IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| NORTHERN CALIFORNIA RIVER WATCH,<br><br>Plaintiff – Appellee,<br><br>v.<br><br>CITY OF HEALDSBURG,<br><br>Defendant – Appellant | No. 05- 15442<br><br>AMERICAN FOREST & PAPER ASSOCIATION's MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* |

American Forest & Paper Association, Inc. ("AF&PA") respectfully moves the Court, pursuant to Fed. R. App. P. 29, for leave to file an *amicus curiae* brief in connection with petitions and motions for rehearing filed last week in this case. Defendant-Appellant City of Healdsburg does not object to this motion. Plaintiff-Appellee Northern California River Watch has refused its consent to AF&PA's *amicus* brief and indicated it intends to oppose this motion.

AF&PA is the national trade association of the forest, paper, and wood products industry. AF&PA members are engaged in growing, harvesting, and processing wood and wood fiber; manufacturing pulp, paper, and paperboard products from both virgin and recycled fiber; and producing engineered and

traditional wood products. AF&PA members have an interest in the present case because they operate hundreds of wastewater treatment and storage ponds, cooling ponds, log storage ponds, and other surface impoundments. AF&PA members would be subject to additional burdensome and unworkable regulation if those units were considered "waters of the United States" under an excessively broad interpretation of the federal Clean Water Act. AF&PA and its predecessor organizations have been actively involved for over 25 years in the policy debate concerning the appropriate definition of "waters of the United States," including commenting on the interpretations discussed in this case and filing several *amicus curiae* briefs in the United States Supreme Court in cases related to the definition of "waters of the United States." AF&PA filed an *amicus curiae* brief in the instant case on July 22, 2004.

The City of Healdsburg has petitioned for rehearing of the case, seeking to change the Panel's judgment that Basalt Pond, which Healdsburg uses for polishing and percolation of its treated municipal wastewater, is a "water of the United States" subject to federal regulatory jurisdiction under the Clean Water Act and requiring a permit for the discharge into Basalt Pond. AF&PA takes no position on defendant-appellant City of Healdsburg's petition for rehearing, although AF&PA agrees with statements in that petition that the Panel Opinion erred in a number of ways in interpreting the jurisdictional boundaries of the Clean

Water Act and U.S. Army Corps of Engineers and U.S. Environmental Protection Agency implementing regulations.

AF&PA wishes to file an *amicus curiae* brief to provide information to assist the Court in disposing of the suggestions of plaintiff-appellee Northern California River Watch ("River Watch") and *amicus curiae* United States that this Court expand upon the Panel Opinion to address issues not reached in the Panel Opinion and not necessary to sustain the judgment of the District Court, as explained in the proposed *amicus* brief being lodged with this motion.

This Court has accepted *amicus curiae* briefs in connection with requests by one or more parties that a case be reheard. *See, e.g., Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Dept. of Agriculture*, No. 05-35264, Order of Oct. 4, 2005, granting motions of multiple organizations for leave to file *amicus* briefs in support of the appellee's petition for rehearing. In fact, as the United States' Motion as *Amicus Curiae* To Clarify the Court's Opinion notes, the Court has even entertained *amicus curiae* briefs that themselves sought rehearing. *Id*. at 1 n.1.

River Watch asks this Court to "reconsider" and "re-write" its opinion to provide an alternative grounds for upholding its victory in the District Court: that mere "adjacency of Basalt Pond to the Russian River" is sufficient to make Basalt Pond a "water of the United States." River Watch Motion at 3. Because the Panel

found that there were significant connections between Basalt Pond and the Russian River, it did not need to base its decision on an assessment of whether mere physical adjacency is sufficient to convey CWA jurisdiction.

The United States, which is not even a party to this case (although it could have exercised its statutory right and participated as a party, *see* 33 U.S.C. § 1365(c)(2)), has filed a motion as *amicus curiae*, asking the Court to "clarify" the Panel Opinion "to more fully explicate the legal standard by which federal regulatory jurisdiction may be established under the Clean Water Act…." U.S. Motion at 2. The United States recognizes that, because the Panel Opinion concluded that CWA jurisdiction over Basalt Pond was established under the criteria in Justice Kennedy's concurring opinion in *United States v. Rapanos*, 547 U.S. __, 126 S. Ct. 2208 (June 19, 2006), "the Court had no occasion to consider whether CWA jurisdiction could be established under any other legal standard." U.S. Motion at 3. Nevertheless, the United States urges this Court to "clarify" the Panel Opinion by adopting an analysis of *Rapanos*, offered now by the United States but never briefed or argued in this case, that would provide "an alternative legal standard under which CWA jurisdiction may be established." *Id*.

