

Case No. 07-35266

Date of Decision: August 17, 2010

Panel: William A. Fletcher, Raymond C. Fisher, Charles R. Breyer

**IN THE 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 ASSOCATION OF OREGON COUNTIES; IDAHO ASSOCIATION OF COUNTIES; ASSOCIATION OF O & C COUNTIES; DOUGLAS COUNTY and, NATIONAL ASSOCIATION OF COUNTIES IN SUPPORT OF PANEL REHEARING OR REHEARING *EN BANC*

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1 **CORPORATE DISCLOSURE STATEMENT**

2
3 The Association of Oregon Counties is an intergovernmental agency of
4 county governments established under ORS 190 and has no subsidiary or parent
5 organizations, and has no shareholders.

6 The Idaho Association of Counties is a non-profit, non-partisan service
7 organization dedicated to the improvement of county government. It was
8 designed and incorporated under 501(c)(4) by county elected officials to provide
9 services, research, uniformity, and coordination among member counties, in
10 order for the county elected officials to serve their constituents better. The
11 Association has no subsidiary or parent organizations. Its members are the 44
12 Idaho Counties.

13 The Association of O & C Counties is an unincorporated, voluntary
14 association of the 18 counties in western Oregon that are the beneficiaries of the
15 lands managed by the Bureau of Land Management under the O & C Act of 1937
16 (43 U.S.C. §1181a *et seq*). The Association has no subsidiary or parent
17 organizations and has no shareholders.

18 Douglas County is a county government established by the State of Oregon
19 and as such has no subsidiary or parent organizations, and has no shareholders.

20 The National Association of Counties (NACo) is the national organization
21 that represents county governments in the United States. Founded in 1935,

1 NACo provides essential services to the nation's 3,068 counties. NACO
2 is a Delaware non- profit corporation and there are no subsidiary or parent
3 organizations and it has no shareholders.

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1 **I. STATEMENT OF THE CASE**

2
3 Pursuant to Fed. R. App. P. 35 and 40, Defendants-Appellees Marvin
4 Brown, Oregon State Forester, in his official capacity; Stephen Hobbs; Barbara
5 Craig; Diane Snyder; Larry Giustina; William Heffernan; William Hutchison and
6 Jennifer Phillipi (members of the Oregon Board of Forestry, in their official
7 capacities (“hereinafter collectively referenced as “State of Oregon”) have
8 petitioned for rehearing or rehearing *en banc* of the panel decision.

9 Similarly, Defendants-Appellees Hampton Tree Farms, Inc.; Stimson
10 Lumber Co.; Georgia-Pacific West LLC; and, Swanson Group, Inc.; as well as
11 the Intervenors-Appellees Oregon Forest Industries Council; and, American
12 Forest and Paper Association (collectively referenced herein as “Forest
13 Appellees”) have also petitioned for rehearing or rehearing *en banc* of the panel
14 decision.

15 The State of Oregon and Forest Appellees has sought rehearing based upon
16 the Panel overlooking and/or misapprehending critical facts and legal issues.

17 The Defendant-Appellees also request rehearing or rehearing *en banc* based on
18 the Panel’s decision subjecting thousands of forest roads to National Pollutant
19 Discharge Elimination System (“NPDES”) permitting under the Clean Water
20 Act, 33 U.S.C. 1251 et seq (“CWA”) despite the long-standing determinations by
21 the agency implementing the CWA that such roads are not subject to NPDES

1 permit requirements.

2 The Association of Oregon Counties, Idaho Association of Counties,
3 Association of O & C Counties, Douglas County, and the National Association
4 of Counties (collectively herein referenced as “Counties”), join in the
5 Defendants-Appellees' motion for rehearing or rehearing *en banc* and have
6 moved to file this brief under Fed. R. App. P. 29 and 9th Cir. R. 29-2, in order to
7 illustrate to this Court the exceptional importance of the question presented and
8 the complexity of the issue created by the Panel’s decision. (Fed. R. App. P. 35).

