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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ENVIRONMENTAL PROTECTION INFORMATION CENTER, Plaintiff, v. PACIFIC LUMBER COMPANY; SCOTIA PACIFIC COMPANY, LLC, and; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	Case No.: C01-2821 MHP PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT ON THIRD CLAIM FOR RELIEF; BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S THIRD CLAIM FOR RELIEF Date: October 6, 2003 Time: 2:00 p.m. Courtroom: 15

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on October 6, 2003, at 2:00 p.m., or as soon thereafter as counsel may be heard by the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California, plaintiff Environmental Protection Information Center will and hereby does move the Court for partial summary judgment on plaintiff's Third Claim for Relief on the ground that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law as to that claim.

Plaintiff's Third Claim for Relief alleges that defendant Environmental Protection Agency's ("EPA") promulgation of Section 122.27 of the Code of Federal Regulations is not in accordance with law and in excess of the statutory authority delegated to EPA by the Federal

Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1251 *et seq*. The Clean Water Act mandates that any discharge of any pollutants from any point source is unlawful unless authorized by a National Pollutant Discharge Elimination System ("NPDES") permit. The Clean Water Act defines "point sources" 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). Section 122.27 is *ultra vires* because it purports to exempt discrete conveyances, including ditches, culverts, channels and gullies, that discharge pollutants associated with logging operations from the NPDES permitting program.

For this reason, Plaintiff requests the Court to issue a partial summary judgment on their Third Claim for Relief and issue an order that 1) declares that EPA's promulgation of Section 122.27 was not in accordance with law and in excess of statutory authority; 2) declares Section 122.27 null and void; and 3) orders EPA to take the necessary administrative steps to strike Section 122.27 and any references to that section from the Code of Federal Regulations within 120 days.

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Plaintiff Environmental Protection Information Center ("EPIC") files this brief in support of its motion for summary judgment on its Third Claim for Relief challenging the legitimacy of Section 122.27 of Title 40 of the Code of Federal Regulations, the "silvicultural point source" rule.

I. INTRODUCTION

The devastation that logging activities by Defendants Pacific Lumber Company and Scotia Pacific Co. LLC (collectively "Pacific Lumber") are wreaking on Bear Creek in Humboldt County, California exemplifies a much broader pollution problem that exists throughout California's and the Nation's forested lands. Widespread pollution caused by logging activities is polluting and in some instances destroying our Nation's waters. The reason this problem exists is Defendant Environmental Protection Agency's ("EPA") promulgation and continued maintenance of an illegal exemption to the National Pollutant Discharge Elimination System ("NPDES") permitting program mandated by the Federal Water Pollution Control Act (hereinafter "Clean Water Act" or "Act"), 33 U.S.C. § 1251 *et seq*.

By promulgating Section 122.27, EPA has frustrated Congress' mandate that all point source discharges, including those constructed or caused by the logging industry, must obtain a NPDES permit assuring all discharges will comply with water quality standards. EPA's continued application of section 122.27 attempts to cloak the agency in authority it does not have under the Clean Water Act. Congress has retained for itself the exclusive authority to establish exemptions to its mandate that NPDES permits be issued for all point sources and that point sources include any discrete conveyance, including any pipe, ditch, channel, tunnel, or conduit – in short, each and every storm water drainage feature employed by the logging industry. The Act does not exempt the logging industry from that fundamental requirement.

EPIC requests that the District Court grant this motion for summary judgment and issue an order declaring that Section 122.27 is ultra vires and inconsistent with the Clean Water Act; ordering EPA to vacate Section 122.27 and all other references to that section found in the Code of Federal Regulations, and; permitting EPIC to proceed to litigate its first two claims for relief, seeking to enforce Pacific Lumber's violations of the Clean Water Act in the Bear Creek watershed.

II. LEGAL BACKGROUND

The Clean Water Act is one of the most comprehensive, far-reaching federal environmental statutes ever enacted by Congress. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 317-319 (1981). "Beginning with the Congressional intent to eliminate pollution from the nation's waters by 1985, the [Clean Water Act] was designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). *See* 33 U.S.C. § 1251(a)(1). In furtherance of that goal, "[t]he Act established a comprehensive scheme for federal regulation of water pollution, the National Pollution [sic] Discharge Elimination System ["NPDES"], as a means of achieving and enforcing effluent limitations." *Trustees for Alaska v. EPA*, 749 F.2d 549, 553 (9th Cir. 1984). Where the NPDES program applies, it is unlawful for any person to discharge pollutants without first obtaining a permit and complying strictly with its effluent limitations. *Id.*; 33 U.S.C. § 1311(a).

A. The Clean Water Act's Definition of "Point Source" Is Unambiguous

Congress has defined "point source" 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). Congress' definition of "point source" is "broadly construed" in order to effectuate the remedial purpose of the Clean Water Act. *Earth Sciences*, 599 F.2d at 373; *see also Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002). Congress sought to further the goal of eliminating pollution discharges and achieve fishable and swimmable waters "by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." *Earth Sciences*, 599 F.2d at 373; *see* 33 U.S.C. § 1251(a)(1)-(2).

Not surprisingly, the courts have found a broad array of conveyances to be point sources. *See, e.g. League of Wilderness Defenders/Blue Mountain Diversity Project v. Forsgren*, 309 F.3d 1181, 1185-86 (9th Cir. 2002) (aircraft equipped with tanks and mechanical sprayers spraying pesticides associated with logging activities a point source); *Earth Sciences*, 599 F.2d at 374 (unintentional discharges of pollutants from a mine system designed to catch runoff met the

statutory definition of a point source); *North Carolina Shellfish Growers Ass'n v. Holly Ridge Assoc., LLC*, __ F.Supp.2d __, 2003 WL 21995171*20-23 (E.D.N.C. 2003) (ditches, check dams, sediment traps, gullies, rills, and cleared, graded or excavated areas associated with lands managed as forestlands are point sources).

