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BEFORE THE HOUSE COMMITTEE ON JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

LEGISLATIVE HEARING ON:
H.R. ___, THE "PERMITTING LITIGATION EFFICIENCY ACT OF 2018," AND
H.R. 4423, THE "NORTH TEXAS WATER SUPPLY SECURITY ACT OF 2017"

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Thank you, Chairman Marino, Ranking Member Cicilline, and distinguished Members of the Subcommittee, for the opportunity to appear before you again today.

I am the Glen Earl Weston Research Professor of Law at the George Washington University Law School, and am also a member-scholar of the not-for-profit regulatory think-tank, the Center for Progressive Reform, and the past Chair of the Administrative Law Section of the Association of American Law Schools. I am testifying today, however, on the basis of my expertise and not as a partisan or representative of any organization. As a professor and scholar of administrative law, environmental law, and energy law, I specialize in matters related to the Administrative Procedure Act, permitting of major federal projects, and the role of citizen participation in regulatory governance. My work is published in the country's top scholarly journals as well as in many books and shorter works, and I regularly speak on these subjects across the nation. Early in my career, I practiced as a civil engineer; that experience and training inform my understanding of scientific and technical environmental analyses, major construction projects, and federal permitting.

In my testimony today, I document the many problematic aspects of the Permitting Litigation Efficiency Act of 2018 (PLEA) and H.R. 4423. Both bills amount to stunning attempts to chill public engagement and undermine principles of good governance.

I. AMENDING GENERAL STATUTES FOR NAKED POLITICAL PREFERENCES

Both PLEA and H.R. 4423 are thinly veiled attempts to tamper with well-established procedural systems on behalf of anti-environmental interests. The Administrative Procedure Act (APA) embodies an important choice made by a unanimous Congress: The statute creates generally applicable, neutral procedures for agencies to follow, rather than creating piecemeal carve-outs for specific agencies or subject-matter areas.[1] The Federal Rules of Civil Procedure are similarly designed. Both are procedural systems that provide access to enforcing substantive rights and obligations, thereby ensuring fairness and promoting confidence in the legal system. The effect of these bills would be to undermine the integrity and predictability of both the administrative state and the judicial system, to the detriment of *all* interests.

[1] *See generally* Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986).

With respect to PLEA, the pitfalls of changing these long-settled understandings are many. First, expect confusion in the courts as they grapple with poor drafting, a perplexing method of amending the APA, and a tacit amendment of the Federal Rules of Civil Procedure. Second, expect unintended consequences, as the new language can also limit access to the courts for the very same big-business beneficiaries for whom these bills are ostensibly drafted. Third—and most importantly—expect deterioration of the rule of law.

II. H.R. ___, THE "PERMITTING LITIGATION EFFICIENCY ACT OF 2018"

A. The Scope of the Amendment is Unclear

PLEA suffers from an initial flaw in that its scope is entirely unclear. It applies to "Federally-required permits," but does not define those terms. Section 551(8) of the APA provides that a license is "whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption, or other form of permission." The APA does not further define "permit," so PLEA creates confusion whether it includes all licenses or some subset of licenses.

Further, the confusing term "Federally-required" belies the pro-big-business motives of the bill while simultaneously ignoring existing federal law. Many agency actions are wholly within their discretion and not subject to judicial review at all.[2] For those actions that are reviewable, whether an action is "federally required" necessitates reading the agency's statutory mandate. Courts do not mandate federal issuance of permits unless consistent with the statutory mandate. Of course, the bill's language could also be read to refer to permits that are required before an applicant can proceed with some action. But that reading undermines the carefully considered balances of interests for which agencies' statutory mandates already account.

B. The Presumption of Unreasonable Delay Is Unnecessary and Creates Bizarre Incentives as Drafted

Section 2 of PLEA directs courts that they should presume unreasonable delay if a federal agency has not taken final action on a required permit within specified time frames. The proposal is bizarre on its face: In subsection (2), it contemplates 2 years for agency consideration of completed applications, but alternatively in subsection (1), it contemplates no grace period if an agency has set its own goal for a final determination. This creates a perverse incentive for agencies to either forgo creating schedules altogether (to the detriment of transparency and public engagement), or to schedule final determination dates so far into the future as to be meaningless.

