



Water Quality and Water Quantity in Montana :

Northwest Environmental Defense Center v. Brown:
the Evolving Point Source

By Peter G. Scott



Gough, Shanahan, Johnson & Waterman



Background

- Action brought under Clean Water Act citizen suit provision, 33 USC § 1365(a), to determine if natural runoff from logging roads on state land requires NPDES permit.
- District Court of Oregon (J. Garr King) dismissed the action with prejudice under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.



Parties

- Plaintiff: Northwest Environmental Defense Center (NEDC).
- State Defendants: Oregon State Forester and Oregon Board of Forestry.
- Timber Defendants: Hampton Tree Farms, Inc., Georgia-Pacific West, Inc., Stimson Lumber Co., Swanson Group, Inc.
- Intervenors: Oregon Forest Industry Council, American Forest and Paper Association, Tillamook County.
- *Amici*: Natural Resource Defense Council, United States, Pacific Legal Foundation.



Issues

- When does natural runoff become regulated discharge?
- What is the scope of the silvicultural exemption to NPDES requirements?
- What effect, if any, does 1987 CWA amendments have on analysis?



Standard of Review

- *De novo* review of dismissal under Rule 12(b)(6).
 - All material facts accepted as true, and construed in light most favorable to NEDC.
- *De novo* review of district court's interpretation of implementing regulations, with
 - Deference given to agency's interpretation unless plainly erroneous, inconsistent or impermissible.
- *Chevron* deference to agency interpretation of CWA.
 - Step 1: unambiguous statutory language controls.
 - Step 2: permissible construction by agency controls where statute is silent or ambiguous.



When does runoff become regulated discharge?

- Logging trucks create sediment source by crushing road bed materials.
- Logging road stormwater systems collect runoff.
- Runoff carries sediment.
- Sediment is deposited in receiving waters.
- Fish habitat is adversely impacted by sediment (i.e., spawning beds, oxygen levels, food chain).



Point Source Defined

- “Any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feed operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharge and return flows from irrigated agriculture.” 33 USC § 1362(14).



Nonpoint Source - nondefined?

- “The most common example of nonpoint source pollution is the residue left on roadways by automobiles. . . When it rains, the rubber particles and copper dust and gas and oil wash off of the streets and are carried along by runoff in a polluted soup, winding up in creeks, rivers, bays, and the ocean.” *League of Wilderness Defenders v Fosgren* (9th 2002).
- “The most common example of nonpoint source pollution is the residue left on roadways by logging trucks. . . When it rains, sediment washes off of the logging roads and is carried along by runoff in a polluted soup, winding up in creeks, rivers, bays, and the ocean.”



Reasoning - contrasted

- CWA established “distinctly different methods to control pollution released from point sources and that traceable to nonpoint sources.” *Pronsolino v. Nastri* (9th 2002).
- “runoff is not inherently a nonpoint or point source of pollution. . . depending on whether it is allowed to run off naturally or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances.” Opinion at 1182.



What is the scope of the silvicultural exemption to NPDES requirements?

- First silvicultural rule was overturned in *NRDC v. Train* (DC Dist. 1975) affirmed in *NRDC v. Costle*, (DC Cir. 1977).
 - Rule exempted silvicultural activities that did not involve controlled use of water (e.g., log storage or gravel washing).
 - Administrator [of EPA] cannot lawfully exempt point sources from regulation under NPDES.
- Amended silvicultural rule provides:
 - “Silvicultural point source” does not include nonpoint source silvicultural activities such as: nurseries, site preparation, reforestation, thinning, prescribed burning, pest and fire control, harvesting, surface drainage, and road construction and maintenance from which runoff results from precipitation events. 40 CFR § 122.27.



EPA Rational

- Amended silvicultural rule distinguishes point from nonpoint sources based upon source of pollutant rather than method of delivery (discrete conveyance vs natural runoff),
- EPA distinguished nonpoint sources:
 - Pollutants are not traceable to discrete facility
 - Discharge of pollutants induced by natural processes (i.e, precipitation and runoff)
 - Pollutants are better controlled by BMPs.



Analysis

- Is silvicultural rule based on permissible interpretation of 33 USC § 1362(14).
 - In *Fosgren* the Ninth Circuit examined the rule in connection with aerial application of insecticide
 - **Held.** Rule did not apply to insecticide discharged directly into stream by airplane (vessel = point source).
- In this case court is asked whether natural runoff becomes a point source when channeled through discrete conveyance.
 - **Held.** Categorical exemption for natural runoff containing pollutants that is collected by ditches (etc.) is not consistent with definition of point source and therefore impermissible.



What effect, if any, does 1987 CWA amendments have on analysis?

- The short answer is none.
- Defendants argued legislative acquiescence based on 1987 amendments to stormwater permitting requirements. Theory is that Congress did not disturb the longstanding silvicultural rule.
- The panel distinguished authorities because:
 - Susceptibility of statutes to administrative interpretation
 - Congress did not have the silvicultural rule squarely in mind
 - Amended stormwater requirements apply to timber industry



1987 Stormwater Amendments

- Congress addressed the difficulty of permitting thousands of point sources that deliver unpolluted (or lightly polluted?) runoff.
- Set up Phase I and Phase II categories for regulation.
 - Phase I includes discharges from industrial facilities; All others are Phase II.
 - Phase I regulation exempts timber based on silvicultural rule.



Analysis

- Logging is identified in the Standard Industrial Classifications (SIC). 40 CFR §122.26(b).
- Prior holdings prohibit exemption of industrial facilities from permitting requirements. *NRDC v. EPA* (9th 1992).
- Phase I regulation extends to discharges from “immediate access roads . . . used or traveled by carriers of raw materials. . . used or created by the facility.” 40 CFR §122.26(b).



Present Status

- Petitions for rehearing and *en banc* reconsideration filed based on:
 - Conflict with prior decisions of the court,
 - Displacement of longstanding regulatory scheme,
 - Opinion misconstrues stormwater rule,
 - Inter and intra circuit conflicts.
- Approximately 20 requests to file *amici* briefs.
- <http://wflc.org/cases/docket/nedcvbrown>



Peter G. Scott



Gough, Shanahan, Johnson & Waterman

33 South Last Chance Gulch

Helena Montana 59601

Tel: (406) 442-8560

Fax: (406) 442-8783

pgs@gsjw.com

