

The Ninth Circuit Strikes Again: Logging Roads Ruled to Require Clean Water Act Permits

BY JULIE WEIS

In August 2010, in a decision having practical implications far beyond the forest, a three-judge panel of the Ninth Circuit Court of Appeals concluded that two public roads used for logging and related silvicultural activities on Oregon's Tillamook State Forest were point sources requiring Clean Water Act permits (National Pollutant Discharge Elimination System, or NPDES, permits). The appellate court's decision, on which rehearing has been sought, has potentially far-reaching ramifications beyond the realm of forest roads and into the everyday world of all roads, private or governmental, that feature ditches or culverts designed to capture and properly dispose of stormwater runoff.

The logging roads decision has its origin in an Oregon district court case filed more than four years ago by an environmental nonprofit (Northwest Environmental Defense Center or NEDC) against the State of Oregon (actually against Oregon's State Forester and 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. NEDC's lawsuit claimed that storm-



water flowing into ditches alongside the Trask River and Sam Downs 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 an NPDES permit. Because of the potential implications of the case, the Oregon Forest Industries Council and the American Forest and Paper Association, joined by Tillamook County, intervened on the side of the state and forest products industry defendants.

The Oregon district court quickly dismissed the logging roads lawsuit in early 2007 on the grounds that any discharge of pollutants from the public roads was excluded from the NPDES permitting system by EPA's so-called Silvicultural Rule (found at 40 C.F.R. § 122.27(b)(1)). Under the Silvicultural Rule, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff are exempt from the NPDES permitting requirement. NEDC appealed the dismissal of its case, and more than three years later the Ninth Circuit sided with NEDC by concluding 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 an NPDES permit.

The technicalities of the Ninth Circuit's decision are not the point of this article. But in brief, the appellate

court first took issue with EPA's authority to adopt the Silvicultural Rule in a way that exempted stormwater runoff from logging roads and their associated drainage systems from the Clean Water Act. The Ninth Circuit then turned its attention to an argument not even reached by the district court, namely whether certain amendments to the Clean Water Act dealing with the complicated issue of stormwater discharges (Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p)) had exempted logging road stormwater runoff from the NPDES permit requirement. Despite EPA's prior decision to the contrary, the Ninth Circuit concluded that logging was a defined industrial activity not exempt from the NPDES permitting process. In reaching that conclusion, the appellate court ignored common-sense reasons why logging roads did not fall within the regulatory definition of "immediate access roads . . . used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility."

So what does the logging roads decision mean in a practical sense? First, as of this writing, the decision resides in a sort of legal limbo. The Ninth Circuit did not impose a remedy on the state and forest products industry defendants, but instead sent the case back to the district court to consider that issue. The case remains in the Ninth Circuit, however, because on October 5, 2010, the state and forest products industry defendants asked the Ninth Circuit to rehear the case, either by the same three-judge panel that decided it originally, or by a larger "en banc" panel of 11 Ninth Circuit judges. If the Ninth Circuit declines that request, the parties' last chance for further review would be with the U.S. Supreme Court. If no further review is granted, the case eventually will end up back in Oregon district court.

Second, if the case is not revisited by either the Ninth Circuit or the U.S. Supreme Court, the logging roads decision will become the law of the land within the expansive Ninth

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Circuit. The Ninth Circuit encompasses nine states—Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington—plus two Pacific Islands, so the number of affected private and governmental entities is potentially huge. And NEDC likely will advocate for a nationwide remedy, which would inflict the logging roads decision on the rest of the nation's roads.

Although it is difficult to predict the way in which the Oregon district court ultimately might fashion a remedy, 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. The U.S. Forest Service already has received notice of legal challenges to forest road construction, restoration and maintenance activities—and been sued in Idaho—as a result of the logging roads decision, even though the agency was not a party to the case. In most cases, EPA's delegation of NPDES permitting authority to states will mean that the permitting process will fall to already-overburdened state agencies that historically relied on comprehensive and prudent systems of best management practices to address the issue of silvicultural stormwater runoff.

At this point, the Ninth Circuit's logging roads decision has created more questions than answers. So stay tuned as the case works its way through the legal system, and perhaps catches the eye of those in Congress that recognize a problem in need of a legislative solution. ♦

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