9 The Panel’s decision that stormwater runoff from roads used “primarily for
10 logging” represent discharges required to obtain NPDES permits has swept into
11 the NPDES permitting process not only private roads previously excluded under
12 the silvicultural rule, but also large numbers of public roads.

13 Rather than repeat the arguments presented in the Defendant-Appellees’
14 motions for rehearing or rehearing *en banc*, the Counties join in their arguments.
15 However, since their briefs do not fully illustrate the complexity and magnitude
16 of the Panel’s decision, the Counties discuss below the implications of the
17 decision on the county road systems throughout Oregon as well as other counties
18 within the Ninth Circuit and throughout the United States.

19

20

1 **II. DISCUSSION**

2
3 **A. Rehearing by the Panel or En banc rehearing is warranted because**
4 **the Panel’s decision is extremely broad reaching and will result in**
5 **unwarranted burdens on the Counties.**
6

7 The decision that NPDES permits are required for the ditches and culverts
8 associated with roads that are “primarily logging roads” has far reaching
9 implications beyond merely the immediate site wherein logging occurs.¹

10 Further, while the Panel appears to have assumed that these “primary
11 logging roads” are built and maintained by the logging companies (*See*
12 *Northwest Environmental Defense Center v. Brown* at p. 12035), it was in error,
13 for large numbers of roads within Oregon that fall within the Panel’s definition of
14 “primary logging roads” are owned, built and maintained by the Oregon Counties
15 or the Bureau of Land Management.² Similarly, throughout the United States the

¹ The Panel erred not only in rejecting the silvicultural rule, it also erred in failing to address the stormwater discharges from logging operations in the context of the EPA regulations’ focus on the references to “*immediate* access roads” and to discharges *directly related* to manufacturing, processing or raw materials storage areas *at an industrial plant.*” (40 C.F.R. 122.26(b)(14)(*emphasis* added).

² In response to the Timber Defendants’ contention that the logging roads are not “immediate access roads” because they are not confined to the immediate area of the site where the logging takes place, the panel disagreed noting that:

“[t]he preamble to the Phase I regulations provides that “immediate access roads” means “roads which are exclusively or primarily dedicated for use by the industrial facility.”

(*Northwest Environmental Defense Council v. Brown*, at p. 12035). However, the reference to exclusively or primarily dedicated is not particularly helpful in
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1 counties own and maintain roads that fall within the classification of “primary
2 logging roads.”

3 *En banc* rehearing is warranted in that the Panel’s holding that stormwater
4 runoff from primarily logging roads qualifies as Phase I runoff, will displace the
5 existing regulatory framework and, in turn, may establish a new and
6 unprecedented requirement for NPDES permitting for County roads. Further, it
7 is warranted in that the Panel’s holding has created the potential for local
8 governments to be subject to CWA liability when their road systems are utilized
9 by private and public entities under the complex system of reciprocal right of
10 way agreements, or when these entities merely exercise their rights as the general
11 public to utilize the county road systems.

12 If left unchanged, the Panel’s opinion would impose an extensive and cost
13 prohibitive permitting and monitoring requirement upon the Counties and other
14 private parties. Local, State and Federal officials will be inundated with an
15 enormous permitting workload in order to obtain NPDES permits for ditches and
16 culverts which have insignificant environmental impacts.

17 To illustrate the magnitude of the problem created by the Panel decision,
18 the Association of Oregon Counties surveyed the various county Road

defining what constitutes an “immediate” access road. Under the Panel’s
interpretation the word “immediate” becomes surplus.

1 Supervisors in Oregon to determine the number of County roads that would be
2 “primarily logging roads” as that phrase was used in the Panel’s decision (*See*
3 *Northwest Environmental Defense Council v. Brown*, at p. 12035).

4 The County Road Supervisors identified that within the county road
5 systems there are approximately 4,800 miles of “primary logging roads” and
6 approximately 20,000 cross culverts (culverts that cross under the county road)
7 associated with these “primary logging roads.”³ Not included within this analysis
8 were the culverts that do not cross under these “primary logging roads” but cross
9 connecting side roads or private access driveways. (Declaration of Jon A. Oshel).

