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WHAT'S INSIDE

SPECIAL ISSUE

U.S. Supreme Court report: An insightful look at the high court's agenda

U.S. Supreme Court decisions can make and change law across a wide spectrum of practice areas. *Westlaw Journal* provides subscribers with a comprehensive look at pending high court cases in this special year-end issue. Each of our writers contributes analysis of lawsuits in the myriad fields we cover throughout the year. The court's rulings in fields such as business and finance, employment, product liability, and toxic torts frequently influence the law in many other areas.

The high-impact cases covered in this issue include:

- *Kiobel v. Royal Dutch Petroleum,* in which the justices will decide whether a 1789 law, the Alien Tort Statute, allows victims of human rights abuses to bring suit in U.S. courts against foreign corporations accused of aiding in the abuse.
- *Standard Fire Insurance Co. v. Knowles,* which could have a far-reaching effect on the ability of companies to defend against class actions.
- *Vance v. Ball State University,* to decide how much authority an employee must have over a co-worker to be deemed a "supervisor" in Title VII harassment cases, with potentially broad implications for employer liability.

We trust readers will find this compendium of groundbreaking legal developments helpful in keeping up with changes in the law.

Westlaw Journal will provide updates on the high court's actions in the coming months.

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Tough law or tough break? Supreme Court to review 9th Circuit decision in *Georgia-Pacific v. Northwest Environmental Defense Center*

By Emily S. Sherlock, Esq.
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The U.S. Supreme Court heard oral argument Dec. 3 in a highly controversial Clean Water Act case, *Georgia-Pacific West Inc. v. Northwest Environmental Defense Center.*[1] The Supreme Court will review a 9th U.S. Circuit Court of Appeals ruling that runoff from logging roads when conveyed in ditches and culverts is subject to the Environmental Protection Agency's phase I storm water regulations and requires a National Pollutant Discharge Elimination System permit under the Clean Water Act. The 9th Circuit's holding calls into question the EPA's long-standing Silvicultural Rule, which has always excluded forest road runoff from the NPDES program, and has the potential to create a tremendous burden on both the logging industry and the EPA.

REGULATORY BACKGROUND

Section 402 of the Clean Water Act establishes the NPDES permitting program, which requires a federal NPDES permit for the discharge of pollutants from any point source into waters of the United States.[2] The CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[3] The term specifically excludes agricultural storm water discharges and return flows from irrigated agriculture. Discharges from non-point sources do not require an NPDES permit, and regulation is left to the states.

The EPA has established regulations implementing the NPDES program and further distinguishing between point sources that are subject to NPDES permitting and non-point sources that are not. The EPA's Silvicultural Rule, adopted in 1976, identifies certain silvicultural point sources and non-point sources.

A silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting or log storage facilities that are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point-source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.[4]

In addition, 40 C.F.R. § 122.3 expressly excludes from the NPDES program "[a]ny introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from ... forest lands, but not discharges from ... silvicultural point sources as defined in Section 122.27."

In 1987, Congress amended the Clean Water Act to establish a two-phase protocol for regulating storm water under the NPDES program.[5] Phase I of the storm water amendments identifies five categories of storm water discharges that require an NPDES permit, including "a discharge associated with industrial activity."[6] Phase II requires the EPA to issue regulations designating certain other storm water discharges not covered in phase I that require an NPDES permit or that are regulated under another comprehensive program.[7]

REUTERS/Mike Blake

A truck carries logs along a highway near Eugene, Ore. The Supreme Court will review a 9th Circuit ruling that runoff from logging roads when conveyed in ditches and culverts is subject to the EPA's phase I storm water regulations.

The EPA's storm water regulations implementing phase I define "storm water discharge associated with industrial activity" as "the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under part 122."[8]

In its phase II rulemaking, the EPA identified only two additional categories of storm water that are subject to NPDES permits: small municipal storm sewer systems and certain construction sites.

The EPA does not require an NPDES permit for storm water runoff from logging roads, whether or not the runoff is collected and conveyed in ditches, pipes, channels or drains. Its rationale is that runoff from forest roads, although sometimes channeled, is non-point-source in nature because it is "caused solely by natural processes, including precipitation and drainage, [is] not otherwise traceable to any single identifiable source, and [is] best treated by non-point source controls."[9]

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The EPA has traditionally relied on the examples of point sources and non-point sources set forth in its Silvicultural Rule, and it has consistently declined to categorize runoff from logging roads as a storm water discharge directly relating to an industrial plant under the phase I storm water regulations. Runoff from logging roads is typically regulated by the states pursuant to state-established best management practices.

THE NEDC CASE

The Northwest Environmental Defense Center brought a citizen suit alleging that the defendants violated the Clean Water Act by discharging into forest streams and rivers polluted precipitation runoff from ditches, channels, culverts and pipes along a number of Oregon logging roads without an NPDES permit.[10]

The NEDC argued that ditches, culverts and so forth clearly meet the statutory definition of "point source" and that the Silvicultural Rule cannot exclude from regulation under the NPDES program discharges from such conveyances. The plaintiff further argued that storm water discharges from logging roads meet the regulatory definition of "storm water discharge associated with industrial activity" under the EPA's phase I regulations.

