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Supreme Court to Review Two Ninth Circuit Decisions Involving Whether Certain Releases of Stormwater Are Regulable Under the Clean Water Act

On June 25, 2012, the U.S. Supreme Court agreed to review two decisions from the U.S. Court of Appeals for the Ninth Circuit involving whether certain releases can be regulated under the Clean Water Act (CWA) because they constitute "addition" of pollutants from a "point source."

Stormwater Liability for Contaminated Runoff Flowing Through Municipal Stormwater Systems

In *Los Angeles Cty. Flood Control Dist. v. NRDC,* the U.S. Supreme Court granted certiorari to review a Ninth Circuit decision holding the Los Angeles County Flood Control District ("District") liable under the CWA for contaminated runoff that its storm drains channel into the Los Angeles and San Gabriel rivers and eventually the Pacific Ocean. The question presented for review is whether there is a "discharge" for purposes of the CWA when water flows from one portion of a jurisdictional river, through a concrete channel constructed for flood and stormwater control as part of a municipal separate storm sewer system ("MS4"), into a lower portion of the same river.

Natural Resources Defense Council (NRDC) alleged that the District was discharging polluted urban stormwater runoff collected by the District's MS4s into navigable waters of Southern California in violation of a National Pollutant Discharge Elimination System (NPDES) permit that covered 86 MS4s operated by 84 cities, the County of Los Angeles and the District. Although the District agreed that the level of pollutants in the rivers exceeded water quality standards, the District contended water passing through its MS4s did not constitute a "discharge" within the meaning of the CWA, so it was not liable for the runoff. The Ninth Circuit held that the District had a duty under its NPDES permit to clean up pollution in its storm drain system. The Court of Appeals concluded that water flowing from one portion of a river, through concrete channels that are part of the MS4, into another portion of the same river constitutes a discharge from a point source and outfall within the meaning of the CWA.

The District argued that the Ninth Circuit decision wrongly imposed liability under the CWA for a "discharge" of pollutants within a single body of water in direct contravention of the Supreme Court's decision in *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, which held that a mere transfer of water between two points of a single body of water cannot constitute the "addition" of pollutants for purposes of the CWA. The District also contended that the Ninth Circuit incorrectly held that only "naturally occurring" waters may be navigable waters of the United States, and that man-made improvements somehow transform the status of a "navigable water" under the CWA, but the Court declined to consider that issue.

The Supreme Court has limited its review to the issue of whether water flowing from one portion of a river through a man-made channel into another portion of the same river constitutes a discharge subject to CWA permitting requirements. The decision is likely to have implications for any entity that undertakes flood and/or stormwater control and could result in increased NPDES permitting requirements for operations involving transfers through engineered structures between two points on the same waterbody.

Requiring NPDES Permits for Channelized Logging Road Runoff

The U.S. Supreme Court also agreed to review two consolidated cases, *Decker v. Northwest Envtl. Defense Center* and *Georgia-Pacific West Inc. v. Northwest Envtl. Defense Center*, to review another Ninth Circuit decision requiring regulators to treat logging roads as "point sources" of pollution under the Clean Water Act whenever stormwater runoff from the roads is channeled. It has been the longstanding position of the Environmental Protection Agency (EPA) that channeled runoff from forest roads does not require a permit.

These cases were commenced under the citizen suit provisions of the Clean Water Act, alleging that Oregon officials that operated two logging roads in Oregon and various timber companies that harvest timber along the two roads violated the Clean Water Act by discharging stormwater runoff from the logging roads without appropriate permits. The U.S. District Court for the District of Oregon dismissed the case, holding that the "Silviculture Rule," as promulgated and interpreted by EPA, defines stormwater discharges from logging roads as "nonpoint sources," which are not regulated under the CWA but are instead left to state regulation. The Ninth Circuit reversed and ruled that stormwater runoff from logging roads that is ultimately discharged into waters of the United States is a "point source" discharge requiring a permit whenever it is collected in roadside ditches and culverts. The Ninth Circuit affirmed, based on its holding that stormwater discharges from forest roads are "associated with industrial activity" and must be covered by the stormwater program.

Oregon State Forester Doug Decker and the Oregon Board of Forestry filed a petition for review of the Ninth Circuit decision. Forest industry companies, including Georgia-Pacific West, Inc., filed a separate petition for review. All petitioners argued that the Ninth Circuit should have deferred to EPA's interpretation of the Clean Water Act, that precipitation runoff from forest roads is nonpoint source in nature even when it is channeled by roadside ditches and culverts. By commanding EPA to interpret the statutory phrases "point source" and "associated with industrial activity" to include discharges of channeled forest road runoff, the petitioners argue, the Court of Appeals defied Supreme Court precedent established by *Chevron U.S.A. Inc. v. NRDC*, improperly substituting its own views for those of EPA.

In addition to the issue of whether runoff from forest roads is subject to NPDES permit requirements, the Decker petition argues that the Ninth Circuit erred when it found that it had jurisdiction to review Northwest Environmental Defense Center's challenge to the validity of EPA's silvicultural rule and stormwater rule in a citizen suit. According to the petition, whereas citizen suits may be brought to *enforce* EPA standards, other circuits have held that suits to *invalidate* EPA's rules must be brought exclusively under 33 U.S.C. § 1369. Thus, the Decker petition argues that the Ninth Circuit decision has created a circuit split on the issue of whether a citizen suit can be used to invalidate EPA standards.

The Supreme Court agreed to review the Ninth Circuit opinion to determine: (1) whether the Court of Appeals erred in allowing a citizen suit to challenge the validity of EPA's NPDES permitting program; and (2) whether the Court of Appeals should have deferred to EPA's longstanding position that channeled runoff from forest roads is not a "point source" and does not require an NPDES permit. Given the prospect of ruling on the role of citizen suits under the CWA and the importance of the distinction between point sources and nonpoint sources as a demarcation between federal and state authority, this case is likely to have significant implications for entities regulated under the Clean Water Act.

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