

**TESTIMONY of
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**BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES— SUBCOMMITTEE ON FEDERAL
LANDS**

MARCH 23, 2023

Concerning

**H.R. 200, Forest Information Reform Act
H.R. 1473, Targeting and Offsetting Existing Illegal Contaminants Act
H.R. 1567, Accurately Counting Risk Elimination Solutions Act
H.R. 1586, Forest Protection and Wildland Firefighter Safety Act of 2023**

Chairman Tiffany, Ranking Member Neguse, and Members of the Subcommittee, thank you for the opportunity to present the views of the U.S. Department of Agriculture (USDA) on several bills under the jurisdiction of the U.S. Forest Service (Forest Service).

H.R. 200 – Forest Information Reform Act

The Forest Service takes seriously its responsibility to comply with the Endangered Species Act (ESA) regulations, and the health and vitality of listed species. The Forest Service’s mission requires us to integrate the need to protect listed species with our obligation to carry out management actions to promote healthy and resilient ecosystems, protect our communities, support a diversity of species, and deliver many other benefits that the American people enjoy and depend on.

As you are aware, the Endangered Species Act of 1973 requires federal agencies to consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (Services) when their discretionary actions might affect either ESA species or designated critical habitat. This consultation ensures that actions of federal agencies do not jeopardize listed species or adversely modify their critical habitat. Even after a biological opinion has been rendered by the Services, there are circumstances that might alter the Services’ original conclusions of the action’s impact on species or critical habitat which can trigger a requirement to reinitiate of consultation.

A pair of Ninth Circuit court decisions, commonly referred to as *Pacific Rivers Council (PRC)* and *Cottonwood*, which held that a new ESA listing of a species or critical habitat designation required the Forest Service to reinitiate consultation on approved land management plans because either the plan was an “ongoing action” (*PRC*) or because the agency retains discretion to authorize site-specific projects governed by the land management plan (LMP) (*Cottonwood*), have no basis in the ESA or its implementing regulations. LMPs provide general management direction for an

entire national forest or grassland. This direction is then integrated into projects, which normally requires a second decision and ESA consultation to dictate what on-the-ground actions can be taken. A Tenth Circuit decision (commonly known as *Forsgren*) reached a different conclusion than the Ninth Circuit's conclusions in *Cottonwood*, and instead held that the Forest Service did not need to reinstate consultation on an approved plan with the Services because LMPs are neither ongoing nor self-executing actions for purposes of the ESA.

Congress enacted legislation in the FY 2018 Consolidated Appropriations Act (CAA) so that the Secretary of Agriculture did not need to reinstate consultation on land management plan decisions when a new species is listed or critical habitat is designated in areas covered by land management plans less than 15 years old. The CAA also provided an exemption, or "safe harbor," for reinstatement of consultation for five years from the enactment of the bill or when a species is listed or critical habitat is designated regardless of when a land management plan had been adopted. Project level consultation on every federal action was not affected by the CAA and continued.

H.R. 200 exempts the Forest Service from reinstating consultation with the Services on plans that have already been subject to consultation at the time they were approved, revised, or amended when a species is subsequently listed, critical habitat is designated, or new information concerning a listed species or critical habitat becomes available. It eliminates the time limits on the statutory exemption enacted in the 2018 CAA, making all land management plans exempt regardless of their age or when new ESA listings and new critical habitat designations were made. This bill would also eliminate any requirement that the Forest Service reinstate consultation on LMPs when new information becomes available. Under Forest Service guidelines, new information is considered in project-level documents when it could influence the decision and subsequent actions that could affect a species listed under the ESA.

With the safe harbor provision in the 2018 CAA expiring today, March 23rd, about eighty-seven land management plans across the nation could now be subject to litigation. Since enactment of the CAA, the Forest Service has maintained its responsibilities in consulting with the Services on projects. Every agency action must comply with the ESA. The requirement to reinstate consultation on LMPs that affect ESA listed species as redundant to the project-level consultations that are required. Furthermore, the Forest Service believes that concerns with new information and newly listed species and their critical habitat are adequately addressed through consultation at the project level. H.R. 200 directs that the agency is not required to reinstate consultation on land management plans when there is new information, a new species listing, or a new critical habitat designation.

The USDA and the Department of the Interior (DOI) realizes ESA consultation is an issue with a number of equities that need to be addressed. We are committed to continuing to work together towards a legislative solution that allows for timely decision making, while maintaining the important wildlife protections afforded by the Endangered Species Act. As drafted, the Administration has concerns and looks forward to working with the Committee and the bill sponsor to address concerns with the bill. We want to ensure clarity on how consultation for specific actions or projects can provide the American public with confidence that the agency is upholding its responsibilities to protect listed species and their habitat while providing the many benefits we gain by managing our forests.

