

Testimony of Steve Ellis

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H.R. 1586, *Forest Protection and Wildland Firefighter Safety Act of 2023*

Chairman Tiffany, Ranking Member Neguse and Members of the Committee, I appreciate the chance to testify today on H.R. 1586, a crucial and timely bill, to allow for the continued use of fire retardant by our Nation's wildland firefighters. I'm Steve Ellis, retired after 38 years of federal service with both the Forest Service and Bureau of Land Management. I have a lot of fire management experience with both agencies. I am Chair of the National Association of Forest Service Retirees (NAFSR). We are an organization dedicated to sustaining the Forest Service mission and adapting to today's and tomorrow's challenges. Our principal beliefs and values include protecting and managing diverse lands and valued resources while providing a wide array of uses and services to the public. This includes providing for clean water and quality aquatic and terrestrial habitat. Our values also include responding professionally and responsibly in support of the agency's efforts to protect public interest and ensure public safety.

1. We know a lot about fire suppression, prescribed fire, and wildland fire use.
2. Management of fire requires the use of many important tools; fire retardant is one of the most crucial.
3. As fire season has already begun this year, removing such an important tool from the toolkit is an existential threat to firefighters and the public safety, as well as watersheds, wildlife, and smoke as a health hazard.
4. Requiring a national permit for the use of retardant would take years to complete at a substantial cost, and would create a bad precedent, putting other agricultural and silvicultural exemptions at risk.
5. Even if EPA were to develop a national permit, states would not be required to adopt it, but could modify or create their own, putting an additional burden on federal and state agencies for the development of individual state permits. This would further complicate firefighting across state lines.
6. Retardant is already regulated with numerous implementation and monitoring requirements that guide the safe and successful use of retardant by Federal and State agencies.
7. Given all this, we believe Congress needs to step in to maintain the status quo and codify the 30-year exemption for the use of retardant. That's why we support H.R. 1586.

This past fall, Forest Service Employees for Environmental Ethics (FSEEE) filed a lawsuit in Montana District Court under the "citizen suit" provision of the Clean Water Act (CWA) alleging violations of the CWA for past discharges of aerial fire retardant into navigable waters without a National Pollutant Discharge Elimination System (NPDES) permit. The 2011 Aerial Application of Fire Retardant EIS delineated more than 30% of USFS land area as retardant avoidance areas

and developed a tracking process to monitor inadvertent drops into water. The 2011 decision prohibits delivery of fire retardant directly into waterbodies, or into buffers surrounding waterbodies, with an allowed exception to protect life and safety.

In the draft 2022 Aerial Fire Retardant SEIS, the Forest Service disclosed that 376 out of 56,868 total fire retardant drops (less than one percent) made between 2012 and 2019 were directly into water, because of unintended encroachments on waterbodies, or the exception allowed to protect life and safety. FSEEE is alleging these direct drops into waterbodies violate the CWA because the Forest Service did not have a NPDES permit. The CWA requires NPDES permits for any addition of a pollutant from a point source to navigable waters/waters of the United States, which essentially means any waterway with permanent water. The Forest Service has been operating under the assumption that a NPDES permit was not required because the regulations for administering the NPDES system (40 CFR 122) specifically state that fire control is a “non-point source silvicultural activity” (40 CFR 122.27) and communications from EPA dating back to 1993 indicated a permit was not required.

Currently there is no NPDES permit established for aerial application of fire retardant. We understand that a rulemaking to establish a general permit would take 2-3 years at extensive cost. Even if EPA develops a national permit, states are not required to adopt it, but can modify or create their own. As a result, additional time would be required for the agency to obtain individual state permits. This would further complicate firefighting across state lines and potentially create unnecessary chaos in an already complex and risk laden environment. A NPDES permit would add a large administrative burden to Forest Service wildfire operations and likely not change aerial application requirements, nor actual resource effects on the ground.

FSEEE is requesting the Forest Service not to use fire retardant until the permit is secured. This could result in fire retardant not being available for use starting this 2023 fire year and would needlessly put billions of dollars of infrastructure/assets/natural resources and millions of people at risk. More importantly, it would remove a key tool used to safely fight wildfires and put at risk local, county, state, and federal firefighters at a time where wildfire is increasing in scale and scope across the western United States. Any court ruling has the potential to be nation-wide and affect the Department of the Interior (DOI), state fire agencies, and the Department of Defense (DOD), essentially all those who fight wildfires on federal, state and private lands. In our view, Congress will need to pass legislation, either to give agencies time to develop a national permit or to codify the existing firefighting exemption.

At a minimum, a potential solution would be to pursue a legislative fix that would allow the agency time to work through the permitting process while continuing to use fire retardant. A much better and permanent solution would be to legislate that a permit not be required, nor should any State require a permit for application of fire retardant from aircraft in connection with fire suppression activities. We support the latter. Many members of NAFSR are former wildland firefighters and understand the need and use of fire retardant as a critical tool, as well as the need to ensure its careful use. We feel that not having the option of using fire retardant in fire suppression would have huge consequences. Congress may also find it unacceptable to stand by

in the middle of this summer as a wildfire threatens life, property, and valuable natural resources without the use of fire retardant.

NAFSR sees fire retardant is a necessary tool in the fire manager's toolkit. Given that the rare instances of "retardant into waterways" are either accidents or to protect property or human life, it's not clear to us what improvement could be made by the EPA. Do they disagree with the judgement calls of on the scene fire practitioners on the exceptions? Will a NPDES permit stop accidents or change implementation of the agency priority of firefighter and public safety? Since 1995, Federal Fire Policy has had human life as the #1 value. This has essentially been the doctrine for almost 30 years. Nobody wants to harm aquatic life. In fact, the aftermath of large wildfires can be an even greater threat. If using retardant is the difference between saving some of our colleagues in the green pants and yellow shirts who are in a bad spot, or say, hitting a waterway...our priority would be human life. I have talked to several colleagues who have either experienced or known of instances where retardant drops at the right time and place made all the difference in life and/or property protection outcomes. The bottom line is that the Forest Service has been diligent in efforts to use retardant wisely to minimize negative environmental effects and statistics show those efforts have been effective.

If there are ecological or other concerns with the use of retardant, then maybe those concerns should be specifically identified and addressed in some kind of public forum. In the meantime, we do not believe any tools should be removed from the agency's fire management toolkit.

NAFSR also supports H.R. 200, the *Forest Information Reform (FIR) Act*. We feel that unless actions are taken to resolve challenges stemming from the 2015 "Cottonwood" decision, the Forest Service could have to go through re-consultation, regardless of the merit, on dozens of forest plans that would take years and potentially cost millions of dollars that could better be spent elsewhere.

Thank you for the opportunity to be part of this hearing today. Also included in my testimony is an addendum that includes some important background information. I welcome any questions that subcommittee members might have.