These provisions are all the more problematic when compared to the provisions cross-referenced in subsections (2)(A), (B), and (C). The cross-referenced provisions are subject-matter specific statutes that require coordinated planning for specified major projects requiring

[2] 5 U.S.C. § 701(a)(2).

federal permits, like certain highway and water development projects. Among other things, these provisions are already aimed at streamlining environmental permitting. Moreover, they:

- Foster transparency, for example, through a Regulatory Dashboard established pursuant to the Fixing America's Surface Transportation (FAST) Act;
- Acknowledge that agencies may lack resources to complete permit reviews if they are insufficiently funded, as in the FAST Act;
- Highlight the importance of public participation in permitting processes, as in the FAST Act and 23 U.S.C. § 139; and
- Promote agency coordination as a means of limiting red tape, as in the Water Resources Development Act.

Section 2 of the bill contemplates that these cross-references also provide timetables, the exceedance of which would be presumed unreasonable. Yet these cross-references expressly contemplate that agencies may have very good reasons for failing to meet initially set deadlines. In fact, these cross-references only highlight the absurdity of using a general statute like the APA to address highly fact-specific permitting issues.

Indeed, it is possible that this provision would have *no* impact on judicial review of agencies for unreasonable delay because the governing law strongly accounts for separation-of-powers principles between the courts and agencies. Specifically, courts are reluctant to issue writs of mandamus against agencies on grounds of delay because it is inappropriate for the unelected judiciary to become entangled in the many policy considerations the executive branch must reconcile in deciding whether to take final action. Among these considerations are the President's policy agenda, funding availability, and competing priorities. Judicial reluctance to second-guess such matters is extraordinarily strong.[3] Indeed, the most one can typically expect upon a finding of unreasonable delay is for the court to retain jurisdiction and establish a timetable for completion of the action; courts already do this.[4] In short, accepting for the sake of argument that there is a "problem" for PLEA to "solve," the courts have long demonstrated that they are more than capable of doing so—and in a way that respects the separation-of-powers principles at the heart of our constitutional system of governance.

C. Section 2(c) of PLEA Establishes a One-Way Ratchet in Favor of Regulated Entities

Section 2 of PLEA is of great concern in two respects. First, it carves out the mysterious "Federally-required permits" for special statute-of-limitations treatment under the APA. Once again, Congress has already weighed the important policy considerations inherent in statutes of limitations by establishing such time limits in other statutes, often in connection with the

[3] *See, e.g.*, Cmty. Nutrition Inst. v. Young, 773 F.2d 1356, 1361 (D.C. Cir. 1985) ("Mandamus is an extraordinary remedy; we require similarly extraordinary circumstances to be present before we will interfere with an ongoing agency process.")
[4] *See, e.g.*, Telecomms. Research & Action Ctrv. v. FCC, 750 F.2d 70 (D.C. Cir. 1984).

substantive matters covered by those statutes. The 180-day limit in subsection (c) is unusually short—meant, of course, to benefit permit applicants at the cost of access to justice.

Even more concerning is the component of 2(c) that limits judicial review "only to matters that were included in any record of the proceeding." The general rule on this matter has been firmly established for decades, dating at least to 1943 in *SEC v. Chenery Corp.*: "The grounds upon which an administrative order must be judged are those upon which the record discloses that the action was based."[5] Yet courts are obligated under the APA to review agency actions on a number of grounds, and supplementing the administrative record may be the only way to ensure that the courts can fulfill their responsibilities. Thus, a variety of exceptions to the *Chenery* rule permit supplementing the record if a petitioner makes a sufficient showing. These include an agency's failure to place in the record all of the information on which it relied, an agency's failure to consider an important aspect of the problem, a court's need to understand the issues more clearly, and cases in which relief like a preliminary injunction is at issue.[6] Indeed, the limitation in section 2(c) would have the impact of forbidding courts from considering the vast scope of matters required by section 3 (discussed below). Overall, subsection 2(c) is designed to make it impossible for petitioners to prove their cases in the very worst instances of agencies' neglect of their duties.

D. The New Standards for Equitable Relief Are Unmanageable and Unpredictable

Section 3 of PLEA turns decades of carefully circumscribed judicial equitable power on its head. Moreover, it appears to be an attempt to amend Federal Rule of Civil Procedure 65, making an end run around the complex Federal Rules development process. To decide whether to grant a stay, courts consider equitable factors, including (1) the petitioner's likelihood of success on the merits; (2) the threat of irreparable injury absent the injunction; (3) the possibility of harm to others if the injunction is issued; and (4) the public interest.[7] This fact-specific standard represents a longstanding approach that courts have undertaken in all manner of cases, and has the benefit of flexibility for the many varieties of administrative actions courts might review.

