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Via EPA's Rulemaking Docket, [http:// www.regulations.gov](http://www.regulations.gov).

Mr. Jeremy Bauer
EPA Headquarters
Office of Wastewater Management
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Docket Number EPA-HQ-OW-2012-0195; comments on EPA's proposal to revise EPA's stormwater regulation to specify that NPDES permits are not required for stormwater discharges along logging roads.

Dear Mr. Bauer:

Thank you for the opportunity to comment on the U.S. Environmental Protection Agency's proposal to revise its stormwater regulation, 40 C.F.R. § 122.26, to specify that stormwater discharges from pipes, ditches and channels along active, industrial logging roads will no longer require a National Pollutant Discharge Elimination System (NPDES) permit. The Washington Forest Law Center and the Crag Law Center represent the Northwest Environmental Defense Center in matters related to NPDES permitting of stormwater discharges from industrial logging roads. These comments are submitted on behalf of the Northwest Environmental Defense Center, Sierra Club, American Rivers, Atlantic States Legal Foundation, Wildlands CPR, Waterkeeper Alliance, River Network, Wild Salmon Center, Environmental Protection Information Center, Center for Biological Diversity, Oregon Wild, Friends of the Kalmiopsis, Public Employees for Environmental Responsibility, Oregon Coast Alliance, Kentucky Resources Council, Gifford Pinchot Task Force, Swan View Coalition, Rogue Riverkeeper, Alliance for the Rockies, Heartwood, Lake Pend Oreille Waterkeeper, Southeast Alaska Conservation Council, Northwest Environmental Advocates, Friends of the Wild Swan, Olympic Forest Coalition, and Amigos Bravos ("the Conservation Groups") in response to the request for public comments published in the Federal Register on September 4, 2012. *See* 77 Fed. Reg. 53834 (Sept. 4, 2012).

In addition to this comment letter, by courier we are sending EPA a compact disc that contains journal articles, studies, reports and other information pertinent to EPA's proposal to amend the stormwater rule to exempt logging roads from NPDES permitting. We are also re-submitting the comments we submitted to EPA on June 22, 2012, in response to EPA's May 23,

2012 Federal Register notice. *See* 77 Fed. Reg. 30473 (May 23, 2012). Although we assume that EPA is considering all the studies and information cited in the May 23, 2012 Federal Register notice as it decides whether to amend the Phase I stormwater rule, we hereby formally request that EPA include in the administrative record for this matter all the information mentioned or cited in that Federal Register notice. Additionally, please include these comments, our June 22, 2012 comments, and the materials we are submitting via courier in the administrative record for this matter (Docket Number EPA-HQ-OW-2012-0195). The submitted materials include a letter and materials sent to EPA by the Northwest Environmental Defense Center on April 25, 2012 regarding examples of current logging road management. These examples, which include programs in Washington State and in United States National Forests, inform the Conservation Groups' comments and should be viewed as instructive in developing a strategy for reducing pollution from logging roads. Also please respond to each comment in writing.

Before explaining the Conservation Groups' specific concerns with the proposed rule, we wish to express our disappointment with EPA's decision not to respond to the comments we submitted on June 22, 2012, in response to EPA's May 23, 2012 Federal Register notice. EPA failed to respond to the conservation community's concerns about forest roads during the Phase II rulemaking process in the late 1990s. *See Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003). Since then—and for nearly ten years—EPA has failed or refused to respond to the remand order in that case. Now, without responding *at all* to the Conservation Groups June 2012 comments, EPA proposes to roll back the NPDES permit requirements for active industrial logging roads, while also claiming it needs to continue studying other forest road discharges before building a Phase II program for non-industrial and inactive forest roads.

EPA's refusal to squarely and publicly address the well-documented pollution problem caused by logging roads is discouraging. Had EPA responded to our June 22 comments in the September 4, 2012 Federal Register notice, the conservation community would be in a much better position now to provide comments that specifically address EPA's concerns with the U.S. Court of Appeals' decision in *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011). EPA must bring significantly more clarity and transparency to its regulatory approach to stormwater discharges from logging roads. EPA can take the first step in that direction by responding clearly and fully to all comments submitted on its proposed rule.

As to the substance of EPA's proposal, the Conservation Groups request that EPA abandon its effort to amend the Phase I stormwater rule as it pertains to discharges from active, industrial logging roads, and that EPA also adopt and implement a Phase II program for inactive, nonindustrial and other forest roads as soon as possible. As EPA recognizes, "[s]tormwater discharges from logging roads, especially improperly constructed or maintained roads, may introduce significant amounts of sediment and other pollutants into surface waters and, consequently, cause a variety of water quality impacts." 77 Fed. Reg. at 30476. Where such discharges occur along active, industrial logging roads they do, and should, require NPDES permits. Where such discharges occur along other forest roads, they should be subject to a rigorous Phase II program that protects water quality.

1. The Clean Water Act requires EPA to regulate stormwater discharges associated with industrial logging activities.

Active, industrial logging roads should remain regulated under EPA's Phase I rule because they generate "stormwater discharges associated with industrial activity." *See* 33 U.S.C. § 1342(p)(2); *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063, 1085 (9th Cir. 2011). In the most recent Federal Register notice, EPA recognizes that if a point source discharge is "associated with industrial activity," it must be regulated pursuant to the NPDES permit program. 77 Fed. Reg. at 53835. In a footnote, EPA states that it is not "conceding that discharges of stormwater from logging roads constitute point source discharges * * *." 77 Fed. Reg. at 53835. Yet EPA also fails to explain how it could exclude discharges from pipes, ditches and channels associated with logging roads from the definition of point source.

Of course EPA cannot create such an exemption. The Clean Water Act includes a specific and broad definition of "point source" that includes "any pipe, ditch [or] channel * * *." 33 U.S.C. § 1362(14) (emphasis added). And EPA regulations have long defined the term "discharge of a pollutant" to include "additions of pollutants into waters of the United States from: *surface runoff which is collected or channelled by man.*" 40 C.F.R. § 122.2 (emphasis added). Courts have therefore held that the plain language of the Silvicultural Rule does not, and cannot, redefine logging road point sources as non-point sources. *Northwest Env't'l Defense Ctr.*, 640 F.3d at 1080; *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1185-86 (9th Cir. 2002); *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977); *Environmental Protection Information Ctr. v. Pac. Lumber Co.*, 2003 WL 25506817 (N.D. Cal. 2003). According to the statutory definition of point source, pipes, ditches and channels are point sources and must be regulated as such.

