American Association for Justice * Center for Biological Diversity
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National Association of Consumer Advocates

April 16, 2024

The Honorable Tom Tiffany
Chair, House Natural Resources
Sub-Committee on Federal Lands
1324 Longworth House Office Building
Washington, DC 20515-6201

The Honorable Joe Neguse
Ranking Member, House Natural Resources
Sub-Committee on Federal Lands
1324 Longworth House Office Building
Washington, DC 20515-6201

RE: Please Defend Access to Justice and the Rule of Law – Oppose Rep. Westerman's draft so-called "Forest Health" bill

Dear Federal Lands Sub-Committee Chairman Tom Tiffany and Ranking Member Joe Neguse:

The undersigned nine civil justice groups write today to express our strong opposition to Congressman Westerman's draft bill, the poorly named "Forest Health" bill. We understand this bill will be the subject of the sub-committee's hearing scheduled for April 17th, 2024.

While this bill would likely do nothing to promote "healthier forests," and would likely promote potentially harmful and destructive extractive projects under final rules of the Forest Service and the Bureau of Land Management, the comments of our groups in this letter focus specifically on the attacks to access to justice through access to our federal judiciary in sections 121, 122, and 123 of the bill. These provisions would interfere with the power of federal courts to say what the law "is" and provide appropriate redress to litigants, and should therefore be rejected.

Section 121 & 122 – Section 121 of the bill contains several provisions that severely limit longstanding judicial review standards for certain Forest Service and Bureau of Land Management actions. Specifically, it would interfere with the judiciary's application of Rule 65 of the Federal Rules of Civil Procedure by significantly altering a federal court's balancing test for issuing a preliminary injunction. It also inappropriately applies a severe 30-day limit on any court-ordered preliminary injunction which will strain limited judicial resources by requiring re-application of these limited injunctions. This is simply not how the federal courts work. Section 121 also dramatically limits the time to seek judicial review to 120 days after final agency action, (from as much as 6 years under the National Environmental Policy Act, or "NEPA"). This abbreviated time frame places an undue burden on interested parties and communities with limited resources and would likely have the unintended consequence of leading to more litigation, not less, as interested parties may be forced to file suit to protect their legal rights. Section 121 also prohibits any judicial review of claims challenging the inappropriate use of a categorical exclusion by an agency under NEPA. Finally, Section 122 simply waives the federal Endangered Species Act law in certain circumstances, and with it, judicial review over agency actions that could violate one of our nation's bedrock environmental laws.

Section 123 - We focus the rest of our comments on Section 123 of the bill. Importantly, this section would trample on access to justice principles in our democracy by stifling citizens' ability to seek redress through our courts, instead channeling many agency final actions into secretive forced binding arbitration proceedings.

Eliminates judicial review -- Judicial review is a central tenet of the rule of law in our democracy. Congress has long recognized the critical role the public plays in going to court to hold the government and private actors accountable to our most fundamental federal protections, including those protecting civil rights, consumers, the environment, government transparency, people with disabilities, private property, public resources, public health, and workers. Yet, this bill would give the Forest Service and the Bureau of Land Management the power to eliminate this judicial review. Specifically, Section 123 would force certain public challenges to final agency actions through an unprecedented internal and "binding" agency arbitration process with final decisions "not… subject to judicial review."

Dangerously privatizes agency actions – The arbitration process created by this bill specifically anticipates outsourcing management decisions on public lands to private entities, including resource extraction industries, which will create a high likelihood of abuse and mismanagement. Under this bill, an extractive entity could challenge a forest management plan, and through a binding arbitration process would be free to write their own regulatory "alternative proposal" for consideration. The arbitrator cannot "modify any proposal" offered by non-federal entities, but could select such a plan despite being written by private parties. This is not how our democracy works. Final agency regulatory actions *must* be actions of the agency, not third parties. Had the legal challenge gone to an independent court, a legally inadequate plan would be remanded to an *agency* to "try again" rather than allowing arbitration to illegally privatize that action.

Violates due process – The binding arbitration process also effectively obliterates the due process and public notice and comment protections of the Administrative Procedure Act, since there is no requirement that a privately selected plan get *any* public review. Such review is critical, especially given that – shockingly – the bill does not *require* the arbitrator to select a plan that in any way complies with the statutes governing these management plans.

Not a "pilot" program - The bill's language implies it is creating a limited and discretionary arbitration "pilot program" limited to "no more than 15" legal challenges a year for *each* "Forest Service Region" and *each* "State Region of the Bureau of Land Management," which is incredibly misleading. First, there are a total of 21 regions between the two agencies, which could mean that up to 315 legal challenges a year could be forced into arbitration. Given that there were only 264 *total* environmental/public land cases against all of the federal government in 2023 (out of over 60,000 civil cases), this could eliminate all judicial review of these agencies actions.[1] Second, the public, in fact, has no discretion on whether to have their concerns heard by a federal court or submit to binding arbitration. The agency would have "sole discretion" to decide which challenges are forced into this binding arbitration process (if not all of them), and that decision would also not be judicially reviewable. This broad one-sided discretion would imbue the agency with the power to shield itself from federal judiciary oversight for whichever

[1] See U.S. Department of Justice civil litigation statistics here - https://www.justice.gov/usao/media/1343726/dl?inline at pg. 20 (visited 4-9-24).

legal challenges it finds most problematic, which to our knowledge would be an unprecedented government agency power. Again, our democracy simply doesn't work this way.

In sum, this draft legislation is a dangerous and reckless attack on every day citizens' ability to enforce the law. On behalf of our members and supporters, we ask that you defend access to justice through access to independent federal courts, protect our public lands, and uphold the rule of law **by opposing this "Forest Health" bill,** should it be filed**.**

Sincerely,

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