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CLIENT ALERT

Crowell & Moring Files *Amicus* Brief In Support of Cert Petitions Seeking Review of the Ninth Circuit's Ruling on Clean Water Act Permitting for Forest Roads

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On October 17, 2011, Crowell & Moring filed an *amicus* brief on behalf of the National Alliance of Forest Owners, the American Farm Bureau Federation, and eleven other state and national trade associations all representing forest landowners (together, "*Amici*") in support of two petitions for writs of certiorari seeking review of the U.S. Court of Appeals for the Ninth Circuit's ruling in *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (2011), that storm water runoff from forest roads is subject to permitting under Clean Water Act section 402, 33 U.S.C. § 1342. The Ninth Circuit rejected the longstanding position of the U.S. Environmental Protection Agency ("EPA") that section 402 permits were not required for such runoff under the Agency's 1976 Silvicultural Rule – a position that EPA reaffirmed in its 1990 stormwater regulations implementing the 1987 amendments to the statute. (For a more detailed discussion of the Ninth Circuit's decision, click here).

Two separate cert petitions were filed in September 2011 seeking review of this controversial decision. The first was filed by the Oregon State Forester and members of the Oregon Board of Forestry, in their official capacities, and has been docketed as *Decker v. Northwest Environmental Defense Center*, No. 11-338. The second was filed by a group of private entities and Tillamook County, Oregon, and has been docketed as *Georgia-Pacific West, Inc. v. Northwest Environmental Defense Center*, No. 11-347. The brief of *Amici* in support of these petitions focused on the Ninth Circuit's extraordinary jurisdictional analysis.

Generally, challenges to Clean Water Act rulemakings – such as the 1976 Silvicultural Rule -- must be filed in a federal court of appeals within 120 days of promulgation unless they are based solely on grounds that arose after the 120-day window. 33 U.S.C. § 1369. Challenges that *could have* been brought in this manner cannot later be attacked through enforcement proceedings such as citizen suits. Interestingly, when the Ninth Circuit issued its original opinion in this case in August 2010 (617 F.3d 1176), it did not address whether it had subject matter jurisdiction. But, the Court asked for supplemental briefing on jurisdiction in connection with its consideration of petitions for rehearing. Ultimately, the Court issued a revised opinion on May 17, 2011 denying rehearing and holding that it had subject matter jurisdiction.

In order to assert subject matter jurisdiction, the Ninth Circuit turned to its holding, on the merits, that EPA's Silvicultural Rule was subject to two readings: (1) permits are not required for stormwater runoff from forest roads; or (2) permits are required for such runoff when it is channeled and discharged through systems of ditches, culverts, and channels. The Court held that there was no way for the public to know which reading EPA would adopt until the government submitted its *amicus* brief in this case in 2007, adopting the first reading, which in the Ninth Circuit's view amounted to new grounds that reopened the opportunity for judicial review and cleared the way for finding subject matter jurisdiction.

In support of the petitions for cert, *Amici* argued that the Ninth Circuit's failure to respect the statutorily prescribed means for challenging Clean Water Act rulemakings makes this a case of exceptional importance. First, *Amici* noted that the Ninth Circuit's finding of jurisdiction was based on a transformative construction that the Court forced upon EPA's Silvicultural Rule in order to make it consistent with its reading of the Clean Water Act. In particular, *Amici* emphasized that the Ninth Circuit disregarded

EPA's contemporaneous statements in the preamble to the Silvicultural Rule that put all parties on notice of EPA's interpretation that stormwater runoff, whether channeled or not, was not subject to Clean Water Act permitting. Indeed, the issue is not whether the rule appears ambiguous today, but whether an interested party *could have* mounted a challenge against EPA within 120 days of the rulemaking.

Next, *Amici* argued that the Ninth Circuit went equally far afield in holding that stormwater runoff from forest roads constitutes discharges associated with industrial activity and hence, is subject to permitting under the 1987 stormwater amendments to the Clean Water Act. *Amici* emphasized that the Ninth Circuit once again ignored EPA's contemporaneous statements in the preamble to its 1990 Phase I regulations implementing the 1987 stormwater amendments, which clarified that the Agency did not intend to require permits for stormwater runoff from forest roads. *Amici* argued that, like the Silvicultural Rule, EPA's 1990 Phase I regulations *could have* been challenged within 120 days of promulgation but was not.

Amici then noted that even if the Ninth Circuit's holding on the scope of the Silvicultural Rule somehow called into question EPA's view that stormwater runoff was not subject to permitting under its Phase I regulations (because the Phase I regulations incorporated the Silvicultural Rule by reference), the decision to rethink whether such runoff is subject to permitting under the Phase I regulations is one that Congress intended for EPA to make in the first instance. Nonetheless, the Ninth Circuit imposed its view on what constitutes discharges associated with industrial activity. In doing so, it showed no obvious deference to arguments that EPA raised in an *amicus* brief in this case that silvicultural activities did not constitute industrial activity within the meaning of the 1987 amendments.

The *Amici* highlighted that the Ninth Circuit's jurisdictional analysis flouts the limits that Congress placed on judicial review of Clean Water Act rulemakings, which is a problem capable of replication under a number of other federal statutes that contain jurisdictional provisions that are identical, in pertinent part, to the provision in the Clean Water Act (*e.g.*, the Clean Air Act, the Resource Conservation and Recovery Act, etc.). The Ninth Circuit's decision leaves rulemakings under these statutes perpetually open to judicial review, despite the limits that Congress placed on review in the statute, based on claims that the regulations are inconsistent with the governing statute and hence, somehow ambiguous. This is so even if the Agency that promulgated the regulation clearly expressed its views on the scope of the regulation in the preamble and thus, the regulation *could have* been challenged within the statutory filing window.

In addition to the *amicus* brief filed by Crowell & Moring in this case, several other *amici* filed briefs in support of the two cert petitions. Most notably, 26 states filed a joint brief supporting review of the Ninth Circuit's decision (Arkansas, Alabama, Alaska, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, New Hampshire, New Mexico, Michigan, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, Wyoming). Such broad support for the cert petitions from both public and private entities across the nation underscores that this is truly a case of exceptional importance.

To read the *Amici* brief, click here. To read the States' brief, click here.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Clifton S. Elgarten
Partner – Washington, D.C.
Phone: +1 202.624.2523

Email: celgarten@crowell.com

Kirsten L. Nathanson
Partner – Washington, D.C.
Phone: +1 202.624.2887
Email: knathanson@crowell.com

David Chung
Partner – Washington, D.C.
Phone: +1 202.624.2587
Email: dchung@crowell.com