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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.

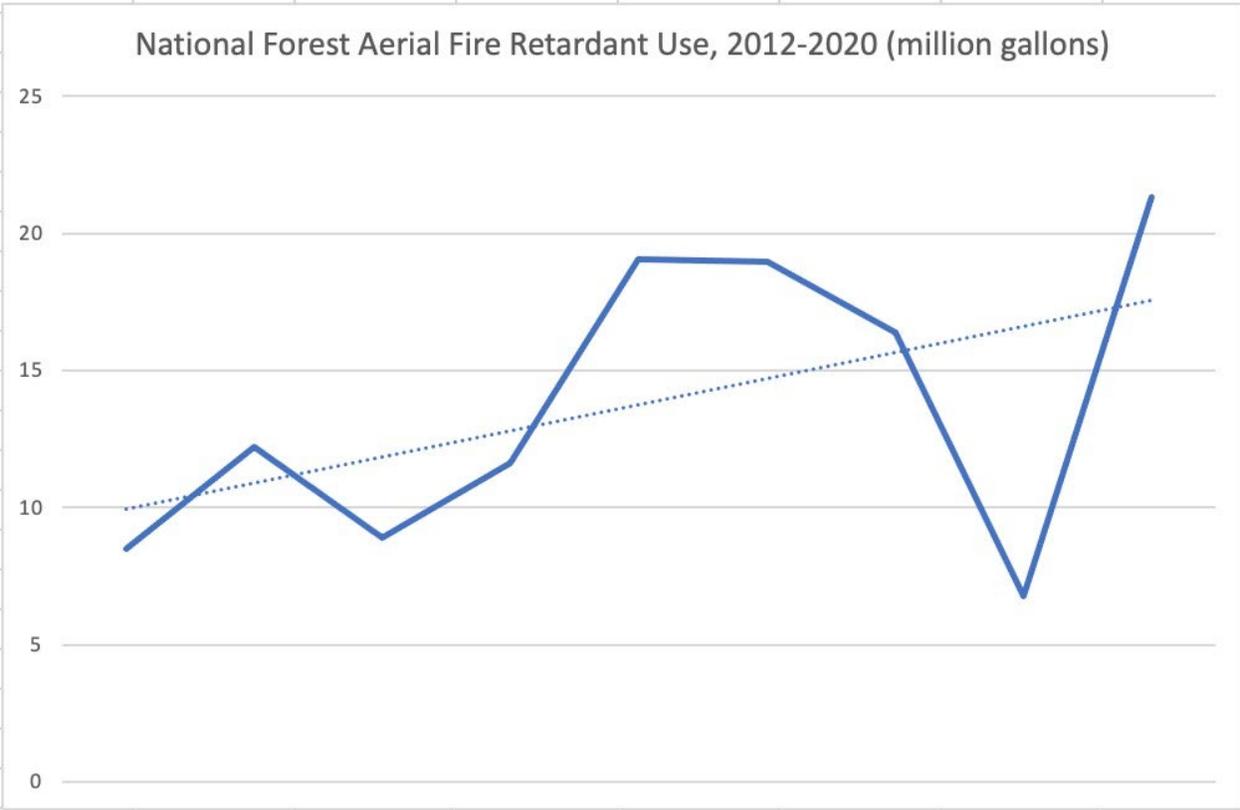
32. Aerial retardant drops are not allowed in waterways or buffers surrounding them or in avoidance areas that have been mapped for certain threatened, endangered, proposed, candidate or sensitive species. This national direction is mandatory and is implemented except in cases where human life or public 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
(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
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
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
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)
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1 Incorporated or Principal Place of Business In This State
2 2 Incorporated and Principal Place of Business In Another State
3 3 Foreign Nation
4 4
5 5
6 6

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

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 ACTION
Cite 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 1365
Brief 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