



HOUSE COMMITTEE ON
NATURAL RESOURCES
CHAIRMAN BRUCE WESTERMAN

To: Subcommittee on Federal Lands Republican Members
From: Subcommittee on Federal Lands, Brandon Miller and Taylor Wiseman –
Brandon.Miller@mail.house.gov and Taylor.Wiseman@mail.house.gov, x6-7736.
Date: Thursday, March 23, 2023
Subject: Legislative Hearing on Four Forest Health and Wildfire Prevention Bills

The Subcommittee on Federal Lands will hold a legislative hearing on four bills: H.R. 200 (Rosendale), the “*Forest Information Reform (FIR) Act*”; H.R. 1473 (Peters), the “*Targeting and Offsetting Existing Illegal Contaminants (TOXIC) Act*”; H.R. 1567 (Tiffany), the “*Accurately Counting Risk Elimination Solutions (ACRES) Act*”; and H.R. 1586 (LaMalfa), the “*Forest Protection and Wildland Firefighter Safety Act of 2023*”, on Thursday, March 23, 2023, at 2:00 p.m. in Room 1324 Longworth House Office Building.

Member offices are requested to notify Sophia Varnasidis (sophia@mail.house.gov) by 4:30 p.m. on Wednesday March 22, if their Member intends to participate in the hearing.

I. KEY MESSAGES

- Republicans’ first Federal Lands Subcommittee legislative hearing will advance real, concrete solutions to address the most pressing crisis facing our federal forests: catastrophic wildfires.
- Weaponized environmental laws, frivolous litigation, and bureaucratic red tape all stand in the way of restoring forest health and preventing millions of acres from burning each year. The bills on this hearing are the first step in creating a true paradigm shift necessary to increase the pace and scale of active forest management.
- Extreme environmentalists aren’t just suing to stop projects that would prevent catastrophic wildfires, they’re also suing to ban the firefighting tools necessary to put fires out once they start. H.R. 200 and H.R. 1586 would fix this.
- Urgently passing a full, permanent fix to the *Cottonwood* decision¹ is paramount, as the partial legislative fix enacted by Congress in the FY 2018 Omnibus² expires the same day as this hearing. The *Cottonwood* decision presents unnecessary, unworkable and costly bureaucratic hurdles that empower environmental litigants with additional weapons to delay or cancel land and forest management projects. Resolving this issue is paramount to the protection of our nation’s forests and public lands and the prioritization of critical agency resources.

¹ FindLaw, “Cottonwood Environmental Law Center v. United States Forest Service (2015)”, <https://caselaw.findlaw.com/us-9th-circuit/1704521.html>.

² Public Law 115-141

- Republicans are holding the Biden administration accountable by moving legislation that would bring transparency to the misleading and inaccurate way hazardous fuels treatments are reported (H.R. 1567) and ending the growing environmental destruction caused by illegal cannabis sites operated by drug cartels in federal forests and fueled by the crisis on our Southern border (H.R. 1473).

II. WITNESSES

- **Mr. Chris French**, Deputy Chief for National Forest Systems, U.S. Forest Service, Washington, DC [All bills]
- **Mr. Jonathan Wood**, Vice President of Law and Policy, The Property and Environment Research Center, Bozeman, Montana [H.R. 200 and H.R. 1567]
- **Mr. Ryan Bronson**, Director of Government Affairs, Rocky Mountain Elk Foundation, St. Paul, Minnesota [H.R. 200 and H.R. 1567]
- **Mr. Steve Ellis**, Chairman, Board of Directors, National Association of Forest Service Retirees, Beaver Creek, Oregon [H.R. 1586]
- **Ms. Susan Jane M. Brown**, Senior Staff Attorney, Western Environmental Law Center, Eugene, Oregon [*Minority Witness*] [H.R. 200 and H.R. 1567]

III. BACKGROUND

[H.R. 200: “Forest Information Reform \(FIR\) Act” \(Rep. Matt Rosendale, R-MT\)](#)

Forest Plans and Resource Management Plans

The U.S. Forest Service (FS) is required to complete both unit-level planning and project-level planning as a part of managing the roughly 193 million acres of federal lands they steward across 200 individual units.³ At a unit level, the National Forest Management Act of 1976 (NFMA) requires the FS to develop land and resource management plans, commonly referred to as “forest plans,” for each unit.⁴ Forest plans establish a broad framework that are used to guide long-term management decisions. NFMA requires these plans be updated every 15 years and they must comply with the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the National Historical Preservation Act (NHPA), and other laws and regulations.⁵ Likewise, the Federal Land Policy and Management Act of 1976 (FLPMA) requires the Bureau of Land Management (BLM) to develop Resource Management Plans (RMPs) for the management of the 245 million acres of surface land and 700 million acres of subsurface mineral estate the agency administers.⁶

Similar to forest plans, RMPs lay out broad planning blueprints and do not authorize specific projects. Importantly, in order to carry out specific projects (such as hazardous fuels reduction or road construction projects), the FS and BLM are required to ensure that the project is consistent

³ Congressional Research Service, “Legal and Practical Implications of the Ninth Circuit’s Cottonwood Environmental Law Center v. U.S. Forest Service Decision Under the Endangered Species Act”, Erin H. Ward, Pervaze A. Sheikh, and Katie Hoover, August 2, 2022, <https://www.crs.gov/Reports/R47201?source=search#fn71>.

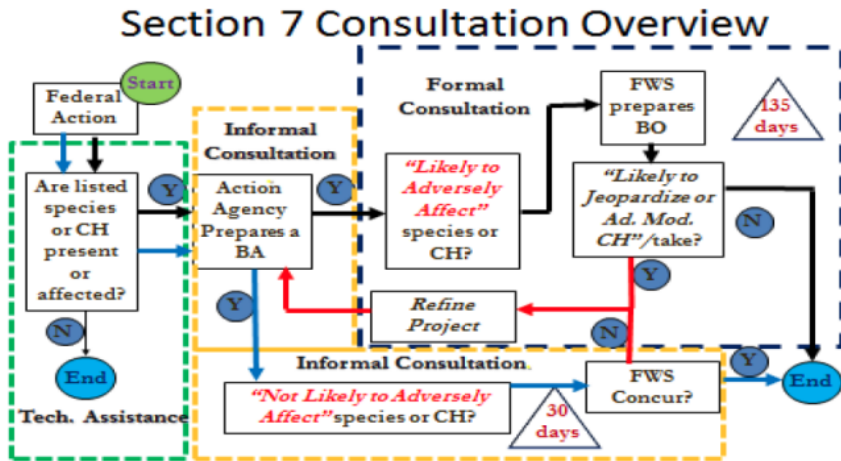
⁴ U.S. Forest Service, “Planning Rule Overview Page”, <https://www.fs.usda.gov/planningrule>.

⁵ *Id.* In practice, Forest Plans are often not updated every 15 years.

⁶ Bureau of Land Management, “What Informs Our Plans” <https://www.blm.gov/programs/planning-and-nepa/what-informs-our-plans>.

with the governing forest plan or RMP, complete an environmental analysis on the specific project, and complete consultations under the ESA and NHPA to ensure the project is in compliance with those laws.⁷

Consultation under the Endangered Species Act



Source: National Park Service, 2016.

Consultation between FS or BLM and the U.S. Fish and Wildlife Service (FWS) to protect endangered species and their habitat is already an integral part of the permitting process for specific land and forest management projects nationwide. Section 7 of the ESA requires federal agencies to consult formally or informally with FWS if “their discretionary

actions may affect either species listed under the ESA or the designated critical habitat for those species.” [emphasis added]⁸ This consultation occurs to ensure that agency actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”⁹ After the initial consultation is complete, a re-initiation of consultation can be triggered by the following circumstances:

1. The amount or extent of taking specified in the incidental take statement is exceeded.
2. New information on the species or action reveals effects of the action that may affect species or critical habitat in a manner or to an extent not previously considered.
3. The identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence.
4. A new species is listed or critical habitat is designated that may be affected by the identified action.¹⁰

Canada Lynx and Tenth Circuit Court Precedent on Reinitiating ESA Consultations

Several court cases have offered different interpretations about consultation requirements, especially with regards to reinitiating consultations. The primary conflict debated in *Cottonwood*

⁷ *Id.*

⁸ *Id.* Agencies may also be required to consult with the National Marine Fisheries Service.

⁹ 16 U.S. Code § 1536.

¹⁰ 50 CFR 402.16.

Environmental Law Center v. United States Forest Service (Cottonwood) was whether FS and BLM should be required to reinitiate consultation on forest plans and RMPs that have previously been approved in the case of newly designated critical habitat of the threatened Canada Lynx.

