

HB

546

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. Jim Holm
Rep. Dan Ogg
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg



State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Leg. Legal
From: Vanessa Tondini, Committee Aide
House Judiciary Committee
Date: April 17, 2004
Re: CS Request – Revised

Please create a final draft House Judiciary Committee Substitute for work order # 23-GH 2157A, HB 546, incorporating the attached two amendments. I have also written the amendments into the text of the attached bill draft for clarification. The bill was passed out of committee yesterday.

Sorry, one more thing! Please set out a lead in Section 3 of the bill, Page 3, Line 5. before (13) by inserting, "The department may..." for clarification purposes.

If you have any questions, please call me at 4990. Thank you!

The information attached to this memo is **CONFIDENTIAL** an/or privileged. It is intended to be reviewed initially by only the individual named above. If the reader of this Memorandum is not the intended recipient or a representative of the intended recipient, you are hereby notified that any review, dissemination, or copying of the information contained herein is prohibited. If you have received this in error, please immediately notify the sender by telephone and return this to the sender at the above address.

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HB 546

Amendment #1 - PASSED

by Rep. McGuire

P.3, L.26-27

Delete "one publication"

Insert "two publications"

HB 546
Amendment #2 - PASSED
by Rep. Gruenberg

P. 5, L. 12

Delete "for a permit"



RESOURCE DEVELOPMENT COUNCIL

Growing Alaska Through Responsible Resource Development

April 15, 2004

Representative Lesli McGuire
Chair, House Judiciary Committee
Alaska State Legislature
State Capitol, Room 118
Juneau, Alaska 99801-1182

Re: HB 546 — Pollution Discharge & Waste Treatment/Disposal

Dear Representative McGuire:

On behalf of the Resource Development Council for Alaska, Inc. (RDC), I am writing to express our support for HB 546 — Pollution Discharge & Waste Treatment/Disposal.

RDC is a statewide non-profit business association representing companies from all of Alaska's basic industries — timber, tourism, fisheries, oil and gas and mining. Our membership also includes Native regional and village corporations, organized labor, local communities and industry-support firms. For nearly thirty years we have worked to expand Alaska's economy through the responsible development of the state's natural resources.

Over the past few months we have worked closely with both the Department of Environmental Conservation (DEC) and our members in the timber industry to determine how best to move forward with state primacy over National Pollution Discharge Elimination System (NPDES) permits. While 45 other states administer NPDES permits within their respective boundaries, the cost and complexity of the program have kept Alaska from following suit.

By creating a pilot-program for the timber industry, HB 546 will provide DEC with valuable expertise in administering NPDES permits. Only through this experience will the department and the regulated community truly understand the issues involved with state assumption of the entire NPDES program. A sector-specific program is an important incremental step toward future state assumption of the entire program.

HB 546 is a bill that deserves your full support and one we urge the committee to pass. Thank you for considering our position on this important and forward-looking piece of legislation. Feel free to contact me with any questions.

Sincerely,

RESOURCE DEVELOPMENT COUNCIL
for Alaska, Inc.

Tadd Owens
Executive Director

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION
OFFICE OF THE COMMISSIONER

FRANK H. MURKOWSKI, GOVERNOR
410 Willoughby Ave., Ste 303
Juneau, AK 99801-1795
PHONE: (907) 465-5065
FAX: (907) 465-5070
<http://www.state.ak.us/dec/>

April 6, 2004

The Honorable Lesil McGuire, Chair
House Judiciary Committee
State Capitol, Room 118
Juneau, Alaska 99801

Dear Representative McGuire,

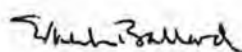
The Department of Environmental Conservation respectfully requests your consideration in scheduling a hearing for HB 546, an "Act relating to the regulation of the discharge of pollutants from timber-related activities under the National Pollutant Discharge Elimination System; relating to waste treatment and disposal permits; making conforming amendments; and providing for an effective date," before the House Judiciary Committee at your earliest convenience.

HB 546 instructs DEC to seek primacy for a portion of the federal National Pollutant Discharge Elimination System (NPDES) wastewater discharge permitting program, namely the portion related to timber industry discharges. While DEC supports seeking state primacy for the entire NPDES program, partial primacy for timber-related discharges will provide an opportunity to test the concept in an industry sector where the state has significant expertise.

The fiscal note reflects a two-year effort to complete program development and to achieve U.S. Environmental Protection Agency approval. Annual costs for FY 2005 and FY 2006 are divided between federal grant funds of \$235.0 available for two years with the balance of \$177.6 in FY 2005 and \$161.4 in FY 2006 derived from general funds. After the two-year implementation, the general fund support decreases with the addition of general fund program receipts from fees.

Dan Easton, DEC's Water Division Director will provide you with any additional information you might require regarding this bill. Your staff can contact Mr. Easton at 465-5135, or Melanie Lesh, the department's legislative liaison, at 465-5290. As always, please contact me if I can be of assistance.

Sincerely,



Ernesta Ballard
Commissioner

cc: Dan Easton, Director, Division of Water, DEC

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

HB 546

PARTIAL NPDES PRIMACY FOR TIMBER-RELATED WASTEWATER DISCHARGES

HB 546 instructs DEC to seek primacy for permitting timber-related waste discharges under the federal National Pollutant Discharge Elimination System (NPDES) discharge permitting program. Upon approval, the Alaska Department of Environmental Conservation (DEC), and not the U.S. Environmental Protection Agency (EPA), would issue discharge permits for the timber industry sector in Alaska.

The NPDES Program

The NPDES wastewater discharge permit program is established under Section 402 of the Clean Water Act (CWA). In Alaska, major industries with NPDES permits include timber, seafood, mining, and oil and gas. Municipal sewage treatment facilities also require NPDES permits. The CWA envisions that each state will seek primacy for the program and tailor it to the state's individual needs. Alaska is among only five states that have not yet sought primacy.

Partial Primacy

While primacy for the entire NPDES program is the norm, states have the option of seeking partial primacy for one or more specific industry sectors. Under a partial primacy arrangement, the state issues permits and conducts monitoring and compliance activities for the sector. EPA retains oversight authority. The Alaska water quality standards serve as the basis for all NPDES permits regardless of whether the EPA or the State implements the program.

Timber Sector Wastewater Discharges

NPDES permitting of timber sector discharges primarily focuses on permitting log transfer facilities.

