Nos. 00-70014, 00-70734 and 00-70822

Opinion filed January 14, 2003
Judges Browning, Reinhardt and Tallman

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENVIRONMENTAL DEFENSE CENTER, *ET AL.*,
Petitioners,

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Petitioner-Intervenor,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of an Action of the
United States Environmental Protection Agency

PETITION FOR REHEARING OF PETITIONER ENVIRONMENTAL DEFENSE CENTER AND PETITIONER-INTERVENOR NATURAL RESOURCES DEFENSE COUNCIL, INC.

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February 27, 2003

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PRELIMINARY STATEMENT

Petitioner Environmental Defense Center ("EDC") and petitioner-intervenor Natural Resources Defense Council ("NRDC") respectfully request rehearing for a straightforward reason: the Court has not considered arguments demonstrating that section 402(p)(6) of the Clean Water Act ("CWA"), 33 U.S.C. § 1342(p)(6), does not grant the Environmental Protection Agency ("EPA") authority to exempt forest roads from regulation solely because they are not municipal or industrial sources of stormwater pollution.

The Court's ruling that EPA has such authority, *Environmental Defense Center* v. *EPA*, Nos. 00-70014, 00-70734, 00-70822, 2003 WL 113486, at *22 (9th Cir. Jan. 14, 2003) [the "Opinion"], is in error because the plain language of section 402(p)(6) in no way authorized EPA to evade regulation of non-municipal or non-industrial sources in the Phase II Rule, and the caption of section 402(p) cannot be used to override that language. Moreover, EPA itself has interpreted section 402(p)(6) to grant it authority to regulate silvicultural and other non-municipal, non-industrial sources.

In support of the ruling, the Court also posited the existence of an EPA policy that deemed silvicultural sources to be agricultural rather than municipal or industrial, and therefore exempt from regulation, *id.*, but in fact EPA takes the opposite position: the CWA's statutory exemption for agricultural sources does not encompass silvicultural sources. EPA's position is consistent with both the CWA's text, which does not include

silviculture in the agricultural exemption, and a recent decision of this Court, *League of Wilderness Defenders* v. *Forsgren*, 309 F.3d 1181 (9th Cir. Nov. 4, 2002).

EDC and NRDC established, in their briefs, the prerequisites for regulation of forest roads under section 402(p)(6): forest roads and their drainage systems are point sources under the CWA, and the record demonstrates the need to regulate discharges from forest roads to "protect water quality." Brief for Petitioner EDC and Petitioner-Intervenor NRDC at 65-69 (Jan. 18, 2000); Reply Brief of Petitioner EDC and Petitioner-Intervenor NRDC at 22-36 (Jul. 20, 2001) ["EDC/NRDC Rep. Br."]. EPA did not challenge these assertions, and the Court has not rejected them. Brief of Respondent EPA at 120-123 (Jun. 22, 2001) ["EPA Br."]; Opinion at *22.

Because the rationales supporting the Court's forest roads decision were not presented by any party as defenses to EDC's and NRDC's forest roads claim, EDC and NRDC respectfully ask this Court to now consider arguments demonstrating that those rationales are in error, to find unlawful EPA's failure to regulate forest road discharges, and to remand the Phase II Rule to EPA to regulate those discharges.

ARGUMENT

I.

THIS PETITION SHOULD BE GRANTED BECAUSE THE COURT HAS NOT CONSIDERED ARGUMENTS ESTABLISHING THE BROAD SCOPE OF EPA'S AUTHORITY

Because the Court did not consider the arguments that EDC and NRDC set out below, the Court should grant this petition for review. The "purpose of petitions for rehearing, by and large, is to ensure that the panel properly considered all relevant information in rendering its decision." *Armster* v. *United States Dist. Ct.*, 806 F.2d 1347, 1356 (9th Cir. 1986); *see also* Fed. R. App. P. 40(a) (petition for rehearing "shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended"). In finding that EPA's decision not to regulate forest roads was not arbitrary, the Court first reasoned that the section 402(p) caption, which reads "Municipal and industrial stormwater discharges," authorizes EPA to exclude sources of pollution other than municipal and industrial activities from regulation under section 402(p)(6). Opinion at *22. Second, the Court reasoned that EPA's decision not to regulate forest roads was not arbitrary because it was consistent with a purported EPA "policy practice of treating silviculture as an agricultural, rather than an industrial, activity." *Id.*

