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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**No. 07-35266**  
**(Panel: William A. Fletcher, Raymond C. Fisher, Charles R. Breyer)**

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NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Plaintiff-Appellant,

v.

MARVIN BROWN, *et al.*,

Defendants-Appellees,

and

OREGON FOREST INDUSTRIES COUNCIL, *et al.*,

Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON, Civ. No. 06-1270-KI

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**PLAINTIFF-APPELLANT NORTHWEST ENVIRONMENTAL DEFENSE  
CENTER'S OPPOSITION TO THE PETITIONS FOR REHEARING  
AND REHEARING EN BANC**

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## INTRODUCTION

Plaintiff-Appellant Northwest Environmental Defense Center (NEDC) hereby files its answers to the Court's October 21, 2010, questions and its opposition to the petitions for panel rehearing and rehearing *en banc* filed by Defendants-Appellees Marvin Brown *et al.* (the State) (Docket #89), and Defendants-Appellees Hampton Tree Farms *et al.* and Intervenors-Appellees Oregon Forest Industries Council *et al.* (the Timber Companies) (Docket #88), (collectively the Defendants).

In its well-reasoned decision, the unanimous panel construes the plain language of the Clean Water Act regulations and holds that stormwater discharges along logging roads require National Pollutant Discharge Elimination System (NPDES) permits. The panel opinion rejects the Defendants' argument that 40 C.F.R. § 122.27 redefines their pipes, ditches and channels as non-point sources. The opinion also rejects the Defendants' argument that the U.S. Environmental Protection Agency (EPA) did not regulate the logging industry when it included Standard Industrial Classification 2411 (Logging) on the list of industries required to obtain NPDES permits. *Northwest Environmental Defense Center v. Brown*, 617 F.3d 1176 (9th Cir. 2010) (Judges W. Fletcher, Fisher and Breyer).

NEDC respectfully requests that the Court deny the petitions because the Defendants have done little more than repeat the arguments that were rejected by

the panel. The unanimous panel opinion faithfully applies the appropriate standard of review and existing Ninth Circuit precedent in its well-reasoned opinion.

Although the Defendants disagree with the outcome, the petitions for rehearing *en banc* fail to demonstrate that the panel opinion conflicts in any way with existing precedent from this Circuit or that it involves a question of exceptional national importance. As to the petitions for panel rehearing, the Defendants fail to establish that the panel misapprehended a relevant point of law or fact. The panel already considered the Defendants' arguments and correctly concluded that EPA's inclusion of logging on the list of regulated industries means that discharges of polluted stormwater from logging roads require NPDES permits.

#### ARGUMENT

#### I. THIS COURT HAS JURISDICTION OVER THIS CLEAN WATER ACT CITIZEN SUIT.

Before addressing the Defendants' petitions, NEDC will respond to the two questions posed by the Court in its October 21, 2010, Order:

1. Can a suit challenging EPA's interpretation of its regulations implementing the Clean Water Act's permitting requirements be brought under the Act's citizen suit provision, 33 U.S.C. § 1365(a)?
2. Must a suit challenging EPA's decision to exempt the discharge of a pollutant from the Clean Water Act's permitting requirements be brought under the Act's agency review provision, 33 U.S.C. § 1369(b)?

These questions explore whether the District Court had subject matter jurisdiction over NEDC's citizen suit, or, alternatively, whether Section 509(b) of the Act, 33 U.S.C. § 1369(b), required NEDC to file a petition for review directly in a Court of Appeals.

In answer to question number one: citizen suits may challenge EPA's interpretation of its NPDES permit regulations. This Court has repeatedly ruled that the purpose of the Act's citizen suit provision is to permit citizens to enforce the Clean Water Act when the responsible agencies fail or refuse to do so. Here, NEDC's citizen suit is properly before this Court because NEDC satisfied the Act's express procedural requirements before filing suit. EPA's argument (as amicus) that the Defendants do not need permits may be relevant to how this Court construes EPA's regulations, but it does not divest this Court of jurisdiction.

In answer to question number two: section 509(b) is one—but not the only—way to challenge an EPA decision exempting the discharge of a pollutant from the NPDES permit requirement. Here, however, section 509(b) is inapplicable because NEDC is not challenging an EPA permit exemption. Rather, NEDC has contended throughout this litigation that the plain language of the regulations requires the Defendants to obtain permits for their discharges of industrial stormwater.

A. The panel opinion construes the plain language of the rule.

NEDC alleges in this case that the Defendants are illegally discharging polluted stormwater from pipes, ditches and channels along logging roads without NPDES permits that are required by the Clean Water Act, 33 U.S.C. § 1251 *et seq.* NEDC contends, and the panel opinion holds, that the plain language of the NPDES permit regulations requires the Defendants to obtain the permits.

The central dispute on appeal was whether 40 C.F.R. § 122.27 (the silvicultural rule) (Appendix A) exempted statutory point sources from the NPDES permit requirement. The panel faced a choice between two possible constructions of the silvicultural rule. Slip Op. at 12028. Rejecting the Defendants’ argument, the panel holds that the rule does not exempt statutory point sources like pipes, ditches and channels from the NPDES permit program. Slip Op. at 12026-27 (“In our view...”). Instead, accepting NEDC’s contentions, the panel opinion construes the plain language of the regulation—EPA’s use of the terms “nonpoint source” and “natural runoff”—to mean that the rule does not exempt any “point source” from the NPDES program. Slip Op. at 12028-29.

