



Timberlands & Water Quality

Lessons From Clean Water Act Case Law





Clean Water Act & Timberlands

- The CWA is the #1 federal regulatory program with reach to timberlands.
- It requires a National Pollution Discharge Elimination System (NPDES) permit for “point source” discharges of pollutants to navigable waters.
- Non-point source pollution is not subject to the same permitting requirements and is addressed in a variety of ways, including through Total Maximum Daily Load allocations (TMDLs).



Clean Water Act & Timberlands

- There are statutory exemptions from the NPDES permit requirement, including for some agricultural operations, but not for forest management activities.
- However, by regulation EPA has long exempted silvicultural activities from the NPDES permit requirement of the CWA.



Silvicultural Exemption

“Silvicultural point source means 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 from which pollutants are discharged into waters of the United States. **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.**

However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit.” 40 CFR 122.27(b).



Best Management Practices

- Water quality impacts from timberlands generally are subject to state-level voluntary or imposed BMPs.
- NOAA Fisheries, EPA, and the environmental community have repeatedly expressed concerns about water quality impacts from forest operations notwithstanding BMPs. But because the federal agencies are not able to directly regulate non-point source pollution, they must rely on state BMP programs.



Pesticides

- Environmental groups have long asserted that NPDES permits are required for pesticide applications where surface waters may be affected.
- Key questions:
 - Does the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) registration preempt CWA permitting?
 - Is a pesticide properly applied a pollutant?
 - Is pesticide application a point source?



A Decade of Case Law

- *Headwaters Inc. v. Talent Irrigation District*, 243 F3d 526 (9th Cir 2001)
 - Pesticide residue is a pollutant.
 - Pesticide application is a point source.
 - NPDES permit is required.
- *League of Wilderness Defenders v. Forsgren*, 309 F3d 1181 (9th Cir 2002)
 - Spraying from an airplane is a point source even for passive drift to surface water.
 - Forest Service admitted without debate that the pesticide was a pollutant.
 - NPDES permit is required for aerial spraying where it can migrate to surface water.
- *Fairhurst v. Hagener*, 422 F3d 1146 (9th Cir 2005)
 - Where a pesticide is applied in accordance with its FIFRA label and **there are no residues or unintended effects**, the pesticide is not a pollutant under the CWA.
 - No NPDES permit is required.



EPA Final Rule, 71 Fed Reg 68483 (Nov. 27, 2006)

- Pesticides applied in accordance with FIFRA are not chemical wastes or biological materials and, therefore, are not pollutants under the CWA.
- The rule specifically exempted two types of pesticide applications from NPDES permitting requirements:
 - Pesticide applied directly to waters of the US to control pests present in the water; and
 - Pesticide applied to control pests over, including near, waters of the US.



National Cotton Council v. EPA, *553 F3d 927 (6th Cir 2009)*

- Court agreed with the 9th Circuit *Fairhurst* opinion:
 - “so long as the chemical pesticide is intentionally applied to the water [to perform a particular useful purpose] and leaves no excess portions after performing its intended purpose[] it is not a ‘chemical waste,’” and does not require an NPDES permit.
- But excess and residual pesticide is a pollutant from a point source and requires an NPDES permit.
 - Court included any residual from aerial or terrestrial applications that makes its way to the water.
 - Court also included residuals from aquatic pesticides applied directly to surface water.



Forest Roads As Point Sources

- *Northwest Environmental Defense Center (NEDC) v. Brown*, 2010 WL 3222105 (9th Cir 2010)
 - NEDC presented photographs allegedly showing turbid runoff from ditches and culverts from the Trask River Road and Sam Downs Road in the Tillamook State Forest.
 - NEDC alleged the state owned the roads.
 - NEDC alleged that the defendants, who are timber purchasers, haul logs on the roads, thereby “grinding up the road surface and creat[ing] much of the sediment and other pollutants delivered to rivers and streams.”
 - NPDES permit required for stormwater runoff from forest roads. In other words, runoff is a point source.





Plaintiff's Legal Arguments

- Discharges from ditches and culverts associated with the roads are point source discharges.
- The Silviculture Exemption is invalid.
- Hauling logs is an “industrial activity” under section 402(p) of the CWA that is subject to stormwater permitting requirements.