H.R. 1473 – Targeting and Offsetting Existing Illegal Contaminants Act

H.R. 1473 establishes an environmental restoration program under the jurisdiction of the USDA Forest Service, consistent with the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601). The goal of this bill is to identify, investigate, research, and develop solutions to and remediation of contamination resulting from the cultivation of cannabis on National Forest System (NFS) lands. The bill additionally amends the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136l(b)(2)) to amend criminal penalties identified in that Act both independently and in connection with other federal offenses.

The Forest Service faces significant challenges related to illegal cannabis cultivation on NFS lands. More than 4,000 illegal grow sites have been identified on NFS lands. These sites pose problems for Forest Service law enforcement, public safety, and the environment with pesticides poisoning wildlife, soil, and water. In 2022, Forest Service staff and partners addressed 56 cultivation sites on 10 national forests, removing 49,318 pounds of trash, 68.7 miles of plastic irrigation line, and 169 containers of banned and illegal pesticides at a cost of over \$2.3 million. The Forest Service was able to restore over 307 million gallons of surface water diversions associated with these 56 sites.

The Forest Service appreciates the bill sponsors' intent to significantly enhance the Forest Service's ability to address trespass cultivation, including cannabis cultivation. The USDA supports the enhancements The USDA would like to work with the bill sponsors and Subcommittee on technical changes to better define the Forest Service's enforcement authority and the appropriate remediation activities to be undertaken. The ultimate outcome of this work is remediation of the damaged ecosystems and enhanced public safety.

The USDA supports the intent of the Targeting and Offsetting Existing Illegal Contaminants Act and looks forward to working with the bill sponsors and Subcommittee on technical changes to further support the Forest Service's ability to address trespass cultivation and the associated negative impacts. The Department of the Interior advises similar authority for management of DOI lands could be beneficial.

H.R. 1567 – Accurately Counting Risk Elimination Solutions Act

H.R. 1567 requires the U.S. Department of Agriculture (USDA) and Department of Interior (DOI) to include a publicly available report on hazardous fuels reduction activity acres in the yearly President's Budget. This report must account for each acre only once regardless of whether multiple hazardous fuels reduction activities were carried out on that acre during the year. In addition, the report must identify the following: the location of the acres and if they are in the wildland-urban interface; the level of wildfire risk on the first and last day of the reporting period; the types of hazardous fuels activities completed; the cost per acre by treatment type; and the effectiveness of the hazardous fuels reduction activities on reducing wildfire risk.

The bill requires the USDA and DOI to implement standardized procedures for tracking data related to hazardous fuels reduction activities. These procedures must include standardized data reviews of the accuracy and timely input of data used to track hazardous fuels reduction activities; verification methods that validate the data; an analysis of the effectiveness of the hazardous fuels

reduction activities on reducing the risk of wildfire; and methods to distinguish which acres are located within and outside of the wildland-urban interface.

Further, The USDA and DOI are required to provide a report within two weeks after implementing the standardized procedures required describing the procedures and program and policy recommendations to address any limitations in tracking data related to hazardous fuels reduction activities. Not later than two years after the date of enactment, the Government Accountability Office shall conduct a study on the implementation of this Act, including any limitations with respect to reporting hazardous fuels reduction activities or tracking data related to hazardous fuels reduction activities.

The USDA agrees that accurately tracking hazardous fuels treatments and the reduction of wildfire risk to communities is important for accountability to the American public and will help provide a comprehensive understanding of wildfire risk reduction. Tracking each dollar spent can improve our understanding of the funding needed to achieve the desired risk reduction to communities and better maintain our landscapes. However, a report accounting for each acre only once would limit the ability of decisionmakers and the public to understand the connection between risk reduction and financial accountability. For example, often the same acre requires multiple treatments (3 treatments on average) in a short period of time, such as mechanical thinning first and then prescribed fire to achieve the desired risk reduction. Once this phase is complete, those acres can be moved to a maintenance strategy (the point at which low-cost thinning or burning treatments are conducted at the appropriate fire-return intervals for a given landscape, on average every 10 to 15 years). Only accounting for one phase of a multi-phased treatment would only provide a partial window to the true cost of risk reduction and resilience.

The USDA supports the reporting of treatment locations, type of treatment, and cost of treatment across the landscape annually. The timing outlined in the bill on the first and last day of the reporting cycle will require continued development of metrics. Currently, the Forest Service has metrics to evaluate fire risk to communities, however these metrics continue to evolve with continued scientific analysis. The sensitivity of these metrics to detect change in vegetative conditions at fine scale is continuing to be evaluated. Fine scale detection is critical to ensure all treatments are evaluated to determine effectiveness with reducing fire risk to communities. We expect that these metrics within an annual report will evolve and change over time. Development of the standard structure and procedures will take time and coordination both internally and with DOI.

