

## **Introduction Statement for the Silviculture Regulatory Consistency Act**

**Senator Ron Wyden**

July 14, 2011

Mr. President, today I am joining with my colleagues from Idaho, Senator Crapo and Senator Risch, and my colleague from Alaska, Senator Begich, to correct a regulatory problem that left uncorrected will bury private, state and tribal forest lands in a wave of litigation. If we have learned anything from the court battles that have contributed to the widespread gridlock and mismanagement of our federal forests, it is that this is not the best path to ensure our forests' future and should be considered only as a last resort. Now those battles threaten to spill over onto private forest lands.

Since the advent of the Clean Water Act, Democratic and Republican administrations have held that most silviculture activities were non-point sources for purposes of the Act and would be best regulated at the state level, under the states' individual forest practices laws. Under this rule, known as the "silviculture rule," silvicultural activities – such as nursery operations, site preparation, reforestation and subsequent treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance, from which there is natural runoff – were regulated through the Clean Water Act by states' best management practices.

This rule for forest roads has now been explicitly invalidated by the 9<sup>th</sup> Circuit Court of Appeals, which – in a series of two decisions – implicitly undermined the long-held "silvicultural rule," stemming from litigation over the use of forest roads in Oregon state-owned forests.

According to the 9<sup>th</sup> Circuit, stormwater runoff collected and directed by a system of ditches and culverts creates a discrete point source and therefore, must be regulated as industrial stormwater runoff. This judicial interpretation of the Clean Water Act means that every source of runoff on forest roads will now require an industrial stormwater runoff permit. Not only will new roads need to be permitted, but the hundreds of thousands of miles of existing roads in Oregon and around the country – on both public and private lands – will now need to be reviewed and issued permits.

If this one court's decision to overturn 35 years of widely-accepted, Environmental Protection Agency (EPA) policy is allowed to stand, private, state, and tribal forest owners will also likely be subjected to litigation as part of the permitting process or through lawsuits under the citizen suit provisions of the Clean Water Act. The outcome could well deny states the use of their forests which they depend on to pay for schools and services, while significantly depressing the investment required to sustain private forestry.

If this decision is allowed to stand, every use of forest roads will require permitting and will therefore be subject to challenge by citizen lawsuits. This will not only overburden landowners and managers in 9th Circuit states by adding significant compliance and permitting costs, it will create an opportunity for administrative appeal and litigation every time a permit is approved.

Initially, the court's ruling will apply solely to my region of the country, but we can expect lawyers to quickly beat a path to other federal courts and the EPA itself, seeking to extend the ruling to all other forested regions of the country, and giving an immediate and perhaps permanent competitive advantage to our foreign competitors who have far lesser environmental standards and enforcement.

The fact of the matter is that forests and forest roads – even private ones -- have multiple economic and environmental uses and users – from wildlife habitat to recreation to timber production – over decades long growing and harvesting cycles. The “silviculture rule” existed because forestry is different from other industries, even other agricultural production. This is why, in this instance, I believe the courts have gone too far in reinterpreting the law and why legislation is needed to make the long-accepted “silvicultural rule” the legal basis for Clean Water Act regulation of forestry practices.

The Clean Water Act is one of the cornerstones of environmental protection. In the past two Congresses, I co-sponsored the Clean Water Restoration Act because I believed that the U.S. Supreme Court went too far in reinterpreting decades of Clean Water Act law by excluding wetlands and intermittent streams that had long been protected under that law. Here too, I believe that the courts have gone too far in reinterpreting what has been a longstanding understanding of how silvicultural activities should be regulated. The 9<sup>th</sup> Circuit concluded that only Congress can authorize EPA's original reading of the law. Senators Crapo, Risch, Begich and I are introducing legislation today in response to that conclusion.

That is not to say that the persons who orchestrated this litigation were not well-intentioned in their desire to address the water quality issues that can arise from silviculture, as they can in virtually every other agricultural activity. Rather, I believe they had the best of intentions. In fact, I share their intentions. I have labored for decades and will continue to work to address the poor condition of forest roads on federal lands. I will also be the first to argue that the federal government has much to do in that regard. Efforts can also be made on state and private lands. In many instances, what is needed is simply more technical assistance and financial incentives to help landowners and managers that are seeking to do the right thing. I certainly care about keeping the pristine quality of our streams and the impacts that sediment can have on salmon and aquatic creatures. It is part of the reason why I have championed wilderness and wild and scenic river legislation to protect Oregon's special places, including its beautiful waterways.

But I can't agree with their decision to first fight this out in court. Their litigation tries to impose an outcome on my region without ever attempting to address the concerns and needs of the thousands of people in my state who earn their living as responsible stewards of private forest land. Oregon is still struggling to come back from the economic crisis and many of our forested counties continue to suffer from double digit unemployment. Where will the 120,000 people in Oregon who make their living on private forest land go when private lands experience the same gridlock as their federal land counterparts? How will small woodlot owners in Oregon - mostly mom and pop investments - survive when subjected to federal regulation and lawsuits for the first time in our state's history? How many millions of acres of private, shareholder-owned forest land will be converted to non-agricultural purposes when companies are no longer able to

carry out needed forest management? To my knowledge, the litigants did not make a meaningful effort to address any of those challenges before initiating the lawsuit that now threatens to throw my state into a dangerous economic trajectory.

I should point out that this issue transcends partisan concerns, as evidenced by the prominent Democrats who have found common ground with Republicans on this issue. Oregon's governor, John Kitzhaber, one of the most prominent environmental champions in the nation, has consistently fought against the Northwest Environmental Defense Center ruling and continues to do so. Senator Begich, who is known for his thoughtful and balanced approach to natural resource issues, joins me as an original cosponsor. On the House side, I am joined by Democratic Congressman Kurt Schrader, who knows better than most the unintended consequences of well-intentioned, but poorly-aimed efforts at regulation.

To my friends in the environmental community who raise legitimate concerns about a range of issues surrounding this policy I encourage you to sit down with us in a dialogue, at both the federal and state levels. Bring your ideas for how we can monitor and protect water without sacrificing what remains of Oregon's forest industry. You will be heard and I stand ready to work with you. But it is not enough to simply dictate outcomes. We have to first look for solutions that avoid the epidemic of litigation and appeals that threaten the sustainability and survival of our timber industry. You are, of course, right to expect that we arrive at those solutions within a reasonable period of time.