- 98 log transfer facilities are eligible to be covered under an NPDES General Permit that governs the discharge of bark and wood waste into the marine environment.
- 98 log transfer facilities are eligible for coverage under the NPDES Multi-Sector General Permit for uplands stormwater management.
- All sawmills are eligible for coverage under the NPDES Multi-Sector General Permit for uplands stormwater management.
- Any new timber facility construction that disturbs greater than one acre is eligible for coverage under the NPDES construction general permit for stormwater management.
- Logging camps with domestic wastewater (approx. 12) require a permit. Most of them fall below the current EPA threshold for minor discharges and are currently issued a state, rather than an NPDES domestic wastewater discharge permit.

Why the Timber Sector?

The State of Alaska has significant expertise and a significant role in timber sector permitting and compliance activities. Partial primacy for timber-related discharges will provide an opportunity to test state NPDES primacy in a familiar industry sector.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

HB 546

PARTIAL NPDES PRIMACY FOR TIMBER-RELATED WASTEWATER DISCHARGES

Expected Benefits

Alaskans Protecting Alaska's Water Resources. Alaskans should be in charge of protecting Alaska's environment. The State is committed to, and capable of protecting its own resources. Exercising timber sector wastewater permitting authority is an opportunity for the State of Alaska to demonstrate its commitment and competence.

Rational Rules. A state timber wastewater discharge permit program will be a part of a broader state program for regulating water quality. The state program will be based on six essential elements of a good regulatory program: unambiguous statutory authority, a documented basis for concern, protective standards, rational regulations, documented compliance, and enforcement.

Fair, Predictable Enforcement. A state program will include a coherent system for assessing compliance with permit terms and conditions. Permittees will know exactly what is expected of them. Along with clarity will come higher expectations for compliance and predictable enforcement.

Efficiency and Timeliness. With a state-run timber-related discharge permitting program, permit holders can expect their permits to be timely and current.

Alaskans Accountable to Alaskans. The mission, priorities, level of effort and performance measures of DEC's regulatory programs are subject to annual review and approval by the State Legislature. Planning and budgeting for a federally run NPDES program does not offer this opportunity for state control.

Better Access to Rule Makers and Permit Writers. A state run program will place rule makers and permit writers closer to the Alaskan public and permit holders. No longer will permits be written and enforced by federal staff unfamiliar with the State.

A Focus on Results, Not Process. The federal program focuses on consistent federal process instead of site-specific and risk-based results. The state program will focus on results.

The Costs

The Department projects a two-year (FY 2005 and FY 2006) effort to complete program development and transition work necessary to apply to EPA for timber sector NPDES primacy. Costs to develop and promulgate regulations, develop permitting procedures, secure legal and technical services, and prepare an application are anticipated at approximately \$400 thousand for each of the two-year development and transition effort. One-time federal grant funds are available to cover approximately one-half of the cost. The balance would be paid for with General Funds. Once the program is operating in FY 2007, annual costs would be about \$130 thousand per year. Permit fees would generate approximately \$30 thousand per year.

HB 546 -- Sectional Analysis

Relating to Regulation of the Discharge of Pollutants From Timber-related Activities

Section 1. Provides findings and intent language to lay foundation for assumption of NPDES primacy for timber-related discharges as a single-sector, pilot-project.

Section 2. Adds the timber NPDES program to the list of programs for which DEC is given authority in AS 44.46.025(a) to adopt user fee regulations. By operation of existing law in the AS 37.10.058(2)(B) definition of "designated regulatory service," the permits issued under a timber NPDES program would fall into the category of services for which DEC is required to adopt fixed fee regulations and can use negotiated services agreements in the interim until such regulations have been adopted.

Section 3. Authorizes assumption of partial NPDES primacy limited to timber-related activities.

Section 4. Amends permit application requirement to eliminate conflict with NPDES requirement for submittal of application at least 180 days in advance of planned operation.

Section 5. Changes notice requirements to ensure that notice can be given of the availability of a draft permit, instead of requiring publication of notice at the application receipt stage, which may precede permit development by many months. Also changes requirement for two separate publications to a requirement for "at least one," to allow greater flexibility in structuring notice of availability of draft NPDES permits. Makes conforming amendments.

Section 6. Clarifies permit duration limit and adds explicit authority for regulations to provide for administrative continuance of expiring permits.

Section 7. Amends statutory provisions on termination and modification of waste disposal permits to fill gaps in legal authority needed to satisfy NPDES primacy requirements.

Section 8. Extends existing enhanced civil penalty authority to the timber NPDES program.
(Required for primacy.)

Section 9. Extends criminal penalty provisions to the timber NPDES program (required for primacy) and makes conforming changes.

Section 10. Extends criminal fine provision authorizing payment of up to \$10,000 for each separate violation to violations of the regulations that would be adopted for the timber NPDES program.
(Required for primacy.)

Section 11. Provides for an immediate effective date to allow work on timber NPDES regulations and other efforts to secure primacy to begin without delay.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HB 546
 (H) Publish Date: 3/25/04

Revision Date/Time (Note if correction): _____ Dept. Affected: Environmental Conservation
 Title An Act relating to regulation of timber-related discharges under NPDES RDU Air & Water Quality
 Component Water Quality
 Sponsor Rules Committee
 Requester Governor Component No. 2062

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 | FY 2010 |
|------------------------------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Personal Services | 67.0 | 67.0 | 67.0 | 67.0 | 67.0 | 67.0 |
| Travel | 21.0 | 21.0 | 7.0 | 7.0 | 7.0 | 7.0 |
| Contractual | 300.9 | 300.9 | 56.0 | 56.0 | 56.0 | 56.0 |
| Supplies | 3.0 | 3.0 | 1.0 | 1.0 | 1.0 | 1.0 |
| Equipment | 20.7 | 4.5 | 1.5 | 1.5 | 1.5 | 1.5 |
| Land & Structures | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Grants & Claims | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Miscellaneous | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| TOTAL OPERATING | 412.6 | 396.4 | 132.5 | 132.5 | 132.5 | 132.5 |
| CAPITAL EXPENDITURES | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CHANGE IN REVENUES (1005) | 0.0 | 0.0 | 30.0 | 30.0 | 30.0 | 30.0 |

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|--------------------------|--------------|--------------|--------------|--------------|--------------|--------------|
| 1002 Federal Receipts | 235.0 | 235.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 1003 GF Match | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 1004 GF | 177.6 | 161.4 | 102.5 | 102.5 | 102.5 | 102.5 |
| 1005 GF/Program Receipts | 0.0 | 0.0 | 30.0 | 30.0 | 30.0 | 30.0 |
| 1037 GF/Mental Health | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Other | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| TOTAL | 412.6 | 396.4 | 132.5 | 132.5 | 132.5 | 132.5 |