Neither of these rationales was argued as a defense to EDC's and NRDC's forest roads claim. *See* EPA Br. at 120-123.[1] As a result, EDC and NRDC had no cause to argue in their briefs the points and authorities set out in this petition, which are clearly "relevant information" for the purpose of deciding this claim. Because this is a matter of first impression concerning statutory interpretation and is of great importance to water quality and the future of the nationwide Phase II permitting program, and because EDC and NRDC bear no fault for not raising these arguments earlier, the Court should grant this petition. *See, e.g., United States* v. *Geyler*, 949 F.2d 280, 282 (9th Cir. 1991).

II.

SECTION 402(p)(6) DOES NOT AUTHORIZE EPA TO EXCLUDE FOREST ROADS FROM REGULATION

A. The Section 402(p) Caption Cannot Be Used to Limit Section 402(p)(6)'s Plain Meaning

Because CWA section 402(p) bears the caption "Municipal and industrial stormwater discharges," the Court concluded that section 402(p)(6) gives EPA discretion to designate and regulate only municipal or industrial sources of stormwater pollution. Opinion at *22. In reaching this conclusion, the Court erred because it failed to apply the "wise rule that the

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[1] While, as a result of the Court's February 5, 2003 order, the brief of the American Forest & Paper Association ("AF&PA") is no longer before this Court, EDC and NRDC note that AF&PA did not make these arguments either. *See* Brief of Respondent-Intervenor AF&PA in Case No. 00-70014 at *passim* (May 23, 2001).

title of a statute and the heading of a section cannot limit the plain meaning of the text." *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-529 (1947); *see also Pike* v. *United States*, 340 F.2d 487, 489 (9th Cir. 1965) (quoting *Brotherhood of R.R. Trainmen*); *Lynch* v. *Rank*, 747 F.2d 528, 532 (9th Cir. 1984) (titles "should be used to resolve ambiguities, and not to create them") (internal quotation marks omitted). In *Brotherhood of Railroad Trainmen*, the issue was whether, under section 17(11) of the Interstate Commerce Act, the phrase "any proceeding arising under this Act" included court proceedings as well as administrative proceedings, even though the section 17 heading read "Commission procedure; delegation of duties; rehearings" and thus did not reference court proceedings. 331 U.S. at 527. The Court ruled that the statute contained no limitation to administrative proceedings:

> [T]he meaning of s 17(11) is unmistakable on its face. There is a simple unambiguous reference to 'any proceeding arising under this Act' . . . . There is not a word which would warrant limiting this reference so as to allow intervention only in proceedings arising under s 17 or in proceedings before the Commission.

Id. at 529. As for the role of the section heading, the Court explained:

> That the heading of s 17 fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact. That heading is but a short-hand reference to the general subject matter involved. While accurately referring to the subjects of Commission procedure and organization, it neglects to reveal that s 17 also deals with judicial review of administrative orders and with intervention by employee representatives.

> But headings and titles are not meant to take the place of the detailed provisions of the text. . . . Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles.

Id. at 528.

The reasoning in *Brotherhood of Railroad Trainmen* applies equally here. As demonstrated in section II.B below, the plain language of section 402(p)(6) is not ambiguous: there is "not a word which would warrant limiting" EPA's authority to municipal and industrial sources. Because the five-word caption accompanying section 402(p) is "not meant to take the place of the detailed provisions" of the "complicated and prolific" section 402(p) text, the caption should not be used to imply any limitation on the unqualified scope of EPA's power to regulate forest roads or other non-municipal, non-industrial sources under section 402(p)(6)'s plain language.

