

SECTION-BY-SECTION ANALYSIS OF “WILDFIRE EMERGENCY ACT”

Senator Dianne Feinstein, May 2021

Title I – Landscape-Scale Forest Restoration

Section 101: Definitions.

Defines “conservation finance agreement” as an agreement of 2-20 years in duration that

- 1) may provide that performance during the second and subsequent years of the agreement is contingent on the appropriation of funds; and
- 2) may include a cancellation payment to the partner if the agreement is not funded in future years.

Section 102: Purpose.

The purpose of this title is to increase the pace and scale of forest restoration and reduction in the risk of uncharacteristic wildfire through –

- 1) Conservation finance agreements with sufficient Forest Service funding commitments to leverage non-Federal investment in landscape-scale forest restoration projects;
- 2) Project planning and analysis procedures to scale up to the landscape level of 100,000 acres or more;
- 3) Collaborative development and ecological standards for landscape projects; and
- 4) Use of interagency personnel transfers to staff up for landscape-scale projects.

Section 103: Selection and Implementation of Landscape-Scale Forest Restoration Projects

- Subsection (a) provides that landscape-scale forest restoration projects (“projects”) can be implemented on National Forest System lands and, in coordination with non-Federal entities, on adjoining lands.
- Subsection (b) provides that the Secretary shall implement no more than 20 projects in the 5-year period beginning on the date of enactment of the Act.
- Subsection (c)(1) establishes eligibility criteria for the a project, including:
 - Purposes shall include 1) restoration of ecological integrity; 2) restoration of appropriate natural fire regimes; and 3) wildfire risk reduction in the wildland urban interface (WUI), to the extent that the project includes lands in the WUI
 - A collaborative group representing diverse interests must develop and support the project

- The project shall be based on a landscape assessment that
 - 1) covers at least 100,000 acres (with limited exceptions for assessments of at least 50,000 acres for Eastern forests, or at least 80,000 acres if the assessments are already complete or substantially completed and the Secretary determines a larger assessment area is not necessary)
 - 2) evaluates ecological integrity and reference conditions for the landscape;
 - 3) identifies areas that have departed from reference conditions;
 - 4) identifies criteria for determining appropriate restoration treatments;
 - 5) are based on the best available scientific information, including, where applicable, high-resolution imagery and LiDAR; and
 - 6) identifies priority restoration strategies.

- Restoration actions shall 1) emphasize the reintroduction of characteristic fire; 2) for any proposed mechanical treatments, seek to restore reference conditions and the establishment of conditions facilitating prescribed fire; and 3) fully maintain or contribute to the restoration of reference old forest conditions, including protecting large old trees

- The project shall be consistent with all applicable environmental laws, and the roadless rule

- Multiparty monitoring is required

- No new permanent road may be built as part of the project, and any temporary roads needed to implement the project shall be decommissioned within 3 years of the project's completion

- The project uses an efficient approach to landscape-scale analysis and decisionmaking that is consistent with NEPA

- Subsection (c)(2) provides that if the Secretary determines there are an insufficient number of projects that fully comply with all the foregoing eligibility requirements, the Secretary may, during the first two years of the Act's implementation, select up to 5 landscape-scale forest restoration projects that:
 - 1) have purposes and needs that the Secretary determines are consistent with the purposes and needs described above;
 - 2) are supported by landscape assessments that substantially if not completely comply with the foregoing requirements, as long as they meet the minimum size criteria and are supported by the best available scientific information; and
 - 3) otherwise meet the foregoing eligibility requirements.

- Subsection (d) directs the Secretary to evaluate eligible projects for funding based on
 - 1) specified criteria;

2) the extent to which the project uses identified approaches to project planning and implementation; and

3) the recommendations of an advisory panel.

