



WESTERN FORESTRY LEADERSHIP COALITION

LEGISLATIVE & POLICY UPDATE

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Brent Keith, Forest Policy Director, 503.507.0550, bkeith@wflcweb.org

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 selection of the issues the WFLC is currently tracking.

Ninth Circuit Forest Roads Decision

Oral argument in the forest roads case, *Decker v. NEDC*, was heard by the Supreme Court on Monday December 3, 2012. On the Friday before oral argument the U.S. Environmental Protection Agency (EPA) finalized a rule that was intended to clarify that a National Pollutant Discharge Elimination System (NPDES) permit is not required for stormwater discharges from logging roads. As discussed in a previous update, this rule release and its impact on the case became the focus of oral arguments, leaving more questions than answers about if and how the Court might address the new rule and the unresolved legal issues in the underlying case.

On January 8, 2013 the Supreme Court issued an Order in which the Court accepted a supplemental brief filed by the State of Oregon addressing the impact of the new EPA rule on the case. The Order also provides the other parties in the matter the opportunity to file their own supplemental briefs addressing the effect of the EPA rule. Briefs are due on January 22, 2013.

In a related development, prior to the Order on supplemental briefing from the Supreme Court, NEDC filed a Petition for Review of the EPA rule in the U.S. Court of Appeals for the Ninth Circuit. The NEDC petition filed with the Ninth Circuit is essentially a placeholder for a separate legal action against the EPA to challenge the new rule, although that challenge could be impacted by any action taken by the Supreme Court in *Decker v. NEDC*.

With the new Order and forthcoming briefs, it appears that February is now the earliest that we could see a decision from the Court in this case. The Order on supplemental briefing likely indicates that the Court is still struggling with how to handle this case. Please contact me with any questions or if you would like a copy of the Order, supplemental briefs or the NEDC Petition for Review.

EPA Boiler & Incinerator Rule Modifications

On December 20 of last year the EPA finalized a series of adjustments to Clean Air Act standards for boilers and certain solid waste incinerators. The adjustments followed an earlier rulemaking in March of 2011 and are intended to address concerns that were raised by stakeholder groups with the initial rule. The Council of Western State Foresters (CWSF) provided comment to the EPA in 2010 on the initial proposed rule. The CWSF comments are available at http://www.wflccenter.org/infomaterials/letters_of_comment.php?year=2010.

It should be noted that this rulemaking does not address the separate but related issue of accounting for biogenic CO₂ emissions under the Tailoring Rule.¹ The EPA has finalized but not yet published the rules. The Agency expects to publish all of boiler rules together in the Federal Register within two to three weeks. More information on the final emissions standards for Area and Major Source Industrial, Commercial and Institutional Boilers and Commercial/Industrial Solid Waste Incinerators can be found at <http://www.epa.gov/airquality/combustion/actions.html>.

Finally, in yet another rulemaking adjustment, the EPA is addressing concerns raised with the classification of materials as Non-Hazardous Secondary Materials that are, or are not, solid waste. This classification is important as different provisions of the Clean Air Act are triggered when a facility burns materials classified as solid waste. Ultimately, the waste classification determines whether a facility is regulated as a boiler or an incinerator. The final rule clarifies that a fuel source is generally not considered a solid waste when any of the following criteria are met:

- The material used as a fuel remains within the control of the generator and meets legitimacy criteria (outlined in 40 CFR 241.3(d));
- The material is used as an ingredient in a manufacturing process and meets legitimacy criteria;
- The material has been determined through a case-by-case petition process not to have been discarded and is indistinguishable from a fuel product; or
- The material has been identified as a categorical non-waste fuel listed in 40 CFR 241.3(b). Such material includes resonated wood and dewatered pulp and paper sludge.

The rule also provides a process to provide additional categorical determinations and the Agency intends to pursue such determinations for several materials including paper recycling residuals and construction and demolition wood processed pursuant to best practices.

Budget and Appropriations

- **Fiscal Year 2013:** The federal government is still operating under a Continuing Resolution (CR) approved in late September of 2012 that provided partial-year funding for federal fiscal year (FY) 2013. The current CR is set to expire on March 27, 2013. It

¹ Accounting for biogenic CO₂ emissions has been deferred by the EPA until July of 2014 to provide the agency time to consider the best approach. The EPA has put together an initial Accounting Framework for Biogenic CO₂ Emissions from Stationary Sources (available at <http://www.epa.gov/climatechange/ghgemissions/biogenic-emissions/study.html>). This Framework has been submitted for peer review to the EPA Science Advisory Board.

remains unclear how Congress will ultimately fund the final 6 months of FY 2013. Further complicating the matter, the U.S. is expected to reach the federal debt limit on or before February 28th, which is also when the Congress must again address the so-called fiscal cliff, or automatic spending cuts triggered under sequestration. It seems that nearly all options are still on the table; however an additional 6-month CR may be the cleanest way for the Congress to address current year funding to free up time for other issues.

- **2014 Budget:** While there has not been an official announcement from the White House, it appears that the 2014 Budget will not be released on the first Monday in February as prescribed in statute. The expected delay is likely linked to the larger negotiations around the federal debt limit and sequestration. We will continue to closely track the budget and appropriations work in Congress once the budget has been released and provide updates as appropriate.

Aircraft Transfer Legislation

In late December the Congress approved the National Defense Authorization Act which included language similar to the Wildfire Suppression Aircraft Transfer Act of 2012 (S. 3441 and H.R. 6248). The approved language provides the Secretary of Defense the discretion to transfer up to 7 excess aircraft each to the U.S. Forest Service and the U.S. Coast Guard. While it is unlikely that any aircraft could be transferred to the Forest Service and properly equipped for the 2013 fire season, State Foresters have supported this legislation while calling on the Forest Service to continue work to implement the Large Airtanker Modernization Strategy (see <http://www.stateforesters.org/press-release-nasf-endorses-legislation-transfer-airtankers-suppression-purposes>).

Farm Bill

The last minute deal to avert the fiscal cliff reached in late December 2012 included provisions to extend the 2008 Farm Bill through the remainder of fiscal year 2013. Congress had allowed the 2008 Farm Bill to expire at the end of federal fiscal year 2012 last September. While the 9-month Farm Bill extension left funding for several energy programs in jeopardy, most conservation programs (e.g. EQIP and WHIP) were either extended or had been unaffected by the Farm Bill lapse this past September due to separate authorization provided in a previous Continuing Resolution.

The newly seated 113th Congress now adds the task of writing a 5-year Farm Bill to an already busy legislative calendar. Farm Bill hearings could begin again as early as this February. However, it remains to be seen how much time and energy Congress will have for items outside of the looming budget and debt limit issues. We will continue to closely follow the Farm Bill process and provide additional updates as a path forward becomes clear.

For more information on these or other items, please contact Brent Keith, Forest Policy Director, at 503.507.0550 or bkeith@wflcweb.org.

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