Specifically, the panel opinion agrees with the district court in *Environmental Protection Information Center v. Pacific Lumber Co.*, (“EPIC”) 2003 WL 25506817 (N.D. Cal.). Slip Op. at 12027. The *EPIC* court refused to construe the silvicultural rule as an exemption for statutory point sources because

that reading would conflict with the Act. Equally important, the *EPIC* court concluded that the plain language of the rule only excludes nonpoint source “natural runoff.” The *EPIC* court concluded that for point source discharges,

[the silvicultural rule’s] own terms are unsatisfied; once runoff enters a conduit like those listed in [the statutory definition of “point source”], the runoff ceases to be the kind of ‘natural runoff’ [the silvicultural rule] expressly targets. In this latter context, [the silvicultural rule] does not—and cannot—absolve silvicultural businesses of the CWA’s ‘point source’ requirements.

Slip Op. at 12028 (*citing EPIC*, 2003 WL at \*15).

The panel opinion construes the silvicultural rule in a manner that is consistent with the plain language of the regulation, consistent with the Clean Water Act, and consistent with this Court’s decisions. As a result, it does not vacate or strike down the silvicultural rule. Slip Op. at 12026-29, and at 12041 (reversing and remanding but not vacating any rule). The panel opinion reflects the fact that NEDC did not challenge the silvicultural rule, or any other rule, in its First Amended Complaint. *See* ER 07 at 24-25 (relief requested).

B. A suit challenging EPA’s interpretation of its NPDES regulations may be brought under the Act’s citizen suit provision.

Answering the Court’s first question, NEDC’s claims are properly before this Court even though they implicate EPA’s interpretation of its regulations. Federal courts have jurisdiction over Clean Water Act citizen suits if, sixty days before filing suit, a plaintiff gives notice of the alleged violations to EPA, the state

in which the alleged violations occurred, and the alleged violators, and if EPA and the state then fail to diligently prosecute an enforcement action. *See* 33 U.S.C. § 1365(b); *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 174-75 (2000). Here, NEDC satisfied the sixty day notice requirements, and neither EPA nor the State of Oregon commenced and diligently prosecuted an enforcement action against the Defendants. ER 07 at 4-5 ¶¶ 8-11, at 26-71, and at 72. Consequently, this Court has subject matter jurisdiction over this case.

The fact that EPA appeared as amicus and claimed that the Defendants do not need NPDES permits does not divest this Court of jurisdiction. This Court has repeatedly ruled that the “purpose of the citizen suit provision of the CWA is to permit citizens to enforce the Clean Water Act when the responsible agencies fail or refuse to do so.” *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007) (citation omitted); *see also Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources*, 299 F.3d 1007, 1014 (9th Cir. 2002) (*Hammersley*) (“The plain language of the Clean Water Act has created opportunity for citizen suit when government agencies do not act.”).

In *Hammersley*, 299 F.3d. at 1011-12, this Court specifically rejected the contention “that a private party cannot bring a Clean Water Act citizen's suit for unpermitted discharges when the state agency charged with administering the

NPDES permit program has determined that such a permit is not required.” The

Court explained its reasoning:

... neither the text of the Act nor its legislative history expressly grants to the EPA or such a state agency the exclusive authority to decide whether the release of a substance into the waters of the United States violates the Clean Water Act. See *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 566-67 (5th Cir.1996) (holding courts may determine in citizen suits whether discharged substance is pollutant even if EPA has not issued NPDES permit). Here, if EPA and Ecology decline enforcement, then they have no statutory or common law right to veto environmental review sought by a citizen who otherwise has complied with the Act. To the contrary, we must honor the Act's express provisions authorizing citizen suits in appropriate cases where procedural requirements are met. ... That [the state agency] has decided that an NPDES permit is not needed warrants consideration but does not divest the federal courts of jurisdiction. The State may choose to sit on the sidelines, but state inaction is not a barrier to a citizen's otherwise proper federal suit to enforce the Clean Water Act. We have subject matter jurisdiction to hear [the plaintiff's] citizen suit.

*Id.* at 1012-1013 (emphases added).

The analysis does not change simply because it is the EPA that asserts that the Defendants do not need permits. Indeed, in *San Francisco Baykeeper*, 481 F.3d at 706, this Court recognized that it would have jurisdiction over a Clean Water Act citizen suit that “calls into question” EPA’s interpretation of the statute even though, if appropriate, it still might have to defer to those regulations.

