

No. 07-35266

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Plaintiff-Appellant,

v.

MARVIN BROWN, Oregon State Forester, in his official capacity; STEPHEN HOBBS, BARBARA CRAIG, DIANE SNYDER, LARRY GIUSTINA, CHRIS HEFFERNAN, WILLIAM HUTCHINSON and JENNIFER PHILLIPI, members of the Oregon Board of Forestry, in their official capacities; HAMPTON TREE FARMS, INC.; STIMSON LUMBER CO.; GEORGIA-PACIFIC WEST LLC; and SWANSON GROUP, INC.,

Defendants-Appellees.

OREGON FOREST INDUSTRIES COUNCIL; AMERICAN FOREST AND PAPER ASSOCIATION; and TILLAMOOK COUNTY,

Intervenors-Appellees.

Appeal from the United States District Court, District of Oregon,
Case No. 06-1270-KI

**BRIEF OF AMICUS CURIAE AMERICAN FOREST RESOURCE
COUNCIL IN SUPPORT OF APPELLEES' PETITION FOR REHEARING
EN BANC TO REVERSE THE PANEL DECISION**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), appellant American Forest Resource Council states that it is an Oregon nonprofit corporation that does not issue shares to the public and has no parent corporation or subsidiaries.

DATED this 14th day of October, 2010.

Respectfully submitted,

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I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 29, American Forest Resource Council (AFRC) submits this amicus curiae brief in support of appellees' petition for rehearing *en banc*. AFRC urges the Court to reverse the three judge panel's wrongly decided opinion that logging roads are associated with industrial facilities and that stormwater runoff from logging roads channeled through ditches and culverts requires a National Pollution Discharge Elimination System (NPDES) permit. *Northwest Environmental Defense Ctr. v. Brown*, 2010 WL 3222105 (9th Cir. 2010).

II. CONSENT TO FILING AMICUS CURIAE BRIEF

Appellant takes no position on AFRC's motion to file the amicus curiae brief. Appellees do not oppose the motion to file the amicus curiae brief.

III. IDENTITY AND INTEREST OF AMICUS CURIAE

AFRC is an Oregon nonprofit corporation that represents the forest products industry throughout Oregon, Washington, Idaho, Montana, and California. AFRC represents over 80 forest product businesses and forest landowners. AFRC's mission is to create a favorable operating climate for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, policies and decisions that determine or influence access to, and management of, forest lands.

AFRC members purchase the majority of timber from federal lands managed by the U.S. Department of Agriculture, Forest Service and U.S. Department of Interior, Bureau of Land Management in the states where AFRC members are located and purchase a significant amount of timber sold by the individual states. AFRC members also enter into long-term stewardship contracts on the federal lands that include forest restoration projects such as repairing roads. AFRC members also own land adjoining federal land that can only be accessed by crossing roads on federal land subject to permits, easements, and right of way agreements. Thus, AFRC has a strong interest to ensure that federal and state agencies can promptly sell timber, repair and reconstruct roads, and provide permits for road use. An expensive and lengthy permit process imposed on federal and state agencies to obtain NPDES permits will be detrimental to AFRC members' interests in obtaining timber to run their mills and securing access to manage their lands.

AFRC wants to provide the Court with its perspective of how the decision may affect management of federal and state lands in addition to the two roads on the Tillamook State Forest that were the direct subject of the litigation. The wide ranging effect of the three-judge panel opinion is relevant to the Court of Appeals deliberation on whether to grant the motion for rehearing *en banc*. The Court's opinion will significantly increase the cost and time for the Forest Service

and the Bureau of Land Management to manage their lands, sell timber, repair roads, and reduce the risk of wildfires that threaten to burn onto AFRC members' lands causing significant reductions in water quality.

IV. ARGUMENT

This Court should grant rehearing *en banc* because the three judge panel opinion incorrectly interpreted the Clean Water Act, 33 U.S.C. §1342(p), creating conflicts within the Ninth Circuit and between other circuits as explained in detail in appellees' petitions for panel rehearing or rehearing *en banc*. Ct. App. Dkt. 88 and 89. For more than three decades, silvicultural activities, road construction, and road restoration have been exempt from NPDES permit requirements under the Environmental Protection Agency's silvicultural rule. 36 C.F.R. §122.27(b)(1). AFRC agrees with EPA's long-standing interpretation that logging that occurs over several months on a site on 20 to 30 year intervals is not an industrial facility and that runoff is best controlled by existing best management practices. 55 Fed. Reg. 47,990, 48,011 (Nov. 16, 1990). Logging on tracts of public land is even less frequent, often separated by intervals by 60 years or more.

