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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Swimming Upstream: 9th Circuit CWA Cases Heading To SCOTUS

Law360, New York (August 17, 2012, 1:44 PM ET) -- The U.S. Supreme Court has agreed to review two U.S. Ninth Circuit Court of Appeals Clean Water Act (CWA) cases. Both cases involve the extent to which certain releases are properly categorized as point source discharges and must accordingly be regulated by the National Pollutant Discharge Elimination System (NPDES) permits under the CWA.

Is the Conveyance of Water from One Part of a River to Another Properly Defined as "Discharge" Under the Clean Water Act?

In Los Angeles Cty. Flood Control Dist. v. National Resources Defense Council (NRDC), the Supreme Court agreed to decide whether the Los Angeles County Flood Control District was liable under the CWA for excessive pollution discharges into two California rivers.

The question presented for review is whether there is "discharge" under the meaning of the CWA when water from one portion of a river flows through a municipal separate storm sewer system (MS4) into a lower portion of the same river.

The county argued that it could not be held liable for what was essentially a transfer of water between two points of the same water body.[1] The Ninth Circuit, however, found that the man-made MS4 system was distinct from the two navigable rivers, and that the discharge from a point source occurred when the polluted stormwater flowed out of the concrete man-made channels and back into the navigable waterways.

Because the district controlled the MS4 system — a point source of pollution — the court held that the district was discharging pollutants into the navigable portions of the Los Angeles and San Gabriel Rivers and was thus in violation of the CWA.

Are NDPES Permits Required for Stormwater Runoff from Logging Roads?

The Supreme Court also granted certiorari to review two consolidated cases, Decker v. Northwest Envtl. Defense Center and Georgia-Pacific West Inc. v. Northwest Envtl. Defense Center, where the Ninth Circuit determined that stormwater runoff from logging roads requires an NPDES permit under the CWA.

Oregon officials had argued that the runoff at issue was subject to the U.S. Environmental Protection Agency's "silviculture rule," which exempts natural runoff from silvicultural activities from the CWA's definition of point source.

Nonpoint source runoff is exempt from CWA permitting requirements and is left instead to state regulation. The Ninth Circuit rejected this argument and held that logging roads are point sources that must be regulated by NPDES permits.

Because the logging activities at issue collect stormwater runoff through a system of ditches, culverts and channels, which is then discharged into nearby streams and rivers, the Ninth Circuit held that this type of runoff falls under the CWA's definition of a point source ("any discernible, confined and discrete conveyance") and is thus not exempt by the silvicultural rule.

The court of appeals further reasoned that because stormwater discharges from forest roads are "associated with industrial activity," they must be covered by the CWA.[2]

The Supreme Court agreed to review the question of whether the Ninth Circuit should have deferred to the EPA's position that channeled runoff from forest roads is not a "point source" and does not require an NPDES permit.

Supreme Court Review

It is notable that the Supreme Court granted review of both cases despite opposition by the U.S. Department of Justice. The solicitor general recommended that the court not take the Los Angeles County case, arguing that the decision should remain intact because it did not reach any "sweeping legal conclusions" about the CWA.

Solicitor General Donald Verrilli specifically noted that the Ninth Circuit's decision was based upon a factual issue, and that the case did not represent a legal error that would affect future cases.

The DOJ similarly urged the Supreme Court to decline intervening in Decker because the EPA has already taken steps to address the case by announcing plans to amend the regulation to make it clear that stormwater discharges do not require NPDES permits.

Regardless of which way the Supreme Court decides, the holdings in both cases will have a major impact on the scope of the EPA's permitting authority under the Clean Water Act, which will in turn have significant implications for regulated entities.

--By S. Keith Garner and Maggie Brennan, Sheppard Mullin Richter & Hampton LLP

Keith Garner is a partner in Sheppard Mullin's San Francisco office. Maggie Brennan is a summer associate with the firm.

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[1] The Supreme Court's 2004 decision in South Florida Water Management Dist. v. Miccosukee Tribe of Indians held that a transfer of water between two points of the same body of water is not an "addition" of pollutants under the Clean Water Act.

[2] The court noted that while Congress exempted many stormwater discharges from NPDES permitting requirements in the 1987 amendments to the CWA, discharges "associated with industrial activities" were not exempt (citing 33 U.S.C. § 1362(14)).

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