

# ***NEDC v. Brown* Litigation Background**

- On September 6, 2006, the Northwest Environmental Defense Center (NEDC) sued the Oregon State Forester, the Oregon Board of Forestry, and four timber purchasers, alleging that “logging” roads in the Tillamook State Forest are “point sources” requiring NPDES permits (*NEDC v. Brown.*) Under the Clean Water Act, EPA has always defined “logging” roads and other forestry activities as nonpoint sources most effectively regulated by states through best management practices.
- On March 1, 2007, the U.S. District Court for the District of Oregon upheld the EPA’s regulation.
- On August 17, 2010, the Ninth Circuit reversed the District Court and determined that forest roads and their stormwater runoff gathering systems are point sources subject to the CWA’s National Pollutant Elimination Discharge System (NPDES) permit requirement.
- Breaking with 35 years of practice, the court ruled that the EPA lacks authority to designate forest roads and associated stormwater runoff systems as a nonpoint source.
- The Ninth Circuit further ruled that timber harvest is an “industrial activity” under Phase 1 of the EPA’s stormwater permit program and that roads supporting timber harvest require NPDES permits. Under the CWA Phase I activities must obtain an NPDES permit for stormwater discharges.
- The defendants requested that the Ninth Circuit rehear the case “*en banc*,” arguing that the court cannot ignore EPA’s own interpretation of its stormwater regulations on the meaning of “industrial activity.” On May 17, 2011, the Court denied the request and declined to stay its decision pending Supreme Court review.
- The defendants now have until August 15 to request Supreme Court review.

## **EPA’s Involvement in Litigation**

- EPA vigorously defended its nonpoint source definition in its *amicus* brief on the appeal to the Ninth Circuit. In this brief, EPA also explained that it excluded forestry activities from the 1990 definition of “industrial activity” under the Phase 1 program, meaning that if the court found forest roads to be point sources, they would not be subject to mandatory NPDES permits. The Ninth Circuit ignored this explanation.
- Despite its *amicus* brief on the appeal, EPA took no steps to defend its regulations during the rehearing process and argued that the court should not dismiss the challenge to these decades-old regulations.
- The agency now seems to have accepted the Ninth Circuit’s decision and is considering ways to implement it both within the Ninth Circuit and elsewhere in the country.
- It is also uncertain whether the EPA will further defend its regulations during the Supreme Court petition process.