Nos. 11-338, 11-347

In The Supreme Court of the United States

DOUG DECKER, the Oregon State Forester, in his official capacity; et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST LLC; et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, ASSOCIATION OF OREGON COUNTIES, IDAHO ASSOCIATION OF COUNTIES, ASSOCIATION OF O & C COUNTIES, AND, DOUGLAS COUNTY AS *AMICI CURIAE* SUPPORTING PETITIONERS

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The National Association of Counties, Association of Oregon Counties, Idaho Association of Counties, Association of O & C Counties, and Douglas County (collectively "Counties") respectfully submit this brief as *amici curiae* in support of Petitioners.[1]

INTERESTS OF *AMICI CURIAE*

The National Association of Counties ("NACo") is the national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,068 counties. NACo is a Delaware non-profit corporation, there are no subsidiary or parent organizations, and it has no shareholders.

The Association of Oregon Counties ("AOC") is an intergovernmental agency of county governments established under the laws of Oregon, it has no subsidiary or parent organizations, and it has no shareholders.

The Idaho Association of Counties ("IAC") is a non-profit, non-partisan service organization dedicated

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

to the improvement of county government. IAC was designed and incorporated by county elected officials under Idaho law and under Section 501(c)(4) of the Internal Revenue Code to provide services, research, uniformity, and coordination among member counties in order for the county elected officials to better serve their constituents. IAC has no subsidiary or parent organizations. Its members are the 44 Idaho Counties.

The Association of O & C Counties ("Association") is an unincorporated, voluntary association of the 18 counties in western Oregon that are the beneficiaries of the lands managed by the Bureau of Land Management under the O & C Act of 1937 (Act of Aug. 28, 1937, c. 876, Title I, §1) (43 U.S.C. §1181a, *et seq.*). The Association has no subsidiary or parent organizations and has no shareholders.

Douglas County is a county government established by the State of Oregon and as such has no subsidiary or parent organizations, nor any shareholders. Douglas County maintains a system of county roads over which the public has a right of use for forestry, industrial, recreational, domestic and general use.

The Counties have a vital interest in the definitive resolution of the question whether the runoff from that subset of their public roads that are logging roads not directly associated with any industrial facility are subject to the permitting requirements of the National Pollution Discharge Elimination System

("NPDES") of the Clean Water Act ("CWA") (33 U.S.C. §1342).

Pursuant to this Court's Rule 37.2(a), counsel of record in this case received timely notice of the Counties' intent to file this brief, and all parties consented to the filing of this brief with the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the far-reaching decision by the Ninth Circuit displacing the longstanding manner in which the Environmental Protection Agency ("EPA") and the State of Oregon implement the stormwater control provisions of the CWA (33 U.S.C. §1342(p)).

In *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011), the Ninth Circuit shifted the management of stormwater runoff associated with logging roads from the nonpoint source control programs managed by the respective states to a system of permitting under the National Pollution Discharge Elimination System ("NPDES") (33 U.S.C. §1342).

This fundamental shift in the long-established stormwater management scheme, ignored that Congress has chosen to focus the CWA's NPDES permitting requirements on those discharges of pollutants from point sources and only a limited number of

stormwater discharges (33 U.S.C. §1342), rather than require permitting for discharges or runoff associated with activities such as silvicultural activities.

In accord with this focus, EPA's longstanding interpretation of the CWA stormwater provisions has been that that subgroup of stormwater discharges associated with silvicultural activities, including logging roads, was not subject to NPDES permitting, rather these discharges were to be controlled as part of the State's primary responsibility to prevent, reduce and eliminate pollution (33 U.S.C. §1251(b)), which in this case was through the respective state's nonpoint source control programs implemented under 33 U.S.C. §1329 and 33 U.S.C. §1288.

Recognizing that differences in climate and geography make nationwide uniformity in controlling nonpoint source pollution virtually impossible, Congress has traditionally depended on land use controls state or local in nature to control these discharges and runoff. (*Oregon Natural Desert Association, et al. v. United States Forest Service*, 550 F.3d 778, 785 (9th Cir. 2008)). Congress has opted to regulate these sources of runoff and discharge through the programs established in 33 U.S.C. §1329(b) and 33 U.S.C. §1288.