Estimate of any current year (FY2004) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

| | | | | | | |
|-----------|---|---|---|---|---|---|
| Full-time | 1 | 1 | 1 | 1 | 1 | 1 |
| Part-time | 0 | 0 | 0 | 0 | 0 | 0 |
| Temporary | 0 | 0 | 0 | 0 | 0 | 0 |

ANALYSIS: (Attach a separate page if necessary)

This bill directs the Department of Environmental Conservation to seek authority from the U.S. Environmental Protection Agency (EPA) to implement the federal National Pollutant Discharge Elimination System (NPDES) wastewater discharge permitting program for timber-related activities. The Department projects a two-year (FY 2005 and FY 2006) effort to complete program development and transition work necessary to apply to EPA for NPDES primacy. With EPA approval, the Department would begin implementing the NPDES program for timber-related activities in FY 2007. The funds to support transition to primacy consist of General Funds and Federal Receipts. A total of \$470.0 in one-time federal grant funds are available to support program development work. The balance of the development and transition costs are General Funds. Upon implementing the program in FY 2007, the Department anticipates annual program receipts of \$30.0.

(continued)

Prepared by: Lynn J. Tomich Kent Phone (907) 465-5312
 Division: Air & Water Quality Date/Time 3/9/2004
 Approved by: Kurt Fredriksson, Deputy Commissioner Date 3/9/2004
 Agency: Department of Environmental Conservation

FISCAL NOTE # 1

STATE OF ALASKA
2004 LEGISLATIVE SESSION

BILL NO. HB 546

ANALYSIS CONTINUATION

The FY 2005-2006 funds will provide the following services:

Personal Services - one permanent position to develop permit process regulations, conduct the rulemaking process, develop written permitting procedures, standardized program forms, and the NPDES primacy application to EPA. Development of the Log Transfer Facility general permit will begin in FY 2006.

Travel - program and regulations development, primacy application, and NPDES permit writing and compliance training for new and existing staff.

Contractual - two long term non-permanent positions to assist in developing written permitting procedures, standardized program forms, and the NPDES primacy application to EPA; professional services assistance; RSA to Dept. of Law for legal assistance with regulations development; and position support costs.

Supplies - standard office supplies.

Equipment - office furniture and computers for staff. The FY 2006 budget eliminates the funding for office equipment, which is a one-time purchase.

The Department anticipates NPDES primacy approval from EPA beginning in FY 2007 for timber industry related permitting. The fiscal note for FY 2007 and beyond reflects the ongoing costs of implementing the program and provides the following:

Personal Services - one permanent position to develop individual permits, general permits, issue authorizations under general permits, review dive survey reports, conduct inspections and take enforcement actions if necessary.

Travel - staff permitting and facility inspections (one inspection of each operating facility during the 5-year life of the permit); ongoing technical training; and occasional program development meetings.

Contractual - public notices; staff training; professional services contracts for assistance with NPDES permitting and compliance-related issues; RSA to Dept. of Law for enforcement actions and program legal assistance; and position support costs.

Supplies - standard office supplies and water quality sampling supplies.

Equipment - ongoing office equipment and computer replacement costs, environmental monitoring equipment purchase or replacement, and other facility inspection equipment (such as personal safety gear and cameras).

Projected impact on Alaska economy and local government

- eliminates the current patchwork of federal and state permits for the timber industry.
- increased permit and compliance fees for owners/operators of facilities with timber-related wastewater discharges.

Personal Services New Position Detail

Department of Environmental Conservation
Partial NPDES Primacy

Scenario: A Scenario for FY2005 Fiscal Notes (3605)

Component: Water Quality (2062)

RDU: Air and Water Quality (206)

| PCN | Job Class Title | Time Status | Retire Code | Barg Unit | Location | Salary Sched | Range & Steps | Budgeted Months | Split / Annual Count | Annual Salary | COLA | Premium Pay | Annual Benefits | Total Costs |
|---------|------------------------|-------------|-------------|-----------|----------|--------------|---------------|-----------------|----------------------|---------------|------|-------------|-----------------|-------------|
| 18-#028 | Environmental Spec III | FT | A | GP | Juneau | 2A | 18B | 12.0 | | 47,316 | 0 | 0 | 19,712 | 67,028 |

Justification: Implementation - NPDES Primacy for timber related discharges.

Funding Detail:

| | | | |
|-----------------------|-----------------------|----------------|---------------|
| 1004 | General Fund Receipts | 100.00% | 67,028 |
| Total Funding: | | 100.00% | 67,028 |

Component Summary:

Total New Positions: 1

| Fund Description | Fund Percent | Fund Amount |
|----------------------------|----------------|---------------|
| 1004 General Fund Receipts | 100.00% | 67,028 |
| Total Funding: | 100.00% | 67,028 |

Note: If a position is split, an asterisk (*) will appear in the Split/Count column. If the split position is also counted in the component, two asterisks (**) will appear in this column.

March 23, 2004

The Honorable Pete Kott
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, AK 99801-1182

Dear Speaker Kott:

Under the authority of article III, section 18, of the Alaska Constitution, I am transmitting a bill that would allow the State of Alaska to tailor part of its water discharge program to fit state concerns and environmental features. This bill would authorize the State of Alaska to administer National Pollutant Discharge Elimination System (NPDES) permits for the timber industry. Presently, NPDES permitting, compliance, and enforcement decisions are made pursuant to federal law designed to apply generically to all 50 states. The importance and value of assuming primacy is reflected by the fact that 45 other states have assumed primacy from the Environmental Protection Agency (EPA) for administering NPDES permits.

The Department of Environmental Conservation (DEC) has the capacity and experience to successfully implement primacy for the timber industry. DEC regulates a broad universe of technological and water-quality aspects for waste and wastewater disposal activities. These activities include regulation of timber industry discharges such as state certification of NPDES permits for log transfer facilities.

To accommodate NPDES primacy assumption, this bill would amend some existing permit requirements related to application submittals, public notice and comment opportunities, the maximum term of permits, and the causes for termination or modification of an authorization. These amendments would have the added benefit of streamlining and clarifying process requirements, to some extent, for all waste treatment or disposal authorizations.

The bill also includes legislative findings and intent language, to underscore the fact that assuming partial primacy for the NPDES program for a single industry sector might facilitate future assumption of a larger part or all of the NPDES program. A single-sector pilot-project-type program would allow

The Honorable Pete Kott
March 23, 2004
Page 2

the state to expand the current level of expertise and gain valuable experience in administering the program and working to resolve program administration issues with the EPA, which retains oversight authority over state NPDES programs. Because administration of the NPDES program is complex and costly, and assumption of the full program would require DEC to develop additional expertise, it makes sense to take measured steps toward full assumption by beginning with a single industry sector.