Nor can there be any question that logging is an industrial activity. In the September 4, 2012 Federal Register notice EPA states: "This notice proposes adding language to the existing stormwater regulations to clarify that, for the purposes of assessing whether stormwater discharges are 'associated with industrial activity,' the only facilities under SIC 2411 that are 'industrial' are: rock crushing, gravel washing, log sorting, and log storage." 77 Fed. Reg. at 53835. However, in promulgating the Phase I rule, EPA without reservation or exception included SIC code 24, including SIC code 2411, on the list of facilities considered to be engaged in industrial activity. 40 C.F.R. § 12.26(b)(14)(ii). As the Ninth Circuit held in *Northwest Environmental Defense Center*: "[i]t is undisputed that 'logging,' which is covered under SIC 2411 (part of SIC 24), is an 'industrial activity.' SIC 2411 defines 'logging' as '[e]stablishments primarily engaged in cutting timber and in producing . . . primary forest products or wood raw materials . . . in the field.'" 640 F.3d at 1083-84.

EPA's original inclusion of logging on the list of regulated industries implements the plain meaning of the statutory language. *See* 40 C.F.R. §122.26(b)(14)(ii) (designating facilities classified as Standard Industrial Classification 24, which includes SIC 2411 (Logging)). The ordinary meaning of "industrial" is "of, connected with, or resulting from industries"; the dictionary defines "industry," in turn, as "any particular branch of producing, esp. manufacturing, enterprise" or "any large-scale business activity." Webster's New World

Dictionary 689-90 (3rd ed. 1988). EPA therefore cannot limit the Phase I rule to only four specific activities associated with industrial logging.

There can be little question that logging – cutting trees in the field as defined by SIC 2411 – is an industrial activity. Modern day logging involves extensive large-scale harvesting operations across large swaths of land, which requires a wide variety of heavy machinery, including harvesters and “feller bunchers,” skidders and forwarders, log loaders, massive trucks for hauling the logs to sawmills, and extensive heavy machinery used to grade, gravel and maintain the haul routes.¹

Furthermore, the preamble and response to comments for the Phase I rule also clearly demonstrate that logging is an industrial activity for purposes of the Phase I permitting program. In discussing the scope of the term “associated with industrial activity,” EPA stated that it was deciding to “exclude from the definition of industrial activity, as § 122.26(b)(14) of today’s rule, those facilities that are generally classified under the Office of Management and Budget [SIC] as *wholesale, retail, service, or commercial activities.*” 55 Fed. Reg. at 48007 (emphasis added). Logging does not fit within any of those categories. Moreover, EPA stated that “facilities identified by SIC 24 (except 2434) . . . are expected to have the following activities, processes occurring on-site: storing raw materials; . . . the use of unhooded manufacturing and heavy industrial equipment; and generating significant dust or particulates.” *Id.* EPA therefore concluded explicitly that “these are classes of facilities which can be viewed as generating stormwater discharges associated with industrial activity requiring a permit.” *Id.* For more than twenty years, EPA has acknowledged the plain fact that logging is an industrial activity.

Indeed, federal and state governments refer to logging as industrial. The Bureau of Labor Statistics and the Oregon Employment Department state that the forestry and logging subsector is made of three *industries*, one of which is “logging.”² According to the North American *Industry Classification System*, which has largely replaced the Standard Industrial Classification system, logging is listed as industrial code 1133.³ The U.S. Census Bureau states with regard to NAICS 133 that “[t]his U.S. *industry* comprises establishments primarily engaged in one or more of the following: (1) cutting timber; (2) cutting and transporting timber . . .”⁴

¹ <http://en.wikipedia.org/wiki/Harvester> (forestry). A complete catalogue of logging machinery and equipment is available on the Forestry Department’s website at Virginia Tech University. See <http://web1.cnre.vt.edu/harvestingsystems/>. For a video of a harvester at work, see <http://www.youtube.com/watch?v=QQmtEdOphy8&feature=related>. Examples of typical log loaders doing their jobs are here: <http://www.youtube.com/watch?v=13m4zx4shqU&feature=related>; <http://www.youtube.com/watch?v=PHT0-GKxi9s>. For photos of various kinds of logging trucks, see http://en.wikipedia.org/wiki/Logging_truck.

² <http://www.qualityinfo.org/olmisj/ArticleReader?itemid=00006527>

³ <http://www.bls.gov/iag/tgs/iag113.htm>

⁴ <http://www.census.gov/epcd/ec97/def/1133.HTM>

Even the timber industry itself refers to logging as industrial. The American Forest and Paper Association, on a page of its website entitled “Our Industry” declares that the “forest products industry” is a “top 10 manufacturing employer in 48 states.”⁵ The National Alliance of Forest Owners states that it is focused on the “U.S. *industry* of private forest owners/managers and their business needs.”⁶ The Oregon Forest *Industries* Council represents large private forestland owners and forest products manufacturing-related firms.⁷ The Southern Forest Product Association describes itself as “one of the foremost trade organizations in the forest products *industry*.”⁸ The Great Lakes Timber Professionals Association states that it “has provided leadership in the Lake States forest products *industry* for over 65 years.”⁹ The New Mexico Forest Industry Association works to “[p]romote and provide public relations for the forest *industry* and to stimulate interest, use and involvement in the forest products *industry*.”¹⁰ This list could go on and on, but the point is clear. Even the logging companies and their trade associations consistently refer to logging as an “industry” and to logging activities as “industrial.” There is no rational basis based on the plain meaning of the statutory language for EPA or the timber industry to back away from that characterization only in the case of a regulatory program designed to protect the environment. If EPA is to amend the Phase I rule, it must explain why “logging” is not an industrial activity or why point-source discharges along logging roads are not associated with industrial activity. Yet EPA has utterly failed to explain that.

2. EPA has not identified a rational basis or factual evidence that would justify limiting the reach of the Phase I rule and NPDES permit requirement to stormwater discharges from rock crushing, gravel washing, log sorting, and log storage facilities operated in connection with silvicultural activities.

EPA stated in the Phase I rule that “logging” is an industrial activity that generates stormwater discharges associated with industrial activity. The rule states: “[t]he following categories of facilities are considered to be engaging in ‘industrial activity’ for purposes of paragraph (b)(14). . . .” 40 C.F.R. § 122.26(b)(14) (emphasis added). The rule then undisputedly includes logging on the list of regulated industries. *See id.* § 122.26(b)(14)(ii) (listing facilities classified as SIC 24, which includes SIC 2411, “Logging”). EPA now proposes to amend the language of 40 C.F.R. § 122.26(b)(14)(ii) to limit the scope of facilities under SIC 2411 deemed to be engaging in industrial activities. Specifically, the proposed rule would limit the facilities subject to the NPDES permit requirement to rock crushing, gravel washing, log sorting, or log storage facilities operated in connection with silvicultural activities. 77 Fed. Reg. at 53835, 53836, 53838.