FWS listed the Canada Lynx as a threatened species in 2000 following eight years of litigation from environmental groups.¹¹ The original listing included Colorado, Idaho, Maine, Michigan, Minnesota, Montana, New Hampshire, New York, Oregon, Utah, Vermont, Washington, Wisconsin, and Wyoming.¹² Six years later, FWS designated roughly 1,841 square miles of critical habitat for the Canada Lynx.¹³ Even though none of the designated critical habitat was located on FS land, the FS still proposed the Northern Rocky Mountains Lynx Management Direction (Lynx Amendments), which subsequently amended the forest plans for 18 national forests.¹⁴ The FS initiated Section 7 consultation with FWS on the Lynx Amendments, and FWS found that the Lynx Amendments would not jeopardize the Canada Lynx.¹⁵

In 2009, FWS added an additional 37,159 square miles of critical habitat, including more than 10,000 square miles within 11 national forests located in the Northern Rocky Mountains critical habitat unit.¹⁶ The FS chose not to reinitiate consultation on the Lynx Amendments for the newly designated additional habitat “because the agency action was complete when the agency adopted the Lynx Amendments and amended the forest plans.”¹⁷



Source: Associated Press, 2005.

The FS made this decision based on precedent set by the 2004 *Norton v. Southern Utah Wilderness Alliance (SUWA)* decision.¹⁸ The *SUWA* case addressed whether NEPA regulations that require agencies to supplement their environmental reviews when significant new information emerges should be applied to RMPs that had already been approved.¹⁹ The Supreme

¹¹ FindLaw, “Cottonwood Environmental Law Center v. United States Forest Service (2015)”, <https://caselaw.findlaw.com/us-9th-circuit/1704521.html>.

¹² U.S. Fish and Wildlife Service, “Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx” 65 FR 16051, March, 24, 2000, <https://www.federalregister.gov/documents/2000/03/24/00-7145/endangered-and-threatened-wildlife-and-plants-determination-of-threatened-status-for-the-contiguous>.

¹³ *Id.*

¹⁴ U.S. Forest Service, “Lynx Amendment” <https://www.fs.usda.gov/detail/r2/landmanagement/planning/?cid=stelprdb5199567>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

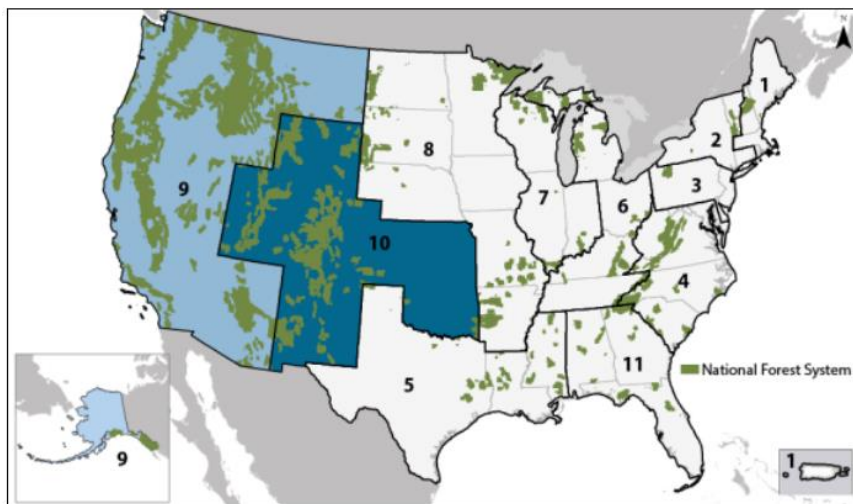
¹⁹ *Id.*

Court ruled in *SUWA* that approval of a land use plan is a major federal action, and once completed should not require supplementation.²⁰

This precedent is consistent with the Tenth Circuit Court of Appeals' decision in *Forest Guardians v. Forsgren* in 2007.²¹ Three years after the *SUWA* decision, the Tenth Circuit first addressed the Canada Lynx issue when Forest Guardians, along with other environmental groups, sued the FS for failing to reinstate consultation on the adopted forest plans for the Carson and Santa Fe National Forests. While the original listing did not include New Mexico, Canada Lynx had begun entering from Colorado, following reintroduction in the region. The Tenth Circuit rightly applied similar reasoning to the *SUWA* decision that adopted forest plans should not be considered an ongoing agency action, and do not require additional consultation.²² In issuing its opinion, the Court stated that:

Much like the promulgation of a regulation, we have little doubt after [*SUWA*] that the act of approving, amending, or revising a [Land and Resource Management Plan (LRMP)] constitutes "action" under § 7(a)(2) of the ESA. Nothing in the foregoing overview, however, suggests that LRMPs, once approved, amended, or revised, constitute on-going, self-implementing action under § 7(a)(2). To the contrary, the NFMA, FWS regulations, and Tenth Circuit case law suggest LRMPs are implemented through the approval of proposed projects and activities that are consistent with the plan's direction. Once the LRMP is in place, "agency action" takes place at the project level.²³

Cottonwood Environmental Law Center v. United States Forest Service



Federal Circuit Court Regions Relative to the National Forest System
Source: Congressional Research Service, 2022.

In 2015, the Ninth Circuit revisited this question in *Cottonwood Environmental Law Center v. U.S. Forest Service*.²⁴ The Cottonwood Environmental Law Center argued that FS violated the ESA by not reinstating consultation when the additional critical habitat for Canada Lynx was designated in 2009 and included FS land. On appeal, the Ninth Circuit held that FS was required to reinstate consultation, contradicting the previous

²⁰ Congressional Research Service, "Legal and Practical Implications of the Ninth Circuit's *Cottonwood Environmental Law Center v. U.S. Forest Service* Decision Under the Endangered Species Act", Erin H. Ward, Pervaze A. Sheikh, and Katie Hoover, August 2, 2022, <https://www.crs.gov/Reports/R47201?source=search#fn71>.

²¹ *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1151 (10th Cir. 2007).

²² *Id.*

²³ *Id.*

²⁴ *Cottonwood Environmental Law Center v. U.S. Forest Service*, No. 13-35624 (9th Cir. 2015)

SUWA and Tenth Circuit *Forest Guardians* rulings, finding that an approved forest plan is considered an agency action.²⁵ In its decision, the Ninth Circuit argued that “even if the agency action is complete and not ‘ongoing,’ the agency still may be required to reinitiate consultation if there is ‘discretionary Federal involvement or control’ over the completed action.”²⁶

Following this decision, in some FS regions, the agency was required to reinitiate Section 7 ESA consultations on completed forest plans when a new species is listed, when critical habitat is designated, or when new information is brought forward.²⁷ The conflicting Ninth and Tenth Circuit Court opinions mean that FS is required to reinitiate consultation on previously adopted forest plans if any triggering events occur in the Ninth Circuit, but not in the Tenth Circuit. Since January 2016, there have been at least 35 *Cottonwood*-related lawsuits in 13 states and 57 notices of intent (NOIs) to sue involving ESA new information claims, challenging both plan-level and project-level decisions.²⁸ Completing re-consultation has required the FS to spend an estimated 400 person days valued at approximately \$250,000 over a 12 month period.²⁹

In response to the confusion and uncertainty created by *Cottonwood*, the Consolidated Appropriations Act of 2018 implemented a partial fix that exempted forest plans and certain BLM RMPs from re-initiation of consultation.³⁰ This provision only applies for reinitiating consultation on new species listings and critical habitat designations and not to new information becoming available. This partial legislative fix is set to expire on March 23, 2023, at which point there is concern that the *Cottonwood* precedent could impact forest plans and RMPs outside of the Ninth Circuit.³¹ The Forest Service estimates this could lead to additional, onerous consultations on 187 projects across 36 national forests, which would divert finite resources and delay important forest management activities.³² The delay or cancellation of these projects would not only imperil the ability of FS to meet their own fuels reduction targets outlined in the “Confronting the Wildfire Crisis” strategy, but could have serious, long-lasting ramification on the health of our national forests and public lands.

Fallout from Cottonwood on Active Land Management

Cottonwood has led to significant challenges for FS’ management of National Forest System lands, exacerbating the forest health and wildfire crisis. *Cottonwood* unnecessarily lengthens the consultation process and makes active forest management projects virtually impossible to develop and implement by creating limitless opportunities to reinitiate consultation. This diverts finite agency resources from active management in our nation’s forests and public lands to endless planning, regulatory compliance, and responses to litigation. New lawsuits and threats of litigation directly contribute to the devastating wildfire crisis by creating an ‘analysis paralysis’ where the agencies attempt to bulletproof environmental reviews and consultations in a usually fruitless attempt to fend off litigation.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Information provided by the U.S. Forest Service.

