On July 5, 2016, effective July 11, 2016, 81 FR 43492, EPA published its notice of decision not to regulate forest road discharges under the CWA. The following information is excerpted from the notice.

EPA’s Rationale:

EPA has determined not to designate stormwater discharges from forest roads for regulation under Section 402(p)(6) of the Clean Water Act (CWA) at this time. EPA’s decision is based on several interrelated factors. First, state, federal, regional, tribal governmental, and private sector programs already exist nationwide to address water quality problems caused by discharges from forest roads. Wide variations in topography, climate, ownership, management, and use across the nation’s network of forest roads make the establishment of any nationwide regulatory program a complex and difficult endeavor.

EPA is exercising the “broad discretion the CWA gives the EPA in the realm of stormwater runoff,” in deciding not to regulate stormwater discharges from forest roads. See Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct 1326, 1338 (2013) (affirming EPA’s determination not to regulate stormwater discharges from logging roads in its industrial stormwater rule).

Background:

In 1987 Congress added Section 402(p) to the CWA, which required NPDES permits for certain specified stormwater discharges and provided EPA with discretion to determine whether and how discharges from other stormwater sources should be addressed “to protect water quality.” For the initial phase of stormwater regulation, Section 402(p)(1) created a temporary moratorium on NPDES permits for point sources except for those listed in Section 402(p)(2). Section 402(p)(2) includes discharges already required to have a permit; discharges from municipal separate storm sewer systems serving a population of 100,000 or more; and stormwater discharges “associated with industrial activity.” Congress did not define discharges associated with industrial activity, allowing EPA to interpret the term. For other stormwater discharges, Section 402(p)(5) directs EPA to conduct studies, in consultation with the states, for “identifying those stormwater discharges or classes of stormwater discharges for which permits are not required”; “determining to the maximum extent practicable, the nature and extent of pollutants in such discharges”; and “establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate
impacts on water quality.” Section 402(p)(6) authorizes the Administrator to issue regulations, in consultation with state and local officials, based on the studies prescribed by Section 402(p)(5). It provides EPA discretion in selecting which discharge sources to regulate and how to regulate them; it does not require the use of NPDES permits. Specifically, the section states that the regulations “shall establish priorities, establish requirements for state stormwater management programs, and establish expeditious deadlines” and may include “performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.” 33 U.S.C. 1342(p)(6). This flexibility is unique to stormwater discharges regulated under Section 402(p)(6) and differs from the requirement for NPDES permits for stormwater discharges listed in Section 402(p)(2) of the Act.

In 1990, EPA promulgated the Phase I stormwater regulations (55 FR 47990, November 16, 1990) (“Phase I Rule”), to develop regulations requiring permits for large and medium municipal separate storm sewer systems and stormwater “discharges associated with industrial activity.” In March 1995, EPA submitted to Congress a report on the results of the Section 402(p)(5) study that evaluated the nature of stormwater discharges from municipal and industrial facilities not already regulated under the Phase I regulations (EPA, 1995). On December 8, 1999, EPA promulgated the Phase II stormwater regulations to address stormwater discharges from small municipal separate storm sewer systems and construction sites that disturb one to five acres. 64 FR 68722. Under CWA Sections 402(p)(2)(E) and 402(p)(6), EPA retains the discretionary authority to designate additional stormwater discharges for regulation.

The Phase II stormwater regulations were challenged in Environmental Defense Center v. US EPA, 344 F.3d 832 (9th Cir. 2003) (EDC v. EPA). In that case, petitioners contended that EPA arbitrarily failed to regulate discharges from forest roads under the Phase II rule. The court held that EPA failed to consider petitioners’ comments and remanded the issue to EPA “so that it may consider in an appropriate proceeding Petitioner’s contention that Section 402(p)(6) requires the EPA to regulate forest roads. The EPA may then either accept Petitioners’ arguments in whole or in part, or reject them on the basis of valid reasons that are adequately set forth to permit judicial review.” Id. at 863.

In 2011, the U.S. Court of Appeals for the Ninth Circuit issued a decision in Northwest Environmental Defense Center v. Brown, 640 F.3d 1063 (9th Cir. 2011) (“NEDC”), a citizen suit alleging violations of the CWA for unpermitted discharges of stormwater from ditches alongside two logging roads in state forests. The court held that because the stormwater runoff from the two roads in question is collected by a system of ditches, culverts, and channels and then discharged into waters of the U.S., there was a point source discharge of stormwater associated with industrial activity for which an NPDES permit is required.

On May 23, 2012, EPA published a Notice in the Federal Register summarizing known water quality impacts related to forest roads and discussing existing state, tribal, and voluntary programs designed to address those impacts. (77 FR 30473). The Notice expressed EPA’s intent to specify that only stormwater discharges associated with rock crushing, gravel washing, log
sorting, and log storage are discharges associated with silvicultural activity that are subject to permitting under the stormwater regulations pertaining to industrial activity. The Notice also discussed the Agency’s consideration of non-permitting approaches to address other stormwater discharges from forest roads. On December 7, 2012, EPA promulgated a rule (77 FR 72970) clarifying that discharges of stormwater from silviculture activities other than rock crushing, gravel washing, log sorting, and log storage do not require an NPDES permit. On March 20, 2013, the Supreme Court reversed the Ninth Circuit’s ruling in NEDC, holding that discharges of stormwater that ran off logging roads into ditches, culverts, and channels did not require an NPDES permit as stormwater from industrial activity. See Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct 1326 (2013).

In January 2014, Congress amended CWA Section 402(l) to effectively prohibit the requirement of NPDES permits for the discharge of runoff “resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: 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.” 33 U.S.C. 1342(l). In addition, the amendment prohibits third-party lawsuits (“citizen suits”) authorized by CWA Section 505(a) for any requirements established under Section 402(p)(6) for the silviculture activities listed above.

In December 2014, the EDC and the Natural Resources Defense Council filed a petition with the Ninth Circuit to compel EPA to respond, within six months, to the question remanded in the 2003 EDC v. EPA decision of whether Section 402(p)(6) requires federal regulation of stormwater discharges from forest roads. Following execution of a settlement agreement filed with the court on August 26, 2015, the court entered an order establishing a schedule requiring EPA to issue a final determination by May 26, 2016. The parties subsequently extended the deadline by joint stipulation to June 27, 2016.

Ultimately, on July 5, 2016, EPA issued this Notice of Decision not to regulate forest road discharges under the CWA. For additional information, see the following:


and

https://www.epa.gov/npdes/forest-roads.