In accord with this policy, and in reliance on its EPA approved nonpoint management program (33 U.S.C. §1329), the State of Oregon promulgated administrative rules which established standards for the control of the nonpoint sources of pollution (Oregon

Administrative Rules 340-042-0025), including discharges and runoff associated with silvicultural practices (Oregon Administrative Rules 629, divisions 625; 635; 640; 645; 650; 655; 660). Specific to logging roads, the State of Oregon incorporated into its Forest Practice Rules a series of best management practices addressing logging road construction and maintenance (Oregon Administrative Rules 629-625-0000, *et seq.*).

Plaintiff challenged EPA's and the State of Oregon's long-standing interpretation by alleging that the State of Oregon as the owner, or as the operator, of two logging roads (Trask Road and Sams Down Road) was in violation of the CWA by allowing the discharge of stormwater runoff from these logging roads without first acquiring a NPDES permit.

Plaintiff contended that the stormwater runoff from these logging roads represents a "discharge associated with industrial activity" and as such the roads were automatically subject to the NPDES permitting requirements under 33 U.S.C. §1342(p)(2)(B). Plaintiff sought to shift the focus of the State of Oregon's approved nonpoint pollution control program to a NPDES permitting program.

The defendants and intervenor-defendants moved to dismiss the case based on EPA's silvicultural rule (40 C.F.R. §122.27) and stormwater rule (40 C.F.R. §122.26) whereby logging roads were excluded from CWA permitting requirements. EPA filed an *amicus* brief in support of the motion to dismiss, explaining

that stormwater runoff from logging roads was not the type of discharge Congress had directed be subject to permitting (United States *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, 3:06-cv-01270 filed Dec. 6, 2006, C.R. 44).

As EPA explained in its *amicus* brief, part of the 1987 amendments to the CWA, Congress adopted a two-phase approach to management of stormwater discharges.

During the first phase, the CWA directed that five specific types of stormwater discharges were to be automatically subject to permitting ("Phase I") (33 U.S.C. §1342(p)(2) & (3)).

With respect to the other stormwater discharges, Congress directed that EPA, in consultation with the States, was to identify which of these other forms of stormwater discharges existed and were not regulated under Phase I (33 U.S.C. §1342(p)(2)). Once it identified these various discharges, it was then to identify which of these non-Phase I stormwater discharges should be subject to regulation. (33 U.S.C. §1342(p)(2) & (5)). The non-Phase I discharges that EPA determined were to be subject to permitting became known as the Phase II discharge. The remaining discharges were left to the States to manage.

In identifying the non-Phase I discharges pursuant to 33 U.S.C. §1342(p)(5), EPA had to first define and determine the scope of the ambiguous phrase "discharge associated with industrial activity." Defining this phrase was a critical step in fulfilling its

CWA obligations under 33 U.S.C. §1342(p)(5) & (6) to identify the non-Phase I discharges.

EPA defined the phrase "associated with industrial activity" as:

> "[s]torm water discharge associated within industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is **directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122.**"

(40 C.F.R. §122.26(b)(14)) (*emphasis added*).

EPA established a three part test which required there be: first, a direct relationship between the road and the industrial activity; secondly, that the activity be one of the specific activities identified; and, third, that the discharge occur at a specific industrial plant or facility. Neither the Trask Road nor the Sams Down Road met any of these elements.

Further, EPA also interpreted the phrase as not including activities that were excluded from NPDES permitting pursuant to 40 C.F.R. §122. Included within Part 122, were the road related activities described in the silvicultural rule.

As part of its delegated authority to interpret the CWA, EPA established the silvicultural rule as a means of distinguishing which silvicultural activities

were to be "silvicultural point sources" and subject to permitting (40 C.F.R. §122.27), from those "silvicultural nonpoint sources" which were subject to state management.

EPA defined the "silvicultural point sources" as:

> "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."

(40 C.F.R. §122.27(b)(1)).

EPA specifically referenced that the logging roads were nonpoint sources in that the term silvicultural point sources:

> "does not include nonpoint 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."

