



THE U.S. WOOD SUPPLY SYSTEM AND OVERREGULATION AT THE FEDERAL LEVEL

The U.S. wood supply system is the largest and most highly developed in the world, providing the raw material that furnishes our country's seventh largest industrial sector, forest products. Overregulation threatens this system's ability to continue to serve both its economic and environmental goals in a sustainable manner, especially in view of the large role small business plays in this system's function and management.

Paralysis by overregulation places in jeopardy the livelihoods of mills, employees, and dependent communities; harvesting and forest operations contractors and their employees; and the four million private, institutional, and industrial forest landowners that support its resource base. In the end, a dysfunctional wood supply system would not only be economically devastating but would expose the forest resource to wildfire and disease, leaving watersheds and wildlife habitat vulnerable, and compromising the character of our country's landscape.

What is overregulation? *The intrusion of government into the management of private business to an extent not justified by the duty to promote the general welfare or to achieve transparency in exercising that duty.*

Cases in point of overregulation

- *Foreign guestworkers employed by reforestation contractors*
- *Forest road construction and maintenance*
- *Independent contractor status determination*
 - *IRS jurisdiction*
 - *DOL jurisdiction*
- *Emissions from industrial boilers*
- *Uncompetitive truck weight rules*
- *FMCSA's "Compliance, Safety, Accountability" (CSA) program*

Overregulated: Foreign guestworkers employed by reforestation contractors

Impact: Makes reforestation on private and public lands unaffordable

The Issue: The H-2B Visa program annually authorizes the temporary entry of seasonal foreign guestworkers serving specific employment niches which domestic workers are unwilling to fill. Among those niches is the hand-planting of hardwood and softwood tree seedlings following timber harvest.

In its overhaul of the H-2B Visa program, the U.S. Department of Labor has imposed conditions upon reforestation contractors which make it impossible for them to operate. A *final rule*, governing wage establishment for guestworkers, while based on regional wage survey data, has adopted a wage index that places treeplanting guestworker wages artificially and uncompetitively high. In addition, a *proposed rule*, governing working conditions for these guestworkers, ignores the operating realities of reforestation in demanding travel itineraries, a three-quarter work guarantee, and identification of inspected housing months in advance of the actual work.

Largely because of its seasonal, itinerant nature, U.S. workers are not interested in this work, even at the artificially high wage rates the Department of Labor has established; however, labor interests have pressured a compliant DOL to press ahead with the fiction that the new rules protect U.S. jobs and serve larger “social justice” goals. In actuality, in making reforestation unaffordable, the rules will discourage reforestation, leading to land conversion, depriving a major industry of its resource base, and thus threatening the employment of millions of U.S. workers, as well as that of whatever workers reforestation work might have attracted.

Status: FRA and other niche-sectors affected are litigating DOL’s H-2B wage rule in federal court. In response, DOL has temporarily withdrawn the rule without providing even a temporary replacement, making it impossible for contractors to hire guestworkers for the 2011-2012 planting season. Meanwhile, Senators Barbara Mikulski (D-Maryland) and Mary Landrieu (D-Louisiana) have placed legislation in a pending Senate Appropriations bill that would block implementation of the Wage Rule in its current form. On the House side, similar legislation blocking the rule (HR 3162) has been introduced by Reps. Alexander (R-Louisiana), Wittman (R-Virginia), Boustany (R-Louisiana), and Harris (R-Maryland).

Overregulated: Forest road construction and maintenance

Impact: Imposition of costly paperwork and delays in logging access on both private and public lands, as well as exposure of roadbuilding to “public interest” litigation

The Issue: Since 1976, the federal Environmental Protection Agency’s administration of the Clean Water Act has classified run-off from forest road construction or other silvicultural activities as non-industrial, “non-point” pollution sources for the purpose of federal enforcement, in essence leaving the regulation of such discharge to state authorities, with reporting requirements to the federal government. This regulatory system, in which states establish and monitor compliance with Best Management Practices for Water Quality, has been effective in controlling and reducing the impacts of forest practices on waterways. *It should be noted that logging and silviculture have never been major contributors to waterway impairment, either in absolute terms or in proportion to the size of the total U.S. forested area, as numerous studies have confirmed.*

However, a recent decision by the Ninth Circuit Court of Appeals calls on EPA to require National Pollutant Discharge Elimination Permits for forest road construction and maintenance—not only a heavy paperwork burden that would add costs and time to the business of establishing logging access, but also, because of rights of public participation and legal challenge, would add uncertainty, as well. Such a burden would weigh heavily on the small business model characterizing the typical logging contractor.

