges associated with industrial activity and that an NPDES permit is not required for these stormwater discharges.

D. Unfunded Mandates Reform Act (UMRA)

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for state, local, or tribal governments or the private sector. This action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. This action clarifies existing regulations and has no economic impact. Thus, it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government as specified in Executive Order 13132 (64 FR 43255, November 2, 1999).

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F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866. Moreover, this action clarifies existing regulations and has no economic, public health, or environmental impacts.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

The action is not a “significant energy action” as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Additionally, the change does not involve the installation of treatment or other components that use a measurable amount of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the EPA decides not to use available and applicable voluntary consensus standards.

The action clarifies existing regulations and makes no change to existing standards.

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J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission. Agencies must do this by identifying and addressing as appropriate any disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this action does not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The action clarifies existing regulations and has no economic, public health, or environmental impacts.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A Major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].

This document is a prepublication version, signed by Lisa P. Jackson on November 30, 2012. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Title: Revisions to Stormwater Regulations to Clarify that an NPDES Permit is not Required for Stormwater Discharges from Logging Roads

Rule p. 17 of 18

List of Subjects 40 CFR Part 122

Environmental protection, water pollution control

Dated: November 30, 2012

/s/

Lisa P. Jackson

Administrator

This document is a prepublication version, signed by Lisa P. Jackson on November 30, 2012. We have taken steps to ensure the accuracy of this version, but it is not the official version.

For the reasons set out in the preamble, 40 CFR part 122 is amended as follows:

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

Authority: 33 U.S.C. 1251 et seq.

Subpart B--[Amended]

2. Section 122.26 is amended by revising paragraph (b)(14)(ii) to read as follows:

§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

* * * * *

(b) * * *

(14) * * *

(ii) Facilities classified within Standard Industrial Classification 24, Industry Group 241 that are rock crushing, gravel washing, log sorting, or log storage facilities operated in connection with silvicultural activities defined in 40 CFR 122.27(b)(2)-(3) and Industry Groups 242 through 249; 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373; (not included are all other types of silviculture facilities);

* * * * *

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Circuit Mediation Office
Phone (415) 355-7900 Fax (415) 355-8566
<http://www.ca9.uscourts.gov/mediation>

MEDIATION QUESTIONNAIRE

The purpose of this questionnaire is to help the court's mediators provide the best possible mediation service in this case; it serves no other function. Responses to this questionnaire are *not* confidential. Appellants/Petitioners must electronically file this document within 7 days of the docketing of the case. 9th Cir. R. 3-4 and 15-2. Appellees/Respondents may file the questionnaire, but are not required to do so.

9th Circuit Case Number(s):	<input type="text"/>
District Court/Agency Case Number(s):	<input type="text"/>
District Court/Agency Location:	<input type="text"/>
Case Name:	<input type="text"/> v. <input type="text"/>
If District Court, docket entry number(s) of order(s) appealed from:	<input type="text"/>
Name of party/parties submitting this form:	<input type="text"/>

Please briefly describe the dispute that gave rise to this lawsuit.

Briefly describe the result below and the main issues on appeal.

(Please continue to next page)

Describe any proceedings remaining below or any related proceedings in other tribunals.

Provide any other thoughts you would like to bring to the attention of the mediator.

Any party may provide additional information *in confidence* directly to the Circuit Mediation Office at ca09_mediation@ca9.uscourts.gov. Please provide the case name and Ninth Circuit case number in your message. Additional information might include interest in including this case in the mediation program, the case's settlement history, issues beyond the litigation that the parties might address in a settlement context, or future events that might affect the parties' willingness or ability to mediate the case.

CERTIFICATION OF COUNSEL

I certify that:

- a current service list with telephone and fax numbers and email addresses is attached (see 9th Circuit Rule 3-2).
- I understand that failure to provide the Court with a completed form and service list may result in sanctions, including dismissal of the appeal.

Signature

("s/" plus attorney name may be used in lieu of a manual signature on electronically-filed documents.)

Counsel for

Note: Use of the Appellate ECF system is mandatory for all attorneys filing in this Court, unless they are granted an exemption from using the system. **File this document electronically** in Appellate ECF by choosing Forms/Notices/Disclosure > File a Mediation Questionnaire.