Finally, excluding acres improved or maintained by wildfire is achievable, however, we make note that the maintenance of acres by wildfire will be critical to the long-term success of fire risk reduction to communities. As more acres are treated to reduce fire risk, they must be maintained, and one critical means for doing so is through naturally occurring fire. We want to ensure that reporting requirements will have the desired effect of both improving fiscal accountability and serving as a tool that can improve the health and resilience of our forests and communities to the threat of wildfire.

The USDA appreciates the intent of the bill and would like to work with the Subcommittee and bill sponsors to address our concerns.

H.R. 1586 – Forest Protection and Wildland Firefighter Safety Act

H.R. 1586 amends the Federal Water Pollution Control Act, also known as the Clean Water Act (CWA), to provide the Secretary of Agriculture and Secretary of the Interior the authority to discharge fire retardant and other chemicals for fire suppression, control, or prevention activities. The bill exempts the Forest Service and certain other agencies from needing a permit under section 402 of the CWA.

In the western U.S., National Forests supply drinking water to almost 90 percent of the people served by public water systems. The Administration is committed to providing firefighters with the investments and tools they need to protect communities, our forests and sources of drinking water while at the same time maintaining the integrity of the Clean Water Act. The Administration does not, however, believe that an amendment to the Clean Water Act is necessary in light of the administrative steps that are being taken.

The CWA requires National Pollutant Discharge Elimination System (NPDES) permits for any discharge of a pollutant from a point source to navigable waters of the United States. The Forest Service's position has been that an NPDES permit was not required for fire control activities based upon guidance received from EPA in 2003. On February 16, 2023, the USDA Forest Service and EPA entered into a Federal Facility Compliance Agreement to address the Forest Service's discharge of pollutants during aerial fire-retardant applications and to require the Forest Service to obtain NPDES permit coverage for discharges to waters.

Currently, there is no NPDES permit established for aerial application of fire retardant, however the Administration is working diligently to come into compliance with the Clean Water Act. The Forest Service is working collaboratively with EPA on a general permit for aerially delivered retardant. EPA estimates it will take between two to three years to develop and issue an EPA permit as well as coverage in 47 states, which issue their own permits, a process that would take about another year depending on the states' own permit timelines.

Current direction in the Nationwide Aerial Application of Fire Retardant on National Forest System Land Record of Decision (Decision) from 2011 has demonstrated it is very effective at reducing retardant 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. Over the last 10 years, less than one percent of retardant drops impacted American waterways.

Aerially delivered long-term fire retardant is part of an integrated firefighting strategy and is an essential tool the Forest Service and the interagency community uses in support of ground-based firefighting resources. Long-term retardants alter the way wildfire burns, decreases fire intensity, and slows the advance of fire, even after the water they originally contained has evaporated. If the Forest Service is only able to use water from airtankers, our ability to successfully suppress fires would be significantly impacted. In addition to the impact on our wildfire response, we must consider the implications for our wildland firefighter workforce. Ensuring that we are allowed to continue using wildfire retardant to protect homes and communities is the highest priority of the administration. We believe retardant can be (and has been) delivered without compromising public health and the environment.

The USDA is committed to CWA compliance and protection of water quality and keeping our communities and wildland firefighters safe. The nation is experiencing hotter, drier and longer wildfire seasons. Wildfires are growing, both in size and severity, due in part to fuels buildup, fire exclusion, development in fire-prone areas and climate change. The dedication, bravery, and professional integrity of our wildland firefighters and support personnel is second to none. We must protect approximately 11,300 Forest Service wildland firefighters and the communities they defend, using every tool available, including fire retardant. As we work with our many partners to assist communities impacted by wildfires, we are committed, through shared stewardship, to change this trend in the coming years. While we agree with the Sponsors' view that the application of fire retardant is an essential tool for protecting communities, forests, and our firefighters, we believe we can protect this long-standing practice without amending the CWA, which is essential to protecting public health and our drinking water supplies. While the Administration cannot support this bill, we look forward to working with the bill sponsors and Subcommittee on efforts that ensure the integrity of the CWA while continuing to allow aerial retardant as part of the interagency suppression response. Nonetheless, we are reviewing a technical assistance request and look forward to working with the bill sponsors and Subcommittee on efforts that ensure the integrity of the CWA while continuing to allow aerial retardant as part of the interagency suppression response.

Thank you again for the opportunity to testify on these bills, and I welcome any questions.