Contrary, to the Court's *en banc* decision in *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008), the three-judge panel opinion gives no deference to EPA's interpretation of the Clean Water Act, a statute which EPA has expertise to

interpret. Under the Act, Congress delegated to EPA the authority to conduct studies to determine whether certain stormwater discharges not identified explicitly in the statute should be regulated and to develop the methods to control such discharges (Phase II). 33 U.S.C § 1342(p)(5). EPA decided through rulemaking not to include stormwater discharge from forest roads. 64 Fed. Reg. 68,722, 68,722-734 (Dec. 8, 1999). The recent *en banc* decision in *McNair*, cautioned that courts are not to impose "a requirement not found in any relevant statute or regulation" and called for particular deference to an agency determination in an area involving a "high level of technical expertise." *McNair*, 537 F.3d at 991, 993. The three-judge panel opinion ignores the teachings of *McNair*.

AFRC agrees with appellees' arguments that the three-judge panel opinion conflicts with prior Circuit law and creates conflicts with other circuits. See e.g. Ct. App. Dkt. 88, Petition for Panel Rehearing or Rehearing En Banc by Defendants-Appellees Hampton Tree Farms, Inc., et al. at 7-14. Rather than repeat those arguments in support of rehearing, as explained below AFRC wants to emphasize that rehearing is also supported because of the exceptional importance of the decision to the management of state and federal forest lands which supply timber to its members.

AFRC believes that *en banc* review of the panel decision is vital because the decision will broadly limit the federal and state land management agencies' ability to continue to sell timber, contract for road construction and restoration projects, and provide timely access to intermingled private lands that can only be reached across federal or state lands. There are over 200 million acres of federal land and millions of acres of state forest land within the Ninth Circuit. For example, in Washington, there are approximately 5.5 million acres of forestland on the national forests and 2.7 million acres of state owned forest land managed in trust by the Department of Natural Resources for Washington's counties and schools.

<http://www.wfpa.org/pdf/brochure/07%20Forest%20Facts%20And%20Figures.pdf>

In Oregon, there are approximately 12.1 million acres of forestland on the national forests, 3.8 million acres of forestland administered by the Bureau of Land Management, and 0.8 million acres of state administered forestland.

http://www.oregonforests.org/assets/uploads//OR_Facts_Figures_Web.pdf

Many of these state and federal lands are intermingled with private lands and the use of private lands are dependent upon access across these lands. See e.g., E. Richardson, BLM's Billion – Dollar Checkerboard, Managing the O & C Lands (1980).

It is unclear whether timber purchasers, road contractors, or stewardship contractors would be obligated to obtain NPDES permits and conduct the required monitoring or whether this would be the responsibility of federal or state agencies. However, regardless of who is responsible for obtaining the permit and conducting the monitoring, it would be a time-consuming and daunting task. The Forest Service has approximately 378,000 miles of roads under its jurisdiction covering 193 million acres. Exhibit 1. Under the many miles of federal wildland roads, there are thousands of stream crossings and culverts. Many of these culverts are old and damaged or are too small and need to be replaced to improve fish passage. Land Management Agencies - Restoring Fish Passage through Culverts on Forest Service and BLM Lands in Oregon and Washington Could Take Decades, GAO Rep. GAO-02-136 (Nov. 2001), <http://www.gao.gov/new.items/d02136.pdf>. For example, in Oregon and Washington alone there are over 10,000 culverts on fish bearing streams on federal lands administered by the Forest Service and Bureau of Land Management. Id. at 1. Both agencies are trying to take action to replace these culverts in conjunction with timber sales, through stewardship contracts, and direct contracts for road restoration. Having to obtain in NPDES permits would significantly delay this beneficial work. The Forest Service estimates that if it must obtain NPDES permits on a road by road basis, it would have to obtain over 400,000

permits, a process it estimates could take more than 10 years. Exhibit 1. Even if the Forest Service can obtain programmatic permits by state, it estimates it would still take several years to obtain the necessary programmatic permits. Id.

