



# Permitting for Forest Roads

## Is the National Pollutant Discharge Elimination System (NPDES) Coming to Forest Management?

Presented to the  
North Carolina Forestry Association  
October 28, 2010

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# Silvicultural Point Sources

## 40 CFR § 122.27 (1976)

- **EPA defines 4 activities as “point sources:”**
  - Rock crushing, gravel washing, log sorting, log storage
- **EPA excludes “nonpoint 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.”



# CWA Key Definitions

- “**pollutant**” – chemical wastes, biological materials, rock, sand, and industrial, municipal, and agricultural waste, etc.
- “**point source**” – any discernible, confined and discrete conveyance, i.e. pipe, ditch, or channel, from which pollutants are or may be discharged...this term does not include agricultural stormwater discharges and return flows from irrigated agriculture.



# Water Quality Act of 1987

## Two-phase stormwater discharge regulation NPDES Permit Program:

- Phase I - Activities listed in law require a permit and include “industrial activities.” Regulations issued in 1990.
- Phase II – EPA to identify additional activities requiring permits; Regulations issued 1999.



# *Environmental Defense Center v. EPA – 2003*

- Environmentalists sought review of EPA's Phase II stormwater regulations.
- Environmentalists' argued stormwater discharges from forest roads should be regulated under the Phase II permit program.
- Court ordered EPA to reconsider environmentalists' comments on proposed rule arguing for forest road permits and to respond in a manner subject to judicial review.



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## ***Northwest Environmental Defense Center v. Brown – 2010***

- Plaintiff relied on a 1997 Oregon road-sediment study in the Tillamook State Forest finding:
  - 25-39% of the road system was delivering sediment to streams
  - from 459 different discharge points
  - Along 42 miles of road



Ninth Circuit first ruled:

## Forest Road Are “Point Sources”

- Roadside ditches collect and convey sediment-laden storm water to streams.
- Stream crossings and roads parallel to streams contribute same.



Ninth Circuit then ruled:

## Forest Roads Are Part Of an “Industrial Activity”

- In the 1990 Phase 1 stormwater NPDES regulations, EPA included SIC Code 24, which includes 2411 – Logging
- SIC Codes include ancillary access roads
- Court discounted EPA effort in rule preamble to exclude logging from SIC 24



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## How Would a Permit Program Work?

- Who must obtain permit coverage?
- Who issues the permit?
- Procedural requirements for permit issuance
- General permits
- Coverage for forest roads
- Terms and conditions
- Impaired waters

*Thanks to Ellen Steen of Crowell & Moring*



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# Who Must Obtain Permit Coverage?

Owner/operator of road – and possibly operator of other activities that generate pollutants discharged via road

- “Person who discharges” must apply for permit coverage
- Generally interpreted to be the owner or operator of discharging facility (e.g., the road)
- If owner and operator are different, EPA typically assigns operator primary responsibility
- Person whose activities generate pollutants may also be viewed as discharger – even if not owner or operator of discharging facility
- What if multiple landowners and /or operators.





# Who Is the Permitting Authority?

- EPA Regional Offices (4 states) or State environmental agency
- Answer may be industry-specific (e.g., if State authority is limited under State law) or location specific (e.g., tribal lands)
- State permit issuance eliminates certain federal requirements (e.g., Endangered Species Act consultation)
- EPA retains oversight and veto authority
- Unresolved whether EPA oversight may trigger federal requirements such as ESA consultation



# Who Has Enforcement Authority?

EPA, State, and citizens—

- Enforcement for discharge without permit or for any violation of permit terms and conditions (e.g., violation of permit-mandated BMPs, recordkeeping, etc.)
- Maximum civil penalties of \$32,500 per violation, per day
- Citizens may also file enforcement lawsuit



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# Procedural Requirements for Permit Issuance

- Public notice of any application for permit; General Permit notices of intent are posted
- Permit term limited to five years
- The following steps are required for individual permits, but EPA does not follow them for General Permit notices:
  - Issuance of draft permit for public comment
  - Opportunity for public hearing
  - Opportunity for appeal by permittee or commenters



# Scope of Permit Coverage

- NPDES permits regulate *discharges* of pollutants – not *activities*
- Permit likely required for any discharges of pollutants from road features, even in absence of logging.
- As a practical matter, permit will likely regulate, directly or indirectly, anything – road maintenance, road use, harvesting, site preparation, etc. – that affects the quality of the stormwater discharge
- What if activities occur on lands under different ownership or control?
- Advance coverage over 5-year permit term OR specific permit modification as activities are planned?
- General Permit would not resolve compliance confusion



# Scope of Permit Coverage

## **NPDES permits may have narrow or broad geographic scope**

1. Specific industrial wastestream from identified “outfall”
2. Broader scope – for particular *type* of discharge at a given site or area such as stormwater (municipal systems and facilities), concentrated animal feeding operations (CAFOs), and now pesticide applications; general permits may be considered

## **What geographic scope might apply for forest road discharges?**

- Individual culverts/ditches?
- Localized section of road(s) discharging to one receiving water?
- Entire system of roads with multiple receiving waters (1000 acres, 5000 acres, or more)?



# Problems With a General Permit System

- General Permits require advance notice, specific measures, monitoring, reporting and possible planning requirements
- Activists generally challenge adoption of these permits
- Permit compliance also subject to judicial review
- 46 states must develop their own



# Permitting Speed Bumps and Roadblocks

- Mandatory compliance, subject to CWA enforcement penalties
- Likely to require highly prescriptive and inflexible site-specific BMPs
- Environmentalists likely to seek (through litigation, if necessary)
  - Public participation and FWS/NMFS involvement in selection of site-specific BMPs
  - Incorporation of site-specific BMPs into permit, so modification will require additional public participation and agency approval
  - Public comment and hearings on use of general permit



# Permitting Speed Bumps and Roadblocks

- Impaired Waters – TMDLs
  - General Permit coverage not be available
  - Individual permitting likely contentious, possibly precluded
- High Quality Waters – Anti-Degradation Policy
  - General Permit coverage not be available
  - Three tiers with increasingly limited discharges
- Endangered Species Act
  - Applicable to adoption of General Permit
  - Applicable to EPA-issued permits
  - State general and individual permits?