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Editor's Note: In this issue, Greg Corbin of Stoel Rives LLP provides an alternative summary and analysis of the Ninth Circuit Court of Appeals decision in *NEDC v. Brown*, addressing Clean Water Act permitting requirements for the discharge of stormwater from logging roads. This decision was also summarized in E-Alert Issue 6 (2010).

We have reproduced the entire article below. Any opinions expressed in this article are those of the author alone. For those who prefer to view this article in PDF format, a copy will be posted on the Section's website: <http://www.osbenviro.homestead.com/>.

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NINTH CIRCUIT HOLDS NPDES PERMIT REQUIRED FOR LOGGING ROADS

On August 17, 2010 the United States Court of Appeals for the Ninth Circuit held that a National Pollution Discharge Elimination System ("NPDES") permit is required for stormwater runoff from logging roads. In *NEDC v. Brown*, No. 07-35266, three judges decided a case involving two long-existing public roads that enter the Tillamook State Forest and are used for logging, among other things. NEDC asserted that the defendants should be required to obtain an NPDES permit for stormwater runoff from the roads because the sediment in the stormwater is a pollutant under the federal Clean Water Act ("CWA").

The CWA requires an NPDES permit for the discharge of any pollutant to any navigable water from any point source. The CWA distinguishes between point source discharges of pollutants and non-point source pollution. Non-point source pollution, which is not defined in the CWA, includes any source of water pollution not characterized as a point source discharge. Since 1973, rules promulgated by the Environmental Protection Agency ("EPA") have distinguished between point source and non-point source pollution. Included in these rules is the so-called Silvicultural Rule found at 40 C.F.R. § 122.27(b)(1), which has remained stantially in its current form since 1976. The Silvicultural Rule specifically defines timber "harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff" to be "non point source silvicultural activities" excluded from NPDES permitting requirements.

NEDC argued that the ditches and culvert system associated with the forest roads constitute point sources that discharge into forest streams and rivers. The U.S. District Court for the District of Oregon held that the discharges of which NEDC complained were exempt from permitting under

the Silvicultural Rule. The Ninth Circuit disagreed, holding that stormwater runoff that is collected and channeled in a system of ditches and culverts before being discharged into streams and rivers constitutes a point source, and that EPA lacks authority to promulgate a rule to the contrary.

The defendants had also argued that no permit is required for forest road stormwater runoff pursuant to EPA's rules promulgated under section 402(p) of the CWA. Section 402(p) requires EPA to promulgate stormwater runoff permitting requirements in two phases. In phase I, EPA promulgated rules for permitting stormwater runoff discharges from industrial activities and certain municipal systems. EPA's rule defines "industrial activity" and specifically excludes activities described in the Silvicultural Rule. 40 C.F.R. § 122.26(b)(14). The Ninth Circuit rejected this EPA definition of industrial activity and found that logging is an industrial activity as that term is used in section 402(p). EPA's rules apply the stormwater permitting requirements to "immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility." 40 C.F.R. § 122.26(b)(14)(ii). For guidance on the meaning of "immediate access roads" the Ninth Circuit looked to EPA's preamble for this rule, which indicates that immediate access roads means "roads which are exclusively or primarily dedicated for use by the industrial facility." 55 Fed. Reg. 47,990, 48,009 (Nov. 16, 1990). The court then concluded that logging roads fall within this description because, but for logging, the roads would not have been built (note that the district court never made such a factual finding or even heard evidence relevant to such a finding). On this basis, the Ninth Circuit held that logging sites are industrial facilities and that logging roads are immediate access roads subject to the NPDES permitting rules under section 402(p) of the CWA and that "EPA is not free to create exemptions from permitting requirements for such activity."

The court's decision has potentially sweeping implications. First, combined with the Ninth Circuit's opinion in *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002), this opinion appears to leave the Silvicultural Rule with little potency. Second, if broadly read, this opinion would require NPDES permits for every road in the country that is served by ditches or culverts that eventually discharge to natural surface waters and that is not already regulated by the CWA.

The court's opinion also leaves many critical questions unanswered. Even if the opinion were limited to logging roads, what constitutes a logging road? Contrary to the court's assumptions of fact, many forest roads, including the roads at issue in this case, are not dedicated to logging. Who is responsible for obtaining the necessary permits? The defendants in this case sued the Oregon State Forester and the individual members of the Oregon Board of Forestry in their capacity as administrators of the state's forest roads, but they also sued four timber companies that had purchased timber from the state from areas served by the roads. The court did not address whether the permit obligation rests with the owner of the roads or every entity that transports logs on the roads, or even those using the roads to access the forest for recreation. Clearly this opinion requires EPA and the states to adopt rules to provide for permitting discharges from logging roads, but the court does not provide any guidance on how discharges from existing roads should be managed in the interim before permits can be issued. Unlike some activities subject to CWA permit requirements, discharges from existing roads cannot be stopped

while waiting for a permit. The court also ignores the extraordinary work that may be necessary to bring existing roads into compliance with such permits. So once again, the Ninth Circuit has turned our understanding of the CWA upside down, and left EPA and the public to sort it out again.

For copies of the opinion and the briefs before the court go to:

<http://www.stoel.com/showalert.aspx?Show=6993>

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