I urge your prompt and favorable action on this measure.

Sincerely yours,

Frank H. Murkowski
Governor

Enclosure

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Briefs and Other Related Documents

United States Court of Appeals,
Ninth Circuit.

LEAGUE OF WILDERNESS DEFENDERS/BLUE MOUNTAINS BIODIVERSITY PROJECT, an Oregon nonprofit corporation; Kettle Range Conservation Group, a Washington nonprofit corporation; The Lands Council, a Washington nonprofit corporation; Hells Canyon Preservation Council, an Oregon nonprofit corporation; Oregon Natural Resources Council, an Oregon nonprofit corporation; Northwest Ecosystem Alliance, Washington nonprofit corporation; American Lands, an Oregon nonprofit corporation, Plaintiffs-Appellants,

v.

Harv FORSGREN, in his official capacity as Regional Forester, Pacific Northwest Region, U.S. Forest Service; United States Forest Service, an agency of the United States, Defendants-Appellees.


No. 01-35729.

Argued and Submitted April 2, 2002.
Filed Nov. 4, 2002.

Environmental groups brought action against United States Forest Service (USFS), alleging that aerial pesticide spraying project violated National Environmental Policy Act (NEPA) and Clean Water Act (CWA) and seeking to enjoin further action on project prior to completion of supplemental environmental impact statement (EIS). The United States District Court for the District of Oregon, 163 F.Supp.2d 1222, James A. Redden, J., granted summary judgment in favor of USFS. Environmental groups appealed. The Court of Appeals, D.W. Nelson, Circuit Judge, held that: (1) aerial spraying at issue was "point source" requiring National Pollution Discharge Elimination System (NPDES) permit, and (2) initial EIS inadequately analyzed mitigation measures regarding potential pesticide drift.

Reversed and remanded with instructions.

West Headnotes

[1] Environmental Law  196
149Ek196 Most Cited Cases

Aerial pesticide spraying over waters within National Forest land constituted "point source" of pollutants, as required for spraying to be subject to National Pollution Discharge Elimination System (NPDES) permit requirements under Clean Water Act (CWA); insecticides at issue met definition of "pollutant" under CWA, United States Forest Service (USFS) aircraft sprayed insecticides directly into rivers, and use of airplanes fitted with tanks and mechanical spraying apparatus constituted "discrete conveyances" under CWA. Federal Water Pollution Control Act

Amendments of 1972, § 502(6, 14), as amended, 33 U.S.C.A. § 1362(6, 14).

[2] Environmental Law 196

149Ek196 Most Cited Cases

Aerial pesticide spraying over waters within National Forest land did not constitute silvicultural pest control activity, and thus spraying was not excluded from National Pollution Discharge Elimination System (NPDES) permit requirements under Clean Water Act (CWA) pertaining to "point sources" of pollutants; applicable regulation excluded nonpoint source silvicultural activities from NPDES permit requirements, whereas spraying at issue was point source activity. Federal Water Pollution Control Act Amendments of 1972, § 502(14), as amended, 33 U.S.C.A. § 1362(14); 40 C.F.R. § 122.27.

[3] Environmental Law 196

149Ek196 Most Cited Cases

Informal correspondence and guidance document from Environmental Protection Agency (EPA), purporting that no National Pollution Discharge Elimination System (NPDES) permit was required for aerial pesticide spraying by United States Forest Service (USFS) over waters within National Forest land, were not due any deference under Clean Water Act (CWA) for exempting spraying from NPDES permit requirements for "point source" pollutants; correspondence provided no analysis and did not mention regulation upon which USFS relied, guidance document pertained to CWA exemption for return flows from irrigated agriculture, not to pest control activities at issue, and EPA did not have authority to refine definitions of point source pollution in way that contravened Congressional intent. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., as amended, 33 U.S.C.A. § 1251 et seq.; 40 C.F.R. § 122.27.

[4] Environmental Law 604(6)

149Ek604(6) Most Cited Cases

Initial environmental impact statement (EIS) prepared by United States Forest Service (USFS) in connection with aerial pesticide spraying over National Forest land failed adequately to analyze mitigation measures concerning pesticide drift, as required under National Environmental Policy Act (NEPA); even though EIS discussed mitigation of drift into designated wilderness areas, it failed to include non-wilderness areas, and USFS' Record of Decision (ROD) with regard to spraying project failed to acknowledge operational precautions for mitigating drift submitted by sister agency and other sources. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

*1182 Marianne Dugan, Facaros & Dugan, Eugene, Oregon; Lauren Regan, Eugene Oregon, Brent Foster, Portland, OR, for the appellants.

John C. Cruden, Acting Assistant Attorney General, Environment and Natural Resources Division, Washington D.C.; Kristine Olson, United States Attorney, Thomas C. Lee, Assistant United States Attorney, Val. J. McLam Black, Special Assistant United States Attorney, Portland, OR; Ellen J. Durkee, Paul S. Weiland, Environment and Natural Resources Division, Department of Justice, Washington D.C., for the appellees.

Appeal from the United States District Court for the District of Oregon; James A. Redden, District Judge, Presiding. D.C. No. CV-00-01383-RE.

Before D.W. NELSON, THOMPSON and PAEZ, Circuit Judges.

OPINION

D.W. NELSON, Senior Circuit Judge:

Appellees Harv Forsgren and the United States Forest Service ("Forest Service") have underway a program of annual aerial insecticide spraying over 628,000 acres of national forest lands in Washington and Oregon. The spraying is aimed at controlling a predicted outbreak of the Douglas Fir Tussock Moth ("Moth"), which kills Douglas Fir trees.

Appellants League of Wilderness and seven other environmental groups ("Environmental Groups") filed suit in district court challenging the spraying program. They assert that the Environmental Impact Statement ("EIS") prepared by the Forest Service was inadequate and that the Forest Service failed to obtain a National Pollution Discharge Elimination System permit ("NPDES permit"), which the Environmental Groups argue is required for this type of aerial spraying. The district court granted summary judgment on the EIS and NPDES claims in favor of the Forest Service. The Environmental*1183 Groups appeal on both issues. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we reverse with instructions to the district court to enter an injunction prohibiting the Forest Service from further spraying until it acquires an NPDES permit and completes a revised EIS.

