June 12, 2018

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, A*dministrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 321-27 (2013).
[2] Koretoff v. Vilsack, 707 F.3d 394, 397-98 (D.C. Cir. 2013).

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