B. All Discharges of Pollutants from Point Sources Must Be Regulated by the NPDES Permitting Program

With the exception of a few, specific exclusions established in the Act by Congress, all discharges of pollutants from point sources must obtain a NPDES permit. "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from *any* point source. . . ." 33 U.S.C. § 1362(12) (emphasis added). Such discharges include "additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man. . ." 40 C.F.R. § 122.2. "Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *City of Milwaukee*, 451 U.S. at 318. *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) ("The Act applies to all point sources and virtually all bodies of water. . ."); *Natural Resources Defense Council, Inc. v. Costle ("NRDC II")*, 568 F.2d 1369, 1381 (D.C. Cir. 1977) (Congress issued a "clear mandate that all point sources have permits"); 1383 ("We find a plain Congressional intent to require permits in any situation of pollution from point sources").

Only where there is no discernable conveyance of polluted effluent, *i.e.*, no "point source," is a discharger relieved of having to obtain a NPDES permit. "Nonpoint source pollution is not specifically defined in the Act, but is pollution that does not result from the 'discharge' or 'addition' of pollutants from a point source." *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998). Thus, only storm water runoff that "could not be traced to any identifiable point of discharge" falls outside of the NPDES permitting program. *See Trustees for Alaska*, 749 F.2d at 558; *League of Wilderness Defenders*, 309 F.3d at 1185-86. *Accord Environmental Defense Center, Inc. v. U.S. EPA* ("*EDC*"), 319 F.3d 398, 406 n. 8 (9th Cir. 2003) ("Diffuse runoff, such as rainwater *that is not channeled through a point source*, is considered nonpoint source pollution and is not subject to federal regulation") (emphasis added). As the Ninth Circuit has explained:

> point and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance. Thus, when mining activities release pollutants from a discernible conveyance, they are subject to NPDES regulation, as are all point sources.

Trustees for Alaska, 749 F.2d at 558.

Congress has established only five specific and limited exceptions to the Act's mandate that all point sources must obtain a NPDES permit. In the original 1972 statute, Congress specifically exempted "sewage from vessels" and "a discharge incidental to the normal operation of a vessel of the Armed Forces" from the NPDES program by removing such discharges from the definition of "pollutant." 33 U.S.C. § 1362(6).[1] Shortly after the D.C. Circuit's 1977 decision in *NRDC II* held that EPA had no authority to exempt silvicultural and agricultural discharges from the NPDES program, Congress responded by amending the CWA to exempt *agricultural return flows* from the NPDES permitting program. 33 U.S.C. §§ 1342(l)(1); 1362(14).[2] In 1987, Congress broadened the farming exemption to include agricultural stormwater discharges. 33 U.S.C. § 1362(14) ("This term ['point source'] does not include agricultural stormwater discharges and return flows from irrigated agriculture"). Lastly in 1987, Congress established a very limited exemption for unpolluted discharges from stormwater diversion facilities used in the mining industry. 33 U.S.C. § 1342(l)(2).[3] Congress has never

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[1] Congress addressed "sewage from vessels" comprehensively through Section 1322, requiring the establishment of technological standards and requirements for marine sanitation devices for all vessels. 33 U.S.C. § 1322.

[2] At the same time, Congress also expressly provided a limited exemption for the construction and maintenance of logging roads from the CWA's dredge and fill permitting requirements. 33 U.S.C. § 1344(f)(E) (so-called "section 404 permits"). The dredge and fill permitting program is managed by the Army Corps of Engineers and is separate and distinct from the NPDES program. *Id.*; §1342(a)(1) (NPDES permits do not apply to Section 404 dredge and fill discharges); 40 C.F.R. § 122.3(b).

[3] Section 1342(l)(2) provides:

> [t]he Administrator shall not require a permit under [section 1342], nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission

amended the Clean Water Act to include any exemption for logging-related pollutant discharges from the NPDES program.

In addition to these express exemptions, in 1987 Congress clarified its existing mandate that all storm water discharges from point sources are subject to the NPDES permitting requirements by establishing specific storm water permitting requirements and issuing deadlines for EPA to establish regulations to assist in implementing that mandate. 33 U.S.C. § 1342(p).

C. The Court's Rejected EPA's Previous Effort to Exempt Logging-Related Point Sources from the NPDES Permitting Program

The D.C. Circuit Court of Appeal firmly rejected EPA's prior effort to unilaterally create an exemption for the logging industry's point source pollution discharges from the NPDES permitting program. In *NRDC II*, the Court of Appeal invalidated EPA's original rulemaking that attempted to exempt certain categories of silvicultural, agricultural and storm water pollution discharges from the NPDES permitting program. *NRDC II*, 568 F.2d 1369. In 1973, EPA had published a regulation that sought to exclude various categories of point source discharges from the CWA's NPDES permitting program. *Natural Resources Defense Council v. Costle ("NRDC I")*, 396 F.Supp. 1393, 1395 (D.D.C. 1975). The exempted discharges included discharges from storm sewers composed entirely of storm runoff uncontaminated by industrial or commercial activity, certain smaller sized animal confinement facilities, silvicultural activities, and irrigation return flows from larger farms. 40 C.F.R. § 125.4 (1975); *NRDC I*, 396 F.Supp. at 1395; *NRDC II*, 568 F.2d at 1373 n. 5 (quoting regulation's language). The district court struck down the regulation as plainly inconsistent with the language and purposes of the Act, holding that "the Administrator cannot lawfully exempt point sources discharging pollutants from regulation under NPDES." 396 F.Supp. at 1402. The D.C. Circuit Court of Appeals affirmed the district court's

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> facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

33 U.S.C. § 1342(l)(2).

ruling, holding that "the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § [1342]. Courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute." 568 F.2d at 1377.

