April 16, 2024

The Honorable Tom Tiffany
Chair
Subcommittee on Federal Lands
Natural Resources Committee
U.S, House of Representatives
1324 Longworth House Office Building
Washington D.C. 20515

The Honorable Joe Neguse
Ranking Member
Subcommittee on Federal Lands
Natural Resources Committee
U.S. House of Representatives
1324 Longworth House Office Building
Washington D.C. 20515

**RE: OPPOSITION TO WESTERMAN HARMFUL FOREST "DISCUSSION DRAFT"**

Dear Chairman Tiffany and Ranking Member Neguse:

On behalf of Defenders of Wildlife and the Center for Biological Diversity, we write to express our opposition to Chairman Westerman's "Discussion Draft" bill, *To expedite under the National Environmental Policy Act of 1969 and improve forest management activities on National Forest System lands, on public lands under the jurisdiction of the Bureau of Land Management, and on Tribal lands to return resilience to overgrown, fire-prone forested lands, and for other purposes*. The bill will be the subject of the Subcommittee's hearing on April 17, 2024. We request this letter be included in the hearing record.

Chairman Westerman's bill proposes a large-scale rollback of the Endangered Species Act (ESA) and National Environmental Policy Act (NEPA) on millions of acres of federal lands. Its sweeping provisions would also pave the way for unlimited logging and remove accountability from federal land managers.

At a time when our planet is facing an extinction crisis of epic proportions, Congress should not undermine the Endangered Species Act -- our most effective tool for preventing extinctions. Nor should it remove the informed decision-making and public disclosure requirements of NEPA, or citizens' rights to judicial review. This is especially true for a bill that both threatens widespread harms to ecosystems and imperiled species and imposes no obligation that fire-management actions (or the other land uses swept in by the bill) serve either the long-term health or fire-resilience of federal lands.

## A. Widespread Rollback of Bedrock Environmental Laws and Opening of Lands to Unlimited Logging

This bill proposes broad rollbacks of environmental laws. It removes the obligation to reinitiate consultation under Section 7 of the ESA for Forest Service land management plans and BLM resource management plans if: (1) a new species is listed or critical habitat designated under the ESA, or (2) new information reveals effects of the plan may affect listed species in a manner or to an extent not previously considered. *See* Section 122. Section 7 consultation at this stage plays a crucial role in providing a landscape-scale evaluation. The language of this bill resembles

that of another Chairman Westerman separately proposed, H.R. 7408. Here, it is suggested as part of a Subtitle named "Addressing Frivolous Litigation," which is discussed further below and effectively characterizes all litigation under the statutes whose protections the bill would remove as frivolous, however meritorious the claims would be. *See* TOC; Section 122 (the only part of the bill that addresses these plans).

Forest Service and BLM management plans are the blueprints that govern agency actions. And, the requirement to reinitiate consultation reflects the continuing obligation of federal agencies under Section 7 of the ESA to insure that their actions, including the implementation of management plans, are not likely to jeopardize the continued existence of any listed species or result in the destruction of their critical habitat. Allowing exemptions for Forest Service and BLM plans blatantly disregards the agencies' Section 7 obligation and could potentially threaten the existence of imperiled species in plan areas.

In a similar vein, Section 106(a)(3)(A) would deem "emergency" provisions in regulations implementing the ESA and NEPA applicable "[f]or any fireshed management area designated under section 101" of the bill.[1] In so doing, it requires no finding of actual emergency. Nor does it contain any limiting language confining the application of these provisions to fire-related activities. Instead, it would extend these emergency provisions, across-the-board, to areas comprising hundreds of thousands of acres each. A single fireshed is "about 250,000 acres."[2] And Section 101 indicates fireshed management areas will span multiple firesheds. *See* Section 101(a).[3] In Section 101(a)(1), the bill also would remove any obligation to comply with NEPA in undertaking the designation process, *see* Section 101(b).[4]

ESA and NEPA compliance provide a framework for agencies to carefully consider the environmental consequences of wildfire management, as well as to make informed decisions that balance the need for effective fire management with the protection of natural resources and ecosystems. The ESA, as discussed above, also provides substantive protections crucial in a time in which biodiversity is in crisis. Without a requirement to follow these laws, agencies could potentially harm listed species and the ecosystems they rely on.