AF&PA's perspective on the requests of River Watch and the United States is not represented by any of the parties or the movants, and without the filing of AF&PA's proposed *amicus* brief the Court will not have the benefit of the legal

and practical considerations presented in AF&PA's that apply to rehearing or modifying the Panel Opinion in the ways that River Watch and the United States have requested.

AF&PA's *amicus curiae* brief will explain how both River Watch and the United States are asking the Court to opine on the application of the Clean Water Act to hypothetical facts, which this Court has recognized repeatedly it should not do. Additionally, AF&PA will point out the particular dangers of using a rehearing procedure to announce general principles of Clean Water Act applicability, when both this Court and the Supreme Court have recognized that the determination of Clean Water Act applicability is very fact- and site-specific.

AF&PA's members, who operate surface impoundments throughout the country for management of their wastewater and for other purposes, and who own and manage vast tracts of land in connection with their silvicultural activities, would be adversely affected in many respects if the Court engaged in a hypothetical analysis to announce over-broad general principles of Clean Water Act applicability. No other party will represent these views. Counsel for River Watch has suggested that AF&PA's opportunity to file an *amicus* brief, if at all, should be after rehearing is granted. But, because of the unusual nature of River Watch's and the United States' requests, at that point the perspectives that AF&PA wishes to provide the Court on the pitfalls of accepting their invitation to

render an advisory opinion on Clean Water Act jurisdiction would be moot—the Court would have already started down that path.

For the foregoing reasons, AF&PA satisfies the criteria for filing an *amicus curiae* brief to aid the Court in considering River Watch's and the United States' requests for rehearing or clarification. AF&PA respectfully requests that its motion for leave to file such a brief be granted and that the proposed brief lodged with this motion be filed.

Dated: September 6, 2006

Respectfully submitted,

Russell S. Frye
FryeLaw PLLC
3050 K Street, N.W., Suite 400
Washington, DC 20007-5108
(202) 572-8267
*Counsel for American Forest & Paper Association*

## CERTIFICATE OF SERVICE

Copies of the foregoing Motion of American Forest & Paper Association for leave to file a brief as *amicus curiae* was served by placing it in the U.S. first-class mail this 6th day of September, 2006, addressed to:

Peter W. McGaw, Esq.
Archer Norris
2033 North Main Street, Suite 800
PO Box 8035
Walnut Creek, CA 94596-3728

Jack Silver, Esq.
Law Office of Jack Silver
11220 Occidental Road
Sebastopol, CA 95472

Michael E. Gogna, Esq.
Meyers Nave Riback Silver & Wilson
401 Mendocino Avenue, Ste. 100
Santa Rosa, CA 95401

Nicole Granquist, Esq.
Melissa A. Thorme, Esq.
David R.E. Aladjem
Downey Brand LLP
555 Capitol Mall, 10th Floor
Sacramento, CA 95814

Lawrence R. Liebersman, Esq.
Rafe Petersen, Esq.
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Washington, DC 20006

Charles Tebbutt, Esq.
Western Environment Law Center
1216 Lincoln Street
Eugene, OR 97401

Amrit Kulkarni, Esq.
Meyers Nave Riback Silver & Wilson
555 12th Street, Suite 1500
Oakland, CA 94607

Christopher J. Carr, Esq.
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

James Murphy, Esq.
National Wildlife Federation
58 State Street
Montpelier, Vermont 05602

Alexandra Dapolito Dunn, Esq.
General Counsel
Association of Metropolitan Sewerage Agencies
1816 Jefferson Place, NW
Washington, DC 20036

____________________
Russell S. Frye

No. 04-15442

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**NORTHERN CALIFORNIA RIVER WATCH**
Plaintiff – Appellee

v.

**CITY OF HEALDSBURG**
Defendant – Appellant

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On Appeal from the United States District Court,
Northern District of California
Nos. C01 04686 WHA & C02 03249 WHA

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# BRIEF OF AMICUS CURIAE AMERICAN FOREST & PAPER ASSOCIATION IN RESPONSE TO REQUESTS FOR REHEARING OR CLARIFICATION

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Russell S. Frye
FryeLaw PLLC
3050 K Street, N.W. Suite 400
Washington, DC 20007-5108
(202) 572-8267
*Counsel for American*
*Forest & Paper Association, Inc.*

September 6, 2006

**RULE 26.1 DISCLOSURE STATEMENT FOR AMICUS CURIAE, AMERICAN FOREST & PAPER ASSOCIATION**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for the American Forest & Paper Association, Inc. ("AF&PA") certifies as follows:

AF&PA is the national trade association of the forest, paper, and wood products industry. AF&PA members are engaged in growing, harvesting, and processing wood and wood fiber; manufacturing pulp, paper, and paperboard products from both virgin and recycled fiber; and producing engineered and traditional wood products.