In response to the ruling by the district court in *NRDC I*, EPA sought to reframe the logging exemption struck down by the district court by enacting 40 C.F.R. § 122.27.[4] Applying purported interpretive authority pursuant to 33 U.S.C. § 1361(a), EPA proposed a revised regulation that exempted all but four types of silviculture-related facilities from the NPDES permitting program. 41 Fed. Reg. 6281-6283 (Feb. 12, 1976).[5] On June 18, 1976, EPA published a final rule excluding almost all point sources associated with logging from the NPDES program by decreeing all but four silviculture activities to be "nonpoint sources." 41 Fed. Reg. 24709-24712 (June 18, 1976). *See also* 45 Fed. Reg. 33290, 33446-47 (May 19, 1980) (moving examples of nonpoint source activities from comment to text of regulation).

40 C.F.R. § 122.27 provides:

> (b) Definitions.
> (1) "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 [citations omitted].[6]

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[4] Originally enacted as 40 C.F.R. § 125.54. 41 Fed. Reg. 6283 (Feb. 12, 1976).

[5] 33 U.S.C. § 1361(a) provides that "[t]he Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter."

[6] 40 C.F.R. § 122.27 is cross-referenced by the following sections of the Code of Federal Regulations: 122.3(e) ("The following discharges do not require NPDES permits . . . (e) Any introduction of pollutants from non point source . . . silvicultural activities, including storm water runoff from . . . forest lands, but not . . . discharges from silvicultural point sources as defined in § 122.27"); 122.2 ("*Silvicultural point source* is defined at § 122.27"); 122.26(b)(14) (the term "storm water discharge associated with industrial activity" . . . "does not include

The preamble to Section 122.27 spells out three rationales relied upon by EPA to exempt discrete conveyances associated with most logging operations from the NPDES program:

> 1. The pollutants discharged are induced by natural processes, including precipitation, seepage, percolation, and runoff; 2. The pollutants discharged are not traceable to any discrete or identifiable facility; and 3. The pollutants discharged are better controlled through the utilization of best management practices, including process and planning techniques.

41 Fed. Reg. 24710 (June 18, 1976). On August 23, 1999, when EPA proposed to amend 40 C.F.R. § 122.27, the agency questioned the validity of the rationales upon which, in 1976, it based Section 122.27: "As evidenced by implementation of the NPDES permitting program for storm water discharges associated with construction, the first and third of these criteria are probably less meaningful in the current context of silvicultural road building and maintenance." 65 Fed. Reg. 43651 (July 13, 2000).

EPIC's complaint alleges that Pacific Lumber is discharging pollutants to waters of the United States through various point sources, including culverts, ditches, channels, pipes, logging-induced erosion gullies and other conveyances. First Amended Complaint, ¶¶ 39, 41, 64. EPA interprets Section 122.27 to exempt each of those point sources from the NPDES permitting program. *See* 65 Fed. Reg. 43651. Neither EPA nor Pacific Lumber dispute that Section 122.27 serves to exempt each of the point source discharges alleged by EPIC in its first amended complaint. *See* Pacific Lumber's Memorandum of Points and Authorities in Support of PALCO's Motion to Dismiss First Amended Complaint, pp. 1-2 (Feb. 11, 2002) (Docket entry # 70); Dec'l of William R. Murray, ¶ 6 (Dec. 17, 2001) (accompanying Docket entry # 54); Dec'l of Mark Rentz, ¶ 6 (Dec. 18, 2001) (accompanying Docket entry # 54). Previously, this Court has ruled that the plain language of Section 122.27 exempts all discharges associated with logging operations, even those from discrete conveyances such as a ditch, culvert, or gully. Transcript, Aug. 13, 2001 Hearing on Plaintiff's Motion for Temporary Restraining Order, p. 38 (attached as Exhibit B to Dec'l of Christopher J. Carr in Support of PALCO's Motion to Dismiss

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discharges from facilities or activities excluded under this part 122").

First Amended Complaint (Feb. 11, 2002) (Docket entry # 71, Att. 2).[7]

III. ARGUMENT

A. Standard of Review

Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*., "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret. . . statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . (2) hold unlawful and set aside agency action,

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[7] Plaintiff respectfully reiterates its previous argument that, by its express terms, Section 122.27 does not exempt point source discharges associated with silvicultural operations, even point sources not specifically identified by the regulation. By its terms, Section 122.27 only excludes *nonpoint* sources from the NPDES program. 40 C.F.R. § 122.27(b)(1). Accordingly, Section 122.27 does not bar plaintiff's first two claims for relief seeking to enforce Pacific Lumber's failure to apply for and obtain a NPDES permit for the point source discharges from its operations in Bear Creek. Any interpretation by EPA of Section 122.27 as exempting any discrete conveyances that are discharging pollutants is impermissible and must be rejected. *See Auer v. Robbins*, 519 U.S. 452, 457, 461 (1997) (agency's interpretation of its own regulation not controlling if an impermissible construction of statute, plainly erroneous or inconsistent with the regulation).

In *League of Wilderness Defenders*, the Ninth Circuit rejected the argument previously made in this case by both EPA and Pacific Lumber that the four silvicultural point sources enumerated by Section 122.27 is the exclusive list of all point sources associated with logging. 309 F.3d at 1187-88. The Court of Appeal has now held that "the list of four silvicultural point source activities is not exhaustive." *Id*. at 1188. The Court also explained that nonpoint sources did not channelize runoff but rather were limited to sources of "natural runoff." *Id*. at 1185-86. Section 122.27 "does not (and cannot) mean that activities which meet the statutory definition of point source pollution are excluded from NPDES permit requirements." *Id*. at 1188 n. 6.

More recently, in *North Carolina Shellfish Growers*, the North Carolina district court had the opportunity to clarify that Section 122.27 did not apply to drainage of storm water from ditches associated with lands managed for silviculture because such drainage ditches are not "natural runoff." 2003 WL 21995171*23 ("It is difficult to imagine how drainage from such a network could be deemed 'natural runoff' for purposes of the EPA exemption").

