

## SILVICULTURE REGULATORY CONSISTENCY ACT

SEPTEMBER 20, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MICA, from the Committee on Transportation and Infrastructure, submitted the following

### R E P O R T

[To accompany H.R. 2541]

[Including cost estimate of the Congressional Budget Office]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 2541) to amend the Federal Water Pollution Control Act to exempt the conduct of silvicultural activities from national pollutant discharge elimination system permitting requirements, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

#### SECTION 1. SHORT TITLE.

This Act may be cited as the “Silviculture Regulatory Consistency Act”.

**SEC. 2. SILVICULTURAL ACTIVITIES.**

Section 402(l) of the Federal Water Pollution Control Act (33 U.S.C. 1342(l)) is amended by adding at the end the following:

“(3) SILVICULTURAL ACTIVITIES.—

“(A) NPDES PERMIT REQUIREMENTS FOR SILVICULTURAL ACTIVITIES.—The Administrator shall neither require a permit under this section, nor directly or indirectly require any State to require a permit under this section, for a discharge resulting from the conduct of the following silvicultural activities: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road use, construction, and maintenance, from which there is runoff.

“(B) PERMITS FOR DREDGED OR FILL MATERIAL.—Nothing in this paragraph exempts the conduct of a silvicultural activity resulting in the discharge of dredged or fill material from any permitting requirement under section 404.”.

**PURPOSE OF THE LEGISLATION**

The purpose of H.R. 2541 is to exempt the conduct of silvicultural activities from National Pollutant Discharge Elimination System permitting requirements under the Federal Water Pollution Control Act.

**BACKGROUND AND NEED FOR LEGISLATION**

*The Clean Water Act*

In 1972, Congress passed the Federal Water Pollution Control Act Amendments of 1972 (commonly known as the Clean Water Act or the CWA; 33 U.S.C. § 1251 *et seq.*). The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. The primary mechanism for achieving this objective is the CWA’s prohibition on the discharge of any pollutant from a point source to a jurisdictional waterbody without a National Pollutant Discharge Elimination System (NPDES) permit. (See CWA §§ 301, 402.)

The CWA defines a “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. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.” (See CWA § 502(14).)

The Environmental Protection Agency (EPA) has the authority to regulate the discharge of pollutants from point sources either through general permits or through individual permits. NPDES permits specify limits on what pollutants may be discharged from point sources and in what amounts. Under the CWA, 46 states currently have authorized programs and are authorized to implement NPDES permits and enforce permits. The EPA manages the CWA program in the remaining states and territories.

NPDES permits are the basic regulatory tool of the CWA. The EPA or an authorized state may issue compliance orders, or file civil suits against those who violate the terms of a permit. In addition, in the absence of Federal or state action, individuals may bring a citizen suit in United States District Court against those who violate the terms of an NPDES permit, or against those who discharge without a valid permit.

*Forest roads under the Clean Water Act*

In 1976, the EPA adopted administrative regulations governing the NPDES permit program, including the “Silvicultural Rule,” which defined forestry activities. (See 40 CFR § 122.27 (Silvicultural activities).) In these regulations, the EPA identified those forestry activities the Agency considered to be “silvicultural point sources” subject to NPDES permit program, and forestry activities the Agency considered to be “nonpoint sources,” not subject to regulation under the CWA. (*Id.*)

The EPA defined “silvicultural point sources” as “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.” (40 CFR § 122.27(b)(1).) The rule went on to specifically exclude “nonpoint source silvicultural activities, including harvesting, site-preparation, pest and disease control, thinning, cultural treatment, prescribed burning, reforestation, and road construction and maintenance from which there is runoff from precipitation events.” (*Id.*)

In the preamble, the EPA noted that these nonpoint source silvicultural activities are effectively addressed under State best management practice programs. (41 Fed. Reg. 24709, 24710 (June 18, 1976).) The EPA amended the final phrase of the exclusion in 1980 to read “from which there is natural runoff,” stating at the time that they intended no change in meaning. (45 Fed. Reg. 33447 (1980).)

