

FOREST PROTECTION AND WILDLAND FIREFIGHTER
SAFETY ACT OF 2023

—————
OCTOBER 25, 2024.—Ordered to be printed
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Mr. WESTERMAN, from the Committee on Natural Resources,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1586]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 1586) to allow the Secretary of the Interior and the Secretary of Agriculture to use a fire retardant, chemical, or water for fire suppression, control, or prevention activities, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Forest Protection and Wildland Firefighter Safety Act of 2023”.

SEC. 2. PERMITTING REQUIREMENTS FOR CERTAIN DISCHARGES OF FIRE RETARDANT.

(a) **AUTHORIZED USES.**—The Secretary of the Interior and the Secretary of Agriculture are each authorized to discharge a fire retardant, chemical, or water from aircraft for fire suppression, control, or prevention activities.

(b) **PERMITTING REQUIREMENTS.**—Notwithstanding any provision of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), a permit under section 402 of such Act (33 U.S.C. 1342) shall not be required for the activities authorized by subsection (a) or for similar activities conducted by a covered entity.

(c) **DEFINITION.**—In this section, the term “covered entity” means—

- (1) the Forest Service;
- (2) the National Park Service;
- (3) the Bureau of Land Management;
- (4) the United States Fish and Wildlife Service;
- (5) the Bureau of Indian Affairs;

- (6) the Federal Emergency Management Agency;
- (7) a State (as defined in section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362)) or a political subdivision thereof;
- (8) a Tribal government; and
- (9) the Department of Defense.

Amend the title so as to read:

A bill to allow the Secretary of the Interior and the Secretary of Agriculture to use a fire retardant, chemical, or water from aircraft for fire suppression, control, or prevention activities.

PURPOSE OF THE LEGISLATION

The purpose of H.R. 1586, as ordered reported, is to allow the Secretary of the Interior and the Secretary of Agriculture to use a fire retardant, chemical, or water from aircraft for fire suppression, control, or prevention activities.

BACKGROUND AND NEED FOR LEGISLATION

While federal land managers continue to work on the long-term goal of making forests healthier and more resilient to wildfires, robust firefighting tools are essential. One of these tools is fire retardant. Fire retardant, although chemically different throughout time, has been used by the U.S. Forest Service (USFS) since the 1950s. Fire retardant alters the way fires burn by “cooling and coating fuels, depleting the fire of oxygen, and slowing the rate of fuel combustion as the retardant’s inorganic salts change how fuels burn.”¹ It is primarily applied by arial units and leads to further control and containment of fires. Retardant is “most effective with support from ground resources but can be used to hold a fire for long durations or even stop the fire.”² Importantly, the use of retardant is critical in assisting wildland firefighters as they suppress raging infernos while minimizing risks to their safety. The typical ingredients in fire retardant are 10 percent salts (typically fertilizers) and 85 percent water. The other five percent includes minor ingredients such as colorant, thickener, and stabilizers. Colorants make the fire retardant visible to both arial and ground crews.³

The Clean Water Act (CWA) typically requires a National Pollutant Discharge Elimination System (NPDES) permit for any addition of a pollutant from a point source to navigable waters.⁴ The regulations for administering NPDES permits specifically states fire control is a “non-point source silvicultural activity”, and therefore exempt from the requirements to obtain a permit.⁵ Specifically, the Environmental Protection Agency (EPA) determined in 2011 that a NPDES permit under the CWA was not necessary for fire retardant administered via air.⁶ As a result, there is currently no NPDES permit established for aerial application of fire retardant.

¹ U.S. Forest Service, Record of Decision, December 2011, https://www.fs.usda.gov/sites/default/files/media/wysiwyg/wfcs_rod_12_15_11_0.pdf.

² U.S. Fish and Wildlife Service, Fire Retardant Biological Opinion, February 13, 2023, <https://www.fs.usda.gov/sites/default/files/2023-02/Fire-Retardant-FWS-Biological-Op.pdf>.

³ U.S. Department of Agriculture, “What is Fire Retardant and How Does it Work?”, September, 28, 2021, <https://ask.usda.gov/s/article/What-is-fire-retardant-and-how-does-it-work>.