EPIC believes these two decisions provide an appropriate alternative path for the Court to declare the meaning of Section 122.27 as not excluding any point sources from the NPDES program, including those alleged by EPIC. Such a declaration would reject EPA's interpretation of its regulation as impermissible, leave the regulation intact, and allow EPIC to proceed with its first two claims for relief.

findings, and conclusions found to be--
(A) . . . not in accordance with law; [or] . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. . . ." 5 U.S.C. § 706.

The Court's review of Section 122.27 is guided by the Supreme Court's decision in *Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984). *See, e.g. Sierra Club v. U.S. Fish & Wildlife Service*, 245 F.3d 434, 440-41 (5th Cir. 2001) (court reviews validity of regulation under ESA pursuant to *Chevron*); *Pronsolino v. Nastri*, 291 F.3d 1123, 1131 (9th Cir. 2002). The first step of a *Chevron*-analysis requires answers to two questions: whether EPA has delegated any rulemaking authority at all to the agency and, even where such general authority exists, whether Congress limited that delegation in specific instances by addressing precise questions. *Chevron*, 467 U.S. at 842-43. Where Congress has directly spoken to the precise question at issue and its intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 843; *see also I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987). "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988). "If EPA lacks authority under the [statute], then its action is plainly contrary to law and cannot stand." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C.Cir. 2001).

"A claim that agency action is 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,' 5 U.S.C. § 706(2)(C), necessarily entails a firsthand judicial comparison of the claimed excessive action with the pertinent statutory authority." *Western Union Tel. Co. v. FCC*, 541 F.2d 346, 354 (3d Cir. 1976). Thus, "[i]t will not save EPA's failure to meet the statutory requirement that there is ambiguity in other sections of the statute. It is only where 'the statute ... is silent or ambiguous with respect to the specific issue before us' that 'we defer to the agency's interpretation of the statute.'" *Natural Resources Defense Council, Inc. v. EPA*, 194 F.3d 130, 137-38 (D.C.Cir. 1999) (citation omitted). Where an EPA regulation fails to effectuate an express mandate of Congress, it must be remanded. *See id.* at 138. In the context of exceptions to a public interest statute, such exceptions must be express and will not be implied. *See Sierra Club v. EPA*, 719 F.2d 436, 453 (D.C. Cir. 1983).

Only if the statute is silent or ambiguous with respect to the specific issue does the Court move to the second-tier question of whether the agency's rulemaking is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843. Regulations must be "consistent with and in furtherance of the purposes and policies embodied in the congressional statutes which authorize them. Those which are not are contrary to law and must be set aside." *Pacific Coast Medical Enters. v. Harris*, 633 F.2d 123, 131 (9th Cir. 1980) (citations omitted). The courts also look to the provisions of the statute as a whole, and to its object and policy. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164 (9th Cir. 1999). Even a permissible construction of a statute by an agency will be set aside if it frustrates congressional policy. *See CHW West Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001).

Federal agencies also must construe their regulations in light of the statutory mandates under which the regulations were issued. *Pacific Coast Medical*, 633 F.2d at 131. The courts' deference does not extend to an agency's construction that conflicts with statutory directives. *See Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *State of Oregon v. Bureau of Land Management*, 876 F.2d 1419, 1425 (9th Cir. 1989). "[T]he existence of a prior administrative practice, even a well-explained one, does not relieve us of our responsibility to determine whether that practice is consistent with the agency's statutory authority." *State of Oregon*, 876 F.2d at 1425.

Because Congress clearly has mandated that *all* point sources be subjected to NPDES permits and has precisely defined the discrete conveyances employed by the logging industry as point sources, with only limited enumerated exceptions that do not include discharges associated with logging, the Court must give effect to Congress' clear directions by striking down Section 122.27.

B. Section 122.27 Is *Ultra Vires* Because it Exempts "Discrete Conveyances" That Discharge Pollutants Associated with the Logging Industry from the Act's NPDES Permitting Requirements

Section 122.27 is *ultra vires* and unlawful because it contradicts Congress' mandate that any discharge of any pollutants from any point source is illegal unless authorized by a NPDES permit.

There can be no serious dispute that the types of "discernable, confined and discrete conveyances" alleged by EPIC and employed generally by the logging industry are point sources

under the Clean Water Act. Several of them are specifically listed in the Act's definition of "point source," including roadside ditches that collect polluted stormwater and channel and discharge it to navigable waters or their tributaries. 33 U.S.C. § 1362(14). Culverts, such as those used by logging operators to collect and channel under roads storm water runoff from hillsides and road surfaces are obviously a channel, tunnel or conduit. Erosion gullies resulting from logging roads or harvesting activities are channels.

Numerous courts have held that these structures are point sources when they have served to discharge storm water. Ditches that channel and discharge polluted storm water are point sources that must be regulated under the NPDES program. *See Earth Sciences*, 599 F.2d at 374 (unintentional discharges of pollutants from a mine runoff system, including ditches, met the statutory definition of a point source); *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 44-45 (5th Cir. 1980) ("ditches, gullies and similar conveyances" conveying surface runoff associated with mining activities constitutes point source pollution)*; Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir. 1999) (sediment discharges from timber harvesting and other activities must obtain a permit); *North Carolina Shellfish Growers Ass'n*, 2003 WL 21995171*20-23 (ditches draining lands managed as forestlands are point sources); *United States v. Ottati & Goss, Inc.*, 630 F.Supp. 1361, 1401 (D.N.H. 1985) (discharge from ditch a point source); *Reynolds v. Rick's Mushroom Service, Inc.*, 246 F.Supp.2d 449, 456 (E.D.Pa. 2003). Culverts, likewise, have always been found to be point sources when that issue has been raised before the courts. *See Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2nd Cir. 1991), *rev'd in part on other grounds* 505 U.S. 557 (1992) (landfill leachate that seeps into pond and then discharges through culvert to a marsh area is a point source discharge) ; *U.S. v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 648 (2nd Cir. 1993) (discharges from culvert a "classic 'point source' discharge"); *California Sportfishing Protection Alliance v. Diablo Grande, Inc.*, 209 F.Supp.2d 1059, 1077-78 (E.D.Cal. 2002). The courts also unanimously agree that erosion gullies associated with human activity are point sources under the Act. *See Abston Constr.*, 620 F.2d at 45 ("pollution formed . . . as a result of natural erosion" associated with mine drainage a point source); *Driscoll*, 181 F.3d at 1291; *O'Leary v. Moyer's Landfill Inc.*, 523 F.Supp. 642, 655 (E.D.Pa. 1981) (leaks from landfill leachate collection system, emanating from overflowing ponds, bypasses, cracks and defects, gullies, trenches and ditches were point source discharges governed by Act); *North Carolina*

