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BEFORE THE SENATE COMMITTEE ON AGRICULTURE AND NATURAL RESOURCES
REGARDING H.R. 1904, THE HEALTHY FORESTS RESTORATION ACT OF 2003
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INTRODUCTION

I appreciate the opportunity to appear before the Committee to offer my comments on H.R. 1904, the so-called Healthy Forests Restoration Act. This is a deeply flawed piece of legislation that cuts the heart out the NEPA process,¹ eliminates citizen appeal rights,² and usurps the traditional role of the federal courts in exercising their equitable authority to fashion injunctive relief to assure compliance with federal laws (discussed below).

These are draconian measures that are unnecessary and unjustified. Under the guise of reducing risks of wildfires and insect infestations, this bill seeks to increase commercial logging on millions of acres of public lands, including remote backcountry. No one disputes that many of our publicly owned forests are “unhealthy” as a result of centuries of bad policies, like fire suppression; and bad management, like massive clear-cutting and road-building. And no one disputes the need to reduce the risk of wildfires in the “urban interface,” or to take appropriate action to prevent the spread of insect infestations. But “more of the same,” i.e. more logging and road-building, is not necessarily the cure for what ails our public forests. More to the point, it is

¹ Section 103 (b) provides that the Secretary “is not required to study, develop, or describe any alternative to the proposed agency action.” As the CEQ Regulations state, alternatives analysis is the “heart of the environmental impact statement.” 40 CFR 1502.14. Without alternatives, an environmental assessment under NEPA is an empty gesture.

² Section 105 (c) exempts fuel reduction projects from the Appeals Reform Act of 1992 (PL 102-381) which provides citizens the right to appeal unlawful Forest Service decisions. A wide variety of “citizens” regularly use this provision, including landowners, municipalities, local business, and conservationists. In fact, according to a recent study by the University of Northern Arizona, ranchers file more appeals each year than “environmentalists.”

not necessary to ride roughshod over environmental laws, the public, and the courts in order to address these problems. It takes time to make rational, lawful, well-informed decisions, but history has shown that it is time well spent.

Despite the throaty rhetoric of “paralysis by analysis,” the proponents of this legislation, including the Bush Administration, have produced no hard evidence to substantiate the charges that NEPA, citizens, or the courts are to blame for the conditions on public lands, or that they represent substantial obstacles to improving those conditions.³ Indeed, we would not be in the fix we are today in if the federal agencies responsible for managing these lands had paid more attention to the precautionary principles of NEPA, if they had listened to those who questioned the dominance of timber harvest at the expense of wildlife, watershed and the ecological integrity of the whole forest, and if they had simply obeyed the law.

³ The General Accounting Office has issued two reports casting serious doubt on the Forest Service claim that citizen appeals and litigation have severely hampered the agency’s ability to conduct fuel reduction projects. See *Forest Service: Information on Decisions Involving Fuel Reduction Activities* GAO 03-689R May 14, 2003; *Forest Service Appeals and Litigation of Fuels Reduction Projects*, GAO 01-114R August 31, 2001. The 2003 GAO Report found that more than 95 percent of the 762 [724 out of 762] hazardous fuels reduction projects reviewed by the GAO -- covering some 4.7 million acres of federal forest lands -- were ready for implementation within the standard 90 day review period. Further, the GAO found that only 3% of the projects (23 out of 762) were challenged in court, and by a wide variety of interest groups.

Though there are a host of issues raised by H.R. 1904, I will focus on the judicial review provisions, sections 106 and 107. Together these provisions represent an unprecedented intrusion into the judicial branch that attempts to “micro-manage” the federal courts and tilt the scales of justice in favor of “hazardous fuel reduction projects.” This new term is defined so broadly that it means essentially whatever the responsible federal agencies say it means.⁴ The fact that the bill sets a “cap” of 20 million acres of federal lands that may be included in authorized hazardous fuels reduction projects, an area far larger than any reasonable concept of the “urban interface,” is a clear indication of how broad the grant of authority is to the agencies. See 102 (c).

SECTION 106–MICRO-MANAGING THE COURTS

Section 106 imposes unreasonable deadlines on litigants and the courts, attempts to prioritize the federal dockets, limits judicial authority, and imposes additional procedural steps and workload on busy, understaffed federal courts struggling to reduce a growing backlog of cases. Specifically, section 106 would do the following:

- Require lawsuits challenging fuel reduction projects to file suit within 15 days of the date the final decision is published in a “local paper of record.” Section 106 (a) (1). This is an unreasonably short period of time, triggered by an inadequate notice in obscure publications. It does not provide any opportunity to carefully evaluate the merits of filing suit, or explore settlement. Coupled with the repeal of the administrative appeal rights (section 105), this provision essentially forces citizens to “shoot first and ask questions later.”