Under these authorities, this Court has jurisdiction because NEDC complied with the Act’s express procedural requirements before filing suit. EPA’s assertions

about its regulations may be relevant to how this Court construes those regulations, but they do not divest this Court of jurisdiction.<sup>1</sup>

C. Section 509(b) of the Act is inapplicable because this case does not challenge any EPA action.

The answer to the Court's second question is equally straightforward. Section 509(b) of the Act, 33 U.S.C. § 1369(b), is one of at least two ways to challenge an NPDES permit exemption. *See, e.g., Northwest Environmental Advocates v. EPA*, 537 F.3d 1006, 1014 (9th Cir. 2008) (reviewing NPDES exemption pursuant to the APA); *but see National Cotton Council of America v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009) (reviewing NPDES exemption pursuant to CWA section 509(b)). In general, section 509(b) allows one to obtain judicial review of certain EPA actions by applying to a Court of Appeals within one hundred and twenty days of the action being challenged. The plain language of the Act demonstrates that section 509(b) only applies to EPA actions. *See* 33 U.S.C. §§ 1369(b)(1) ("Review of the Administrator's action..."), (b)(2) ("Action of the Administrator..."), *and* § 1251(d) (defining "Administrator"); *see also Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1433, 1434 (9th Cir. 1991) (dismissing petitions for review of state-issued individual control strategies in part because

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<sup>1</sup> Confirming this conclusion, the District Court ruled that NEDC's claims were properly before the court. ER 66 at 126. No party challenged that ruling or this Court's jurisdiction on appeal. Timber Companies' Response Brief (Docket #43) at 1; State's Response Brief (Docket #44) at 1.

they were not EPA actions); *Shell Oil Co. v. Train*, 585 F.2d 408, 411-15 (9th Cir. 1978).

Here, section 509(b) is inapplicable because NEDC is not challenging any EPA action exempting point sources from the NPDES permit requirement—NEDC is not challenging any “action of the Administrator.” ER 07 at 24-25 (relief requested in NEDC’s First Amended Complaint). Rather, throughout this litigation NEDC has claimed that the plain language of EPA’s regulations requires the Defendants to obtain NPDES permits for their stormwater discharges associated with industrial activity. ER 07 at 3-4 ¶¶ 4-5; NEDC Opening Brief (Docket #23) at 36-54; NEDC Reply Brief (Docket #46) at 21-28, 30-35. NEDC seeks to enforce the regulations. It does not seek to invalidate them.

Specifically, NEDC did not need to challenge 40 C.F.R. § 122.27 because this Court had already ruled that the plain language of the regulation did not exempt any statutory point source from the NPDES permit requirement. *See League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1185-86, 1188 n.6, 1190 (9th Cir. 2002). Indeed, in *Forsgren*, 309 F.3d at 1190 n.8, this Court specifically declined to reach the U.S. Forest Service’s section 509(b) argument because the Court was not invalidating the silvicultural rule but was instead giving it “a construction consistent with its administrative history, case law, and the governing statute.” On appeal in this case, NEDC challenged the District Court’s

interpretation of the silvicultural rule, but NEDC's appeal of the District Court's ruling does not constitute a challenge to the rule itself. Similarly, NEDC did not need to challenge EPA's Phase I regulation because, according to the plain language of the regulation, it applies to the logging industry. *See* 40 C.F.R. § 122.26(b)(14)(ii); ER 47 at 90, 93.

The judicial review provisions in section 509(b) are inapplicable here because this case is not "a suit challenging EPA's decision to exempt the discharge of a pollutant from the Clean Water Act's permitting requirements." NEDC seeks only to enforce the plain language of EPA's regulations. This Court clearly has subject matter jurisdiction over NEDC's claims.<sup>2</sup>

II. THE PETITIONS FOR REHEARING *EN BANC* SHOULD BE DENIED BECAUSE THE PETITIONERS HAVE NOT DEMONSTRATED THAT THERE IS A NEED TO SECURE UNIFORMITY OF THE COURT'S DECISIONS OR THAT THIS PROCEEDING INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE.

"An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Here, the petitions do not meet

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<sup>2</sup> These authorities may explain why no party argued that section 509(b) governs judicial review of this case. EPA briefly argued the point for the first time on appeal. EPA Amicus Brief (Docket #42) at 12-13. But even then Defendants did not raise the issue—or any other jurisdictional issue—in their petitions for rehearing. These facts again imply there is no jurisdictional infirmity here.

either criterion.

A. The panel opinion does not conflict with, but rather is entirely consistent with, prior decisions of this Court.

**1. The panel opinion does not conflict with *Northwest Environmental Advocates v. EPA*.**

The Timber Companies incorrectly contend that the panel opinion conflicts with precedent requiring this Court to “review challenges to agency rules based on an administrative record in lawsuits in which the affected agency is a party....”

Timber at 11-13 (*citing Northwest Environmental Advocates*, 537 F.3d at 1018-19). The Timber Companies do not contend that section 509(b) governs judicial review of NEDC’s claims. Instead, they argue that *Northwest Environmental Advocates* required NEDC “to petition EPA to change its rule and then seek judicial review if EPA declined to do so.” Timber at 12.

The plaintiffs in *Northwest Environmental Advocates* sought invalidation of a regulatory NPDES permit exemption by petitioning EPA to change the rule and then appealing EPA’s refusal to do so. *Northwest Environmental Advocates*, 537 F.3d at 1013. This Court rejected EPA’s argument that section 509(b)(1)(E) and (F) governed judicial review of the claims. *Id.* at 1015-18. This Court recognized the district court’s federal question jurisdiction, *id.* at 1015, and then resolved the plaintiffs’ Administrative Procedure Act claims.

