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Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FOREST SERVICE EMPLOYEES)	
FOR ENVIRONMENTAL ETHICS,)	
)	Cause No.
Plaintiff,)	
)	COMPLAINT
vs.)	
)	
UNITED STATES FOREST)	
SERVICE,)	
)	
Defendant.)	
_____)	

INTRODUCTION

1. In this Complaint Plaintiff Forest Service Employees for Environmental Ethics (FSEEE) challenges the actions of Defendant United States Forest Service on the agency’s discharge of aerial fire retardant into navigable waters of the United States in violation of the Clean Water Act.

2. As more fully set forth below, FSEEE alleges here that the actions of the Forest Service in this matter are arbitrary and capricious, an abuse of

discretion, or otherwise not in accordance with law under the Clean Water Act (CWA), Section 505, 33 U.S.C. §1365. FSEEE seeks declaratory and injunctive relief to mitigate, redress, or avoid irreparable injury to the environment and FSEEE's interests under the law.

3. If FSEEE prevails, FSEEE will seek an award of costs and attorney fees pursuant to the CWA and/or the Equal Access to Justice Act, 28 U.S.C. § 2412.

JURISDICTION

4. This action arises under the CWA, Section 505, 33 U.S.C. §1365 as more fully set forth below. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1361 (mandamus); 28 U.S.C. §§ 2201-02 (declaratory judgment and further relief).

5. An actual, justiciable controversy exists between Plaintiff and Defendant. Plaintiff has exhausted any administrative remedies. This Court has the authority to grant the relief requested.

VENUE

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and LR 3.2. The Forest Service Northern Region headquarters is located in this Division. The Forest Service regularly uses chemical fire retardant to fight wildfires on

national forests within this District. The chemical retardants used by wildland firefighting agencies are tested and approved by the United States Department of Agriculture's Missoula Technology and Development Center, located in this Division. The Forest Service also has a Fire Sciences Lab and Smokejumper Base in this Division. Plaintiff has members who reside in this Division, and who have been injured by the Forest Service actions and activities complained of in this Complaint. Moreover, the Forest Service has discharged aerial fire retardant into navigable waters in this Division without a National Pollution Discharge Elimination System (NPDES) permit.

PARTIES

7. Plaintiff Forest Service Employees for Environmental Ethics is a 501(c)(3) nonprofit organization founded in 1989, with its principal place of business in Eugene, Oregon. FSEEE is composed of thousands of concerned citizens, present, former, and retired Forest Service employees, and other government resource managers. FSEEE's mission is to forge a socially responsible value system for the Forest Service based on a land ethic that ensures ecologically and economically sustainable resource management. FSEEE believes that the land is a public trust, to be passed with reverence from generation to generation. FSEEE is a unique concept—a national organization of government employees holding the Forest Service accountable for responsible land stewardship.

8. FSEEE's members use and enjoy the National Forest System for outdoor pursuits of every kind, including scientific research, boating, backpacking, birdwatching, camping, climbing, fishing, hunting, and sightseeing. In their pursuit of these activities, our members rely on clean water. Degradation of water quality from aerial retardant harms FSEEE's members' use and enjoyment of national forests, including the forests' fish, wildlife, plants, and waters. FSEEE's members intend to continue to use and enjoy these and other areas on the national forests frequently and on an ongoing basis in the future, including this year.

9. The aesthetic, recreational, scientific, and religious interests of FSEEE's members have been and will be adversely affected and irreparably injured if the Forest Service continues to act and fails to act as alleged herein. These are actual, concrete injuries caused by the failure of the Forest Service to comply with mandatory duties under the CWA and other federal laws. The injuries would be redressed by the relief sought.

10. FSEEE has exhausted any available administrative remedies. Reviewable final agency action exists and is subject to this Court's review under Section 505(a), 33 U.S.C. §1365(a).

11. Defendant United States Forest Service is an agency of the United States Department of Agriculture, and is responsible for the lawful management of our national forests.

BACKGROUND

12. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source to waters of the United States except in compliance with, among other conditions, a NPDES permit issued pursuant to §402 of the CWA, 33 U.S.C. §1342.

13. Fire retardant is a pollutant.

14. Aircraft are point sources.

15. The U.S. Forest Service and its contractors have discharged and continue to discharge retardant from aircraft into navigable waters without an NPDES permit.

