

CORPORATE DISCLOSURE STATEMENT

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Pacific Legal Foundation and California Forestry Association respectfully submit this brief *amicus curiae* in support of Appellees Marvin Brown, *et al.* Applicant Amici move concurrently by separate motion to appear as *amici curiae* pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court correctly held that the construction, maintenance, and use of forest roads do not constitute a “point source” within the meaning of the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and therefore that stormwater runoff from those roads does not require a permit under Section 402 of the Act, *id.* § 1342. That conclusion is entirely consistent with this Court’s decision in *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002). *Forsgren* holds that aerial spraying of insecticide constitutes a point source because such spraying falls within the statutory definition of point source, *see id.* at 1185-86, *and* because it does not fall within the “silvicultural exemption” regulation promulgated by the Environmental Protection Agency (EPA), *see id.* at 1186; *see also* 40 C.F.R. § 122.27. Importantly, *Forsgren* did not invalidate the silvicultural exemption but simply interpreted it in a manner consistent with the Act itself. *See Forsgren*, 309 F.3d at 1190 n.8. Therefore, so long as the challenged activity here—the “natural runoff” from the construction, maintenance, and use of forest

roads—falls within the silvicultural exemption, that activity does not constitute a point source and is not subject to Section 402’s permitting requirements.

The challenged activity falls within the exemption. The district court correctly concluded that stormwater that flows into jurisdictional waters from forest roads is not subject to Section 402 permitting, even though that stormwater may become channelized through roadside ditches and culverts. The exemption applies to “natural runoff”; thus, by negative implication, the exemption does not apply to “unnatural” or “artificial” runoff. Stormwater does not become unnatural or artificial merely because it is channelized into ditches and culverts. Rather, what distinguishes natural from unnatural or artificial runoff is the *source* of that runoff. In other words, so long as the stormwater runoff from forest road construction, maintenance, and use is indistinguishable from the runoff that would flow from the road complexes if they lacked drainage ditches, then that runoff is fairly considered “natural” and thus within the silvicultural exemption.

This result is fully consistent with Congress’s intention to restore and maintain the physical, chemical, and biological integrity of the Nation’s waters. *See* 33 U.S.C. § 1251(a). As set forth below, existing state regulation of stormwater discharges—with California offered as an example—is considerable, and extension of federal regulatory control over those discharges would create substantial

administrative difficulties. Leaving the regulatory status quo as it is would thus both produce the correct legal result and constitute good environmental policy.

ARGUMENT

I

UNDER THE CLEAN WATER ACT AND THE SILVICULTURAL EXEMPTION, FOREST ROADS ARE NONPOINT SOURCES AND THUS EXEMPT FROM THE PERMITTING REQUIREMENTS OF SECTION 402

A. Section 402 Permits Are Not Required for Nonpoint Source Discharges

Congress enacted the CWA in 1972. 33 U.S.C. § 1251(a) (originally codified as the Federal Water Pollution Control Act, 62 Stat. 1155). The CWA “establishes a comprehensive statutory system for controlling water pollution.” *Ass’n to Protect Hammersley, Eld & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002) (citation and internal quotation marks omitted). At the heart of this statutory scheme is the National Pollutant Discharge Elimination System (NPDES) for regulation of pollutant discharges into the waters of the United States. *See* 33 U.S.C. §§ 1311(a), 1342(a). Under the NPDES, permits may be issued by EPA or by the states that have been authorized by EPA to act as NPDES permitting authorities. *See* 33 U.S.C. § 1342(a)-(b).

Not all pollutants or pollution sources fall within the scope of the NPDES permitting regime. Under the CWA, “discharge of pollutant” is defined as “any

addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12)(A). A *point source* is defined as “any discernible, confined and discrete conveyance,” but not agricultural stormwater discharges and return flows from irrigated agriculture. *Id.* § 1362(14). NPDES permits are required only for “point source” discharges. *See, e.g., Forsgren*, 309 F.3d at 1183 (“Point source pollution is distinguished from ‘nonpoint source pollution,’ which is regulated in a different way and does not require [the NPDES] type of permit . . .”).