Contrary to the Timber Companies' assertions, there is no conflict between the panel opinion and *Northwest Environmental Advocates* because the panel opinion does not invalidate any EPA rule. See Section I.A., *supra*. Instead, the panel opinion interprets and applies the plain language of 40 C.F.R. §§ 122.26 and 122.27 in holding that the Defendants are required to obtain NPDES permits for their point source discharges of storm water from industrial logging roads. NEDC was not required to file a petition for rulemaking to enforce the plain language of the existing regulations.

The Timber Companies' claims on this point border on misrepresentation. They claim the panel decision "sanctioned a new procedure for judicial review"—that it is a "procedural end-run flatly inconsistent with this Court's precedent regarding long-standing and well-settled principles of administrative law." Timber at 12-13. Yet they misread *Northwest Environmental Advocates* and fail to acknowledge, much less discuss, the Clean Water Act citizen suit provision or this Court's decisions in *Hammersly* and *San Francisco Baykeeper*. Those authorities clearly authorize citizen suits for unpermitted discharges even when the agencies that issue permits claim that no permits are necessary. Similarly, their claim that the panel opinion will "significantly undermine" EPA's ability to defend its rules, Timber at 13, ignores completely that EPA appeared as amicus precisely so that it could defend its rules. It also ignores this Court's holding that permitting agencies

are not necessary parties to Clean Water Act citizen suits. *Hammersly*, 299 F.3d. at 1014. There is no conflict with *Northwest Environmental Advocates*.

**2. The panel opinion does not conflict with this Court's decisions affording deference to EPA interpretations of its regulations.**

The Defendants attempt to manufacture a conflict where none exists between the panel opinion and prior opinions of this Court. The State contends that in the Phase I regulation EPA interpreted the term “industrial activity” as excluding those silvicultural activities classified as nonpoint sources by the silvicultural rule. Relying on *American Mining Congress v. EPA*, 965 F.2d 759 (9th Cir. 1992) and *San Francisco Baykeeper*, the State argues that Congress delegated authority to EPA to interpret the term “industrial activity” and that this Court must defer to EPA’s reasonable interpretation. State at 8-10. The Timber Companies similarly contend that “the proper scope of review in [cases like this] is to presume that the regulations as interpreted by the agency are valid, to apply those regulations to the facts of the case, and to reject arguments that are inconsistent with those regulations.” Timber at 12 (*citing Hammersly*, 299 F.3d at 1018).

The Defendants’ arguments should be rejected because they have not cited a single case, from this Circuit or any other Circuit, where a court concludes that logging is not industrial in nature or not subject to EPA’s Phase I rule. The panel

opinion's interpretation of 40 C.F.R. § 122.26(b)(14)(ii) is a matter of first impression and therefore no conflict could possibly result from its holding that logging roads require NPDES permits.

Rather than identifying a specific conflict warranting *en banc* review, the State instead ignores the central case relied upon by the panel. Slip Op. at 12034 (citing *Natural Resources Defense Council v. EPA*, 966 F.2d 1292, 1306 (9th Cir. 1992) (*NRDC*)). The Timber Companies do essentially the same when they attempt to distinguish *NRDC* with one sentence in a footnote. Timber at 9 n.1.

But as this Court concluded in *NRDC*, once EPA determines that an activity is industrial in nature, “EPA is not free to create exemptions from permitting requirements for such activity.” *NRDC*, 966 F.2d at 1306 (citing *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977)). As the panel opinion correctly notes, it is “undisputed” that EPA included facilities under SIC code 24—including SIC 2411 (Logging)—as “those considered to be engaging in ‘industrial activity.’” Slip Op. at 12034 (citing 40 C.F.R. § 122.26(b)(14)(ii)). The unanimous panel opinion in this case correctly relies upon the holding from *NRDC* in finding that EPA, having determined that logging is industrial in nature, could not create exemptions for the discharge of stormwater from logging roads. Slip Op. at 12037. The State ignores the holding of *NRDC* and fails to offer any explanation as to why the case is inapplicable. But *NRDC*

compels the outcome reached by the panel: EPA cannot grant an exemption from the permit requirements once it determines that logging is an industrial activity.

*NRDC*, 966 F.2d at 1306.

Instead of addressing *NRDC*, the State contends that EPA intended to exclude certain point sources from the definition of “industrial activity” when it incorporated by reference the NPDES regulations at 40 C.F.R. Part 122. State at 9. EPA did not file a brief in support of the petitions for rehearing. But even assuming the State accurately portrays EPA’s position, the opinion correctly rejects that argument.

As the unanimous opinion noted, EPA’s interpretation is entitled to deference only if it is not “plainly erroneous, inconsistent with the regulation, or based on an impermissible construction of the governing statute.” Slip Op. at 12007 (*citing Auer v. Robbins*, 519 U.S. 452, 457, 461-62 (1997)). Here, the State’s interpretation is not entitled to any deference because it is plainly erroneous and contrary to the plain language of the regulation.

EPA defined the industries subject to the Phase I regulation by listing SIC codes. 40 C.F.R. § 122.26(b)(14) (“The following categories of facilities are considered to be engaging in ‘industrial activity’ for purposes of paragraph (b)(14). . . .”); 55 Fed. Reg. 47,990, 48,011 (Nov. 16, 1990) (“EPA intends that the

list of applicable SICs will define and identify what industrial facilities are required to apply.”).