16. Between 2012 and 2019, the Forest Service discharged retardant pollutant on at least 459 occasions, totaling 761,282.5 gallons, from aircraft directly into national forest navigable waters.

17. The Forest Service asserts that a June 23, 2011, letter from EPA excuses its failure to obtain a NPDES permit.

18. However, the factual basis for the letter – “operators [] are not discharging into waters of the US” – is simply not true. *See* EPA letter of June 23, 2011.

19. The Forest Service acknowledges hundreds of retardant discharges into waterways from misapplications and allowable exceptions.

20. An EPA opinion cannot amend the Clean Water Act, which requires a NPDES permit for the discharge of fire retardant from aircraft into waterways.

21. The Forest Service's discharges of retardant pollutants into waterways from aircraft point sources is continuous, on-going, and unpermitted, in violation of the Clean Water Act.

22. In compliance with CWA Section 505(a), 33 U.S.C. §1365(a), on June 23, 2022, FSEEE sent a 60-Day Notice of Intent to Sue for violation of the CWA to the EPA Administrator, the relevant Regional Administrators of the EPA, the states in which the violations are occurring, and to the Chief of the Forest Service, the alleged violator.

23. Sixty days have passed since the notice was served, and the violations complained of in the notice letter are continuing at this time.

CLAIMS FOR RELIEF

COUNT 1

24. Section 301(a) of the CWA, 33 U.S.C. §1311(a), prohibits the discharge of pollutants from a point source to waters of the United States except in compliance with, among other conditions, a NPDES permit issued pursuant to §402 of the CWA, 33 U.S.C. §1342.

25. The Forest Service's discharges of retardant pollutants into waterways from aircraft point sources is continuous, on-going, and unpermitted, in violation of the CWA.

26. The term "discharge of pollutants" means any addition of any pollutant to navigable waters from any point source. 33 U.S.C. §1362(12).

27. The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. 33 U.S.C. §1362(6).

28. Fire retardant is a pollutant. Aerially delivered fire retardant formulations currently in use are primarily inorganic fertilizers (ammonium phosphates) or other inorganic salts (magnesium chloride).

29. The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. 33 U.S.C. §1362(14).

30. Aircraft are point sources.

31. The U.S. Forest Service and its contractors have discharged and continue to discharge retardant from aircraft into navigable waters.

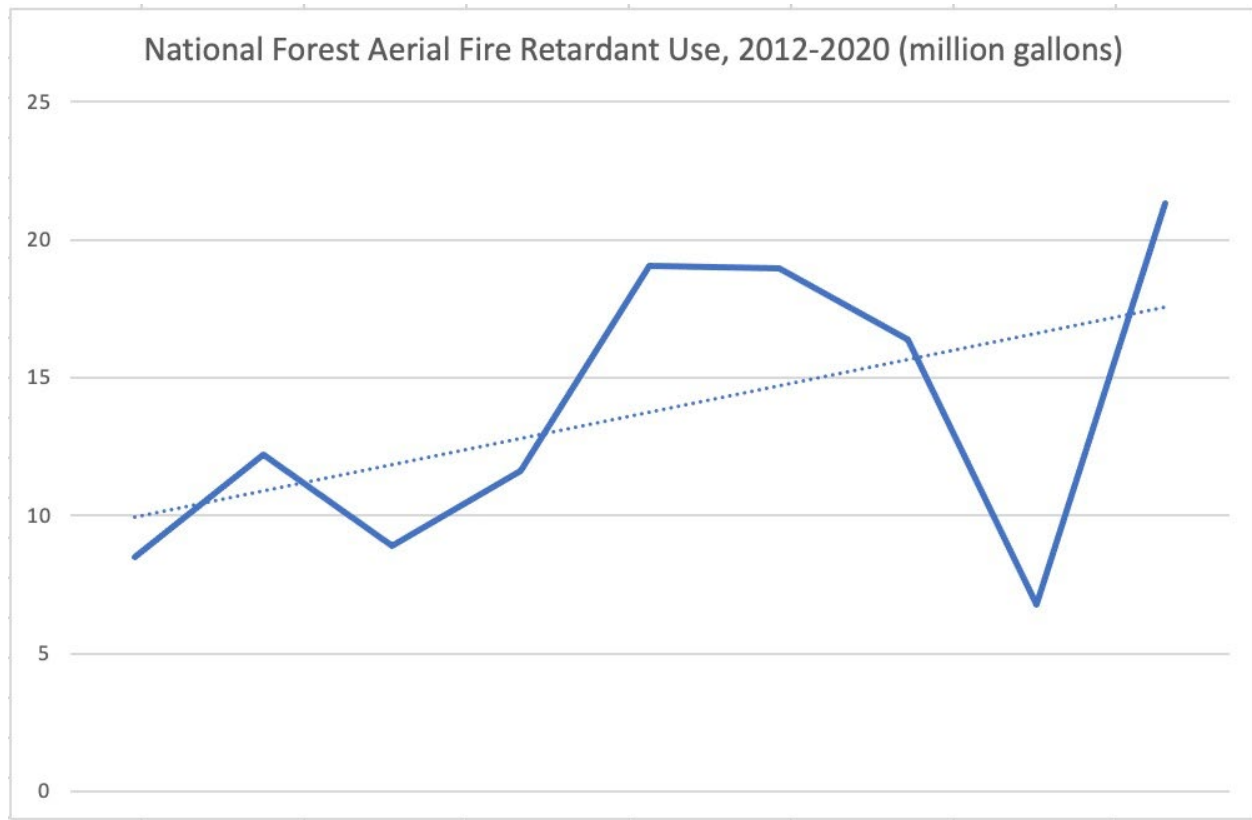
32. Aerial retardant drops are not allowed in waterways or buffers surrounding them or in avoidance areas that have been mapped for certain threatened, endangered, proposed, candidate or sensitive species. This national direction is mandatory and is implemented except in cases where human life or public safety is threatened and retardant use within avoidance areas could be reasonably expected to alleviate that threat.