I. FACTUAL BACKGROUND

In the early 1970's the Moth defoliated approximately 700,000 acres in Oregon, Washington, and Idaho. After that outbreak, the Forest Service developed an early warning system to predict future Moth outbreaks. Based on its warning system, the Forest Service predicted an outbreak in 2000-2002 and designed the spraying program that is the subject of this litigation to reduce its anticipated impact. Moth outbreaks are a natural occurrence in forest ecology and serve the purpose of thinning the forest to create stand openings. However, the Forest Service concluded that the predicted outbreak would cause unacceptable levels of damage in scenic areas, critical habitat areas, and areas where the Forest Service has invested in improvements such as seed orchards.

The record reveals a number of harmful side effects associated with the aerial spraying program. Insecticide will drift outside of the area targeted for spraying and may kill beneficial species, including butterflies. Because aircraft conducting the spraying discharge insecticides directly above streams, stoneflies and other aquatic insects may be affected, reducing food supplies for salmon and other fish. The spraying could also adversely affect birds and plants.

II. STANDARD OF REVIEW

This court reviews the district court's grant of summary judgment *de novo*. Hall v. Norton, 266 F.3d 969, 975 (9th Cir.2001). We review an agency's decision from the same position as the district court. Nevada Land Action Ass'n v. United States Forest Serv., 8 F.3d 713, 716 (9th Cir.1993). Judicial review of agency decisions under NEPA is governed by the Administrative Procedure Act ("APA"), which specifies that an agency action shall be overturned where it is found to be "arbitrary,

55 ERC 1289, 33 Env'tl. L. Rep. 20,107, 2 Cal. Daily Op. Serv. 10,907, 2002
Daily Journal D.A.R. 12,638
(Cite as: 309 F.3d 1181)

capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We review a district court's interpretation of the Clean Water Act *de novo*. *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir.1997) (holding Court of Appeals reviews district court's interpretation of a statute *de novo*). We review a district court's interpretation of a federal regulation *de novo*. *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 918 (9th Cir.1995). An agency's interpretation of its own regulations is entitled to deference unless it is plainly erroneous or inconsistent with the regulation, *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), and so long as the agency's interpretation of the regulation is based on a permissible construction of the governing statute. *Id.* at 457, 117 S.Ct. 905.

III. DISCUSSION

A. NPDES Claim

1. Point Source And Nonpoint Source Water Pollution And NPDES Permit Requirements

The Clean Water Act, 33 U.S.C. §§ 1251-1387, requires that government agencies obtain an NPDES permit before discharging pollutants from any "point source" into navigable waters of the United States. 33 U.S.C. § 1323(a). This type of pollution is commonly referred to as "point source pollution." Absent the required permit, such discharge is unlawful. Point source pollution is distinguished from "nonpoint source pollution," which is regulated in a different way and does not require the type of permit at issue in this litigation.

*1184 The issue before us is whether spraying insecticide from aircraft (as the Forest Service is doing without a permit) is point source pollution or nonpoint source pollution. If the Forest Service's aerial spraying is classified as point source pollution, then the Forest Service must obtain a permit. If the spraying is classified as nonpoint source pollution, then no permit is required. The Forest Service argues that its aerial spraying should be classified as nonpoint source pollution, while the Environmental Groups argue that it should be classified as point source pollution.

Although nonpoint source pollution is not statutorily defined, it is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits. The most common example of nonpoint source pollution is the residue left on roadways by automobiles. Small amounts of rubber are worn off of the tires of millions of cars and deposited as a thin film on highways; minute particles of copper dust from brake linings are spread across roads and parking lots each time a driver applies the brakes; drips and drabs of oil and gas ubiquitously stain driveways and streets. When it rains, the rubber particles and copper dust and gas and oil wash off of the streets and are carried along by runoff in a polluted soup, winding up in creeks, rivers, bays, and the ocean. Nonpoint source pollution of this kind is the largest source of water pollution in the United States, far outstripping point source pollution from factories, sewage plants, and chemical spills. See, e.g., www.epa.gov/region4/water/nps (last visited 9/17/02).

On the other hand, point source pollution discharges that require an NPDES permit are statutorily defined. The definition, which is found in several different code sections, was deftly laid out by the United States Supreme Court:

Under the [Clean Water Act], the "discharge of any pollutant" requires a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. §§ 1311(a),

1323(a).... The term "discharge of any pollutant" is defined as "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12) (emphasis added). [FN1]

FN1. The waters covered also include all "navigable waters" of the United States. 33 U.S.C. § 1362(12). The parties in this litigation do not dispute that the rivers and streams in the area being sprayed by the Forest Service are navigable waters of the United States within the definition of the Clean Water Act.

Pollutant, in turn, means

"dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water...." 33 U.S.C. § 1362(6). [FN2]

FN2. The parties do not dispute that the insecticides at issue meet the definition of "pollutant" under 33 U.S.C. § 1362(6).

And, under the Act, a "point source" is

"any discernable, 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) (emphasis added).

*1185 Weinberger v. Romero-Barcelo, 456 U.S. 305, 308-09, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982).

[1] In the present case, the insecticides at issue meet the definition of "pollutant" under the Clean Water Act, and Forest Service aircraft spray these insecticides directly into rivers, which are waters covered by the Clean Water Act. Further, an airplane fitted with tanks and mechanical spraying apparatus is a "discrete conveyance." Therefore all the elements of the definition of point source pollution are met.

2. The Forest Service's Arguments For Excluding The Aerial Spraying From NPDES Permit Requirements

The Forest Service does not dispute any of this, but rather relies on a regulation drafted by the United States Environmental Protection Agency ("EPA"), two letters written by the EPA, and a passage in a guidance document propounded by the EPA to claim that its spraying is excluded by regulation from being a point source.

i. The Purported Exclusion By Regulation

First, the Forest Service relies on 40 C.F.R. § 122.27, which reads in pertinent part as follows:

(b) *Definitions*. (1) *Silvicultural* [FN3] *point source* means

FN3. The Forest Service advises us that silviculture is the "care and cultivation of forest trees."

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.

The Forest Service argues that the aerial spraying is a silvicultural pest control activity, and that the regulation excludes pollution arising from silvicultural pest control activities from NPDES permit requirements by defining such pollution as nonpoint source. The Forest Service reads the regulation as a blanket exclusion for all silvicultural pest control activities.