⁵ <http://www.afandpa.org/ourindustry.aspx?id=438>

⁶ <http://nafoalliance.org/about-nafo/>

⁷ <http://www.bls.gov/iag/tgs/iag113.htm>; <http://www.ofic.com/>

⁸ <http://sfpa.org/about/>

⁹ <http://timberpa.com/association/about-us>

¹⁰ http://www.nmfia.net/index.php?option=com_content&view=section&layout=blog&id=5&Itemid=6

But EPA has failed to provide any justification, based on the plain language of the statute, as to why EPA no longer considers logging to be “industrial activity” or why EPA believes that point-source discharges along logging roads are not “associated with” industrial activity. 33 U.S.C. § 1342(p)(2)(B). EPA has failed to articulate any basis, much less a rational basis, for treating some phases of the logging process as industrial while treating other parts of that same process as non-industrial.

By listing SIC 241 (“logging”) on the list of industrial activities subject to the Phase I rule, EPA recognized that logging is an “industrial activity” within the meaning of CWA section 402(p). Further, by attempting to capture silvicultural-related rock crushing, gravel washing, log sorting, and log storage facilities through its listing of SIC 241, even EPA’s proposed rule recognizes that those four facilities derive their “industrial” nature from the larger process that they serve: logging. It therefore makes absolutely no sense for EPA to claim that those four facilities are industrial while also claiming that the larger process they serve is not industrial. For this reason, EPA’s proposed rule is fundamentally, and irretrievably, flawed. In any event, at a minimum, EPA must articulate a rational basis for its determination that some logging activities are industrial (rock crushing, gravel washing, log sorting, log storage) while others are not (timber hauling).

- A. If rock crushing, gravel washing, log sorting, and log storage facilities operated in connection with silvicultural activities are industrial in nature, so logging and timber hauling must be industrial in nature.

The Conservation Groups submit that there is no valid way to justify treating logging and timber hauling as non-industrial while at the same time treating rock crushing, gravel washing, log sorting, and log storage facilities as industrial activities subject to the Phase I rule. Rock crushing, gravel washing, log sorting and log storage facilities are not discrete industrial activities that take place on their own, they are an integral part of the larger process of logging. Indeed, those four activities are inextricably intertwined with logging—they have *no* independent utility apart from what they contribute to the larger process of extracting timber from the forest and transporting it to the mills. Consequently, because EPA agrees that rock crushing, gravel washing, log sorting, and log storage facilities that are categorized as SIC 241 are “industrial” in nature, EPA must also agree that other activities within SIC 241 are also “industrial” in nature.

The process of getting timber out of the forest and to the mill starts with the building or upgrading of logging roads and ends with log storage and sorting at the mill. After a timber company or landowner decides to harvest timber in a particular location it must then evaluate the existing road network to determine whether it provides the necessary access to the harvesting location. If existing roads already provide that access, then the timber company or landowner will prepare the road surface so the road is capable of supporting, during all seasons when the work will be done, the heavy trucks that haul the heavy equipment and timber. If they need to build new roads to provide that access they will do that. Either way, a large part of preparing the roads involves ensuring the stormwater collection system is properly moving stormwater off the roads and ensuring that the road is properly surfaced, both of which help ensure that trucks will

not get bogged down in mud during wet weather. Dumping and spreading tons and tons of gravel on the road is the usual method for ensuring that the road surfaces will remain operable during wet weather. Once the stormwater collection systems are in good shape and the roads properly surfaced, the timber company or landowner can then haul in the heavy equipment it needs to build the landings, harvest the timber, load the logs onto logging trucks, haul the timber out of the forest and to the mill, move the remaining slash into piles, and complete any other required work before moving to the next harvesting location.

In the context of logging, then, the only reason to operate rock crushing and gravel washing facilities is to obtain materials to surface the logging roads and landings so they will support industrial logging activities. And the only reason to operate log sorting and storage facilities is to receive the timber that is cut and hauled out of the forest. Rock crushing, gravel washing, log sorting and log storage facilities are thus inextricably intertwined with logging because they would not even exist but for the harvesting and hauling activities. Those facilities have no independent utility—they do not perform any function at all except to facilitate the industrial logging activities that take place. They are clearly not independent industrial activities, but are integral phases of the industrial activity of “logging.”

EPA has not articulated a rational basis consistent with the Clean Water Act for categorizing some phases of the timber harvesting process as “industrial” while categorizing other phases of that same process as “non-industrial.” See *Northwest Environmental Defense Center v. Brown*, 640 F.3d at 1085 (“As we explained in *NRDC v. EPA*, 966 F.2d at 1306, “if[logging] activity is industrial in nature, and EPA concedes that it is [see SIC 2411], EPA is not free to create exemptions from permitting requirements for such activity.”). At a minimum, EPA must articulate why it considers rock crushing, gravel washing, log sorting and log storage facilities to be industrial but does not consider timber harvesting and hauling to be industrial even though all the activities are part of the same process of removing timber from the forest and transporting it to the mills.

B. EPA must explain the criteria it used to decide to limit the reach of the Phase I rule’s NPDES permit requirement.

The proposed rule does not provide a discussion of what criteria EPA has applied in determining whether logging more generally – apart from the four limited activities described – meets the definition of industrial activity. We therefore request clear and explicit guidance from EPA as to what criteria it has used to determine that logging more generally is not an industrial activity.

Using the criteria that EPA announced and applied during the Phase I rulemaking, logging is quite clearly an industrial activity and nothing in the proposed rule justifies treating it as anything else. As discussed above, in the preamble to the Phase I rule EPA stated that it was excluding from the definition of industrial activity facilities that were generally classified as “wholesale, retail, service, or commercial activities.” 55 Fed. Reg. at 48007. Clearly, logging does not fit into any of the above categories. Similarly, in the Phase I preamble EPA noted that activities included in the original list of industrial activities, including explicitly SIC 2411

(logging), are expected to involve the storage of raw materials, the use of heavy industrial equipment, and the generation of significant amounts of dust and particulates. *Id.* As EPA initially found in 1990, logging and logging roads clearly meet those criteria. The criteria announced in the Phase I rule therefore clearly indicate that logging must be considered an industrial activity. At the same time, those criteria do not provide any basis for EPA's proposed amendment to the Phase I rule.

