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No. 07-35266

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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NORTHWEST ENVIRONMENTAL DEFENSE CENTER,  
Plaintiff-Appellant,

v.

MARVIN BROWN, Oregon State Forester, in his official capacity, et al.,  
Defendants-Appellees,

and

OREGON FOREST INDUSTRIES COUNCIL, et al.,  
Intervenors-Appellees.

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On Appeal from the United States District Court for the District of Oregon  
Honorable Garr M. King, District Judge

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**BRIEF AMICUS CURIAE OF AMERICAN LOGGERS COUNCIL,  
ASSOCIATED LOGGING CONTRACTORS – IDAHO, ASSOCIATED  
OREGON LOGGERS, THE BUCKEYE CONSERVANCY, CALIFORNIA  
FORESTRY ASSOCIATION, FOREST LANDOWNERS ASSOCIATION,  
KLAMATH ALLIANCE FOR RESOURCE AND ENVIRONMENT,  
MONTANA LOGGING ASSOCIATION, NATIONAL ALLIANCE OF  
FOREST OWNERS, SOUTHEASTERN LUMBER MANUFACTURERS  
ASSOCIATION, TUOLUMNE COUNTY ALLIANCE FOR RESOURCES  
AND ENVIRONMENT, WASHINGTON CONTRACT LOGGERS  
ASSOCIATION, AND WASHINGTON FOREST PROTECTION  
ASSOCIATION IN SUPPORT OF PETITION FOR REHEARING OR  
REHEARING EN BANC OF DEFENDANT-APPELLEES HAMPTON  
TREE FARMS, INC., STIMSON LUMBER CO., GEORGIA-PACIFIC  
WEST LLC, AND SWANSON GROUP, INC., AND  
INTERVENOR-APPELLEES OREGON FOREST INDUSTRIES COUNCIL  
AND AMERICAN FOREST AND PAPER ASSOCIATION**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, the American Loggers Council, Associated Logging Contractors – Idaho, Associated Oregon Loggers, Buckeye Conservancy, California Forestry Association, Forest Landowners Association, Klamath Alliance for Resource and Environment, Montana Logging Association, National Alliance of Forest Owners, Southeastern Lumber Manufacturers Association, Tuolumne County Alliance for Resources and Environment, Washington Contract Loggers Association, and Washington Forest Protection Association hereby state that they have no parent corporation and that no publicly held corporation owns 10% or more of their stock.

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Pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Rule 29-2, Applicant Amici American Loggers Council, Associated Logging Contractors – Idaho, Associated Oregon Loggers, The Buckeye Conservancy, California Forestry Association, Forest Landowners Association, Klamath Alliance for Resource and Environment, Montana Logging Association, National Alliance of Forest Owners, Southeastern Lumber Manufacturers Association, Tuolumne County Alliance for Resources and Environment, Washington Contract Loggers Association, and Washington Forest Protection Association submit this brief in support of the petition for rehearing or rehearing *en banc* filed by Defendant-Appellees Hampton Tree Farms, Inc., Stimson Lumber Co., Georgia-Pacific West LLC, and Swanson Group, Inc., and Intervenor-Appellees Oregon Forest Industries Council and American Forest and Paper Association.

### **IDENTITY OF AMICI CURIAE**

Amici are a collection of timber industry trade groups, farm and forest landowners, and other entities representing owners or operators of forested lands or forest roads with possible “discernible, confined and discrete conveyance[s]” (water conveyance structures) within the meaning of Section 502(14), 33 U.S.C. § 1362(14), of the Clean Water Act (CWA), *id.* § 1251, *et seq.*<sup>1</sup> Amici have a direct interest in the

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<sup>1</sup> A complete discussion of the particular interests of the Amici can be found in their concurrently filed Motion to Appear as Amici Curiae.

panel's decision in *Northwest Environmental Defense Center (NEDC) v. Brown*, No. 07-35266 (Aug. 17, 2010), which may require members of the Amici to change long-established industry practices and seek permits for the discharge of stormwater runoff associated with tree harvests and road use for the first time in the CWA's history.

### **SUMMARY OF ARGUMENT**

The panel decision, overturning a three-decade-plus understanding of the CWA, holds that harvesting trees is an "industrial activity" requiring a CWA permit for any stormwater runoff that reaches jurisdictional waters by means of culverts, ditches, or similar water conveyance structures. *See NEDC*, slip op. at 12,041. Amici believe that the panel decision raises an issue of exceptional importance meriting *en banc* review under Federal Rule of Appellate Procedure 35(a)(2).