²⁹ Chris French, Questions for the Record, Senate Energy and Natural Resources Committee, 6/24/21,

https://naturalresources.house.gov/uploadedfiles/french_responses_to_qfrs_10.21.21_senr_cmte_hrg_daines.pdf

³⁰ Consolidated Appropriations Act, 2018, H.R. 1625, 115th, <https://www.congress.gov/bill/115th-congress/house-bill/1625/text>

³¹ *Id.*

³² Chris French, Questions for the Record, Senate Energy and Natural Resources Committee, 6/24/21,

https://naturalresources.house.gov/uploadedfiles/french_responses_to_qfrs_10.21.21_senr_cmte_hrg_daines.pdf

One example of *Cottonwood*'s real-life impacts is the Hermits Peak Fire in New Mexico, the largest and most destructive wildfire in the state's history. The fire burned over 340,000 acres, destroyed more than 900 structures, and racked up over \$278 million in suppression costs.³³ This does not even include an additional \$3.95 billion spent by the federal government compensating victims of the fire.³⁴ The FS' report reviewing the fire highlighted mechanical and prescribed fire treatments that had been delayed for over a year by a *Cottonwood*-related injunction related to the Mexican Spotted Owl. This injunction, coupled with other delays and a narrow window of opportunity to complete the prescribed burn project, "led to acceptance of unforeseen risk" that eventually resulted in this devastating wildfire.³⁵ Additionally, mechanical thinning or earlier treatment would have very likely lowered the fire severity significantly.³⁶



Satellite image of the Hermits Peak fire.
Source: Marax Technologies, 2022.

Another senseless delay occurred in Montana when a planned vegetative management project designed to benefit elk and other wildlife was put on hold by *Cottonwood*-related litigation.³⁷ In 2017, the Park Creek and Arrastra wildfires burned over half the treatment area with such intensity that it damaged the soil in the area.

In the case of both fires, *Cottonwood*-related delays have not only done nothing to help threatened species, they have actually led to the destruction of critical habitat.³⁸ There is no conservation benefit associated with reinitiating consultation on approved forest plans, as

³³ InciWeb – Incident Information System, "Hermits Peak Fire," <https://inciweb.nwcg.gov/incident/8049/>.

³⁴ FEMA, "Hermit's Peak/Calf Canyon Fire," <https://www.fema.gov/disaster/current/hermits-peak#:~:text=On%20Sept.,%2C%202023%2C%20that%20passed%20Dec.>

³⁵ FS, "Gallinas-Las Dispensas Prescribed Fire Declared Wildfire Review Santa Fe National Forest, Southwestern Region," April 2022, file:///C:/Users/AButler1/Downloads/Las%20Dispensas%20Review_.pdf.

³⁶ Ryan Bronson, Rocky Mountain Elk Foundation, Testimony at House Natural Resources GOP Forum "Confronting America's Out-of-Control Wildfire and Forest Health Crisis" Thursday July 12th, https://naturalresources.house.gov/uploadedfiles/bronson_testimony.pdf.

³⁷ *Id.*

³⁸ *Id.*

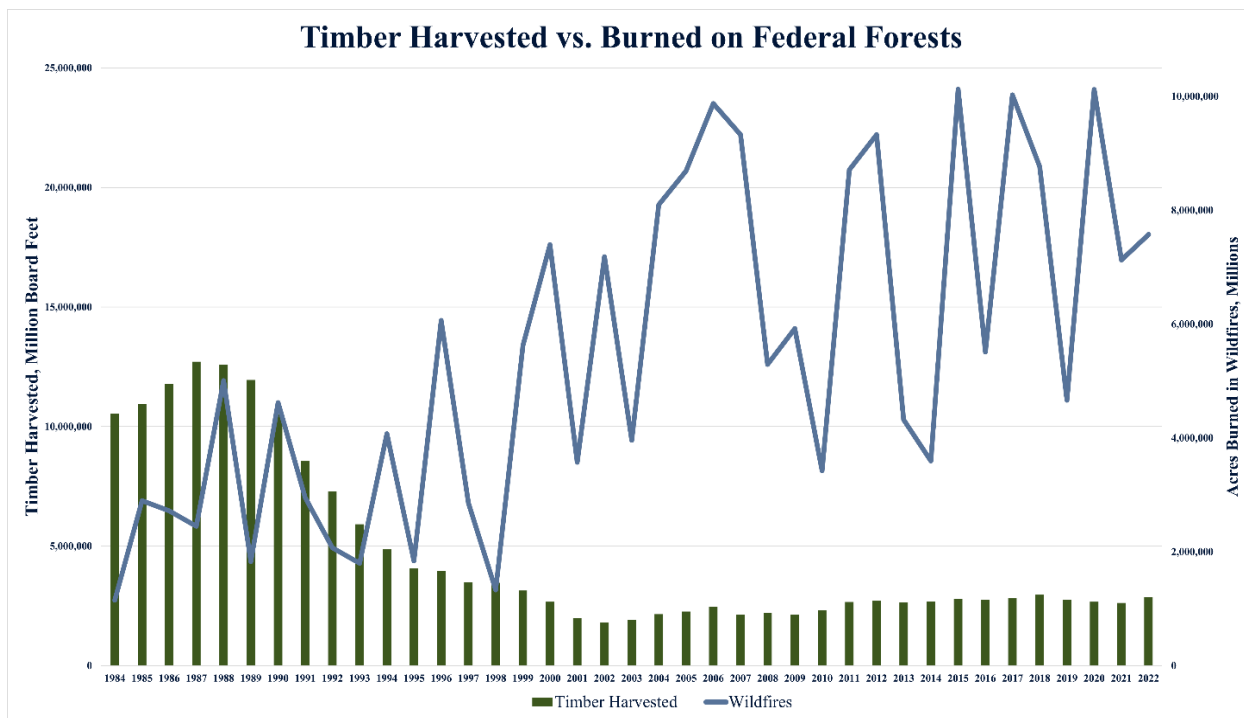
consultation is still required for individual forest projects. Even the FWS’s original biological opinion from the Lynx Amendments found that:

This consultation on the amended Forest Plans represents the first layer of a tiered consultation framework. Subsequent projects that may affect lynx as implemented under the amended Forest Plans will constitute the second tier of consultation. Second tier biological opinions would be issued, as appropriate, where proposed actions would result in adverse effects to lynx.³⁹

The Forest Information Reform (FIR) Act and Bipartisan Support for Fixing Cottonwood

The “Forest Information Reform (FIR) Act” provides a permanent fix to the disastrous *Cottonwood* decision hamstringing agency response to the historic wildfire threat afflicting federal lands. This legislation amends the Forest and Rangeland Renewable Resources Planning Act of 1974 and FLPMA to specify that neither the FS nor BLM, respectively, are required to reinitiate consultation with FWS on completed forest plans or RMPs when a species is listed as threatened or endangered, critical habitat is designated, or new information concerning a listed species or critical habitat becomes available. This will stop costly and unnecessary delays on badly needed forest management projects to address the out-of-control wildfire crisis. Additionally, the legislation will create certainty and address confusion created by the conflicting Ninth and Tenth Circuit Court decisions.

As demonstrated by the chart below, there is a correlation between the decline of active management, such as harvesting timber, and the rise of catastrophic wildfires. Reducing the rate



Source: House Committee on Natural Resources based on data compiled from the U.S. Forest Service, Bureau of Land Management, National Interagency Fire Center, and Congressional Research Service, 2023.

³⁹ FWS, Biological Opinion on Lynx Amendments, Letter to Rick Cables dated July 25, 2008, https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5357385.pdf.

of active management even further will have immediate and dire consequences on the amount of acreage burned annually.

H.R. 200 is the latest example in a long, bipartisan history that has spanned multiple administrations and Congresses to enact a *Cottonwood* fix. In May of 2016, the Obama administration petitioned the Supreme Court to review and overturn the *Cottonwood* precedent.⁴⁰ The Trump administration supplemented that effort by crafting a proposed rule, “Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation,” published on January 12, 2021, to fix the *Cottonwood* precedent.⁴¹ Unfortunately, the Biden administration has refused to finalize that rule. In addition, Congress took bipartisan action advancing legislation in the Senate Energy and Natural Resources Committee last year by a bipartisan 16-4 vote to reverse *Cottonwood*’s precedent.⁴² Unfortunately, Congress failed to pass this fix by the end of the 117th Congress, making the passage of the FIR Act necessary and urgent. On February 8, 2023, Chairman Westerman and 13 members of the House Natural Resources Committee sent a letter to Department of the Interior (DOI) Secretary Deb Haaland and FS Chief Randy Moore more to urge them to work together to finalize this proposed rule.⁴³

H.R. 1473: “Targeting and Offsetting Existing Illegal Containments (TOXIC) Act” (Rep. Scott Peters, D-CA)



Illegal cannabis site on National Forest System land.
Source: NBC News, 2021.

Illegal cannabis cultivation sites have become a major problem on federal lands and forests, resulting in environmental degradation, harm to wildlife, increased crime, and catastrophic wildfires. The FS has identified at least 72 national forests in 21 states with illegal marijuana cultivation sites and an “average of more than 2 million cannabis plants were

⁴⁰ No. 15-1387 in the Supreme Court of the United States - Scotusblog. <https://www.scotusblog.com/wp-content/uploads/2016/07/15-1387-cert-petition.pdf>.

