



2011 FFA Annual Conference

Legal/Policy Roundtable – Public
Regulation of Private Forests

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Topics

1. Forest Road Regulatory Issues
2. Wildlife BMPs
3. Gopher Tortoise Listing
4. ESA Section 6 Cooperative Agreement between the FFWCC and USFWS
5. Potential Expansion of Federal Jurisdiction Over Pesticide Application
6. Potential Expansion of Federal Jurisdiction Over Wetlands
7. H-2B Wage Regulation
8. Greenhouse Gas Regulations; 3-year Biomass Exemption; Recent State-court decisions involving biomass
9. Recent Case Law: Can a timber harvest spread contamination?
10. The USEPA or FDEP - which numeric nutrient criteria will apply in Florida?

Will we discuss all of these topics today? **NO**. In fact, we intend to focus the majority of our time on the first two topics but we have included reference materials in your notebook for the issues not covered today.

1. Update on Forest Road Regulatory Issues

The Ninth Circuit's Decision (NEDC v. Brown), the Clean Water Act (CWA) and Logging Roads

- Under the CWA, a National Pollution Discharge Elimination (NPDES) permit is required for "point source" discharges of pollutants to navigable waters.
- Non-point source pollution is not subject to the NPDES permit requirement.
- In fact, there are statutory exemptions from the NPDES permit requirement (including some agricultural operations, but **not** for forest management activities)

1. Update on Forest Road Regulatory Issues

The Ninth Circuit's Decision (NEDC v. Brown), the Clean Water Act (CWA) and Logging Roads

- However, EPA has exempted silvicultural activities from the NPDES permit requirement since 1976
- In the NEDC v. Brown lawsuit, filed in Oregon, the Plaintiff/NEDC claimed (and the 9th Circuit agreed) that (i) a NPDES permit was required for industrial stormwater runoff from forest roads, including associated ditches and culverts because the roads, ditches and culverts contain or direct runoff and thus constituted a point source and (ii) the silviculture exemption in USEPA's rules (in place since 1976) was invalid) because USEPA lacked the statutory authority to draft such a rule. Bottom line: Only Congress can create an exemption for silvicultural activities.

1. Update on Forest Road Regulatory Issues

The Ninth Circuit's Decision (NEDC v. Brown), the Clean Water Act (CWA) and Logging Roads

- EPA's **Silvicultural Rule** defines timber "*harvesting operations, surface drainage or road construction/maintenance from which there is natural runoff*" to be **non-point** source silvicultural activities (i.e., non-point = nursery operations, site preparation, reforestation, and subsequent cultural treatment, thinning, prescribed burning, pest and fire control) exempted from NPDES permitting.
 - NOTE: Some activities (e.g., stream crossing for roads) may involve point source discharges of dredged or filled material which may require a CWA s. 404 permit. 40 CFR 1222.27(b)

1. Update on Forest Road Regulatory Issues

The Ninth Circuit's Decision (NEDC v. Brown), the Clean Water Act (CWA) and Logging Roads

- Defendants (i.e., Oregon State Forester, all the members of the Oregon Board of Forestry, and companies with state logging contracts that hauled logs on the roads in question) argued that the ‘**Silviculture Rule**’ (i.e., silviculture exemption; 40 CFR § 122.27(b)(1)) exempted them from permits (**US District Court Judge in Oregon agreed**)
- Defendants also argued that no permit was required for road stormwater runoff pursuant to EPA’s rules promulgated under Sect 402(p).

– Phase I and Phase II stormwater permitting

1. Update on Forest Road Regulatory Issues

The Ninth Circuit's Decision (NEDC v. Brown), the Clean Water Act (CWA) and Logging Roads

- EPA promulgated rules for permitting stormwater discharges from **industrial activities** and municipal waste water under Phase I
- Phase I defined industrial activity and explicitly exempted 'forestry' under the Silviculture Rule
- Forestry **point** sources are limited to rock crushing, gravel washing, log sorting and log storage facilities