Subsections (1) and (2) invite a protracted, unmanageable, and unpredictable judicial exploration into matters of the general economy. Although PLEA seems aimed at reducing delay for federally permitted projects, the offers of proof that the bill contemplates will require significant trial-type proceedings guaranteed to promote even further delay. These subsections would make the availability of equitable relief unpredictable. For example, both opponents and proponents of a federally permitted project will be able to marshal employment data in support of their positions. The current standard for equitable relief is sufficiently flexible to permit courts

[5] SEC v. Chenery Corp., 318 U.S. 80, 87 (1943).
[6] *See* Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989) (listing exceptions to general rule against supplementing administrative record).
[7] *E.g.*, Winters v. Natural Resources Def. Council, 555 U.S. 7, 20 (2008); Nat'l Wildlife Fed. v. Burford, 835 F.2d 305, 319 (D.C. Cir. 1987). Agencies may also stay the effect of rules on their own. 5 U.S.C. § 705 (2012).

to tailor their considerations to the matters at hand, and it need not be modified to provide for such a far-reaching, speculative exploration as drafted.

E. The Bond Requirement Chills Public Engagement and Has Grave Federalism Implications

Section 3(b)(3)—which invites judges to impose a $5 million dollar bond on litigants—is a blatant attempt to chill public engagement in agency decisionmaking and deny access to justice. Read in conjunction with subsection (e), which permits courts to preclude recovery on a bond if the action was "substantially justified," the bond requirement amounts to a massive fee-shifting provision that expects petitioners to gamble on unpredictable judicial outcomes. Many public interest groups, of course, cannot afford such a gamble—especially given that agencies' judicial win rates are typically well above fifty percent. Judicial review promotes transparency, participation, deliberation, and rational decision-making, regardless of whether the petitioner prevails on the merits.[8] By imposing such a steep risk on would-be petitioners, this provision undermines the basic components of good governance.

The bond requirement has grave federalism implications as well. Consider that states and local governments frequently have a stake in federal permitting decisions—especially those that implicate land or water use. State and local governments can no more afford the bond risk than can public interest groups, yet their participation in the full administrative process—including judicial review—protects important federalism ideals by holding the federal government accountable to compliance with the rule of law.

Finally, business competitors are also frequent petitioners before the courts. The bond requirement chills healthy competitive forces as well by weighting the scale in favor of a single permit applicant.

III. H.R. 4423, THE "NORTH TEXAS WATER SUPPLY SECURITY ACT OF 2017"

H.R. 4423 is deficient for many of the same reasons as PLEA. The changes to the standard for equitable relief and the bond provision are equally as problematic as described above.

Additional factors, however, make H.R. 4423's attempt to limit access to the courts especially egregious. First, the 60-day limitations period on petitions for judicial review is especially harsh because it applies to a project for which the record of decision was signed in February 2018. In other words, it may be impossible to file a petition for review by the time of hearings on this bill. It is not necessary for such a short limitations period to apply in any event; prospective petitioners have every incentive to seek judicial review *prior* to shovels in the ground on a major federal project. It is extraordinarily unfair, however, to effectively bar review altogether.

[8] Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 321-27 (2013).

Second, section (b)(2) unnecessarily restricts the scope of who may seek judicial review to those who actually commented on the revised draft environmental impact statement. It is certainly appropriate to require that issues considered in litigation must first have been raised before the agency, and that is the current legal requirement.[9] This provision, however, imposes a retroactive restriction for proceedings that have already taken place. Moreover, it severely restricts access to justice by changing the governing legal standard, which currently focuses on whether an issue was raised—not whether the same party who raised it later petitions for judicial review.[10] There is no evidence that this standard is insufficient to protect the agency's interests in fully considering an issue; anything more appears to be simply another attempt to foreclose petitioners from holding agencies to their legal standards.

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Thank you again for the opportunity to testify today. I look forward to your questions.

[9] Koretoff v. Vilsack, 707 F.3d 394, 397-98 (D.C. Cir. 2013).
[10] *Id.*