Forest Roads and Clean Water Act Update

By Professor Jay O'Laughlin

The Clean Water Act (CWA) mandates that the discharge of any pollutant by any person is unlawful, except in compliance with other provisions of the statute. The CWA provides the National Pollutant Discharge Elimination System (NPDES) permit program for pollutants discharged from a "point source"—defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel [etc.] from which pollutants are or may be discharged." Litigation by the Northwest Environmental Defense Center (NEDC) challenged the longstanding U.S. Environmental Protection Agency (EPA) position that most silvicultural activities, including forest roads, are nonpoint sources and thus exempt from NPDES permit requirements.

NEDC v. Brown. The NEDC sued Oregon state forester Marvin Brown in 2006, alleging CWA violations for discharging stormwater from ditches alongside two logging roads in state forests without a permit. In 2007 the federal district court in Oregon found for the defendant. The NEDC appealed to the 9th Circuit Court, which in 2011 held that logging road runoff is subject to NPDES permitting because it either qualifies as a "point source" discharge if channeled through ditches, or it falls under a regulated category of stormwater associated with "industrial" activity. The National Association of Forest Owners (NAFO) and the State of Oregon filed petitions requesting that the U.S. Supreme Court review the 9th Circuit's decision.

EPA Rule Revision. As a result of *NEDC v. Brown*, the EPA saw the need to clarify its regulations and announced in May 2012 that it was revising the "silviculture rule" because it did not intend for logging roads to be regulated as industrial facilities. The rule-making process was completed on November 30, 2012. The new rule makes it clearer that discharges of stormwater from silviculture activities that require an NPDES permit are limited to "rock crushing, gravel washing, log sorting, and log storage facilities." The new rule attempts to define forest runoff as Phase II stormwater, which perhaps can be managed more flexibly and without permits, but according to NAFO, raises more potential for litigation. Possibly the most significant impact of the new rule, then, is that it will perpetuate litigation in the 9th Circuit. Nevertheless, the EPA maintains its consistent position of 30+ years that stormwater discharges from forest roads can be controlled and addressed effectively with best management practices (BMPs). Such BMPs

include grading and seeding road surfaces, and designing road drainage structures to discharge runoff in small quantities to off-road areas that are not hydrologically connected to surface waters. The EPA's new rule interfered with arguments that took place in the Supreme Court.

Decker v. NEDC. In response to petitions to the Supreme Court to review the issues raised by *NEDC v. Brown*— now renamed *Decker v. NEDC*, since Douglas Decker had become state forester—the U.S. Solicitor General argued that the Supreme Court should not be reviewing the case. Nevertheless, in June 2012 the Court granted the review petitions, and oral arguments commenced December 3, 2012, only a Saturday and Sunday removed from the EPA's new rule. The focus of advocates and justices alike shifted from issues they were scheduled to address to the potential effects of the new rule. Chief Justice John Roberts congratulated the forest industry's advocates for obtaining nearly all the relief they had sought, and chastised the U.S. Solicitor General for not informing the Court of the impending rule change. A decision by the Court is likely months away.

CWA Issues Remain Murky. It appeared to *Legal Planet* blogger Richard Frank that a working majority of the justices were uncomfortable with the prospect of the 9th Circuit opinion in *Decker* remaining in effect. In response to the justices' questions, the environmentalists' counsel made it clear that a legal challenge to the new EPA regulation would be forthcoming. It seemed obvious to some that although the NEDC will not preserve its win in the 9th Circuit, it's almost equally unlikely that forestry interests will obtain the reversal on the merits that they had been seeking from the Supreme Court.

Forester/attorney Brent Keith, Government Affairs director with the Council of Western State Foresters, attended the Supreme Court proceedings. Based on what happened, he opined that the Court is likely to dispose of the case without a decision on the merits. One such option would be to vacate and dismiss the case, which would eliminate the 9th Circuit decision as precedent. As a modified version of that option, the Court could also decide to vacate and remand to the 9th Circuit for further proceedings, with instructions to the 9th Circuit concerning the issues to be addressed on remand, such as considering the impact of the EPA's new rule.

It is clear that despite Chief Justice Roberts' congratulations, forestry interests did not escape from regulatory uncertainty. Because the EPA's rule applies nationwide, whatever the 9th Circuit ultimately decides will apply nationwide as well. To relieve such regulatory uncertainty, forestry

interests would like to see a bill move through the new 113th Congress similar to the Silviculture Regulatory Consistency Act that died during the previous Congress.

By the time you read this, the CWA issues pertaining to forest roads will likely remain unsettled. The substantive issue is about keeping human-caused sediment out of water bodies. The arguments about who has authority to make rules for doing so are a secondary but procedurally important concern. Regardless of what the Court decides, foresters have a responsibility to control sediment pollution from forest roads as best they can. The commentary by Kevin Boston in the September 2012 *Journal of Forestry* provides ideas for doing that.

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