10 In addition to the “primary logging roads” identified by the County Road
11 Supervisors, the Association of O & C Counties identified the number of roads
12 and culverts within the 2.1 million acres managed by the Bureau of Land
13 Management (“BLM”) pursuant to the O & C Act of 1937. This analysis
14 identified an additional 16,817 miles of “primary logging roads” along with 500
15 culverts that are larger than 80 inches in diameter and an additional 40,000
16 culverts of less than 80 inches in diameter. (Declaration of Kevin Q. Davis).

17 While a separate NPDES permitting system for the “primary logging
18 roads” does not currently exist, the magnitude of the problem facing the Counties

³ The “primary logging roads” are a subset of the total county road system within Oregon. (Declaration of Jon A. Oshel).

1 is evident if one assumes that the same application requirements as are currently
2 required for stormwater discharges associated with industrial activity (*See* 40
3 C.F.R. 122.26(c) will be imposed for these “primary logging roads.”

4 Under 40 C.F.R. 122.26(c), each culvert and ditch that discharges
5 stormwater will require a NPDES permit application that includes at a minimum:
6 (a) a site map with topography, drainage structures, underground springs (40
7 C.F.R. 122.26(c)(1)(i)(A)); (b) an estimate of impervious surfaces and the total
8 area drained by each outfall, along with a narrative of the past activities (40
9 C.F.R. 122.26(c)(1)(i)(B));⁴ (c) certifications of testing each of the outfalls for
10 non stormwater discharge (40 C.F.R. 122.26(c)(1)(i)(C)); (d) information
11 regarding significant spills of toxic or hazardous pollutants (40 C.F.R.
12 122.26(c)(1)(i)(D)); and, (e) sample data collected during storm events from all
13 outfalls (40 C.F.R. 122.26(c)(1)(i)(E).

14 Based upon the number of miles of “primary logging roads” identified by
15 the various County Road Supervisors, the Association of Oregon Counties’ road

⁴ The requirement to obtain data on past activities and on surrounding areas within the drainage wherein pesticides, herbicides, soil conditioners and fertilizers may have been applied, imposes an impossible burden on the person applying for a NPDES permit since these activities are undertaken by adjacent landowners or other operators who do not necessarily own or maintain the ditches or culverts. If the applicant is an Oregon County it is being placed in the position of collecting enormous amounts of data from the landowners or operators adjacent to its county road system.

1 engineer estimated that if all cross culverts and roadway ditches required a
 2 NPDES permit, then for the 4,800 miles of “primarily logging roads” and their
 3 accompanying culverts under county jurisdiction, there would be a permitting
 4 cost to the counties of approximately \$56,000,000 (20,000 culverts x 40 hours
 5 staff time per permit x \$70 per hour = \$56,000,000). (Declaration of Jon A.
 6 Oshel). This cost will be higher as the “primary logging road” permitting
 7 requirement is applied to the forest counties in other States.

8 Notably, this estimate does not include the required pre-application
 9 sampling of each outfall during a stormwater runoff event as required under 40
 10 C.F.R. 122.26(c)(1)(i)(E) which will be a staggering burden in its own right.

11 The data collection provisions of 40 C.F.R. 122.26(c)(1)(i)(E) require:
 12

13 “[q]uantitative data based on samples *collected during storm events* and
 14 collected in accordance with 122.21 of this part *from all outfalls*
 15 containing a storm water discharge associated with industrial activity for
 16 the following parameters: . . .

17 (3) Oil and grease, pH, BOD5, COD, TSS, total phosphorous, total
 18 Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;

19 **

20 (5) Flow measurements or estimates of the flow rate, and the total
 21 amount of discharge for the storm event(s) sampled, and the
 22 method of flow measurement or estimation;

23 (6) The date and duration (in hours) of the storm event(s) sampled,
 24 rainfall measurements or estimates of the storm event (in inches)
 25 which generated the sampled runoff and the duration between the
 26 storm event sampled and the end of the previous measurable (greater
 27 than 0.1 inch rainfall) storm event (in hours).”