⁴¹ U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration, “Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation,” published in the Federal Register on August 27, 2019, <https://www.federalregister.gov/documents/2019/08/27/2019-17517/endangered-and-threatened-wildlife-and-plants-regulations-for-interagency-cooperation>.

⁴² Lowery, Reilly. “Three Major Daines Bills One Step Closer to Becoming Law.” *Senator Steve Daines*, 14 Sept. 2022, <https://www.daines.senate.gov/2022/07/21/three-major-daines-bills-one-step-closer-to-becoming-law/>.

⁴³ https://naturalresources.house.gov/uploadedfiles/2023-02-08_westerman_et_al_to_haaland_moore_re_cottonwood.pdf.

eradicated on federal land from 2007-2019.”⁴⁴ In fiscal year 2019, officials confiscated \$948 million worth of marijuana.⁴⁵ This crisis is particularly bad in California, where 80-85 percent of the country’s illegal cannabis grown on public land is occurring.⁴⁶ In one California national park alone, officials have eradicated 270,000 plants “with an estimated street value of \$911 million” since the early 2000’s.⁴⁷ Since 2000, FS law enforcement officers arrested more than 21,000 people in California for illegally growing marijuana on National Forest System (NFS) lands and annually bust more than 200 illegal sites.⁴⁸ However, an estimated 300-500 additional grow sites go undetected each year.⁴⁹ Cleaning up illegal sites after a bust is an arduous and costly process, as they often contain “large mounds of graded dirt, trash, propane tanks, toxic chemicals, human waste, garbage, rat poison, and moldering food scraps that get abandoned.”⁵⁰ At one illegal cultivation site in the Cleveland National Forest worth an estimated \$1.2 million, a FS team removed roughly 3,000 pounds of waste and trash, a mile of irrigation piping, 1,110 pounds of fertilizer and several bottles of banned pesticides.⁵¹ Some estimate that statewide, “9,000 pounds of rodenticide, 70,200 pounds of fertilizer, 726 miles of irrigation line, 4,800 gallons of insecticide, 6,000 gallons of Carbofuran, and 300 tons of garbage are deposited in [California’s] forests annually.”⁵² The cost for cleaning up these sites has been roughly \$40,000 per site.⁵³

⁴⁴ Warren, Beth, “Marijuana wars: Violent Mexican drug cartels turn Northern California into ‘The Wild West’,” *Courier Journal*, December 19, 2021, <https://www.usatoday.com/in-depth/news/nation/2021/12/19/mexican-drug-cartels-move-in-on-californias-shadow-marijuana-industry/8960873002/>. “In recent years, officials found large grows on national forests in California, Alabama, Arkansas, Arizona, Colorado, Georgia, Idaho, Indiana, Kentucky, Michigan, Montana, North Carolina, New Mexico, Nevada, Oregon, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin.”

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Sequoia and Kings Canyon National Park, “\$7.5 Million Worth of Illegal Marijuana Eradicated from Sequoia National Park,” October 12, 2016, <https://www.nps.gov/seki/learn/news/illegal-marijuana-eradicated-from-sequoia-national-park.htm>.

⁴⁸ NBCNews, “We’re one cigarette away’: Illegal marijuana farms pose wildfire risk in California’s parched national forests”, Adiel Kaplan, Kenzi Abou-Sabe and Cynthia McFadden, December 1, 2021, <https://www.nbcnews.com/news/us-news/fire-guns-poison-illegal-marijuana-farms-pose-deadly-risks-californias-rcna7153>. Soft Secrets, “Illegal Grows are killing Californian Forests”, Liz Filmer, December 7, 2021, <https://softsecrets.com/en-GB/article/illegal-grows-are-killing-californian-forests>.

⁴⁹ McDaniel, Piper, “Pay No Attention to the Crime Behind the Emerald Curtain,” National Forest Foundation, <https://www.nationalforests.org/blog/pay-no-attention-to-the-crime-behind-the-emerald-curtain>.

⁵⁰ Prine, Carl, “FEDERAL FOREST BUST HIGHLIGHTS DEBATE OVER CALIFORNIA MARIJUANA FARMS,” August 22, 2022, <https://coffeordie.com/california-marijuana-farms-forest/>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

The majority of these illegal sites are funded and operated by Mexican drug cartels “with flagrant disregard for environmental and social well-being” and have been exacerbated by the Biden border crisis.⁵⁴ According to reports, “the number and size of [illegal marijuana] grows have been increasing every



A toxic, illegal marijuana site clean up in the Plumas National Forest.
Source: High Country News, 2017.

year as [cartels] vie for control of production, operating trespass-grow sites throughout the Pacific Northwest, as well as in Colorado, Utah, Nevada, Arizona and New Mexico.”⁵⁵ The increase in illegal sites has also brought an increase in dangerous crime, as they cartels are “exploiting workers, robbing and shooting adversaries, poisoning wildlife and poaching water in a state [California] fighting widespread drought and devastating wildfires.”⁵⁶ FS law enforcement officials have estimated that the arrests they make for illegal cannabis cultivation are “almost all drug cartel-related.”⁵⁷ In 2017, Operation Forest Watch, a local, state, and federal law enforcement operation targeting marijuana growing on federal forests in California, resulted in 77 arrests, the seizure of 82 firearms, and the seizure of 25,334 pounds of processed marijuana.⁵⁸ Over a two year period, FS law enforcement conducted raids that resulted in 120 arrests and more than 50 weapons seized.⁵⁹ Since 2019, the San Diego-based Border Pesticide Initiative, a similar initiative, has prosecuted over 50 defendants and seized more than 1,000 containers of illegal pesticides.⁶⁰

Illegal cannabis sites in national forests exacerbate the dual threats of catastrophic wildfire and severe drought. Since 2009, at least 13 wildfires that have burned 275,000 acres in California have been attributed to illegal cultivation sites, however that number is likely much higher as the

⁵⁴ McDaniel, Piper, “Pay No Attention to the Crime Behind the Emerald Curtain,” National Forest Foundation, <https://www.nationalforests.org/blog/pay-no-attention-to-the-crime-behind-the-emerald-curtain>.

⁵⁵ McDaniel, Piper, “The Forest Service’s battle against illegal marijuana farms,” High Country News, October 31, 2017, <https://www.hcn.org/articles/the-forest-services-battle-against-illegal-marijuana-farms>.

⁵⁶ *Id.*

⁵⁷ NPR, “Illegal Pot Operations In Public Forests Are Poisoning Wildlife And Water,” November 12, 2019, <https://www.npr.org/transcripts/773122043>.

⁵⁸ *Id.*

⁵⁹ Wade, Paul, “Forest Service Law Enforcement Use D.A.R.E., Other Strategies To Combat Drugs,” Forest Service, <https://www.fs.usda.gov/detailfull/r5/home/?cid=FSEPRD678622&width=full>.

⁶⁰ *Id.*

Recent fires caused by marijuana grows on federal land

NBC News identified six wildfires on Forest Service and tribal land since 2009 caused by people working at illegal marijuana grows in remote forested areas. Together they have burned more than 275,000 acres.



Source: NBC News, 2021.

precise ignition of wildfires is often hard to confirm.⁶¹ Most recently, in 2020, an illegal cannabis grower started the 125,000-acre Dolan Fire that burned in the Los Padres National Forest that “overran firefighters,” “killed 11 endangered condors,” and was “just a nightmare.”⁶² Similarly, illegal marijuana sites are also contributing to California’s drought. According to the State of California’s Attorney General:

[As] California finds itself in the midst of an unprecedented drought, the cost of illegal marijuana planting is particularly high to communities and farmers already facing water scarcity. Researchers estimate that one marijuana plant consumes six gallons of water per day. Multiply that across the entire illegal marketplace, and the cost to the agriculture industry – including the legal cannabis marketplace – cannot be ignored.⁶³

At one illegal site, an environmental assessment “concluded that more than 14.25 million gallons of water were illegally diverted.”⁶⁴

Concerningly, the cartels are indiscriminately using more banned pesticides and “some of the most toxic chemicals you could ever use” that have long been outlawed in the United States on these illegal sites.⁶⁵ The highly toxic pesticides are being smuggled into the United States across the Southern border from Mexico.⁶⁶ The use of these banned chemicals is creating

environmental hazards in national forests that are poisoning wildlife and contaminating soil and watersheds.⁶⁷ Cartels use potent rodenticides at these sites to poison animals that are threatening the crops and campsites.⁶⁸ These chemicals leech into the soil and water and slowly make their

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ U.S. Attorney’s Office, Eastern District of California, “Mexican National Sentenced to 10 Years in Prison for Growing Over 6,500 Marijuana Plants in the Shasta-Trinity National Forest,” March 10, 2023, <https://www.justice.gov/usao-edca/pr/mexican-national-sentenced-10-years-prison-growing-over-6500-marijuana-plants-shasta>.