UNITED STATES COURT OF APPEALS for the NINTH CIRCUIT**Office of the Clerk****After Opening a Case – Counseled Non-Immigration Agency Cases**
*(revised December 2012)***Court Address – San Francisco Headquarters**

<i>Mailing Address for U.S. Postal Service</i>	<i>Mailing Address for Overnight Delivery (FedEx, UPS, etc.)</i>	<i>Street Address</i>
Office of the Clerk James R. Browning Courthouse U.S. Court of Appeals P.O. Box 193939 San Francisco, CA 94119-3939	Office of the Clerk James R. Browning Courthouse U.S. Court of Appeals 95 Seventh Street San Francisco, CA 94103-1526	95 Seventh Street San Francisco, CA 94103

Court Addresses – Divisional Courthouses

<i>Pasadena</i>	<i>Portland</i>	<i>Seattle</i>
Richard H. Chambers Courthouse 125 South Grand Avenue Pasadena, CA 91105	Pioneer Courthouse 700 SW 6th Ave, Ste 110 Portland, OR 97204	William K. Nakamura Courthouse 1010 Fifth Avenue Seattle, WA 98104

Court Website – www.ca9.uscourts.gov

The Court's website contains the Court's Rules and General Orders, information about electronic filing of documents, answers to frequently asked questions, directions to the courthouses, forms necessary to gain admission to the bar of the Court, opinions and memoranda, recordings of oral arguments, links to practice manuals, and an invitation to join our Pro Bono Program.

Court Phone List

Main Phone Number	(415) 355-8000
Attorney Admissions.....	(415) 355-7800
Calendar Unit.....	(415) 355-8190
Docketing.....	(415) 355-7840
Death Penalty.....	(415) 355-8197
Electronic Filing – Appellate ECF.....	Send email to cmecf_ca9help@ca9.uscourts.gov
Library.....	(415) 355-8650
Mediation Unit.....	(415) 355-7900
Motions Attorney Unit.....	(415) 355-8020
Procedural Motions Unit.....	(415) 355-7860
Records Unit.....	(415) 355-7820
Divisional Court Offices:	
Pasadena.....	(626) 229-7250
Portland.....	(503) 833-5300
Seattle.....	(206) 224-2200

Electronic Filing - Appellate ECF

The Ninth Circuit’s Appellate ECF (Electronic Case Files) system is mandatory for all attorneys filing in this Court, unless they are granted an exemption. All non-exempted attorneys who appear in an ongoing case are required to register for and to use the Appellate ECF system. [Registration](#) and information about ECF is available on the Court’s website at www.ca9.uscourts.gov under *Electronic Filing–ECF*. Read the [Circuit Rules](#), especially Ninth Circuit Rule 25-5, for guidance on Appellate ECF, including which documents can and cannot be filed electronically.

Rules of Practice

The Federal Rules of Appellate Procedure (Fed. R. App. P.), the Ninth Circuit Rules (9th Cir. R.) and the General Orders govern practice before this Court. The rules are available on the Court's website at www.ca9.uscourts.gov under *Rules*.

Practice Resources

The Court has prepared a practice guide video entitled *Perfecting Your Appeal*. The video may be viewed for free on the Court's website at www.ca9.uscourts.gov under *FAQs, Forms and Instructions -> Guides and Legal Outlines*, and may be purchased through the Clerk's office in San Francisco for \$15.00. Continuing legal education credit for viewing this videotape is available in most jurisdictions.

Admission to the Bar of the Ninth Circuit

All attorneys practicing before the Court must be admitted to the Bar of the Ninth Circuit. Fed. R. App. P. 46(a); 9th Cir. R. 46-1.1 & 46-1.2.

To apply for admission, obtain an application on the Court's website at www.ca9.uscourts.gov under *Forms* or by calling (415) 355-7800. If you are registered for the 9th Circuit's Appellate ECF system, upload your application and pay the \$230.00 fee with a credit card by logging into Appellate ECF and clicking on Utilities > Attorney Admission. Otherwise, mail the application to the Clerk's Office in San Francisco with the admission fee of \$230.00. Your check or money order must be included with the application.

Notice of Change of Address

Counsel who are registered for Appellate ECF must update their personal information, including street addresses and/or email addresses, online at: <https://pacer.psc.uscourts.gov/psco/cgi-bin/cmecf/ea-login.pl> 9th Cir. R. 46-3.

