

Alliance for Justice * American Association for Justice
Center for Biological Diversity * Center for Justice & Democracy
Consumer Action * Earthjustice * Environmental Working Group
Impact Fund * Institute for Agriculture and Trade Policy
Waterkeeper Alliance

April 11, 2018

Chairman Robert Goodlatte
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

Ranking Member Jerold Nadler
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

Chairman Tom Marino
House Judiciary Subcommittee on Regulatory
Reform, Commercial & Antitrust Law
517 Cannon House Office Building
Washington, D.C. 20515

Ranking Member David Cicilline
House Judiciary Subcommittee on Regulatory
Reform, Commercial & Antitrust Law
517 Cannon House Office Building
Washington, D.C. 20515

RE: Defend Access to Justice and the Rule of Law – Oppose H.R. XX, the deceptively named “Permitting Litigation Efficiency Act of 2018” and H.R. 4423 - the misleading “North Texas Water Supply Security Act of 2017”

Dear Chairman Goodlatte, Chairman Marino, Ranking Member Nadler, and Ranking Member Cicilline:

We write in opposition to both pieces of legislation scheduled for a hearing on April 12th in the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law – H.R. XX, the “Permitting Litigation Efficiency Act of 2018” and H.R. 4423, the “North Texas Water Supply Security Act of 2017.” We urge all members to oppose these bills.

To begin with, we want to be very clear that the draft “Permitting Litigation Efficiency Act” bill as written, is much broader than its’ title implies. This dangerous bill is nothing short of a frontal attack on one of the most important laws available to the public for holding federal agencies accountable – the Administrative Procedure Act or “APA.” For 72 years this law has allowed the public to exercise our 1st Amendment rights to petition our government for redress when the federal government fails to follow the law, but this bill would undermine those important protections. And both bills are an attack on people’s right to have their day in court and to defend the public’s right to enforce bedrock environmental, civil rights, consumer protection and other public protection laws. As described in more detail below, these bills would interfere with, constrain, and in some instances eliminate the powers of the federal judiciary to ensure 1) that justice is available to affected individuals, 2) that the rule of law is followed, and 3) that the court can act as a check and balance against any abuse of power by the executive branch.

The **“Permitting Litigation Efficiency Act of 2018”** would amend the APA to increase the power of industry and supporters of infrastructure projects to sue for unreasonable delay of final action on permit applications. In particular, the language rewrites the APA to require that federal courts presume agency delay is unreasonable if final agency action on a permit has not occurred by the date set by the President

of the United States or someone designated by the President. This new presidential power would not only politicize permitting applications even further, but will likely limit proper environmental review under the National Environmental Policy Act (“NEPA”).

While expanding the rights of *industry* to sue on the one hand, the bill would also limit access to justice through the courts to the *rest* of the public by shrinking the time for filing a legal challenge from six years (in most cases) to 180 days, and by limiting the scope of what federal courts can review to “matters that were included” in the agency’s official record. This draft bill further engages in a broadside attack on access to justice through the courts because it would ***rewrite the federal judiciary’s Rule 65 balancing test for injunctive relief for any permit-related legal challenges filed under the APA***, tipping the scales of justice against stopping possible irreparable harm, while suggesting the court impose new financial hurdles on public interest efforts to enjoin such harm during the pendency of a lawsuit. The power grab suggested by this bill shreds our American principles of democracy and the idea that no one is above the “rule of law.”

We also strongly oppose Rep. Sam Johnson’s bill, **H.R. 4423**, the poorly named “**North Texas Water Supply Security Act**.” Purporting to protect public drinking water supplies, this bill instead endangers protections provided by the Clean Water Act and NEPA. Substantively, HR 4423 seeks to eliminate the rule of law for one federal project favored by the bill’s sponsor – the proposed Lower Bois d’Arc Creek Reservoir, proposed for northern Texas near the city of Dallas. The planned reservoir would flood over 16,000 acres of terrestrial and aquatic habitat. By seeking to dramatically curtail the court’s power to ensure the rule of law is followed, this bill would make a sham of years of public participation on this reservoir project, while hollowing out our nation’s bedrock environmental laws, including the Clean Water Act and NEPA. While this letter does not speak to the adequacy of the planning and reviews as part of the reservoir planning, we defend the right of the public to challenge those reviews if they believe the law has not been followed.

Compliance with NEPA is fundamental to making sound decisions on federal infrastructure projects. NEPA also helps to ensure that the public and local decision-makers are fully engaged in the decision-making process so that agency decision-makers have the information they need to understand the impacts of a proposed action and to know whether reasonable alternatives exist to achieve the project goals while incurring fewer environmental, social, cultural, and economic costs. Undermining this process and the judicial recourse to ensure its compliance (by both of the bills referenced for a hearing) is an attack on the public’s voice and on well-informed decision-making that keeps our communities safe from reckless project proposals. Specifically, HR 4423 would do the following:

1. ***Restricts Judicial review*** – would restrict judicial review of most, if not all, legal challenges for the reservoir project to those filed within 60 days of a final action. For the Final Environmental Impact Statement, which normally allows six years to file a judicial challenge, the record of decision was signed February 2nd, 2018, so arguably the 60-day window provided in the bill has already run and could preclude all judicial review after April 2, 2018. The same 60-day window to sue would also apply to any future supplemental EIS or project authorizations which could include authorizations of work by private entities that could then claim shields them from possible future litigation exposure.
2. ***Limits Standing*** – would interfere with the federal judiciary’s prudential standing (to sue) analysis under the Constitution’s “case or controversy” by replacing it with a Congressional constraint, limiting standing to only those who filed public comments on the DEIS.
3. ***Constrains Venue*** – interferes with the federal judiciary’s equitable power to determine proper venue for a case by requiring all claim to be brought in United States District Court for the Eastern District of Texas.

