



State and Federal Issues Impacting Forestry

A Snapshot

Max Braswell

Executive Vice President
Arkansas Forestry Association

May 8, 2012

Issues Abound!

- Forest Roads
- Arkansas Pesticide General Permit
- H-2B
- USDA BioPreferred Program
- Boiler MACT
- Farm Bill
- Death Tax
- Postal Reform
- Truck Weights
- Lacey Act
- Tailoring Rule/Carbon Neutrality of Biomass

Focus For Today

- Forest Roads
- Arkansas Pesticide General Permit
- H-2B
- USDA BioPreferred Program
- Boiler MACT

Forest Roads Background

On May 17, 2011, the 9th Circuit denied reconsideration of its decision on forest roads in Northwest Environmental Defense Center v. Brown:

- NEDC sued the Oregon State Forester and others in 2008 over alleged “excessive” runoff in Oregon’s Tillamook State Forest.
- Roads are point sources of pollution and the long-standing silvicultural rule no longer applies
- Logging is an industrial activity under EPA’s storm water regulations
- Permits required inside the 9th Circuit. EPA considers this to have nationwide impact
- 9th Circuit is historically controversial, liberal and diverse

Silvicultural Rule

A difference of interpretation

- The defendants argued that the silvicultural rule clearly applies to the case.
- EPA has the broad authority to interpret the term “point source” in the rule.
- The plaintiffs argued that the exemption only applies to “non-point sources” and that EPA lacked the authority to designate forest roads as “non-point sources.”

9th Circuit Decision Ignored

- EPA's clear position that the inclusion of SIC 24 was not intended to encompass logging activities covered by the sivicultural rule.
- Forest road discharges do not fit the definition of industrial discharges.
- The court's own ruling in a 2003 case recognizing that forest roads are not subject to phase I permitting requirements as an industrial activity.

Implications

Regulations such as the “non-point source” definition of silviculture are critical factors enabling landowners to maintain their forestland.

- High cost of new and unnecessary permits
- Litigation time and cost
- Additional burdens to forest owners struggling against already challenging economic forces
- Huge number of roads and culverts that might be subject to permitting

Who needs a permit?

- Road owner
- Landowner
- Timber Harvester

What kind of permit?

- No established permitting system
- No clear permitting criteria

The Latest

EPA

- Taking steps to set up a regulatory framework
- Have written a draft Notice of Intent
- Considering “flexible” options including “non-permitting” options that recognize the vastness, diversity and complexity of the nations logging network and existing federal, state, local and tribal BMPs.
- Working with BLM and USFS and will seek public comment

Petition to the U.S Supreme Court

- Waiting on courts decision on whether to take up case
- Justice Department to file brief by May 25

Coalitions and Coordination with others

- Pushing hard for US Inspector General to recommend in favor of Supreme Court accepting the appeal
- 27 State Government Interveners plus industry
- EPA barred from using fiscal 2012 funds to implement until Sept. 30

Arkansas PGP Background

A January 2009 ruling by the 6th Circuit in *National Cotton Council v. EPA* required an NPDES permit for certain pesticide applications applied to, over or near Waters of the U.S.

- Court rejected a 2006 EPA ruling that said certain pesticide applications are exempt under the Clean Water Act
- Industry argued that herbicide applications were exempt as a nonpoint source under the Silvicultural Rule
- Forest Canopy and Weed control two of four types of applications covered
- H.R. 872 - Reducing Regulatory Burdens Act of 2011 passed U.S. House 292-134 in late March 2011
- Requirement went into effect Nov. 1, 2011. EPA administers in 6 states. 44 use a general permit administered by their state
- EPA has given states flexibility in administering their permits but has made it very clear that they consider forestry pesticide spraying to be a point source discharge.

Approach in Arkansas

AFA began working with a core group of large landowner members in late 2010 to ensure the Arkansas PGP was as “business as usual” as possible:

- Multiple meetings and comments to ADEQ
- Initial approach to ensure the inclusion of silvicultural exemption language in the Arkansas PGP
- ADEQ receptive and the language was included
- February 2012 - ADEQ released final PGP. Used EPA guidance on definition of Point Source, making exemption language moot
- Coalition shifted its focus to specific elements within the PGP

Approach in Arkansas

Areas of Concern

- Educate ADEQ
- Notice of Intent
- Threshold Values
- Application Categories
- Pest Management Areas

Approach in Arkansas

The Latest

- Incremental success on Education
- ADEQ developing a “Permit by Rule”
- PBR would not require filing NOI
- Landowners must follow current PGP for now
- Field tour with ADEQ in the works
- Still need clarification on Canopy or Weed category

H-2B Background

In October 2010 the USDOL released a proposed rule on wages for H-2B workers that has the potential to increase manual tree planting costs by 30-60%. There were two parts to the Guest Worker Program (housing, transport, $\frac{3}{4}$ work guarantees, etc.) and (Wage Rates).