⁴For example, under section 102 (a) five categories of federal lands are made eligible for hazardous fuels reduction projects, including those where “windthrow or blowdown, or the existence or threat of disease or insect infestation pose a significant threat to forest or rangeland health or adjacent private lands.” It is hard to imagine any forest lands anywhere in the country that would not fall under that kind of open-ended description.

- Prohibit the courts from granting any waivers of the filing deadline, even where the parties might otherwise agree to it, or the interests of justice might require it. Section 106 (a) (2).
- Urge courts “to expedite, to the maximum extent practicable, the proceedings in such lawsuit with the goal of rendering a final determination on jurisdiction, and if jurisdiction exists, a final determination on the merits, within 100 days from the date the complaint is filed.” Section 106 (c). Even though this is not a mandatory deadline, it puts undue pressure on judges to “fast-track” a special class of cases, whether or not they deserve it in relation to other cases, including criminal cases where a “speedy trial” is a constitutional imperative.
- Limit any preliminary injunction granted by the court to 45 days, a totally arbitrary time limit. Section 106 (b) (1). Courts are “permitted” to extend the period after “taking into consideration the goal expressed in subsection (c) for the expeditious resolution of [fuel reduction] cases.” Before applying for an extension of the preliminary injunction, “the parties shall present the court with an update on any changes that may have occurred during the period of the injunction to the forest or rangeland conditions that the authorized hazardous fuels reduction project is intended to address.” Section 106 (b) (2).
- Require the Secretary to report to Congress every time there is a request to renew a preliminary injunction. Section 106 (b)(3). It is not clear what Congress is supposed to do with this information; the notice seems calculated to put more pressure on the courts to refrain from extending injunctions regardless of the equities.

SECTION 107–INJECTING BIAS INTO A CORE FUNCTION OF THE JUDICIAL BRANCH

Even more troublesome than the interference with the court’s management of its docket is

the attempt in section 107 to bias the judgment of the judiciary in exercising its equitable authority. The exercise of equitable discretion is one of the core functions of the judiciary. Statutes determine what conduct is legal or illegal, but it is the courts that determine what remedy is required to enforce compliance with the law in the circumstances of each particular case. As the U.S. Supreme Court said in Hecht v Bowles, 321 U.S. 321, 331 (1944), the leading case regarding the relationship of equity and statutes:

The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument of nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

To do equity, courts must be independent. Indeed, the independence of the judiciary is one of the core values of American democracy. We rely upon the courts to administer justice fairly and impartially, adjudicating the facts of specific controversies and enforcing the rule of law “without fear or favor.” One of the primary responsibilities of the courts is to ensure that the laws passed by Congress are not “lost in the halls of the bureaucracy.” Injunctive relief is the only tool that courts have to ensure compliance with statutory requirements, while taking into account competing interests and shaping relief to avoid unnecessary harm to third parties or to the public interest. This is a uniquely judicial function that deserves respect from the coordinate branches of government.

Federal courts have always treated injunctions as an extraordinary form of relief, available only where there is the threat of irreparable harm and no other adequate remedy at law. Courts do not issue injunctions lightly. Plaintiffs must meet four tough tests: (1) that there has been a violation of law, or at least the likelihood of such a violation; (2) that plaintiff will suffer irreparable harm if an injunction is not issued; (3) that any potential harm to the defendant or

third parties does not outweigh the harm to plaintiff; and (4) that the public interest will be served by an injunction. Cf. Sierra Club v Penfold, 857 F.2d 1307, 1318 (9th Cir. 1988). In fact, courts often deny injunctive relief in environmental cases [cite Winner, Rodgers]

The Supreme Court has made it clear that injunctions do not automatically issue every time a statutory violation has been established. Weinberger v Romero-Barcelo, 456 U.S. 305, 313 (1982); Amoco Production Co. v Village of Gambel, 107 S.Ct. 1396, 1403 (1987). Courts are required to carefully weigh the equities and “balance the hardships” before issuing injunctions, except in those unusual circumstances where unless Congress has unmistakably decreed that certain values are to be given “paramount” importance, such as the preservation of endangered species. TVA v Hill, 437 U.S. 153, 193-95 (1978).

Courts are well suited to consider all of the circumstances and tailor injunctive relief to assure compliance without unduly harming affected interests. United States v City of Parma, 661 F.2d 562, 576 (6th Cir. 1981) (“Courts have a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objective.”). In the landmark *Reserve Mining* case, for example, the court ordered compliance with the statute but allowed the defendant a reasonable time to come into compliance so as to avoid a shut-down of the facility and the attendant economic dislocation that would have entailed. In cases against federal land management agencies, courts have declined to enjoin activities, such as logging, pending compliance with environmental statutes, such as NEPA and the Endangered Species Act, where there was no showing that there would be any irreparable harm to the environment and no “irreversible or irretrievable commitment of resources” pending compliance. Cf. Southwest Center for Biological Diversity v U.S Forest Service, 307 F.3d 964, 973 (9th Cir 2002). Courts have also denied injunctive relief for NEPA violations where there was an urgent need for

action, such as arresting the spread of insect infestations. Alpine Lakes Protection Soc v. Shlepfer, 518 F.2d 1089, 1090 (9th Cir. 1975). On the other hand, courts must have the discretion to issue injunctions where necessary to preserve the status quo pending compliance; otherwise the court is put in the untenable position of sanctioning violations of the law. Thomas v Peterson, 753 F.2d 754, 764 (9th Cir 1985)

