

The Ninth Circuit's Decision on Forest Roads and EPA's Proposed Guidance on the Reach of Its Clean Water Act Jurisdiction – An Intersection of Significant Consequences

- For over three decades, forestry activities had been defined by EPA as nonpoint source activity not subject to NPDES permitting under the Clean Water Act (CWA). Now, with both EPA's recently issued NPDES permit for pesticide application pursuant to the Sixth Circuit decision in *National Cotton Council v. EPA* and the recent Ninth Circuit decision on forest roads in *NEDC v. Brown*, forestry is suddenly facing two NPDES permitting programs for the first time in the history of the CWA. At the same time, EPA is developing a new and expanded statement of Clean Water Act jurisdiction.
- The intersection of two new permitting programs with an expansion of Clean Water Act jurisdiction has significant implications. Preliminary analysis indicates that even a minimal permitting program will add millions of dollars of cost to management of private working forests and will force decisions that remove forest lands from production and convert such lands to non-forest uses.

Ninth Circuit Decision (*NEDC v. Brown*, 640 F.3d 1063 (2011), decision on *certiorari* expected by June 2012)

- In *NEDC v. Brown*, the U.S. Court of Appeals for the Ninth Circuit ruled that forest roads and their associated stormwater runoff gathering systems are "point sources" that require NPDES permits under the Clean Water Act.
- In so ruling, the Ninth Circuit both struck down EPA's longstanding interpretation of "nonpoint source" as including forest roads, as well as EPA's exclusion of forest roads from EPA's longstanding definition of stormwater discharges associated with industrial activity.
- If the Solicitor General does not recommend that the Supreme Court review the case, and the Supreme Court denies the petition for *certiorari*, the hundreds of thousands of miles of forest roads on federal, state and private forestland nationwide will require a new system of Clean Water Act NPDES permits, imposing new costs never before contemplated by forestry in over three decades of Clean Water Act implementation.
- The broader EPA stretches its Clean Water Act jurisdiction over water features, the more expansive the forest roads permitting program becomes, with NPDES permits required for distant tributaries, intermittent and ephemeral streams, upland ditches, and isolated wetlands, including dry wetlands that have been in productive forests for decades. EPA has not considered the extra costs that would be imposed by a new stormwater permitting program for forest roads that includes the unprecedented sweep of water features covered by the Proposed Guidance.
- Industry cost analyses under existing federal jurisdictional interpretations suggest that permitting costs will range from \$16,000-\$24,000 per permit, and in the Pacific Northwest alone the 44 million acres of private forest lands contain up to 870,000 discharge points that will require NPDES permits under the Ninth Circuit's decision. Total compliance costs nationwide will reach the high hundreds of millions of dollars.

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- Permit requirements also place forest owners and operators in jeopardy of citizen enforcement lawsuits that will cause severe disruption of forestry operations.
- The combined impact of compliance costs and legal exposure will impose an unprecedented economic burden and additional job loss on a sector already reeling from the worst downturn in housing and associated building materials in our nation's history. This added burden will force forestland out of production as forest owners are compelled to move their land from forestry to other more economically beneficial uses.

Proposed Guidance on Clean Water Act Jurisdiction (76 Fed. Reg. 24,479 (May 2, 2011))

- The National Alliance of Forest Owners (“NAFO”) commented on three elements in the Proposed Guidance that appear to expand EPA’s Clean Water Act jurisdiction and exceed the scope of EPA’s statutory authority as interpreted by the Supreme Court – tributaries, ditches, and the revised concept of adjacency as applied to wetlands and “other waters.”
- If EPA must develop an NPDES permitting program for forest roads within the expanded jurisdiction in the Proposed Guidance, the implications are far-reaching for forestry:
 - The Proposed Guidance’s standard for identifying jurisdictional tributaries is based on an assessment of the collective impact that all tributaries in a watershed will have on downstream navigable waters, and thus allows the Agencies to exercise jurisdiction over tributaries that do not individually impact or contribute to a collective impact on a downstream navigable water.
 - Non-navigable tributaries are ubiquitous on forest lands, particularly in the northwest, and EPA’s proposed interpretation of jurisdiction dramatically expands the scope of road systems required to obtain NPDES permits.
 - The Proposed Guidance expands the Agencies’ CWA jurisdiction by including nontidal ditches within the definition of “tributaries” that are jurisdictional waters.
 - Identifying ditches as jurisdictional waters will take extensive acreage out of forest production. In addition, ditches are integral components of the stormwater management systems for forest roads, and EPA’s interpretation thus transforms the entire nationwide network of forestry stormwater control into jurisdictional waters. Ironically, forest owners have developed this network under existing Best Management Practices (BMPs) to comply with and achieve the objectives of the CWA.
 - Under the Proposed Guidance, a wetland or “other water” may be “adjacent” to a jurisdictional water if there is an ecological interconnection between the wetland and the jurisdictional water. The ecological interconnection can be established by resident aquatic species such as amphibians.
 - Forest lands in the southern United States are interwoven with extensive networks of wetlands, and EPA’s broad jurisdictional view brings hundreds of thousands of acres of isolated wetlands into the new NPDES permitting programs for forestry.