⁶⁵ *Id.*

⁶⁶ Times of San Diego, Dangerous, Banned Pesticides Finding Their Way into California Marijuana Fields, JW August, May 20, 2021, <https://timesofsandiego.com/crime/2021/05/20/dangerous-banned-pesticides-finding-their-way-into-california-marijuana-fields/>

⁶⁷ PLOS, “Distribution of trespass cannabis cultivation and its risk to sensitive forest predators in California and Southern Oregon”, Greta M. Wengert et al, September 1, 2021, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0256273>.

⁶⁸ PLOS, “Distribution of trespass cannabis cultivation and its risk to sensitive forest predators in California and Southern Oregon”, Greta M. Wengert et al, September 1, 2021, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0256273>

way through the entire food chain, creating what officials call a “circle of death” for wildlife habitat.⁶⁹ One example of a pesticide commonly used by the cartels is carbofuran, an extremely toxic chemical that is so potent, one teaspoon can kill a 600-pound black bear.⁷⁰ At a recent bust of seven sites in the Trinity River watershed, officials found the equivalent of 60-70 gallons of carbofuran, enough to kill approximately 53,760 black bears (18 percent of the entire population of black bears in the country).⁷¹ Cartels also use zinc phosphide to kill rats that like to eat marijuana plants. Zinc phosphide is so deadly that it is “in the class of neurotoxins that originally were designed to be chemical-warfare weapons” and “ingestion of seven drops to one teaspoon of zinc phosphide would likely kill a 150-pound person.”⁷² Other toxic chemicals typically found at illegal cultivation sites include “methyl parathion, aluminum phosphate ... and illegal fertilizers.”⁷³

These toxic chemicals are extremely harmful to humans and animals alike. Species like the Northern Spotted Owl and California Fisher have been especially vulnerable to poisoning as they feed on rodents that ingest toxic chemicals. According to one study, over 80 percent of Pacific Fishers and 70 percent of Northern Spotted Owls in California and Southern Oregon were found to have poison in their system.⁷⁴ Research also found that illegal sites likely overlap with an estimated 40-48 percent of habitats for sensitive species like the Pacific Fisher, Humboldt Marten, and Northern Spotted Owl.⁷⁵ Fisher deaths have been on the rise as a result of ingesting these chemicals, including rat poison, with nine recorded deaths over a two year period.⁷⁶ In addition to the environmental and wildlife harms, there are serious health threats for the general public as well as FS employees that are tasked with cleaning up toxic sites.⁷⁷ The chemicals found at these sites are often so toxic, cleanup crews must use military-grade testing devices and “a number of officers and cleanup workers have been hospitalized for exposure.”⁷⁸ End users may consume the chemicals used through drug use and there are concerns these chemicals may make it into public water systems through snowmelt and other sources. This is particularly concerning because 90 percent of people in the West served by public water systems receive water from national forests and grasslands.⁷⁹

To address this issue, the “Targeting and Offsetting Existing Illegal Contaminants (TOXIC) Act,” led by Reps. Scott Peters (D-CA) and Doug LaMalfa (R-CA), would seek to address the environmental damage caused by toxic chemicals associated with illegal marijuana cultivation and subject those illegally cultivating and harvesting marijuana on federal lands to stricter criminal penalties. Specifically, this bill creates a Trespass Cannabis Cultivation Site Remediation Program and authorizes FS to use Superfund toxic waste remediation authorities to

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* <https://northamericannature.com/where-can-you-see-black-bears-in-america/>.

⁷² Times of San Diego, “Spotted Owls, Fishers Dying in California from Pesticides in Illegal Marijuana Fields”, JW Augst, September 23, 2021, <https://timesofsandiego.com/tech/2021/09/23/spotted-owls-fishers-dying-in-california-from-pesticides-in-illegal-marijuana-fields/>

⁷³ California Attorney General, “Attorney General Bonta Announces Eradication of More Than One Million Marijuana Plants as Part of Interagency Effort to Combat Illegal Grows,” October 17, 2021, <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-eradication-more-one-million-marijuana-plants>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Times of San Diego, “Dangerous, Banned Pesticides Finding Their Way into California Marijuana Fields”, JW August, May 20, 2021, <https://timesofsandiego.com/crime/2021/05/20/dangerous-banned-pesticides-finding-their-way-into-california-marijuana-fields/>

⁷⁸ *Id.*

⁷⁹ West, Cynthia, “New Research Reveals How Critical Forests are to Drinking Water Supply,” Forest Service, October 4, 2022, <https://www.usda.gov/media/blog/2022/10/04/new-research-reveals-how-critical-forests-are-drinking-water-supply>.

address the environmental harm caused by the use of banned chemicals at illegal cannabis sites on federal lands. The “TOXIC Act” also raises the criminal penalties for using banned pesticides in illegal cannabis cultivation to a maximum of 20 years in prison and a \$250,000 fine, which would create parity with the existing penalties for smuggling banned chemicals into the country.

[H.R. 1567: “Accurately Counting Risk Elimination Solutions \(ACRES\) Act” \(Rep. Tom Tiffany, R-WI\)](#)

Across the U.S., there are now 1 billion acres at risk of wildland fire.⁸⁰ More than 117 million acres of federal land, including 63 million acres of FS lands and 54 million acres of DOI lands, are at high or very high risk of wildfire, representing nearly one-fifth of the lands administered by these agencies.⁸¹ Over the last 20 years, an average of 7 million acres per year burned in catastrophic wildfires, more than double the average seen during the 1990s.⁸² The three worst wildfire seasons on record (2015, 2017, and 2020) all occurred in the last decade, with each burning more than 10 million acres.⁸³ Despite this crisis, the FS only treats an average of roughly 2 million acres per year.⁸⁴ At this paltry rate, it would take the FS more than 30 years to complete treatments on their high-risk areas.

While this reported pace is already insufficient, recent investigative reporting uncovered the situation is likely much worse, as agencies like the FS have been overstating their treatment numbers by over 20 percent.⁸⁵ In some states like California, treatment numbers are overstated by roughly 30 percent.⁸⁶ The investigative reporting found the FS counted treatments on the same pieces of land toward its risk reduction goals multiple times, even up to more than 30 times in some cases.⁸⁷ The discrepancy arises because FS will record multiple treatments (i.e. mechanical thinning, prescribed burning, chipping and piling, etc.) on the same acre separately as if multiple acres had been treated. If treatment work occurs over several years, the overcounting of acres could become even larger.

⁸⁰ Chris French, Testimony before the Senate Energy and Natural Resources Committee, 6/24/21, <https://www.energy.senate.gov/services/files/AAF7DF40-2A47-4951-ADA4-4B124AD3894F#:~:text=In%20the%20United%20States%2C%20there.high%20risk%20of%20wildland%20fire.>

⁸¹ Congressional Research Service, “Federal Wildfire Management: Ten-Year Funding Trends and Issues (FY2011-FY2020)”, Katie Hoover, October 28, 2020, <https://www.crs.gov/Reports/R46583?source=search&guid=8a080671120b4e7f92061e82e8a2bdf3&index=6>.

⁸² Congressional Research Service, “Wildfire Statistics”, Katie Hoover, June 1, 2022, <https://www.crs.gov/Reports/IF10244?source=search&guid=b82a4d954677449b918a65ece823396f&index=0>.

⁸³ *Id.*

⁸⁴ PERC, “Does Environmental Review Worsen the Wildfire Crisis”, Eric Edwards, Sara Sutherland, June 14, 2022, <https://perc.org/2022/06/14/does-environmental-review-worsen-the-wildfire-crisis/>.

⁸⁵ NBC News, “The Forest Service is overstating its wildfire prevention progress to Congress despite decades of warning not to”, Adiel Kaplan, Monica Hersher, August 9, 2022, <https://www.nbcnews.com/news/investigations/forest-service-overstating-wildfire-prevention-progress-congress-decad-rcna41576>.