⁴ 40 CFR 122.

⁵ 40 CFR 122.27.

⁶ *Id.*

⁷ *Forest Service Employees for Environmental Ethics vs. U.S. Forest Service*, Case 9:22-cv-00168-DLC Filed October 11, 2023, United States District Court of Montana.

In October 2022, the Forest Service Employees for Environmental Ethics (FSEEE) sued the USFS under the “Citizen Suit” provision of the CWA in the District Court in Montana.⁷ FSEEE alleges past use of aerial fire retardant was dropped into navigable waters without a NPDES permit, in violation of the CWA.⁸ FSEEE is a serial litigant that has challenged the agency’s use of fire retardant in court over the past two decades.⁹

The majority of fire retardant is dropped on land, and, in very rare cases, retardant is dropped into water. To mitigate this, in 2011, the USFS completed an Environmental Impact Statement (EIS) on “Nationwide Aerial Application of Fire Retardant on National Forest System Land” (2011 EIS). The 2011 EIS prohibits delivery of fire retardant directly into waterbodies, or into 300-foot buffers surrounding waterbodies, with an allowed exception to protect life and for safety. Current direction in the 2011 EIS has demonstrated to be very effective at reducing retardant drops into water. In the 2022 Draft Supplemental EIS on “Nationwide Aerial Application of Fire Retardant on National Forest System Land” (2022 Draft EIS), USFS disclosed that 457 out of 56,868 total retardant drops (less than one percent) made between 2012 and 2019 were into avoidance areas on National Forest System (NFS) lands.¹⁰ Of these drops, “213 intrusions landed partially in water, either in accordance with the exception to protect human life or public safety (23 intrusions) or due to accident (190 intrusions).”¹¹ In total, the USFS dropped approximately 102,362,031 gallons of fire retardant on NFS lands during this period.¹²

While the current lawsuit under the CWA is still ongoing, there are serious concerns that this could lead to significant restrictions on the use of aerial fire retardant. Acquiring an NPDES permit would create significant and costly bureaucracy for the use of fire retardant but would not materially change aerial application requirements nor actual resource effects on the ground in the long term. A rulemaking by the EPA to establish a general permit for fire retardant is not an immediate solution and will lead to massive amounts of bureaucratic paperwork and delays, according to the USFS:

The development of a general permit for fire retardant discharges will require the acquisition of significant information regarding fire retardant, its uses, existing practices, and its impacts to waters. EPA must identify the types of retardants and applications that require permit coverage, and it must develop permit conditions, including effluent limitations, sufficient to meet Clean Water Act requirements. EPA must give public notice of a draft general permit, provide an opportunity for public comment, and respond to those public comments prior to issuing the permit. EPA must consult with outside parties to develop permit conditions that meet several state, tribal, and federal requirements, including the Endangered

⁸*Id.*

⁹*Id.*

¹⁰ Forest Service, Draft Supplemental Environmental Impact Statement, February 2022, <https://www.fs.usda.gov/sites/default/files/2022-02/2022-Aerial-Fire-Retardant-DraftSEIS.pdf>.

¹¹ Defendant United States Forest Service’s Response in Opposition to Plaintiff’s Motion for Summary Judgment, *Forest Service Employees for Environmental Ethics vs. U.S. Forest Service*, Case 9:22-cv-00168-DLC Filed October 11, 2023, United States District Court of Montana.

¹²*Id.*

Species Act, the Coastal Zone Management Act, and the National Historic Preservation Act. EPA also plans to work with nonfederal permitting authorities to assist them in developing their own NPDES general permits. EPA estimates that this administrative process—involving development, proposal, and issuance of general permits—will take approximately two and a half years, and is dependent on timely actions by outside parties.¹³

Additionally, EPA has delegated permitting authority to most states.¹⁴ Potentially, each of the 48 individual state and territory regulatory agencies with NPDES authority would also need to develop their own general permit using EPA’s general permit as a model. Once a permit is established at the national and state level, the USFS would have to apply for each permit.¹⁵ 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). The delay would be caused by the bureaucracy of up to 48 agencies establishing a permit and USFS, and other agencies, applying for up to 48 permits.¹⁶ This would put millions of people and billions of dollars of infrastructure at risk.¹⁷ A years-long paperwork process should not stand in the way of protecting lives.

