

1. **FORESTS: Judge threatens to block fire-retardant drops, put USDA official in jail** (01/11/2008)

Dan Berman, E&ENews PM senior reporter

A federal judge in Montana is threatening to block the Forest Service's use of fire retardant drops and throw Agriculture Undersecretary Mark Rey in jail.

U.S. District Judge Donald Molloy today ordered the Forest Service to court to explain why the agency has failed to conduct proper studies of fire retardant drops. A hearing is scheduled for Feb. 26 in Missoula.

If the agency's arguments are unpersuasive, Molloy said he would consider enjoining the use of all aerial fire retardants nationwide, except for water, until the Forest Service complies with his orders and federal environmental laws. As an alternative, Molloy suggests placing Rey in jail or under house arrest.

"In my view, the Forest Service is in contempt of the law and the prior orders of this court," Molloy wrote. "Nonetheless, a hearing is appropriate before reaching a final conclusion on that issue."

At issue is firefighters' use of fire retardant containing fish-killing ammonia compounds.

While federal and state agencies drop an average of 15 million gallons of retardant annually, up to 40 million gallons in some years, the Forest Service Employees for Environmental Ethics complained the service didn't review the environmental impact, violating the National Environmental Policy Act (NEPA). In addition, Section 7 of the Endangered Species Act requires the agency to consult with the National Marine Fisheries Service and the Fish and Wildlife Service.

"The Forest Service has, throughout these proceedings, evidenced a strategy of circumventing, rather than complying with, NEPA and ESA," Molloy wrote in an order today. "The apparent pattern suggests a strategy of looking for ways to avoid the law's mandate as opposed to looking for a means of complying with the law."

The environmental group has not requested a nationwide injunction against the fire retardant drops, instead favoring a contempt finding against Rey, the former timber industry lobbyist who oversees the Forest Service at USDA.

"We're not turning Mark Rey into a criminal," said the group's executive director, Andy Stahl. "We are seeking to find some sensible means to force the government to do the studies the law requires."

In a statement, a Forest Service spokesman said the agency is acting in good faith. "We take very seriously our obligations to perform the environmental analysis required by law and have made every effort to comply with the court's rulings in this case," said Joe Walsh. "We expect to demonstrate the government's good faith in further proceedings before the court."

'Avoiding the law'

Today's order is the latest in the five-year-old lawsuit. In 2005, Molloy ruled that the Forest Service violated NEPA and ESA by failing to study the environmental effect of using the flame retardant, blamed for fish kills including the death of 20,000 fish in central Oregon in 2002.

Molloy was scheduled to consider the contempt charge against Rey in October, but the Forest Service responded by filing a new environmental assessment from the

Forest Service, biological opinion from the National Marine Fisheries Service, and a last-minute, qualified, "finding of no significant impact" from Forest Service chief Gail Kimbell ([Greenwire](#), Oct. 15, 2007).

In that biological opinion, NMFS found potential harm to 24 threatened and endangered species in the Northwest. Among the fish in jeopardy are nine species of Chinook salmon, two species of chum salmon, two species of coho salmon, Snake River sockeye salmon, 10 species of steelhead, the shortnose sturgeon and green sturgeon.

"It's the largest jeopardy opinion in U.S. history," Stahl said, "and yet the government a day late and a dollar short made a finding of no significant impact. It's facially irrational."

The environmental group wants the Forest Service to treat fire retardant like they do pesticides, which the agency uses infrequently and in limited areas, generally after much study. "The Forest Service uses retardant wherever, whenever, however, as much as they can," Stahl said. "They are both toxic chemicals being used to deal with a perceived environmental problem."

Fire retardant is approximately 85 percent water, but ammonia compounds constitute up to 90 percent of the product, with thickeners such as guar gum and attapulgate clay, dyes and corrosion inhibitors making up the rest. Retardant is favored because it rapidly reduces wildfire intensity and the rate of spread, by robbing the fire of oxygen, and slowing the rate of fuel combustion with inorganic salts that change how a fire burns.

As part of its biological opinion, NMFS provided a draft of "reasonable and prudent alternatives" such as additional monitoring and evaluations that the Forest Service can implement to ensure chemical fire retardant does not harm species at risk. The group suggests preventing drops in wilderness areas near critical watersheds and waterways with threatened and endangered fish species.

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