---

[1] These provisions include 50 C.F.R. § 402.05, which allows informal consultation under alternative procedures, with formal consultation deferred until after the emergency is under control. Under this bill, consultation appears intended to be deferred as long as the bill is in force.

[2] Confronting the Wildfire Crisis (usda.gov) at 3.

[3] Strangely, the bill calls for updated fireshed maps at five-year intervals, but also purports to sunset this process, along with other provisions, after seven years. *See* Sections 101 & 107.

[4] Meanwhile, according to the Forest Service's *Wildfire Crisis Strategy* document, *Confronting the Wildfire Crisis: A Strategy for Protecting Communities and Improving Resilience in America's Forests*, "scientists have already located the communities at highest wildfire risk and the firesheds that are the source of highest community exposure to wildfire." Confronting the Wildfire Crisis (usda.gov) at 28.

Turning back to the text, Section 2 of the bill defines "hazardous fuels management" in a way that does not require that the activity be intended for the purpose of reducing hazardous fuels. Instead, it encompasses "any vegetation management activities that reduce the risk of wildfire...." This leaves room to argue any "mechanical thinning" or other vegetation management activity would provide such risk reduction and should be deemed to fall within the definition.

Section 106 uses the definition set forth in Section 2 in requiring that the Forest Service and BLM "shall" carry out, as "fireshed management projects," "hazardous fuels management" actions, which Section 106(a)(2)(A) frames as "including" timber harvest, grazing, and others activities. *See* Section 106(a)(2)(A) (also referencing mechanical thinning, prescribed burning, cultural burning, and mastication). Read together, these provisions could be interpreted to provide a vehicle for the agencies to carry out a number of activities already occurring on federal lands, including for reasons unrelated to fire management, but without the standards, responsibility, and accountability that would otherwise exist.

### B. Reduction of Federal Agency Accountability and Citizen's Rights to Judicial Review

#### 1. Lacks Protective Standards and Expands NEPA Exclusions

In mandating that the Forest Service and BLM "shall" undertake certain actions in Section 106, the bill directs no consideration for long-term forest health, including the need to protect of old growth forests, and the role of public lands in sequestering carbon, mitigating the effects of climate change.[5]

Additionally, Section 106(a)(3)(B) calls for broad categorical exclusions (CEs) from NEPA obligations, accomplished by adopting CEs from other, existing laws. Going still further, it removes acreage limitations set forth in those CEs for projects located in areas in which an agency and a state have "completed a fireshed assessment under Section 105" of the bill. *See* Section 106(a)(3)(B)(ii) (removing 3,000-acre limit for categorical exclusions under Sections 603(c)(1) & 605(c)(1) of the Healthy Forests Restoration Act (HFRA) and Section 40806(d) of the Infrastructure Investment and Jobs Act, as well as the 4,500-acre limit in Section 606(g) of the HFRA, along with other provisions of law described in the bill). The Section 105 "fireshed assessment" itself would be also exempted from NEPA. *See* Section 105(b).

[5] Apart from this lack of standards, it also bears noting that the bill expressly vests a responsible official with discretion, for example, to decide an "appropriate basal area" for the removal of trees to address overstock and crowding, without providing or referencing any guideposts. *See* Section 106(a)(2)(e).

### 2. Removes Rights to Judicial Review

#### i. Section 121

The bill also proposes to remove accountability from the agencies by foreclosing and frustrating judicial review in multiple ways, set forth in Subtitle C. Though titled "commonsense litigation reform," Section 121 of the bill is anything but. *First*, it purports to devise a different test than the one courts typically use for injunctive relief. The existing equitable evaluation already addresses likelihood of success on the merits and any public interest in pursuing, or not pursuing an activity. *Compare* Section 121(a)-(b). The bill needlessly proposes to alter traditional equitable principles.