Evaluative criteria include

- The demonstrated need and opportunity to restore the ecological integrity of the landscape;
- The importance of watersheds in the area for downstream water supply, and opportunities to restore those watersheds;
- Potential extent of non-Federal cost sharing for the project, and the extent of the non-Federal cost-share that is in the form of cash contributions;
- The quality of data for the landscape;
- Whether the project proposes to use innovative approaches to resource surveys that are less costly and time-consuming but still effective;
- Whether the project would reduce the number of miles of permanent roads on NFS lands that are not necessary for resource management or recreational access;
- Whether the project would quantify ecosystem service benefits;
- Whether the project has the potential to support wood processing infrastructure and increase local employment, particularly in economically disadvantaged communities;
- The scale of the landscape assessment for the project (larger assessments preferred); and
- Whether the project would restore ecological integrity across the landscape and reduce the risk of uncharacteristic fire in the WUI.

Approaches to planning and implementation include:

- 1) The use of conservation finance agreements as described in section 104
 - 2) The use of interagency personnel collaboration to support the project through authorities such as the Intergovernmental Personnel Act and the Good Neighbor Authority
- Subsection (e) establishes an advisory panel to provide recommendations on potential landscape-scale restoration projects that the Secretary is reviewing. The panel
 - Shall be composed of no more than 15 members, fairly balanced in points of view, and including experts in specified areas
 - Shall be exempt from the Federal Advisory Committee Act (FACA)

Section 104: Conservation Finance Agreements

- Conservation finance leverages investment from multiple sources to achieve a conservation end. The Forest Service's financing structures have not generally supported the landscape-scale projects at the level of 100,000 acres or more needed to restore the ecological resilience of forests and reduce the risk of uncharacteristic fire. The Collaborative Forest Landscape

Restoration Program, which does support large-scale projects, is limited to 24 landscapes across the nation, and currently closed to funding other projects.

- As a result, national forests typically implement forest restoration and hazardous fuel reduction projects of limited size based on available funds.
- There are substantial state, local, water district, private and other funding sources willing to invest in landscape-scale forest restoration projects if the Forest Service is willing and able to make long-term financial commitments.
- This section gives the Forest Service the ability to enter into conservation agreements that can leverage these non-Federal funding sources to plan and implement projects at the 100,000 acre scale.
- The section draws on two statutory precedents for conservation finance agreements:
 - 1) 10 USC 2306b, which gives DOD, the Coast Guard and NASA the authority to enter into multi-year contracts as an exception to rules that would otherwise govern under the Anti-Deficiency Act, consistent with the Act's language in 31 USC 1341(a)(1)(B) allowing statutory exceptions to its provisions. GAO has determined that 10 USC 2306b provides an exception to the recording statute's general requirement that DOD obligate funds sufficient to cover the government's full liability under a contract at the time that it is entered.
 - 2) Subsection (h) of 16 USC 6591c, which provides the Forest Service with flexibility in obligating funds for cancellation ceilings in stewardship contracts, was enacted in the FY 2018 Interior Appropriations bill as part of the fire funding fix.
- As explained further below, subsections (a) through (d)(2) use the structure and much of the language of 10 USC 2306b. Subsection (d)(3) is based closely on provisions from subsection (h) of 16 USC 6591c.
- This section involves agreements rather than multiyear contracts due to the Forest Service's typical approach to large projects. The Forest Service typically enters into an agreement for such projects with non-profit partner (e.g. National Forest Foundation, Wild Turkey Foundation, Pheasants Forever, etc.). The non-profit partner then serves as the general contractor entering into contracts with entities performing the service work of removing the small diameter trees.
- Subsection (a) closely follows the structure of subsection (a) of 10 USC 2306b. This provision directs the Secretary to establish a pilot program under which the Secretary may enter into a conservation finance agreement to implement a landscape-scale forest restoration project if the Secretary makes certain findings, including:
 - A reasonable expectation that the Secretary will request sufficient funding to avoid agreement cancellation

