

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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