



Briefing Paper

Date: April 12, 2011

Topic: Fire Manager and Air Quality Regulator Coordination

Background:

New direction in federal wildland fire policy (*Guidance for Implementation of Federal Wildland Fire Management Policy, February, 2009*) changes the terminology for describing wildland fires and allows for greater flexibility in managing them. Under the new guidance, wildland fires are categorized into two types: wildfires and prescribed fires. All unplanned ignitions are referred to as wildfires, including events formally termed wildland fire use (WFU) fires. In addition, escaped prescribed fires may be declared wildfires by a federal fire manager. Any wildland fire may be concurrently managed for one or more objectives and those objectives can change as the fire spreads across the landscape. Objectives are affected by changes in fuels, weather, and topography; varying social understanding and tolerance; and involvement of other governmental jurisdictions having different missions or objectives. This briefing paper reiterates that we need to evaluate the ramifications of state and local air quality requirements respecting smoke management when exercising our wildland fire management authority. It is important to keep in mind that air quality requirements may lag behind our evolving federal terminology and policies.

Many state and local air quality regulators continue to use the term WFU and require a burn plan for WFU fires, and under some rules WFU fires have the same permitting requirements as prescribed fires. Because the term wildfire now includes those unplanned ignitions that were formally termed WFU, as well as escaped prescribed fires, and due to the greater federal flexibility in managing wildfires, we are concerned about the increased potential for friction with state and local air quality regulators and their smoke management requirements. This briefing paper provides information and suggestions to help avoid such friction. There may be instances in which we cannot avoid a disagreement that may result in an air quality regulator seeking judicial or administrative sanctions against a park for not following a directive to mitigate smoke impacts while managing a wildfire. This briefing paper also provides information and suggestions to assist in those situations.

Key Issues:

Are park-managed wildfires subject to state and local requirements respecting the control and abatement of air pollution, such as smoke management requirements?

Yes, the Clean Air Act (CAA) requires federal agencies to comply with state and local requirements respecting the control and abatement of air pollution as if they are nongovernmental entities. For example, CAA Section 118(a) states in part that each “department, agency, and instrumentality of the executive, legislative, and judicial branches of the federal government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all federal, state, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity.” In addition, Executive Order 12088, *Federal compliance with pollution*

control standards (Oct. 13, 1978) calls on executive agencies to cooperate with the U.S. Environmental Protection Agency (EPA) and state, interstate, and local agencies in the prevention, control, and abatement of environmental pollution, and to consult with them on the best techniques and methods available.

In the event of a potential disagreement between the objectives of a federal fire manager and a state or local air quality regulator, the fire manager should consider Executive Order 13132, *Federalism* (Aug. 4, 1999), which states that “when an agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the agency shall consult, to the extent practicable, with appropriate state and local officials in an effort to avoid such a conflict.” Further, the fire manager should keep in mind the Administration’s general policy, stated in the White House Memorandum on Preemption (May 20, 2009), that “preemption of state and local law should be undertaken only with full consideration of the legitimate prerogatives of the states and with sufficient legal basis for preemption.”

Because CAA Section 118(a) *expressly* makes state and local requirements respecting the control and abatement of air pollution applicable to executive agencies, it is particularly important for Park Superintendents and fire managers to seek to avoid conflict with state and local air quality regulators on fire management issues, and to refer any questions regarding federal preemption of state and local air quality requirements to the Regional Solicitor. While Executive Order 12088, Executive Order 13132, and the White House Memorandum on Preemption call on federal agencies to comply with environmental laws and to cooperate with state and local agencies, they *do not* create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies, its officers, or any person.

What should a Park Superintendent do if a state or local air quality regulator wants to limit the growth of a wildfire even though suppression would pose excessive risk to firefighter health or safety, or would be inconsistent with an approved planning document that indicates the longer-term resource benefits would outweigh the shorter-term air quality degradation?

The first priority in every fire management activity is firefighter and public safety. Consideration of mitigation measures to curtail smoke impacts is an important factor in wildfire planning, however, not at the cost of human safety. If coordination and communication are at all times maintained between the federal fire manager and the state or local air quality regulator, we feel confident that the air quality regulator will not request suppression of a wildfire if it is made clear to them that firefighters would be exposed to inappropriate risk.

Prepare contingency plans ahead of time, consider sharing them with state and local air quality regulators and, and consider including them in management action points (MAPs) for worst case scenarios (e.g., weather events leading to poor air quality). Waiting until the last moment only leads to frustration and the breakdown of trust between parties. Fire managers will use a decision support process to guide and document wildfire management decisions. The process will provide situational assessment, analyze hazards and risk, define implementation actions, and document decisions and rationales for those decisions. Once an air quality regulator wants to change for smoke management purposes how a fire is being managed by the park, all subsequent communication and decisions, and the social, economic, and other policy concerns weighing in favor and against the park’s decisions, need to be documented. These policy concerns may include (but are not limited to) firefighter and public health

and safety; environmental impacts (e.g., air quality impacts, resource benefits, and protection of private property); and economic considerations (e.g., fire suppression costs). The protection of human life is the single, overriding priority. Setting priorities among protecting human communities and community infrastructure, other property and improvements, and natural and cultural resources will be done based on the values to be protected, human health and safety, and the costs of protection.