Moreover, the criteria that EPA purportedly used to identify nonpoint source silvicultural activities are in conflict with the Clean Water Act. EPA stated that it had used three criteria to identify nonpoint sources associated with silvicultural activities:

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

41 Fed. Reg. 24709, 24710 (June 18, 1976).

All three of these criteria are clearly in conflict with Section 402(p) of the statute. With respect to the first criteria, section 402(p) only applies to stormwater – i.e. stormwater discharges that are “induced by precipitation.” Congress has therefore spoken directly to this issue and determined that stormwater discharges that are induced by precipitation and associated with industrial activity must be regulated pursuant to the NPDES permit program. The same can be said with respect to each of the other two criteria as well. Regardless of whether or not storm water can be traced to any discrete or identifiable facility, it must be regulated if it is “associated with industrial activity.” Congress, in fact, required that municipal stormwater, which is clearly not traceable to a discrete facility, be subject to the NPDES permitting program, 33 U.S.C. § 1342(p)(2)(C)-(D), and this criteria is not embodied in the statutory language of Section 402(p)(2). Similarly, Congress has not granted to EPA the discretion to exempt sources of stormwater listed in Section 402(p)(2) from the NPDES permit program based on whether or not best management practices would provide a useful means of controlling pollution. EPA may have discretion to do so with respect to sources not listed in 402(p)(2) through the procedures outlined in Section 402(p)(5)-(6), but the applicability or usefulness of BMPs has no role to play in identifying “industrial activity” that is subject to the NPDES permitting program. Rather, those BMPs can be incorporated into the permits that are developed by state agencies on a state-by-state basis.

EPA has set forth no criteria or explanation for how its decision to amend the Phase I rule falls within the discretion delegated to the agency by statute. The original rationale set forth by the agency in 1976 for designating four limited activities as the only ones subject to the NPDES permit program clearly conflict with the amendments to the Clean Water Act made by Congress

in 1987. Furthermore, the criteria EPA used to designate “industrial activities” in 1990 clearly apply to logging activities in general and logging roads in particular. EPA must do more to explain the basis for its decision to amend the Phase I rule.

C. EPA cannot amend the Phase I rule based on an incorrect and outdated belief that pipes, ditches and channels along logging roads are nonpoint sources of pollution.

EPA states that “[t]he intent of the EPA in this notice of proposed rulemaking is that the NPDES program requirements be implemented with regard to ‘immediate access roads’ in the same way they were implemented prior to the decision by the Ninth Circuit.” 77 Fed. Reg. at 53836. EPA did not clearly explain in the September 4, 2012 Federal Register notice that EPA is amending the rule because it believes that logging roads produce only nonpoint source pollution. However, EPA did state in that notice that in the Phase I rule EPA only intended to regulate four silvicultural point sources and that, based on the silvicultural rule (40 C.F.R. § 122.27), EPA intended “to exclude from the Phase I regulation stormwater runoff from other silvicultural activities.” 77 Fed. Reg. at 53836. EPA also claims in the *Northwest Environmental Defense Center* litigation that, based on its interpretation of the silvicultural rule, it considers stormwater discharges along logging roads to be nonpoint source pollution that is not subject to the NPDES permit program.

For at least three reasons, the assertion that logging roads produce only nonpoint source pollution is not a valid justification for amending the Phase I rule. First, the assertion is clearly erroneous because, as previously explained, the Clean Water Act unambiguously defines pipes, ditches and channels as “point sources.” The EPA therefore cannot exclude pipes, ditches and channels along logging roads from the Phase I rule based on the assertion that pollution from those sources is nonpoint in nature. Second, and similarly, CWA section 402(p) only allows EPA to exclude a point-source discharge of stormwater from regulation if it is not associated with industrial activity. A determination by EPA that logging roads produce only nonpoint source pollution is not equivalent to, and does not substitute for, a determination that logging roads are not associated with industrial activity. Third, if EPA continues to believe that logging roads produce only nonpoint source pollution, then there is no reason at all to amend the Phase I rule because that rule would not and could not apply to logging roads in the first place.

In fact, because the Phase I rule only applies to point-source discharges of stormwater, by proposing to amend the rule EPA acknowledges that logging roads can produce point-source discharges that are subject to the Phase I rule. It is therefore impossible for the NPDES program requirements to be “implemented with regard to ‘immediate access roads’ in the same way they were implemented prior to the decision by the Ninth Circuit.” Rather than rely on an outdated rationale for not requiring NPDES permits for point-source discharges of stormwater along logging roads, EPA should provide a thoughtful and valid explanation for excluding those discharges from the Phase I rule. That explanation should also account for and squarely respond to the Ninth Circuit’s holdings in *Northwest Environmental Defense Center*.

D. Industrial logging roads are “immediate access roads” and EPA’s interpretation to the contrary is incorrect.

EPA also appears to believe that the logging roads at issue in *NEDC v. Brown*, and others like them, do not qualify as “immediate access roads” as that term is used in the Phase I rule. EPA states:

The EPA considers ‘immediate access roads’ to refer to roads which are exclusively or primarily dedicated for use by the industrial facility. 55 Fed. Reg. 47990, 48009 (Nov. 16, 1990). These ‘immediate access roads’ do not include public access roads that are state, county, or federal roads such as highways or Bureau of Land Management roads which happen to be used by the facility.

77 Fed. Reg. at 53836. EPA then states: “Unlike ‘immediate access roads’ associated with industrial facilities, many logging roads have multiple uses, including recreation and general transportation, and commonly extend over long distances (i.e.; may not provide ‘immediate access’ to an industrial site).”

EPA appears to misunderstand key facts about the roads at issue in the *Northwest Environmental Defense Center* case. The two roads at issue in that case are located within the Tillamook State Forest, a state forest that is wholly-owned by the State of Oregon and that is managed year-round for timber harvest. The roads are designated in numerous timber sale contracts as the access roads for specific logging sites covered by the contracts. And the timber sale contracts obligate the purchasers of the rights to harvest timber at those locations to maintain the two roads so that they will continue to facilitate the industrial activity that takes place. The two roads at issue are clearly “immediate access roads” because they are designated access routes for the industrial logging activities that take place and they are used to transport raw materials—timber harvested in the forest. The two roads are not *incidentally* used for timber hauling based on the logging truck driver’s decision about which route to take, as would be the case with public highways or other county roads. Rather, the truckers are *obligated* to use the two roads to access the sites and haul timber out of the forest. Furthermore, although the two roads may be publicly owned, *they are located in a state forest that is actively managed year-round for the production of timber*. The fact that the two roads happen to be publicly-owned does not make them any less “immediate access roads.”

