

High Court Seeks US Input In Logging Runoff Permit Row

By **Greg Ryan**

Law360, New York (December 12, 2011, 2:08 PM ET) -- The U.S. Supreme Court asked the federal government Monday for its take on challenges to a Ninth Circuit ruling that stormwater runoff from logging roads required an environmental permit under the Clean Water Act.

The high court is considering whether to review the Ninth Circuit's rejection of a U.S. Environmental Protection Agency rule allowing states to regulate stormwater runoff from silviculture — the growing and harvesting of trees — through best management practices rather than via National Pollutant Discharge Elimination System permits.

The Northwest Environmental Defense Center sued the Oregon Board of Forestry and several lumber companies in federal court in September 2006 over stormwater discharges from two roads in Tillamook State Forest.

The district court dismissed the suit in March 2007, but the Ninth Circuit overturned the decision in August 2010, ruling that the runoff needs a NPDES permit because it qualifies as a point source discharge and that it is subject to the CWA because it is associated with industrial activity.

The forestry agency and timber industry groups filed petitions for certiorari with the court in September, asking the justices to consider whether the Ninth Circuit's decision was a mistake in light of the EPA's determination that the runoff was not subject to the CWA.

Timothy S. Bishop of Mayer Brown LLP, an attorney for the industry groups, said Monday he saw the court's request for a brief from U.S. Solicitor General Donald B. Verrilli Jr. as a positive development for his clients.

"I wouldn't expect the U.S. would deviate from the view the EPA has consistently taken over the past 35 years, through both Democratic and Republican administrations," Bishop said.

But an attorney for the NEDC, Paul A. Kampmeier of the Washington Forest Law Center, said the government had shifted its position over the course of the litigation. The government told the district court the suit should be dismissed because the runoff at issue did not violate the CWA, and argued before the Ninth Circuit that the group could not challenge the rule through a citizen suit, Kampmeier said.

However, in a later brief before the Ninth Circuit, filed in February, the government allowed that a citizen suit challenging the rule could be brought under certain circumstances.

“It will be interesting to see how the solicitor general is going to respond given the varying positions the government has taken throughout the case,” Kampmeier said.

Kampmeier said he hoped the Supreme Court's request for government input discouraged lawmakers from including riders in appropriations bills that exempted the timber industry from CWA provisions.

In their petitions for certiorari, the Oregon forestry agency and the industry groups argued that the Ninth Circuit had failed to consider the EPA or Congress' intent and neglected to follow Supreme Court precedent requiring courts to defer to an agency's interpretation of a statute.

A coalition of 26 states filed an amicus brief in October arguing the appeals court mistakenly concluded that the runoff qualified as a point source discharge and that logging constituted an industrial activity instead of an agricultural one. The CWA specifically exempts agricultural stormwater discharges from NPDES permitting requirements, according to the attorneys general.

Kampmeier said Monday that the runoff harmed water quality and aquatic life.

“Every other American industry has to get permits for stormwater; there's no reason the timber industry shouldn't, either,” he said.

The industry groups are represented by Per A. Ramfjord, Leonard J. Feldman and Jason T. Morgan of Stoel Rives LLP and Timothy S. Bishop, Richard Bulger and Chad Clamage of Mayer Brown LLP.

The Northwest Environmental Defense Center is represented by Paul A. Kampmeier of the Washington Forest Law Center and Christopher Winter of Cascade Resources Advocacy Group.

The cases are Decker et al. v. Northwest Environmental Defense Center, case number 11-338, and Georgia-Pacific West et al. v. Northwest Environmental Defense Center, case number 11-347, in the U.S. Supreme Court.

--Additional reporting by Bibeka Shrestha, Erin Fuchs and Allison Grande. Editing by Cara Salvatore.