- The effort to fight the new rules on a national scale was lead by FRA and a coalition of industry representatives
- AFA provided comments to USDOL in November 2010; made congressional contacts throughout 2011
- Lawsuit filed by FRA in Louisiana and another filed in Florida.
- H.R. 3162 introduced in October 2011
- Rules delayed three times - the latest in December as an amendment to the 2012 Labor, Health and Human Services spending bill. Delayed to Oct. 1, 2012
- February 2012 the La. Lawsuit transferred to circuit court in Philadelphia, PA. Lawsuit withdrawn.

H-2B Background

The Latest

- In late April, the Judge in the Florida lawsuit issued a preliminary injunction against both the H-2B wage Rule and the H-2B Program Rule
- Both rules block nationwide until at least November
- The DOL will likely appeal the ruling
- Major victory for seasonal employers

USDA BioPreferred Program Background

The BioPreferred Program was originally created by the 2002 Farm bill to increase the purchase and use of biobased products.

- Under the program every federal agency is required to rank their preference of biobased products for purchasing decisions
- To increase consumer recognition, the program also created voluntary labeling similar to Energy Star
- Nearly 3,000 products have been designated as biobased
- Products include cleaners, lubricants, building materials, insulation, roof coatings, fuel additives, and other sustainable industrial materials
- What's missing? Wood and pulp and paper products
- Why? USDA considers that these products come from "mature markets"

USDA BioPreferred Program

The Latest

- Three AFA members - Tom Crowder, Charles Purtle and Clark Tennyson participated in the AFF Fly-In
- Senator Pryor expressed interest in helping and AFA began working with his office, AF&PA and AFF to craft language to implement changes
- Senators Pryor and Roy Blunt (R-MO) introduced S. 2346 The Forest Products Fairness Act on April 26
- The legislation is designed to open new opportunities for American (Arkansas) forestry producers
- Allows for labeling as biobased and to receive federal government procurement preference
- Includes wood products, pulp, paper, paperboard, pellets and any recycled products derived from forest materials
- Provision in Senate Farm Bill also addresses mature market exclusion

Boiler MACT Background

- Boiler Maximum Achievable Current Technology (MACT) has been ongoing for a number of years
- AFA has been part of a coalition working the issue for several years
- Sets emission limits for hazardous air pollutants from gas, liquid, or solid-fuel fired boilers and process heaters.
- Impacts 40 boilers in the forest industry in Arkansas - 48 total
- \$390 million in cost to forest industry - \$490 million to all industry in Arkansas (\$7 billion for U.S. Forest Industry)
- Direct cost that cannot be passed through. Will replace planned efficiency upgrades and expansions
- EPA emission limits extremely stringent, often approaching barely detectable levels and unachievable. Only top 12% of boilers could meet these standards

Boiler MACT Background

- Arkansas has received excellent support from Governor Mike Beebe, Attorney General McDaniel, and ADEQ Director Marks
- AF&PA supported legislation has received bipartisan support in both House (275-142) and Senate (52-46) but it is unlikely to become law this year in its current form
- EPA proposed changes to the rule at the end of 2011
- The repropoed rule was improved but did not meet all of the needs of forest industry
- AF&PA has acknowledged the positive changes and offered additional alternatives
- EPA is expected to finalize its Boiler MACT rules soon - before end of June

Boiler MACT

The Latest

- AF&PA's three remaining priority areas include:
 - Achievable limits - especially for carbon monoxide for biomass, coal and oil boilers
 - Additional non-hazardous secondary materials be listed as fuels
 - A longer compliance schedule
- These three are thought to have the best chance for further progress
- EPA seems to be working to address as much of the request as possible
- Congressional intervention continues to be a powerful tool
- USW submitted comments to EPA Director Jackson on February 21
- AF&PA and a small group of CEOs expected to make case with administration soon

Questions?