Shellfish Growers Ass'n, 2003 WL 21995171*20-23 (erosion-induced gullies and rills are point sources); *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1525 n. 1 (11th Cir. 1996) ("[w]hen rainwater flows from a site where land disturbing activities have been conducted, such as grading and clearing," such water is a pollutant under the Clean Water Act).

Nor can EPA or Pacific Lumber reasonably dispute that Congress mandated that all dischargers of pollutants from any point source must obtain a NPDES permit. *See supra*, pp. 3-4; *see also Northern Plains Resource Council v. Fidelity Exploration and Dev. Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003) ("The CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit"); *American Mining Congress v. EPA*, 965 F.2d 759, 767 (9th Cir. 1992) ("All point sources that discharge pollutants, including point sources that discharge pollutants from inactive mines, require a permit"); *Committee to Save the Mokelumne River v. East Bay Municipal Utility Dist.*, 13 F.3d 305, 309 (9th Cir. 1993) ("the Act categorically prohibits any discharge of a pollutant from a point source without a permit"); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 696 (D.C. Cir. 1974) ("After December 31, 1974, the Act contemplates that all discharges from point sources shall be made in conformity with a permit"); *Pronsolino v. Marcus*, 91 F.Supp.2d 1337, 1341 (N.D.Cal. 2000), *aff'd* 291 F.3d 1123 (9th Cir. 2002) ("The Act . . . required an NPDES permit for any discharge by any point source into any navigable water of the United States, interstate or intrastate"); 40 C.F.R. § 122.1(b) ("The NPDES program requires permits for the discharge of 'pollutants' from any 'point source' into 'waters of the United States'").[8]

In light of these clear mandates, the ruling of *NRDC I* and *NRDC II* that EPA has no authority to exempt any point sources has been adopted by every single court that has addressed the issue. *See, e.g. Earth Sciences*, 599 F.2d at 372; *Northern Plains*, 325 F.3d at 1164 ("the EPA does not have the authority to exempt discharges otherwise subject to the CWA. Only

[8] *See also Gill v. LDI*, 19 F.Supp.2d 1188, 1196 (W.D.Wash. 1998) ("The [Clean Water Act] prohibits all discharges of pollutants from identifiable 'point sources' to waters of the United States absent an NPDES permit"); *Altamahah Riverkeepers v. City of Cochran*, 162 F.Supp.2d 1368, 1369 (M.D.Ga. 2001) ("All 'point sources' must obtain and operate under a . . . NPDES permit. . ."); *Bear Tooth Alliance v. Crown Butte Mines*, 904 F.Supp. 1168, 1173 (D. Mont. 1995).

Congress may amend the CWA to create exemptions from regulation"); *see also Friends of Sakonnet v. Dutra*, 738 F.Supp. 623, 630 n. 15 (D.R.I. 1990) ("the EPA does not have discretion to determine what categories of point source discharges need a permit although it can consider how to implement the permit program"). Of particular note is the Ninth Circuit's ruling in *League of Wilderness Defenders*, in which the Court held that "the EPA may not exempt from NPDES permit requirements that which clearly meets the statutory definition of a point source by 'defining' it as a non-point source. Allowing the EPA to contravene the intent of Congress, by simply substituting the word 'define' for the word 'exempt,' would turn [*NRDC II*] on its head." 309 F.3d at 1190.

Because the plain language of the statute is clear, the Court must give effect to that language. *Chevron*, 467 U.S. at 842-43. Thus, despite Congress' delegation of authority to EPA "to prescribe such regulations as are necessary to carry out his functions under [the Act]," that delegation does not include amending Congress' definition of point source or otherwise exempting point source discharges from the NPDES program. 33 U.S.C. § 1361(a). There is no logical argument that EPA can assert to dissociate the discrete conveyances employed by logging operators from the clear language of Congress' definition and Congress' clear permitting mandate without dismembering Congress' express terms.

C. Congress' Inclusion of Express Exemptions for Discharges from Specified Point Sources Precludes Any Implied Exemption for Logging-related Point Source Discharges

The Act's plain language is strongly supported by other provisions established by Congress to exempt specified discharges of pollutants from discrete conveyances that do not include an express exemption for discharges of pollutants from logging-related point sources. As mentioned above, Congress provided express exemptions for five categories of discharges that it intends to be excluded from the NPDES permitting program. These express exemptions include sewage from vessels, discharges incidental to the normal operation of Armed Forces vessels, agricultural return flows, agricultural storm water discharges, and unpolluted stormwater associated with diversion facilities at mining sites. *See supra*, p. 4.

Congress did not provide any such exemption from the NPDES program for logging-related point source discharges. Applying the time-worn maxim of *expressio unius est exclusio*

alterius, the inclusion of express exemptions precludes the courts from implying any additional exemptions. *Sierra Club v. EPA*, 719 F.2d at 453 ("EPA's construction of the statute is condemned by the general rule that when a statute lists several specific exceptions to the general purpose, others should not be implied"); *Tennessee Valley Auth. v. Hill,* 437 U.S. 153, 188 (1978) (where no exemptions exist in the Endangered Species Act for federal agencies, the maxim *expressio unius est exclusio alterius* requires Court must presume that ESA's limited "hardship cases" were all that Congress intended to exempt).