Amici demonstrate below that the panel's reasoning may require Section 402 permits for millions of forest landowners, loggers, and other owners or operators of forest roads throughout the nation. The Environmental Protection Agency (EPA) has no program in place for processing Section 402 permits for stormwater runoff from tree harvesting. The decision will engender an unprecedented number of stormwater permit applications that EPA will be unable to process expeditiously, thereby resulting in significant delay and costs to Amici and their members.



None of this is necessary. Nationwide, stormwater runoff from forest lands and forest roads has been addressed under the CWA for decades as nonpoint pollution, minimized through thoughtfully developed and tested “best management practices” (BMPs) at the state level, implemented in some states through state forest practices regulations, all with EPA oversight.<sup>2</sup> EPA, state agencies, and stakeholders have found this state-based system of BMPs to be efficacious. The panel decision tosses out that system in favor of wholly unworkable point-by-point federal regulation. Forest landowners and operators nationwide have three decades of effort invested in the nonpoint source program. The panel decision has created justifiable alarm among the affected parties both within and outside this Circuit. For that reason, Amici from around the country join in this brief and offer information concerning the nationwide implications of the panel decision, should that decision be allowed to stand and should it in the future be adopted nationwide.

For all these reasons, Amici believe that the Petition raises an issue of exceptional importance meriting this Court’s *en banc* review.

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<sup>2</sup> See 33 U.S.C. § 1329 (nonpoint source management programs); [http://www.epa.gov/owow\\_keep/NPS/cwact.html](http://www.epa.gov/owow_keep/NPS/cwact.html) (last visited Oct. 14, 2010) (EPA nonpoint source program website); [http://www.epa.gov/owow\\_keep/NPS/forestry.html](http://www.epa.gov/owow_keep/NPS/forestry.html) (last visited Oct. 14, 2010) (EPA website on nonpoint source BMPS for forestry).

## ARGUMENT

### I

#### **THE PANEL DECISION WILL CREATE AN OVERWHELMING NUMBER OF PERMIT REQUESTS FOR MILLIONS OF MILES OF FOREST ROADS, LEADING TO TREMENDOUS AND BURDENSOME PERMITTING DELAYS**

The panel decision raises an issue of exceptional importance because it creates a new and significant CWA permitting requirement for stormwater discharges from tree harvesting that ends up in jurisdictional waters by means of a forest road or other discrete conveyance. Amici and their members have compiled data reflecting how many landowners and miles of forest roads may be covered by the panel's decision.<sup>3</sup> This data establishes that the imposition of the CWA permitting requirement for stormwater runoff from forest roads will likely produce unprecedented permitting costs and delays. Although this data is based on the best 2010 estimates for Amici, the data is similar to what was known in 1990 when, contrary to the panel decision's conclusion, *see NEDC*, slip op. at 12,037, EPA decided not to regulate stormwater runoff associated with tree harvesting operations. *See* 40 C.F.R. § 122.26(b)(14); 55 Fed. Reg. 47,990, 48,011 (Nov. 16, 1990).

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<sup>3</sup> The last several pages of the panel's opinion discuss the potential procedural headaches for the agency in crafting a forest road stormwater runoff program, but nevertheless mandate that such a program be crafted. *See NEDC*, slip op. at 12,038-41.

**A. The Panel’s Decision Will Result in a Significant Increase in the Number of CWA Stormwater Permitting Applications**

If the panel decision stands and EPA is forced to develop a stormwater permitting program for tree harvesting, that program could be developed on a per-landowner or a per-harvest basis. Under either scenario, however, a permit would have to authorize and impose meaningful effluent limitations on each permitted discharge, which might well turn on the number of pertinent forest road water conveyances. *Cf.* 33 U.S.C. § 1311(e) (“Effluent limitations . . . shall be applied to *all* point sources of discharge of pollutants . . . .”) (emphasis added). Therefore, to provide a full picture as to the likely impact of the panel’s decision, Amici provide data below pertaining to numbers of forest landowners and tree harvests, as well as numbers of potential stormwater conveyances associated with tree harvesting operations.