4. ***Changes Court's Balancing Test for Injunctive relief*** – rewrites the four-part balancing test courts apply under Federal Rules of Civil Procedure 65 for weighing the equity of granting a preliminary injunction by adding new factors courts must consider.
5. ***Eliminates Courts' discretion on Bonding Fees*** – eliminates the court's equitable power to waive bonding fees before issuing injunctions if justice so demands, thereby discouraging lawsuits by potentially making it too expensive to sue for economically disadvantaged plaintiffs, which could include rural farmers impacted by the reservoir project.
6. ***Catch all prohibition on right to judicial review*** – for good measure, the bill includes a provision to ensure no right to judicial review is created by the legislation.

In sum, both of the bills up for a hearing on April 12, 2018 by the subcommittee are dangerous and reckless attacks on judicial review and the rule of law. These bills constrain access to justice through the courts while simultaneously eliminating the checks and balances our founders envisioned for an independent judiciary which would act as a bulwark against tyranny. All of the provisions of HR 4423 and most of the provisions of the draft bill are designed to prevent justice from running its proper course and could deny the public's First Amendment right to seek redress from their government. That is simply not how our constitutional democracy works and these bills must be rejected. On behalf of our members and supporters, we oppose H.R. 4423 and the draft "Permitting Litigation Efficiency Act of 2018" and ask that you defend judicial review, access to justice and the rule of law.

Sincerely,

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June 12, 2018

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Chairman Bob Goodlatte
Ranking Member Jerrold Nadler
U.S. House Committee on the Judiciary

Re: Concerns with H.R. 4423 – North Texas Water Supply Security Act of 2017

Dear Chairman Goodlatte and Ranking Member Nadler,

As individual academics who specialize in administrative law, environmental law, and regulatory policy, we are writing to express several concerns with H.R. 4423, the North Texas Water Supply Security Act of 2017, which tampers with well-established procedural systems, including the Federal Rules of Civil Procedure and the National Environmental Policy Act (NEPA). If this bill becomes law, it will undermine the integrity and predictability of both the administrative state and the judicial system.

Specific Concerns with H.R. 4423

First, this bill would turn decades of carefully circumscribed judicial equitable power on its head. Subsection (2)(e) of the bill seeks to rig the balancing test courts apply under Rule 65 of the Federal Rules of Civil Procedure for granting preliminary injunctions by requiring courts to consider new factors that are meant to stack the analysis against public health, safety, and the environment. Moreover, the new standards invite a protracted, unmanageable, and unpredictable judicial exploration into matters of the general economy. These subsections would make the availability of equitable relief unpredictable. The current standard for equitable relief is sufficiently flexible to permit courts 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.

Second, this bill seeks to chill public engagement in agency decision-making and deny access to justice. Subsection (2)(e) of the bill envisions an onerous bonding requirement that members of the public who are adversely affected by the water project covered under

the bill must satisfy in order to seek an injunction against those projects. Judicial review promotes transparency, participation, deliberation, and rational decision-making, regardless of whether the petitioner prevails on the merits.¹ By imposing such a steep risk on would-be petitioners, this provision undermines the basic components of good governance. Even worse, the water project that is the subject of H.R. 4423 is already the subject of litigation. It is manifestly unfair to retroactively change the rules for those who have already exercised their right to judicial review.

Third, the bill would impose unreasonable restrictions on judicial review. Subsection (2)(b) would bar NEPA challenges to the bill's covered water project after more than 105 days from the publication of the final record of decision for the project. Although one lawsuit has been filed within that statute of limitations, any other future challenges would be barred. It is not necessary for such a short limitations period to apply; prospective petitioners already 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.

Fourth, the bill seeks to unnecessarily restrict the scope of individuals who may seek judicial review. Subsection (2)(b) would limit potential challengers to only those who actually commented on the revised draft environmental impact statement. This provision imposes a retroactive restriction for proceedings that have already taken place. Moreover, it 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.² 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.

Conclusion

We urge this Committee to abandon H.R. 4423 and others like it that would undermine the role of the regulatory and judicial systems in ensuring that agencies properly account for environmental concerns in major infrastructure projects. Instead, we urge this Committee to explore reforms that would empower members of the public who are adversely affected by such projects to participate more meaningfully in agency decision-making *prior* to any final agency action.

Sincerely,

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¹ 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).

² *Koretov v. Vilsack*, 707 F.3d 394, 397-98 (D.C. Cir. 2013).

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