B. The Plain Language of Section 402(p)(6) Does Not Authorize EPA to Evade Regulation of Non-Municipal or Non-Industrial Sources

Section 402(p)(6) gives EPA full authority "to designate stormwater discharges . . . to protect water quality" and nowhere authorizes EPA to limit that authority to municipal or industrial sources. Section 402(p)(6) reads as follows:

> Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under [section 402(p)(5)]) which

> designate stormwater discharges, other than those discharges described in [section 402(p)(2)], to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

Under *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984), EPA and this Court are obliged to "give effect to the unambiguously expressed intent of Congress," and section 402(p)(6)'s plain language unambiguously does not limit EPA's authority to designate "stormwater discharges" to municipal or industrial sources. Nor does the statute grant EPA discretion to decline to regulate sources when necessary "to protect water quality" merely because those sources are not municipal or industrial sources. *See Royal Foods Co.* v. *RJR Holdings Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2001) ("[w]here Congress has . . . intentionally and unambiguously drafted a particularly broad definition, it is not our function to undermine that effort"). Section 402(p)(6) contains no language even suggesting such limitation or discretion; in fact, the words "municipal" or "industrial" are nowhere found in this provision. Instead, the statute clearly requires EPA to regulate "stormwater discharges" as necessary to "protect water quality." Thus, under *Chevron* and *Brotherhood of Railroad Trainmen*, EPA must regulate forest roads because they meet the statutory requirements for regulation and because Congress has not given EPA authority to

categorically exclude sources that meet those standards.[2] *See NRDC* v. *Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (denying EPA authority to exempt silvicultural sources from regulation when statutory language admitted of no such exemptions).

Congress knew how to limit section 402(p)(6) to municipal or industrial sources if had wanted to do so: it explicitly limited the applicability of other provisions of section 402(p) to municipal or industrial sources. Under section 402(p)(2), Congress limited the Phase I program to, among other things, discharges associated with (1) "industrial activity," (2) "municipal separate storm sewer system[s] serving a population of 250,000 or more," and (3) "municipal separate storm sewer system[s] serving a population of 100,000 or more but less than 250,000." 33 U.S.C. §§ 1342(p)(2)(B), (C) & (D).[3] Had Congress intended to restrict section 402(p)(6) to municipal and industrial sources, it presumably would have done so expressly as it did in the preceding section 402(p)(2). *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2)").

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[2] As noted in the preliminary statement, EDC and NRDC demonstrated in their briefs that forest roads are point sources and that regulation of forest roads is necessary to "protect water quality." The Court did not find, and EPA did not argue, to the contrary.

[3] Section 402(p)(3) also contains provisions limited in scope to municipal and industrial sources. 33 U.S.C. §§ 1342(p)(3)(A) & (B).

When Congress incorporates limitations in one provision of a statute, but omits those limitations in another provision of that statute, the limitations should not be read into the latter provision. *Id.*; *see also United States* v. *Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999) (refusing to read restrictive standard from one CWA provision into another); *Stewart* v. *Ragland*, 934 F.2d 1033, 1041 (9th Cir. 1991) ("[w]hen certain statutory provisions contain a requirement and others do not, we should assume that the legislature intended both the inclusion and the exclusion of the requirement").[4]

C. EPA Interprets Section 402(p)(6) to Give It Authority to Regulate Silvicultural and Other Non-Municipal, Non-Industrial Sources

If the Court finds that section 402(p)(6) is ambiguous (and, on this point, it is not), EPA's repeated, reasonable interpretation of that provision to cover non-municipal, non-industrial sources – including silvicultural activities – is entitled to deference. *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 843-44 (1984). In its 1995 report to Congress, EPA stated that "*all* unregulated facilities which have point source discharges of storm water are potential Phase II sources" and specifically indicated that

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[4] Although the Court need not examine legislative history when, as here, the statute is unambiguous, *Gumport* v. *Sterling Press (In re Transcon Lines)*, 58 F.3d 1432, 1437 (9th Cir. 1995), EDC and NRDC note that Senator Durenberger described the conference bill that became the 1987 CWA amendments as "includ[ing] provisions which address industrial, municipal, and *other* storm water point sources." 133 Cong. Rec. S1280 (Jan. 14, 1987) (emphasis added).

