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Farm Tile Runoff: The Next EPA Battle?

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"We conclude that storm water runoff from logging roads that is collected by and then discharged from a system of ditches, culverts and channels is a point source discharge for which an NPDES permit is required." This conclusion comes from the United States Court of Appeals for the 9th Circuit in San Francisco, California, and was handed down on May 17, 2011.

All of us with farming operations know that we have swales, waterways and roadside ditches in and around our fields, and there are certainly culverts and channels to handle water which runs off our fields into county road ditches. This case raises the question of whether our tile systems which drain millions of acres could constitute "a system of channels" which will become point source discharges and require a Clean Water Act NPDES permit.

The case handed down by the U.S. Court of Appeals in San Francisco involved an environmental plaintiff suing the Oregon Board of Forestry, private foresters and Tillamook County, Oregon.

A U.S. District Court had previously concluded that discharges of storm water or runoff from timber hauling on logging roads were exempt from the CWA permitting process by the Silvicultural Rule. This is a similar rule to the agricultural storm water exemption which protects all of our farming operations from being required to have a CWA permit for storm water runoff from our fields.

The Court was very concerned about logging roads being a major source of sediment because trucks traveling these roads grind up the dirt and dust on the surface of the road and this dirt, according to the court, is then washed by rainfall into ditches, culverts and channels that collect and convey storm water runoff for most of their length. The Court goes to great length in describing the logging roads as having ditches on either side, culverts that cross under roads and culverts that deliver storm water into rivers.

The factual aspects of the case in many ways describes exactly what counties do in every Midwestern state in creating ditches along county roads, installing culverts for the water to drain into streams and the streams into rivers.

Until this case, the timber industry believed and acted on the assumption that even though timber hauling on logging roads is a source of sediment flowing into streams from rainfall, the timber industry did not believe it needed the CWA NPDES permit for silviculture storm water runoff. The timber defendants argued that storm water runoff is non-point source water discharges.

The environmental groups argued that the storm water runoff coming from logging roads is collected in a system of ditches, culverts and channels and is then delivered into streams and rivers and is therefore a point source discharge and is subject to the CWA NPDES. The U.S. Court of Appeals agreed with the environmental groups.

The Court cited to one of its own cases in describing storm water. The court defines a non-point source as "Storm water that is not collected or channeled and then discharged but rather runs off and dissipates in a natural and unimpeded manner..." (This does not describe the tile systems which lace the Midwest.) The court goes on to observe that non-point source pollution is runoff caused primarily by rainfall around activities that employ or create pollutants. The court claims "Such runoff could not be traced to any identifiable point of discharge."

Sen. Bob Dole, R, Kans., is quoted in the case stating "Very simply a non-point source of pollution is one that does not confine its pollution discharge to one fairly specific outlet, such as a sewer pipe, a drainage ditch or a conduit; thus, a feedlot would be considered to be a non-point source as would pesticides and fertilizers." The courts have been eating away at this definition.

After reviewing regulatory and legislative history, the Court held that storm water runoff from logging roads which is collected in a system of ditches, culverts, and channels, and is then discharged into streams and rivers constitutes a point source discharge of storm water associated with an industrial activity. So the cutting of trees and hauling them on logging roads means that the loggers and the county must have a CWA NPDES permit because their collected storm water runoff becomes a point source discharge of storm water.

Based on this case, my guess is we will see either EPA or environmental groups asserting in the near future that our farm tile systems and roadside ditches and culverts are point sources under the CWA. There will be a claim that the agricultural storm water runoff exemption does not apply to our farms when we discharge storm water through our tile systems or a point source!

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Your farm tiles, ditches, may require a Clean Water Act permit.

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