AF&PA does not have any parent corporations and no publicly held company owns 10 percent or more of AF&PA's stock.

Respectfully submitted,

______________________

Russell S. Frye
FryeLaw PLLC
3050 K Street, N.W., Suite 400
Washington, DC 20007-5108
(202) 572-8267

*Counsel for American Forest & Paper Association, Inc.*

September 6, 2006

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## INTEREST OF *AMICUS CURIAE*

*Amicus curiae* American Forest & Paper Association, Inc. ("AF&PA") is the national trade association of the forest, paper, and wood products industry. AF&PA members are engaged in growing, harvesting, and processing wood and wood fiber; manufacturing pulp, paper, and paperboard products from both virgin and recycled fiber; and producing engineered and traditional wood products. AF&PA members have an interest in the present case because they operate hundreds of wastewater treatment and storage ponds, cooling ponds, log storage ponds, and other surface impoundments. AF&PA members would be subject to additional burdensome and unworkable regulation if those units were considered "waters of the United States" under an excessively broad interpretation of the federal Clean Water Act. AF&PA and its predecessor organizations have been actively involved for over 25 years in the policy debate concerning the appropriate definition of "waters of the United States," including commenting on the EPA rulemaking that produced the definition at issue in this case and filing several *amicus curiae* briefs in the United States Supreme Court in cases related to that definition. AF&PA filed an *amicus curiae* brief in the instant case on July 22, 2004.

AF&PA files this brief pursuant to Fed. R. App. P. 29. Counsel for defendant-appellant and plaintiff-appellee have consented to the filing of this

*amicus curiae* brief. AF&PA takes no position on defendant-appellant City of Healdsburg's petition for rehearing, although AF&PA agrees with statements in that petition that the Panel Opinion erred in a number of ways in interpreting the jurisdictional boundaries of the Clean Water Act and U.S. Army Corps of Engineers and U.S. Environmental Protection Agency implementing regulations. AF&PA strongly opposes, however, the suggestions of plaintiff-appellee Northern California River Watch and *amicus curiae* United States that this Court expand upon the Panel Opinion to address issues not reached in the Panel Opinion and not necessary to sustain the judgment of the District Court, as explained below.

## ARGUMENT

### I. Statutory Background and the Panel Opinion

This case concerns the application of statutory and regulatory definitions that determine applicability of the regulatory controls imposed by the federal Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, *et seq.*, to the particular facts of the City of Healdsburg's operation of and use of "Basalt Pond." (Evaporation, settling, and percolation of treated wastewater occurs in "Basalt Pond," a gravel mining pit, as the final stage of Healdsburg's municipal wastewater treatment system.) Under the CWA, if an area is considered to be a "navigable water," defined to be a "water of the United States" in CWA section 502(7), 33 U.S.C. § 1362(7), then the U.S.

Environmental Protection Agency ("EPA") and delegated state agencies have jurisdiction to restrict or prohibit point source discharges of pollutants into that water, under CWA sections 301 and 402, 33 U.S.C. §§ 1311 and 1342. "Navigable waters" also delineate the authority of the U.S. Army Corps of Engineers (the "Corps") to regulate discharges of dredged and fill material into wetlands under CWA section 404, 33 U.S.C. § 1344.

The Panel Opinion rests on three findings: (1) Basalt Pond is a "wetland" that "significantly affects the physical, biological and chemical integrity of the Russian River, and ultimately warrants protection as a 'navigable water' under the CWA." Slip Op. at 9312-13. (2) Basalt Pond does not fall under the waste treatment system exemption from the definition of waters of the United States/ navigable waters in EPA and Corps regulations. Slip Op. at 9314. (3) Basalt Pond does not qualify for an exemption for ongoing gravel excavation operations in a Corps interpretation of its definition of "waters of the United States." Slip Op. at 9315. The first of these conclusions was based on the Panel's interpretation of the District Court's opinion as finding that Basalt Pond affects the quality of the Russian River through seepage through a levee separating Basalt Pond from the river and through direct connection with the river during flooding. Slip Op. at 9311-12.

