



March 7, 2023

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The Honorable Tom Vilsack  
Secretary, U.S. Department of Agriculture  
1400 Independence Avenue, SW  
Washington, DC 20250

Dear Secretary Vilsack:

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 intrusions 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. 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. Overturning this 30-year-old exemption would set a bad precedent, opening a Pandora’s box, and likely putting other agricultural or silvicultural exemptions at risk.

Currently there is no NPDES permit established for aerial application of fire retardant. A rulemaking to establish a general permit would take several years and cost millions of dollars that could better be spent elsewhere. Even if EPA develops a national permit, states are not required to adopt it, but can modify or create their own. This would further complicate firefighting across state lines. A NPDES permit would add a large and wasteful administrative burden to Forest Service operations and would 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 under this section, 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 to not allow the use of fire retardant in fire suppression would be unconscionable.

The Congress would 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. Legislating during such an emergency is certainly less desirable than acting now.

Sincerely,

*Steve Ellis*

Steve Ellis, Chair

National Association of Forest Service Retirees (NAFSR)

cc:

Under Secretary Wilkes

Chief Moore