Counsel who have been granted an exemption from using Appellate ECF must file a written change of address with the Court. 9th Cir. R. 46-3.

Payment of Fees

The \$450.00 filing fee or a motion to proceed in forma pauperis shall accompany the petition for review. 9th Cir. R. 3-1.

A motion to proceed in forma pauperis must be supported by the affidavit of indigency found at [Form 4](#) of the Federal Rules of Appellate Procedure, available at the Court's website, www.ca9.uscourts.gov, under *Forms*.

Failure to satisfy the fee requirement or to apply to proceed without payment of fees will result in the petition's dismissal. 9th Cir. R. 42-1.

Motions Practice

Following are some of the basic points of motion practice, governed by Fed. R. App. P. 27 and 9th Cir. R. 27-1 through 27-13.

- Neither a notice of motion nor a proposed order is required. Fed. R. App. P. 27(a)(2)(C)(ii), (iii).
- Motions may be supported by an affidavit or declaration. 28 U.S.C. § 1746.
- Each motion should provide the position of the opposing party. Circuit Advisory Committee Note to Rule 27-1(5); 9th Cir. R. 31-2.2(b)(6).
- A response to a motion is due 10 days from the service of the motion. Fed. R. App. P. 27(a)(3)(A). The reply is due 7 days from service of the response. Fed. R. App. P. 27(a)(4); Fed. R. App. P. 26(c).
- A response requesting affirmative relief and/or relief by a date certain must include that request in the caption. Fed. R. App. P. 27(a)(3)(B).
- A motion filed after a case has been scheduled for oral argument, has been argued, is under submission or has been decided by a panel, must include on the initial page and/or cover the date of argument, submission or decision and, if known, the names of the judges on the panel. 9th Cir. R. 25-4.

Emergency or Urgent Motions

All emergency and urgent motions must conform with the provisions of 9th Cir. R. 27-3. Note that a motion requesting procedural relief (e.g., an extension of time to file a brief) is *not* the type of matter contemplated by 9th Cir. R. 27-3. Circuit Advisory Committee Note to 27-3(3).

Prior to filing an emergency motion, the moving party *must* contact an attorney in the Motions Unit in San Francisco at (415) 355-8020.

When it is absolutely necessary to notify the Court of an emergency outside of standard office hours, the moving party shall call (415) 355-8000. Keep in mind that this line is for true emergencies that cannot wait until the next business day (e.g., an imminent execution or removal from the United States).

Briefing Schedule

The Court sets the briefing schedule at the time the petition for review is docketed.

Certain motions (e.g., a motion for dismissal) automatically stay the briefing schedule. 9th Cir. R. 27-11.

The opening and answering brief due dates (and any other deadline set for a date certain by the Court) are not subject to the additional time described in Fed. R. App. P. 26(c). The early filing of petitioner's opening brief does not advance the due date for respondent's answering brief. 9th Cir. R. 31-2.1.

Extensions of Time to file a Brief

Streamlined Request

If you have not yet asked for any extension of time to file the brief, you may request one streamlined extension of up to 30 days from the brief's existing due date. Submit your request via the Appellate ECF system using the "File a Streamlined Request to Extend Time to File Brief" event on or before your brief's existing due date. No form or written motion is required.

Written Extension

Requests for extensions of more than 14 days will be granted only upon a written motion supported by a showing of diligence and substantial need. This motion shall be filed at least 7 days before the due date for the brief. The motion shall be accompanied by an affidavit or declaration that includes all of the information listed at 9th Cir. R. 31-2.2(b).

The Court will ordinarily adjust the schedule in response to an initial motion. Circuit Advisory Committee Note to Rule 31-2.2. The Court expects that the brief

will be filed within the requested period of time. *Id.*

Contents of Briefs and Record

The required components of a brief are set out at Fed. R. App. P. 28 and 32, and 9th Cir. R. 28-2, 32-1 and 32-2.

The content and filing of the record are governed by Fed. R. App. P. 16 and 17. If respondent does not file the record or certified list by the specified date, petitioner may move to amend the briefing schedule.