[2] The Forest Service's argument fails because the statute itself is clear and unambiguous. The statutory definition of point source, "any discernible, confined and discrete conveyance, including but not limited to any ... vessel," 33 U.S.C. § 1362(14), clearly encompasses an aircraft equipped with tanks spraying pesticide from mechanical sprayers directly over covered waters. [FN4] The Forest Service cannot *1186 contravene the will of Congress through its reading of administrative regulations. "If the intent of Congress 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." Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

FN4. We note that other courts have not hesitated to find the discharge of pollutants from aircraft over navigable waters to be point source discharges. Romero-Barcelo concerned the Navy dropping bombs from aircraft into the ocean off of Vieques Island in Puerto Rico. The district court for the district of Puerto Rico, in a thorough and scholarly opinion, found that the "release or firing of ordnance from aircraft into the navigable waters of Vieques" was a point source discharge requiring a NPDES permit and that a permit was required whether the discharge was "accidental or intentional." Romero-Barcelo v. Brown, 478 F.Supp. 646, 664 (D.P.R.1979), vacated in part on other grounds, 643 F.2d 835 (1st Cir.1981). On appeal, the Supreme Court did not quibble with the district court's finding that discharge of pollutants from aircraft constitutes a point source discharge. The Supreme Court, rather, reversed the First Circuit which had vacated a portion of the district court's order with respect to the remedy for the violation. Weinberger, 456 U.S. at 305, 320, 102 S.Ct. 1798.

Unlike the Forest Service, we read the regulation to conform to the statute and to the common understanding of the difference between point source and nonpoint source pollution. We conclude that the regulation excludes from the definition of point source pollution only those silvicultural pest control activities from which there is natural runoff, rather than all silvicultural pest control activities. Again, the operative sentence reads as follows:

The term [point source] 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.

We read the final modifying phrase, "from which there is natural runoff," to modify all the listed activities in the sentence. Therefore, silvicultural pest control *from which there is natural runoff* would be an example of a "nonpoint source silvicultural" activity not included in the term "point source." Simply put, the regulation excludes nonpoint source silvicultural activities from NPDES permit requirements, whereas the spraying involved here is not a nonpoint source activity at all.

We are aware that a common canon of statutory construction provides that "[r]eferential qualifying phrases, where no contrary intention appears, refer solely to the last antecedent." 2A Singer, Sutherland--Statutory Construction § 47.33 (5th ed.1992). However, our reading of "from which there is natural runoff" to reach back, qualifying all of the preceding antecedent examples of nonpoint source activities makes sense because nonpoint source pollution involves runoff that picks up scattered pollutants and washes them into water bodies. Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092, 1098 (9th Cir.1998) ("Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants. Such runoff could not be traced to any identifiable point of discharge.") (citing Trustees for Alaska v. EPA, 749 F.2d 549, 558 (9th Cir.1984)) (citing United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir.1979)) (citing legislative history of the Clean Water Act) (emphasis added).

The Forest Service asserted at oral argument that the qualifying phrase "from which there is natural runoff" applies only to the last antecedent "road construction and maintenance," and does not reach back to qualify the activity at issue here, which is pest control. However, the administrative history of the regulation leaves no doubt that the qualifying phrase "from which there is natural runoff" reaches back to qualify all the listed activities, including pest control.

An early version of this regulation reads in pertinent part as follows:

This term does not include nonpoint source activities inherent to forest management such as nursery operations, site preparation, reforestation in all stages of growth, thinning, prescribed burning, pesticide and fire control, and harvesting operations from which runoff results from precipitation events.

*1187 National Pollution Discharge Elimination System and State Program Elements Necessary for Participation, Silvicultural Activities, 41 Fed.Reg. 6281, 6283 (Feb. 12, 1976). At the time this early version of the present regulation was promulgated, "road construction and maintenance" were not among the listed activities. Road construction and maintenance were added to the list several months later in June 1976 and the proposed regulation was changed to read as follows:

This term does not include nonpoint source activities inherent to silviculture such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, and road construction and maintenance from which runoff results from precipitation events.

Part 124--State Program Elements Necessary for Participation in the National Pollutant Discharge Elimination System, Application of Permit Program to Silvicultural Activities, 41 Fed.Reg. 24709, 24711 (June 18, 1976). As the regulation was updated, the qualifying phrase remained at the end of the sentence and additional activities were simply inserted before the final qualifying phrase. [FN5] This editorial practice leaves no doubt that the final qualifying phrase modifies all the listed activities and that the regulation means only that those listed activities from which there is natural runoff are defined as nonpoint source

activities. Because discharging pesticide from aircraft directly over covered waters has nothing to do with runoff, it is not a nonpoint source activity.

FN5. The final modifying phrase has subsequently undergone minor rewording from "from which runoff results from precipitation events" to "from which there is natural runoff."

The Forest Service also argues that the first sentence of the regulation limits point source silvicultural activities to only the four listed point source activities:

Silvicultural point source means any discernable, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities.

40 C.F.R. § 122.27. In support of this reading, the Forest Service points to a passage from the Federal Register appearing contemporaneously with the publication of the regulation: "only discharges from four activities related to silvicultural enterprises, rock crushing, gravel washing, log sorting and log storage facilities, are considered point sources and thus subject to the NPDES permit program." 41 Fed.Reg. 24710 (June 18, 1976). The Forest Service reads this quote out of context. Our reading of the entire text explaining the regulation leaves only one reasonable conclusion: that at the time the regulation was promulgated, only these four activities had previously been identified as point source activities associated with silviculture, and they are specifically listed to make clear that it is not the intent of the new regulation to exclude them from NPDES permit requirements.

First, the explanation elucidates the general criteria applicable to silviculture for identifying nonpoint and point sources:

Basically, nonpoint sources of water pollution are identified by three characteristics:

- (i) The pollutants discharged are induced by natural processes, including precipitation, seepage, percolation [sic], and runoff;
- (ii) The pollutants discharged are not traceable to any discrete or identifiable facility; and
- *1188 (iii) The pollutants discharged are better controlled through the utilization of best management practices, including process and planning techniques.

In contrast to these criteria identifying nonpoint sources, point sources of water pollution are generally characterized by discrete and confined conveyances from which discharges of pollutants into navigable waters can be controlled by effluent limitations. It is these point sources in the silviculture category which are most amenable to control through the NPDES program [i.e. require permits].

41 Fed.Reg. 24710. There would be no reason to announce general criteria for identifying silvicultural point sources if the narrow list of four activities was intended to be exhaustive.

Next, the explanation makes clear that the list is not exhaustive by providing the reason for listing the four activities:

By recognizing that most water pollution from silvicultural activities is nonpoint in nature, it was not intended that certain operations already identified as point sources be excluded from the permit program by definitional oversight. Thus, for the four operations incidental to silvicultural activities--rock crushing, gravel washing, log sorting and log storage--the jurisdiction and impact of these regulations remain the same.