In 1987, Congress adopted a variety of amendments to the CWA in the Water Quality Act of 1987. One of the more significant amendments was establishment of a two-phase process to regulate stormwater discharges under the NPDES program. (CWA § 402(p).) In these amendments, Congress intended to clarify the EPA’s existing responsibility to regulate point source stormwater discharges of pollutants. In CWA section 402(p)(2), Congress identified specific discharge categories requiring NPDES permits in Phase 1. Among the activities subject to the mandatory NPDES permit requirement are “discharges associated with industrial activities.” (*Id.*)

The EPA developed regulations to implement new stormwater NPDES permitting requirements under the NPDES program. The EPA adopted Phase 1 regulations in 1990, including an extensive definition of “discharges associated with industrial activity” in 40 CFR § 122.26(b)(14). (55 Fed. Reg. 47990, 48063 (November 16, 1990).) A commenter on the proposed rulemaking for the Phase 1 rule pointed out that logging is defined as a nonpoint source under the Silvicultural Rule.

In response, the EPA added to the Phase I rule an exception from the definition of industrial activity for all activities excluded from the NPDES permit requirement in 40 CFR Part 122. (See 40 CFR § 122.26(b)(14) (“The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122.”.) In addition, the EPA expressly stated in the preamble to its Phase 1 regulations that the definition of “storm water discharges associated with industrial activity” specifically excluded activities listed in 40 CFR 122.27, namely, the Silvicultural Rule. (See 55 Fed. Reg. at 48011.)

The EPA issued NPDES regulations for Phase 2 stormwater discharges in 1999. (64 Fed. Reg. 68722 (December 8, 1999).) In the Phase 2 stormwater regulations, the EPA rejected a comment to include forest roads as a regulated discharge, based on the Silvicultural Rule.

Since promulgating the Silvicultural Rule in 1976, the EPA had never required an NPDES permit for nonpoint source silvicultural activities. For the past 35 years, under the Silvicultural Rule, the management of forest roads across 755 million acres of public, private, State, and tribal forests in the United States has been guided by State laws using best management practices and as nonpoint sources under the CWA. This long-standing, flexible policy has worked because it recognized that the responsible management of a working forest varies widely depending on location and applies a variety of best management practices to address stormwater runoff.

#### *Litigation on the Silvicultural Rule and responses*

During the 1990s, activist groups unsuccessfully argued that forest roads and other forestry activities in National forests are point sources requiring NPDES permits. For example, in 1998, the U.S. Court of Appeals for the 8th Circuit found that, under the Silvicultural Rule, NPDES permits are not required for forest roads, and held that “EPA regulations do not include the logging and road building activities cited by the Wildlife Association in the narrow list of silvicultural activities that are point sources requiring NPDES permits.” (*Newton County Wildlife Association v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998) (citing the Silvicultural Rule).)

In September 2006, the Northwest Environmental Defense Center (NEDC) sued the Oregon State Forester, the Oregon Board of Forestry, and four timber purchasers for failure to obtain NPDES permits on logging roads in the Tillamook State Forest. They alleged that roads used for timber harvest in the Tillamook State Forest are “point sources” requiring NPDES permits under the CWA. Industry groups intervened and the EPA filed *amicus* briefs at the district court and at the circuit court, defending its regulations. The U.S. District Court for the District of Oregon dismissed the lawsuit on March 1, 2007. (*NEDC v. Brown*, 476 F.Supp.2d 1188 (D.Or. 2007).) The Court held that forest roads, with their ditches and culverts for dispersal of stormwater, are within the meaning of the EPA Silvicultural Rule defining “road construction and maintenance from which there is natural runoff” as nonpoint sources. NEDC appealed to the U.S. Court of Appeals for the 9th Circuit.

Breaking with 35 years of practice, the 9th Circuit, on August 17, 2010, reversed the District Court and ruled that the EPA lacks authority to designate forest roads as nonpoint sources, and that forest roads using stormwater management measures, such as ditches, are point sources requiring NPDES permits. (*NEDC v. Brown*, 617 F.3d 1176 (9th Cir. 2010).) The 9th Circuit further ruled that logging is an “industrial activity” under the EPA’s stormwater regulations and therefore “logging roads” require NPDES permits. The EPA defended its regulations in its *amicus* brief on the appeal to the 9th Circuit, but the 9th Circuit ignored the EPA’s explanation.

The 9th Circuit denied the defendants' request for rehearing and reissued its decision with an additional holding regarding jurisdiction on May 17, 2011. (*NEDC v. Brown*, 640 F.3d 1063 (9th Cir. 2011).) The 9th Circuit said the Silvicultural Rule does not exempt logging roads with stormwater management measures that convey the runoff and discharge it into streams and rivers that are subject to CWA jurisdiction. Following issuance of the revised decision, the 9th Circuit denied a motion to stay the decision while the parties sought review by the U.S. Supreme Court. In September, 2011, the defendants filed petitions for certiorari with the Supreme Court.