Moreover, where EPA intended to exclude an industry from the list, it stated that clearly in the list of SIC codes in the Phase I regulation. *See, e.g.*, 40 C.F.R. § 122.26(b)(14)(ii) (“Facilities classified as Standard Industrial Classification 24 (except 2434), 26 (except 265 and 267), 28 (except 283)...” (emphases added).

The Phase I rule plainly does not exclude SIC 2411 even though it plainly excludes many other industries. As discussed, because EPA clearly included SIC 2411 (Logging) within the definition of “industrial activity,” any point source stormwater discharge “associated” with that industry requires an NPDES permit.

The so-called exemption relied upon by the State is not an exemption from the list of activities that EPA considers “industrial.” Indeed, there is no textual support in the Phase I regulation for the State’s argument that EPA exempted the logging industry from the Phase I regulation. To the extent the general incorporation of the NPDES regulations at Part 122 functions as an exclusion, it does so by limiting the stormwater discharges that are considered “associated with” the listed industries. *See generally American Mining Congress*, 965 F.2d at 764 (distinguishing between industrial activities and stormwater discharges associated with industrial activities).

The reference in the Phase I regulation to the Part 122 regulations adopts the Act's point/nonpoint dichotomy and excludes only nonpoint sources from the rule. *See* 55 Fed Reg. at 47,996-97 (discussing the broad definition of point source). As this Court held in *Forsgren*, 309 F.3d at 1188, the silvicultural rule does not exempt any point source from regulation because that rule's list of silvicultural point sources is not exhaustive. The unanimous panel opinion in this case correctly rejects the notion that 40 C.F.R. § 122.27 exempts from regulation point source discharges of stormwater from logging roads. Slip Op. at 12028-29. None of the parties challenge that interpretation of the silvicultural rule, and yet the State still argues, albeit incorrectly, that EPA's reference to the Part 122 regulations creates an exemption for point source discharges from logging roads. The State's argument conflicts with the plain language of the silvicultural rule and this Court's prior interpretation of that regulation as set forth in *Forsgren*.

The State misplaces its reliance on *American Mining Congress* and *San Francisco Baykeeper* in attempting to create a conflict in the case law where none exists. The Defendants' interpretation of the rule, even if EPA agreed with it, is not entitled to deference because it is plainly erroneous and inconsistent with the plain language of the regulations. *Auer*, 519 U.S. at 461.

In a matter of first impression, the panel correctly upheld and enforced the plain language of the rule and, in doing so, adhered to the appropriate standard of

review regarding interpretation of agency regulations. *Auer*, 519 U.S. at 457, 461. There is no need for an *en banc* review of the panel’s unanimous holding that EPA designated logging as an “industrial activity.”

**3. The panel opinion does not conflict with *Environmental Defense Center v. EPA*.**

The Defendants argue incorrectly that the panel opinion conflicts with *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003). As the panel opinion correctly notes, *Envtl. Defense Center* involved a challenge to EPA’s Phase II regulations. Slip Op. at 12037. The parties in that case did not present to this Court, nor did this Court address, whether the Phase I rule covers logging roads. Consequently, there can be no conflict between the two decisions.

The Timber Companies make far too much of *Envtl. Defense Center*, going so far as to miscast the holding of the Court. The Timber Companies assert that in *Envtl. Defense Center* this Court “concluded, in other words, that discharges from forest roads fit within the category of Phase II discharges....” Timber at 13-14. The Timber Companies are wrong. In *Envtl. Defense Center*, this Court remanded to EPA the question of whether logging roads should be regulated under the Phase II storm water rule, but it did not decide that question. *Envtl. Defense Center*, 344 F.3d at 863. Nor did the parties in that case ever present the issue of whether logging roads are regulated pursuant to the Phase I rule. *Envtl. Defense Center*

does not address the Phase I rule, nor does it hold that logging roads are subject to the Phase II rule, as the Defendants contend.

The State is not so cavalier. The State argues that the opinion in *Envtl. Defense Center*, at best, represents an “implicit recognition” that “forest road runoff is a Phase II stormwater discharge, rather than a Phase I discharge.” State at 11; *see also id.* at 9. The undeniable fact, however, is that this Court has never before ruled on whether logging roads are regulated under the Phase I rule. The unanimous panel opinion in this case addresses that issue for the first time within this Circuit. The “implicit recognition” relied upon by the Defendants does not equate with a conflict in the case law warranting *en banc* review. Fed. R. App. P. 35(a)(1) (*en banc* review is not favored and ordinarily will not be ordered unless “necessary to secure or maintain uniformity of the court’s decisions”).

**4. The panel opinion does not conflict with *Newton County Wildlife Ass’n v. Rogers*.**

In a footnote, the Timber Companies contend that the panel opinion conflicts with *Newton County Wildlife Ass’n v. Rogers*, 141 F.3d 803 (8th Cir. 1998). Timber at 14 n.5. As this Circuit’s rules make clear, an inter-circuit conflict may warrant *en banc* review if the panel decision “directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity.” Circuit Rule 35-1 (emphasis added).

