

No. 11-16042

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

ECOLOGICAL RIGHTS FOUNDATION,  
Plaintiff-Appellant,

v.

PACIFIC GAS & ELECTRIC COMPANY, *et al.*,  
Defendants-Appellees.

*Brief of Amici Curiae*

American Coke and Coal Chemicals Institute, American Farm Bureau Federation,  
American Road & Transportation Builders Association, Association of American  
Railroads, Chamber of Commerce of the United States of America,  
Creosote Council, Edison Electric Institute, National Rural Electric Cooperative  
Association, North American Wood Pole Council, Railway Tie Association,  
Treated Wood Council, United States Telecom Association, Utility Solid Waste  
Activities Group, Utility Water Act Group, and Western Business Roundtable  
In Support of Defendants-Appellees and Affirmance of the  
U.S. District Court for the Northern District of California

October 13, 2011

Karma B. Brown  
Hunton & Williams LLP  
2200 Pennsylvania Avenue, NW  
Washington, DC 20037  
(202) 955-1500  
kbbrown@hunton.com

Brooks M. Smith  
Hunton & Williams LLP  
Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, VA 23219-4074  
(804) 787-8086  
bsmith@hunton.com

*Counsel for Amici Curiae  
American Coke and Coal Chemicals  
Institute, et al.*

Rae Cronmiller  
Environmental Counsel  
National Rural Electric Cooperative  
Association  
4301 Wilson Boulevard  
Arlington, VA 22203-1860

Nick Goldstein  
Vice President of Environmental &  
Regulatory Affairs and Assistant  
General Counsel  
American Road & Transportation  
Builders Association  
1219 28th Street, NW  
Washington, DC 20007

Lawrence S. Ebner  
Attorney for North American Wood  
Pole Council, Creosote Council,  
Railway Tie Association, and  
Treated Wood Council  
McKenna Long & Aldridge LLP  
1900 K Street, NW  
Washington, DC 20006

Edward H. Comer  
Vice President, General Counsel &  
Corporate Secretary  
Henri D. Bartholomot  
Director, Regulatory Legal Issues  
Edison Electric Institute  
701 Pennsylvania Avenue, NW  
Washington, DC 20004

Danielle D. Quist  
Senior Counsel for Public Policy  
American Farm Bureau Federation  
600 Maryland Avenue, SW  
Suite 1000W  
Washington, DC 20024

Robin Conrad  
Rachel Brand  
National Chamber Litigation Center  
1615 H Street, NW  
Washington, DC 20062  
(202) 463-5337

Kristy Bulleit  
Attorney for Utility Water Act Group  
Hunton & Williams LLP  
2200 Pennsylvania Avenue, NW  
Washington, DC 20037

Michael J. Rush  
Associate General Counsel  
Association of American Railroads  
425 3rd Street, SW, Suite 1000  
Washington, DC 20024

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
I. This Case Raises Issues of Fundamental Importance .....	1
II. <i>Amici</i> Represent a Wide Array of Industries with Direct Interests in the Outcome of the Case.....	2
III. Argument .....	4
A. The District Court Properly Concluded that Treated-Wood Poles Are Not Regulated Under the NPDES Permit Program. ....	5
1. Treated-Wood Poles Are Not Point Sources. ....	5
2. Runoff From Treated-Wood Poles Is Not Among the Categories of Stormwater Subject to NPDES Permitting.....	7
B. The District Court Properly Found RCRA to be Inapplicable Because Poles Treated With Federally Registered Wood Preservatives Are Not “Solid Waste.”.....	9
C. The District Court’s Decision Should be Upheld Because Any Contrary Reading of the CWA or RCRA Would Have Substantial Economic Consequences Without Corresponding Environmental Benefit.....	11
IV. Conclusion .....	17

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009) ..... 10

*Ecological Rights Found. v. Pac. Gas & Elec. Co.*, No. C 09-03704  
SBA, 2011 U.S. Dist. LEXIS 37230 (N.D. Cal. Mar. 31, 2011) ..... 4, 5, 6, 7

*Envtl. Def. Ctr., Inc. v. U.S. Env'tl. Prot. Agency*, 344 F.3d 832 (9th  
Cir. 2003) ..... 6

*Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 834 F.2d 842 (9th Cir.  
1987) ..... 6

*Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778 (9th Cir.  
2008) ..... 5

*Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847 (7th  
Cir. 2008), *cert. denied*, 129 S. Ct. 2002 (2009) ..... 10

**FEDERAL STATUTES**

33 U.S.C. § 1251, *et seq.* ..... 4

33 U.S.C. § 1342(p)(2)(B) ..... 7

33 U.S.C. § 1342(p)(2)(E) ..... 9

33 U.S.C. § 1362(14) ..... 5, 6

42 U.S.C. § 6901, *et seq.* ..... 4

42 U.S.C. § 6903(27) ..... 10

**FEDERAL REGULATIONS AND RULES**

40 C.F.R. § 122.26(a)(1)(v) ..... 9

40 C.F.R. § 122.26(b)(14) ..... 8

40 C.F.R. § 122.26(f)(2) ..... 9

FED. R. APP. P. 29(a) ..... 2

**FEDERAL REGISTER**

53 Fed. Reg. 49,416 (Dec. 7, 1988) ..... 8

55 Fed. Reg. 47,990 (Nov. 16, 1990) ..... 8

**MISCELLANEOUS**

Johnson, Bradley W. for Edison Electric Institute, *Out of Sight, Out of Mind? A study on the costs and benefits of undergrounding overhead power lines* (July 2006), available at [http://www.woodpoles.org/documents/UndergroundReport\\_001.pdf](http://www.woodpoles.org/documents/UndergroundReport_001.pdf) ..... 13

North Carolina Public Staff Utilities Commission News Release (Nov. 21, 2003), available at <http://www.woodpoles.org/documents/undergroundpressrelease.pdf> ..... 13

Railway Tie Association, About RTA, Why Wood Crossties, available at <http://www.rta.org> ..... 13

Utility Solid Waste Activities Group, *et al.*, Comments on “Pentachlorophenol Revised Risk Assessments: Notice of Availability and Solicitation on Risk Reduction Options” Notice 73 Fed. Reg. 20638 (April 16, 2008) at 5 (June 16, 2008), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPP-2004-0402-0087> ..... 11

Vlosky, Richard P., *Statistical Overview of the U.S. Wood Preserving Industry: 2007* (Feb. 16, 2009), available at <http://www.woodpoles.org/documents/SFPATreatedWoodReport2007FINAL2-16-09.pdf> ..... 15

**I. This Case Raises Issues of Fundamental Importance.**

The associations filing this brief represent a broad array of agriculture, business, and industry interests concerned with the legal and practical implications of Plaintiff-Appellant Ecological Rights Foundation's ("ERF") erroneous claims. We agree with the district court, and Defendants-Appellees Pacific Gas & Electric Co. ("PG&E") and Pacific Bell Telephone Co. ("PacBell"), that the claims were unfounded and, thus, rightly dismissed.

Though this case is directly about wood utility poles treated with the preservative pentachlorophenol and used in the distribution of electricity and communication services to parts of Northern California, the case raises concerns well beyond this context. If adopted, ERF's interpretation of the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA") could potentially expand CWA National Pollutant Discharge Elimination System ("NPDES") permitting and RCRA solid waste disposal regulation to the use of a wide array of building materials, including poles, that Congress never intended the NPDES and RCRA programs to cover.

Ironically, ERF has selected as the target of its challenge wood poles treated with a preservative that the U.S. Environmental Protection Agency ("EPA") re-registered in 2008 under the Federal Insecticide, Fungicide, and Rodenticide Act

(“FIFRA”) as environmentally acceptable for precisely this use.<sup>1</sup> Additional regulation of such building materials under the CWA and RCRA is both unnecessary and inappropriate and would not provide environmental benefits, in particular when the substantial negative impacts are taken into account.

## **II. *Amici* Represent a Wide Array of Industries with Direct Interests in the Outcome of the Case.**

As described in the accompanying motion for leave to file this brief, *amici* represent a broad cross-section of the nation’s agriculture, energy, infrastructure, construction, transportation, telecommunication, wood product, and business sectors that are vital to a thriving national economy and provide much-needed products, services, and jobs across the country.<sup>2</sup>

*Amici* have long advocated for clear and precise readings of the CWA and RCRA. Any ruling that subjects treated-wood poles or other common building

---

<sup>1</sup> The wood preservatives used in the pressure-treating of wood utility poles and other treated-wood products are comprehensively regulated by EPA under FIFRA. The stringent process for registration and reregistration of wood preservatives, like other antimicrobial materials, involves a rigorous and thorough scientific analysis to assure there is no unreasonable effect on human health or the environment. Pentachlorophenol, the wood preservative at issue in this litigation, has undergone such a review process and was recently reregistered by EPA, as were creosote and chromated copper arsenate (“CCA”).