*Second*, the bill would limit preliminary injunctions and stays pending appeal to thirty days. Any additional time requires re-briefing and re-deciding within successive, additional 30-day windows. *See* Section 201(c). Thirty days is quite short, particularly given that the default time frame simply to brief, let along decide, a motion may take as much as twenty-eight or thirty-five days.[6] And, such a requirement would serve only to waste resources of the parties and courts alike. If there were reason to believe changed circumstances altered the need for a preliminary injunction or stay, an agency could move to lift it. There is no reason to presume, however, that the reasons which led to the court's decision have changed in thirty days.

*Third,* the bill imposes unreasonable and potentially impossible time limits. *See* Section 201(d). Any suit must be: (1) filed within 120 days of the publication in the Federal Register of a notice of agency intent to carry out a proposed action; but (2) also cannot be filed until after a record of decision (ROD) or other final agency action occurs. This forecloses any claim for which the agency takes final action or issues a ROD more than 120 days after publishing a notice of intent. *See* Section 201(d)(1)-(2). Further, 120 days is very short, undermining the ability of those with fewer resources to sue. It also would make it difficult for anyone to do so by effectively shortening the time frame still further if the law under which a claim is contemplated requires a 60-day pre-suit notice letter, as the ESA does.

*Fourth*, the bill would prohibit any judicial challenge to the applicability of a categorical exclusion. *See* Section 201(d)(3). Even if an agency flagrantly violated the limits set forth on such exclusions, citizens would have no means to challenge this conduct.

#### ii. Section 123

Further insulating agencies from accountability, Section 123 creates a heavily-slanted and vaguely-articulated arbitration pilot program that would keep citizens out of court altogether, at the agencies' discretion. Thereunder, the Forest Service and BLM would select a group of at least twenty arbitrators of their choice. *See* Section 123(e)(1). Although these individuals must not be registered lobbyists at the time, any other potential conflicts of interest, such as industry ties, are

[6] *See, e.g.,* D.C.Colo. L.Civ.R 7.1(d) (35-day period); DUCiv.R 7-1(a)(4)(D) (28-day period).

not disqualifying. *See* Section 123(e)(2). If parties to an individual arbitration cannot agree upon an arbitrator, the agency's choice prevails. *See* Section 123(e)(3). Thereafter, the arbitrator, who need not have any expertise in the subject matter, will make a decision. *See* Section 123(d)-(e). That decision will be based not on the merits of the legal claims, but the perceived superiority of competing proposals. *See* Section 123(d). The agency would choose which challenges to its actions it wants to arbitrate, up to fifteen per fiscal year. *See* Section 123(a)(2)-(3). Any such challenges would not be subject to judicial review. *See id.* The fundamental flaws in, and unfairness of, such a program are obvious.

Moreover, vague language in the bill would create confusion. It is unclear what an "objection or protest" subject to arbitration is. *See* Section 123(a). Will the agency pull cases out of court? Or will it attempt to preemptively guess which out-of-court comments concerning its actions would otherwise have led to a lawsuit? If multiple parties or suits seek to challenge the same action, can the agency attempt to force them all into arbitration and count that as only one of its fifteen potential annual selections?

Setting aside the specific issues presented by Section 123, the U.S. Supreme Court has described arbitration as "well suited to the resolution of contractual disputes," but a "comparatively inappropriate" forum for statutory rights created by Title VII. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 at 56–57 (1974) (discussing, among other things, differences in the fact-finding process and the lack of an obligation for an arbitrator to provide the reasons for an award). This reasoning applies equally to the types of claims at issue here.