(40 C.F.R. §122.27(b)(1)).

In its *amicus* brief to the Ninth Circuit, the United States again pointed out that the silvicultural nonpoint sources were to be controlled through the respective states' nonpoint source management

programs (33 U.S.C. §1329) rather than the NPDES permitting program (United States *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266 (9th Cir. Filed Nov. 15, 2007) C.R. 42).

In rejecting EPA's interpretation, the Ninth Circuit concluded that EPA's rules were invalid to the extent they served to exclude logging road stormwater discharges from the NPDES permitting requirements – a decision that gave inadequate deference to EPA's interpretation of the CWA provisions relating to "associated with industrial activity."

The Ninth Circuit ignored that Congress expressly meant for EPA to have substantial discretion in administering the CWA, entrusting EPA with discretion in defining specific terms (*National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 166-67, 171-75 (C.A.D.C. 1982)). Included within this discretion was the authority to define which stormwater discharges were associated with industrial activities.

Notwithstanding that EPA's interpretation of the phrase "discharge associated with industrial activity" was reasonable, and one EPA was required to make in order to fulfill its obligations under 33 U.S.C. §1342(p)(5), the Ninth Circuit simply reached another conclusion, namely that the EPA's interpretation was not consistent with the Congressional intent. The Ninth Circuit ignored that when, as in this situation, Congress has delegated to the agency the authority to implement a statute and the agency has interpreted provisions thereof through rulemaking, the court

should not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency (*Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984)).

Rather than defer to EPA's interpretation of the CWA, the Ninth Circuit concluded that a logging road is associated with an industrial activity and therefore any stormwater discharge along the logging road represented a "discharge associated with an industrial activity." It failed to recognize EPA's reasonable interpretation that activities covered by the silvicultural rule were not "discharges associated with an industrial activity."

The Ninth Circuit erred not only in rejecting the silvicultural rule, it also erred in failing to defer to EPA's long-standing interpretation of the phrase "associated with industrial activity." Rather than recognize EPA's interpretation of what discharges were subject to Phase I, the Ninth Circuit simply substituted its judgment and cast aside EPA's interpretation that stormwater discharges from logging operations were excluded from permitting.

The Ninth Circuit also ignored that under EPA's interpretation, the discharge must be not only from a conveyance that is used to collect and convey stormwater, it must also be "***directly related*** to manufacturing, processing or raw materials storage areas ***at an industrial plant***." (40 C.F.R. §122.26(b)(14)) (*emphasis added*).

The decision that these two remote logging roads, of which at least one is owned by a local government, are exclusively or primarily dedicated for use by an industrial facility has swept into the NPDES permitting process (33 U.S.C. §1342) not only private roads that were excluded under the silvicultural rule, but also large numbers of public roads owned and managed by the various counties.

The Petitioners have set forth in their respective briefs compelling legal reasons for granting *certiorari* with respect to the Ninth Circuit's departure from the EPA's and the State of Oregon's long-standing interpretations of the stormwater provisions of the CWA. The Counties will not restate these arguments, rather, the Counties instead explain why redefining roads utilized primarily for forestry purposes as roads associated with an industrial activity is overly broad and imposes a significant burden on the Counties.

In setting aside the long-established method of addressing stormwater discharges from silvicultural practices, the Ninth Circuit imposed a significant cost prohibitive burden on the Counties. As discussed *supra,* the financial burden to the Oregon Counties alone in meeting this new permitting burden cost is estimated to be $56,000,000 at a conservative minimum. The Counties can only meet this burden if they divert funding from other essential services to meet this new permitting requirement.

The Ninth Circuit erred in failing to defer to EPA's and the State of Oregon's long-standing interpretation of the CWA relative to management of stormwater discharges from logging roads. As a result of this error, the Ninth Circuit has upset the established CWA management programs and imposed a substantial burden on otherwise financially strapped counties.

ARGUMENT

The Ninth Circuit's decision is extremely broad reaching and will result in unwarranted burdens on the Counties.

The Ninth Circuit's decision that NPDES permits are required for the ditches and culverts associated with roads that are primarily logging roads has far-reaching implications on the Counties.