"[u]nder 402(p)(6), EPA may establish regulations that could include sources that are not currently defined as point sources or examined as potential Phase II sources in this report, *including some operations related to silviculture.*" Excerpts of Record of Petitioners AF&PA and the National Association of Home Builders at ER-81, ER-85 n.13 (Jan. 18, 2001) (emphasis added).

EPA's Phase II Rule itself regulates non-municipal, non-industrial sources: small construction sites, which are not municipal (unless owned by a municipality) and, by EPA's own unchallenged characterization, not industrial. *National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule*, 64 Fed. Reg. 68722, 68772 (Dec. 8, 1999) (declining to regulate small construction sites as industrial sources); *see also* 40 C.F.R. §§ 122.26(b)(14) & (15) (separate definitions of industrial and small construction discharges).

In the Phase II Rule, EPA also reserved residual designation authority to address "individual instances of storm water discharge [that] might warrant special regulatory attention, but do not fall into a discrete, predetermined category." 64 Fed. Reg. at 68781. In neither the regulation nor the preamble does EPA state that such authority is limited to municipal or industrial sources.[5] *See* 40 C.F.R. §§ 122.26(a)(9)(i)(C) & (D); 64 Fed.

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[5] The only restrictions EPA referenced as to the type of sources covered by the residual authority are the statutory exemptions for agricultural

Reg. at 68781-68782. Because industrial sources (as defined by EPA) and many municipal sources are already regulated under the Phase I and Phase II Rules, the Court's limitation of section 402(p)(6) authority to municipal and industrial sources would unduly restrict EPA's residual designation authority, and would be inconsistent with the broad authority EPA itself believes it has.

III.

THE CWA'S STATUTORY AGRICULTURAL EXEMPTION DOES NOT COVER SILVICULTURAL SOURCES

In upholding EPA's forest roads decision, the Court reasoned that EPA's decision was "consistent with [EPA's] policy practice of treating silviculture as an agricultural, rather than an industrial, activity." Opinion at *22. But the Court errs because the CWA's limited exemption for "agricultural storm water discharges" does not cover silvicultural activities. Moreover, EPA policy and Ninth Circuit law exclude silviculture from that agricultural exemption.

A. The CWA Excludes Silvicultural Sources from the Agricultural Exemption

CWA section 502(14) excludes "agricultural stormwater discharges" from the definition of "point source," but does not mention silviculture. 33 U.S.C. § 1362(14); *see also* CWA § 402(*l*)(1), 33 U.S.C.

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stormwater (discussed in section III below) and oil, gas and mining discharges. 64 Fed. Reg. at 68782. EPA does not in any way suggest in the Phase II Rule preamble that the agricultural exemption includes silvicultural sources. *Id.*

§ 1342(*l*)(1) (excluding "return flows from irrigated agriculture"). Any EPA policy characterizing silvicultural discharges as falling within this agricultural exemption would be unlawful as contrary to the plain language of the CWA. *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842-43 (1984) ("the court, as well as the agency, must give effect to the unambigously expressed intent of Congress").

In a number of places, the CWA distinguishes between agricultural and silvicultural activities by naming them separately. *See, e.g.*, 33 U.S.C. § 1288(b)(2)(F); 33 U.S.C. § 1314(f)(A). As noted above, however, the provisions establishing the CWA agricultural exemption *only* refer to agricultural sources. *See* 33 U.S.C. § 1362(14); 33 U.S.C. § 1342(*l*)(1). Because in some CWA provisions Congress used both terms, and because in other CWA provisions – specifically, the agricultural stormwater exemption – Congress used the term "agricultural" without the term "silvicultural," Congress clearly intended the two terms to have different meanings, and did not mean the agricultural exemption to include silvicultural activities. *See Boise Cascade Corp.* v. *EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (holding that "promulgation" was not identical to "approval" because one clause of statute referred to "approving or promulgating" but another clause of statute referred only to "promulgating"); *see also Bates* v. *United States*, 522 U.S. 23, 29-30 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that

