



WESTERN FORESTRY LEADERSHIP COALITION

LEGISLATIVE & POLICY UPDATE

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The *Western Forestry Leadership Coalition (WFLC) Legislative & Policy Update* provides information on issues of importance to the WFLC and our partner groups. This document is posted at www.wflcweb.org/infomaterials/issue_briefs.php. Please note that the items below highlight only a few of the issues the WFLC is currently tracking.

1. USDA Forest Service Land Management Planning Rule

In February the USDA Forest Service (USFS) released a proposed rule for National Forest System Land Management Planning for a 90-day public comment period ending May 16, 2011 (Fed. Reg. Vol. 76, No. 30). The USFS is currently operating under the transition provisions of the 2000 rule, which allow the agency to use the 1982 rule, as several subsequent attempts to update and revise the planning rule have been invalidated in Federal District Court.

The Council of Western State Foresters (CWSF) has been closely reviewing the proposed rule and will submit comments to the USFS that identify several concerns and suggestions for improvements to the proposed rule. Chief among the areas of focus for the CWSF are:

- Coordination of NFS planning efforts with State Forest Resource Assessments and Strategies;
- New provisions regarding the use of “best available science” and a possible impact to the deference traditionally provided to the agency on matters of science within their expertise;
- Interdependence of the ecological, social and economic elements of sustainability and the importance of including plan provisions to maintain or restore all three in forest plans.

On May 5, 2011, the House Agriculture Committee’s Subcommittee on Conservation, Energy, and Forestry held a public hearing to review the proposed rule (see press release from the Subcommittee at <http://agriculture.house.gov/press/PRArticle.aspx?NewsID=1380>). USDA Under Secretary for Natural Resources and Environment Harris Sherman provided testimony on behalf of the USFS on the proposed rule. John Shannon, Vice President of the National Association of State Foresters and Arkansas State Forester also testified on a panel alongside a county commissioner and representatives from the forest industry and motorized recreation sectors. The NASF testimony highlighted the same key issues and concerns identified by the CWSF.

2. Appropriations

- **Fiscal Year (FY) 2011:** as we reported in the April *WFLC Legislative & Policy Update*, a continuing resolution to fund the federal government through the remaining 5 months of FY 2011 was passed and signed into law. The USFS is currently working through the process of receiving their apportionment and getting funding to the Regions as quickly as possible. It appears that the earliest that State and Private Forestry grants and other programs delivered through state foresters are likely to see funds is mid-June.

- **FY 2012:** discussions and debate surrounding federal funding for FY 2012 kicked off almost immediately after the FY 2011 continuing resolution cleared both chambers. Two competing budget proposals have been introduced, the first from House Budget Chairman Paul Ryan (R-WI) and the second from President Obama. Both proposals include substantial cuts to existing federal programs, the primary difference between the two proposals is the depth of spending cuts and their inclusion of tax measures in an effort to provide additional revenue while minimizing cuts.

3. Forestry Legislation

- **S. 375** Good Neighbor Forestry Act was introduced by Senator Barrasso (R-WY) in February 2011 and currently carries 5 cosponsors, Senators Enzi (R-WY), Hatch (R-UT), Tim Johnson (D-SD), Lee (R-UT) and Thune (R-SD). Essentially, the bill would extend the pilot authority currently available in the state of Colorado to all states west of the 100th meridian. The bill was initially referred by mistake to the Senate Committee on Agriculture, Nutrition and Forestry and was recently discharged from that committee and referred to the Energy and Natural Resources Committee, Subcommittee on Public Lands and Forests. Subcommittee Chairman Wyden (D-OR) recently announced that a hearing will be held on May 25, 2011 to consider S. 375 along with 3 other public lands measures. A bill containing very similar language for the expansion of the Good Neighbor Authority was approved by the Energy and Natural Resources Committee during the previous Congress, but not before substantial changes were made to the language that the CWSF and other partners believed would have severely limited the utility of the authority.
- **S. 781**, a bill to amend the Clean Air Act to conform the definition of renewable biomass to the definition given the term in the 2002 Farm Bill, was introduced by Senator Thune (R-SD) in April 2011 and is cosponsored by Senator Crapo (R-ID). This bill includes a rather expansive definition of “biomass” to include “materials (including trees, wood, brush, thinning, and chips) or invasive species from National Forest System land and public lands ... that **would not otherwise be used for higher-value manufactured forest products ...**” (emphasis added). There has been significant discussion over the provision of this bill that requires that renewable biomass materials would not otherwise be used for higher-value products and some concern as to how this limitation would work in practice and adjust to factors such as high energy prices in some rural areas where biomass for energy production may be one of the highest-value uses. The bill has been referred to the Senate Committee on Environment and Public works. No hearing is scheduled at this time.
- **Clean Energy Standard (CES)** – in March of 2011, leaders of the Senate Energy and Natural Resources Committee, Senators Bingaman (D-NM) and Murkowski (R-AK), released a White Paper (available at http://energy.senate.gov/public/index.cfm?FuseAction=IssueItems.View&IssueItem_ID=7b61e406-3e17-4927-b3f4-d909394d46de) soliciting comment to broad questions surrounding the design of a possible CES. The CWSF has had discussions with Committee staff about the importance of including biomass in any CES that the Committee might develop and will continue to follow this issue closely as the Committee leadership reviews responses to their White Paper and considers potential for work on a CES in the 112th Congress.
- **H.R. 1485**, the Catastrophic Wildfire Community Protection Act, was introduced by Congressman Heger (R-CA) in April of 2011. Provisions of this bill would allow counties, in consultation with the State Forester, to determine that either a state of emergency or a “dangerous nuisance” exists due to the accumulation of forest fuels and the associated fire risk to public safety, welfare, infrastructure, et cetera within an area covered by a Community Wildfire Protection Plan. Once a county makes such a declaration the Secretary of Agriculture must then request the CEQ develop