Id. at 24711. The point of listing the four activities is to ensure that they continue to be subject to permit requirements after the new criteria for identifying point and nonpoint sources take effect, not to exclude all other silvicultural activities from NPDES permit requirements.

Considerable background discussion of this regulation found at 41 Fed.Reg. 6281 (Feb. 12, 1976) also makes clear that the four activities are not an exclusive list of point source activities associated with silviculture. [FN6] It is unnecessary, however, to beat an already dead horse with a continued exegesis through the yellowed pages of the Federal Register. We hold that the list of four silvicultural point source activities is not exhaustive. [FN7]

FN6. The Forest Service's other citations to the Federal Register, and our own review of the administrative history, yield a consistent result when read in context and in light of the history and background of the regulation. For example, at one time the EPA considered including a procedure for case-by-case identification of silvicultural point sources through application of the regulation. However, EPA decided after public comment that "designation of any additional silvicultural point sources should be through rulemaking procedures." 44 Fed.Reg. 32871 (June 7, 1979). At most, continued references to the four listed silvicultural point source activities means that the EPA has not yet had occasion to identify through appropriate rule making additional silvicultural point source activities. It does not (and cannot) mean that activities which meet the statutory definition of point source pollution are excluded from NPDES permit requirements. We note in this regard that the district court's determination in Romero-Barcelo, that discharge of pollutants from aircraft is point source pollution, was not disturbed by the Supreme Court regardless of the fact that the EPA had not yet promulgated rules to govern the issuance of NPDES permits for the particular type of discharge at issue. Romero-Barcelo, 478 F.Supp. at 664.

FN7. To the extent that Sierra Club v. Martin, 71 F.Supp.2d 1268, 1304-05 (N.D.Ga.1996), and Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 810 (8th Cir.1998), support the Forest Service's interpretation of this regulation as excluding all but the four listed activities from NPDES permit requirements, we respectfully disagree with those opinions.

ii. The Purported Exclusion By Informal Correspondence From The EPA

[3] Next, the Forest Service points to two one-paragraph letters written by the EPA (in response to Forest Service requests) *1189 and a brief passage in an EPA guidance document that indicate that no NPDES permit is required for this aerial spraying project. These documents do not help the Forest Service. To the extent that these documents purport to show that the Forest Service's interpretation of the regulation is permissible because the statute itself would allow such an interpretation, they are not due any deference. The weight accorded documents of this type when advanced for the purpose of statutory interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944). The Supreme Court has recently reaffirmed the holding in Skidmore, stating that "interpretations

contained in formats such as opinion letters are 'entitled to respect' under our decision [in Skidmore], but only to the extent that those interpretations have the 'power to persuade.' " Christensen v. Harris County, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (quoting Skidmore, 323 U.S. at 140, 65 S.Ct. 161).

The two letters have very little power to persuade. They provide no analysis and do not even mention the regulation that the Forest Service relies on. The guidance document, dated March 29, 2002, is not a guidance document for silvicultural activities. Rather its subject line states that it concerns an exemption from the Clean Water Act for "Return Flows from Irrigated Agriculture." In the middle of the guidance document is a paragraph which refers to the regulation now before us and pronounces EPA's "longstanding interpretation of 'point source' with respect to silvicultural activities. EPA regulations exclude from NPDES permit requirements 'nonpoint source silvicultural activities such as ... pest and fire control ...' 40 CFR 122.27." The guidance document then cites the decision of the district court in this case.

We are unable to discern any connection between the references in the guidance document to this case, which was pending before this panel at the time the guidance document was issued, and the content of the balance of the five pages of the guidance document. The exemption for return flows from irrigated agriculture, unlike the issue now before us, is a statutory exemption not an exclusion purportedly bestowed by regulatory interpretation. 33 U.S.C. § 1342(l)(1). Unlike the balance of the document, which carefully analyzes the statutory exemption for agricultural return flows, including references to the legislative history, the function of the exemption, and the need for parity of regulation between irrigated and non-irrigated agriculture, there is no analysis of the purported exclusion for silvicultural pest control. Indeed, the guidance document provides a good example of persuasive analysis under the Skidmore test with respect to agricultural return flows. The fact that such analysis is entirely lacking with respect to silvicultural pest control activities is glaring in its omission.

An agency's interpretation of its own regulations, as opposed to its interpretation of statutes, is due deference and does not necessarily implicate the Skidmore test. Auer, 519 U.S. at 461-62, 117 S.Ct. 905, 137 L.Ed.2d 79. See also Christensen, 529 U.S. at 587-88, 120 S.Ct. 1655 (providing example of difference between Auer deference for regulatory interpretation and Skidmore deference for statutory interpretation). However, Auer deference is appropriate where the agency's interpretation of its regulation is "based on a permissible construction of the [governing] statute." *1190Auer, 519 U.S. at 457, 117 S.Ct. 905 (quoting Chevron, 467 U.S. at 842-43, 104 S.Ct. 2778). An agency simply may not interpret a regulation in a way that contravenes a statute. Furthermore, these post hoc informal documents provide no rebuttal to the contemporaneous explanation of the regulation published through notice and comment rule making in the Federal Register.

iii. Authority Of The EPA To Define Point Source And Non-point Source Pollution

Even if we were to accept the Forest Service's reading of the two letters and guidance document as definitive pronouncements of the EPA, we reject the Forest Service's 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 Natural Resources Defense Council v. Costle, 568 F.2d 1369 (D.C.Cir.1977), to be misplaced. In Costle, the D.C. Circuit considered the

predecessor of the regulation at issue today. That regulation purported to flatly exempt from NPDES permit requirements certain categories of point sources (rather than defining them as nonpoint sources), including several types of point sources emanating from silvicultural activities. The D.C. Circuit held that "[t]he wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402 [33 U.S.C. § 1342]." *Id.* at 1377. 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 *Costle* on its head.

We hold that the aerial spraying at issue here is a point source and that the Forest Service must obtain an NPDES permit before it resumes spraying. [FN8]

FN8. The Forest Service argues that we may not invalidate the regulation at issue because 33 U.S.C. § 1369(b) establishes that this regulation falls within a class of regulations that must be challenged initially in a court of appeals within 120 days of promulgation, or not challenged at all. The Forest Service applies a broad reading to the sweep of section 1369(b). It is far from clear that review of this regulation would be precluded by section 1369(b), particularly in light of the fact that this Court has counseled against expansive application of section 1369(b). *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir.1992). However, we do not reach the Forest Service's arguments regarding section 1369(b) because we do not invalidate the regulation. Rather, we reject the Forest Service's interpretation of the regulation and give it a construction consistent with its administrative history, case law, and the governing statute.