In addition, given the remedial aspirations of the Clean Water Act, any exceptions must be clear and unambiguous. Exceptions to a public interest statute must be express and will not be implied. *Sierra Club v. EPA*, 719 F.2d at 453. *See also* H.R.Rep. No. 99-189 at 62 (July 2, 1985) ("if exemptions are to be made for storm water, we urge Congress to proceed with extreme caution, and clearly define the dischargers, or types of discharges, to be exempted"). Any assertion of authority by EPA to adopt Section 122.27's broad exemption for most logging-related point sources is based on just such an inappropriate implication. No express exemption from the NPDES permitting program has been established by Congress. "Only Congress may amend the CWA to create exemptions from regulation" – not EPA. *Northern Plains*, 325 F.3d at 1164.

D. In 1987, Congress Reiterated its Mandate That All Point Source Dischargers of Storm Water Must Obtain NPDES Permits, Including the Logging Industry

Responding to EPA's failure to implement the NPDES permitting program for storm water discharges, Congress enacted a comprehensive stormwater permitting program in the Water Quality Act of 1987. 33 U.S.C. § 1342(p); 132 Cong. Rec. S 32400 (Oct. 16, 1986) (Statement of Sen. Durenberger) ("The [CWA] required all point sources including stormwater discharges, to apply for NPDES permits . . . by 1973. Despite this clear directive, EPA has failed to require most stormwater point sources to apply for permits which would control the pollutants in their discharge").[9] In enacting Section 1342(p) of the Act, Congress reconfirmed its intention

[9] *See also NRDC v. EPA*, 966 F.2d at 1296; 133 Cong. Rec. S 1264 (Statement of Sen. Chafee) (Jan. 14, 1987) ("[EPA] has been unable to move forward with a program [for storm water] because the current law did not give enough guidance to the agency. [Section

to require NPDES permits for all discharges of storm water, especially those associated with industrial activity. 33 U.S.C. § 1342(p).

Section 1342(p)(2)(B) requires any "discharge associated with industrial activity" and larger municipalities to immediately obtain NPDES permits.[10] *See Defenders of Wildlife*, 191 F.3d at 1163. "It is not necessary that storm water be contaminated or come into direct contact with pollutants: only association with any type industrial activity is necessary." *NRDC v. EPA*, 966 F.2d at 1304. "If an activity is industrial in nature, EPA is not free to create exemptions for permitting requirements for such activity." *Id*. at 1306.

For smaller municipalities and non-industrial discharges ("Phase II" dischargers), Section 1342(p) established a five-year moratorium on the issuance of NPDES permits until October 1, 1992. Just before that deadline in 1992, Congress extended the deadline for those smaller storm water dischargers by another two years, until October 1, 1994.[11] By including a specific deadline for ending the moratorium, Congress expressly provided that NPDES permits were required of all storm water discharges after that date. Addressing a claim that EPA had no authority to issue permits at the conclusion of the moratorium, the Ninth Circuit held:

> as respondent-intervenor NRDC notes, the mere existence of the § 402(p)(1) permitting moratorium, designed to apply only to Phase II dischargers, necessarily implies that EPA has the authority to require permits from these sources after the

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402(p)] provides such guidance. . .").

[10] The Ninth Circuit has held that "the language 'discharges associated with industrial activity' is very broad." *NRDC v. EPA*, 966 F.2d at 1304. Silviculture is without doubt an industrial activity. *See* Standard Industrial Classification ("SIC") Manual (Office of Management and Budget 1987) (Major Group 24 (Lumber and Wood Products), Industry Group No. 2411, Logging) (Pl. RJN, Ex. B); 40 C.F.R. § 122.26(b)(14)(ii) (Logging under SIC Code 24 an industrial activity).

[11] In addition, the 1987 amendments ordered EPA to promulgate regulations by specific deadlines in order to facilitate the orderly issuance of the requisite NPDES permits. For example, in regards to industrial activities, Section 1342(p)(4) required EPA to promulgate regulations mandating that persons engaged in industrial activities that discharge storm water apply for a NPDES permit by not later than February 4, 1990. 33 U.S.C. § 1342(p)(4)(A). EPA or the State had to issue a permit for such industrial storm water discharges by not later than February 4, 1991. *Id*. Dischargers' compliance with the permits' terms was to be achieved not later than February 4, 1994. *Id*.

> 1994 expiration of the moratorium. Since there would have been no need to establish a permitting moratorium for these sources if the sources could *never* be subject to permitting requirements, petitioners' interpretation violates the bedrock principle that statutes not be interpreted to render any provision superfluous.

EDC, 319 F.3d at 409; *see also id.* at 446. Thus, as of October 1, 1994, there is no exemption for any storm water discharge and Section 1342(p) reiterates the Act's mandate that all discharges from point sources, including storm water discharges, are unlawful unless permitted under the NPDES. *See American Mining Congress*, 965 F.2d at 772 (In its 1987 amendments, "Congress provided a temporary exemption for some sources of storm water discharge, but not for discharges associated with industrial activity").

The legislative history for the 1987 amendments further emphasizes Congress' intent to regulate all storm water point sources. "After October 1, 1992, *all* remaining, unpermitted storm water point sources . . . will be required to obtain permits under section 402 of the Clean Water Act." 133 Cong. Rec. S 1280 (Jan. 14, 1987) (statement of Sen. Durenberger) (emphasis added).

In regards to storm water associated with industrial activities, such as Pacific Lumber's discharges, it is clear that the 1987 amendments had no effect on the Act's already clear mandate that those discharges must obtain NPDES permits. As one of the Committee Report's explains, "[w]e believe that storm water associated with industrial areas must be regulated by permit. . . ." H.R. Rep. No. 99-189 at 62 (July 2, 1985). Likewise, the floor debates explain Congress' understanding that Section 1342 applies to all storm water discharges related to industrial activity:

> Under current judicial and administrative interpretations of the law, businesses and municipalities that channel and discharge ordinary storm water into a navigable water must obtain NPDES permits. H.R. 1 [1987 amendments] does not provide a specific permit exemption for stormwater discharges associated with industrial activity. . . ."

