

SILVICULTURE REGULATORY CONSISTENCY ACT OF 2013

NOVEMBER 12, 2014.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SHUSTER, from the Committee on Transportation and Infrastructure, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 2026]

[Including cost estimate of the Congressional Budget Office]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 2026) to amend the Federal Water Pollution Control Act to exempt certain silvicultural activities from national pollutant discharge elimination system permitting requirements, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

	Page
Purpose of Legislation	2
Background and Need for Legislation	2
Hearings	4
Legislative History and Consideration	5
Committee Votes	5
Committee Oversight Findings	5
New Budget Authority and Tax Expenditures	5
Congressional Budget Office Cost Estimate	5
Performance Goals and Objectives	6
Advisory of Earmarks	6
Duplication of Federal Programs	6
Disclosure of Directed Rule Makings	7
Federal Mandate Statement	7
Preemption Clarification	7
Advisory Committee Statement	7
Applicability to Legislative Branch	7

Section-by-Section Analysis of Legislation	7
Changes in Existing Law Made by the Bill, as Reported	8
Additional Views	10

PURPOSE OF LEGISLATION

The purpose of H.R. 2026 is to exempt certain silvicultural activities from National Pollutant Discharge Elimination System permitting requirements under the Federal Water Pollution Control Act.

BACKGROUND AND NEED FOR LEGISLATION

The Clean Water Act

In 1972, Congress passed the Federal Water Pollution Control Act Amendments of 1972 (commonly known as the Clean Water Act or the CWA; 33 U.S.C. § 1251 *et seq.*). The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The primary mechanism for achieving this objective is the CWA's prohibition on the discharge of any pollutant from a point source to a jurisdictional waterbody without a National Pollutant Discharge Elimination System (NPDES) permit. (See CWA §§ 301, 402.)

The CWA defines a "point source" as "any discernible, 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. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." (See CWA § 502(14).)

The Environmental Protection Agency (EPA) has the authority to regulate the discharge of pollutants from point sources either through general permits or through individual permits. NPDES permits specify limits on what pollutants may be discharged from point sources and in what amounts. Under the CWA, 46 states currently have authorized programs and are authorized to implement and enforce NPDES permits. The EPA manages the CWA program in the remaining states and territories.

NPDES permits are the basic regulatory tool of the CWA. The EPA or an authorized state may issue compliance orders or file civil suits against those who violate the terms of a permit. In addition, in the absence of federal or state action, individuals may bring a citizen suit in United States District Court against those who violate the terms of an NPDES permit or against those who discharge without a valid permit.

Forest Roads under the Clean Water Act

In 1976, the EPA adopted administrative regulations governing the NPDES permit program, including the "Silvicultural Rule," which defined forestry activities. (See 40 CFR § 122.27 (Silvicultural activities).) In these regulations, the EPA identified those forestry activities the Agency considered to be "silvicultural point sources" subject to NPDES permit program, and forestry activities the Agency considered to be "nonpoint sources," not subject to regulation under the CWA. (*Id.*)

The EPA defined “silvicultural point sources” as “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.” (40 CFR § 122.27(b)(1).) The rule went on to specifically exclude “nonpoint source silvicultural activities, including harvesting, site-preparation, pest and disease control, thinning, cultural treatment, prescribed burning, reforestation, and road construction and maintenance from which there is runoff from precipitation events.” (*Id.*)

In the preamble, the EPA noted that these nonpoint source silvicultural activities are effectively addressed under state best management practice programs. (41 Fed. Reg. 24709, 24710 (June 18, 1976).) The EPA amended the final phrase of the exclusion in 1980 to read “from which there is natural runoff,” stating at the time that they intended no change in meaning. (45 Fed. Reg. 33447 (1980).)