- The environmental analysis demonstrates that there is a sufficient supply of small-diameter material to support the conservation finance agreement
- The use of the conservation finance agreement will assist in the purpose of the Act described in section 102
- The project involves an entity that demonstrates experience in conservation finance public-private partnerships, and raising capital commitments from concessional and market rate investors or other external financing
- Subsection (b) reflects 10 USC 2306b(a)'s limitation of the authority to sign multiyear contracts to the heads of specified agencies. This subsection limits the Secretary's delegation of authority to sign conservation finance agreements to the Chief of the Forest Service.
- Subsection (c)
 - limits the use of conservation finance agreements to \$250 million in the aggregate or \$50 million for a single project; and
 - prohibits the Forest Service from paying interest to any other entity funding the project.
- Subsection (d)(1) very closely tracks the language from subsection (d) of 10 USC 2306b. This subsection concerns cancellation, termination, or modification of conservation finance agreements for insufficient funding.
 - Under subparagraph (A), if funds are not made available for the continuation of a conservation finance agreement into a subsequent fiscal year, the agreement must be cancelled or modified. This is an established principle of appropriations law. We think there is unlikely to be such a severe decrease in funding that there would be a need to invoke this provision for projects to reduce the risk of uncharacteristic wildfire, a Congressional priority.
 - Subparagraph (B) concerns cancellation provisions in conservation finance agreements, which limit the agency's liability if it cannot fund the whole agreement. Critically, these provisions will likewise limit the agreement partner's liability if the partner has a matching cancellation provision in its parallel contract with the entity performing the service work.
 - If the agreement has a cancellation provision, the Secretary may use multiple options to pay the cost of cancelling the agreement. This can include either funds originally available when the agreement was signed, or funds "currently available" when the agreement is cancelled.
 - GAO has determined that under the parallel language of 10 USC 2306b, DOD appears to have discretion as to when it must obligate funds for the costs of cancellation. Thus, DOD can either fund the costs of cancellation at the outset of the contract, or only fund such costs later if and when the contract is ever cancelled.

- Subsection (d)(2) is based closely on subsection (c) of 10 USC 2306b. This provision authorizes the Forest Service to enter into cancellation provisions for conservation finance agreements, and such provisions may include both recurring and nonrecurring costs of the partner.
- Subsection (d)(3) is very closely based on subsection (h) of 16 USC 6591c.
 - Subparagraph (A) allows the Secretary to implement funds in stages that are economically or programmatically viable to cover any potential cancellation or termination costs under a conservation finance agreement.
 - Subparagraph (B) allows the Forest Service to enter into a conservation finance agreement with up to \$25 million in unfunded cancellation costs before Congress must be notified. Note that this is not only the same standard as in 16 USC 6591c, it is also an adaptation of subsection (g) of 10 USC 2306b, which allowed the Defense Department to enter into multiyear contracts with up to \$100 million in unfunded cancellation costs before Congress must be notified. We expect any unfunded Forest Service agreement cancellation costs under the draft bill will be well below the \$25 million threshold for notifying Congress.
 - Subparagraph (C) requires parallel notification of OMB if the Forest Service enters into a conservation finance agreement with \$25 million or more in unfunded cancellation costs.
 - Subparagraph (D) makes explicit what is implicit in the previous provisions in subsection (d): The Secretary may enter into a conservation finance agreement that includes partner services in return for payments by the Secretary in future years that are contingent on the appropriation of funds. The agreement shall be subject to the requirement that the Secretary shall pay the partner cancellation costs up to the cancellation ceiling applicable to the agreement if funding for the completion of the agreement is not appropriated.
- We do not expect that based on these provisions, the Forest Service will be able to enter into conservation finance agreements where it contributes no funding upfront. Instead, we expect the Forest Service and its nonprofit partner will negotiate with the entity contracting to do the work how much it must be paid in various stages of the project. This reflects the bill language in subsection (d)(3)(A) that the Secretary “may obligate funds in stages that are economically or programmatically viable to cover any potential cancellation or termination costs for a multiyear agreement.”

Section 105: Administration

The Secretary shall issue guidance for implementing this title within 1 year of enactment.