At present, the Ninth Circuit decision is only binding on the Western states within its jurisdiction, but EPA has given no indication that it intends to defend its existing rule and may follow the assumptions in the Court’s reasoning in revising its treatment of logging roads in other jurisdictions.

Status: FRA has joined with the National Alliance of Forest Owners and a broad representation from other forest users and dependent communities in providing financial and political support to an appeal of the Ninth Circuit decision to the U.S. Supreme Court, and for an alternative

legislative remedy, the Silviculture Regulatory Consistency Act (S 1369; HR 2541). The outcome of both of these campaigns is highly uncertain.

Overregulated: Independent Contractor Status Determination

Impact: In comparison with most other countries with large forest products industries, U.S. wood supply systems are substantially de-integrated, and contracting among their various components is crucial to their operation. The reasons lie in the historical configuration of our diverse forest resource, the many different types and sizes of landownerships, and our country's tradition of enabling and fostering entrepreneurship at the local level. *Two initiatives from the Administration threaten the business viability of harvesting contractors by calling their independence into question and raising vulnerabilities for those contracting with them.*

Issue #1: Threat from the Internal Revenue Service. In 1978, following a period of very aggressive IRS audits, independent contractor interests from the wood supply sector and others worked with congress to enact the "Section 530 Safe Harbor," which establishes a relationship as "independent" for IRS purposes if it passes the following three tests: (1) The relationship is a longstanding industry practice; (2) there has been no "switching" of an employee to independent contractor status (and no similar treatment of purported "independent contractors" and acknowledged employees); and (3) the party paying for the services has filed Form 1099 with the IRS. Section 530 has created stability in status determination since its adoption in 1978 and has proved fair and effective in application throughout that time.

The President's "Jobs Act" included a recommendation to repeal the Section 530 "safe harbor" for independent contractor status determination. Congress rejected the Jobs Act. However, since the Administration erroneously scored repeal as returning \$8 billion to the U.S. Treasury over 10 years, there is reason to fear that the U.S. Congress's *Joint Select Committee on Deficit Reduction* (the "Supercommittee") may consider repeal in the process of drafting the deficit reduction proposal which it will submit to Congress for an up-or-down vote this year.

Issue #2: Threat from the U.S. Department of Labor. Since late 2010, DOL has been gradually releasing information about a proposed rulemaking under its broader "Plan – Prevent – Protect" program called "Right to Know Under the Fair Labor Standards Act." This regulation, much-delayed and still not released, proposes, among other provisions, to require all businesses to make a declaration of whether personnel they obtain services from are employees or independent contractors (under DOL criteria, which are different from IRS criteria).

The regulation would require each business to prepare a statement justifying its classification decision, informing the contractor of his or her right to contest the classification, with DOL empowered to refer any contractor to private legal counsel should he or she desire to contest it, the business's statement being admissible in any legal action. Requiring a business to complete and make public such a statement, with its implied requirement that the business involve itself sufficiently in the contractor's affairs to meet a legal standard of due diligence, would impose great burdens and risks on that business.

Status: The fairness and importance of the Section 530 Safe Harbor has been an important FRA educational message to congress ever since proposals to repeal the provision began to appear in 2008. It was a key message point in FRA's March 2011 Fly-In, and FRA continues to

work with other members of the Coalition to Preserve Independent Contractor Status to monitor key congressional committee members' sensitivity to the issue. With respect to the DOL initiative, FRA and the Coalition have succeeded in inserting language in the House Appropriations Committee's Labor, Health and Human Resources funding bill to withhold funding for the documentation requirement of the "Right to Know under the Fair Labor Standards Act" regulation, should it be promulgated.

Overregulated: Emissions from Industrial Boilers

Impact: Imposing unrealistic air emissions standards and capital cost requirements on forest products mills' boilers will close mills and hurt communities, depriving forest landowners and wood suppliers of customers, with little demonstrable health benefit.