In any event, whatever EPA may think about the two roads at issue in *NEDC v. Brown*, EPA has completely failed to explain why logging roads on private industrial forest lands are not “immediate access roads” or should not be subject to the NPDES permit requirement. Timber companies across the nation own large tracts of forest land that contain logging roads. Just like the roads at issue in *NEDC v. Brown*, those private logging roads are built and maintained to facilitate industrial activities like hauling heavy equipment, accessing logging operations, and transporting cut timber out of the forest. If EPA is correct that the phrase “immediate access roads” does not refer to certain publicly-owned roads, that would have no bearing on logging roads on private industrial forest lands, nor would it justify excluding those roads from the NPDES permit program.

Finally, although the Ninth Circuit focused its analysis on whether the two roads qualify as “immediate access roads,” the Phase I rule is quite clearly broad enough to capture, and require permits for, stormwater discharges along all industrial logging roads. The Phase I rule requires permits for “material handling sites” “used for the transportation or conveyance of any raw material.” Additionally, the rule’s narrative text is illustrative, not exhaustive, so stormwater discharges that are clearly “associated with” logging require NPDES permits even if they are not specifically listed. *See* 40 C.F.R. § 122.26(b)(14) (“For the categories of industries identified in this section, the term includes, but is not limited to....”). Under any of these criteria, logging roads specifically designed, built, maintained, and used for timber hauling are clearly “associated with” industrial logging activities.

E. EPA’s belief that logging roads should be covered by Phase II is not a sufficient reason for amending the Phase I rule.

EPA states that, in response to the remand order in *Environmental Defense Center v. EPA*, it is considering addressing forest road discharges under a Phase II program developed pursuant to CWA section 402(p)(5) and (6). Specifically, in a section of the September 4, 2012 Federal Register notice entitled “rationale,” EPA states: “The EPA believes that stormwater discharges from forest roads, including logging roads, should be evaluated under section 402(p)(6) of the Clean Water Act because the section allows for a broad range of flexible approaches that may be better suited to address the complexity of forest road ownership, management, and use.”

EPA cannot exclude logging roads from the Phase I rule simply because it believes they are better addressed in a Phase II program. If EPA continues to believe that logging roads are nonpoint sources then this reasoning of EPA’s is specious: CWA section 402(p) *only* applies to point sources, so EPA could *never* build a Phase II program for logging roads if they are categorically nonpoint sources of pollution. Equally important, EPA’s preference for a Phase II program is neither relevant to nor a valid basis for amending the Phase I rule because it does not address or explain how stormwater discharges along active, industrial logging roads are not “associated with industrial activity.” As previously noted, EPA can only exclude logging roads from the Phase I rule if EPA validly determines that logging roads do not produce stormwater discharges associated with industrial activity. That logging roads may be better addressed through a Phase II program is irrelevant to that determination.

The September 4, 2012 Federal Register notice fails to articulate a rational basis for EPA’s proposal to exempt the cutting and hauling of timber from the definition of “industrial activity.” Because EPA has not explained how the proposed rule is consistent with the Clean Water Act, the Conservation Groups respectfully request that EPA abandon the proposed rule. Additionally, if EPA decides to finalize the proposed rule, EPA must evaluate the environmental impacts of changing the rule before finalizing any amendment that narrows its regulatory scope.

3. Before amending the Phase I rule EPA must initiate and complete consultation under Section 7 of the Endangered Species Act, 16 U.S.C. § 1536.

Although EPA asserts in the September 4, 2012 Federal Register notice that the proposed rule change will not have any environmental impacts, in fact the proposed rule change itself demonstrates that EPA is rolling back the Phase I rule to reduce the number and kinds of polluting activities that require NPDES permits. The U.S. Court of Appeals for the Ninth Circuit clearly held that stormwater discharges from pipes, ditches and channels along active, industrial logging roads require NPDES permits *under the existing NPDES permit regulations as written*. *Northwest Environmental Defense Center v. Brown, et al.*, 640 F.3d 1063 (9th Cir. 2011). And EPA has repeatedly recognized that logging road stormwater pollution is a widespread and chronic pollution source that impairs water quality and can adversely affect aquatic ecosystems. 77 Fed. Reg. at 30476. Because EPA is changing the rules to eliminate the NPDES permit requirement for logging roads, and because that change will reduce the protections available for aquatic species and waters subject to the Clean Water Act, EPA must initiate and complete consultation under section 7 of the Endangered Species Act to ensure that the proposed rule change will not jeopardize listed species or adversely designated critical habitat. EPA must evaluate the impacts of eliminating NPDES permits for discharges from industrial logging roads before EPA finalizes the proposed rule change.

Section 7 of the Endangered Species Act requires federal agencies to evaluate expected impacts to listed species and designated critical habitat before authorizing, funding, or taking any discretionary action. 16 U.S.C. § 1536(a)(2); *National Association of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007). The consultation process is intended to ensure that planned agency actions do not risk jeopardizing the continued existence of listed species. The consultation process also offers valuable protections against the risk of a substantive ESA violation and ensures that environmental concerns will be properly factored into the decision-making process as intended by Congress. *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1128-29 (9th Cir. 1998).

Federal agencies must go through the ESA section 7 consultation process if proposed actions may affect a listed species. In the Endangered Species Consultation Handbook, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (now NOAA Fisheries) note that the term “affect” is a verb that means “to bring about a change” and that

May affect [is] the appropriate conclusion when a proposed action may pose **any** effects on listed species or designated critical habitat. When the Federal agency proposing the action determines that a “may affect” situation exists, then they must either initiate formal consultation or seek written concurrence from the Services that the action “is not likely to adversely affect” ... listed species.

The threshold for a “may effect” determination is very low. Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement. 51 Fed. Reg. 19926, 19949 (June 3, 1986); *Final ESA Section 7 Consultation Handbook* (Mar. 1998). Upon the conclusion of formal consultation, the ESA directs the U.S.

Fish and Wildlife Service or the NOAA Fisheries Service to issue a biological opinion detailing how the agency action affects the species. 16 U.S.C. § 1536(b)(3)(A).