⁸⁶ *Id.*

⁸⁷ *Id.*

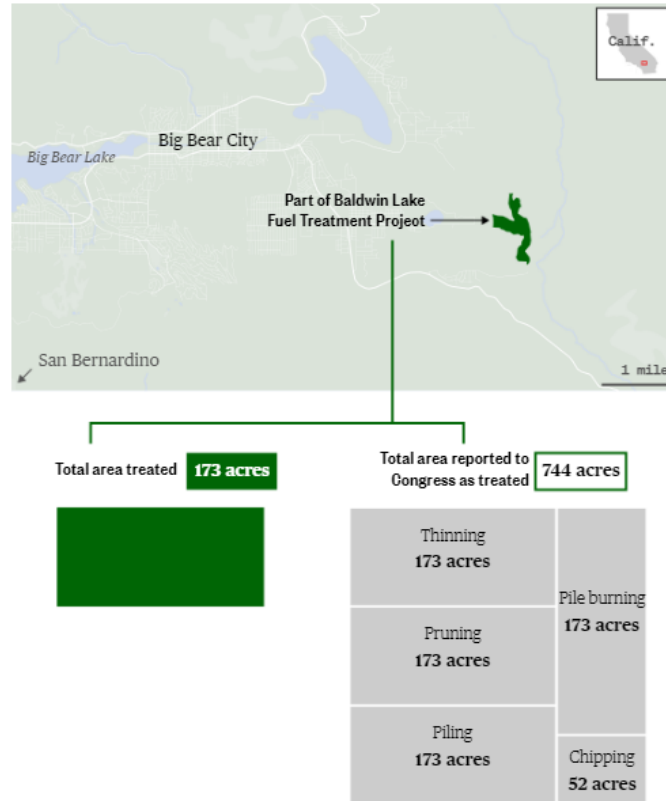
As an illustrative example highlighted in the adjacent graphic, this system of recording hazardous fuels reductions led FS to report 744 acres of wildfire risk reduction on a project that actually only encompassed 173 acres.⁸⁸

The 2021 Caldor Fire in California that leveled the community of Grizzly Flatts is unfortunately another tragic example of the consequences of inaccurate treatment reports.⁸⁹ The FS initially planned to treat 15,000 acres by 2020, a year before the Caldor Fire ignited, around Grizzly Flatts.⁹⁰ Regulatory delays and staffing challenges pushed the original completion date back to 2032, however the full extent of the delay was not apparent as FS data overstated the project’s accomplishments by ten percent.⁹¹ The misleading FS data also claimed that 15,000 acres of fuels reduction work had been accomplished by counting repeat treatments on the same parcel, when that work was actually limited to 5,800 acres of land.⁹² Unfortunately, this follows a disturbing trend in which overestimation of treatments is most pronounced in areas around the wildland-urban interface (WUI), due to additional limitations in FS’ current data to distinguish between WUI and non-WUI areas.⁹³

Over the past 15 years, FS reported wildfire risk reductions on roughly 40 million acres of land.⁹⁴ Based on this troubling report, the number of individual acres is likely closer to 31 million acres

How 173 acres turned into 744 acres in southern California

Fuel reduction is an important part of wildfire mitigation. But the various steps the Forest Service took in an area east of Los Angeles were counted separately toward totals in reports to Congress, leading 173 acres to be reported as more than 700 acres of fuel reduction.



Note: Work done was completed between 2018 and 2021, and was awarded in the 2016-2021 fiscal years.

Source: NBC News, 2022.

⁸⁸ *Id.*

⁸⁹ KCRA, “Caldor Fire, One Year Later: A look back at the destructive blaze that burned into Lake Tahoe Basin”, Greta Serrin, August 14, 2022, <https://www.kcra.com/article/caldor-fire-one-year-later/40874998>.

⁹⁰ Capradio, “Stalled U.S. Forest Service project could have protected California town from Caldor Fire destruction”, Scott Rodd, August 16, 2022, <https://www.capradio.org/articles/2022/08/16/stalled-us-forest-service-project-could-have-protected-california-town-from-caldor-fire-destruction/>.

⁹¹ *Id.*

⁹² *Id.*

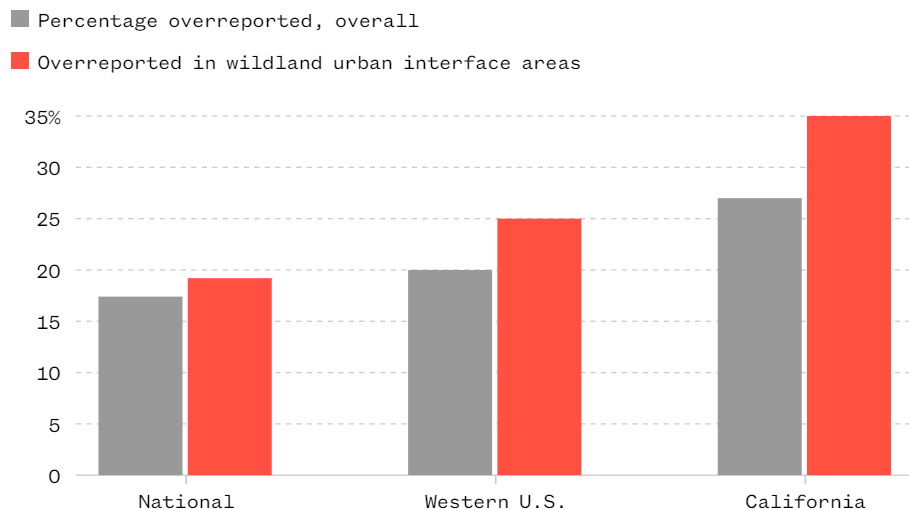
⁹³ *Id.*

⁹⁴ *Id.*

(21 percent less) that have been treated. The FS contends their reporting is transparent, and that acres treated is clearly meant to measure the total amount of work.⁹⁵

Overreporting is worst in the areas it matters the most

Between 2017 and 2021, the Forest Service overstated the amount of land it treated to reduce flammable vegetation by 35% in areas closest to Californians' homes.



Source: NBC News, 2022.

This uncertain contention loses credibility when considering the seemingly clear goals set by the Administration's 10-year "Confronting the Wildfire Crisis" strategy to treat an additional 20 million acres of National Forest System lands and 30 million acres of other Federal, State, Tribal and private lands.⁹⁶ Numerous outside watchdogs have also

challenged the transparency of hazardous fuels reduction reporting, including the Government Accountability Office (GAO) and U.S. Department of Agriculture's Office of Inspector General (OIG). In 2003, GAO found that "under the current reporting system, the way acres are reported when multiple treatments are necessary to reduce the risk of wildfire is also resulting in misleading data on what is actually being accomplished for that year. By reporting multiple treatments on the same acres as separate accomplishments, the agencies are creating the impression that more acres are receiving treatments than what is actually occurring."⁹⁷ A 2016 OIG audit also found that "FS inaccurately reported to Congress the number of acres treated for hazardous fuels reduction in its annual reports for [FY 2012-2014]. Without correct information regarding the amount of acreage treated for hazardous fuels reduction in WUI areas, Congress and FS management run the risk of making funding and prioritization decisions based on inaccurate information."⁹⁸ As a result, according to experts interviewed by NBC News, this system "long incentivize[s] not the most effective and important risk reduction work, but the cheapest."⁹⁹

⁹⁵ *Id.*

⁹⁶ White House, "Fact Sheet: The Biden-Harris Administration Continues Efforts to Address Growing Wildfire Threat", July 28, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/28/fact-sheet-the-biden-harris-administration-continues-efforts-to-address-growing-wildfire-threat/>

⁹⁷ GAO, "Wildland Fire Management: Additional Actions Required to Better Identify and Prioritize Lands Needing Fuels Reduction, August 2003, <https://www.documentcloud.org/documents/21317927-gao-2003-report-wildland-fire-management-additional-actions-required-to-better-identify-and-prioritize-lands-needing-fuels-reduction-gao-03-805#document/p36/a2138224>.

⁹⁸ USDA OIG, "Forest Service Wildland Fire Activities – Hazardous Fuels Reduction, Audit Report 08601-0004-41, 2016, <https://www.documentcloud.org/documents/22120891-usda-oig-2016-forest-service-wildland-fire-activities-hazardous-fuels-reduction-08601-0004-41#document/p20/a2135338>.

⁹⁹ *Id.*

Accurate reporting is necessary to broadly track wildfire mitigation progress in a macro sense, but it is also vitally important that individual treatment projects are tracked properly. When they are not, the results can be disastrous. The “Accurately Counting Risk Elimination Solutions (ACRES) Act” provides a way to hold federal land management agencies accountable, to see the work they are doing to reduce the amount of fuel for wildfires on our public lands and determine the effectiveness of the fuel reduction work. Specifically, this bill would require FS and DOI to produce yearly hazardous fuels reduction reports based on the *actual* number of acres that the respective agencies treated over the past year. The legislation requires additional transparency measures to detail the location, type, effectiveness, and cost of forest treatments carried out. The ACRES Act would also require the agencies to standardize tracking procedures for hazardous fuels reduction to ensure accuracy and timely input. This is a good governance bill that will lead to greater accountability, a more streamlined process, and provide critically important information needed to fight the national wildfire crisis strategically and effectively.