The Issue: In response to a court order, the U.S. Environmental Protection Agency published a Boiler Maximum Achievable Control Technology rule to establish new requirements for industrial boilers—such as those used in pulping and papermaking processes—requiring massive new investment, estimated at \$3 billion industry-wide. The EPA's rulemaking went well in excess of the court's requirement, ignoring the option of a "health-based" standard (which would have evaluated control solutions using predicted health outcomes as a standard) in favor of a "best technologies" standard, regardless of whether those technologies could be practically applied. In addition, in regulating CO2 emissions as a pollutant, EPA has declined to acknowledge the special situation of biomass boilers, which cycle CO2 rather than add to a net increase of it in the atmosphere.

Status: Soon after publishing the rule, under political pressure, EPA agreed to an administrative stay in implementing it, without indicating what new methodology it might adopt in the revision process. Several environmental groups have sued to overturn this stay. Subsequently, both House and Senate have introduced The EPA Regulatory Relief Act of 2011 (S 1392; HR 2250), which lays down guidelines for EPA to follow in reissuing the rule, addressing the main objections; on October 17, this bill passed in the House, but its fate in the Senate remained uncertain, in spite of strong co-sponsorship. Also in mid-October, EPA provided assurances to a group of 11 Senators that its revised rule would not compromise the requirements of biomass-fueled boilers.

Overregulated: Uncompetitive Interstate Truck Weight Rules

Impact: U.S. forest industry is compelled to spend more on per-unit raw material transport than its global competitors do.

The Issue: Although transport from woods to mill is a relatively brief phase within the wood supply process, it accounts for approximately 30% of the total cost of raw material. While technological development has lowered the per-unit cost of harvesting, federal truck weight rules—limiting gross vehicle weight to 80,000 pounds on five axles on the Interstate system—have prevented any savings in basic transport, adding raw material expenses that multiply as a component of the final cost of the product during manufacturing. Our country's main competitors—Canadian, Nordic, South American—haul under much less restrictive weight rules,

and seasonal or freight-specific waivers in certain states also demonstrate the safety and practicality of gross vehicle reform.

Status: FRA supports the Safe and Efficient Transportation Act (S 747, HR 763), which would enable any state, at its option, to authorize trucks weighing up to 97,000 pounds access to Interstate roads within its borders, provided the truck is equipped with a sixth axle, to maintain braking distances and road-wear patterns, and the owner pays a supplement to the established federal Heavy Vehicle Use Tax. There are excellent prospects of including this reform as an element of Surface Transportation Reauthorization, which House and Senate are expected to consider in late 2011 or early 2012.

Overregulated: FMCSA's "Compliance, Safety, Accountability" (CSA) Program

Impact: Threatens to sideline good truck drivers and to make small carriers uncompetitive

The Issue: In 2010, the Federal Motor Carrier Safety Administration began phasing in its "Compliance, Safety, Accountability" (CSA) truck safety enforcement tool, as a replacement for the existing "SafeStat" program. CSA functions to provide safety scores, based on truck inspections by state law enforcement officers, rating both carriers and drivers, posting scores on a web database accessible to shippers, insurers, and others with an interest in safety performance. Although the goals of transparency and establishing motivations for improved safety performance are laudable, CSA in practice is creating market distortions and uncompetitive "playing fields" for reasons not inherently linked to safety.

One problem is simply slow uptake by state law enforcement; officers find the inspection protocols difficult to follow and tend to focus selectively on violations that may or may not reflect palpable safety exposures. Another problem is intrinsic enforcement bias; local officials may use and (according to reports from FRA members) are using the CSA inspection as a tool to punish or favor selected carriers or transportation sectors. Unfavorable CSA scores can be devastating, especially to small carriers, raising fleet insurance rates or making individual drivers uninsurable, as well as making shippers and receivers reluctant to do business with haulers which, for one reason or another, have poor CSA scores. In a trucking environment in which a scarcity of drivers is already a serious concern, a program that effectively removes qualified drivers from the pool further inhibits wood supply chain viability.

Status: Since CSA implementation is still ramping up, and FMCSA's commitment to providing implementation resources at the local level is unclear, it is difficult to gauge the ultimate impact of a fully implemented CSA. FRA is monitoring the program's perceived impacts on its members, and at the point consistent patterns are evident will evaluate the extent of the impact more fully and compare observations with other trucking sectors, to determine a specific public policy recommendation.

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updated October 18, 2011