Silvicultural Exemption

- Defendants argue Silvicultural Exemption applies.
- Plaintiffs argue that exemption only applies to “non-point sources” and that EPA cannot undermine the CWA by exempting point sources (citing *EPIC v. PALCO*).
- Defendants argue that EPA has broad authority to interpret the term “point source” and this is what the Silvicultural Exemption does.



Clean Water Act Section 402(p)

- Two-phase regulatory program for stormwater.
- Phase I required permits for stormwater from:
 - Industrial activity
 - Municipal separate storm sewer systems serving populations $\geq 100,000$
- Phase II required EPA to identify additional sources for regulation. After consideration EPA did not include stormwater from forest operations.
- *Environmental Defense Council v. EPA*, 344 F3d 832 (9th Cir. 2003)
 - On procedural grounds Ninth Circuit remanded Phase II rules.
 - EPA has yet to act on the remand.



Ninth Circuit's Opinion

- NPDES permit is required for stormwater runoff from “logging roads.”
- Silvicultural Rule has no continuing potency, even though the court did not vacate the rule directly.
- Logging use of the roads is an “industrial activity” subject to Phase I permitting under section 402(p).
- Currently seeking rehearing *en banc*.



Implementation Ready TMDLs

- *Northwest Environmental Advocates v. Locke*
 - Challenged NOAA and EPA for failure to make a final decision approving or disapproving Oregon's Coastal Nonpoint Pollution Control Program (CNPCP) required by the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA).
 - CZARA requires the CNPCP to be coordinated with state water quality plans, including TMDLs.
 - Placed DEQs funding (\$3M) for the CNPCP at risk.



Implementation Ready TMDLs

- Final Settlement Agreement:

Oregon Department of Environmental Quality (DEQ) agrees to develop “Implementation Ready TMDLS, which is a **new and novel approach** to achieving and maintaining water quality standards in the State’s coastal sub-basins, and which includes the development and issuance of **enforceable load allocations. . .**”



Enforceable Load Allocations

DEQ “assigns [load allocations] to **individual property owners** – including forestland owners – adjacent to the waterbody as opposed to the general [load allocation] for the nonpoint source pollution sectors as has typically been done in previous TMDLs.”



Can They Do That?

- Oregon Department of Justice says, Yes.
 - 2010 legal opinion declares that if state forest practices rules are not as protective as BMPs set out in a TMDL, then DEQ can enforce the TMDL's BMPs or the landowner can come up with its own BMPs and submit them for DEQ approval.
 - DEQ can do this because the TMDL BMPs “are required by the [Clean Water Act].”



Not So Fast . . .

- Oregon law says, “forest operations on forestlands” must comply with water quality standards established by the EQC.
- But “The **Board of Forestry** shall establish [BMPs] * * * **as necessary** to insure that **to the maximum extent practicable** nonpoint source discharges of pollutants resulting from forest operations on forest lands do not impair * * * water quality standards established by the [EQC]. . .”
- And forest operations conducted in accordance with BMPs “shall not be considered in violation of any water quality standards.”



Just to be sure . . .

Oregon law provides:

“Unless required to do so by [the CWA], neither the EQC nor the DEQ shall promulgate or enforce any effluent limitations upon nonpoint source discharges of pollutants resulting from forest operations on forestlands in this state. Implementation of any limitations or controls applying to nonpoint source discharges or pollutants resulting from forest operations are subject to [Board of Forestry BMPs].”



Required By The CWA?

- Section 319 of the CWA provides funding and incentives to states to develop nonpoint source management plans but does not place any constraints on how states do so.
- Even if the BOF BMPs were somehow a violation of Section 319, the only consequence is loss of funding, not direct DEQ or EPA regulation or forcing the state to develop a specific program.
- And load allocations in TMDLs are not enforceable:
 - *ONDA v. U.S. Forest Service*, 550 F.3d 778 (9th Cir. 2008)
 - *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002)
 - *Friends of Pinto Creek v. U.S. EPA*, 504 F.3d 1007 (9th Cir. 2007)
- Therefore, the CWA does **not** require enforcement through TMDLs.
- DEQ attempting to implement now – may see a challenge to this approach.



Lessons

- Living in the 9th Circuit gives us all a ringside seat to Clean Water Act evolution across the country.
- Environmental litigation continues to be a major driver of Clean Water Act regulation and permitting.
- But takes years, sometimes a decade or more, for issues to mature to a predictable steady state.
- Landowners need to be vigilant and aware of Clean Water Act developments. New rulings create previously unconsidered risks.



Thank You!



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