The Panel applied these factual conclusions to the criteria for finding CWA jurisdiction set out in Justice Kennedy's concurring opinion in *United States v. Rapanos*, 547 U.S. __, 126 S. Ct. 2208 (June 19, 2006).[1] In the Panel's analysis, Basalt Pond qualifies as a water of the United States, Healdsburg needs a CWA permit to discharge into Basalt Pond, and Northern California River Watch's citizen enforcement action against Healdsburg under CWA section 505(a)(1), 33 U.S.C. § 1365(a)(1), for discharging without such a permit is upheld.

## II. River Watch's and the United States' Petitions for Rehearing Ask the Court To Expand the Panel Opinion To Opine on Hypothetical Situations.

Despite the fact that the Panel Opinion gave it everything it asked for, Northern California River Watch ("River Watch") now asks this Court to "reconsider" and "re-write" its opinion to provide an alternative grounds for upholding its victory in the District Court: that mere "adjacency of Basalt Pond to the Russian River," which River Watch incorrectly assumes has been proved (*see* p. 8, *infra*), is sufficient to make Basalt Pond a "water of the United States." River Watch Motion ("River Watch Motion") at 3.

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[1] AF&PA does not intend to imply, by reciting the elements of the Panel Opinion, that it agrees with the factual conclusions in the Panel Opinion or with its interpretation of the Supreme Court's jurisprudence on the scope of CWA jurisdiction.

The United States, which is not even a party to this case (although it could have exercised its statutory right and participated as a party, *see* 33 U.S.C. § 1365(c)(2)), has filed a motion as *amicus curiae*, asking the Court to "clarify" the Panel Opinion "to more fully explicate the legal standard by which federal regulatory jurisdiction may be established under the Clean Water Act…." U.S. Motion at 2. The United States recognizes that, because the Panel Opinion concluded that CWA jurisdiction over Basalt Pond was established under the criteria in Justice Kennedy's concurring opinion in *Rapanos*, "the Court had no occasion to consider whether CWA jurisdiction could be established under any other legal standard." U.S. Motion at 3. Nevertheless, the United States urges this Court to "clarify" the Panel Opinion by adopting an analysis of *Rapanos*, offered now by the United States but never briefed or argued in this case, that would provide "an alternative legal standard under which CWA jurisdiction may be established." *Id*.

AF&PA urges the Court to decline the offers of River Watch and the United States to engage in issuing an advisory opinion to "provide guidance to future decisions of the lower courts" about issues that need not be considered to sustain the District Court's judgment in the instant case. *Id*.

River Watch asks this Court to "clarify" its opinion by addressing a hypothetical situation: if there were no seepage from Basalt Pond and no

occasional over-topping of its levee, so that no pollutants in Basalt Pond ever reached the Russian River and there was no effect of Basalt Pond on the Russian River, would physical proximity of Basalt Pond alone be sufficient to make it a "water of the United States" for CWA jurisdiction purposes? *See* River Watch Motion at 3.[2]

The United States asks the Court to conclude the CWA jurisdiction may be found wherever the criteria of Justice Kennedy's opinion *or* the plurality opinion in *Rapanos* are met. The United States interprets the plurality opinion as finding jurisdiction where there is "a continuously flowing river connected to traditional interstate navigable waters." *Id*. at 7, citing 126 S. Ct. at 2225-2227. But it is clear in this case that there is no "continuously flowing river" between Basalt Pond and navigable-in-fact waters. See Slip Op. at 9303. Thus, the United States also is asking this Court to rule on a hypothetical set of facts, which not only has not been briefed but which does not exist in this case.

## III. This Court Should Decline To Use Rehearing To Issue an Advisory Opinion on the Scope of Clean Water Act Jurisdiction.

A petition for rehearing serves a very limited purpose—to point out to the court a point of law or fact that the petitioner believes the court has overlooked or

[2] The United States also suggests that an opinion from this Court discussing that hypothetical "may be useful to future courts considering this issue." U.S. Motion at 8 n.6.

misapprehended, as provided in Fed. R. App. P. 40(a)(1). *Armster v. United States Dist. Ct for the Central Dist. of Calif.*, 806 F.2d 1347 (9th Cir. 1986). A petitioner "abuse[s] . . . the privilege of making such a petition" when it asks the court for review of a decision beyond the limited confines of Fed. R. App. P. 40. *See Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir. 1962). The requests for rehearing by River Watch and the United States should be rejected because they go beyond the scope of rehearing, asking the Court instead to offer interpretations of CWA jurisdiction beyond its findings in the Panel Opinion.