Nonpoint source pollution is not statutorily defined, but it is “widely understood to be the type of pollution that arises from many dispersed activities over large areas . . . not traceable to any single discrete source.” *Id.* at 1184. The classic example of nonpoint source pollution, as this Court has recognized, is automobile residue, such as rubber, metal, oil, or gas, that is left on roads and washed off by rain. *Id.* at 1186.

Although the discharge of nonpoint source pollution does not require a NPDES permit, such pollution does not escape regulatory control. The CWA requires the states to identify those water bodies within their jurisdictions that are impaired by any number of pollutants, and to establish total maximum daily loads (TMDLs) of pollutants for those impaired water bodies.¹ *See id.* §§ 1311(b)(1)(A), 1313(d). *See*

¹ The CWA also directs EPA to disseminate information regarding nonpoint pollution sources. *See* 33 U.S.C. § 1314(f).

also Or. Natural Desert Ass'n v. Dombek (ONDA), 172 F.3d 1092, 1096-97 (9th Cir. 1998). The statute provides economic incentives to encourage states to enforce TMDLs and bring their impaired water bodies up to the water quality standards established for those water bodies. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2002). Importantly, a waterbody may be listed even though it is impaired by nonpoint source pollution, and TMDLs may be established for that waterbody. There is no requirement that a waterbody be impaired solely by point source pollution to qualify as an impaired waterbody or to have TMDLs established for it. *See id.* at 1140-41.

Congress's decision to exclude nonpoint source pollution from Section 402's permitting requirements is consistent with the legislative policy shift found in the CWA. As this Court explained in *ONDA*, Congress intended the CWA to remedy the previous failed federal water quality regulations, which assumed that the best way to control pollution in the Nation's waters is to establish water quality standards that embody acceptable levels of impairment. That endpoint-to-source approach proved inadequate, by itself, to achieve the goal of water quality enhancement and to provide sufficient incentives to individuals to improve water quality (as opposed merely to maintaining a waterbody's impaired condition). *ONDA*, 172 F.3d at 1096. In response, Congress diversified the CWA's regulatory approach by adding the NDPEs

permitting regime, which focuses on controlling the level of effluent emissions into the Nation's waters by limiting pollutant discharges at their source. The CWA retained the old system's endpoint-to-source strategy most prominently through Section 301(b)'s and Section 303's mandates to the states both to establish water quality standards and TMDLs, and to identify those waterbodies that are impaired by pollution. *See id.* at 1096-97.

B. EPA Regulations Exempt Silvicultural Nonpoint Sources from NPDES Permit Requirements

Following the passage of the CWA, EPA promulgated a proto-silvicultural exemption, which exempted from NPDES permit requirements uncontrolled discharges composed entirely of storm runoff, and some discharges of pollutants from agricultural and silvicultural activities. *See* 40 C.F.R. § 125.4 (1973). In response to a 1975 court decision, EPA promulgated a new silvicultural point source regulation in 1976, *see* 41 Fed. Reg. 24,709, 24,711 (June 18, 1976), and re-promulgated that regulation in 1980, *see* 45 Fed. Reg. 33,290, 33,446-47 (May 19, 1980). The current regulation governing silvicultural point sources is identical to the recodified 1980 version, *Envtl. Protection Info. Ctr. v. Pacific Lumber Co. (EPIC)*, No. C 01-2821 MHP, 2003 WL 25506817, at *3 (N.D. Cal. Oct. 14, 2003), and specifically *excludes* "surface drainage, or road construction and maintenance from which there is natural runoff." 40 C.F.R. § 122.27(b)(1). Here, Appellants seek CWA regulation of natural

runoff from forest roads, even though the discharges associated with such runoff are, as demonstrated below, within the nonpoint source silvicultural activities exemption.