<sup>2</sup> Counsel for *amici* contacted the parties to this appeal to ascertain their position in regard to the motion. FED. R. APP. P. 29(a). The Defendants-Appellees have no objection. ERF takes no position. *Amici* state that this brief has been authored in whole by their counsel, and no party, counsel for any party, or other person has contributed any money towards preparation or submission of this brief.

materials to CWA NPDES permitting or RCRA solid waste disposal regulation, or any expansion of the scope of the definitions of point source, industrial activity, disposal, or solid waste, contrary to the statutory language and Congressional intent, would have a chilling and adverse effect on *amici*'s members and the critical products and services they provide to the nation. An adverse decision in this case could further affect *amici* by thrusting their members' normal and routine business activities into regulatory and enforcement programs that are ill-suited and ill-prepared to accommodate millions of newly regulated sources. Such a misreading also could eviscerate the limits of federal authority over land-based and agricultural activities and bring additional economic activity within the ambit of unnecessary and duplicative federal regulation.

Given these potential impacts, *amici* submit this brief in support of the Defendants-Appellees and the district court and to inform the Court of the potential implications of ERF's erroneous claims.<sup>3</sup>

---

<sup>3</sup> *Amici* note that any reversal of the district court's decision would directly affect only treated-wood utility poles and would be binding only in the Northern District of California and thus would not directly impact other activities within the Northern District or any activities elsewhere. Even so, because many of *amici*'s members have business interests in the Northern District of California, any reversal of the district court's decision would have the potential for substantial direct economic and practical consequences for *amici* and their members. And if any reversal were applied in other districts or to other materials, its reach could be even more significant.



### III. Argument

ERF argues that Defendants-Appellees' treated-wood poles discharge pollutants into "waters of the United States" directly or by way of stormwater runoff. However, the poles are not "point sources" subject to the CWA, 33 U.S.C. § 1251, *et seq.* Nor is runoff from the poles considered to be "associated with industrial activity" as that phrase is used to define regulated stormwater sources under the CWA.

ERF also argues that Defendants-Appellees' poles discharge chemicals that are considered to be "solid waste" within the meaning of RCRA, 42 U.S.C. § 6901, *et seq.* However, useful products that are put to their ordinary, intended use – such as wood utility poles that have been pressure-treated with EPA-registered preservatives – are simply not "solid waste." Moreover, RCRA does not govern ordinary wear-and-tear of useful products.

Thus, as the U.S. District Court for the Northern District of California correctly found, ERF's claims are wrong as a matter of law. *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, No. C 09-03704 SBA, 2011 U.S. Dist. LEXIS 37230 (N.D. Cal. Mar. 31, 2011). The district court properly concluded that the commonplace utility poles at issue in the case are not point sources and, as a result, are not regulated by the CWA. *Id.* at \*17-18. The court further held that the

federally registered wood preservatives used on the poles do not qualify as “solid waste” under RCRA. *Id.* at \*25.

The district court’s decision should be affirmed. Any holding to the contrary would undermine both the letter and intent of the statutes and would lead to profound, onerous, and adverse consequences.

**A. The District Court Properly Concluded that Treated-Wood Poles Are Not Regulated Under the NPDES Permit Program.**

ERF argues that treated-wood poles are point sources, as that term is defined by the CWA, and that stormwater that comes into contact with these poles is subject to NPDES permitting. Neither of these claims is true.

**1. Treated-Wood Poles Are Not Point Sources.**

As the district court correctly noted, only discharges from “point sources” are subject to NPDES permitting under the CWA. A point source is defined as “any *discernible, confined and discrete conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14) (emphasis added).