In 1987, Congress adopted a variety of amendments to the CWA in the Water Quality Act of 1987. One of the more significant amendments was establishment of a two-phase process to regulate stormwater discharges under the NPDES program. (CWA § 402(p).) In these amendments, Congress intended to clarify the EPA’s existing responsibility to regulate point source stormwater discharges of pollutants. In CWA section 402(p)(2), Congress identified specific discharge categories requiring NPDES permits in Phase 1. Among the activities subject to the mandatory NPDES permit requirement are “discharges associated with industrial activities.” (*Id.*)

The EPA developed regulations to implement new stormwater NPDES permitting requirements under the NPDES program. The EPA adopted Phase 1 regulations in 1990, including an extensive definition of “discharges associated with industrial activity” in section 122.26(b)(14) of title 40 of the Code of Federal Regulations. (55 Fed. Reg. 47990, 48063 (November 16, 1990).)

In the 1990 regulation, EPA added to the Phase I rule an exception from the definition of industrial activity for all activities excluded from the NPDES permit requirement in Part 122 of title 40 of the Code of Federal Regulations. (*See* 40 C.F.R. § 122.26(b)(14) (“The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122.”).) In addition, the EPA expressly stated in the preamble to its Phase 1 regulations that the definition of “storm water discharges associated with industrial activity” specifically excluded activities listed in section 122.27 of title 40 of the Code of Federal Regulations, namely, the Silvicultural Rule. (*See* 55 Fed. Reg. at 48011.) However, EPA also stated that it intended to examine the scope of the Silvicultural Rule in a future study of stormwater discharges. (*Id.*)

The EPA issued NPDES regulations for Phase 2 stormwater discharges in 1999. (64 Fed. Reg. 68722 (December 8, 1999).) In the Phase 2 stormwater regulations, the EPA rejected a comment to include forest or logging roads as a regulated discharge, based on the Silvicultural Rule.

Since promulgating the Silvicultural Rule in 1976, the EPA had never required an NPDES permit for nonpoint source silvicultural activities, including forest or logging roads. For the past 37 years, under the Silvicultural Rule, the management of forest roads

across 755 million acres of public, private, state, and tribal forests in the United States has been guided by state laws using best management practices and as nonpoint sources under the CWA.

Litigation on the Silvicultural Rule and Responses

Since the 1990s, the issue of whether discharges from forest roads and other forestry activities should be covered by the NPDES requirements of the Clean Water Act has been heavily litigated. In several of these cases, the courts sided with the Federal government's position that stormwater associated with nonpoint source forestry activities designated in the Silvicultural Rule were not covered by the NPDES requirements of the Act.

However, in 2011, the Federal Court of Appeals for the Ninth Circuit ruled (in *Northwest Environmental Defense Center v. Brown*) that discharges of stormwater from ditches alongside logging roads were "associated with industrial activities," and therefore were required to have an NPDES permit.

The Federal government disagreed with the interpretation of the Ninth Circuit, and maintained that those discharges from logging roads (previously excluded from the CWA permitting requirements under 40 C.F.R. § 122.27) are not associated with industrial activities, but are nonpoint source silvicultural activities that do not require a permit. The Supreme Court overturned the decision of the 9th Circuit by a 7-to-1 vote (in the now-renamed case *Decker v. Northwest Environmental Defense Center*). In this case, the Supreme Court ruled that EPA's interpretation that defined certain discharges related to silvicultural operations as nonpoint sources, and therefore, not subject to the CWA's permit requirements, was permissible, and remanded the decision to the Ninth Circuit.

While the Supreme Court was deliberating *Decker*, EPA proposed to clarify Federal regulations by specifying those silvicultural-related activities that the agency considered "associated with industrial activities" that would require NPDES permits for stormwater runoff. That rulemaking, finalized on November 30, 2012 (77 Fed. Reg. 72970), reaffirmed those specific activities related to silvicultural operations that have long been subject to the permitting requirements of the CWA (e.g., rock crushing, gravel washing, log sorting, or log storage facilities.) At the same time, the agency clarified that discharges of stormwater from silvicultural activities other than the four activities specifically identified above do not require a NPDES permit. A lawsuit challenging the December 2012 rulemaking was filed in January 2013 (*Northwest Environmental Defense Center v. Jackson*, No. 13-70057, 9th Cir.), and was withdrawn in November 2013.