C. The Construction, Maintenance, and Use of Forest Roads Are Exempted Silvicultural Nonpoint Source Activities

In reaching its decision that the building and maintenance of forest roads and the hauling of timber on those roads do not constitute point sources, the district court relied upon *Forsgren*. In that case, environmental groups argued that the planned aerial spraying of insecticides to combat a moth infestation constitutes a point source discharge of pollutants when done over the waters of the United States, thus triggering the NPDES permit requirements pursuant to 33 U.S.C. § 1323(a). *See Forsgren*, 309 F.3d at 1183. The United States Forest Service argued that aerial spraying does not require an NPDES permit because the silvicultural exemption deems pest control to be a nonpoint source. *See id.* at 1185. That exemption provides:

(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 C.F.R. § 209.120 and Part 233).

40 C.F.R. § 122.27 (emphasis added).

Forsgren, of course, ultimately found that the spraying of insecticides from an aircraft over water constitutes a point source discharge of pollutants. Yet it is significant to note that after careful analysis, *Forsgren* did not invalidate the silvicultural exemption. See *Forsgren*, 309 F.3d at 1186 (“[W]e read the regulation to conform to the statute and to the common understanding of the difference between point source and nonpoint source pollution.”). Rather the Court concluded that the regulation should be read as exempting those listed activities from which there is natural runoff. *Id.* The Forest Service’s aerial spraying therefore did not fall within the exemption, because the sprayed insecticide could not fairly be described as “natural runoff.” See *id.*

In this case, the district court recognized that *Forsgren* is apposite. Based upon *Forsgren*’s construction and upholding of the silvicultural exemption, the district court properly concluded that the exemption extends to “nonpoint source silvicultural activities of harvesting operations from which there is natural runoff, surface drainage from which there is natural runoff, and road construction and maintenance from which there is natural runoff.” *Nw. Env’tl. Def. Ctr. (NEDC) v. Brown*, 476 F. Supp. 2d 1188, 1197 (D. Or. 2007).

Thus, the hauling of timber along forest roads does not require an NPDES permit, because stormwater runoff from such activities constitutes a nonpoint source discharge under the silvicultural exemption and *Forsgren*. In *Forsgren*, this Court explained:

The most common example of nonpoint source pollution is the residue left on roadways by automobiles. Small amounts of rubber are worn off of the tires of millions of cars and deposited as a thin film on highways; minute particles of copper dust from brake linings are spread across roads and parking lots each time a driver applies the brakes; drips and drabs of oil and gas ubiquitously stain driveways and streets. When it rains, the rubber particles and copper dust and gas and oil wash off of the streets and are carried along by runoff in a polluted soup, winding up in creeks, rivers, bays, and the ocean.

Forsgren, 309 F.3d at 1184. The discharges from the forest roads in this case derive from natural stormwater runoff, in contrast to the aerial spraying at issue in *Forsgren*, which could hardly be called runoff, much less natural runoff.

That there are ditches alongside the forest roads is irrelevant because runoff from forest roads would wash pollutants into nearby water bodies in the absence of any ditches or culverts. As the district court aptly noted, “the fact that pollutants deposited on top of the roads during timber hauling end up being washed into the water bodies does not turn the road system with its associated ditches and culverts into a point source.” *NEDC*, 476 F. Supp. 2d at 1197. The quantity and quality of the natural stormwater from such roads is a function of the rate of precipitation, not the

ditches on the sides of the road. Accordingly, the challenged activities fall comfortably within the silvicultural exemption.

D. The District Court's Decision Is Consistent with Decisions from This Circuit and Other Courts Holding That Forest Roads Are Exempt Nonpoint Sources

By finding that the Trask River Road and Sam Downs Road are both nonpoint sources, the district court correctly interpreted the CWA and maintained consistency with this Court, as well as courts from this Circuit and other circuits.

The natural runoff from the two state-owned forest roads is composed of residue left on the roadways from motor vehicles. This is exactly the same kind of pollution that this Court previously described as nonpoint source pollution. *Forsgren*, 309 F.3d at 1184. *Forsgren* thus provides binding precedence which the district court properly followed.

