Unjust Judicial Review Provisions in S. 4753 – the Energy Permitting Reform Act

This legislation, S. 4753, would enact dangerous new precedents within the judicial system that benefit industry and polluters, as outlined below, while at the same time curtailing access to justice for many stakeholders and impacted communities. Specifically, it would make access to the courts *easier* for industries seeking permits by prioritizing court access over all other matters before our federal district courts, including voting rights, civil liberties, reproductive freedoms, environmental protections, and criminal cases. Conversely, it would also exacerbate inequities already present in the justice system by making it *harder* for fenceline, low-income, tribal, and environmental justice communities to seek justice through the courts by barring civil actions not filed within a very short Statute of Limitations.

- **Inappropriately mandated expedited judicial review -** Section 101(c) mandates expedited judicial review in district courts for any litigation related to federal permitting approvals or authorizations of projects which disproportionately favor fossil fuel and timber industries. Congress declaring that district courts *must* expedite certain permitting cases is as dangerous as it is unique.
    - Federal courts already possess the inherent discretion and authority to expedite the consideration of any matter in the interest of justice; however, this legislation *requires* it, even if, in doing so, other critical matters before district courts are delayed as a result.
    - This mandate provides no deference to the judicial branch, and that lack of discretion to district courts appears unprecedented. Even where in the past Congress has broadly instructed courts to expedite certain categories of cases (including FISA, death penalty actions, and deportation & removal cases), Congress has only instructed the district courts to move "as expeditiously as possible," not requiring it, as this bill instructs.
    - Federal district courts are already overburdened and understaffed, with extensive backlogs in cases, and 22 venues experiencing "judicial emergencies," for lack of sufficient confirmed federal judges. Bumping industry permitting cases to the front of the line delays justice for everything else, including voting rights, civil liberties, reproductive freedoms, environmental protections, and criminal cases. Often, justice delayed is justice denied.
    - Passing such provisions would likely result in other well-funded special interests seeking similar accommodations through Congressional language.

- **Slashing Statute of Limitations ("SOL")-** Slashing SOLs in most situations from six years down to just five months to bring challenges regarding permit approvals for mining, logging, drilling and other destructive resource extraction activities will necessarily cause further inequities in access to justice for many communities, especially fenceline, low-income, tribal, and environmental justice communities.
    - ***Short statute of limitations exacerbates access to justice inequities -*** Short SOLs represent an added burden to these communities because they often have limited resources to gather data, conduct research, and mobilize support for litigation, which sometimes takes a year or more to bring a case. This is a major environmental justice issue because these communities are often impacted by significant environmental hazards, and short SOLs will exacerbate existing inequities. Finally, such an arbitrarily short statute of

limitations is simply a back-end tactic to deny some of the most vulnerable communities an opportunity to have their voices heard in the courts.

- **Factors that require more time to bring litigation** – Many factors would necessitate more than five months to develop and file litigation aimed at protecting communities' rights and public health, including:
  - ***Agency notice requirements and community knowledge of the permitting action*** – Many frontline communities, tribal nations, and concerned citizens often do not even learn a federal approval has been granted within a five-month period, as federal agencies are not always *required* to notify the public that such approval has occurred, or if they are, only provide notice in forums that the general public may not be aware of, such as only publishing in the Federal Register. Accessible notice requirements must be strengthened.
  - ***Community readiness*** – Communities with limited resources often take much longer to organize because there may not be community groups with the expertise or resources to alert community members and educate them on the threat. Strong legal networks and alliances in those communities may not exist at all, requiring even more time to prepare.
  - ***Access to adequate legal representation*** – Frontline communities often lack the resources to afford legal representation and usually must seek pro-bono assistance, which adds significant time to case development and, ultimately, filing a case. Even when a community can afford to pay for legal representation, finding a firm with the expertise needed, especially on complex cases, can take significant time. Finally, many communities face the prospect of being turned down by firms that do not want to take on large corporate polluters with hundreds of lawyers and millions of dollars at the disposal of those permitted entities.
  - ***Issue complexity*** – Even for well-resourced communities, if an issue is complex, it often takes significant time to conduct scientific research and gather evidence.

- **Court remands to agencies are problematic –** Section 101(d) of the bill contains several additional problematic provisions that inappropriately interfere with the court's discretion to administer justice. First, it requires courts to set a 180-day deadline for agencies to act on remand. This mandate could cause inappropriate re-ordering of the courts' schedules. Moreover, section 101(e) would treat any court-ordered agency revisions or supplemental environmental documents to be "considered to be a separate final agency action." This means the conclusion of judicial review of an action could be assigned to a *different* judge and district court than the initial legal challenge, wasting limited judicial resources because a new judge and their staff would have to learn the case from scratch. To be clear, this provision is an industry get-out-of-jail card that allows them to evade a court that has already found prior permitting actions to be inadequate.

While the bill includes provisions that may accelerate the deployment of the critical clean energy and the transmission infrastructure we have been championing, they should not be paired with massive giveaways to the fossil fuel and mining industry. The A. Donald McEachin Environmental Justice for All Act (HR 1705/S 919), along with other legislative proposals, offer real solutions to address permitting issues while also enhancing public participation in the permitting process and enhancing access to justice through the courts.