Here, the Timber Companies fail to argue, pursuant to standards of this Circuit, why the alleged inter-circuit conflict warrants the attention of an *en banc* panel. But even their implied argument is unpersuasive. The *Newton County* court did not cite, much less consider, the Phase I regulation. Rather, it concluded in one sentence, and without exploration or elaboration, that “logging and road building activities” are not point sources. But this case does not pertain to “logging and road building activities,” it concerns discharges from pipes and ditches along logging roads actively used for timber hauling. Consequently, there is no “direct conflict” between the panel opinion and *Newton County*. If there is a “direct conflict,” it has existed since 2002, when this Court respectfully disagreed with *Newton County*. See *Forsgren*, 309 F.3d at 1188 n.7.

B. This proceeding does not involve a question of exceptional importance.

This proceeding does not present an issue of exceptional importance, as claimed. The State argues that the panel opinion creates such an issue by “displacing” Oregon’s regulatory scheme for logging roads. According to the State, Oregon should be able to continue regulating silvicultural runoff as non-point source pollution under its Forest Practices Act. State at 11-15.

The State’s arguments should be rejected because applying the NPDES permit requirement to logging roads will supplement, not eliminate, Oregon’s existing regulatory programs. Oregon regulates non-point source pollution through

its Forest Practices Act and state water quality programs, while regulating point source pollution through its delegated NPDES program. *See generally* Oregon Revised Statutes Ch. 468B and Oregon Admin. Rules Ch. 340-041, -042, and -045. The Oregon Forest Practices Act regulates all sorts of logging activities—logging roads are only one small part of the logging activities that Oregon regulates—but it is entirely distinct from Oregon’s NPDES program and it does not prohibit, much less regulate, point source discharges of pollutants. The panel opinion modifies Oregon’s regulatory role—discharges from point sources along logging roads now need NPDES permits—but it does not displace Oregon’s forest practices rules or water quality programs.

Equally important, for point source discharges of pollutants, Congress fully intended to replace ineffective state programs with the NPDES permit program. The regulatory “displacement” that the State finds so objectionable is precisely what Congress sought to accomplish when it adopted the NPDES permit program in 1972. *See EPA v. State Water Resources Control Bd.*, 426 U.S. 200, 202-205 (1976); 117 Cong. Rec. 38,798-99 (1971). Congress’ new program required point sources of pollution to obtain NPDES permits but left control of non-point source pollution to the states. *See* 33 U.S.C. §§ 1311(a), 1342, 1362(12)(A). This is not the right time or the right forum for the State to object to Congress’ policy choices.

The State has simply repackaged and reiterated the losing arguments it presented during the merits phase of this appeal. The panel opinion correctly rejects the contention that the silvicultural rule “categorically exempt[s] silvicultural discharges from the NPDES permitting program by defining such discharges as ‘nonpoint source’ pollution for purposes of the CWA.” State at 11; Slip Op. at 12028-29. That Oregon will now have to regulate logging roads through its NPDES permit program instead of its Forest Practices Act implements Congressional intent, it does not create an issue of exceptional importance.

The Timber Companies’ contentions on this point are similarly weak. They incorrectly contend that this case presents an issue of exceptional importance because NPDES permits for logging roads have not been required before and are not yet available. Timber at 14-15. First, there is no evidence that the Timber Companies applied for NPDES permits despite receiving sixty days advance notice of the lawsuit. Even assuming for the sake of argument that the Timber Companies could not obtain permits if they had applied, that fact alone does not alter the Defendants’ obligations to comply with section 301(a) of the Act. *San Francisco Baykeeper*, 481 F.3d at 706; *Hammersley*, 299 F.3d at 1012-13.

Second, there is a clear line of authority stretching back to 1972 that demonstrates that permits were in fact required. In 1972, Congress prohibited the discharge of pollutants from any pipe, ditch, or channel without an NPDES permit.

33 U.S.C. §§ 1311(a), 1362(14). In 1977, it was clear that this requirement applied to the logging industry. *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1379 (D.C. Cir. 1977) (finding unlawful an NPDES permit exemption for stormwater discharges associated with silvicultural activities). In 1990, EPA plainly required permits for stormwater discharges associated with logging. 40 C.F.R. § 122.26(b)(14)(ii). And in 2002, this Court held that EPA's silvicultural rule does not exempt statutory point sources from the NPDES permit requirement. *Forsgren*, 309 F.3d at 1185-86, 1188 n.6, 1190.

What the Timber Companies are really saying is that their prior decisions not to seek NPDES permits somehow constitute evidence that permits are not required. But that argument is obviously fallacious: that NEDC had to sue the Defendants to get them to comply with the Act does not mean that the Act did not previously require NPDES permits for logging roads.

