

High Court Lets SG Join Logging Runoff Permit Arguments

By **Sean McLernon**

Law360, New York (November 13, 2012, 2:30 PM ET) -- The U.S. Supreme Court on Tuesday granted the U.S. solicitor general permission to present oral arguments in an appeal of a Ninth Circuit decision finding that stormwater runoff from logging roads requires an environmental permit under the Clean Water Act.

The nation's high court approved a motion for leave to participate in oral argument as amicus curiae and for divided argument from the solicitor general's office, which has said it believes the Ninth Circuit made a mistake when it rejected a U.S. Environmental Protection Agency rule allowing states to regulate stormwater runoff from the growing and harvesting of trees through best management practices rather than via National Pollutant Discharge Elimination System permits.

The solicitor general had previously urged the Supreme Court to decline to hear the appeal, saying that the issue could be addressed through other means. After the court decided to take up the case, which has been consolidated from two similar suits, the solicitor general's office asked to weigh in during oral arguments scheduled for one hour on Dec. 3.

Attorney Timothy S. Bishop of Mayer Brown LLP, who represents the logging industry groups appealing the Ninth Circuit ruling, told Law360 on Tuesday that the petitioners are pleased that the U.S. has decided to participate on their side.

"They agree with the petitioners that logging road runoff is not subject to Clean Water Act permitting under the current regime and hasn't been for the last 35 years," Bishop said. "We are happy that they plan to defend the agency's conclusion at oral argument and we are happy to give them 10 minutes of our time."

Congress has temporarily barred the EPA from implementing the Ninth Circuit decision, and the EPA announced plans to amend the regulation making it clear that stormwater discharges do not require NPDES permits, according to the U.S. Department of Justice.

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 sided with the NEDC in August 2010 by ruling that the runoff qualified as a point source discharge and needed an NPDES permit, and that it was subject to the CWA because it was associated with industrial activity.

The forestry agency and timber industry groups filed petitions for certiorari with the court in September 2011, 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. The high court granted the petition in June.

The NEDC argued in a brief last month that the CWA generally requires NPDES permits for all discharges from point sources, including "any pipe, ditch or channel." The silviculture rule provides no exception because it only covers nonpoint sources and natural runoff, and the stormwater rule mandates that permits are required for discharges "associated with industrial activity," which must include logging, according to the NEDC.

Disputing the applicability of "industrial activity" in this case, the industry groups argued in their brief filed in August that the EPA has excluded forest road runoff from that definition because stormwater runoff from logging roads are not directly related to manufacturing, processing or raw materials storage at an industrial plant.

Even without the presence of a mill or factory, industrial activity can still be taking place, the NEDC said in its brief. One of the petitioners, Georgia-Pacific West Inc., states on its website that it operates within the "forest products industry," according to the NEDC brief. Additionally, the EPA has recognized that the term "industrial" covers other types of field work, including mining and construction activities and landfill operations, the NEDC brief said.

Counsel for the NEDC were not immediately available for comment Tuesday.

Justice Stephen Breyer, whose brother U.S. District Judge Charles Breyer was sitting on the Ninth Circuit panel when the appeals court ruled on the case, did not take part in the consideration of the motion, the high court said.

The industry groups are represented by Timothy S. Bishop, Richard Bulger, Chad Clamage, Michael B. Kimberly and Jeffrey W. Sarles of Mayer Brown LLP as well as Per A. Ramfjord, Leonard J. Feldman and Jason T. Morgan of Stoel Rives LLP.

The Northwest Environmental Defense Center is represented by Jeffrey L. Fisher, Pamela S. Karlan and Deborah A. Sivas of Stanford Law School Supreme Court Litigation Clinic, 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 Inc. et al. v. Northwest Environmental Defense Center, case number 11-347; both in the U.S. Supreme Court.

--Editing by Katherine Rautenberg.