These statutory requirements apply here. EPA's proposal to eliminate the NPDES permit requirement for stormwater discharges from industrial logging roads is a discretionary federal action that may affect aquatic and other species that are listed and protected under the Endangered Species Act. Indeed, there is ample information demonstrating that stormwater discharges from logging roads are a significant source of pollution that is adversely affecting water quality and listed species. We discussed these impacts in detail in the Conservation Groups' June 22, 2012 comment letter, and we hereby incorporate by reference that letter and all the materials referenced therein. As is plain from our June 22 letter and supporting materials, sediment discharged from culverts, ditches, and channels along logging roads still fouls rivers and streams across the United States. State efforts to control these impacts have often failed, as evidenced by the extensive miles of streams listed by the EPA and states as water quality-limited, as well as by the many listings of imperiled aquatic species under the Endangered Species Act. It is therefore critical that the EPA continue to regulate and require NPDES permits for stormwater discharges from logging roads.

As we stated in our June 22, letter:

According to an EPA-commissioned report, "forestry-related sediment is a leading source of water quality impairment to rivers and streams nationwide."¹¹ Remarkably, EPA indicates that "up to 90% of the total sediment production from forestry operations" comes from logging roads and stream crossings.¹² A significant portion of this sediment is collected and discharged directly into rivers and streams through ditches, channels, and culverts.¹³ In some areas of the Pacific Northwest, up to 75% of forest road drainage systems may directly enter rivers and streams.¹⁴ Sedimentation from forest roads is a serious problem that current management and regulation has failed to control, and we encourage EPA to take this opportunity to address the legacy of forest roads and its effect on our nation's waterways.

* * *

¹¹ Endicott, D. 2008. National Level Assessment of Water Quality Impairments Related to Forest Roads and Their Prevention by Best Management Practices – Final Report (Prepared for the U.S. Environmental Protection Agency, Office of Water, Office of Wastewater Management Permits Division) (Contract No. EP-C-05-066, Task Order 002), at 2 (citing EPA's 2000 and 2002 National Water Quality Inventories).

¹² *Guidance Specifying Management Measures For Sources of Nonpoint Pollution in Coastal Waters*, EPA Guidance Paper 840-B-93-001c, at 27 (1993); *see also* Endicott at 9.

¹³ Endicott at 43-44, 49.

¹⁴ *Id.*; *See also* Mills, Keith, P.E., Oregon Department of Forestry, *Forest Roads, Drainage and Sediment Delivery in the Kilchis River Watershed* 4-5 (Tillamook Bay National Estuary Project, June 1997), available at www.oregon.gov/ODF/privateforests/docs/kilchis.pdf [hereinafter "Mills Report"] (citing studies indicating 25 to 75% of forest road drainage directly enters streams and rivers).

EPA explicitly recognizes that fine sediment from forest roads “can adversely affect the survival of dozens of sensitive aquatic biota (salmon, trout, other native fishes, amphibians, and macroinvertebrates) where these species are located.” *Id.* EPA concluded in the Federal Register notice that these dynamics have already been “well documented.” *Id.* Similarly, Endicott concluded as follows:

The physical impacts of roads have detrimental effects on fish and fish habitat. Mechanisms through which roads exert these deleterious impacts include fine-sediment effects, changes in streamflow, changes in water temperature caused by loss of riparian cover or conversion of groundwater to surface water, and migration barriers. The physical impacts of roads discussed above have widespread and profound effect on fish habitat and fish communities in populations across a wide range of environments and conditions (Lee et al., 1997).

Endicott also notes that impacts from sedimentation can “often lead[] to complete loss of salmonid fisheries.” Clearly, there can be no questions that stormwater from industrial logging roads and forest roads are harming and will continue to harm beneficial uses without adequate regulation.

Given the well-documented harm caused by logging road pollution, EPA must initiate ESA consultation with the U.S. Fish and Wildlife Service and NOAA Fisheries before EPA eliminates the NPDES permit requirement for stormwater discharges from industrial logging roads.

4. EPA should move quickly to develop and implement a Phase II program for non-industrial, inactive and other forest roads that discharge stormwater to streams.

In addition to recommending that EPA abandon the proposed Phase I rule amendment, the Conservation Groups also strongly recommend that you move forward with a Phase II regulatory program, under section 402(p)(6) of the Clean Water Act, to address the ongoing water quality problems resulting from nonindustrial, inactive and all other forest roads not subject to Phase I. This program should be developed in a manner that addresses the on-going degradation of our nation’s waterways from forest road pollution, and eliminates the current violations of the Clean Water Act. With this letter, we once again remind you of the well-documented problems stemming from forest roads. In addition, we put forward an outline of key elements of a regulatory program to be addressed as you develop the new Phase II program.

A. Forest roads continue to have a significant impact on water quality in streams and should be regulated under EPA’s Clean Water Act regulations.

Forest roads impact beneficial uses of waterways through a variety of means, namely:

- Road use and inadequate maintenance leads to excessive fine sediment entering stream channels.

- Most road surfaces are made of erodible material. Exposure to rainfall leads to surface runoff, which carries the sediment into streams (Sugden and Woods 2007).
- Surface erosion is strongly related to maintenance – less maintenance results in increased delivery of fine sediment to streams (Weaver and Hagans 1999, Reiter et al. 2009).
- Changes in road drainage (often brought on by heavy use) can increase erosion and sediment delivery (Brooks et al. 1991, Sheridan 2007).
- Culverts – if too small to meet storm capacity – can get plugged. Water then overtops the road, which can divert streamflow onto the road surface and/or can erode fill (Best et al. 1995, Bloom 1998, Wemple et al. 2001).
- Excess suspended sediment can interfere with drinking water treatment (Dellasala et al. 2011).
- Fine sediments can adversely affect fish. Reproductive success is reduced when sediment interrupts the ability of eggs to metabolize. Young fish that have not emerged from the interstitial spaces of spawning gravel areas can be smothered. And the abundance and quality of spawning substrate can be severely affected by sedimentation. (Cederholm et al. 1980, Eaglin and Hubert 1993, GLEC 2008).
- Roads can potentially increase the frequency of landslides – depositing large amounts of debris into streams.
 - As debris pours into the creek, it fills pools, aggrades the streambed, and covers spawning gravels suffocating fish (Trombulak and Frissell 2000).
 - Roads built with side-cast techniques and mid-slope roads on steep ground (that used unstable fill) are usually the most prone to failure (USDA FS 2000a, Swanston 1991).
 - Large volumes of material from landslides can be deposited to streams and can scour channels for some distance (Weaver and Hagans 1999, GLEC 2008).
- Roads can alter stream morphology – which can result in increased water temperature.
 - Roads can intercept subsurface flow and re-route the water through ditches, cross-drains and stream crossings (USDA FS 2000a). During storms, this system operates like an extension of the stream network - increasing peak flows (Wemple et al. 1996).
 - Changing peak flows can alter the channel dimensions of the stream, often making them wider and/or deeper, which can lead to increased water temperatures (USDA FS 2000a).
 - Roads in valley bottoms can restrict the area where the stream can move (meander). Stream velocities could increase which then leads to increased bank erosion (USDA FS 2003).
- Roads often contain undersized or poorly built culverts at stream crossings - resulting in blocked or restricted passage for aquatic organisms.
 - Culverts – the most widely used crossing type - primarily prevent upstream migration, reducing spawning habitat for aquatic organisms (including threatened

and endangered fish). If the culvert has a poor outlet, fish can be injured/killed as they move downstream (Clancy and Reichmuth 1990, Cupp et al. 1999, Hendrickson et al. 2008).