Turning to the specifics of section 107, two points should be made. First, the provision expands the universe of federal actions subject to its requirements well beyond “hazardous fuel reduction projects.” Second, the provision attempts to bias the exercise of the court’s equitable discretion in ways both subtle and not so subtle. Specifically the provision does the following:

- It defines “covered projects” as “an action on Federal lands, including an authorized hazardous fuels reduction project, that is necessary to restore a fire-adapted forest or rangeland system.” (Emphasis added) Courts interpret this kind of definition as “illustrative” rather than “exclusive.” Thus, contrary to the bill’s supposedly narrow focus on fuel reduction projects, this language opens the door to a broad category of federal actions beyond fuel reduction projects, and makes them eligible for the special treatment afforded by section 107. At a minimum this kind of loose language guarantees lots of litigation over its scope and intent.
- It emphasizes “harm to the defendant” as a dominant consideration in weighing equities. Section 107 (b). Under classic equitable balancing, of course, courts are required to balance the hardships to all parties, as well as irreparable harm to the environment and any irreversible commitments that would prevent ultimate compliance with the law. Section 107 does not even acknowledge that compliance with the law is a relevant consideration.

- It mandates that courts “balance the impact to the ecosystem of the short term and long-term effects of undertaking the agency action against the short-term and long-term effects of not undertaking the agency action.” As discussed above, courts already engage in this kind of balancing , except that it is done in a more even-handed manner without the preference for the defendant’s point of view. At best, this requirement is redundant; at worse, it attempts to skew the court’s analysis.

- It mandates that the courts “give weight to a finding by the Secretary concerned in the administrative record of the agency action concerning the short-term and long-term effects of undertaking the agency action and of not undertaking the agency action, unless the court finds that the finding is arbitrary and capricious.” In effect this means that a court is bound by the Secretary’s (i.e the defendant’s) determination on whether an action should proceed in the face of a finding that the Secretary has violated the law unless the court finds that the Secretary’s determination is arbitrary based on the record that the Secretary has compiled. This is a breathtaking delegation of a judicial function to an Executive Branch official who is also the defendant in the case. This simply defies logic and common sense, and betrays an unwarranted distrust of the federal courts.

RELATED ACTIONS LIMITING ENVIRONMENTAL PROTECTION AND PUBLIC PARTICIPATION IN DECISIONS AFFECTING PUBLIC LANDS

H.R. 1904 cannot be viewed in isolation. There are a number of other actions being taken by the Administration to rollback environmental safeguards and curtail citizen access in the name of “hazardous fuels reduction.” For example:

- On June 5, 2003, the Administration promulgated new rules establishing a “categorical exclusion” from NEPA for fuel reduction projects on national forests and BLM lands. 68

Fed. Reg. 33813. This CE applies to projects up to 1000 acres within the “wildland-urban interface. (For comparison, the previous CE limit for logging was 10 acres.) The new CE virtually eliminates NEPA review for approved projects subject to a very narrow “extraordinary circumstances” exception.

- The day before, on June 4, the Administration published new rules overhauling the Forest Service appeals process under the Appeals Reform Act of 1992. 68 Fed. Reg. 33581. The new rules exempt all “categorically excluded” projects from appeal. Thus, in one-two punch the Administration eliminated NEPA review for fuel reduction projects and then insulated them from administrative review on any basis. Further, the new rules give the Secretary and Assistant Secretary of Agriculture carte blanche authority to exempt any Forest Service project from appeal. See 36 CFR 215.20 (b).

CONCLUSION

H.R. is a bad law. It betrays a cynical distrust of the federal judiciary that is completely unwarranted and antithetical to the fundamental tenet of checks and balances that has guided our democracy from its earliest days. It also betrays a distrust in the value of careful environmental review and an open public debate about how public lands ought to be administered. This is legislation designed to empower an elite clique of federal officials to make all the decisions, and then constrain the courts from conducting the kind of searching, impartial, unflinching analysis of the law, the facts and the equities that has been the hallmark of judicial review of agency action in the past. The premise of this legislation is all wrong. It is not the courts, or the public, or NEPA that is to blame for the sorry condition of our public forests. It is bad policies and bad management. Albert Einstein once observed "We can't solve problems by using the same kind of thinking we used when we created them." We would do well to apply that reasoning to restoring

and improving the health of our natural resources.

Thank you.