The defendants, however, contended that the Silvicultural Rule resolves an ambiguity in the statutory definition of point source and clearly excludes from NPDES permitting requirements as a non-point source storm water runoff from logging roads, whether or not the storm water is conveyed in ditches, culverts or channels.

Furthermore, the defendants argued that storm water runoff from logging roads is not associated with an industrial activity unless the roads are at or within an industrial facility and that the EPA's phase I regulations specifically exclude runoff from silvicultural non-point sources. The EPA's interpretation of its Silvicultural Rule and phase I regulations, the defendants argued, is entitled to deference.

Finally, the defendants pointed out that the NEDC may not challenge the validity of an EPA regulation more than 120 days after the promulgation of such regulation and that the current challenge to the Silvicultural Rule and phase I regulations comes decades too late.

The U.S. District Court for the District of Oregon dismissed the case for failure to state a claim, reasoning that the runoff collection systems at issue were not point sources and that the Silvicultural Rule excludes from the NPDES permitting requirements logging road runoff.

The 9th Circuit, however, agreed with the plaintiff on appeal. The court held that:

- Storm water that may otherwise be a non-point source under the Silvicultural Rule if allowed to run off "naturally" is a point source discharge if it is "collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyance."[11]
- Logging is an industrial activity; thus storm water discharges associated with such activity are subject to NPDES permitting requirements under the EPA's phase I regulations.[12]

The court determined that the Silvicultural Rule is amenable to two possible readings. Under the first reading, which the court noted was the EPA's intended reading, the rule "exempts all natural runoff from silvicultural activities such as nursery operations, site preparation, and the other listed activities from the definition of point source, irrespective of whether, and the manner in which, the runoff is collected, channeled, and discharged into protected water."[13]

Under the second reading, which was not the EPA's intent, the rule "exempts natural runoff from silvicultural activities such as those listed, but only as long as the natural runoff remains natural. That is, the exemption ceases to exist as soon as the natural runoff is channeled and controlled in some systematic way through a discernible, confined and discrete conveyance and discharged into the waters of the United States."[14]

The 9th Circuit held that the first reading is inconsistent with the Clean Water Act and thus adopted the second. Because the court framed its decision as a resolution of an ambiguity in the regulation, it determined that the 120-day time limit to challenge the Silvicultural Rule was inapplicable.

The court also determined that storm water runoff associated with logging activity is subject to the phase I regulations because logging falls within one of the standard industrial classifications considered to be engaged in industrial activity pursuant to 40 C.F.R. § 122.26(b)(14)(ii). The court read the phase I regulations broadly to apply to storm water runoff from industrial facilities, which it held can encompass much more than a traditional plant, as well as any access road primarily dedicated for use by a facility.[15]

Perhaps the most interesting aspect of the 9th Circuit's holding is the court's refusal to give deference to the EPA's interpretation of the Clean Water Act and of its own regulations. In *Chevron U.S.A. v. Natural Resource Defense Council*, the U.S. Supreme Court held that where Congress delegates to an agency authority to implement a statute through rulemaking, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[16] *Chevron* deference has become a well-settled tenet of administrative law. In addition, the court has held that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation."[17]

In *NEDC*, however, the 9th Circuit recognized that the EPA intended to exempt from the definition of point source all runoff from silvicultural activities, yet it interpreted the Silvicultural Rule to exempt only natural runoff that is not collect or conveyed via a ditch, culvert, channel or pipe. The decision seems to be a departure from precedent and it creates a split among the circuits. The deference issue will surely play a significant role in the Supreme Court's analysis on review.

> The 9th Circuit's holding calls into question EPA's long-standing Silvicultural Rule, which has always excluded from the NPDES program forest road runoff, and has the potential to create a tremendous burden on both the logging industry and EPA.

POTENTIAL EFFECTS OF THE 9TH CIRCUIT'S HOLDING

If the 9th Circuit's decision is allowed to stand, many have predicted that it would have serious economic, regulatory and, potentially, environmental effects. Most state programs implementing best management

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practices for storm water control require or encourage the use of ditches, culverts, pipes and channels to direct rainwater away from logging roads. Under the interpretation in *NEDC*, every one of those ditches, culverts, pipes and channels that discharges to a stream or river will require an NPDES permit. The U.S. Forest Service has predicted that it alone would be required to obtain up to 400,000 permits to cover the roads on forestland under its jurisdiction. Taken together with the millions of acres of state and privately owned forestland affected by the ruling, the number of NPDES permit applications will necessarily increase exponentially.

The added cost of permitting and compliance could be significant for landowners and loggers, and the process is often slow and burdensome for the applicant. Oregon counties affected by the ruling estimated that it would cost upward of $56 million to develop and obtain permits for more than 20,000 culverts located on their properties.