Congress took pains to distinguish between point and nonpoint sources. *See Or. Natural Desert Ass’n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008) (“The CWA’s disparate treatment of discharges from point sources and nonpoint

sources is an organizational paradigm of the Act.”). The distinction between point and nonpoint sources is both fundamental and critical to this case. *See Ecological Rights Found.*, 2011 U.S. Dist. LEXIS 37230, at \*17-18. While point sources, as defined by the CWA, are subject to NPDES permitting, all other sources of pollution are deemed to be nonpoint sources and, accordingly, are exempt from the NPDES permitting program and federal regulation. *Id.* *See also Env'tl. Def. Ctr., Inc. v. U.S. Env'tl. Prot. Agency*, 344 F.3d 832, 842 n.8 (9th Cir. 2003); *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 834 F.2d 842, 849 n.9 (9th Cir. 1987). Any blurring of the line between these two types of sources would undermine Congress' carefully crafted distinction and, in turn, overwhelm the regulatory program that Congress designed exclusively for point sources.

Plainly, a treated-wood pole is not a point source because it is not a “conveyance” designed like a pipe, ditch, or channel to discharge pollutants. *See* 33 U.S.C. § 1362(14) (defining point source to mean a “conveyance”). To the contrary, a wood pole is designed to carry overhead electricity and communication wires, *not* to discharge pollutants. The wood preservatives impregnated into these poles, through pressure-treated processes in order to extend the life of the poles, have been studied and registered with EPA for this particular use based, in part, on their demonstrated stability (*i.e.*, limited potential for migration).

A wood pole is no more a point source than a park bench or picket fence. A wood pole is not a mechanism to move a pollutant – it does not convey or channel anything. All of these objects, and many more like them, are deemed to be nonpoint sources under the CWA. Any interpretation to the contrary would lead to absurd results. Just imagine the overwhelming administrative burden, and underwhelming environmental benefit, of establishing a permitting and compliance assurance program for each and every farm fence post in America.

**2. Runoff From Treated-Wood Poles Is Not Among the Categories of Stormwater Subject to NPDES Permitting.**

Having concluded that treated-wood poles are not point sources, the district court did not reach the issue whether ERF's claims also fail because the utility poles are not "associated with industrial activity," and, therefore, are beyond the purview of CWA stormwater regulations. *Ecological Rights Found.*, 2011 U.S. Dist. LEXIS, 37230, at \*17 n.4. But, it is just as clear from the statute and legislative history that Congress did not intend for these types of activities to be covered by the stormwater regulations.

Congress added section 402(p) to the CWA in 1987 to govern the scope and nature of NPDES permitting requirements as applied to certain categories of stormwater discharges, including discharges "associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B). In amending the statute, Congress did not compel EPA to regulate *all* stormwater discharges. Rather, Congress gave EPA discretion to

define the specific industries subject to regulation as “associated with industrial activity” and also to study whether permits were needed for other types of stormwater discharges. ERF contends that discharges from treated-wood poles are “associated with industrial activity.” However, this is clearly wrong as a matter of law.

At Congress’ direction, EPA defined “associated with industrial activity” to include eleven categories of industrial activities. 40 C.F.R. § 122.26(b)(14). None of these categories includes treated-wood poles. In fact, quite to the contrary, EPA considered, and rejected, the only category that would be relevant to such poles.

When EPA first proposed rules to implement CWA section 402(p) in 1988, it considered including a category for “major electrical powerline corridors,” which would have included poles, towers, and other support facilities within those corridors. *See* 53 Fed. Reg. 49,416, 49,432 (Dec. 7, 1988). In that proposal, EPA indicated that it preferred for stormwater discharges from such corridors “*not be classified* as storm water discharges associated with industrial activity.” *Id.* (emphasis added).

When EPA finalized its stormwater rules in 1990, EPA followed through on its preference and removed the category for “major electrical powerline corridors” altogether. *See* 55 Fed. Reg. 47,990, 48,007 (Nov. 16, 1990). By affirmatively exempting powerline corridors from the list of industrial activities, EPA also

exempted poles, towers, and other support facilities within those corridors.

Otherwise, its exemption would be meaningless.

Moreover, if ERF believes that stormwater discharged from the poles is a significant contributor of pollutants to “waters of the United States” (whether “associated with industrial activity” or not), both the statute and regulation authorize the relevant permitting authority (EPA or a delegated State) to designate the discharge for NPDES coverage, independently or in response to a third party petition. 33 U.S.C. §1342(p)(2)(E); 40 C.F.R. § 122.26(a)(1)(v) and (f)(2). This process is committed to the technical expertise of the relevant permitting authority, not the courts. Therefore, to the extent that there are water quality concerns despite EPA regulation under FIFRA, ERF has an independent administrative remedy.

