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## Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 301 F. Supp. 2d 1102 (N.D. Cal. 2004)

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acknowledged that a final agency action may have occurred, it argued that the only reviewable action was a 2000 decision not to amend the regulation—not the regulation itself. Since the 2000 EPA decision marked the end of the agency's decisionmaking process, the court held that the decision qualified as a final agency action. In response to the EPA's argument, EPIC claimed it was bringing an "as applied" action; or in the alternative, that the 2000 decision not to amend the regulation opened the provision open for review, and therefore, open to challenge. The court found EPIC's "as applied" argument unpersuasive since EPIC had not been the object of any EPA enforcement proceeding, nor had EPIC directly petitioned the EPA to amend the regulation. However, the court agreed with EPIC that the 2000 action opened the regulation to challenge since the agency reconsidered the entire issue at the time and invited comments on the provision. Thus, because the final agency action occurred on July 13, 2000, and the EPIC filed its complaint on July 24, 2001, the court held that the action fell within the six-year statute of limitations.

*Kate O. Lively*

**Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 301 F. Supp. 2d 1102 (N.D. Cal. 2004)** (holding that, under the Clean Water Act, a claim alleging increased logging in a watershed created increased sediment in a creek and alleging ditch use to discharge storm water and pollutants stated a claim for which relief could be granted).

Pacific Lumber Company and Scotia Pacific Lumber Company ("Lumber Companies") owned land located in a watershed the Lumber Companies used primarily for logging. The Environmental Protection Information Center ("EPIC") brought suit in the United States District Court for the Northern District of California against the Lumber Companies, the United States Environmental Protection Agency ("EPA") Administrator, and the EPA. EPIC claimed the Lumber Companies discharged pollutants without obtaining a National Pollutant Discharge Elimination System ("NPDES") permit. EPIC asserted the Lumber Companies violated the Clean Water Act ("CWA") by logging in a watershed causing a large increase in sediment deposited into Bear Creek. The EPIC further argued the Lumber Companies were using culverts and drainage ditches to discharge pollutants and storm water, creating a point source under the CWA. The Lumber Companies filed a motion to dismiss, asserting EPIC's complaint failed to state a claim for which relief could be granted.

The first issue was whether discharging storm water via culverts and ditches constituted a point source under the CWA. The CWA prohibits discharging pollutants from a point source into the navigable waters of the United States without an NPDES permit. The CWA defines a point source as a discernable conveyance from various

sources, including ditches. Hence, accepting EPIC's allegations as true, the district court held the Lumber Companies discharged pollutants from a point source.

Next at issue was whether the CWA exempted the Lumber Companies' discharges as a storm water discharge. Although the CWA requires permits for discharges from point sources, section 402 of the CWA exempts discharges comprised entirely of storm water. The district court applied a two-part inquiry in determining whether the storm water exception applied. First, the court addressed whether the Lumber Companies' discharges were comprised entirely of storm water. In its complaint, EPIC asserted that the Lumber Companies used culverts and drainage ditches to discharge storm water and pollutants. Hence, accepting as true all allegations in the complaint, the court concluded the Lumber Companies were not exempt from NPDES permit requirements because the discharges were not comprised entirely of storm water.

Secondly, the court addressed whether the Lumber Companies' discharges were currently unregulated. In 1987, EPA passed regulations authorizing states and the EPA to continue to regulate exempt storm water discharges on a case-by-case basis. Additionally, the CWA expressly regulates point source discharges. Hence, the Lumber Companies discharges were not exempt from the NPDES permitting requirement because the CWA regulates point source discharges.

Accordingly, the court denied the Lumber Companies' motion to dismiss because the Lumber Companies discharged storm water and pollution from a point source, the discharges were not exempt as storm water because they were not comprised entirely of storm water, and the CWA regulates point source discharges.

*Heather K. Chamberlain*

**North Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs., No. 7:01-CV-36-BO(3), 2003 U.S. Dist. LEXIS 13676 (E.D.N.C. July 25, 2003)** (granting representational standing for organizations to pursue Clean Water Act citizen suit claims in federal court; holding that disputed ditches, wetlands and other waters were subject to Clean Water Act jurisdiction; that stormwater and sediment discharged into jurisdictional waters from point sources were pollutants, and therefore subject to permitting under the National Pollutant Discharge Elimination System; and reserving judgment on whether fecal coliform bacteria constituted a pollutant under the Clean Water Act).

The North Carolina Coastal Federation ("NCCF") and North Carolina Shellfish Growers Association ("NCSGA") filed a Clean Water Act ("CWA") citizen suit for violations of sections 402 and 404 of the CWA caused by ditching and excavation activities on a 1,262-acre tract