In light of the litigation and regulatory actions, which resulted in uncertainty in the regulatory status of forest roads under CWA, the sponsors of H.R. 2026 introduced legislation to statutorily (and permanently) exempt those nonpoint source activities that were identified in the Silvicultural Rule from the NPDES requirements of the CWA.

HEARINGS

No hearings were held on H.R. 2026.

LEGISLATIVE HISTORY AND CONSIDERATION

On May 16, 2013, Representative Jaime Herrera Beutler of Washington introduced H.R. 2026, the *Silviculture Regulatory Consistency Act of 2013*, a bill to amend the Federal Water Pollution Control Act to exempt certain silvicultural activities from National Pollutant Discharge Elimination System permitting requirements.

On October 29, 2013, the Committee on Transportation and Infrastructure met in open session to consider H.R. 2026, and ordered the bill reported favorably to the House by voice vote with a quorum present.

In the 112th Congress, the Committee on Transportation and Infrastructure ordered a virtually identical bill (H.R. 2541) reported favorably to the House by voice vote.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the House of Representatives requires each committee report to include the total number of votes cast for and against on each record vote on a motion to report and on any amendment offered to the measure or matter, and the names of those members voting for and against. There were no record votes taken in connection with consideration of H.R. 2026, or ordering the bill reported. A motion to order H.R. 2026 reported favorably to the House was agreed to by voice vote with a quorum present.

COMMITTEE OVERSIGHT FINDINGS

With respect to the requirements of clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives does not apply where a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 has been timely submitted prior to the filing of the report and is included in the report. Such a cost estimate is included in this report.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the enclosed cost estimate for H.R. 2026 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 5, 2013.

Hon. BILL SHUSTER, *Chairman,*
Committee on Transportation and Infrastructure,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2026, the *Silviculture Regulatory Consistency Act of 2013*.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 2026—Silviculture Regulatory Consistency Act of 2013

H.R. 2026 would prohibit the Environmental Protection Agency (EPA) from requiring a point source discharge permit (a type of permit issued under the National Pollutant Discharge Elimination System) for water discharges from the following silvicultural activities: nursery operations; site preparation; reforestation; timber thinning; prescribed burning; pest and fire control; harvesting operations; surface drainage; or road use, construction, and maintenance.

According to EPA, notwithstanding ongoing litigation regarding silvicultural activities, a December 2012 rule regarding permitting for stormwater discharges from logging roads largely addresses the changes to current law proposed under this bill. Thus, CBO estimates that enacting this legislation would result in no significant impact on the federal budget. Pay-as-you-go procedures do not apply to H.R. 2026 because enacting the bill would not affect direct spending or revenues.

H.R. 2026 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Susanne S. Mehlman. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goal and objective of this legislation is to exempt the conduct of certain silvicultural activities from National Pollutant Discharge Elimination System permitting requirements.

ADVISORY OF EARMARKS

Pursuant to clause 9 of rule XXI of the Rules of the House of Representatives, the Committee is required to include a list of congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives. No provision in the bill includes an earmark, limited tax benefit, or limited tariff benefit under clause 9(e), 9(f), or 9(g) of rule XXI.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to section 3(j) of H. Res. 5, 113th Cong. (2013), the Committee finds that no provision of H.R. 2026 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related

to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

Pursuant to section 3(k) of H. Res. 5, 113th Cong. (2013), the Committee estimates that enacting H.R. 2026 does not specifically direct the completion of any specific rule makings within the meaning of section 551 of title 5, United States Code.

FEDERAL MANDATE STATEMENT

The Committee adopts as its own the estimate of federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act (P.L. 104-4).

PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1974 requires the report of any Committee on a bill or joint resolution to include a statement on the extent to which the bill or joint resolution is intended to preempt state, local, or tribal law. The Committee states that H.R. 2026 does not preempt any state, local, or tribal law.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act are created by this legislation.

APPLICABILITY OF LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (P.L. 104-1).