28
 29 (*emphasis* added).

1 As with the requirement to obtain data as to the land practices in the
2 drainage of the culvert or ditch, to obtain this storm event data for each ditch
3 outfall along the 4,800 miles of “primary logging roads” as well as for the
4 accompanying 20,000 cross culverts imposes a staggering burden on the Oregon
5 Counties.⁵ Similarly, to obtain the data for the Bureau of Land Management’s
6 16,817 miles of roads and 40,500 culverts is equally staggering.

7 Further illustrating the complexity of the issue, is the unique checkerboard
8 of intermingled private and public land ownerships and the accompanying
9 reciprocal road right of ways between the various land owners. Access across
10 this checkerboard is provided through reciprocal right of way agreements that
11 provide the United States and the private landowners with the right to use and
12 construct logging roads on each other’s property. These “primary logging roads”
13 are not under one single party’s control and often involve numerous parties
14 utilizing the same road concurrently. Contrary to the Panel’s assumption that
15 these “primary logging roads” are built and maintained by the logging
16 companies, such is not the case for there are hundreds, perhaps thousands, of
17 intermingled private owners within the O & C checkerboard, all of whom share

⁵ The magnitude and impossibility of the permit application process clearly underscores the State of Oregon’s argument that a court cannot simply excise one portion of a rule and treat the balance of the rule as independently operative. (*See* State of Oregon Brief, Dkt Entry 89, pp 21-23 of 67).

1 the same interconnecting system of “primary logging roads.”

2 The Panel has miscomprehended the nature of the road system that is
3 utilized for log haul purposes. Left in its present state, the Panel’s decision to
4 treat “primary logging roads” as access to industrial facilities creates a significant
5 and unwarranted burden on the Counties.

6 **III. Conclusion**

7
8 Rehearing by the Panel or *En banc* rehearing of the Panel’s decision is
9 warranted in that it sets aside a long standing regulatory scheme and adopts a
10 new and expansive definition of immediate access roads. The definition ignores
11 the nature of the logging road network and its intertwined nature of public and
12 private road systems. Left unchanged the Counties face increased costs,
13 litigation risks and uncertainty in the operation of the public roads. In addition, if
14 the Panel decision is left unchanged, the Bureau of Land Management will
15 similarly face additional costs and uncertainty in meeting its obligations to the O
16 & C Counties. For these reasons, rehearing or *en banc* rehearing is warranted.

17 Dated: October 15, 2010.

18 Respectfully submitted,

19 /s/ Ronald S. Yockim

20 Ronald S. Yockim, OSB #81430

21 Attorney for the Association of Oregon Counties;

22 Idaho Association of Counties; Association of

23 O & C Counties, Douglas County and National

24 Association of Counties

1 CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION,
2 TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS
3

4 The undersigned certifies, pursuant to Circuit Rules 35-4 and 40-1 that:
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9 this brief contains 2,866 number of words, excluding the parts of the brief
10 exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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12 2. This brief complies with the typeface requirements of Fed. R. App. P.
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20 /s/Ronald S. Yockim

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23 Counties; Idaho Association of Counties,
24 Association of O & C Counties;
25 Douglas County and, National Association
26 of Counties
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28 Dated: October 15, 2010
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1
2 **CERTIFICATE OF SERVICE**
3

4 I hereby certify that on October 15, 2010, I electronically filed the
5 foregoing Brief of Association of Oregon Counties; Idaho Association of
6 Counties, Association of O & C County; Douglas County and National
7 Association of Counties in Support of Panel Rehearing or Rehearing *En Banc*
8 with the Clerk of the Court for the United States Court of Appeals for the Ninth
9 Circuit using the appellate CM/ECF system.

10 I further certify that all participants in this case are registered CM/ECF
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21 s/ Ronald S.Yockim
22