As briefly outlined above, it is well-established in the scientific literature that sedimentation from forest roads has a major impact on beneficial uses of our nation's rivers and streams. According to the *2008 National Level Assessment of Water Quality Impairments Related to Forest Roads and Their Prevention by Best Management Practices Final Report*, "Among all pollutants measured in streams, sediment has the largest effect on stream biota" (GLEC 2008). Sedimentation has major impacts on stream water quality and fish habitat. The health of a stream depends greatly on the ability of fish and other organisms to survive. Therefore, sedimentation is a major concern for the overall health of forest streams.

In EPA's latest water quality report to Congress, sediment continues to be identified as one of the top 10 causes of impairments in assessed rivers and streams (US EPA 2009). The 'Wadeable Streams Assessment' included in that report concludes that excess streambed sediments (and nutrients) have the highest impact on biological condition (US EPA 2009). The U.S. Forest Service has also identified sediment (turbidity and bedload) to be one of the most significant water quality problems on national forests (USDA FS 2000b; *see generally* relevant materials sent to EPA by the Northwest Environmental Defense Center on April 25, 2012 and resubmitted with this letter).

In the Federal Register EPA has acknowledged the impact of forest roads on streams, stating: "[s]tormwater discharges from logging roads, especially improperly constructed or maintained roads, may introduce significant amounts of sediment and other pollutants into surface waters and, consequently, cause a variety of water quality impacts." 77 Fed. Reg. at 30476. EPA acknowledges that pollution from forestry and related activities is among the "top twelve probable sources of impairment for rivers, streams, and coastal shorelines." *Id.* Knowing these effects of forest roads, EPA would be remiss to not address the issue by instituting a Clean Water Act Phase II regulatory program.

B. Non-industrial and other forest roads should be regulated by EPA with a regulatory program under Section 402(p)(5) and (6) of the Clean Water Act; essential regulatory elements should be applied nationally, regardless of land ownership.

EPA's authority to develop Phase II programs derives from sections 402(p)(5) and (6) of the Clean Water Act, 33 U.S.C. §§ 1342(p)(5) & (6). Section 402(p)(6) requires EPA to issue regulations that "designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and [to] establish a comprehensive program to regulate such designated sources." 33 U.S.C. § 1342(p)(6); *see also* 402(p)(5)(C). Any Phase II program must meet certain requirements: "The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines." *Id.* "The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." *Id.*

While the National Pollution Discharge Elimination System (NPDES) program has been remarkably successful in reducing surface water pollution from regulated point sources, nonpoint source programs under sections 208 and 319 of the Clean Water Act are widely acknowledged to be ineffectual. Andreen at 542-43 (praising effectiveness of NPDES program and ability of the program to achieve results “without causing any significant harm to the economy in terms of unemployment or growth or investment”); Glicksman at 71-73 (indicating “[n]onpoint sources are responsible for about sixty percent of state water quality standard violations”). Indeed, EPA acknowledges that the majority of the nation’s remaining water quality impairment comes from nonpoint source pollution. Glicksman at 72; Andreen at 544 n.36, 42; GLEC at 3 (stating EPA reported that nonpoint source pollution was the dominant source of remaining surface water pollution). The failure of the nonpoint programs has been ascribed primarily to the lack of mandatory monitoring requirements, the lack of agency and citizen enforcement actions, and the lack of penalties for noncompliance. Andreen at 548-92 (describing hallmarks of NPDES regulation that have made it a successful program); Glicksman at 63-64, 71-73, 77-78. Thus, these are critical components that must be included in an effective Phase II regulatory program.

As stated above, stormwater from forest roads has a profound effect on the water quality of forest streams. In order to protect beneficial uses, EPA needs to regulate non-Phase I forest roads under a restrictive Phase II program. EPA’s Phase II regulatory approach should, at the minimum, include the following essential elements to ensure that water quality protection will be achieved during a reasonable compliance period: 1) an inventory of all roads (i.e., including unauthorized, unused and temporary roads); 2) a plan for action; 3) a schedule for completion; 4) performance measures that achieve water quality standards; 5) accountability measures through enforcement (i.e., civil penalties); 6) a monitoring program; and 7) adaptive management.

1. Inventory of all roads.

All forest landowners should develop and maintain an inventory of all roads and submit that inventory to the regulatory agency. The inventory should include roads currently being used, roads no longer used, temporary roads, and unauthorized roads. In addition, the inventory should contain minimum information about the condition of the roads. Field verification may be warranted.

2. Plan for action.

Forest landowners should submit a plan for action to the regulatory agency for approval. The plan should include the following: (a) a map of all roads, fish passage barriers and drainage problems; (b) a list of roads, prioritizing roads with passage barriers, drainage problems, and landslide risk and dealing with the worst first; (c) proposed treatments (i.e., decommissioning, maintenance, improvements); (d) work detail; (e) a schedule for implementation; and (f) a storm plan to handle emergency maintenance and repairs. The plan for action should prioritize disconnecting forest roads from the stream network, i.e., reducing hydrologic connectivity between forest roads and nearby rivers and streams. Any changes to the work plan should be approved by the regulatory agency. A good example of this is Washington State’s regulatory

program (*See* 77 Fed. Reg. 30477; *see generally* relevant materials sent to EPA by the Northwest Environmental Defense Center on April 25, 2012 and resubmitted with this letter).

3. Schedule for completion.

Forest landowners should submit for agency approval an overall schedule for addressing all impacts to streams from their road network. The schedule should include interim milestones and expected completion dates to bring roads up to standards. Some tasks, such as maintenance, will be ongoing to ensure impacts are eliminated or reduced, but should also be included in the schedule. The schedule helps secure a commitment from the landowner that water quality protection will occur within a reasonable timeframe.