Finally, the Timber Companies contend that the panel opinion creates an issue of exceptional importance by improperly determining as a matter of fact that the logging roads at issue are dedicated to an industrial activity. *Timber* at 10 n.2, 15. But the panel opinion's discussion of logging roads does not equate to a finding of fact. Furthermore, the panel was well within its authority to assume that the facts alleged are true and that NEDC therefore stated a claim upon which relief can be granted. *See* ER 07 at 2 ¶ 2, at 3 ¶¶ 4-5, at 6-8 ¶¶ 15-21, and at 18-20 ¶¶ 69-

75; Slip Op. at 12006 (*citing Knieval v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005)); *see also* ER 07 at 7-8 ¶ 19 (regarding Klahnberry timber sale); ER 47 at 94-100 (portions of Klahnberry Timber Sale Contract), especially at 98 ¶ 50 (Route of Haul) and at 99-100 ¶ 53 (Access) and ¶ 54 (Road Maintenance). Even if the Timber Companies are correct and the panel improperly decided a question of fact, that is a matter for panel rehearing not rehearing *en banc*.

Under the panel decision, the Defendants now have to comply with the Clean Water Act like nearly every other American industry. This case is important to the parties, and it is important to water quality in Oregon's coast range, but it does not present an issue of exceptional importance that justifies *en banc* review. *See National Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir. 2009) (denying petitions for rehearing and rehearing *en banc* after vacating EPA NPDES permit exemption for certain pesticide discharges).

**III. THE PETITIONS FOR PANEL REHEARING SHOULD BE DENIED BECAUSE THE OPINION DOES NOT OVERLOOK OR MISAPPREHEND ANY POINT OF LAW OR FACT.**

Petitions for panel rehearing are reserved for instances in which the Court has "overlooked or misapprehended" a critical point of law or fact. Fed. R. App. P. 40(a)(2). "It should go without saying that a petition for rehearing should not be filed simply to reargue matters already argued unsuccessfully in the original appeal proceedings...." Wright and Miller § 3986.1. Moreover, "[i]ssues that were not

presented in the initial briefs and argument will seldom be considered when presented for the first time by petition for rehearing.” *Id.*; *see also Varney v. Secretary of Health and Human Services*, 859 F.2d 1396, 1397 (9th Cir. 1988).

In their petition for panel rehearing, the Timber Companies simply repeat the unpersuasive arguments they made during the merits phase. Timber at 7-11. The State, on the other hand, raises a brand new issue, arguing for the first time that the panel should have conducted a severability analysis and then remanded with instructions to abate the case pending a new rulemaking by EPA. State at 16-17. The Defendants’ arguments are unpersuasive and should be rejected.

A. The panel opinion considers and properly rejects the Timber Companies’ arguments regarding the Phase I regulation.

The Timber Companies reprise the same arguments they made in their briefing and at argument in seeking a panel rehearing on interpretation of the Phase I regulation. Timber at 7-9. In particular, focusing on the preamble to the Phase I rule rather than the language of the rule itself, the Timber Companies object to the panel’s holding that logging is an “industrial activity.” Slip Op. at 12034-35.

The Timber Companies make the same mistake as the State, discussed above. *See* Section II.A.2., *supra*. This Court’s analysis must focus first on the plain language of the regulation. *Auer*, 519 U.S. at 461. As this Court has explained in the past, and as the plain language of the rule demonstrates, the list of “industries” is separate and distinct from the definition of discharge “*associated*

with industrial activity.” *American Mining Congress*, 965 F.2d at 764 (emphasis in original); *see also* 40 C.F.R. § 122.26(b)(14) (“The following categories of facilities are considered to be engaging in ‘industrial activity’ for purposes of paragraph (b)(14)...”). Here, the panel opinion correctly holds that EPA clearly included SIC 2411 (Logging) within the definition of “industrial activity.”

The Timber Companies seek a panel rehearing premised almost exclusively upon the preamble to the regulation while ignoring the plain language of the rule. The Timber Companies argue that the preamble “specifically rejected any argument that inclusion of SIC 24 was intended to cover logging itself.” Timber at 8. According to the Timber Companies, EPA received a comment that SIC 2411 should be excluded and EPA agreed. *Id.* First, the Timber Companies previously raised this argument in their brief, *see* Timber Response Brief (Docket #43) at 36-37, and the panel properly rejected it in ruling that the Phase I regulation unambiguously defines SIC 2411 as “industrial activity.” Slip Op. at 12034-35.

Second, the Timber Companies’ claim is misleading because its portrayal of the preamble is inaccurate. The preamble sets forth public comments on each specific proposed subsection of the regulation. 55 Fed. Reg. at 48,011. Two comments requested that EPA exclude SIC 2411 from the list of industries in 40 C.F.R. § 122.26(b)(14). *Id.* EPA agreed that the provision “needs clarification,” *id.*, but it did not exclude SIC 2411 from the list. Instead, EPA stated that, “...the

definition of ‘storm water discharge associated with industrial activity’ does not include sources that may be included under SIC 24, but which are excluded under 40 C.F.R. 122.27.” *Id.* As the panel opinion correctly holds, 40 C.F.R. § 122.27 does not and cannot exclude from the NPDES permit program point source discharges of stormwater. Slip Op. at 12028-29. Furthermore, the preamble states clearly that “EPA intends that the list of applicable SICs will define and identify what industrial facilities are required to apply.” *Id.* The Timber Companies neglect to mention these details in their petition.

The Timber Companies also repeat their arguments regarding the definition of “immediate access road,” which the panel opinion thoroughly considers and properly rejects. They again rely on language from the preamble to the regulation, where EPA explained that the term “immediate access roads” includes “roads which are exclusively or primarily dedicated for use by the industrial facility” but does not include “public access roads such as state, county, or federal roads such as highways or BLM roads which happen to be used by the facility.” Timber at 10 (*citing* 55 Fed. Reg. at 48,009).