This Court has also declined to hold that construction of a forest road constitutes a point source. In *Oregon Natural Resources Council (ONRC) v. United States Forest Service*, 834 F.2d 842, 844 (9th Cir. 1987), the plaintiffs contended among other things that the construction of a bridge and logging road would violate the CWA's command to federal agencies to comply with state water quality requirements. *See* 33 U.S.C. § 1323. ONRC brought its action under the CWA's citizen suit provision to enforce state water quality standards affected by nonpoint sources. This Court concluded that the pertinent effluent limitations are applicable

only to point sources. 834 F.2d at 850. Given that forest road construction is a nonpoint source, ONRC could not bring a citizen suit under the CWA to enforce the discharges associated with the forest road. *See id.* (“[T]he ‘limitations’ set forth in section 1311(b)(1)(C) are ‘effluent limitations’ and, therefore, by definition, applicable only to point sources. Having reached this conclusion, we find that plaintiffs do not have a cause of action under the citizen suit provision of the CWA.” (citation omitted)).

The Eighth Circuit’s holding in *Newton County Wildlife Association v. Rogers*, 141 F.3d 803 (8th Cir. 1998), is consistent with *ONRC*, and provides persuasive authority for the district court’s decision. In *Newton*, the plaintiff argued that the Forest Service needed NPDES permits for logging and road construction. The Eighth Circuit disagreed and noted that the silvicultural nonpoint source exemption does not designate logging and road building as point sources. *Id.* at 810.

The determination by the district court that even the *use* of forest roads falls within the silvicultural nonpoint source exemption flows logically from *O’Aha’ino v. Galiher*, 28 F. Supp. 2d 1258, 1260 (D. Haw. 1998). There, the plaintiff alleged that construction activities, including the construction, use, and maintenance of agricultural access roads, triggered the requirement for an NPDES permit. The court rejected the claim, finding that the roads in question were analogous to logging roads, which fall within the silvicultural exemption. *See id.* at 1261-63.

Justification for determining that natural run-off from the use of forest roads is exempt under the silvicultural nonpoint source exemption was well articulated in *Sierra Club v. Martin*, 71 F. Supp. 2d 1268, 1303 (N.D. Ga. 1996). *Sierra Club* similarly concluded that the use of forest roads does not constitute point sources. In that case the plaintiffs argued that, because forest roads remain in use after timber harvesting is complete, they should be deemed point sources. *Id.* at 1306. The court disagreed, positing that there would be no purpose to exempt the roads from NPDES permit requirements during harvesting, yet then require a permit once the logging stops. *Id.* The plaintiff in *Sierra Club* also contended that runoff from forest roads causes unnatural runoff, as opposed to natural runoff. The court rejected the argument, reasoning that “[to] read[] the exemption for road construction and maintenance as narrowly as Plaintiffs urge would run counter to the EPA’s intent to exclude timber harvesting and road construction and maintenance and to limit the Clean Water Act’s permit requirement to only a few silvicultural activities.” *Id.* Thus, *Sierra Club* is consistent with the district court’s conclusion here that even the *use* of forest roads is a nonpoint source.

The foregoing authority confirms that the district court’s conclusion in this case is judicially sound: forest roads do not constitute point sources.

II

FEDERAL REGULATION OF STORMWATER DISCHARGES ASSOCIATED WITH SILVICULTURAL ACTIVITIES MAY PROVE UNNECESSARY AND COUNTERPRODUCTIVE

Subjecting stormwater runoff from forest road construction, maintenance, and use to Section 402's permitting requirements would add an inefficient layer of regulation to an activity that is already heavily burdened by regulation. California's regulatory approach to forestry management and environmental protection fleshes out the point: the state's timber industry has, since the 1976 promulgation of the silvicultural exemption, structured and planned its activities in reliance on the exemption by, among other things, constructing forest roads with drainage ditches and culverts.