Section 106: Report Evaluating Program Implementation

The Secretary shall submit to Congress a report on the implementation of this title within 4 years of enactment.

Section 107: Funding

- Subsection (a) authorizes \$250 million from fiscal years 2022 to 2026 to
 - 1) plan and develop landscape-scale forest restoration projects (“projects”); and
 - 2) to implement the projects selected under section 103.
- The authorization is for funding available until expended (no-year funding), which gives the Forest Service the flexibility to obligate funding for portions of a cancellation provision or some project activities substantially in advance of expending the funds for a landscape-scale, long-term project.
- Subsection (b) authorizes funding of projects from multiple sources of Forest Service, other Federal, and non-Federal funding.
- Subsection (c) establishes a maximum 60% Federal cost-share for project implementation, and a maximum 75% Federal cost-share for planning and developing landscape-scale forest restoration projects. This subsection also allows the non-Federal share to be funded through in-kind contributions. The required non-Federal cost-share is higher than for many other Forest Service programs, which reflects the conservation finance goals of this bill to leverage State, water district, and other external investments.
- Subsection (d) reserves at least 5% of the funding for each project to be used for monitoring and adaptive management.
- Subsection (e) allows the Forest Service to enter into stewardship agreements as appropriate for projects, and to use stewardship contracting authorities if they do so in addition to the other authorities in this title.
- Subsection (f) provides that no more than 5% of funding under this title may be used for administrative management and program oversight.

Title II – Increasing Community Resilience to Wildfire

Section 201: Critical Infrastructure and Microgrid Program

- Subsection (a) provides definitions for a new Department of Energy grant program to improve the energy resilience, energy efficiency, and power needs of critical facilities.
- Subsection (b) directs the Secretary of Energy to establish program to improve resilience of critical facilities through the use of microgrids, renewable energy, energy efficiency, reduced electricity demand, and on-site storage. The subsection also requires the use of funds to provide technical assistance and facilitate the distribution of consumer-facing information and resources.
 - Subsection (b)(2) requires the new program to ensure that on-site back-up power is renewable, low-carbon liquid, and on-site storage are included, and requires the installation at the transmission and distribution level of interoperable technologies,

advanced power flow control, dynamic line rating, topology optimization, and communications systems.

- Subsection (b)(3) requires consultation with state energy regulators, electric utilities, Regional Transmission Organizations and Independent System Operators, electric utility customers and ratepayer organizations, local governments, community choice aggregators or regional energy collaboratives, and other interested parties in developing the program under subsection (b).
- Subsection (c) authorizes \$100 million to carry out this section, available until the funds are expended and limits the amount that can be used for administrative costs to no more than 10 percent of total program funding.

Section 202: Retrofits for Fire-Resilient Communities

- Subsection (a) amends the Weatherization Assistance program to make materials that are resistant to high heat and fire and dwellings that utilize fire-resistant materials and incorporate wildfire prevention and mitigation planning eligible for funds.
- Subsection (b) increases the level of available funding to \$13,000 or \$6,000 depending on the type of assistance, and allows for increases with inflation.

Section 203: Hazard Mitigation Using Disaster Assistance

- Specifies that FEMA hazard mitigation dollars can be used to install fire-resistant wires and infrastructure and the undergrounding of wires.

Section 204: Wildfire Detection Equipment.

- Subsection (a) amends the Healthy Forests Restoration Act of 2003 by directing the Department of the Interior and the Department of Agriculture to expedite the placement of wildfire detection equipment such as sensors and cameras and expand the use of satellite data to assist wildfire response.
- Subsection (b) corrects the table of contents for the Healthy Forests Restoration Act of 2003.

Title III – Research, Training, and Capacity Building

Section 301: Western Prescribed Fire Centers

- Subsection (a) requires the Secretary of Agriculture and the Secretary of the Interior to establish one or more Prescribed Fire Centers in the West to train individuals in prescribed fire methods and other methods relevant to the mitigation of wildfire risk.
- Subsection (b) requires the center(s) to be located at 1 or more institutions of higher education or developed in collaboration with 1 or more institutions of higher education.