Congress acts intentionally and purposely in the disparate inclusion or exclusion"); *United States* v. *Fiorillo*, 186 F.3d 1136, 1148 (9th Cir. 1999) (referencing "the basic assumption that Congress does not use different language in different provisions to accomplish the same result"). An interpretation that agricultural activities include silvicultural activities would improperly render the term "silvicultural" superfluous in provisions where both terms are mentioned, since a reference to agricultural activities would subsume silvicultural activities and therefore preclude any need to refer to silvicultural activities. *See, e.g., TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (applying "cardinal principal" that "a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant"); *Boise Cascade*, 942 F.2d at 1432 (failure to distinguish between "promulgation" and "approval" would make use of "approval" in statutory provision "superfluous" or would render provisions internally inconsistent).

The Court relies on the fact that "industrial" processes are referenced in CWA section 304(e), 33 U.S.C. § 1314(e), while "agricultural and silvicultural" activities are referenced separately in CWA section 304(f)(A), 33 U.S.C. § 1314(f)(A). Opinion at *22. However, the fact that agricultural and silvicultural sources are mentioned together in a different provision than industrial sources only means that they are both different than

industrial sources, not that silvicultural sources are a subset of agricultural sources.[6]

B. EPA Excludes Silvicultural Sources from the Agricultural Exemption

Contrary to the Court's finding, EPA has taken the position that it has authority to regulate silvicultural sources because the statutory agricultural exemption does not include those sources. In its proposed TMDL rule, EPA provided for the regulation of silvicultural point sources on a case-by-case basis, demonstrating its belief that it had authority – and cause – to regulate such sources. *Revisions to the National Pollutant Discharge Elimination System Program and Federal Antidegradation Policy in Support of Revisions to the Water Quality Planning and Management Regulation; Proposed Rule*, 64 Fed. Reg. 46058, 46077-46078 (Aug. 23, 1999). In so doing, EPA noted that Congress ratified EPA's regulatory exclusion for agricultural sources in the 1977 and 1987 CWA amendments, but also noted that "[n]either . . . the 1977 nor the 1987 amendments provided any ratification of the silvicultural exclusions." *Id.* Although EPA ultimately declined to regulate silvicultural sources in the final rule,[7] in the

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[6] Indeed, if simple textual proximity indicated that two terms meant the same thing, then "agricultural" and "industrial" would mean the same thing, since they are mentioned together in CWA section 304(*l*)(1)(A), 33 U.S.C. § 1314(*l*)(1)(A).

[7] EPA did not specify why it changed its position on regulating silvicultural sources in the final TMDL rule. 65 Fed. Reg. 43586, 43652 (Jul. 13, 2000).

preamble of that final rule EPA maintained its position that the statutory exemption for agriculture did not extend to silviculture. *Compare Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation; Final Rules*, 65 Fed. Reg. 43586, 43651 (Jul. 13, 2000) (EPA "can not and would not" regulate "agricultural storm water" discharges because CWA explicitly exempts such sources) *with id.* at 43650 (EPA "hastens to note that the existing limitation on regulation of discharges from silvicultural sources was not compelled by the CWA").

Nothing cited in the Opinion demonstrates that EPA *does* have a policy characterizing silviculture as subject to the agricultural exemption. The Court cites an EPA regulation concerning silvicultural discharges, Opinion at *22, n.54, but that regulation nowhere mentions agriculture, 40 C.F.R. § 122.27.[8] The Court also cites an EPA regulation concerning