While the Ninth Circuit appears to have assumed that these primarily logging roads are built and maintained solely by the logging companies or by the operators of an industrial facility (*See Northwest Environmental Defense Center v. Brown* at p. 1084), this assumption is clearly in error. If the Ninth Circuit had had the benefit of public review and comment of the rule making procedures of the Administrative Procedures Act, it would have found that large numbers of the logging roads in Oregon – if not the majority – that fall within the Ninth Circuit's definition of "primary logging roads" are owned,

built and maintained by the Oregon Counties, the State of Oregon, United States Forest Service or the United States Bureau of Land Management.

Similarly, throughout the United States the various counties own and maintain a large number of roads that also fall within the Ninth Circuit's classification of primarily logging roads as roads that provide access to logging sites (*id.* at p. 1084).

Review is warranted by this Court in that the Ninth Circuit's holding that stormwater runoff from primarily logging roads qualifies as Phase I discharge has established a new and unprecedented burden requiring NPDES permitting for County roads that are used for logging purposes. This drastic shift in the manner in which the CWA is implemented alone warrants this Court's review.

Further, review is also warranted because the Ninth Circuit's holding has created the potential for local governments to be subject to CWA liability when their road systems are utilized by private or other public entities in exercising their rights to utilize the county road systems.

If the Ninth Circuit opinion is left in place, County, State and Federal officials will be inundated with an enormous workload in order to obtain NPDES permits for ditches and culverts which have insignificant environmental impacts.

The practical effect of the requirement to impose permitting requirements on logging roads would

impose an extensive and cost prohibitive permitting and monitoring requirement upon the Counties and other private parties – a burden they can ill afford without sacrificing funding for other essential services.

To illustrate the magnitude of the problem created by the Ninth Circuit's decision, the Association of Oregon Counties surveyed the various County Road Supervisors in Oregon to determine the number of County roads that would be defined as "primarily logging roads" as that phrase was used in the Ninth Circuit's decision. (Association of Oregon Counties, *et al.*, *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266, C.R. 95 (9th Cir. Filed Oct. 15, 2010)).

The County Road Supervisors identified that the county road systems within Oregon contain approximately 4,800 miles of roads that fall within what the Ninth Circuit defined as "primarily logging roads." (Association of Oregon Counties, *et al.*; *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266, C.R. 95 (9th Cir. Filed Oct. 15, 2010)).

Associated with these primary logging roads are approximately 20,000 cross culverts (culverts that cross under the primary logging road). Not included within this analysis are the culverts that do not cross under these "primary logging roads" but cross connecting side roads or private access driveways. (Association of Oregon Counties, *et al.*; *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266, C.R. 95 (9th Cir. Filed Oct. 15, 2010)).

In addition to the "primary logging roads" identified by the County Road Supervisors, within the 2.1 million acres managed by the Bureau of Land Management ("BLM") the Association of O & C Counties also identified the number of roads and culverts. This analysis identified an additional 16,817 miles of "primary logging roads" along with 500 culverts that are larger than 80 inches in diameter and an additional 40,000 culverts of less than 80 inches in diameter. (Association of Oregon Counties, *et al.*; *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266, C.R. 95 (9th Cir. Filed Oct. 15, 2010)).

The Oregon Department of Transportation in its 2009 Orégon Mileage Report also identified that there were 6,612 miles of "public" United States Forest Service roads which would mostly be logging roads. (ODOT 2009 Mileage Report, p. 163; at (http://www.oregon.gov/ODOT/TD/TDATA/rics/PublicRoadsInventory.shtml#Oregon_Mileage_Report.)

While a separate NPDES permitting system for the "primary logging roads" does not currently exist, the magnitude of the problem facing the Counties can be quantified if one assumes that the same application requirements as are currently required for stormwater discharges associated with industrial activity (*See* 40 C.F.R. §122.26(c)) will be imposed for these "primary logging roads."