alternative NEPA arrangements to expedite a fuels reduction project within 15 days from the receipt of the request from the Secretary. If the CEQ fails to meet the 15 day deadline, the Secretary is then directed to proceed with the project notwithstanding any other provisions of law (including NEPA and provisions for administrative or judicial review). The bill has been referred to House Agriculture and House Natural Resources Committee. Because of the provisions that would allow projects to proceed notwithstanding any other laws in the event that the CEQ fails to provide the Secretary with alternative arrangements within the 15 day window, it is not yet clear how much support this bill will garner, although it currently has 10 cosponsors, all House Republicans, from Utah, Colorado, California, Idaho and Washington.

4. Farm Bill

The Forests in the Farm Bill Coalition is continuing work to develop recommendations for consideration in the 2012 Farm Bill. The time frame for moving forward on reauthorization of the next Farm Bill is still somewhat in flux. Initial signals from the House indicated that the Committee on Agriculture did not intend to begin writing the new bill until sometime in early 2012. However, Senator Stabenow, Chairwoman of the Senate Committee on Agriculture, Nutrition and Forestry, recently announced the first official hearing to be held in Michigan on May 31st, indicating that the Senate may begin work on the reauthorization in 2011. The Forest Priorities for the 2012 Farm bill document produced by the Forests in the Farm Bill Coalition is available at:

http://www.affoundation.org/stuff/contentmgr/files/1/ff126e3cc9cdfb99e51191810144d761/pdf/fifb_coalition_web_version.pdf. The CWSF will continue to be an active participant in the Coalition as the group works to refine more specific policy recommendations for inclusion in the 2012 Farm Bill.

5. Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)

Following a series of cases in federal court culminating with a decision from the U.S Court of Appeals for the 6th Circuit which invalidated a final rule promulgated by the U.S. Environmental Protection Agency (EPA) clarifying that a National Pollutant Discharge Elimination System (NPDES) permit is not required for pesticides used in and around water so long as the pesticides are registered and regulated under FIFRA. Under the decision, the EPA was instructed to proceed with a NPDES permitting program for the application of pesticides around water. The House recently passed H.R. 872 with bipartisan support to amend FIFRA and clarify Congressional intent that FIFRA be the sole regulation applied to the application of pesticides near water. The bill has been transmitted to the Senate for Consideration and to the Senate Committee on Agriculture, Nutrition and Forestry, and Senate Environment and Public Works.

6. Forest Roads – *en banc* review denied by Ninth Circuit

On May 17, 2011 the U.S. Court of Appeals for the Ninth Circuit denied the request for a rehearing of *Northwest Environmental Defense Center v. Brown*. In this case, the court held that a National Pollution Discharge Elimination System (NPDES) permit is required for stormwater runoff from logging roads. Under the court's interpretation, logging qualifies as an industrial activity under EPA regulations and stormwater runoff from logging roads that is collected and conveyed through ditches and culverts before being discharged into navigable waters constitutes a point source under the Clean Water Act and requires a NPDES permit. The denial and opinion is available at <http://www.ca9.uscourts.gov/datastore/opinions/2011/05/17/07-35266.pdf>.

The denial of a rehearing triggers a 90-day time period during which the parties may petition the Supreme Court for review. A mandate is expected to be issued by the Ninth Circuit next during the week of May

23rd, which will officially close this case and implement the decision within the Ninth Circuit. If a party decides to seek review from the Supreme Court they would likely move for a stay of the issuance of the decision, however a stay is not automatic under a petition to the Supreme Court as it was under the petition for an *en banc* review. The WFLC will continue to closely follow developments of this matter and provide additional updates as appropriate.

7. EPA Deferral of Biomass Emissions

As previously reported, the EPA has chosen to defer the regulation of biogenic CO₂ emissions under the Tailoring Rule for three years. The agency determined that additional time was needed to examine the science of biogenic CO₂ emissions, possibly engage an independent scientific panel to consider the issue, and ultimately initiate a notice and comment rulemaking to implement the appropriate accounting approach for these emissions. A notice and comment period on the proposed rule to defer the regulation of biogenic CO₂ emissions closed on May 5, 2011. The CWSF will continue to closely follow this issue and to work with our partners to assist the EPA in determining the appropriate accounting approach for these emissions.

8. Waters of the U.S. guidance

The Environmental Protection Agency (EPA) recently released new agency guidance on identifying "waters of the United States." This definition is significant because the EPA's authority to regulate under the Clean Water Act extends only to waters of the U.S. There is a substantial history behind this guidance going back to the Supreme Court's 2006 decision in *Rapanos v. United States*, 547 U.S. 715 (2006) where the Court split in a 4-1-4 decision. The decision did not change EPA's jurisdiction to regulate traditional navigable waters, interstate waters or adjacent wetlands. However, the new guidance adopts Justice Kennedy's "significant nexus" test which includes a fact specific analysis to determine when waters fall within EPA's jurisdiction. The agency is expected to undertake formal rulemaking based on this guidance document very soon. More info is available at <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>.

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