**1. National Data**

There are 423 million acres of private forest land in the United States, owned by about 11 million individuals and entities. The vast majority of these owners—92%—are individuals or unincorporated entities. They control 62% of all private forest land, amounting to 264 million acres. Of the 264 million acres of family forest land nationally, 58% of those acres are owned by individuals who commercially harvest trees from their property. W. Brad Smith, *et al.*, *Forest Resources of the*

*United States, 2007*, at 20 (2009), available at <http://nrs.fs.fed.us/pubs/7334> (last visited Oct. 14, 2010).

Based on the foregoing, there are approximately 150 million acres of family forest land in this country that are used principally for tree harvesting. Assuming that an average tree harvest on this land would encompass 200 acres, and assuming that each of these harvests would require access to forest roads having some form of water conveyance structure, there are **750,000** potential tree harvest sites for which a stormwater permit may be necessary.

Alternatively, the data can be analyzed on a per-landowner basis. Based on the foregoing statistics, there are approximately 10.1 million family forest landowners in the country. In a recent survey, these landowners were asked to rate, on a scale of 1 to 7, how well a list of uses described the actual use of their working family forest land. From the survey, 30% of the landowners rated timber harvesting as the main reason for owning their forestland (*i.e.*, rating it 1 or 2). See Brett J. Butler, *Family Forest Owners of the United States, 2006*, at 16 (U.S. Forest Serv. 2008), available at [http://nrs.fs.fed.us/pubs/gtr/gtr\\_nrs27.pdf](http://nrs.fs.fed.us/pubs/gtr/gtr_nrs27.pdf) (last visited Oct. 14, 2010). Assuming that these landowners would likely use their land in the future for tree harvesting, and assuming that each of these tree harvests would require access to forest roads having some form of water conveyance structure, it follows that there are approximately **3,000,000** family forest landowners who may be required to obtain a stormwater

permit, under the panel's decision.

Finally, the national data can be analyzed in terms of the number of potential stormwater conveyances for which specific effluent limitations may have to be established as part of the permitting process. Although Amici do not have data readily available on the number of such conveyances nationally, Amici believe that a fair estimate can be extrapolated from regional data. For example, as shown in greater detail *infra* Part I.A.2.c, in the State of California there are approximately 6 miles of forest road per square mile of private forest land. As discussed above, 58% of the nation's 264 million acres of family forest land is held as working forests. Assuming, much more conservatively, a ratio at the national level of 1 mile of forest road per square mile of working family forest land, there are approximately 264 million miles of forest roads on working family forest land. Also in California, there are on average 2.43 water conveyance structures per mile of forest road. Again assuming, much more conservatively, an average ratio at the national level of 1 water conveyance structure per mile of family forest road, the estimated total water conveyance structures associated with forest roads located on working family forest that are potentially subject to CWA stormwater permitting and effluent limitations is **264,000,000**.

## 2. State Data

In this section, Amici provide data, on a per-state basis, pertaining to the estimated number of potential stormwater conveyances for which specific effluent limitations may be required in connection with any future stormwater permitting regime for runoff from tree harvests.

### a. Washington State Data

Washington State has approximately 22.1 million acres of forest land. *See* Smith, *supra*, at 153. Private landowners control approximately 7.8 million acres. Although complete data is not available for all of these acres, data covering 7.3 million acres of the Washington's large private- and state-held timberland reveal that these areas contain approximately 57,000 miles of forest road.<sup>4</sup> Conservatively assuming that the ratio of ditches or culverts to mile of forest road is 1 to 1, the estimated total possible water conveyance structures associated with these timberlands that are potentially subject to CWA stormwater permitting or specific effluent limitation is **57,000**. That number may significantly underestimate the total possible water conveyance structures associated with these timberlands that are potentially

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<sup>4</sup> These data are derived from the Washington State Department of Natural Resources's records for Road Maintenance and Abandonment Plans. Washington state law requires forest landowners to file these plans with the state agency. *See* Wash. Admin. Code §§ 222-24-050 to 222-24-0511. Importantly, this data covers only large private holdings and state-owned timberlands.

subject to CWA stormwater permitting, for two reasons. First, the figure covers only 33% of the total acres of forest land within the state.<sup>5</sup> Second, the forest road data on which the figure is based applies only to those forest roads crossing fish-bearing streams; there are, of course, many more forest roads within the state that cross non-fish-bearing streams that would still be subject to stormwater permitting under the panel decision.