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[8] The Court states that EPA's existing silviculture regulation excludes "forest roads," Opinion at *22, n.54, but, as noted in EDC's and NRDC's reply brief, that regulation only excludes forest road *construction and maintenance* and, in any event has no bearing on whether EPA should have regulated forest roads under section 402(p)(6) because the existing regulation was promulgated under different statutory authority. EDC/NRDC Rep. Br. at 23-24. Additionally, this Court recently held that the list of point sources in EPA's silvicultural regulation is not exhaustive and thus "does not exclude all other silvicultural activities from NPDES permit requirements." *League of Wilderness Defenders* v. *Forsgren*, 309 F.3d 1181, 1188 & n.6 (9th Cir. 2002)

agricultural discharges, Opinion at *22, n.54, but that regulation nowhere mentions silviculture, 40 C.F.R. § 122.23. Thus neither these regulations, nor anything else presented in the briefs or the Opinion,[9] contradicts EPA's express admission that the statutory agricultural exemption does not cover silvicultural sources.[10]

C. The Ninth Circuit Excludes Silvicultural Sources from the Agricultural Exemption

The Court's forest roads ruling is inconsistent with the Ninth Circuit's recent decision in *League of Wilderness Defenders* v. *Forsgren*, 309 F.3d 1181 (9th Cir. Nov. 4, 2002). In that case, the Forest Service

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[9] The Court also states that the "legality of EPA's recent decision not to separate its general treatment of forest roads from its treatment of agricultural activities under the [CWA] is currently under review in the D.C. Circuit, *Am. Farm Bureau Fed'n*, Docket No. 00-1320, and must be resolved in that forum." Opinion at *22, n.55. However, based on EDC's and NRDC's review of filings in that case, no petitioner raised the forest roads issue in that litigation. Additionally, that litigation is likely to be dismissed as moot in the near future: EPA stayed that litigation pending its review of its TMDL rule and has recently proposed to withdraw the rule. *Withdrawal of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation*, 67 Fed. Reg. 79020, 79024 (Dec. 27, 2002).

[10] The Court suggests that "[p]etitioners can barely be regarded as having raised the issue of regulating forest roads at all during the Phase II notice and comment process." Opinion at *22, n.58. But the Court cites no authority indicating that NRDC's comment was legally insufficient, and EPA did in fact respond to NRDC's comment. Excerpts of Record for Petitioner EDC and Petitioner-Intervenor NRDC at 146 (Jan. 18, 2001).

discharged pesticides from aircraft into rivers without an NPDES permit. The Forest Service claimed that, under the authority of EPA regulations, letters and guidance, the spraying was silvicultural pollution not subject to permitting requirements. In ruling that a permit was needed, the Court rejected the Forest Service's reliance on an EPA guidance document captioned "Return Flows from Irrigated Agriculture." Finding that the document was "not a guidance document for silvicultural activities," the Court distinguished Congress' exemption for irrigated agriculture from EPA's exemption for silviculture, stating that the former was "a *statutory* exemption not an exclusion purportedly bestowed by regulatory interpretation." *Id.* at 1189. Thus, the Ninth Circuit determined, contrary to the Court's finding here, that the agricultural exemption did not encompass silvicultural sources.[11]

CONCLUSION

EPA consideration of the need to regulate forest roads and other non-municipal, non-industrial sources was not "irrelevant" to the Phase II rulemaking, Opinion at *22, but is instead the central focus of the section 402(p)(6) regulatory program. The record establishes the need to regulate forest road discharges to "protect water quality," and section 402(p)(6) does not allow EPA to avoid regulating those discharges solely because they are not municipal or industrial in nature. Accordingly, EDC and NRDC

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[11] The Court's decision in this case is also inconsistent with *Forsgren* for the reason set out in footnote 8 above.

respectfully request that the Court reconsider its forest roads decision and remand the rule for the purpose of regulating those roads.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Ninth Circuit Rule 40-1 the attached petition for panel rehearing is proportionally spaced, has a typeface of 14-point Times New Roman, and contains 4,195 words (excluding the table of contents, the table of authorities, this certificate of compliance and the certificate of service).