1. Update on Forest Road Regulatory Issues

Court's Reasoning – Logging is an Industrial Activity

- Court found logging to be an industrial activity as the term is used in section 402(p)
- Industrial activities require permits for “**immediate access roads** and rail lines used or traveled by carriers of raw materials, manufactured products, waste material or by-products used or created by the facility”
- EPA’s preamble for industrial activity defines immediate access roads as, “...roads which are exclusively or primarily dedicated for use by the industrial facility”

1. Update on Forest Road Regulatory Issues

Court's Reasoning – Logging is an Industrial Activity

- Court concluded that logging roads fit this description because, but for logging, these roads would not have been built
- Court defines logging tracts as ‘industrial facilities’ and logging roads as ‘immediate access roads’ therefore NPDES permitting rules apply

1. Update on Forest Road Regulatory Issues

What does this all mean?

- Combined with other decision, Ninth Circuit has gutted EPA's Silviculture Exemption
- Impacts on private timber harvesting
 - lawsuits to enjoin harvesting and/or hauling
 - could County roads be considered "logging roads?"

1. Update on Forest Road Regulatory Issues

What does this all mean?

- Possible that NPDES permits could be required for every forest road that contains ditches and culverts that eventually discharge into streams
 - Court stated that EPA could issue general permits but there is no established permitting system currently in place
 - Since no clear permitting criteria, permittees may have to meet water quality standards/effluent limitations; monitoring requirements
 - USEPA rulemaking: When? Will states be allowed to develop permitting program? Inclusion of BMPs and presumption of compliance?

1. Update on Forest Road Regulatory Issues

What does this all mean?

- Unclear who would be required to obtain a permit
 - Does the obligation rest with the landowner (i.e., road owner) or entities who haul logs on the road? Anyone who uses the road?
 - What construction features actually constitute point sources?
 - What attributes define a logging road and distinguish it from a road not associated with industrial activities?

1. Update on Forest Road Regulatory Issues

Legislative/Judicial Fix

- Silviculture Regulatory Consistency Act (H.R. 2541 and companion act in Senate, S.1369). Both are included in the notebook at **Tab 1**.
- See also, NAFO's July 14, 2001 update and Florida DACS letter from Adam Putnam to Senator Nelson and Senator Rubio (**Tab 2**)
- Request that the USSC review the 9th Circuit's decision
- Request that the 9th Circuit stay its ruling while the USSC review is sought

1. Update on Forest Road Regulatory Issues

Until there is a Fix, what we know about roads, BMPs, and water quality

- Most sediment from a small fraction of the road network (i.e., 80/20 rule)
- Location is critical
- Surfacing and other treatments reduce sedimentation
- Mulching/seeding reduces surface erosion
- Suite of BMPs available to control/direct runoff
- Avoid direct delivery – disconnect streams from road network
- Road maintenance is a balancing act

2. Wildlife BMPs

- FFWCC's "Imperiled Species Rule" became effective on November 8, 2010. Copy of rule is included at Tab 3.
- Section 68A-27.007(2)(d), FAC, of the rule provides the following:
 - Agriculture, as defined in Section 570.02, F.S., conducted in accordance with **best management practices** (BMPs) adopted by the Department of Agriculture and Consumer Service pursuant to Sections 403.067 and 597.004, F.S., is authorized and **does not require a permit authorizing incidental take** despite any other provision of this section. The Commission will work cooperatively with the Florida Department of Agriculture and Consumer Services, landowners, and other stakeholders to legislatively authorize, develop, and adopt BMPs to protect wildlife species **within three years** of the effective date of these rules.
- Update on the current status of the BMP development process

2. Wildlife BMPs

Guidelines for Wildlife BMPs

- Voluntary and non-regulatory
- Compliance provides a presumption of 'no take'
- Science-based using results of studies that document impacts (avoid expert opinion and if there is a need for research, do it)
- Focus is on avoidance and minimization, not recovery
- BMPs, to extent practical, should focus on management practices (the management plans may include species-based protections)
- Easy for practitioners to understand and use (may be need for training in some cases)

2. Wildlife BMPs

Next Steps for BMP Development –
FFWCC Discussion

3. Gopher Tortoise Listing

- On July 27, 2011, the USFWS issued its 12-Month Finding on a Petition to list the gopher tortoise as threatened in the eastern portion of its range.
- The USFWS found that listing of the gopher tortoise in the eastern portion of its range was warranted but such listing at the current time is precluded by higher priority actions. Instead, the gopher tortoise will be placed on the **candidate species** list.
- Candidate Species receive no statutory protection.
- The USFWS intends to initiate a rulemaking when it completes the higher priority actions and has the necessary resources to do so; however, the USFWS cannot predict how long it may take before formal rulemaking is initiated.
- All state regulations will continue to apply.
- See **Tab 4** for reference materials.

