American Association for Justice * Center for Biological Diversity
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June 25, 2024

The Honorable Bruce Westerman
Chair, House Natural Resources Committee
1324 Longworth House Office Building
Washington, DC 20515-6201

The Honorable Raul Grijalva
Ranking Member, HNRC
1324 Longworth House Office Building
Washington, DC 20515-6201

RE: Please Defend Access to Justice and the Rule of Law – Oppose judicial review provisions of H.R. 8790, the "Fix Our Forest Act"

Dear Chairman Westerman and Ranking Member Grijalva:

The undersigned civil justice groups write today to express our strong opposition to the judicial review provisions in H.R. 8790, the "Fix Our Forest Act" bill.

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 of the bill. While we appreciate that the harmful "forced arbitration" language (previously section 123 of the draft bill) was dropped, these judicial review provisions would still significantly 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 - Section 121 of the bill contains several provisions that alter or 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 ("FRCP") by altering a federal court's balancing test for issuing a preliminary injunction. Courts have traditionally applied a four-factored test under FRCP 65 to determine if a preliminary injunction is appropriate. The court balances: the likelihood of success on the merits of the moving party; whether irreparable harm will occur in the absence of an injunction; a balance of the equities that favor the moving party; and if the injunction is in the public interest. Section 121 (a) and (b) will cause confusion and could spark more litigation because these provisions are either re-stating existing portions of the federal courts' balance test or carving out a new test. In the first instance, the language is simply not necessary, in the later, it is problematic because it interferes with the long-standing test applied by the courts and will spark additional litigation over the meaning of these terms.

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 quickly file suit to protect their legal rights. This is especially true if a claim requires a pre-suit notice period, such as the 60-day notice period required by the ESA. In addition, Section 121 creates a new, restrictive standard for standing to sue by requiring a litigant to have participated in the rulemaking in a very specific way that goes beyond the standard required by federal courts for Article III standing. As it is, individuals, small businesses, and affected communities, already face significant challenges to public participation in federal decision-making processes. (*see* https://www.whitehouse.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf)

Finally, and alarmingly, Section 121(c)(2) also allows forest management projects to proceed even when a court finds a plan legally insufficient. When the court finds a plan legally insufficient, under the Administrative Procedure Act, the plan should be remanded to an agency to prepare a legally sufficient plan. However, this provision gives the agency the opportunity to proceed in some circumstances without ever remedying the legal violation, as long the agency did not "entirely fail to prepare" an EA or EIS. This is no legal requirement at all. We therefore oppose this provision of the bill

Section 122 – As we noted in our previous letter to this committee, Section 122 of the bill 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. Carve outs to critical federal laws leads to "death by a thousand cuts" to the rule of law and we therefore oppose this provision.

In sum, the judicial review provisions of H.R. 8790 are 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 the judicial review provisions in the "Fix Our Forest Act" bill.**

Sincerely,

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