Although the Court's decision currently applies to two roads on the Tillamook State Forest, AFRC's concern that a vast acreage of federal and state lands will be drawn into this controversy is supported by recent action by environmental groups. Three days after the Court filed its opinion in this case, the Alliance for the Wild Rockies and the Selkirk Conservation Alliance filed a 60-day notice of intent to sue for violation of the Clean Water Act challenging the Lakeview- Reeder Fuels Reduction Project involving road maintenance, road construction, and road storage and decommissioning to achieve long-term sediment reduction and watershed improvement on the Idaho Panhandle National Forest in Idaho. Exhibit 2. A complaint challenging the project was filed on October 6, 2010. *Alliance for the Wild Rockies v. McNair*, No. 2 - CV-00504-EJL (D. Idaho). Two projects in California have also been challenged on the grounds that the Forest Service has not obtained an NPDES permit for the silviculture, road use, and road restoration included in these projects. The first project is the Angora project in the Lake Tahoe Basin Management Unit which was prepared in response to the Angora fire within the Wildland Urban Interface (WUI) Defense Zone, which destroyed or

damaged more than 250 structures on the South Shore of Lake Tahoe.

http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5181776.pdf. The

Angora project includes removal of dead and dying trees, relocating roads outside of streamside zones, replacement of undersized culverts, and construction,

decommissioning, and restoration of roads. Id. The second project is the Klamath

National Forest travel management plan which will prohibit off road vehicle cross-country travel in some areas and permit off-highway vehicle travel on other roads.

http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5120060.pdf. Both of

these projects have been administratively appealed and appellants have argued that

the Forest Service must obtain an NPDES permit which will delay much needed

road restoration, culvert replacement, and forest health projects that lead to improved water quality.

The potential widespread reach of the Ninth Circuit's decision to federal and state forestland will adversely affect AFRC members whether the federal and state agencies are obligated to obtain the NPDES permits and conduct monitoring or AFRC members who contract with these agencies must do so. In either case, the sale and removal of timber that is supplied from these lands will be more costly and significantly delayed. The housing and lumber markets are among

the worst in this nation's history. See generally,

<http://www.census.gov/const/www/newresconstindex.html>;

http://www.nahb.org/reference_list.aspx?sectionID=130. However, timber sold from public lands at current market prices allows AFRC members to be competitive in the depressed lumber market and some markets, such as for home improvement, are more robust. Moreover, in depressed markets private forest landowners tend to curtail the sale of their timber.¹ This increases the importance of the continuing steady supply of public timber at current market prices to help the West's milling and logging infrastructure survive. Delaying public timber sales now for several years through a costly NPDES permit process applicable to silvicultural practices and logging roads will threaten the already tenuous operations of sawmills, and of road and stewardship contractors that provide scarce jobs to support the struggling economies of rural Western communities. In order for the installed milling capacity and the skilled woods workers who support it to survive to better times, it is vital that the timber supply from public lands not be further curtailed by an NPDES

¹ For example, the Washington Department of Natural Resources, which harvests approximately the same volume of timber each year under a sustained yield statutory mandate, ordinarily is the source of approximately 15-20% of the total timber harvested annually in the State of Washington. In Fiscal Year 2010, the agency was the source of nearly 40% of the states' timber harvest (logs sold). Exhibit 3.

permit process. If this infrastructure is lost due to lack of available timber supply, it is unlikely that the investment will ever again be made in this industry and the loss of jobs will become permanent, rather than temporary or cyclical.

V. CONCLUSION

Because the three judge panel's holding that NPDES permits are required for logging roads misapprehended the law, will extend to millions of acres of federal and state forestland, and because the wood products sector of the economy is one of the hardest hit in this recession, AFRC respectfully requests that the Court grant rehearing *en banc* to reverse and review the decision to ensure that it is consistent with other intra-circuit precedents and affords the agency the deference that it deserves.

Respectfully submitted,

/s/ Scott W. Horngren

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CERTIFICATE OF SERVICE

I hereby certify that for case No. 07-35266, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF on October 14, 2010. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 14th day of October, 2010

/s/ Scott W. Horngren, OSB 880604
Attorney for Amicus Curiae

**CERTIFICATION OF COMPLIANCE PURSUANT TO
FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NUMBER 07-35266**

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1(c)(2), the attached amicus brief is less than 15 pages proportionally spaced, has a typeface of 14 points or more and contains 4,200 words or less.

DATED this 14th day of October, 2010.

/s/ Scott W. Horngren, OSB 880604
Attorney for Amicus Curiae

STATEMENT OF RELATED CASES

Counsel for Amicus Curiae is not aware of any cases currently pending before this Court with substantially similar issues to this case No. 07-35266.

DATED this 14th day of October, 2010.

/s/ Scott W. Horngren, OSB 880604
Attorney for Amicus Curiae