Excerpts of Record

The Court requires Excerpts of Record rather than an Appendix. 9th Cir. R. 17-1.1. Please review 9th Cir. R. 17-1.3 through 17-1.6 to see a list of the specific contents and format. For Excerpts that exceed 75 pages, the first volume must comply with 9th Cir. R. 17-1.6 and 30-1.6(a). Excerpts exceeding 300 pages must be filed in multiple volumes. 9th Cir. R. 30-1.6(b).

Respondent may file supplemental Excerpts, and petitioner may file further Excerpts. 9th Cir. R. 17-1.7; 17-1.8; 30-1.7 and 30-1.8. If you are a respondent responding to a pro se brief that did not come with Excerpts, then your Excerpts need only include the contents set out at 9th Cir. R. 30-1.7.

Excerpts must be submitted in PDF format on Appellate ECF on the same day the filer submits the brief, unless the Excerpts contain sealed materials. If the Excerpts contain sealed materials, do not electronically submit the Excerpts. The filer shall serve a paper copy of the Excerpts on any party not registered for Appellate ECF.

After electronic submission, the Court will direct the filer to file 4 separately-bound excerpts of record with white covers in paper copy.

Mediation Program

Mediation Questionnaires are required in all counseled cases seeking review of an agency decision except those cases seeking review of a Board of Immigration Appeals decision. 9th Cir. R. 15-2.

The Mediation Questionnaire is available on the Court's website at www.ca9.uscourts.gov under *Forms*. The Mediation Questionnaire should be filed within 7 days of the docketing of the Petition for Review. The Mediation Questionnaire is used only to assess settlement potential.

If you are interested in requesting a conference with a mediator, you may call the Mediation Unit at (415) 355-7900, email ca09_mediation@ca9.uscourts.gov or make a written request to the Chief Circuit Mediator. You may request conferences confidentially. More information about the Court's mediation program is available at <http://www.ca9.uscourts.gov/mediation>.

Oral Hearings

Notices of the oral hearing calendars are distributed approximately 4 to 5 weeks before the hearing date. The Court sits monthly in San Francisco, Pasadena and Seattle. The Court sits in Portland every other month, depending on caseload. The Court also hears cases 3 times a year in Honolulu and once a year in Anchorage.

The Court will change the date or location of an oral hearing only for good cause, and requests to continue a hearing filed within 14 days of the hearing will be granted only upon a showing of exceptional circumstances. 9th Cir. R. 34-2.

Oral hearing will be conducted in all cases unless all members of the panel agree that the decisional process would not be significantly aided by oral argument. Fed. R. App. P. 34.



Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

Molly C. Dwyer
Clerk of Court

January 04, 2013

No.: 13-70057
EPA No.: 2040-AF42
Short Title: Northwest Enviromental Defense v. U.S. Environmental Protection, et al

Dear Petitioner/Counsel

Your Petition for Review has been received in the Clerk's office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case.

The due dates for filing the parties' briefs and otherwise perfecting the petition have been set by the enclosed "Time Schedule Order," pursuant to applicable FRAP rules. These dates can be extended only by court order. Failure of the petitioner to comply with the time schedule order will result in automatic dismissal of the petition. 9th Cir. R. 42-1.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 04 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NORTHWEST ENVIROMENTAL
DEFENSE CENTER,

Petitioner,

v.

U.S. ENVIRONMENTAL
PROTECTION AGENCY; LISA
JACKSON,

Respondents.

No. 13-70057

EPA No. 2040-AF42

Environmental Protection Agency

TIME SCHEDULE ORDER

The parties shall meet the following time schedule.

- | | |
|-------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Fri., January 11, 2013 | Mediation Questionnaire due. If your registration for Appellate ECF is confirmed after this date, the Mediation Questionnaire is due within one day of receiving the email from PACER confirming your registration. |
| Mon., March 25, 2013 | Petitioner's opening brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1. |
| Wed., April 24, 2013 | Respondents' answering brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1. |

The optional petitioner's reply brief shall be filed and served within fourteen days of service of the respondents' brief, pursuant to FRAP 32 and 9th Cir. R. 32-1.

Failure of the petitioner to comply with the Time Schedule Order will result in automatic dismissal of the appeal. See 9th Cir. R. 42-1.

FOR THE COURT:

Molly C. Dwyer

Clerk of Court

William Fa'aita

Deputy Clerk