33. Despite that mandate, the USFS admits that between 2012 and 2019, on at least 459 occasions, it discharged retardant pollutant, totaling 761,282.5 gallons, from aircraft directly into national forest navigable waters.

34. If fire retardant enters a waterway, direct effects include lethal and sublethal effects on aquatic species. These could include mortality of organisms, change in abundance and composition of aquatic communities, or adverse impacts to habitat.

35. From 2012 to 2019 there were 138 intrusions into threatened or endangered species habitat that required consultation. As such, the expected rate of intrusions is assumed to be 17 per year.

36. Retardant use is increasing, suggesting that more retardant will be discharged to navigable waters in the future:



37. The Forest Service’s “may affect” determination for 57 aquatic threatened and endangered species and its “likely to adversely affect” finding for an additional 32 aquatic species from retardant applications are further acknowledgements that the Forest Service regularly discharges aerial retardant pollution into waterways.

WHEREFORE, Plaintiff Requests the Following Relief:

- A. Declare that the Forest Service’s continuous, on-going, and unpermitted discharges of retardant pollutants into waterways from aircraft point sources violate the CWA;

- B. Grant Plaintiff injunctive relief to compel the Forest Service to comply with applicable environmental statutes, prevent irreparable harm, and satisfy the public interest;
- C. Award Plaintiff its costs, expenses, expert witness fees, and reasonable attorney fees under applicable law; and
- D. Grant Plaintiff such further relief as may be just, proper, and equitable.

DATED this 11th day of October, 2022.

/s/ Timothy M. Bechtold
BECHTOLD LAW FIRM, PLLC

Attorney for FSEEE

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Forest service Employees for Environmental Ethics

(b) County of Residence of First Listed Plaintiff _____

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Timothy Bechtold PO Box 7051 Missoula, MT 59807 406-721-1435

DEFENDANTS

U.S. Forest Service

County of Residence of First Listed Defendant _____

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTIONCite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 USC 4331; 15 USC 1531; 33 USC 1365Brief description of cause:
lawsuit alleges violations of environmental laws**VII. REQUESTED IN COMPLAINT:**☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE

10/10/2022

SIGNATURE OF ATTORNEY OF RECORD

/s/Timothy M. Bechtold

FOR OFFICE USE ONLY

RECEIPT # _____

AMOUNT _____

APPLYING IFP _____

JUDGE _____

MAG. JUDGE _____