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Ninth Circuit Ruling that Rainwater Runoff from Logging Roads Is a Point Source Discharge Requiring NPDES Permitting Is Under Fire: Relief May Be on the Way

Background: *NEDC v. Brown*, 617 F.3d 1176 (2010, rehearing denied 2011)

In August, 2010, the U.S. Court of Appeals for the Ninth Circuit issued its opinion in *NEDC v. Brown*, in which the court overturned more than 35 years of U.S. Environmental Protection Agency (EPA) regulations governing storm water runoff from logging roads. The court held that rainwater runoff from forest roads used for timber harvesting and other silviculture activities is a “point source” of water pollution under the Clean Water Act, and, therefore requires a discharge permit, notwithstanding the EPA’s own Silviculture Rule (40 C.F.R. § 122.27).

The Silviculture Rule excludes from the National Pollutant Discharge Elimination System (NPDES) “point source” permitting requirements for certain silviculture activities such as “nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance” from which there is natural runoff. The rule specifically identified these as “nonpoint source” activities and, as a result, the EPA did not require permitting for discharges of pollutants from ditches, culverts and channels that collect stormwater runoff from logging roads. However, the Northwest Environmental Defense Center (NEDC) brought suit claiming that the Silviculture Rule was invalid because logging operations are an industrial activity and, as such, cannot be exempted from the requirement to obtain NPDES “point source” permits.

In its ruling, the Ninth Circuit held the silviculture exemption ceases to exist as soon as the natural runoff is channeled and controlled in some systematic way through a “discernible, confined and discrete conveyance” and discharged into the waters of the United States. Based on the facts of the case, the court held that the system of ditches, channels and culverts by which the rainwater runoff is channeled and controlled through a “discernible, confined and discrete conveyance” results in a discharge into waters of the United States from an industrial activity. As a result, potentially thousands of miles of forest roads and associated ditches, channels, culverts and other means of channeling rainwater runoff will be required to be permitted under the NPDES.

Appeal to Supreme Court

NEDC v. Brown is now on appeal to the U.S. Supreme Court. After reviewing the appeal briefs of the parties, together with several amicus briefs (both in support of and in opposition to the Ninth Circuit ruling), the Supreme Court has taken the unusual step of requesting the U.S. Solicitor General to seek out and report to the Supreme Court the views of several relevant federal agencies, including the EPA, the U.S. Department of Agriculture, the Department of Interior and the Council on Environmental Quality. The National Alliance of Forest Owners (NAFO) has estimated that the Solicitor General will submit the report and brief of the administration in June 2012, and that the Supreme Court will decide whether to grant certiorari shortly thereafter. Many forest industry groups see this as an optimistic sign that the court will hear the case as early as the fall term.

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Legislative Action

The bipartisan Silviculture Regulatory Consistency Act was introduced in response to the *NEDC v. Brown* decision and is currently pending in both houses of Congress (HR 2541 and S 1369). If passed, the effect of the legislation will be to overturn the Ninth Circuit decision. As of the end of 2011, the NAFO reported that the House and Senate bills have the bipartisan sponsorship and co-sponsorship of 79 members of the House and Senate.

Meanwhile, the Omnibus Appropriations Bill, which passed both houses of Congress late in December 2011, prohibited the EPA from implementing the NPDES permitting regime mandated by *NEDC v. Brown* through September 30, 2012. Section 429 of the Omnibus Appropriations Bill provided:

SEC. 429. From the date of enactment of this Act until September 30, 2012, the Administrator of the Environmental Protection Agency shall not require a permit under section 402 of the Federal Water Pollution Control Act ([33 U.S.C. 1342](#)), nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from roads, the construction, use, or maintenance of which are associated with silvicultural activities, or from other silvicultural activities involving nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, or surface drainage.

This legislative relief is only temporary, but leading trade associations of the forest products industry are guardedly optimistic that permanent relief will come from the Supreme Court or from legislative action on the Silviculture Regulatory Consistency Act. For more information on the views of the forest products industry, click [here](#).

Expansion to Agricultural Operations

All large farming operations involve rainwater runoff management through tile systems, ditches, swales and channels that take the water from the farm fields to streams or to drainage systems that handle runoff from public roads and ultimately into waters of the United States. Virtually all states have adopted Best Management Practices to mitigate any negative effects of farm rainwater runoff, although to date, obtaining an NPDES point source discharge permit has not been required by the EPA. In fact, the newly published Water Quality Standards for the State of Florida's Lakes and Flowing Waters (40 C.F.R. Part 131, December 6, 2010) reflect a continuation of the EPA policy to treat all agricultural rainwater and return flows from farmland irrigation as nonpoint source discharges which do not require NPDES permitting, an approach which seems to be required by the language of Section 502 of the Clean Water Act, which provides, in pertinent part:

(14) The term "point source" means 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.* [Emphasis Added]

Whether agricultural operations are an industrial activity is not definitively answered by the Clean Water Act or by the EPA regulations, although the EPA has not asserted (outside of the livestock industry) that agricultural operations are an industrial activity. However, it is entirely possible that a hypothetical plaintiff environmental group might bring a suit in which it could assert that modern

mechanized farming operations and much of the permanent plantings such as vineyards, groves and orchards and their associated processing operations might indeed constitute industrial operations. In addition, such a hypothetical plaintiff could assert, based on the reasoning of the Ninth Circuit and *NEDC v. Brown* that the language of Section 502 (14) of the Clean Water Act only applies to *naturally occurring* rainwater runoff and return flows from irrigation. In other words, the hypothetical plaintiff could assert, based on the Ninth Circuit’s holding in *NEDC v. Brown*, that the exception ceases to exist once the runoff and return flows are channeled and controlled in some systematic way through a “discernible, confined and discrete conveyance” and discharged into the waters of the United States. Therefore, it seems entirely possible that if *NEDC v. Brown* is not reversed by the Supreme Court, or if the Silviculture Regulatory Consistency Act is not passed by Congress, environmental groups, or even the EPA itself, could seek to impose on the agribusiness industry the same NPDES point source discharge permitting regime as imposed by the Ninth Circuit on the forest products industry in the states included within its jurisdiction. See, <http://www.sfntoday.com/blog/default.aspx?blogID=1100>.



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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