Does Your Logging Road Need a Clean Water Act Permit? Thanks to the Ninth Circuit Court of Appeals, the Answer May Be Yes

BY JULIE WEIS

If you are a woodland owner who values certainty in life, you may not want to read this article right before bedtime. This is because after 30-plus years of logging roads being exempt from Clean Water Act permitting requirements, the Ninth Circuit Court of Appeals recently jettisoned the exemption and concluded that stormwater runoff from logging roads is subject to Clean Water Act permitting requirements. As discussed below, the Ninth Circuit did so in an opinion that left many basic questions unanswered. For example, how would a woodland owner who uses a forest road to haul a load of timber even get a Clean Water Act permit given that the Environmental Protection Agency (EPA) has no permit program in place for logging roads?

The Ninth Circuit is the largest of our Courts of Appeal, covering nine western states and two U.S. territories and presently boasting 46 judges. If you are reading this article, there is a good chance you live within the court's jurisdiction. In August 2010, a three-judge panel of Ninth Circuit judges concluded that two public roads used for logging and related silvicultural activities on Oregon's Tillamook State Forest were "point sources" of pollution (similar to a factory discharge pipe), thus requiring Clean Water Act permits (National Pollutant Discharge Elimination System, or NPDES, permits). Because of the decision's potentially far-reaching ramifications—its impacts could extend into the everyday world of all roads, public or private, that feature ditches or culverts designed to capture and properly dispose of stormwater runoff—the Ninth Circuit was asked to rehear the case. But on May 17, 2011, the court declined to do so. Instead, the court issued a revised version of its logging roads decision that included a previously-missing justification for why the court had subject matter jurisdiction over the case.

The logging roads decision arose out of an Oregon district court case filed in 2006 by the Northwest Environmental Defense Center (NEDC) against Oregon's State Forester, the individual members of Oregon's Board of Forestry, and four Oregon forest products companies: Hampton Tree Farms, Inc., Stimson Lumber Company, Georgia-Pacific West, Inc. and Swanson Group, Inc. The lawsuit claimed that stormwater flowing into ditches alongside two publicly-owned roads on the Tillamook State Forest in northwestern Oregon was transporting sediment into streams and rivers in a manner that constituted "discharge of a pollutant from a point source" and hence required a Clean Water Act permit.

In 2007, the Oregon district court dismissed the logging roads lawsuit on the grounds that any discharge of pollutants from the public roads was excluded from the Clean Water Act permitting system by the EPA's so-called Silvicultural Rule (found at 40 C.F.R. § 122.27(b)(1)). Under this rule, timber harvest operations, surface drainage, or road construction and maintenance from which there is natural runoff are exempt from the permitting requirement because they are diffuse, "nonpoint" pollution sources. NEDC appealed the dismissal of its case, leading to the Ninth Circuit's 2010 conclusion that "stormwater runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is a point source discharge" requiring a Clean Water Act permit. The Ninth Circuit did not invalidate the Silvicultural Rule outright, but it certainly rendered the rule impotent with respect to logging roads.

The technicalities of the Ninth Circuit's decision are not the point of this article, although they may provide the basis for a request for U.S. Supreme Court review of the decision. In a nutshell, the Ninth Circuit took issue with EPA's authority to adopt the Silvicultural Rule in a way that exempted logging road stormwater runoff from the Clean Water Act. The court also held that certain amendments to the Clean Water Act dealing with stormwater discharges had not exempted logging road stormwater runoff from the Clean Water Act's permitting requirement.

So why the above reference to the Supreme Court, and what does the logging roads decision mean in a practical sense?

First, the four Oregon forest products companies in the case, joined by the Oregon Forest Industries Council and the American Forest and Paper Association, have decided to seek U.S. Supreme Court review of the logging roads decision. In May 2011, the forest products entities had asked the Ninth Circuit to stay its decision while they decided whether to seek further judicial review, but the Ninth Circuit denied that request on June 3, 2011. The Ninth Circuit's refusal to stay its decision means the logging

roads decision now is the law in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and two Pacific Islands. It also means the case now will be sent back to the Oregon district court—the Ninth Circuit's decision did not impose a remedy on the state and forest products industry defendants, instead ordering the district court to conduct further proceedings consistent with the logging roads decision to address the remedy issue. At press time, the forest products entities had asked the Ninth Circuit to reconsider their request for a stay given their commitment to petitioning the Supreme Court for relief.

Second, if the case is not revisited by the Supreme Court (a very small percentage of requests for Supreme Court review are granted), some observers believe that many private and governmental entities will be required to obtain a permit for the discharge of stormwater from logging roads under their control or ownership. Although it is difficult to predict the way in which the Oregon district court will fashion a remedy, the Ninth Circuit's acceptance of the argument that road use by log trucks is an industrial activity opened a door for requiring point source permits.

But woodland owners are often referred to specifically as *nonindustrial* landowners. Does that mean the log truck drivers who use woodland owners' roads will have the permitting obligation even without having control or ownership over the roadway? And given that roads on woodland properties almost always are used for other purposes, can the "industrial" label be applied? Also, given that EPA currently does not have a permitting program in place for logging roads, how might one apply for a Clean Water Act permit to avoid potential environmental liability? If permits are required, EPA's delegation of Clean Water Act permitting authority to states will cause the time-consuming permitting process to fall in most cases on already-overburdened state agencies that historically relied on comprehensive systems of "best management practices" (in the Pacific Northwest, these are each state's forest practices rules) to address the issue of silvicultural stormwater runoff.

In short, the Ninth Circuit's logging roads decision offers the woodland owner anything but certainty. So stay tuned as the parties seek Supreme Court review, or perhaps as a legislative solution becomes a possibility—the logging roads decision now has caught the attention of at least some members of Congress. A May 23, 2011, letter to EPA signed by 44 members of the House of Representatives, including Pacific Northwest Representatives from both the Republican and Democratic parties, urged EPA to reaffirm the wisdom of using best management practices to control stormwater runoff in the forest setting, and to take action to "limit the scope of" the logging roads decision. ■

Julie Weis *is a partner in the Haglund Kelley Jones & Wilder law firm in Portland, Ore., where she enjoys putting her natural resources background to work on environmental law matters, including forest products issues, as part of a busy civil litigation practice. She can be reached at 503-225-0777 or weis@hk-law.com.*