The 9th Circuit ruling upends 35 years of EPA policy treating forestry activities and forest roads as "nonpoint sources," best regulated under State developed best management practices, and exposes Federal, State, tribal, and private forest owners and operators to significant economic harm, private citizen lawsuits, and uncertainty.

In response to the 9th Circuit's decision, on July 14, 2011, Representative Herrera Beutler introduced H.R. 2541, the *Silviculture Regulatory Consistency Act*, to affirm and preserve the EPA's long-standing policy that forest roads should be regulated as nonpoint sources using State developed best management practices. Then in December, 2011, Congress and the Administration enacted legislation, modeled after H.R. 2541, as part of the Fiscal Year 2012 Consolidated Appropriations Act, delaying the 9th Circuit's permit requirement from taking effect until October 1, 2012.

On May 23, 2012, the EPA published in the Federal Register a Notice of Intent announcing two related actions. First, the Agency announced its intent to clarify in its stormwater regulations that a mandatory permit is not required for forest roads used for timber harvest. Second, the EPA announced a separate study to evaluate stormwater discharges from forest roads to determine whether any additional agency action is necessary.

On May 24, 2012, the Solicitor General filed a brief with the Supreme Court, arguing that the 9th Circuit decision was wrong, because the court failed to defer to the EPA's interpretation of its own regulations under the CWA. The Solicitor also noted that Congress and the EPA are best able to resolve the issue and the Supreme Court should not review the 9th Circuit's decision. The Solicitor General further observed that any rules that the EPA would adopt would be subject to judicial review and delay, which raises the point that this leaves legislative action by Congress as the only way to provide finality and certainty on this issue without continued litigation.

On June 25, 2012, the Supreme Court announced that it will review the 9th Circuit's decision in *NEDC v. Brown* (now called *Decker v. Northwest Environmental Defense Center*, No. 11-338, and is consolidated with another petition filed in response to the case, *Georgia-Pacific West, Inc. v. Northwest Environmental Defense Center*, No. 11-347). The Court will likely render a final decision in the spring of 2013. The outcome is uncertain. The State of Oregon and several forest products companies (defendants in the case), twenty-six State Attorneys General, counties and industry associations from across the Nation have urged the Supreme Court to review the decision.

Meanwhile, on September 4, 2012, the EPA proposed revisions to its Phase I stormwater regulations, in an attempt to clarify 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. (See 77 Fed. Reg. 53834 (September 4, 2012).) This rule, when finalized, will be subject to judicial review and could result in further delay in achieving finality and certainty on this issue.

Although the Supreme Court has agreed to review the 9th Circuit decision, and the EPA has proposed to address the issue through a rulemaking, legal and economic uncertainty will continue to surround this issue. Many believe a permanent legislative fix is needed to end the uncertainty, and that Congress is best positioned to address the 9th Circuit's decision with legal certainty through permanent legislation. Congressional action to enact such legislation will preserve the EPA's long-standing policy that forest roads are nonpoint sources best regulated under State developed best management practices, and will resolve the legal and economic uncertainty surrounding the 9th Circuit's decision once and for all. Legislation will also help ensure that forests continue to provide important public benefits, like good paying jobs, renewable consumer products, water quality, outdoor recreational opportunities, and habitat for fish and wildlife.

#### HEARINGS

No hearings were held on H.R. 2541.

#### LEGISLATIVE HISTORY AND CONSIDERATION

On July 14, 2011, Representative Jaime Herrera Beutler of Washington introduced H.R. 2541, the *Silviculture Regulatory Consistency Act*, a bill to exempt the conduct of silvicultural activities from National Pollutant Discharge Elimination System permitting requirements under the Federal Water Pollution Control Act. On August 1, 2012, the Committee on Transportation and Infrastructure met in open session to consider H.R. 2541, and ordered the bill reported favorably to the House by voice vote with a quorum present.

An amendment was offered in Committee by Representative Larsen of Washington, which was adopted by voice vote. The amendment clarified that the activities exempt from permitting are limited to the silvicultural activities specified in the bill.

#### COMMITTEE VOTES

Clause 3(b) of rule XIII of the House of Representatives requires each committee report to include the total number of votes cast for and against on each record vote on a motion to report and on any amendment offered to the measure or matter, and the names of those members voting for and against. There were no record votes taken in connection with consideration of H.R. 2541, or ordering the bill reported. A motion to order H.R. 2541 reported favorably to the House was agreed to by voice vote with a quorum present.