4. Performance measures – Water quality standards.

EPA should establish clear and understandable performance measures. Performance measures are on-the-ground outcomes that may be met through a combination of different best management practices (BMPs). An example of a site-specific performance measure from Washington State is: no visible plume of sediment. To meet this, a broad range of BMPs may be implemented such as sediment barriers, mulching, improving road surfaces, settling basins, etc. If a sediment plume is observed, then water quality standards are not being met and BMPs need to be evaluated and improved.

In some states that already mandate BMPs, additional BMPs can and should be developed where those BMPs are not adequate to meet the performance measures. In states that have no mandatory BMPs, a full suite of BMPs will have to be developed to meet the performance measures. By establishing performance measures, EPA will allow for flexibility while still maintaining a consistent level of protection for the designated and existing uses adopted in each state's water quality standards.

For example, the program must ensure that the use of BMPs is verified to ensure that BMP implementation will achieve the results expected, namely meeting the performance standards and protecting water quality. There is extensive scientific research that documents that BMPs are often ineffective at addressing impacts, and, in particular, cumulative impacts from roads often are not accounted for.¹⁵ Because some, if not all, states operate under the principle that landowners' implementing recommended or required BMPs is the equivalent of meeting water quality standards, it is essential that any permit require a demonstration that BMPs meet the performance measures and other water quality goals.

¹⁵ Espinosa et al. 1997 demonstrated that aquatic habitats were severely damaged by roads and logging in several watersheds despite BMP application. The authors further noted that the blind reliance on BMPs in lieu of limiting or avoiding activities that cause aquatic damages serves to increase aquatic damage. Even activities implemented with somewhat effective BMPs still often contribute negative cumulative effects (Ziemer et al. 1991, Rhodes et al. 1994).

Annual reports should be submitted summarizing (at minimum) the BMPs implemented and road maintenance completed that year. Landowners should also be required to submit, every 3-5 years, a supplemental report on whether performance measures are being met. This will ensure that road maintenance and implementation of BMPs are tracked by the regulatory agency, and that the implementation of those BMPs actually meets performance measures. Annual water quality monitoring should also be used to verify that BMPs and performance measures are sufficient to achieve or maintain water quality. If water quality standards are still not being met for a water body, additional measures should then be required.

In developing these performance measures, EPA must be comprehensive in providing full protection of existing and designated beneficial uses. For example, when analyzing culverts, consideration of fish passage must include all life cycle stages of relevant fish. In areas of non-fish bearing streams, consideration for protection of amphibians must include addressing passage concerns that are essential for purposes of allowing populations to recolonize. Likewise, culverts should be designed not only to accommodate 100-year floods with debris passage but should also consider locally-projected impacts of global climate change.

5. Accountability – Enforcement – Civil Penalties.

EPA should ensure the regulatory program establishes accountability. Objectives must be understood from the beginning so it is clear when a road is in compliance. Checks and balances are needed to ensure inventories are complete, BMPs are being implemented and built correctly, BMPs are effective as designed, water quality standards are being met, and schedules are being adhered to. EPA and state water quality protection agencies should retain authority to implement enforcement actions, such as stop work orders and imposition of civil penalties, if these elements are not adhered to. In addition, citizens should retain the right to file lawsuits if EPA is not enforcing the Clean Water Act or landowners are not complying with it.

6. Monitoring.

EPA should include a monitoring component – beyond the annual reports described in #4. Monitoring should cover implementation to ensure actions are being taken as planned and to keep track of progress over time. Monitoring should also assess effectiveness – whether the program, BMPs and/or other activities are indeed effective at reducing impacts to beneficial uses of the Nation's waters.

7. Adaptation.

Although landowners, agencies and the public appreciate predictability, there will be times when changes need to be made to meet the desired outcomes. As stated repeatedly in this letter, the goal is to ensure forest roads are compliant with the Clean Water Act. If measures and practices outlined in an EPA regulatory program are not meeting the goal, then the program needs to be reviewed and changed.

As is often stated by stakeholders, the development of the program, implementation, and results should all be transparent. In addition, it should be consistent enough to be applicable from state to state, across landownerships and between EPA regions while also considering geographic and climatic differences. The program should be equitably administered and should achieve results in a timely fashion.

Forest roads are impacting water quality across the nation in violation of the Clean Water Act. We urge the EPA to step forward and address this issue, just as it has done with industry, municipalities, construction sites, dairy farmers, transportation infrastructure, and other pollution sources. We would be willing to work with you as you move forward in developing an effective Phase II regulatory program for non-Phase I forest roads.

5. Conclusion.

Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p), and EPA's Phase I stormwater rule, 40 C.F.R. § 122.26, currently require NPDES permits for stormwater discharges associated with "industrial activity." Logging activities in state forests and on other large, forested tracts owned or managed specifically for timber production are clearly "industrial" in nature, as EPA determined when it included Standard Industrial Classification 2411 ("Logging") in the Phase I rule. Even EPA recognizes that many logging roads are associated with industrial activity: "[p]rivate forest land owners invest considerable resources in forest road construction and maintenance, as they are critical assets that enhance property values, *maintain economic viability, and facilitate sustainable forestry management.*" 77 Fed. Reg. at 30,475. Logging roads facilitate industrial-scale timber harvest by providing ingress and egress for logging sites, by supporting the hauling of heavy equipment in and out of forests managed primarily for timber harvest, and by supporting the hauling of timber to mills. Logging roads are an integral part of the industrial process of obtaining raw timber and turning it into finished products. Where those logging roads use pipes, ditches and channels to discharge stormwater to waters of the U.S., section 402(p)(2) of the Clean Water Act requires those discharges to be authorized by an NPDES permit. EPA should therefore abandon its effort to amend the Phase I rule to overturn the court of appeals' decision in *Northwest Environmental Defense Center v. Brown*.

EPA should also build a Phase II program to address stormwater discharges along inactive, non-industrial, and other forest roads, in response to the remand order in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003). That program should be regulatory, not voluntary, and it should not replace the Phase I permit requirement for active industrial logging roads. As EPA recognizes, "[s]tormwater discharges from logging roads, especially improperly constructed or maintained roads, may introduce significant amounts of sediment and other pollutants into surface waters and, consequently, cause a variety of water quality impacts." 77 Fed. Reg. at 30476. EPA's Phase II program for forest roads should therefore supplement EPA's Phase I regulation of active, industrial logging roads.

Thank you for considering and responding to these comments and the comments we submitted to EPA on June 22, 2012. Please also inform the Washington Forest Law Center, the Crag Law Center, and the Conservation Groups in writing of any subsequent action you take

related to the regulation of stormwater discharges from industrial logging and other forest roads. In the meantime, please contact me if you have any questions about these comments or if you would like to discuss these issues further.

Sincerely,

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