Date: February 27, 2003

Andrew G. Frank

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February 2003, I caused to be served by first-class mail one copy of the foregoing *Petition for Rehearing of Petitioner Environmental Defense Center and Petitioner-Intervenor Natural Resources Defense Council, Inc.* on:

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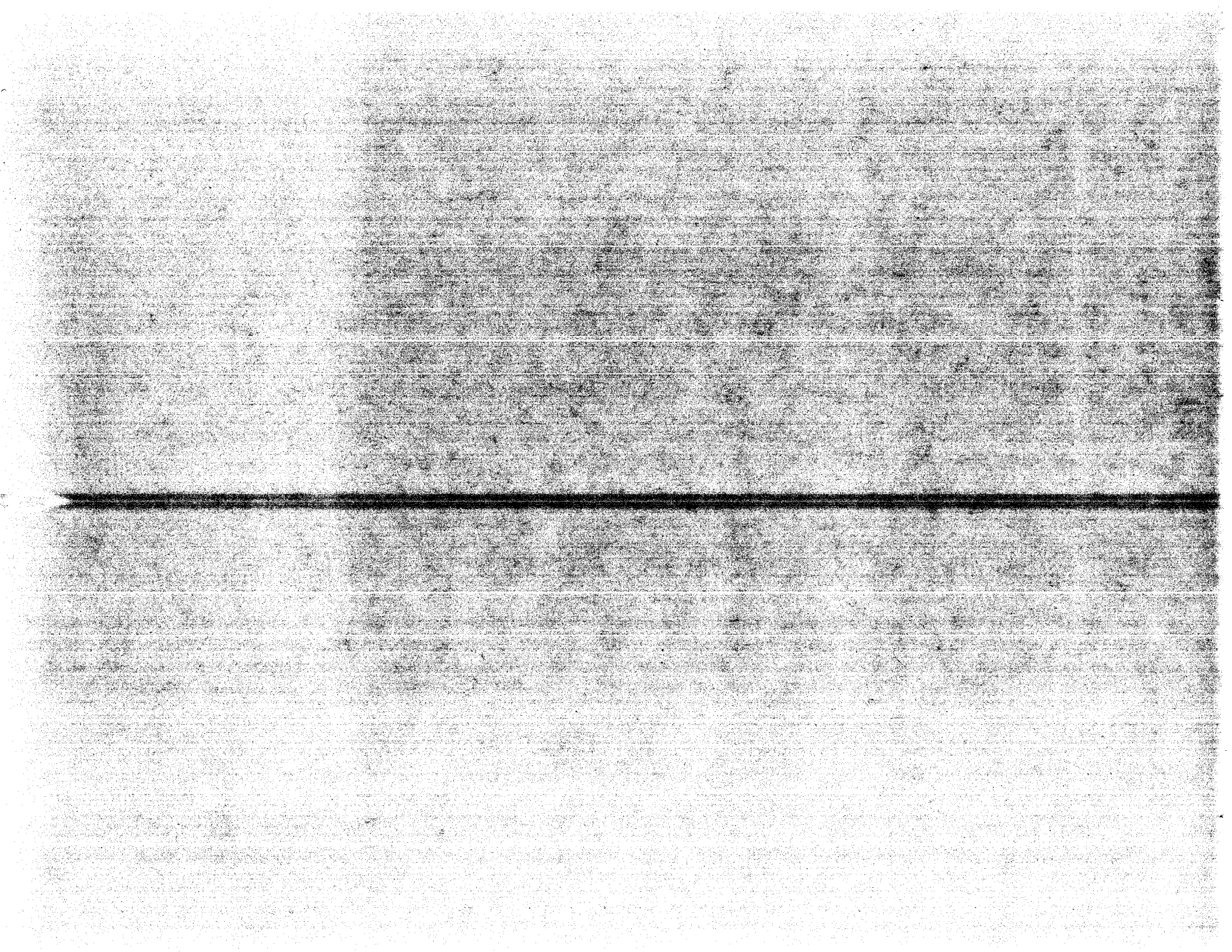

ADDENDUM

Clean Water Act Section 402(p)(6),

33 U.S.C. § 1342(p)(6)

Clean Water Act § 402(p), 33 U.S.C. § 1342(p)

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 1342 of this title) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers –

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each

such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of--

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.