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9th Circ. Won't Rehear Logging Runoff Permit Challenge

By **Allison Grande**

Law360, New York (May 17, 2011) -- The Ninth Circuit on Tuesday refused to reconsider its holding that runoff from logging roads in Oregon's Tillamook State Forest was subject to permitting requirements under the Clean Water Act, a decision that timber companies claimed misconstrued federal regulations.

The three-judge panel that decided the Aug. 17 opinion voted unanimously to deny the petitions for rehearing by timber companies and regulators who argued that the runoff was exempt from permitting requirements. No other judge in the Ninth Circuit requested a vote on whether to rehear the matter en banc.

In their Oct. 5 petitions, the state regulators and timber companies argued that reconsideration was warranted because the panel's ruling in favor of appellant Northwest Environmental Defense Center — a ruling that subjected certain entities that use forest roads for timber transport to the permitting requirements for the first time — conflicted with prior case law, improperly interpreted U.S. [Environmental Protection Agency](#) rules and overlooked regulatory guidance on the issue.

“This radical shift in permitting requirements occurred as a result of the panel's decision without any direct challenge to EPA's prior rulemaking, without any deference to the agency, without an administrative record, without the necessary district court fact-finding, and without EPA (the agency that would be required to administer such permits) even being a party to the case,” the timber companies said.

The case concerned whether the CWA required a National Pollutant Discharge Elimination System permit for stormwater runoff from forest roads used for logging and related silvicultural activities when that runoff was channeled into ditches and culverts and ultimately discharged into streams and rivers.

In its September 2006 complaint, the NEDC alleged that stormwater discharges from two roads in Tillamook State Forest violated the CWA because the private defendants, who conduct logging operations along those roads, and the governmental defendants, who are responsible for those roads, had not obtained NPDES permits for those discharges.

The defendants countered that the alleged stormwater discharges did not require permits because the EPA had opted not to regulate them as stormwater discharges.

The U.S. District Court for the District of Oregon agreed with the defendants' assessment in March 2007, electing to dismiss the complaint on the grounds that the EPA's silvicultural rule exempted the

alleged discharges from NPDES permit requirements.

On appeal, the Ninth Circuit ruled that the EPA rule conflicted with the CWA's definition of point source, which is defined as “any discernible, confined and discrete conveyance” from which pollutants are discharged.

The EPA's rule said silvicultural runoff was considered point source if it was related to activities such as rock crushing and gravel washing, but not “natural” runoff from activities like nursery operations and reforestation, regardless of whether that runoff was channeled into waters protected under the CWA.

The court found that the disputed runoff should be considered point source under the CWA definition, and that the EPA rule was improperly designating runoff as point source or nonpoint source based on the activities generating the runoff.

The panel remanded the dispute to the lower court for further proceedings, a decision it upheld in denying rehearing Tuesday.

Paul A. Kampmeier of Washington Forest Law Center , which represents NEDC, told Law360 Wednesday that the CWA has been “wildly effective” at eliminating water pollution and keeping the nation's water clean for decades, and that the Ninth Circuit's decision “is perfectly consistent with” Congressional authority and federal stormwater discharge rules.

“Especially in the Pacific Northwest, logging roads are a chronic and pervasive source of pollution that harms aquatic species and the environment, so to be able to apply the CWA to this is great news for fish and clean water,” he said.

U.S. Circuit Judges William A. Fletcher and Raymond C. Fisher sat on the panel for the Ninth Circuit, along with U.S. District Judge Charles R. Breyer, sitting by designation from the Northern District of California.

The NEDC is represented by Paul A. Kampmeier of Washington Forest Law Center and Christopher Winter of Cascade Resources Advocacy Group.

The Oregon Forestry Industry Council and American Forest & Paper Association, which intervened on the side of the defendants, are represented by Louis A. Ferreira of [Stoel Rives LLP](#) and Ellen B. Steen of [Crowell & Moring LLP](#).

The timber companies — Hampton Tree Farms Inc., Stimson Lumber Co., Georgia-Pacific West Inc. and Swanson Group Inc. — are represented by Louis A. Ferreira, J. Mark Morford and Per A. Ramfjord of Stoel Rives LLP.

The case is Northwest Environmental Defense Center et al. v. Brown et al., case number 07-35266, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by John Williams.

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