**b. Idaho Data<sup>6</sup>**

Idaho contains 21 million acres of forest land. *See Smith, supra*, at 152. As an example of the panel decision's impact in Idaho: Amicus Associated Logging Contractors – Idaho reports that 650,000 acres of forest land in Northern Idaho (a very small percentage of the total timberland in the state) contain approximately 6,000 miles of roads. Further, there are approximately 4 culverts for every mile of forest road on this land. Thus, the estimated total possible water conveyance structures that

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<sup>5</sup> The National Alliance of Forest Owners reports data from 8 of its members having forest lands primarily in the Northwest. These members report a water conveyance to mile of forest road ratio of approximately 2.5 to 1, which is significantly higher than the conservative estimate adopted in the text for Washington State timberlands, and thus further emphasizes the conservative nature of that estimate.

<sup>6</sup> It is difficult at the present time to generate much good data on the potential impact of the panel's decision on the Idaho timber industry for a variety of reasons, but if the Petition for Rehearing *En Banc* is granted, Amicus Associated Logging Contractors – Idaho will be able to provide firmer data.

are potentially subject to CWA stormwater permitting or specific effluent limitation for this small sample of Idaho timberland is approximately **24,000**.

The Idaho Department of Lands manages roughly 1 million acres of timberland representing 7% of the state's total. The Department estimates the total mileage of logging roads to be 7,741 miles.<sup>7</sup> The Department does not have current data on the number of water conveyance structures on its land. Assuming conservatively that the ratio of water conveyance structures per mile of state forest road is 2 to 1 (compared to a ratio of 4 to 1 for the privately owned Idaho timberland described in the previous paragraph), then the estimated total possible water conveyance structures associated with state forest roads that are potentially subject to CWA stormwater permitting is approximately **15,400**.

### **c. California Data**

Of California's nonindustrial private timberland, there are 4.1 million acres of productive, unreserved forest, which equals approximately 6,400 square miles of forest. Based on Amicus California Forestry Association (CFA) survey data of its members, there are approximately 6.19 miles of forest road per square mile of forest.<sup>8</sup> Thus, CFA estimates that, on California nonindustrial private timberland, there are approximately 44,400 total miles of private nonindustrial forest road. Also based on

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<sup>7</sup> This data comes from the Associated Logging Contractors – Idaho.

<sup>8</sup> The range is 4.9 to 7.4 miles of road per square mile of forest.



CFA's survey data, there are on average 2.43 water conveyance structures per mile. Hence, the estimated total possible water conveyance structures associated with private nonindustrial forest roads that are potentially subject to CWA stormwater permitting or specific effluent limitation is **107,000**.

Of California's industrial private timberland, there are approximately 4.4 million acres of productive, unreserved forest, which equals 6,878 square miles of forest. Based on the survey data discussed above, there are approximately 6.19 miles of forest road per square mile of forest (equaling approximately 42,600 total miles of private industrial forest road), also with an average of 2.43 water conveyance structures per mile. Hence, the estimated total possible water conveyance structures associated with private industrial forest roads that are potentially subject to CWA stormwater permitting or specific effluent limitation is **103,000**.

Based on United States Forest Service timberland data for California,<sup>9</sup> CFA estimates that there are 9.8 million acres of productive unreserved forest within the state under the Service's jurisdiction, equivalent to 15,312 square miles of forest.<sup>10</sup>

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<sup>9</sup> Although Amici do not represent federal agencies, Amici do have members who use or maintain forest roads on federal lands, and thus would likely be responsible for bearing the cost of obtaining CWA stormwater permits. Moreover, the number of federal roads that would be subject to the panel's decision is important to the interests of the Amici: the more permit requests filed (whether by governmental or private actors), presumably the longer it will take for EPA to issue permits.

<sup>10</sup> Forest Service data were provided to CFA in part by personal communications from  
(continued...)

CFA also estimates that these lands are covered by 46,800 miles of forest roads, and that these roads, depending on their use, can have up to 20 water conveyance structures per mile.<sup>11</sup> CFA estimates that 45% of the Service's California forest road miles—approximately 21,000—have culverts or ditches. Assuming that, of those roads having culverts or ditches, there are approximately 20 of such structures per mile of forest road, then the estimated total possible water conveyance structures associated with Forest Service forest roads that are potentially subject to CWA stormwater permitting is 420,000. However, the Service's data include "cross-drains" among water conveyance structures. Generally, such drains do not deliver stormwater to streams or rivers, and thus would not be covered by the panel's decision. Assuming conservatively that half of the Service's water conveyance structures are nonpermittable cross-drains, then the estimated total possible water conveyance structures associated with Forest Service forest roads that are potentially subject to CWA stormwater permitting or specific effluent limitation is **210,000**.