Under 40 C.F.R. §122.26(c), each culvert and ditch that discharges stormwater will require a

NPDES permit application that includes at a minimum:

(a) a site map with topography, drainage structures, underground springs (40 C.F.R. §122.26(c)(1)(i)(A));

(b) an estimate of impervious surfaces and the total area drained by each outfall, along with a narrative of the past activities (40 C.F.R. §122.26(c)(1)(i)(B));

(c) certifications that each of the outfalls has been tested for non stormwater discharge (40 C.F.R. §122.26(c)(1)(i)(C));

(d) information regarding significant spills of toxic or hazardous pollutants at the facility (40 C.F.R. §122.26(c)(1)(i)(D)); and,

(e) sample data collected during storm events from each of the outfalls (40 C.F.R. §122.26(c)(1)(i)(E)).

The requirement of subpart (b) that the owner of the primary logging road provide a narrative on past activities that have occurred within the drainage standing alone imposes an impossible burden on the Counties since these past activities were often undertaken by adjacent landowners or operators. If the owner of the logging road is a county or other governmental entity, it is being placed in the position of collecting enormous amounts of data from the landowners or operators adjacent to its county road system who have little incentive or requirement to provide this data.

Based upon the number of miles of "primary logging roads" identified by the various County Road Supervisors, the Association of Oregon Counties' road engineer estimated that to obtain permits for all of the cross culverts and roadway ditches associated with just the 4,800 miles of "primary logging roads" and their accompanying culverts under county jurisdiction, there would be a permitting cost to the Oregon Counties of approximately $56,000,000 (20,000 culverts x 40 hours staff time per permit x $70 per hour = $56,000,000) (Association of Oregon Counties, *et al.*; *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266, C.R. 95 (9th Cir. Filed Oct. 15, 2010)). One can assume that the impact of the Ninth Circuit's ruling will be far greater once the "primary logging road" permitting requirement is applied to the forest counties in other states.

Not included within this $56,000,000 estimate is the required pre-application sampling of each outfall during a stormwater runoff event as required under 40 C.F.R. §122.26(c)(1)(i)(E) – a stormwater sampling program that will be a staggering burden in its own right.

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

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

* * *

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

* * *

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

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

(*emphasis added*).

As with the requirement under 40 C.F.R. §122.26(c)(1)(i)(B) to obtain data as to the land practices in the drainage area of each culvert or ditch, to obtain this storm event data for each culvert or ditch outfall along the 4,800 miles of "primary logging roads" as well as for the accompanying 20,000 cross culverts imposes a staggering burden on the Oregon Counties. Likewise, for the Federal agencies to obtain the data for the Bureau of Land Management's 16,817 miles of roads and the approximate 6,612 miles of Forest Service roads is an equally staggering financial burden.

Increasing the complexity of the issue is the unique checkerboard of intermingled private and public land ownerships in Oregon resulting from the reciprocal rights-of-way associated with the 1937 O&C Act lands managed by the Bureau of Land Management. Access across this checkerboard is provided through reciprocal right-of-way agreements that provide the United States and the private landowners with the right to use and construct logging roads on each other's property. (*See* 43 C.F.R. §2812 *et seq.*). As a result of these road agreements, numerous landowners have rights to use a road that they do not directly control, likewise they own roads to which other landowners have rights of use.

The "primary logging roads" covered by these reciprocal agreements are not under one single party's control and often involve numerous operators utilizing the same road concurrently. Contrary to the Ninth Circuit's assumption that the "primary logging roads" are built and maintained by the logging companies, such is not the case, for there are hundreds, perhaps thousands, of intermingled private owners within the O & C checkerboard, all of whom share the same interconnecting system of "primary logging roads." This interconnecting system of reciprocal rights of way are, in most cases, not associated either directly or indirectly with any specific industrial facility.

The Ninth Circuit has simply miscomprehended the nature of the road system that is utilized for silvicultural purposes. Rather than defer to the

established programs for controlling the stormwater discharges associated with silvicultural activities, the Ninth Circuit imposed an entirely new interpretation of the CWA – an interpretation that imposes a staggering burden on the Counties. This burden is not warranted given the existing programs to manage stormwater discharges and runoff. To meet this burden, the Counties will need to redirect funding from other essential services to fund this new and unwarranted permitting process.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be granted.

Respectfully submitted,

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