And the exemption has guided not just road construction. Harvesting plans, the development of which depends on existing forest roads or the construction of new roads, have also been drafted in reliance on the exemption. For more than a quarter century, the timber industry across the Nation has built forest roads and developed and implemented harvest plans with the understanding—based on the exemption—that forest roads and their associated drainage structures result in nonpoint source pollution and are not subject to Section 402 permitting requirements. The economic impacts of including forest road construction, maintenance, and use

within the NPDES ambit would therefore be enormous. Yet such regulation would, in the case of California, be largely unnecessary, perhaps redundant, and certainly administratively ungainly.²

A. California Provides Significant Environmental Protection to Mitigate the Environmental Effects of Timber Harvesting

California has the most extensive body of laws applicable to private forest practices of any state in the Nation. The primary governing statute is the Z'Berg

² This focus on California is not to suggest, however, that other western states, such as Oregon, do not have similarly vigorous water quality protections. For example, the Oregon Nonpoint Source Control Program Plan of 2000, submitted to EPA pursuant to Section 319 of the CWA, 33 U.S.C. § 1329, contains an ambitious and comprehensive plan to ensure that Oregon's waters are not degraded by nonpoint sources of pollution. *See Oregon Nonpoint Source Control Program (Oct. 2000), available at <http://www.deq.state.or.us/wq/nonpoint/plan.htm>* (last visited Nov. 1, 2007). By 2007, Oregon intends to have analyzed all impaired surface waters in the state to determine how they became polluted and how they will be restored. *Id.* at ii. The state has imposed monitoring and assessment systems for that purpose, and will soon complete total maximum daily load (TMDL) evaluations of the state's waters. *Id.* at iii. The Oregon Plan also identifies ten objectives designed to improve steelhead habitat, and goes into considerable detail describing how those objectives are being met. *See id.* at 5-1 to 5-11.

Moreover, like California, Oregon has a Forest Practices Act, Or. Rev. Stat. §§ 527.610-527.770, 527.990(1), 527.992, under which have been promulgated Water Protection Rules, Or. Admin. R. 629-635-0000 to 629-660-0060. *See id.* 629-635-0100(2). Those rules give high priority to the preservation of water quality. *See, e.g., id.* 629-035-0100(7)(a) ("The protection goal for water quality . . . is to ensure through the described forest practices that, to the maximum extent practicable, non-point source discharges of pollutants resulting from forest operations do not impair the achievement and maintenance of the water quality standards.").

Nejedly Forest Practice Act (FPA) of 1973, Cal. Pub. Res. Code § 4511, *et seq.* In enacting the FPA, the California Legislature found and declared that

it is the policy of this state to encourage prudent and responsible forest resource management calculated to serve the public's need for timber and other forest products, while giving consideration to the public's need for watershed protection, fisheries and wildlife, and recreational opportunities alike in this and future generations.

Id. § 4512(c). Pursuant to the FPA, the state Board of Forestry issues Forest Practice Rules. Compliance with the Rules, including the timber harvest plan (THP) review and approval process required by the FPA, provides more than adequate assurance that water quality and the beneficial uses of water will be sufficiently protected from significant adverse environmental impacts.

1. Board of Forestry Rulemaking

The FPA authorizes the Board to adopt forest practice rules and regulations. *Id.* § 4551. Since 1973, the Board has adopted almost 1,000 forest practice rules. The Board has promulgated over two dozen major rule packages to address water quality and the beneficial uses of water; that rulemaking comprises more than 1,300 requirements. *See* Exh. 1 (Water Quality Rule Chronology). The forest practice guidelines, issued by the Board, set forth regulations and on-the-ground requirements “to ensure that the beneficial uses of water, native aquatic and riparian species, and the beneficial functions of riparian zones are protected from potentially significant adverse site-specific and cumulative impacts associated with timber operation.” Cal.

Code. Regs. tit. 14, § 916. Moreover, the Board includes with the Rules a detailed appendix devoted entirely to the analysis of cumulative watershed effects. *See id.* § 916.9. The appendix requires the THP submitter to evaluate the impacts to watershed resources within the Watershed Assessment Area, including impacts from sediment discharge, temperature change, organic debris discharge, chemical contamination, and peak flow change.