The Timber Companies incorrectly interpret this language to mean that a road can never be part of an industrial facility if it is publicly owned. *Id.* To the contrary, EPA clarified “...that it intends the language ‘immediate access roads’ (including haul roads) to refer to roads which are exclusively or primarily

dedicated for use by the industrial facility.” 55 Fed. Reg. at 48,009 (emphasis added). Similarly, public roads that “happen to be used by the facility” are not considered “immediate access roads.” *Id.* (emphasis added). The inquiry focuses on how the road is currently used and not simply whether it is publicly owned. The logging roads at issue in this case, for instance, are in a large state forest with ongoing logging activities. Further, the stormwater collection systems along these designated haul routes are maintained by logging companies pursuant to contracts with the State. Slip Op. at 12035. In contrast, interstate highways, also publicly owned, may be an example of roads that only “happen to be used by the facility” and are not “exclusively or primarily dedicated” for use by industry.

The panel opinion thoroughly reviews and rejects the Timber Companies’ arguments. Although they disagree with the panel opinion, the Timber Companies have done little more than simply repeat arguments previously made without showing any need for a panel rehearing.

B. The Court should reject the State’s untimely effort to introduce new issues at this stage of the proceedings.

Unsatisfied with the well-reasoned opinion of the unanimous panel, the State now asserts for the first time that this Court should remand and abate this litigation because 40 C.F.R. § 122.26 is not severable from its supposed reference to 40 C.F.R. § 122.27. State at 16-18. The State never once raised this issue before the District Court, in its appellate response brief, or during oral argument. Only now,

more than four years after the initial complaint was filed, does the State argue for an abatement of the litigation.

First and foremost, this Court should reject the State's untimely and highly prejudicial request for an abatement of the litigation. This Court has long held that as "a general rule, we will not consider issues that a party raises for the first time in a petition for rehearing." *Varney*, 859 F.2d at 1397 (citing *Escobar Ruiz v. Immigration and Naturalization Service*, 813 F.2d 283, 285-86 (9th Cir. 1987)); see also *Wright and Miller* § 3986.1. The Court recognizes limited exceptions in cases of extraordinary circumstances. *Id.*

The State fails to so much as acknowledge the Court's precedent on raising new issues in a petition for rehearing and certainly offers no justification whatsoever for doing so here. Instead, the State simply argues that the panel's "methodology for construing the EPA's stormwater rule is analytically flawed." State at 16. The State had numerous opportunities to raise the severability issue and indeed could have first done so before the District Court several years ago when filing its motion to dismiss. Now, after years of briefing in which the parties thoroughly vetted their respective approaches to construing EPA's regulation, the State's argument is untimely. The Court should reject the State's request as untimely, bordering on frivolous, dilatory and highly prejudicial.

Moreover, even if the State had a colorable reason for making such an untimely request, which it does not, the State's argument is wrong because the panel opinion does not strike down any rule. The doctrine holds that a court "may partially set aside a regulation if the invalid portion is severable." *Arizona Public Svcs. Co. v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009). Here, NEDC has not challenged the silvicultural rule and the panel opinion does not strike down any portion of EPA's regulations. The unanimous panel opinion interprets the meaning of 40 C.F.R. § 122.27, but no portion of that rule or any other EPA regulation has been challenged or set aside by the Court. The concept of severability simply does not apply in this case and in no way justifies an abatement at this time.

For the foregoing reasons, NEDC respectfully requests that the Court deny the pending petitions for rehearing and rehearing *en banc*.

Respectfully submitted this 13th day of December, 2010.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(5), Federal Rules of Appellate Procedure, I certify that PLAINTIFF-APPELLANT NORTHWEST ENVIRONMENTAL DEFENSE CENTER'S OPPOSITION TO THE PETITIONS FOR REHEARING AND REHEARING EN BANC is proportionately spaced and has a typeface of 14 points or more, that it contains 7,007 words, and that it complies with this Court's October 21, 2010, Order (Docket #106) limiting the response to 30 pages.

DATED: December 13, 2010

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## CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2010, I directed that PLAINTIFF-APPELLANT NORTHWEST ENVIRONMENTAL DEFENSE CENTER'S OPPOSITION TO THE PETITIONS FOR REHEARING AND REHEARING EN BANC be electronically filed 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 documents by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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# Appendix A

40 C.F.R. § 122.27.

Silvicultural activities (applicable to State NPDES programs, see Sec. 123.25).

(a) Permit requirement. Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program.

(b) Definitions. (1) Silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233).

(2) Rock crushing and gravel washing facilities means facilities which process crushed and broken stone, gravel, and riprap (See 40 CFR part 436, subpart B, including the effluent limitations guidelines).

(3) Log sorting and log storage facilities means facilities whose discharges result from the holding of unprocessed wood, for example, logs or roundwood with bark or after removal of bark held in self contained bodies of water (mill ponds or log ponds) or stored on land where water is applied intentionally on the logs (wet decking). (See 40 CFR part 429, subpart I, including the effluent limitations guidelines).