SECTION-BY-SECTION ANALYSIS OF LEGISLATION

Section 1. Short title

Section 1 of H.R. 2026 provides the short title of the bill. The section states that the Act may be cited as the “Silviculture Regulatory Consistency Act of 2013.”

Section 2. Silvicultural activities

The legislation intends to codify the EPA’s Silvicultural Rule by amending section 402 of the CWA to exclude specific forest management activities and forest roads from permits and other regulation under the point source stormwater program.

H.R. 2026 amends Section 402(1) of the Clean Water Act, which provides limitations on the requirement to obtain an NPDES permit for certain types of discharges. Section 2 of the bill adds an additional limitation on the requirement to obtain an NPDES permit, by adding a new paragraph (3), entitled “Silvicultural Activities,” at the end of section 402(1).

New paragraph (3)(A) provides that the EPA Administrator shall neither require an NPDES permit or otherwise promulgate regulations under this section, nor directly or indirectly require any state

to require an NPDES permit, for a discharge of stormwater runoff resulting from the conduct of the following silvicultural activities: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, and road use, construction, and maintenance, from which there is runoff. The legislation does not affect the EPA's requirement for permits for silvicultural point sources, namely discernible, confined, and discrete conveyances related to rock crushing, gravel washing, log sorting, and log storage facilities that are operated in connection with silvicultural activities and from which pollutants are discharged into jurisdictional waters, and does not alter the current regulatory treatment of discharges that have long been regulated under existing industrial stormwater regulations, such as EPA's Multi-Sector General Permit for Industrial Stormwater as it pertains to the timber products sector. The legislation also does not alter existing requirements related to construction activities for currently regulated facilities.

New paragraph (3)(B) specifies that the NPDES permitting limitation added by the bill does not exempt the conduct of a silvicultural activity resulting in the discharge of dredged or fill material from any applicable permitting requirement under section 404 of the CWA (pertaining to permits for the discharge of dredged or fill material into jurisdictional waters).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in roman):

FEDERAL WATER POLLUTION CONTROL ACT

* * * * *

TITLE IV—PERMITS AND LICENSES

* * * * *

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

SEC. 402. (a) * * *

* * * * *

(1) LIMITATION ON PERMIT REQUIREMENT.—

(1) * * *

* * * * *

(3) SILVICULTURAL ACTIVITIES.—

(A) *NPDES PERMIT REQUIREMENTS FOR SILVICULTURAL ACTIVITIES.*—*The Administrator shall not require a permit or otherwise promulgate regulations under this section or directly or indirectly require any State to require a permit under this section for a discharge of stormwater runoff resulting from the conduct of the following silviculture activities: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burn-*

ing, pest and fire control, harvesting operations, surface drainage, and road use, construction, and maintenance.

(B) PERMITS FOR DREDGED OR FILL MATERIAL.—Nothing in this paragraph exempts a silvicultural activity resulting in the discharge of dredged or fill material from any permitting requirement under section 404.

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ADDITIONAL VIEWS

The stated intent of H.R. 2026 is to return Clean Water Act permitting of silvicultural operations around forest roads to the same standards that applied before recent court decisions created uncertainty about which standards should be used. Before court actions, a Clean Water Act permit was not required for nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road use, construction, and maintenance. Permits were required for activities that involved rock crushing, gravel washing, log sawing and log storage. That standard has worked for many years, and, as a cosponsor of H.R. 2026, I support continuing that standard.

However, the Environmental Protection Agency (EPA) has informed the Committee that the language in H.R. 2026 could create legal ambiguity on what should and should not be covered with a Clean Water Act permit. EPA further indicates that returning to the language contained in similar legislation passed by the House in the 112th Congress, H.R. 2541, would address this concern. Clarification that the intent of the bill is simply to return to the old standards may need to be made should this bill advance further in the legislative process.

The bill's sponsors have consistently indicated that the intent of this bill is to return to the long-standing silviculture rule used by the EPA. I support that effort and I am hopeful that any ambiguity in the bill's drafting can be addressed before it is signed into law.

RICK LARSEN.