### 3. Cedes Control of and Responsibility for Federal Lands

The bill cedes control of and responsibility for federal land management to state and local governments (but not tribes) in two respects.[7] First, Section 106 provides that federal agencies "shall carry out," as "fireshed management projects," any activities recommended in a state-specific fireshed assessment under Section 105 of the bill. *See* Section 106(a)(2)(G). Sections 104-105, in turn, would provide for state-federal agreements, pursuant to which the referenced assessments are made. Those provisions do not, however, address how to resolve any fundamental differences or disagreements if state and federal regulators do not agree about recommendations for federal lands. Additionally, Section 106(a)(2)(H) would mandate any activities recommended in applicable community wildlife protection plans. Federal agencies' role with respect to such plans, however, is one of consultation, not control.

[7] Because fireshed management areas could include non-federal land, *see* Section 101(a)(1)(D), the bill may also make federal agencies responsible for activities on non-federal lands. If that is the case, it does so without additional funding to carry out this responsibility.

**4. Additional Issues**

Apart from the more overarching provisions, Section 205 grants broad exemptions from following the law for utility rights of way. Both "the development and approval of a vegetation management, facility inspection, and operation and maintenance plan" under Section 512(c)(1) of the Federal Land Policy and Management Act of 1976 and the implementation of routine activities under such a plan are subject to exemptions from NEPA, ESA Section 7 consultation, Section 106 of the National Historic Preservation Act, and "[a]ny other applicable law." *See* Section 205. Although there are two exceptions to the NEPA categorical exclusion for: (1) designated (but not proposed) wilderness areas under the National Wilderness Preservation System; and (2) National Forest System lands on which another statute restricts removal of vegetation, it is unclear if the restrictions on judicial review extend to this section (or if the catchall eliminates Administrative Procedure Act review), limiting the enforceability of these exceptions. Further, the bill lacks any similar caveat for the ESA and other laws whose protections it removes. It also appears to expressly allow unlimited temporary road construction—with no exception for wilderness areas. *See* Section 205(e). Our nation's environmental laws exist for a reason, as discussed above with respect to ESA Section 7 and NEPA. And, the broad catchall exemption to any applicable law seems likely to lead to unintended consequences.

In contrast to the license granted in this area, Section 202 of the bill would tie the Forest Services' hands in certain respects in using fire as a management tool. This provision would require the Forest Service to suppress all wildfires within 24 hours, limit the use of backfire, and restrict the use of fire as a management tool to prescribed fires within the bounds of the prescription. The 24-hour requirement parallels the "10:00 a.m. policy" implemented in the first half of the 20th century, in which the Forest Service was tasked with extinguishing any ignited wildfire by 10:00 a.m. the following day. Fire is essential to forest ecosystems. Returning natural fire to fire-adapted areas in a way that protects communities is an important way to reduce uncharacteristically large fires that can threaten people, their homes and pets and livestock. The limitation to prescribed fire in this provision also appears in tension with the inclusion of both prescribed burning and cultural burning as activities the agency must undertake pursuant to Section 106 of the bill.

Finally, Section 305 of the bill proposes a study of potentially moving the Forest Service headquarters. This is not the place to divert resources amidst the challenges confronting the agency. Further, many high-level staffers presently live (and work) outside the existing headquarters. And, both Forest Service regions and individual forest supervisors have significant decision-making power under the status quo. Any such move would come at considerable cost to taxpayers without adding value. It also risks the loss of institutional knowledge if individuals leave the agency, as occurred when BLM moved its headquarters.

***

In short, this bill provides neither additional funds to confront the wildfire crisis nor the tools to do so. Instead, it proposes to rollback environmental (and other) laws and divert resources to deprive the affected public of judicial review and engage in needless study of moving an agency office.

Thank you for your consideration.

Sincerely,

Desiree Sorenson-Groves
Vice President of Land and Habitat Conservation
Defenders of Wildlife

Randi Spivak
Public Lands Policy Director
Center for Biological Diversity