133 Cong. Rec. H 991 (Jan. 8, 1987) (statement of Rep. Stangeland). *See* 132 Cong. Rec. S 32382 (Sen. Stafford) (in establishing schedule for EPA regulations, Congress did not intend "to defer permit requirements for storm sewers associated with industrial activities"); H.R. Conf. Rep. No. 1004, p. 157 (Oct. 15, 1986) ("The permit requirements of the Clean Water Act respecting such [industrial] stormwater discharges are not affected by this amendment").

The legislative history also underscores Congress' intent in enacting Section 1342(p) that

all non-industrial storm water discharges, indeed all storm water discharges, are still included in Congress' NPDES permitting mandate. Congressman Roe, for example, stated:

> The control of storm water discharges to protect the quality of the Nation's waters is a vast undertaking which, under existing law, would require an estimated 1 million permits. The provision in the bill establishes an orderly procedure which will enable the major contributors of pollutants to be addressed first, and *all discharges* to be ultimately addressed in a manner which will not completely overwhelm EPA's capabilities.

133 Cong. Rec. H 1006 (Jan. 8, 1987) (emphasis added). In the final Senate debate, Senator Durenberger stated:

> Within 4 years of enactment or earlier if the water quality data warrants, EPA will commence a control program for storm sewer systems servicing communities with a population between 100,000 and 250,000. . . .
>
> *After October 1, 1992, all remaining, unpermitted storm water point sources will return to current law status and will be required to obtain permits under section 402 of the Clean Water Act.*

133 Cong. Rec. S 1280 (Jan. 14, 1987)(emphasis added).[12]

In 1992, Congress amended Section 1342(p) to extend the permitting moratorium for the non-industrial discharges and small municipalities. Once again, Congress took the opportunity to reemphasize its clear mandate that all storm water point sources must obtain NPDES permits. In the House debate, Congressman Hammerschmidt (the House sponsor of the moratorium extension) explained:

> The 1987 amendments to the Clean Water Act set up an ambitious, phased approach to the regulation of storm water. That approach involved numerous permit application and compliance deadlines, focusing first on dischargers of the greatest concern, such as certain industrial activities and medium to large-sized municipalities. EPA was required to promulgate guidelines and regulations for industrial activities and cities of 250,000 or more within 2 years of enactment and for cities of 100,000 or more but less than 250,000 within 4 years of enactment.
>
> The Storm Water Program, however, has faced a lot of scientific, legal, and

[12] *See also* 132 Cong. Rec. S 32381 (Oct. 16, 1986) (Statement of Sen. Stafford). After describing the permits to be issued for municipalities with populations of 100,000 or more, Senator Stafford, emphasized that "[f]inally, after October 1, 1992, EPA and the States must issue permits for the remaining municipal separate storm sewer systems." *Id.*

> institutional obstacles. EPA has missed its target deadlines and is only now beginning to implement storm water regulations for industries and large cities. EPA and the States are simply not ready to move ahead on storm water regulations for smaller cities - that is, cities under 100,000 population - and for countless other dischargers. Unfortunately, the statutory moratorium on storm water permitting for small towns and other lower priority dischargers expires on October 1 of this year - literally only days away.
>
> *When this moratorium expires, small towns, non-industrial concerns such as parking lot owners, and even private homeowners, could be in violation of the act unless Congress moves to extend the deadline. And that is precisely what my bill does - nothing more, nothing less.*

138 Cong. Rec. H 9789 (Sept. 29, 1992) (emphasis added).

It is clear from these statements that, to the extent Congress provided for a limited moratorium for non-industrial discharges and discharges from small municipalities (so-called Phase II discharges), that moratorium ended on October 1, 1994. After that date, no storm water discharger, whether industrial or non-industrial, was excluded from the Act's clear mandate that all point sources must obtain a NPDES permit. *NRDC II*, 568 F.2d at 1377. Accordingly, EPA can find neither comfort nor authority in section 1342(p) for its continuing exemption of logging storm water from the Act's permitting mandate.

EPA has explicitly acknowledged that no polluted storm water, regardless of its source, can be legally discharged without an NPDES permit after October 1, 1994. A 1994 Guidance Memorandum states that, at the conclusion of the permitting moratorium for Phase II discharges, "the Agency and approved NPDES States are unable to waive the statutory requirement that point source discharges of pollutants to waters of the United States need an NPDES permit." *Policy for End of Moratorium for Storm Water Permitting – October 1, 1994* at 3 (Oct. 18, 1994) (http://www.epa.gov/npdes/pubs/owm0141.pdf) (attached as Exhibit A to Plaintiff's First Request for Judicial Notice); 4 ("citizen suits can be brought against operators of phase II point source discharges composed entirely of storm water to waters of the U.S. that are not authorized by an NPDES permit after October 1, 1994"). Likewise, in response to comments on the Final Interim Phase II Discharge Rule issued August 7, 1995, EPA again makes clear that Section 1342(p) does not exempt any storm water discharges after October 1, 1994:

> Many commenters disagreed with EPA's interpretation of section 402(p) of the

> CWA in which EPA determined that section 402(p) sets a statutory deadline for the issuance of permits to phase II storm water dischargers. The commenters argued that 402(p) does not require permits for all discharges of storm water after October 1, 1994, rather it prohibits the need for such permits before this date. EPA disagrees. CWA section 301(a) states that it is illegal to discharge pollutants to waters of the U.S. except in compliance with Section 402. The current regulations under section 402 establish a permit program for point source discharges. In the 1987 amendments to the CWA, Congress added Section 402(p) to ensure the orderly evolution of the NPDES storm water program. Section 402(p)(1) did not alter the basic underlying prohibition in Section 301(a) as it applied to storm water discharges. Section 402(p)(1) did, however, establish temporary relief from permitting requirements for certain storm water discharges for a specified period of time.

