

Ninth Circuit Rules that NPDES Permits Are Required for Logging Road Ditches and Culverts

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In a decision that may eventually have significance far beyond the nine states encompassed by the Ninth Circuit Court of Appeals, that court ruled on August 17, 2010 that timber companies are required to obtain National Pollutant Discharge Elimination System ("NPDES") permits for stormwater discharges from logging roads that collect such runoff in ditches, culverts and other channels prior to discharge to streams and rivers. *Northwest Environmental Defense Center v. Brown*, No. 07-35266 (9th Cir., Aug. 17, 2010). In doing so, the court emphasized that it was applying a long-standing interpretation of the term "point source" as defined in the federal Clean Water Act, under which "point and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the [stream] through a confined, discrete conveyance." *Northwest Environmental Defense Center*, at *12010 (citing the Tenth Circuit's decision in *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1978)). Since the stormwater runoff in question is directed to ditches and culverts, the court found that it is discharged through point sources -- regardless of whether that water would otherwise properly be classified as "natural runoff." *Northwest Environmental Defense Center*, at *12024. In the court's words, only such "'natural runoff' that remains natural" may properly be excluded from NPDES permitting. The court rejected the argument that EPA's Silvicultural Rule excluded such discharges from the definition of "point source," finding that such an interpretation would be inconsistent with the Clean Water Act.

In the course of addressing the objections of the defendant Oregon forestry agencies and intervenor trade groups, the court noted that "infeasibility" -- either from the perspective of state permitting agencies faced with enormous numbers of permit applications, or from the logging companies that will be required to obtain those permits before starting operations -- was not a concern when Congress passed the 1987 Amendments to the Clean Water Act establishing the phased-in stormwater permitting program. According to the Ninth Circuit panel, the only question to be asked is whether the activity that captures stormwater runoff is "industrial in nature"; if it is, then those who undertake such activity must obtain NPDES permit coverage.

Acknowledging the potentially heavy burden this ruling will impose on EPA and state permitting agencies, the court concluded the opinion by stating that "[I]n some respects, we are sympathetic with EPA." As a possible means of alleviating this concern, the court observed that Congress has also authorized the use of general NPDES permits in appropriate circumstances, in response to situations where there were "a vast number of de minimus stormwater sources, many of which pose[] no environmental threat." *Northwest Environmental Defense Center*, at *12038, 12040.

Should this ruling be applied nationally by EPA and states with delegated NPDES permit programs, it will likely add another layer of environmental permitting and compliance concerns to those engaged in forestry, mineral extraction and other earth-disturbing activities that are required to maintain drainage control over disturbed areas. Even for those companies that are already required to obtain NPDES permits for process wastewater or certain portions of large disturbed areas, the requirement to obtain specific coverage for roadside ditches and the like will undoubtedly present substantial administrative and managerial challenges.

For those with operations that may be affected, this is an issue that is worth monitoring for future developments.