Any interested party, including California's regional water boards, can propose a rule package for the Board's consideration. As the Board deliberates on a rule package, it seeks the technical input from all state agencies, including the State Water Resources Control Board and the nine regional boards, the Department of Forestry and Fire Protection, the Department of Fish and Game, the state Geological Survey, and various federal agencies, such as the EPA, the Fish and Wildlife Service, and the National Marine Fisheries Service.

Recent modifications to the Rules ensure that water quality will be not just preserved, but enhanced. *See, e.g.*, Cal. Code. Regs. tit. 14, § 916.9 (Protection and Restoration in Watersheds with Threatened or Impaired Values). The Board continues to revise the Rules when there is evidence demonstrating a need for additional regulations to protect water quality and the beneficial uses of water. *See* Exh. 1 (Water Quality Rule Chronology).

2. Timber Harvest Plans

California requires the most comprehensive planning, documentation, review, and approval process for timber harvesting operations on private forest lands in the United States. Only a state-licensed professional forester can prepare a THP and only a state-licensed timber operator can conduct on-the-ground timber harvesting operations. In order to secure a permit, the licensed forester must complete a THP and submit it to the Department of Forestry and Fire Protection for its review and approval. Because of the rigorous requirements of the forest practice rules, the THP review process has been certified by the Secretary of the California Resources Agency as the functional equivalent to an Environmental Impact Report, required under the California Environmental Quality Act, Cal. Pub. Res. Code § 21000, *et seq.* See Cal. Pub. Res. Code § 21080.5.

The Director of the Department of Forestry and Fire Protection has the sole authority to approve a THP, and he must deny a THP if “[i]mplementation of the plan as proposed would cause a violation of any requirement of an applicable water quality control plan adopted or approved by the State Water Resources Control Board.” Cal. Code. Regs. tit. 14, § 898.2(h). See *id.* § 898.1(c)(3); Cal. Pub. Res. Code § 4582.7. The licensed forester must demonstrate conformance with all the applicable forest practice rules. Each THP must go through an extensive review process before it is

approved. The entire planning and implementation process, including post-harvest requirements, may take as many as eight years to complete.

The State Water Resources Control Board and the regional boards have a statutorily designated role in the THP process. Cal. Pub. Res. Code § 4582.6. The regional boards participate on interdisciplinary review teams chaired by Department of Fire and Forestry Protection. The teams “review plans and assist [the Department] in the evaluation of proposed timber operations and their impacts on the environment.” Cal. Code Regs. tit. 14, § 1037.5. The regional boards and other agencies have a formal role in the THP review and approval process through their inclusion in the review teams. *See* Cal. Pub. Res. Code § 4582.6(a); Cal. Code Regs. tit. 14, § 1037.5. Typically, a review team meets at least twice to consider whether a THP should be approved. The first meeting is held shortly before or shortly after the Department accepts a THP for filing to determine “whether a preharvest inspection (initial inspection) is necessary and what areas of concern are to be examined during the inspection.” Cal. Code Regs. tit. 14, § 1037.5(g)(1).

Preharvest inspections are on-the-ground inspections of the area to be harvested and involve physical investigation of a range of subjects considered in the determination of whether to approve a THP; these subjects include soil stability, erosion potential, and all other factors implicating water quality. *See* Cal. Pub. Res. Code §§ 4562.5, 4562.7, 4562.9; Cal. Code Regs. tit. 14, §§ 898.1, 912.5, 912.9,

914.2, 932.5, 932.9, 934.2, 952.5, 952.9, 954.2. Following the preharvest inspection, each agency that participated in the review will prepare a preharvest inspection report, which notes concerns and recommends any necessary mitigation measures. *See* Cal. Code Regs. tit. 14, § 1037.5(f).