## COMMITTEE OVERSIGHT FINDINGS

With respect to the requirements of clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in this report.

## NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives does not apply where a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 has been timely submitted prior to the filing of the report and is included in the report. Such a cost estimate is included in this report.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the enclosed cost estimate for H.R. 2541 from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, August 9, 2012.*

Hon. JOHN L. MICA,  
*Chairman, Committee on Transportation and Infrastructure,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2541, the Silviculture Regulatory Consistency Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

ROBERT A. SUNSHINE  
(For Douglas W. Elmendorf, Director).

Enclosure.

*H.R. 2541—Silviculture Regulatory Consistency Act*

H.R. 2541 would prohibit the Environmental Protection Agency (EPA) from requiring a point source discharge permit (a type of permit issued under the National Pollutant Discharge Elimination System) for water discharges from the following silvicultural activities: nursery operations; site preparation; reforestation; timber thinning; prescribed burning; pest and fire control; harvesting operations; surface drainage; or road use, construction, and maintenance.

CBO estimates that enacting this legislation would result in no significant impact on the federal budget because EPA is expected to make this change through regulation within the next 12 months. Pay-as-you-go procedures do not apply to H.R. 2541 because enacting the bill would not affect direct spending or revenues.

H.R. 2541 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Susanne S. Mehlman. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

#### PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goal and objective of this legislation is to exempt the conduct of silvicultural activities from National Pollutant Discharge Elimination System permitting requirements.

#### ADVISORY OF EARMARKS

Pursuant to clause 9 of rule XXI of the Rules of the House of Representatives, the Committee is required to include a list of congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives. No provision in the bill includes an earmark, limited tax benefit, or limited tariff benefit under clause 9(e), 9(f), or 9(g) of rule XXI.

#### FEDERAL MANDATE STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the “Unfunded Mandates Reform Act” (P.L. 104–4).

#### PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1974 requires the report of any Committee on a bill or joint resolution to include a statement on the extent to which the bill or joint resolution is intended to preempt state, local, or tribal law. The Committee states that H.R. 2541 does not preempt any state, local, or tribal law.

#### ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act are created by this legislation.

#### APPLICABILITY OF LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (P.L. 104–1).

#### SECTION-BY-SECTION ANALYSIS OF LEGISLATION

##### *Section 1. Short title*

Section 1 of H.R. 2541 states that the Act may be cited as the “Silviculture Regulatory Consistency Act.”

##### *Section 2. Silvicultural activities*

H.R. 2541 amends Section 402(1) of the Clean Water Act, which provides limitations on the requirement to obtain an NPDES permit for certain types of discharges. Section 2 of the bill adds an ad-



ditional limitation on the requirement to obtain an NPDES permit, by adding a new Paragraph (3) at the end of Section 402(l).

New Paragraph (3)(A) provides that the EPA Administrator shall neither require an NPDES permit, nor directly or indirectly require any State to require an NPDES permit, for a discharge resulting from the conduct of the following silvicultural activities: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road use, construction, and maintenance, from which there is runoff. The Committee adopted an amendment in a Committee meeting held on August 1, 2012, which clarified that the silvicultural activities exempt from permitting are limited to those activities specified in Paragraph (3)(A).

Amended Paragraph (3)(B) specifies that the NPDES permitting limitation added by the bill does not exempt the conduct of a silvicultural activity resulting in the discharge of dredged or fill material from any applicable permitting requirement under section 404 of the CWA (pertaining to permits for the discharge of dredged or fill material into jurisdictional waters).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

**FEDERAL WATER POLLUTION CONTROL ACT**

\* \* \* \* \*

**TITLE IV—PERMITS AND LICENSES**

\* \* \* \* \*

**NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

**SEC. 402. (a) \* \* \***

\* \* \* \* \*

**(1) LIMITATION ON PERMIT REQUIREMENT.—**

**(1) \* \* \***

\* \* \* \* \*

**(3) SILVICULTURAL ACTIVITIES.—**

*(A) NPDES PERMIT REQUIREMENTS FOR SILVICULTURAL ACTIVITIES.—The Administrator shall neither require a permit under this section, nor directly or indirectly require any State to require a permit under this section, for a discharge resulting from the conduct of the following silvicultural activities: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road use, construction, and maintenance, from which there is runoff.*

*(B) PERMITS FOR DREDGED OR FILL MATERIAL.—Nothing in this paragraph exempts the conduct of a silvicultural activity resulting in the discharge of dredged or fill material from any permitting requirement under section 404.*

\* \* \* \* \*