4. ESA Section 6 Cooperative Agreement between the FFWCC & USFWS

- The proposal is to amend the existing Cooperative Agreement between the two agencies
- One of the stated objectives is to reduce or eliminate duplication and inconsistency in order to create more predictable outcomes, compressed permitting timeframes, and more effective conservation/mitigation measures
- The catalyst for the proposal was adoption of the FFWCC's imperiled species rule (i.e., 68A-27, F.A.C., et seq.), which revised species listing procedures and added provisions to eliminate the need for duplicate USFWS and FFWCC permits for the intentional and incidental take of listed species

4. ESA Section 6 Cooperative Agreement between the FFWCC & USFWS

- The proposal differs from the existing Cooperative Agreement by expressly and affirmatively authorizing the FFWCC to issue conservation permits and incidental take permits for listed species, provided certain conditions are met, without prior issuance of a USFWS permit.
- A separate agreement between the agencies would be required before the FFWCC could assume primary permitting responsibility, and any subsequent agreement between the agencies will provide that a permittee can opt back-in to the USFWS permitting requirements.
- Anticipated that the amendment to the Cooperative Agreement will be approved on or before October 1, 2011. A copy of the draft amendment and the existing Cooperative Agreement is provided at **Tab 5**

5. Potential Expansion of Federal Jurisdiction Over Pesticide Application

- US EPA has issued a draft NPDES permit for point source discharges from the application of pesticides to waters of the United States. This permit is also known as the Pesticides General Permit (PGP). The PGP was developed in response to a decision by the Sixth Circuit Court of Appeals (National Cotton Council, et al. v. EPA). The Sixth Circuit vacated **EPA's 2006 rule** that said NPDES permits were not required for applications of pesticides to U.S. waters. As a result of the Court's decision, discharges to waters of the U.S. from the application of pesticides will require NPDES permits when the court's mandate takes effect, on October 31, 2011.

5. Potential Expansion of Federal Jurisdiction Over Pesticide Application

- The U.S. Senate Agricultural Committee approved H.R. 872, the Reducing Regulatory Burdens Act of 2011. The legislation affirms that pesticide application for activities such as forest management is effectively regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and does not require a duplicative NPDES permit.
- The House approved the bill in March. Still need Senate approval.
- In the event the U.S. Senate does not act before the court-ordered October 31, 2011, deadline, the Florida DEP recently adopted a rule (effective on April 14, 2011) establishing a pesticide general permit, which permits the application of pesticides to waters of the state, provided that the conditions of the permit are met (62-621.300(8), F.A.C.

5. Potential Expansion of Federal Jurisdiction Over Pesticide Application

- DEP's rule provided to the USEPA and USEPA did not object.
- Only operators listed in the table at 62-621.300(8)(b) are required to submit a Notice of Intent to the Florida DEP.
- Reference material included at **Tab 6**.

6. Potential Expansion of Federal Jurisdiction Over Wetlands

- In April 2011, the USEPA and USACOE published a revised proposed guidance document (Guidance) regarding the federal government's authority to regulate wetlands.
- The decision to issue the proposed Guidance instead of immediately initiating rulemaking has been criticized by members of Congress and representative from both industry and environmental interest groups.
- The decision to rely on a policy statement rather than a rule also runs counter to several recent federal appellate decisions giving limited deference to agency 'guidance' documents.
- The 2011 Guidance would significantly expand the scope of federal agency review under the CWA, is not a regulation, and is likely to be challenged on that basis.