The use of fire retardant as a tool to save lives, protect structures, and contain wildfires is invaluable. Retardant will also inevitably be dropped into water at some point, as “the only way to prevent entirely accidental discharges of retardants to waters is to prohibit their use entirely.”¹⁸ The “Forest Protection and Wildland Firefighter Safety Act of 2023” would protect the continued use of fire retardant by (1) authorizing USFS and DOI to use fire retardant in fire suppression, control, or prevention; and (2) exempting the use of retardant by USFS and DOI from permitting requirements under the CWA. This is a bipartisan bill that is being coled by Representative Panetta (D–CA). Senator Lummis (R–WY) is leading companion legislation in the Senate.

COMMITTEE ACTION

H.R. 1586 was introduced on March 14, 2023, by Rep. Doug LaMalfa (R–CA). The bill was referred to the Committee on Natural Resources, and within the Committee to the Subcommittee on Federal Lands. The bill was also referred to the Committee on Transportation and Infrastructure, and the Committee on Agriculture. On March 23, 2023, the Subcommittee on Federal Lands held a hearing on the bill. On May 17, 2023, the Full Natural Resources Committee met to consider the bill. The Subcommittee on Federal Lands was discharged by unanimous consent. Rep. LaMalfa (R–CA) offered an amendment in the nature of a substitute, designated LaMalfa 01. Rep. Val Hoyle (D–OR) offered an amendment to the amendment in the nature of a substitute, des-

⁹*Id.*

¹⁰ Forest Service, Draft Supplemental Environmental Impact Statement, February 2022, <https://www.fs.usda.gov/sites/default/files/2022-02/2022-Aerial-Fire-Retardant-DraftSEIS.pdf>.

¹¹ Defendant United States Forest Service’s Response in Opposition to Plaintiff’s Motion for Summary Judgment, *Forest Service Employees for Environmental Ethics vs. U.S. Forest Service*, Case 9:22-cv-00168–DLC Filed October 11, 2023, United States District Court of Montana.

¹²*Id.*

¹³*Id.*

¹⁴ U.S. Environmental Protection Agency, “About NPDES,” <https://www.epa.gov/npdes/about-mpdes>.

ignated Hoyle #1. The amendment was withdrawn by unanimous consent. The amendment in the nature of a substitute offered by Rep. LaMalfa was adopted by voice vote. The bill, as amended, was then ordered favorably reported to the House of Representatives by a roll call vote of 22 yeas to 17 nays, as follows:

HEARINGS

For the purposes of clause 3(c)(6) of House rule XIII, the following hearing was used to develop or consider this measure: hearing by the Subcommittee on Federal Lands held on March 23, 2023.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 names this bill the “Forest Protection and Wildland Firefighter Safety Act of 2023.”

Sec. 2. Permitting requirements for certain discharges of fire retardant

Section 2 authorizes the use of fire retardant by the Secretary of the Interior and the Secretary of Agriculture for fire suppression, control, or prevention activities. The section also exempts the Department of the Interior, Department of Agriculture, Department of Defense, states, Tribes, and the Federal Emergency Management Agency from needing a permit under the Clean Water Act to use aerial fire retardant.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources’ oversight findings and recommendations are reflected in the body of this report.

COMPLIANCE WITH HOUSE RULE XIII AND CONGRESSIONAL BUDGET ACT

1. *Cost of Legislation and the Congressional Budget Act.* With respect to the requirements of clause 3(c)(2) and (3) of rule XIII of the Rules of the House of Representatives and sections 308(a) and 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for the bill from the Director of the Congressional Budget Office:

H.R. 1586, Forest Protection and Wildland Firefighter Safety Act of 2023			
As ordered reported by the House Committee on Natural Resources on May 17, 2023			
By Fiscal Year, Millions of Dollars	2023	2023-2028	2023-2033
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	0	0	0
Increases <i>net direct spending</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Statutory pay-as-you-go procedures apply? No	
		Mandate Effects	
Increases <i>on-budget deficits</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Contains intergovernmental mandate? No	
		Contains private-sector mandate? No	

H.R. 1586 would allow federal, state, local, and tribal firefighting agencies to use fire retardants to prevent and respond to wildfires without first obtaining a National Pollutant Discharge Elimination System permit. Because the Forest Service and other agencies currently use fire retardants without this permit, CBO estimates that enacting the bill would have no effect on federal spending.