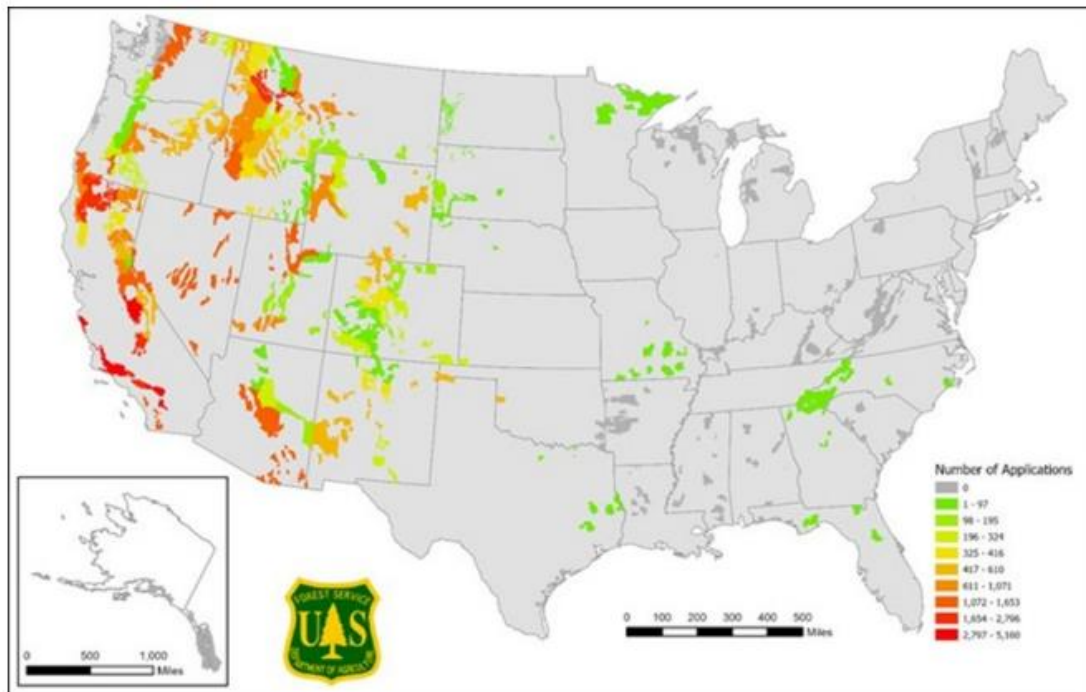
An air tanker dropping fire retardant to fight a wildland fire.
Source: Associated Press, 2022.

[H.R. 1586: “Forest Protection and Wildland Firefighter Safety Act of 2023” \(Rep. Doug LaMalfa, R-CA\)](#)

Overview

In addition to the millions of acres destroyed annually in wildfires, the loss of human life and structures is also devastating. The most recent data from the National Fire Protection Association

shows in 2021 there were 9 firefighter fatalities related to wildfires and 110 civilian deaths related to wildland and other outside fires.¹⁰⁰ These fires are also disastrous to structures, destroying homes and entire neighborhoods. From 2012 to 2021, an average of 8,000 structures burned annually.¹⁰¹ In 2020, a record 17,904 structures burned, over half of which were residences.¹⁰² The risk of additional structure and life loss is increasing as more people move to the WUI, an area where structures like homes are in or near wildlands. The most reliable estimate notes approximately 43 million homes and 191 million acres make up the WUI, or 9 to 10 percent of the country’s land area.¹⁰³



Aerial fire retardant application on NFS lands, 2012-2019.

Source: FWS, 2023.

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. Although chemically different throughout time, fire retardant has been used by the FS 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.”¹⁰⁴ 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

¹⁰⁰ National Fire Protection Association, Firefighter Fatalities in the US in 2021, August 2022, <https://www.nfpa.org/-/media/Files/News-and-Research/Fire-statistics-and-reports/Emergency-responders/osFFF.pdf>. National Fire Protection Association, Fire Loss in the United States During 2021, September 2022,

<https://www.nfpa.org/-/media/Files/News%20and%20Research/Fire%20statistics%20and%20reports/US%20Fire%20Problem/osFireLoss.ashx>.

¹⁰¹ Congressional Research Service, “Federal Assistance for Wildfire Response and Recovery”, Katie Hoover, December 2, 2022, <https://www.crs.gov/Reports/IF10732?source=search>

¹⁰² Congressional Research Service, “Wildfire Statistics”, Katie Hoover, December 2, 2022, https://www.crs.gov/Reports/IF10244?source=search#_Ref21088511

¹⁰³ PNAS Journal, Rapid Growth of the US Wildland-Urban Interface Raises Wildfire Risk, Volker C. Radeloff, et. all., March 12, 2018, <https://www.pnas.org/doi/full/10.1073/pnas.1718850115>

¹⁰⁴ Forest Service, Record of Decision, December 2011, https://www.fs.usda.gov/sites/default/files/media_wysiwyg/wfcs_rod_12_15_11_0.pdf.

used to hold a fire for long durations or even stop the fire.”¹⁰⁵ Importantly, the use of retardant is critical in assisting wildland firefighters and minimizing risks to their safety as they suppress raging infernos. Fire retardant is also sometimes used in forest management projects to reduce the risk of catastrophic fires, primarily when conducting prescribed burns. 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 ariel and ground crews.¹⁰⁶

Serial Litigants Threatening the Use of Fire Retardant

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.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹ This is consistent with guidance the agency has provided since 1993 stating that fire suppression activities do not require a CWA permit.¹¹⁰ As a result, there is currently no NPDES permit established for aerial application of fire retardant.

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 FS completed an Environmental Impact Statement (EIS) on “Nationwide Aerial Application of Fire Retardant on National Forest System Land” (2011 EIS).¹¹¹ 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.¹¹² 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), FS disclosed that 457 out of 56,868 total retardant drops (less than one percent) made between 2012 and 2019 were into avoidance areas on NFS lands.¹¹³ 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).”¹¹⁴ In total, the FS dropped approximately 102,362,031 gallons of fire retardant on NFS lands during this period.¹¹⁵

¹⁰⁵ FWS, Fire Retardant Biological Opinion, February 13, 2023, <https://www.fs.usda.gov/sites/default/files/2023-02/Fire-Retardant-FWS-Biological-Op.pdf>.

¹⁰⁶ United States 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>.

¹⁰⁷ 40 CFR 122.

¹⁰⁸ 40 CFR 122.27.

¹⁰⁹ *Id.*

¹¹⁰ Letter from NASFR to Secretary Vilsack, March 7, 2023.

¹¹¹ Forest Service, Record of Decision, December 2011, https://www.fs.usda.gov/sites/default/files/media_wysiwyg/wfcs_rod_12_15_11_0.pdf.

¹¹² *Id.*

¹¹³ 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>.

¹¹⁴ 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.

¹¹⁵ *Id.*

In October 2022, the Forest Service Employees for Environmental Ethics (FSEEE) sued the FS under the “Citizen Suit” provision of the CWA in the District Court in Montana.¹¹⁶ FSEEE alleges past use of aerial fire retardant dropped into navigable waters without a NPDES permit, in violation of the CWA. FSEEE is now seeking a prohibitory injunction on the use of fire retardant.¹¹⁷ FSEEE is a serial litigant that has challenged the agency’s use of fire retardant in court over the past two decades.¹¹⁸ FSEEE first challenged the FS’ use of retardant in 2003 under NEPA and the ESA, arguing the FS needed to analyze the effects of fire retardant on endangered species, fish, and wildlife.¹¹⁹ The FS was directed to study this and issued a Finding of No Significant Impact in 2008 after conducting an environmental assessment (EA).¹²⁰ FSEEE filed another suit that same year challenging the EA and consultation with the FWS and National Marine Fisheries Service (NMFS). The Court directed the FS to issue a new decision and address any NEPA or ESA violations.¹²¹ This led to the issuance of the 2011 EIS described above, which was approved by the Obama administration.¹²²

While the current lawsuit under the CWA is ongoing, there are serious concerns that this could lead to significant restrictions or even a nationwide injunction on the use of aerial fire retardant. Given the severity of the wildfire crisis, this would be cataclysmic to the protection of human life and public safety, private property and residences, and forests and federal lands. Acquiring an NPDES permit would also create significant and costly bureaucracy for the use of fire retardant, but would likely not change aerial application requirements nor actual resource effects on the ground in the long term. A rulemaking by the Environmental Protection Agency (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 FS:

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 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.¹²³

¹¹⁶ *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.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ 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.

Additionally, EPA has delegated permitting authority to most states.¹²⁴ Potentially, each of the 47 individual state regulatory agencies with NPDES authority would also need to develop their own general permit using EPA's general permit as a model. Once a permits are established at the national and state levels, the FS would have to apply for each permit.¹²⁵ This could not only disrupt the FS' use of retardant for the 2023 fire year, but potentially limit or restrict the use of retardant into 2025.¹²⁶ Furthermore, there is concern that overturning nearly 30 years of precedent of fire retardant as a non-point source silvicultural exemption could lead to other lawsuits targeting similar agricultural or silvicultural exemptions.

