

Ninth Circuit Ruling is Cause For Concern

By John R. Barnwell

Senate Western Caucus Chairman John Barrasso (R-WY) was one of the first to denounce the Environmental Protection Agency and the Army Corps of Engineers, Guidance Regarding Identification of Waters Protected by the Clean Water Act, released on May 2, 2011. Senator Barrasso complained that the revised interpretation of the Clean Water Act was an unwarranted expansion of the regulatory power scope afforded to the EPA and Army Corps of Engineers and infringed on private property rights.

The new guidance document relies on the judgment of agency personnel when determining what constitutes a “water of the United States” and will extend the Clean Water Act jurisdiction. Therefore, the concerns about the impacts private property entitlements are warranted, but the new definition did not remove the Section 404 (f) permitting exemptions provided to agriculture, forests, and ranching in the Clean Water Act and provides some relief for those involved in forest management activities who worried that the new definition would amend Section 404.

However, the application of the Clean Water Act on land management still merits close attention by forest landowners and forest management professionals across the country. In a recent announcement the Ninth Circuit Court of Appeals declined to reconsider an August, 2010, ruling by three judges on U.S. Federal Court Ninth Circuit Court of Appeals, Northwest Environmental Defense Center vs. Brown (NEDC v. Brown), “*en banc*”, with the full panel of Ninth Circuit Court Judges hearing arguments of both parties. The forest roads decision garnered less publicity and attention than the “definition of waters of the United States” draft guidance but threatens to impose fundamental shift in the regulation of forest lands and management activities.

In its ruling, the Ninth Circuit overturned a ruling by the U.S. District Court in Oregon which affirmed that under Section 404 (f) of the CWA, forest management activities including construction and maintenance of forest roads are “nonpoint” sources of pollution that do not require a National Pollution Discharge Elimination System (NPDES) permit. The Ninth Circuit disagreed stating that the logging roads and drainage systems (ditches, culverts, water holding areas, etc.) are subject to the NPDES permitting system and determined that forest roads and the stormwater runoff collection systems associated with the roads in the Tillamook State Forest were “point sources” of pollution. The decision also placed logging roads within the EPA definition of “industrial activities” making permitting of logging roads mandatory under Phase I of the EPA Stormwater NPDES Program and disregarded the prior omission of forest management activities in the “industrial activities” definition

By jettisoning a law that has been in place for 35 years, the Ninth Circuit ruling ignores the contributions of forest lands in improving water quality on watersheds across the country, discounts the progress and technological advances made in the construction and maintenance of forest roads, disregards the important work of responsible forest management professionals, and dismisses the popularity and success of the voluntary Best Management Practices programs.

The EPA must now develop a new regulatory policy that complies with the Court’s ruling, and the new permitting documents and procedures will create regulatory and administrative obstacles

that will hinder forest management operations on public and private lands. The United States Forest Service alone reports over 400,000 miles of logging roads and debate about regulation of silvicultural activities being defined as “industrial activities” will inevitably lead to discussions about what constitutes a logging road under the new standards. Further, states charged with permitting EPA NPDES Stormwater Permit Program already are overwhelmed with a backlog in issuance of NPDES permits and adoption of state water quality standards could result in the development of unattainable water quality standards based on numeric wasteload allocations by state and federal agencies unfamiliar with forest watersheds (Ice, 9).

The SAF policy team at the national office is following this issue closely. SAF is working with the National Alliance of Forest Owners and other interest organizations to encourage Congress to explore legislative options to solve the regulatory headaches that the ruling by the Ninth Circuit threatens to create. The SAF team will offer the scientific expertise of the SAF members to the EPA as they weigh how to interpret and apply the ruling of the Ninth Circuit nationwide and determine a prospective time line for implementation. SAF members are encouraged to contact members of Congress to discuss how the additional regulations would negatively impact forest management activities and the industry and discuss the benefits of Best Management Practices and the growth and success of the BMP program over the last 35 years.

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Reference

Ice, G. 2011. Forest roads: An update on legal and technical issues. Paper presented at OR/WA 2011 BLM Engineering Workshop, March 28-April 1, 2011, Ashland, OR. Available on-file at NCASI West Coast Regional Center, Corvallis, OR.