- Subsection (c) establishes the goals of the centers to train individuals and conduct research on prescribed fire and other methods to reduce wildfire risk, and to develop and advance interdisciplinary science related to wildfire, and to conduct ongoing and forward-looking needs assessments among stakeholders, including Federal and State agencies and Indian Tribes, to determine common need requirements and emerging challenges to reduce wildfire risk and adapt communities to increased risk from wildfire.
- Subsection (d) requires that 1 or more centers be located in a state that is located entirely west of the 100th meridian, and requires a selection of a location for the Center(s) within one year after enactment after consultation with the Joint Fire Science Program and solicitation and evaluation of proposals.

Section 302: Innovative Forest Workforce Development Program

- Subsection (a) establishes definitions for the Workforce Development Program
- Subsection (b) creates a competitive grant program to provide funds to non-profits, educational institutions, and state agencies to assist in the development of activities relating to workforce development in forestry and fire management. Funds can be used for education, training, skills development, and education.
- Subsection (c) establishes qualifications and experience to consider when awarding grants, including institutions that have developed training programs already, work with foresters and fire managers, and have developed educational material.
- Subsection (d) authorizes the use of funds for on the job training, skills development, test preparation for skilled trade apprenticeships, advance training in forestry and fire management, or other support services to facilitate post-secondary success, or for programs that educate students and inform people about the role and opportunities available in forestry and fire management, or for the training of students in weatherization and retrofitting, urban forestry, vegetation management, and for various models of education and workforce development, such as regional collaborations and leadership development.
- Subsection (e) authorizes such sums as necessary to carry out this section.

Section 303: National Community Capacity and Land Stewardship Grant Program

- Subsection (a) defines:
 - “Disadvantaged community” as meaning either:
 - A “low-income community” with either a median income less than 80% of the relevant State’s median income, or greater than 20% poverty rate, based on the New Market Tax Credit definition; or
 - A community that includes a significant population that has been systematically denied a full opportunity to participate in aspects of economic, social, and civic life

based on a particular characteristic, such as Black, Latino, Indigenous, and Native American persons, Asian Americans, Pacific Islanders, and other persons of color.

- “Eligible entities” means non-profits, local governments, tribes or special districts located in or representing disadvantaged communities.
- “Land stewardship activities” means, as applied to qualifying projects: planning, collaboration and building community support, implementation on land other than National Forest System land, and monitoring and adaptive management.
- “Qualifying project” as any of the following activities that takes place at least in substantial part on National Forest System land or national grasslands:
 - (A) Restoration of the ecological integrity of a forest, meadow, grassland, prairie, or other habitat.
 - (B) Tribal management for aligned cultural and ecological values.
 - (C) Enhancing community wildfire resilience in the wildland-urban interface.
 - (D) Increasing equitable access to environmental education and volunteerism opportunities.
- Subsection (b) states the section’s purpose as increasing disadvantaged communities’ capacity for participating in land stewardship activities.
- Subsection (c) authorizes grants by the Secretary, acting through the regional offices of the State and Private Forestry division, to eligible entities that:
 - May include up to 100% of the cost of land stewardship activities;
 - May be for one or more years;
 - Shall not exceed \$50,000 per year; and
 - Shall be administered in compliance with all applicable Federal and State laws.
- Subsection (d) establishes criteria for awarding grants under this section.
- Subsection (e) establishes an advisory panel composed of not more than 15 members of diverse backgrounds including disadvantaged communities to provide feedback each year to each regional office of the State and Private Forestry division of the Forest Service on the implementation of the section. The advisory panel shall be exempt from FACA.
- Subsection (f) requires the Secretary to submit to Congress a report on the implementation of this section within 4 years of enactment.
- Subsection (g) authorizes a total of \$50 million over the period of fiscal years 2022 through 2026 for implementation of this section.