More importantly, they ask the Court to engage in the issuance of an advisory opinion based on hypothetical facts. "Courts must refrain from deciding abstract or hypothetical controversies and from rendering impermissible advisory opinions with respect to such controversies." *Earth Island Institute v. Ruthenbeck*, 2006 W.L. 2291168 at *5 (9th Cir. August 10, 2006), citing *Flast v. Cohen*, 392 U.S. 83 at 96 (1968). Courts must not render "an opinion advising what the law would be upon a hypothetical state of facts." *Id.*, quoting *Preiser v. Newkirk,* 422 U.S. 395 (1975) (internal quotation marks omitted). See also *United States v. Cheely,* 36 F.3d 1439, 1450 (9th Cir. 1994) (Alarcon, J., dissenting). This admonition is especially appropriate in the context of a request to reopen an already-decided case. *See Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1306 (9th Cir. 1977) (declining to entertain "many interesting additional issues" about the effect

of recent amendments to the Clean Air Act that EPA sought, through a petition for rehearing, to have the Court address).

Offering this Court's views of the application of Supreme Court jurisprudence on "waters of the United States" would be particularly problematic, and of limited assistance to other courts in any event, in light of the fact that application of the statutory and judicial criteria is a very fact-specific exercise. *See*, *e.g.*, *Rapanos* at 2249 (Kennedy, J., concurring) (Corps must make a "case-by-case" determination of whether there is a significant nexus to navigable-in-fact waters); *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991) (remanding to district court for factual determination as to which particular parts of property had sufficient connections to interstate commerce to be subject to the Corps' CWA jurisdiction).

For example, the River Watch Motion just assumes that Basalt Pond meets the Supreme Court's concept of being "adjacent to" a navigable river. *See* River Watch Motion at 3. But the case on which the River Watch Motion chiefly relies, *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121, 134-135 (1985), used "adjacent wetlands" to refer to wetlands that extended to the shores of a navigable water—a situation that does not exist in the instant case. *Cf. id*. at 135 with 131-132, n. 8; *see also Rapanos* at 2216. It would be dangerous and

unproductive indeed for this Court to wade into an advisory opinion explicating the meaning of *Rapanos*, *Riverside Bayview*, and other cases on such muddy ground.

## CONCLUSION

For the reasons set forth above, AF&PA urges the Court to reject the requests of River Watch and the United States to address CWA jurisdiction under facts not present in this case and legal conclusions not necessary for the Panel Opinion's holding.

Dated: September 6, 2006

Respectfully submitted,

Russell S. Frye
FryeLaw PLLC
3050 K Street, N.W., Suite 400
Washington, DC 20007-5108
(202) 572-8267
*Counsel for American Forest & Paper Association*

## CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 29(d) AND CIR. RULE 40-1

I certify that, pursuant to Fed. R. App. P. 29(d) and Cir. Rule 40-1, the attached brief of *amicus curiae* American Forest & Paper Association in response to petitions for rehearing is:

____ Proportionately spaced, has a typeface of 14 points or more and contains __________ words (petitions and answers must not exceed 4,200 words)

**or**

____ Monospaced, has 10.5 or fewer characters per inch and contains _______ words or ________ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

**or**

____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

___________________________________

Russell S. Frye
*Counsel for American Forest & Paper Association*

September 6, 2006

## CERTIFICATE OF SERVICE

Copies of the foregoing Brief of *Amicus Curiae* American Forest & Paper Association was served by placing it in the U.S. first-class mail, postage prepaid, this 6th day of September, 2006, addressed to:

Peter W. McGaw, Esq.
Archer Norris
2033 North Main Street, Suite 800
PO Box 8035
Walnut Creek, CA 94596-3728

Jack Silver, Esq.
Law Office of Jack Silver
11220 Occidental Road
Sebastopol, CA 95472

Michael E. Gogna, Esq.
Meyers Nave Riback Silver & Wilson
401 Mendocino Avenue, Ste. 100
Santa Rosa, CA 95401

Nicole Granquist, Esq.
Melissa A. Thorme, Esq.
David R.E. Aladjem
Downey Brand LLP
555 Capitol Mall, 10th Floor
Sacramento, CA 95814

Lawrence R. Liebersman, Esq.
Rafe Petersen, Esq.
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Washington, DC 20006

Charles Tebbutt, Esq.
Western Environment Law Center
1216 Lincoln Street
Eugene, OR 97401

Amrit Kulkarni, Esq.
Meyers Nave Riback Silver & Wilson
555 12th Street, Suite 1500
Oakland, CA 94607

Christopher J. Carr, Esq.
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

James Murphy, Esq.
National Wildlife Federation
58 State Street
Montpelier, Vermont 05602

Alexandra Dapolito Dunn, Esq.
General Counsel
Association of Metropolitan
Sewerage Agencies
1816 Jefferson Place, NW
Washington, DC 20036

____________________
Russell S. Frye