**B. The District Court Properly Found RCRA to be Inapplicable Because Poles Treated With Federally Registered Wood Preservatives Are Not “Solid Waste.”**

Just like ERF’s CWA claim, its RCRA claim is contrary to the explicit terms of the statute. RCRA is a comprehensive “cradle to grave” statute, but it regulates only materials that are defined as “solid waste” and that are not otherwise excluded or exempted from this definition. Solid waste means “any garbage, refuse, sludge ... and other *discarded material* ... resulting from industrial, commercial, mining, and agricultural operations, and from community activities ... but does not include

... industrial discharges which are point sources subject to permits under section 1342 of [the CWA]....” 42 U.S.C. § 6903(27) (emphasis added).<sup>4</sup>

The poles at issue here, along with their preservatives, are useful products that have singularly ordinary and intended uses. Consistent with settled law, useful products “put to [their] ordinary, intended use” are not solid waste under RCRA. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 208-09 (2d Cir. 2009).

Moreover, RCRA does not govern the ordinary wear-and-tear of useful products. *See, e.g., Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 853-54 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2002 (2009). As a result, even assuming for the sake of argument that incidental amounts of preservative are released over time, due to storms, weathering, or animals, such releases would not be considered active or affirmative casting aside, rejecting, abandoning or giving up, as those actions have been ascribed to “discarded material” under the statutory definition of solid waste. Thus, RCRA simply does not apply.

---

<sup>4</sup> ERF’s claims must be taken in the alternative because if something is a point source under the CWA, it is necessarily exempt as a “solid waste” under RCRA.

**C. The District Court’s Decision Should be Upheld Because Any Contrary Reading of the CWA or RCRA Would Have Substantial Economic Consequences Without Corresponding Environmental Benefit.**

Treated-wood utility poles are the backbone of our national electric and telecommunication critical infrastructure grid and the utilities’ “material of choice” over alternative materials, such as steel, concrete and composites. They are widely used because the EPA-registered wood preservatives used to treat the poles extend their useful life and help to avoid service interruptions. A 2002 Utility Solid Waste Activities Group (“USWAG”) survey of the electric utility industry and Rural Utilities Service cooperatives revealed that there were approximately 130 to 135 million treated-wood utility poles in the U.S., with “several” million being installed yearly by the electric utilities alone.<sup>5</sup>

In addition, though not directly at issue in this case, equivalent magnitudes of treated-wood products and other materials are used by farms, ranches, railroads, transportation, and other businesses across the nation for fences, buildings, ditches, irrigation, and other such purposes. Treated-wood products and other such materials are also utilized by, and critical to, public safety infrastructure owned and

---

<sup>5</sup> Comments of the Utility Solid Waste Activities Group, *et al.* on “Pentachlorophenol Revised Risk Assessments: Notice of Availability and Solicitation on Risk Reduction Options” Notice 73 Fed. Reg. 20638 (April 16, 2008) at 5 (June 16, 2008), *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPP-2004-0402-0087>.



operated by federal, state, and local governments. Subjecting such materials to the NPDES permit program or regulating such materials as RCRA solid waste would have profound negative consequences and would impose a huge regulatory and permitting burden on EPA and state environmental agencies, not to mention the affected industries. Such regulatory requirements would challenge affected organizations' ability to continue relying on such materials and would likely change the organizations' purchasing patterns and harm the viability of the treated-wood product and other building material manufacturing industries by disrupting and/or halting commerce throughout the supply chain, from harvesting of the raw material through delivery of the finished product.

This disruption would create shipping delays in response to emergencies and catastrophes (*e.g.*, hurricanes, tornadoes, wind and ice storms) due to lack of inventory and erosion of manufacturing base. That, in turn, would negatively affect agricultural, business, and industry operations that rely on such building materials and could result in longer electric and telecommunication outages affecting the general public, industry, and homeland security.

The use of alternative materials for utility poles could be constrained by factors such as increased danger of electrocution, difficulties for workers being able to climb substitute materials, shorter lifespans of alternative products in particular applications, longer manufacturing cycles, and other possible

environmental and health issues. And undergrounding all utility wires that otherwise would be hung on poles is infeasible because of cost and, in many cases, technical infeasibility.<sup>6</sup> Similarly, in the agriculture context, there are few, if any, practical alternatives to wood materials used for fencing, buildings, ditches, and irrigation. Neither steel, concrete, nor composite would be viable or feasible on a widespread basis due to cost, remoteness, and water contact. The same can be said for treated-wood ties and poles used for signals in the railroad industry.