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<sup>10</sup> (...continued)  
various Forest Service engineering personnel.

<sup>11</sup> The reason for the discrepancy between private timberlands and Forest Service land (2.43 to 20) is that, for private California timberland owners, the practice has been to use outcrops and rolling dips to *disperse* stormwater, rather than culverts and ditches to *collect* water. The former would not qualify as water conveyance structures subject to CWA stormwater permitting because they would not be considered point sources. See *NEDC*, slip op. at 12,008-10, 12,021.

### **3. Summary**

Based on the foregoing data, Amici estimate that the panel decision, if allowed to stand, will create a significant increase in stormwater permit applications. At the national level, Amici estimate that the decision will create an additional **3,000,000** permit applications, based on number of affected landowners, or **750,000** applications, based on number of tree harvests, or **264,000,000** point source discharges requiring permits. The state data compiled by Amici supports the national numbers. In Washington State, Amici estimate very conservatively that the decision may create an additional **57,000** point source discharges requiring permits. In Idaho, Amici estimate very conservatively that the decision may create an additional **40,000** point source discharges requiring permits. In California, Amici estimate that the decision may create an additional **420,000** point source discharges requiring permits.

#### **B. The Panel's Decision Will Impose Significant Costs on Industry Because of the Magnitude of the New Permitting Obligation**

As the preceding section makes clear, the magnitude of the permitting requirement placed on forest landowners is unprecedented in the stormwater regulatory context. The panel itself recognized that fact when it stated its “sympath[y]” with EPA over the consequences of its ruling. *See NEDC*, slip op. at 12,039. Further, the attached declaration, submitted by James A. Hanlon, Director of EPA’s Office of Wastewater Management in connection with *The National Cotton*

*Council of America v. United States Environmental Protection Agency*, 553 F.3d 927 (6th Cir. 2009), underscores that imposition of a stormwater permitting obligation of the magnitude discussed above would overwhelm EPA and the states and make it nearly impossible for forest landowners to obtain needed permits in an expeditious and streamlined manner. Director Hanlon explains that, currently, there are approximately 350,000 stormwater permits administered by EPA and the states. *See* Hanlon Decl. ¶ 11. In California alone, the number of potentially permittable stormwater conveyances under the panel decision exceeds that number by nearly 100,000. Nationally, the estimated number of potentially permittable stormwater conveyances, if the panel’s decision was applied, exceeds that number *by a factor of 754*. “The average applicant for an individual [CWA Section 404] permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes.” *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion). If obtaining a relatively straightforward CWA Section 404 permit for the placement of dredge and fill material can take over two years and cost nearly \$300,000, it does not take much imagination to envision what the consequences for tree harvest stormwater permit applicants would be in light of the expected exponential increase in permit applications.

A worthwhile comparison can be drawn with EPA’s experience in issuing a

general stormwater discharge permit for shipping vessels. That permitting program was the direct result of litigation. *See Nw. Env'tl. Adovcates v. U.S. EPA*, No. C 03-05760 SI, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. Mar. 30, 2005). The decision required EPA to create a permitting regime for approximately 70,000 new discharging sources. *See* <http://cfpub.epa.gov/npdes/vessels/background.cfm> (last visited Oct. 14, 2010). EPA needed *over two years* to devise an adequate program. *See* Hanlon Decl. ¶¶ 7, 11, 38. If the agency needed that much time to develop a new permitting program for 70,000 new sources, one hesitates to estimate how much time the agency would need to produce a permitting program for *over 200 million potential discharging sources*. And while the agency struggles to produce a permitting program, forest road owners and operators will be put in an impossible situation: continue with business as usual and run the risk of becoming a defendant in a CWA citizen suit, *see* Hanlon Decl. ¶ 8—precisely what has happened in this case—or cease using forest roads and abandoning their livelihoods.

## CONCLUSION

For the foregoing reasons, the petition for rehearing *en banc* should be granted.

DATED: October 15, 2010.

Respectfully submitted,

/s/ Damien M. Schiff

DAMIEN M. SCHIFF

Counsel for Amici Curiae

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**REQUIREMENTS, AND TYPE STYLE REQUIREMENTS.**

1. This amicus brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2) because it does not exceed fifteen pages.
2. This amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:  
  
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DATED: October 15, 2010.

/s/ Damien M. Schiff  
Attorney for Amici Curiae

## CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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