In recognition of the importance of continued use of fire retardant, several organizations filed a legal brief seeking to intervene on behalf of the FS.¹²⁷ ¹²⁸ In their brief, the groups wrote in part:

Intervenors' interests in this litigation are unique and of fundamental importance: they represent the communities and industries impacted by wildfires that have spread across national forests before decimating homes, businesses, private timberlands, and other non-federal interests. The aerial application of fire retardant is part of Forest Service's firefighting strategy, and it unquestionably reduces fire's rate of spread, intensity, and danger to the public. An injunction that removes this critical tool is certain to undermine health and safety and cause economic harm to communities and businesses navigating the constant threat of wildfire.¹²⁹

In addition, the National Association of Forest Service Retirees (NAFSR) recently sent a letter to Secretary Vilsack that stated that: "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 to not allow the use of fire retardant in fire suppression would be unconscionable."¹³⁰

The Forest Protection and Wildland Firefighter Safety Act of 2023

The use of fire retardant as a tool to save lives, protect structures, and contain wildfires is invaluable and inevitable. 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," an option that is not available unless the nation is willing to accept catastrophic loss of life and property to wildland fire.¹³¹ Unfortunately, fire retardant may not be available for use in the 2023 fire year and likely years in the future if the FS does not prevail in the current litigation. 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). This would put

¹²⁴ EPA, "About NPDES," <https://www.epa.gov/npdes/about-npdes>.

¹²⁵ 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.

¹²⁶ *Id.*

¹²⁷ Signers of the brief include: the Town of Paradise, California; Butte County, California; Plumas County, California; Rural County Representatives of California; American Forest Resource Council; National Alliance of Forest Owners; Federal Forest Resource Coalition; California Forestry Association; Montana Wood Products Association; Oregon Forest Industry Council; Washington Forest Protection Association; California Farm Bureau; California Women for Agriculture; and the National Wildfire Suppression Association.

¹²⁸ Motion to Intervene on behalf of putative intervenors, *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, March 9, 2023, <https://mura.cfbf.com/sites/cfbv2/assets/Image/2023.03.09--Brief-ISO-Motion-to-Intervene.pdf>.

¹²⁹ *Id.*

¹³⁰ Letter from NASFR to Secretary Vilsack, March 7, 2023.

¹³¹ *Id.*

millions of people and billions of dollars of infrastructure at risk.¹³² A years-long paperwork process should not stand in the way of protecting lives.

The “Forest Protection and Wildland Firefighter Safety Act of 2023” addresses the concerns stated above by (1) authorizing FS and DOI to use fire retardant in fire suppression, control, or prevention; and (2) exempting the use of retardant by FS and DOI from permitting requirements under the CWA.

IV. MAJOR PROVISIONS & ANALYSIS (or /SECTION-BY-SECTION)

H.R. 200: “Forest Information Reform (FIR) Act” (Rep. Matt Rosendale, R-MT)

Sec 2. No Additional Consultation Required

- Amends the Forest and Rangeland Renewable Resources Planning Act of 1974 and the Federal Land Management and Policy Act of 1976 to specify that neither FS or BLM, respectively, are required to reinitiate consultation on a land management or use plan approved, amended, or revised, when a species is listed as threatened or endangered, critical habitat is designated, or new information concerning a listed species or critical habitat becomes available.

H.R. 1473: “Targeting and Offsetting Existing Illegal Containments (TOXIC) Act” (Rep. Scott Peters, D-CA)

Sec. 2. Trespass Cannabis Cultivation Site Remediation Program Established

- Establishes the Trespass Cannabis Cultivation Remediation Program to carry out environmental remediation on NFS land.
- Requires the remediation to be carried in a manner consistent with section 120 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA; Superfund).
- Directs the Secretary of Agriculture to identify a branch within the FS to carry out the program.
- Directs the Secretary to carry out necessary environmental remediation work on sites within the NFS where the cultivation of cannabis occurred.
- In accordance with CERCLA, specifies that the Secretary is not responsible for remediation work if a response action by a responsible person is provided by the Secretary.
- Directs the Secretary to pay fees and charges imposed by the State for the disposal of hazardous material.
- Permits the Secretary to enter into agreements with other federal agencies, state or local agencies, Indian tribes, owners of covenant property, or any nonprofit conservation organization to assist with the environmental remediation work.
- Sets up terms for surety bonds, including indemnification and liability standards.
- Establishes an account known as the Trespass Cannabis Cultivation Site Remediation Account, Agriculture” comprised of appropriated funds, fines from criminal penalties, and reimbursements for contracts.

¹³² *Id.*

- Requires the President to submit a budget request for environmental remediation programs for FS.
- Authorizes \$250 million over ten years for this program.

Sec. 3. Criminal Penalties for Illegal Pesticide Application

- Creates additional criminal penalties for the use of banned pesticides and rodenticides during the commission of a federal offense to a sentence of 10 years in addition to the punishment for the original offense.

Sec. 4. Protection of National Forests; Rules and Regulations

- Raises the criminal penalties for using banned pesticides in illegal cannabis cultivation sites on NFS lands to a maximum of 20 years in prison and \$250,000 in criminal fines to establish parity with the criminal penalties for smuggling banned pesticides into the U.S.

[H.R. 1567: “Accurately Counting Risk Elimination Solutions \(ACRES\) Act” \(Rep. Tom Tiffany, R-WI\)](#)

Sec. 2. Accurate Hazardous Fuels Reduction Reports

- Requires the Secretaries of the U.S. Department of Agriculture (Forest Service) and DOI (National Park Service and Bureau of Land Management) to submit to Congress a yearly hazardous fuels reduction report based on the actual number of acres that the respective agencies treated over the past year.
- Specifies the agencies may only record acres once for the purposes of the report, regardless of the number of treatments performed on a single acre.
- Requires the report include the acreage treated in the WUI; level of wildfire risk of treated acres before and after treatment; the types of treatment utilized; the cost per acre; the region or specific unit where acres are located; and the overall effectiveness of the treatments in reducing the risk of wildfire.
- Requires the report to be made available on a U.S. Department of Agriculture and DOI website.
- Directs the Secretaries to standardize procedures for tracking data for hazardous fuels reduction activities. This includes regular, standardized data reviews of the accuracy and timely input of data used to track hazardous fuels as well as verification that this data directly correlates to hazardous fuels reduction activity. Must also include an analysis of the short and long-term effectiveness of hazardous fuels reduction on reducing the risk of wildfires.
- Directs the Secretaries to establish methods to distinguish between WUI and non-WUI acres in reporting hazardous fuels reduction work for projects that encompass both categories.
- Directs the Secretaries to submit a report to Congress two weeks after implementing these standardized procedures with details about the changes made and any policy recommendations needed to address further limitations in tracking data for hazardous fuels reduction.
- Directs the GAO to complete a study on the implementation of the bill within two years of enactment and submit its findings to Congress.

- Defines hazardous fuels reduction activities to exclude (1) wildland fire managed for resource benefits; and (2) the awarding of contracts to conduct hazardous fuels reduction activities.

H.R. 1586: “Forest Protection and Wildland Firefighter Safety Act of 2023” (Rep. Doug LaMalfa, R-CA)

Sec. 2. Forest Protection and Wildland Firefighter Safety Act of 2023

- Authorizes the use of fire retardant by the Secretary of the Interior and the Secretary of Agriculture for fire suppression, control, or prevention activities.
- Exempts the Department of Interior, Department of Agriculture, states, tribes, and the Federal Emergency Management Agency from needing a permit under the Clean Water Act to use fire retardant.

V. COST

None of the bills on this hearing have received a formal Congressional Budget Office (CBO) cost analysis. However, for S. 2561, a similar bill to H.R. 200 (FIR Act), CBO estimated the legislation would not affect direct spending or revenue.¹³³

VI. ADMINISTRATION POSITION

The Biden administration’s position on the bills included in this hearing is unknown at this time. The administration did provide testimony on S. 2562, a bill similar to H.R. 200. Testimony from the FS and DOI both acknowledged the problem that bill was seeking to address. DOI testimony expressed concern that the language was overly broad, while the FS testimony merely sought to continue working with the bill sponsors to address concerns.¹³⁴

VII. EFFECT ON CURRENT LAW (RAMSEYER)

H.R. 200

H.R. 1246

¹³³ Congressional Budget Office, “S.2561 - A bill to amend the Forest and Rangeland Renewable Resources Planning Act of 1974 and the Federal Land Policy and Management Act of 1976 to provide that a land resource management plan or land use plan approved, amended, or revised under those Acts shall not be considered to be a continuing Federal agency action or constitute a discretionary Federal involvement or control for a distinct Federal purpose, and for other purposes”, November 15, 2022, <https://www.cbo.gov/publication/58814>.

¹³⁴ Christopher French, Deputy Chief, U.S. Forest Service, “Statement before the United States Senate Committee on Energy and Natural Resources”, October 21, 2021, <https://www.energy.senate.gov/services/files/AE540BC1-353E-4918-9046-9AEF345F15A3>. Jeffery Rupert, Director, Office of Wildland Fire, U.S. Department of the Interior, Statement before the Senate Committee on Energy and Natural Resources”, October 21, 2021, <https://www.energy.senate.gov/services/files/48051868-0542-49F4-AFF4-95DD386013E2>.