*Amicus* Railway Tie Association (“RTA”), for example, indicates that 93 percent of the ties used in North American railroads are treated-wood ties.<sup>7</sup>

According to RTA, wood has been chosen for its performance capabilities under millions of gross tons of traffic, its environmental friendliness, and cost based on its initial and long term life cycle economics. *Id.* The impact of additional CWA

---

<sup>6</sup> Changing to underground electric wiring would not be a feasible option because of the prohibitive cost -- approximately \$1 million per mile for distribution lines -- and the time required. Bradley W. Johnson for Edison Electric Institute, *Out of Sight, Out of Mind? A study on the costs and benefits of undergrounding overhead power lines*, at 11 (July 2006), available at [http://www.woodpoles.org/documents/UndergroundReport\\_001.pdf](http://www.woodpoles.org/documents/UndergroundReport_001.pdf). In 2003, the State of North Carolina Utilities Commission estimated it would cost approximately \$41 billion to underground the distribution system alone and would take 25 years to complete. North Carolina Public Staff Utilities Commission News Release, at 1 (Nov. 21, 2003), available at <http://www.woodpoles.org/documents/undergroundpressrelease.pdf>. The cost of moving the transmission system underground was not investigated.

<sup>7</sup> See Railway Tie Association, About RTA, Why Wood Crossties, available at <http://www.rta.org>.

NPDES permitting requirements or RCRA solid waste regulation for each railroad tie, despite its lack of capacity to release significant amounts of preservative to the environment, would be astronomical.

Assuming suitable alternatives even could be found, alternative material manufacturers would have a difficult time filling the gap, particularly in the short term, due to lack of manufacturing capacity and materials. Long delays in wood pole and other material shipments for new projects and for regular maintenance might occur. This could affect the reliability of the electric and telecommunications grid and availability of electricity, cable, and internet services for residential and industrial customers, as well as other industries' operations.

If, contrary to the statutory language and Congressional intent, treated-wood poles and other such materials should become subject to regulation under the CWA or RCRA, millions of existing installations could end up being removed and placed in landfills and, if feasible, replaced with concrete or steel alternatives – the construction, transportation, and installation of which would come with their own significant environmental impacts. Alternatively, these existing installations could be subject to a new, as-yet undefined, permitting regime that would dwarf any in existence and surely overwhelm the administrative capacity of federal and state permitting authorities to adopt, implement, and enforce.

Imposing NPDES or RCRA obligations on each and every utility pole alone, much less other building materials, would be an administrative nightmare for EPA and the states, which already suffer from reduced budgets and increased regulatory workloads. The cost in time, money, and resources for the regulated community to prepare and file the applications necessary to secure permits or otherwise comply with new regulations would be enormous. Indeed, applicants typically spend thousands of dollars preparing individual NPDES applications, especially if technical or site-specific information is required, as is often the case.

These consequences would be especially absurd in light of the fact that EPA has reviewed, registered, and comprehensively regulates the treatment preservatives at issue for this very purpose under FIFRA. Thus, no environmental benefit would result from additional permitting or regulation under the CWA or RCRA.

The immediate effect on the 416 wood treating facilities in the United States and the 60,000 jobs they represent would be substantial.<sup>8</sup> The additional regulatory burden would immediately place manufacturers and suppliers of treated-wood

---

<sup>8</sup> Richard P. Vlosky, *Statistical Overview of the U.S. Wood Preserving Industry: 2007* (Feb. 16, 2009), available at <http://www.woodpoles.org/documents/SFPATreatedWoodReport2007FINAL2-16-09.pdf>. Again, *amici* specifically note that any reversal of this decision would only apply to those facilities located in the Northern District of California.

products at a marketing disadvantage compared to steel, concrete, and composite products, resulting in loss of business and jobs. This new financial cost would ultimately be borne by consumers and would particularly burden customers already suffering from a depressed economy and high unemployment.