Newly issued permits are quite often challenged, and litigation costs further add to the adverse economic impact. Invariably, some of increased cost to the logging industry resulting from the *NEDC* decision will be passed along to the general public by way of an increase in the cost of wood products and a potential workforce reduction in the industry.

Landowners, loggers and the public are not the only parties adversely affected by the increase in the required number of NPDES permits. The EPA will have to process and issue all the new permits, monitor compliance and process renewals for each every five years. The EPA already has a substantial backlog of NPDES permits and renewals, and the additional workload could be overwhelming. The *NEDC* defendants and their supporters raised some of these practical repercussions in their briefs, but the 9th Circuit responded in its opinion that Congress intentionally passed a "tough law."[18]

Many, including the EPA, believe that the NPDES program is ill-suited to regulate storm water runoff from logging roads. Compliance with effluent requirements in this context will be inherently difficult, whereas state-established best management practices have been reasonably effective. There may also be an incentive to avoid collecting storm water in ditches, culverts, channels and pipes, even if that is the most suitable solution to control runoff, because the *NEDC* court's interpretation of the Silvicultural Rule would require an NPDES permit for such a system. Less effective measures may become favored to avoid permitting requirements, which could potentially result in increased sediments being deposited into navigable waters.

REACTION TO THE *NEDC* DECISION

The 9th Circuit's ruling in *NEDC* incited a flurry of activity within both the governmental and private sectors that was aimed at reversing the court's decision. First, Congress immediately introduced bills in the House and Senate to codify the Silvicultural Rule.[19] The bills have not passed, but Congress issued a moratorium on the implementation of the interpretation in *NEDC* until Sept. 30, 2012.[20] The bipartisan push for legislation continues.

The EPA also joined the fray by publishing notice of a proposed revision to its phase I regulations to specify that storm water discharges from logging roads are not "associated with industrial activity" and do not require an NPDES permit.[21] The rule would provide that the only activities within the logging standard industrial classification noted in the phase I regulations that are industrial are rock crushing, gravel washing, log sorting and log storage — the same activities that are deemed silvicultural point sources under the Silvicultural Rule.

The EPA states in the notice and on its website that it never intended to regulate logging roads as industrial facilities and that it hopes to clarify its intent through the rulemaking effort. The agency also said storm water discharges from forest roads should be evaluated under its more flexible phase II storm water regulations. Comments to the notice of proposed rulemaking were due Oct. 4, 2012.

Finally, a number of interested parties, including the U.S. government, have filed *amicus* briefs with the Supreme Court. So far, 28 briefs have been filed, many of them closely tracking the arguments made in the petitioners' brief on the merits. The interest and active involvement of a wide variety of private, state and federal entities underscore the importance of the Supreme Court's upcoming decision in the *NEDC* case.

CONCLUSION

After more than 35 years, the EPA's Silvicultural Rule may no longer exclude from the NPDES program storm water discharges from logging roads where water is collected or conveyed in ditches, culverts, channels or pipes. The 9th Circuit believes the Clean Water Act is just a "tough law" and that Congress intended to impose NPDES permitting requirements for most activities resulting in a discharge of pollutants into navigable waters.

Many of those affected by the ruling, however, might argue that the *NEDC* decision was a tough break from settled precedent that could have severe and lasting effects on federal, state and private parties. The Supreme Court will weigh in very soon. WJ

NOTES

[1] The Supreme Court granted the petition for a writ of *certiorari* June 25 and consolidated two cases: *Georgia-Pacific West v. Northwest Environmental Defense Center,* which addressed NEDC's claims against private-party defendants, and *Decker v. Northwest Environmental Defense Center,* which addressed NEDC's claims against state defendants.

[2] 33 U.S.C. § 1342; *see also* 40 C.F.R. § 122.1(b).

[3] 33 U.S.C. § 1362(14).

[4] 40 C.F.R. § 122.27(b).

[5] 33 U.S.C. § 1342(p). Prior to adoption of the storm water amendments to the CWA, storm water was not treated differently from other discharges. Discharges from point sources required an NPDES permit, and discharges from non-point sources did not.

[6] *Id.* at § 1342(p)(2).

[7] *Id.* at § 1342(p)(6).

[8] 40 C.F.R. § 122.26(b)(14).

[9] 55 Fed. Reg. 20521, 20522 (May 17, 1990).

[10] *Nw. Envtl. Def. Ctr. v. Brown,* 640 F.3d 1063, 1066-67 (9th Cir. 2011).

[11] *Id.* at 1071.

[12] *Id.* at 1083-84.

[13] *Id.* at 1080.

[14] *Id.* (internal quotations omitted).

[15] *Id.* at 1084.

[16] *Chevron U.S.A. Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 844 (1984).

[17] *Auer v. Robbins,* 519 U.S. 452, 461 (1997).

[18] 640 F.3d at 1086.

[19] *See* S. 1369; H.R. 2541.

[20] Consolidated Appropriations Act, 2012, 125 Stat. 1046-1047, Pub. L. 112-74 (Dec. 23, 2011).

[21] 77 Fed. Reg. 53834 (Sept. 4, 2012).

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