*1191 B. NEPA Claim

NEPA, 42 U.S.C. § § 4321-4370f, requires the preparation of a detailed EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2). NEPA regulations and case law require disclosure of all foreseeable direct and indirect impacts. 40 C.F.R. § 1502.16; *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir.1975). Agencies must adequately consider a project's potential impacts and the consideration given must amount to a "hard look" at the environmental effects. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989).

Here, the Forest Service prepared an EIS to identify and analyze the potential

impacts of the aerial spraying project. The Environmental Groups do not dispute on appeal that the EIS adequately identifies and analyzes the potential impacts within the geographic area that is targeted for spraying. However, the Environmental Groups argue that the Forest Service failed to consider the impacts of the inevitable drift of pesticide into areas outside the target spray area.

[4] The EIS does address the effect of pesticide drifting outside the target area and into designated wilderness areas. It adopts mitigation measures designed to prevent harm to moths and butterflies in adjacent wilderness areas. The mitigation measures include providing a one-mile buffer zone adjacent to wilderness areas, where no spraying will occur, and use of only the less hazardous type of pesticide where there is a chance it might drift into wilderness areas. The EIS, however, does not discuss these mitigation measures with respect to drift into adjacent areas that are not designated wilderness areas. The Environmental Groups argue that the adoption of the one-mile buffer zone adjacent to wilderness areas proves that it is needed to prevent drift; the fact that it is not considered or adopted for non-wilderness areas shows that drift into these areas simply was not considered.

The Forest Service responds that the analysis in the EIS of the impacts of spraying inside the target area coupled with statements in the Record of Decision are sufficient to comply with NEPA with respect to pesticide drift. A Record of Decision is propounded after environmental impacts have been considered in an EIS and a final decision to proceed with a project, as analyzed in the EIS, has been made. Here, with respect to pesticide drift, the Record of Decision does not implement the considerations contained in the EIS but contradicts the EIS with respect to pesticide drift.

The EIS concludes that "Neither B.t.k. nor TM-BioControl [insecticides] would affect Lepidoptera populations in any unprotected [non-target] areas." This is quite different from the conclusions contained in the Record of Decision that: Effects of direct application of both B.t.k. and TM-BioControl have been analyzed. Any effects of drift would be similar or less than the effects of direct application. Drift cannot be avoided. Operational guidelines will mitigate the impacts from drift.

The Record of Decision concludes that there will be effects of pesticide drift similar to or less than the effects of direct application, while the EIS concludes that there will not be any effects of pesticide drift.

The Forest Service also points to its Project Guidelines to show that pesticide drift has been adequately considered and addressed. The Project Guidelines address drift as follows: "[I]f wind will cause drift into non-target areas, spraying will be stopped or operations moved to areas with more favorable conditions ... [and] *1192 [s]praying will be suspended when weather conditions could cause drift into no-spray areas." The project guidelines indicate that drift will be avoided by operational precautions, but the Record of Decision flatly states that "[d]rift cannot be avoided." The Project Guidelines and the Record of Decision contradict each other on the issue of drift, just as the EIS contradicts the Record of Decision with regard to drift.

The Project Guidelines also appear to be at variance with a Department of Agricultural document concerning drift control. The Environmental Groups characterize the Department of Agriculture document as a "guideline" for safe application of pesticides, while the Forest Service characterizes it as a "fact sheet." In any event, the Department of Agriculture drift control document states

that for "drift control" pesticides should not be applied at wind speeds over five miles per hour. The Project Guidelines call for spraying to stop only if wind speeds exceed eight miles per hour.

In addition to the Environmental Groups, the Washington Department of Fish and Wildlife raised concerns about the failure of the EIS to consider pesticide drift. In written comments addressed to the Forest Service, the Washington Department of Fish and Wildlife noted that "[t]he DEIS does not discuss Btk drift and the potential for impact to nontarget species resulting from drift. We have concerns about areas not intended (and not recommended) to receive Btk and nontarget species being impacted." The Forest Service points to a response discussing nontarget species. However, it has not shown where it performed any further analysis of the drift issue or responded directly to its sister agency's concerns about drift. Other circuits have held that where sister agencies pose comments such as this, the responsible agency must respond. Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir.1973). Although Silva is not precedent in this circuit, the apparently unanswered concern of a sister agency that drift was not adequately addressed weighs as a factor pointing toward the inadequacy of the EIS.

Based on our consideration of all of the above deficiencies taken together, we hold that the Forest Service's documentation does not amount to a "reasonably complete discussion of possible mitigation measures" required by Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989), and is at best a "mere listing" of mitigation measures, without supporting analytical data. Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 473 (9th Cir.2000). The Forest Service did not consider how far pesticide might drift or in what direction. There does not appear to be any analysis or rationale to support the higher wind speed of eight miles per hour as opposed to the Department of Agriculture's recommendation of five miles per hour. The lack of any analysis of how far the pesticide might drift, in what direction, or of the effect of spraying or not spraying at different wind speeds coupled with the contradictory statements in the Project Guidelines, EIS, Record of Decision, and the apparently unanswered concerns of a sister agency simply do not measure up to the requirements in this Circuit for a "hard look" and discussion of mitigation measures in significant detail to ensure that environmental consequences have been fairly evaluated. Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1380 (9th Cir.1998). We therefore hold that the EIS did not adequately analyze the issue of pesticide drift.

IV. CONCLUSION

We hold that the aerial spraying of pesticide being conducted by the Forest Service *1193 is point source pollution and requires an NPDES permit. We hold that the EIS inadequately analyzes the issue of pesticide drift. We remand to the district court with instructions to enjoin further spraying until the Forest Service adequately analyzes the issue of pesticide drift in a supplement to the EIS, and obtains an NPDES permit. [FN9]

FN9. Because we are able to decide the substantive issues of this case without reference to the two scientific studies excluded by the district court, we do not reach the Environmental Groups' arguments that these studies were improperly excluded.

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REVERSED AND REMANDED WITH INSTRUCTIONS.

309 F.3d 1181, 55 ERC 1289, 33 Env'tl. L. Rep. 20,107, 2 Cal. Daily Op. Serv.
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Briefs and Other Related Documents [\(Back to top\)](#)

- [2002 WL 32103863](#) (Appellate Brief) Appellant's Reply Brief (Jan. 22, 2002)
- [2001 WL 34091664](#) (Appellate Brief) Brief for the United States Forest Service (Dec. 21, 2001)
- [2001 WL 34095618](#) (Appellate Brief) Appellants' Opening Brief (Nov. 13, 2001)

END OF DOCUMENT