When federal fire managers have addressed the respective policy concerns the courts have typically been reluctant to “second-guess” their administrative decisions and denied civil tort claims. That judicial deference has enabled federal fire management policy to evolve. Park Superintendents and fire managers should take care to preserve their discretion by demonstrating their consideration of such policy issues.

What should a Park Superintendent do if he or she receives a notice of violation by a state or local air quality regulator for non-compliance with a directive to suppress a wildfire or to take some other action?

Coordination and communication with state and local air quality regulators presents the best opportunity to prevent a notice of violation (NOV). Notwithstanding best efforts, a Park Superintendent may receive a NOV for smoke impact, and if this occurs the first step is to contact the Regional Solicitor. Although the CAA requires the United States and its officers, agents, and employees to comply with state and local requirements respecting the control and abatement air pollution, they may not be legally obligated to pay civil penalties for non-compliance. Therefore, a Park Superintendent must not pay any such penalties or enter into settlement negotiations over a NOV unless and until she or he consults with and obtains concurrence by the Solicitor’s Office, which may in turn be required to consult with the U.S. Department of Justice. Even when the Solicitor’s Office recommends payment or settlement of a NOV, legal review is needed in particular to address how any documents or agreements describe matters such as federal liability and sovereign immunity.

Recommendations for Fire Managers:

Understand: It is the air quality regulator’s mission to protect the public health, and that includes oversight of smoke impacts. Fire operation is the responsibility of fire managers with oversight from the Park Superintendent. Fire managers should actively educate themselves, and seek out opportunities to be educated by, air quality regulators on the various requirements that influence state and local air quality regulators’ actions, including the National Ambient Air Quality Standards (NAAQS) and the EPA’s policies regarding treatment of air quality data influenced by wildfire exceptional events. This will help fire managers to better understand what state and local governments are faced with in a wildfire smoke situation. Fire managers should also actively seek out opportunities to educate state and local air quality regulators on federal wildland fire policy to help them understand what fire managers are faced with in managing a wildfire. This mutual gathering and sharing of information along with discussing issues will help when the crisis situation of an actual wildfire occurs. Once an air quality regulator requests a mitigation action to alter smoke impacts in a particular area, it is necessary to discuss with them the strategic and tactical options available to comply. It is also critical to get in writing any action(s) requested by state or local air regulators pertaining to management of the fire. Any actions undertaken must be able to be accomplished safely and be based on the relevant policy considerations.

Inform: Notifying state or local air quality regulators of all wildfire starts is imperative, for coordinating with air quality regulators is a critical step in managing air as a resource while achieving land management objectives. Keeping them informed as a fire progresses is also an important element of keeping communication channels open. Use open and simple dialogue to inform everybody on fire management action; do not overwhelm your audience with fire jargon just tell the story of what you are doing, why you are taking the actions, and how it is being done.

Involve: Fire managers should include coordination with air quality regulators as part of the decision process when reviewing the ecological, social, political, and economic considerations of how to manage a fire. This outreach to air quality regulators, both prior to and during incidents, should include ongoing education of the ecological benefits of letting wildfires burn in certain situations. When reviewing approved planning documents (e.g., Fire Management Plan (FMP) and National Environmental Policy Act (NEPA) documentation), the stakeholder involvement of air quality regulators is imperative. The short-term air quality impacts and fire management objectives should be weighed along with the long-term goals and consequences. In ecological communities with burnable vegetation in a fire adapted system, “no fire” is not an option so fire managers and air quality regulators need to plan for fire on the landscape. Fire planning should address acceptable temporal and spatial impacts from smoke while avoiding NAAQS violations or jeopardizing firefighter and public safety. A decision by a fire manager and Park Superintendent not to hold or check a fire based on the long-term ecological benefits could result in a NOV from the air quality regulator.

Communicate: Social, political, and regulatory pressures can challenge fire operations; however, these obstacles are manageable with public outreach, open dialogue, and sound science. Periodically update air quality regulators of the strategic and tactical options available to fire managers during the course of the fire, because this will provide useful context if smoke impacts become a concern. Taking time to advise air quality regulators of the complexities of the current fire strategies and tactics -- in terms they can relate to -- will go a long way in helping them understand the decisions made by the fire manager and Park Superintendent. This understanding will also help when air quality regulators respond to nuisance smoke complaints by being able to talk about the specific management actions occurring on the wildfire. While it is advantageous to engage in open dialogue, clearly documenting conversations, actions, and decisions is essential. These documents will aid in any post analysis, and provide a clear picture of the actions taken.

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