The CBO staff contact for this estimate is Julia Aman. The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

PHILLIP L. SWAGEL,
Director, Congressional Budget Office.

2. *General Performance Goals and Objectives.* As required by clause 3(c)(4) of rule XIII, the general performance goal or objective this bill, as ordered reported, is to allow the Secretary of the Interior and the Secretary of Agriculture to use a fire retardant, chemical, or water from aircraft for fire suppression, control, or prevention activities.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

UNFUNDED MANDATES REFORM ACT STATEMENT

According to the Congressional Budget Office, H.R. 1586 contains no unfunded mandates as defined by the Unfunded Mandates Reform Act.

EXISTING PROGRAMS

Directed Rule Making. This bill does not contain any directed rule makings.

Duplication of Existing Programs. This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program. Such program was not included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139 or identified in the most recent Catalog of Federal Domestic Assistance published pursuant to the Federal Program Information Act (Public Law 95-220, as amended by Public Law 98-169) as relating to other programs.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

Any preemptive effect of this bill over state, local, or tribal law is intended to be consistent with the bill's purposes and text and the Supremacy Clause of Article VI of the U.S. Constitution.

CHANGES IN EXISTING LAW

As ordered reported by the Committee on Natural Resources,
H.R. 1586 would make no changes in existing law.

DISSENTING VIEWS

H.R. 1586 would explicitly authorize the Secretary of the Interior and the Secretary of Agriculture to discharge chemical fire retardants for fire suppression, control, or prevention activities, and would waive Clean Water Act (CWA) permit requirements for any such application by federal land management agencies and state and tribal governments.

Introduction of this legislation was spurred by a recent lawsuit filed by the Forest Service Employees for Environmental Ethics that alleges that U.S. Forest Service (Forest Service) is in violation of CWA permit requirements related to the discharge of pollutants from a point source to the waters of the United States. In response to the lawsuit, the Forest Service has admitted to releasing chemical fire retardants without a CWA permit in emergency fire suppression efforts that would be nearly impossible to carry out in a manner that guarantees absolutely nothing is discharged into the water. They argued that the risk of environmental damage from catastrophic wildfire far outweighs any environmental damage caused by accidental release of fire retardant into waterways, which the agency estimates happen in less than 1% of the thousands of annual delivery loads.

Since the committee proceeding on H.R. 1586, the judge agreed with the Forest Service and the lawsuit was dismissed. There has been no action or injunction, and aerial delivery of fire retardant has not been delayed or stopped. The threat of litigation does not need to be an excuse to waive longstanding environmental laws, especially when those laws are working as designed.

Furthermore, the Forest Service has requested EPA develop a CWA National Pollutant Discharge Elimination System general permit for point source discharge fire suppressant. EPA has considered the request and noted that "EPA is aware that the Forest Service has a substantial amount of information on fire suppressant application that will be made available as we develop the general permit." A Memorandum of Understanding will allow for the continued use of fire retardant while the permit is being developed. Given the ongoing development of a general permit for the application of fire retardant, it is questionable whether the threat of litigation warrants a wholesale waiver of the CWA.

At markup, Representative Hoyle offered and withdrew a compromise amendment developed in conjunction the Transportation and Infrastructure Committee, which has jurisdiction over CWA. The proposed substitute amendment would have authorized the use of fire retardant during the development of the general permit. This would prevent an injunction from upending the use of retardant without undermining critical environmental protections. Unfortunately, the amendment was subject to a germaneness point of order and had to be withdrawn. Going forward, Committee Demo-

crats encourage the majority to work with the Committee on Transportation and Infrastructure on an alternative arrangement that can guarantee the ongoing use of fire retardant without compromising established law and environmental safeguards.

RAÚL M. GRIJALVA,
Ranking Member.

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