

December 3, 2012

EPA's New Final Rule on Logging Roads: Not So Final?

On November 30, 2012, the Environmental Protection Agency (EPA) issued its final rule revising the Phase I stormwater regulations under the Clean Water Act to clarify that stormwater discharges from logging roads do not constitute stormwater discharges associated with industrial activity and that such discharges do not require a National Pollutant Discharge Elimination System permit. The final rule can be found at: http://www.epa.gov/npdes/pubs/sw_forestroad_prepub11302012.pdf.

The EPA's rule responds to a Ninth Circuit Court of Appeals decision from 2010, *NEDC v. Brown*, that is currently on appeal to the Supreme Court, and for which oral arguments were held today. A link to the transcript of today's oral arguments can be found at: http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-338.pdf.

At issue is whether logging road construction and use is "industrial activity" for which a permit would be required. The Ninth Circuit determined that, according to the Clean Water Act and the EPA's previous rule, construction and use of commercial logging roads constitute industrial activity for which a permit is required. The EPA has revised the rule so that activities related to rock crushing, gravel washing, log sorting, and log storage facilities are the only silvicultural activities qualifying as industrial activity for which a permit is required.

The EPA's revised rule, issued before the Supreme Court has decided *NEDC v. Brown*, adds uncertainty to the application of the Clean Water Act to logging roads. Confusion could remain even after the Supreme Court issues a decision, and could depend on whether the Supreme Court takes the EPA's revised rule into account when making its determination. The Supreme Court's decision was expected by June of 2013, but the new rule now calls into question whether it will decide the issue at all.



If you have any questions about this Legal Alert, please feel free to contact the attorneys listed below or the Sutherland attorney with whom you regularly work.

[Victor P. Haley](mailto:victor.haley@sutherland.com)

404.853.8302

victor.haley@sutherland.com

[David F. Reid](mailto:david.reid@sutherland.com)

404.853.8203

david.reid@sutherland.com

[Kevin A. Thomas](mailto:kevin.thomas@sutherland.com)

404.853.8208

kevin.thomas@sutherland.com