6. Potential Expansion of Federal Jurisdiction Over Wetlands

- Proposed Guidance specifically states: "The agencies expect, based on relevant science and recent field experience, that under the understandings stated in this draft guidance, the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance...."
- Reference material included at **Tab 7**.

7. H-2B Wage Regulation

- The U.S. Department of Labor (DOL) regulation that changes the wage calculation system for H-2B temporary workers will apply to wages paid for work performed on or after October 1, 2011.
- DOL revised its methodology for determining wage levels for the H-2B program as a result of a lawsuit.
- H-2B temporary workers include reforestation and pine straw activities.

7. H-2B Wage Regulation

- Based on a preliminary review, it appears that
 - The final regulation eliminated the four-tiered wage system, replacing it with a new formula for calculating wages.
 - Under the new rule, employers must pay H-2B workers a wage that meets or exceeds the higher of the prevailing wage or the federal, state or local minimum wage.
 - The H-2B prevailing wage is the highest of (1) the arithmetic mean wage rate established by the Occupational Employment Statistics (OES) wage survey for the occupation in the area of intended employment; (2) the wage rate established under a collective bargaining agreement; or (3) the wage rate established under the Davis-Bacon Act or McNamara O'Hara Service Contract Act for the occupation in the area of intended employment
- Reference material included at **Tab 8**.

8. GHG Regulations; 3-year biomass exemption; recent state court and administrative decisions involving biomass

- On January 2, 2011, USEPA's Greenhouse Gas (GHG) emissions permitting requirements took effect. These rules apply at large new and modified sources under the Clean Air Act's (CAA) prevention of significant deterioration program.
- However, in a final rule published in the Federal Register (76 Fed. Reg. 43,490), the USEPA will exempt new and modified facilities that burn wood waste from the need to obtain GHG emissions permits for three years.
- USEPA granted the deferral in response to a petition from the National Alliance of Forest Owners (NAFO).

8. GHG Regulations; 3-year biomass exemption; recent state court and administrative decisions involving biomass

- The final rule exempts facilities burning wood waste from the requirement to obtain prevention of significant deterioration permits and Title V operating permits
- Reference material included at **Tab 9**.
- State Appeals Court in North Carolina finds that under the state's renewable energy portfolio standard (which requires public utilities to meet certain renewability and efficiency standards), wood derived from whole trees was a renewable energy source. State of North Carolina Util Comm et al v. Environmental Defense Fund, N.C. Ct. App., No. 11-142 (August 2, 2011). Case attached at **Tab 10**.

8. GHG Regulations; 3-year biomass exemption; recent state court and administrative decisions involving biomass

- Washington State Pollution Control Hearing Board upholds air permit for a biomass-fueled cogeneration project at a pulp mill, finding that burning woody biomass will result in a 25% reduction in the mill's annual combustion of fuel oil. The project opponents objected, claiming that a full-blown environmental impact statement should have been required to fully evaluate the project's CO₂/GHG emissions impacts. The Hearing Board disagreed with this argument, holding that Washington's legislature directed that CO₂ emissions from burning biomass are **not** GHG emissions.
- The Hearing Board's decision is currently under appeal

9. Can timber harvesting cause a dispersal of existing hazardous substances?

In Montville Township v. Woodmont Builders, LLC (3rd Circuit, New Jersey, June 30, 2011), the court found that timber harvesting operations on the property did **not** result in the spread of existing hazardous substances and CERCLA liability.

- Fact specific holding and while decided in a different federal circuit the holding is persuasive in the 11th Circuit. Case attached at **Tab 11.**

10. The USEPA or Florida DEP – Which Numeric Nutrient Criteria Will Apply in Florida?

See <http://www.dep.state.fl.us/water/wqssp/nutrients/index.htm> for copy of Florida DEP's revised draft rule and other related documents

- USEPA's rule will become effective in Florida in March 2012, unless Florida DEP completes a rulemaking that is approved by USEPA. See **Tab 12**
- Lawsuits are currently filed by the State of Florida, Florida DACS, Florida League of Cities, Florida Stormwater Association, Fertilizer industry, among other interests, against USEPA



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