Amendment to Requirements for [NPDES] Permits for Storm Water Discharges Under Section 402(p)(6) of the Clean Water Act, 60 Fed. Reg. 40230, 40231 (Aug. 7, 1995). *See also id.* ("If Congress had not intended unregulated phase II sources to be liable for violations of section [1311(a)] on October 1, 1992, there would have been no need to amend section [1342(p)(1)] at all"). Thus, EPA acknowledges that in 1987 Congress provided no authority to EPA to create or maintain an exemption of logging discharges. Indeed, Congress reemphasized its intent that all point sources of storm water, without exception, be permitted. EPA nevertheless sought once again to carve out an unauthorized exemption for the logging industry by maintaining Section 122.27 and incorporating the logging exemption by reference into the storm water program.[13] As EPA acknowledged in 1999, "[n]either of [Congress'] 1977 nor the 1987 amendments provided any ratification of the silvicultural exclusions." 64 Fed. Reg. 46058, 46077 (Aug. 23, 1999). Indeed Congress went even further, mandating permits for logging discharges in 1972 and again in 1987 - the opposite result effectuated by EPA's silvicultural point source rule.

E. EPA Cannot Create Exemptions by Unreasonably Restricting its Interpretation of the Term "Point Source"

The acknowledgment by the D.C. Circuit that there may be some situations in the real world that would require EPA to define whether a particular discharge was a point source or not was not an open invitation for EPA to ignore Congress' clear definition of that term. *See NRDC*

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[13] Indeed, EPA has indirectly incorporated its faulty interpretation of Section 122.27 into the regulations implementing Section 1342(p) by incorporating Section 122.27's exclusion of nonpoint sources by reference. 40 C.F.R. § 122.26(b)(14).

II, 568 F.2d at 1382. As the D.C. Circuit explains, its mention of EPA's discretion to define point and nonpoint sources was not before the court and, hence, was *dicta*. *Id*. More to the point, the Ninth Circuit has rejected any broad interpretation of the D.C. Circuit's *dicta*:

> we reject the . . . argument that the EPA has the authority to "refine" the definitions of point source and nonpoint source pollution in a way that contravenes the clear intent of Congress as expressed in the statute. We view the Forest Service's reliance in this regard on [*NRDC II*], to be misplaced. . . . . In response to arguments that some of the activities at issue were not clearly point sources, the D.C. Circuit noted that "[t]he definition of point source in § 502(14) [33 U.S.C. § 1362(14)], including the concept of a 'discrete conveyance', suggests that there is room here for some exclusion by interpretation." *Id.* It is in this context that the D.C. Circuit went on to observe that "the power to define point and nonpoint sources is vested in EPA and should be reviewed by the court only after opportunity for full agency review and examination." *Id.* at 1382 (citation and internal quotation marks omitted).
>
> We agree with the D.C. Circuit that the EPA has some power to define point source and nonpoint source pollution *where there is room for reasonable interpretation of the statutory definition.* However, the EPA may not exempt from NPDES permit requirements that which clearly meets the statutory definition of a point source by "defining" it as a non-point source. Allowing the EPA to contravene the intent of Congress, by simply substituting the word "define" for the word "exempt," would turn *NRDC II* on its head.

League of Wilderness Defenders, 309 F.3d at 1190. *See also Auer*, 519 U.S. at 457, 461. EPA's attempt via Section 122.27 to exempt discrete conveyances of pollution associated with the logging industry is plainly inconsistent with Congress express definition of "point source" and Congress' clear mandate that all point sources be subject to the NPDES permitting program.

IV. CONCLUSION

The long-standing trend in logging road design and construction is to minimize culverts and drainage ditches and employ drainage features that blend the road into the surrounding landscape. Hence, wherever possible, new logging roads use features such as "rolling dips" that drain roads by allowing storm water to sheet flow into downhill vegetation. Likewise, well-designed, modern logging roads emphasize decoupling road-side drainage ditches from tributaries flowing under the road and instead, design the ditches to disperse the rainwater, again, via sheet flow into surrounding vegetation. Not only do these design features reduce the number of point sources that are necessary to maintain and operate the road, they also deconcentrate the

stormwater and significantly reduce erosion from roads and hillsides. A ruling effectuating Congress' clear intent that logging pollution discharged from point sources be subjected to NPDES permits would strongly encourage the retrofitting of legacy roads to include these effective features and assure that new logging and roads maximize such techniques.

In addition, the use of general permits issued, for example, for an entire watershed or subwatershed would provide an efficient mechanism for the agencies to implement effective controls addressing cumulative water quality impacts from many logging operations in a single watershed. *See* 40 C.F.R. § 122.28 (authorizing general NPDES permits). Such watershed-based permits also would provide an effective and efficient mechanism to require appropriate monitoring of water quality and management practice effectiveness throughout a watershed.

Congress' mandate that all point sources be subject to the NPDES program and its clear, unambiguous definition of the term "point source" does not leave any gap that implicitly or expressly delegates to EPA any authority to redefine discrete conveyances employed by the logging industry to be "nonpoint" sources and exempt them from the Act's permitting requirement. In 1976, EPA had no authority to exempt logging point source discharges. In 1980, EPA had no such authority. In 1987, EPA had no such authority. Today, EPA has no such authority. EPIC respectfully requests that the Court grant plaintiff's motion for summary judgment on Plaintiff's Third Claim for Relief. EPIC further requests that the Court issue an order declaring that EPA's promulgation of Section 122.27 was without authority and that regulation is *ultra vires*, ordering EPA to vacate Section 122.27 and references to it from the Code of Federal Regulations, and allowing EPIC to proceed with its first two claims for relief seeking to remedy Pacific Lumber's violations of the Clean Water Act.

September 5, 2003

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