Additional protections for water quality can be found throughout the forest practice rules. For example, Article 6 of the Rules addresses “Water Course and Lake Protection” measures for timber harvesting. Article 12 addresses “Logging Roads and Landings.” Article 4 prescribes “Harvesting Practices and Erosion Control.” These rules, including any applicable water quality control plan, must be complied within before the Department will approve a THP. In fact, the Department is specifically prohibited from approving a THP if implementation of the plan would violate water quality standards. *See id.* § 898.2(h). Once a THP is approved, if a regional board disagrees with the approval, it may then request the State Water Board to appeal that decision to the Board of Forestry. Cal. Pub. Res. Code § 4582.9; Cal. Code Regs. tit. 14, §§ 1056-1056.6. Specifically, the State Water Board “may, not later than 10 days after approval of a plan by the director [of the Department of Forestry and Fire Protection], appeal the approval to the [Board of Forestry].” Cal. Pub. Res. Code § 4582.9(a). This administrative process is known as a “Head-of-Agency Appeal.” The simple filing of such an appeal means that “no further timber operations [may] occur under the plan until the final determination of

the appeal by the [B]oard.” *Id.* Moreover, the State Water Board can appeal on the ground that operations on a THP will result in violation of the California Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000, *et seq.*

B. Federal Regulation of Stormwater Discharges Associated with Silvicultural Activity Would Create Significant Difficulties for California Regulatory Agencies

Should the challenged activities in this litigation be held not to fall within the silvicultural exemption, states would then be required completely to revamp their programs and procedures in order to process and issue Section 402 permits for discharge of stormwater from forest roads and their associated drainage features. California’s water quality agency—the State Water Resources Control Board—expressed a reluctance to accept that precise responsibility in its comments on the amendments to the silvicultural exemption in EPA’s proposed 2000 rulemaking.

In 2000, EPA proposed revising the silvicultural point source regulation to give EPA and the states authority to regulate stormwater discharges from activities defined by the regulation as non-point source silvicultural activities. The California State Water Resources Control Board, in comments provided to EPA, objected to the proposed change, explaining:

The extension of NPDES permits to all silviculture operations is problematic. . . . EPA has informally stated that the proposed provision would not be exercised in California because of the extensive regulatory

structure already in place. . . . If permits were to be issued it would create significant overlaps and redundancy and require a very large additional administrative cost. It would cloud and confuse the management process and potentially lead to significant new litigation. We suggest that EPA's opinion be captured in the [proposed regulation] by exempting California from silviculture stormwater permits.

Exh. 2 at 14 (State Water Resources Control Board, *Comments on Proposed Total Maximum Daily Loads (TMDL) Program Rule* (Jan. 20, 2000)).

Historically, the State Water Board and its regional boards have had waivers of waste discharge requirements for timber harvesting to ensure against duplicative regulation. See Cal. Water Code §§ 13260, 13263. In 1999, the California Legislature passed SB 390, requiring all waivers in place as of January 1, 2000, to sunset on January 1, 2003. The legislation mandated that all regional boards review and reconsider the categorical waiver approach to water quality regulation. It also required that any new waivers must not remain in effect for longer than five years. Cal. Water Code § 13269.

Thus, the relevant state regulatory agencies are well poised to ensure that California's waters are not degraded by stormwater discharges. Federal regulation of those discharges stemming from forest road construction, maintenance, and use would upset settled expectations and significantly impede the state's ability to create and implement a coherent and effective regulatory suite.

CONCLUSION

Stormwater runoff from the construction, maintenance, and use of forest roads is not subject to Section 402's permitting requirements. That conclusion is mandated by the silvicultural exemption. It is also consistent with this Court's decision in *Forsgren*, as well as sound environmental policy. Therefore, Applicant Amici urge the Court to affirm the district court's judgment in this case.

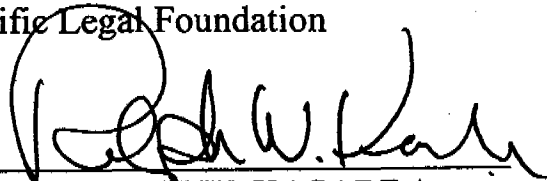
DATED: November 8, 2007.

Respectfully submitted,

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