Furthermore, the impact of additional and unprecedented regulation of treated-wood poles under the CWA or RCRA could extend far beyond utility and telecommunications industries and treated-wood product providers to agriculture, railroad, transportation, and marine industry sectors as well, to name just a few. These other industries would be affected directly, if their uses of treated-wood products and other building materials were to require CWA NPDES permits or compliance with the RCRA solid waste regulatory program. They would also be affected by increased costs and disruptions in availability of electricity, telecommunication services, and treated-wood products.

The potential reach of any decision requiring permits under the CWA or additional regulation under RCRA, if widely applied, is staggering. Any natural or human-made material used in the construction of facilities that are set out in the environment could potentially trigger a permitting requirement. Industrial and residential users of any treated-wood product that has any chance of preservative or preservative component migration from the wood, regardless of how insignificant, would potentially be penalized and discouraged from using treated-

wood products. The nation's electric, telecommunications, railroad, agriculture, construction, and other infrastructure systems that rely on treated-wood would, in turn, experience increased costs, longer replacement response times, and greater outages.

In sum, if treated-wood poles are deemed to be subject to NPDES permitting requirements or RCRA solid waste regulation, *amici* and their members, and all other manufacturers and users of wood products, would suffer significant economic harm for no apparent environmental benefit.

#### **IV. Conclusion**

For the reasons set forth above and in the Defendants-Appellees' Briefs, *amici* respectfully request that the Court uphold the district court's decision.

October 13, 2011

Respectfully submitted,

/s/ Karma B. Brown

Karma B. Brown  
Hunton & Williams LLP  
2200 Pennsylvania Avenue, NW  
Washington, DC 20037  
(202) 955-1500  
kbbrown@hunton.com

Brooks M. Smith  
Hunton & Williams LLP  
Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, VA 23219-4074  
(804) 787-8086  
bsmith@hunton.com

*Counsel for Amici Curiae  
American Coke and Coal Chemicals  
Institute, et al.*

Rae Cronmiller  
Environmental Counsel  
National Rural Electric Cooperative  
Association  
4301 Wilson Boulevard  
Arlington, VA 22203-1860

Nick Goldstein  
Vice President of Environmental &  
Regulatory Affairs and Assistant  
General Counsel  
American Road & Transportation  
Builders Association  
1219 28th Street, NW  
Washington, DC 20007

Lawrence S. Ebner  
Attorney for North American Wood  
Pole Council, Creosote Council,  
Railway Tie Association, and  
Treated Wood Council  
McKenna Long & Aldridge LLP  
1900 K Street, NW  
Washington, DC 20006

Edward H. Comer  
Vice President, General Counsel &  
Corporate Secretary  
Henri D. Bartholomot  
Director, Regulatory Legal Issues  
Edison Electric Institute  
701 Pennsylvania Avenue, NW  
Washington, DC 20004

Danielle D. Quist  
Senior Counsel for Public Policy  
American Farm Bureau Federation  
600 Maryland Avenue, SW  
Suite 1000W  
Washington, DC 20024

Robin Conrad  
Rachel Brand  
National Chamber Litigation Center  
1615 H Street, NW  
Washington, DC 20062  
(202) 463-5337

Kristy Bulleit  
Attorney for Utility Water Act Group  
Hunton & Williams LLP  
2200 Pennsylvania Avenue, NW  
Washington, DC 20037

Michael J. Rush  
Associate General Counsel  
Association of American Railroads  
425 3rd Street, SW, Suite 1000  
Washington, DC 20024



**Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 3,724 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

this brief uses a monospaced typeface and contains \_\_\_\_\_ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using (*state name and version of word processing program*) Microsoft Office 2003  
(*state font size and name of type style*) 14 Font, Times New Roman, *or*

this brief has been prepared in a monospaced spaced typeface using (*state name and version of word processing program*) \_\_\_\_\_  
with (*state number of characters per inch and name of type style*) \_\_\_\_\_

---

Signature

Attorney for

Date

9th Circuit Case Number(s) 11-16042

**NOTE:** To secure your input, you should print the filled-in form to PDF (File > Print > PDF Printer/Creator).

\*\*\*\*\*

### CERTIFICATE OF SERVICE

#### When All Case Participants are Registered for the Appellate CM/ECF System

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

on (date) .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

\*\*\*\*\*

### CERTIFICATE OF SERVICE

#### When Not All Case Participants are Registered for the Appellate CM/ECF System

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

on (date) .

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

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)