TESTIMONY

Testimony of
Gregory S. Wetstone
Director of Advocacy Programs
Natural Resources Defense Council
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Environmental Laws
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Mr. Chairman, members of the Committee, my name is Gregory Wetstone and I am director of advocacy at the Natural Resources Defense Council (NRDC), a national, non-profit organization of scientists, lawyers, and environmental specialists, dedicated to protecting public health and the environment. On behalf of NRDC, and our more than 550,000 members across the nation, I want to thank you for convening this vitally important hearing, and for providing NRDC with the opportunity to participate.

The topic before the committee today, the status of environmental protection efforts at the federal agencies of the Bush Administration, is an exceptionally urgent one, with great relevance to millions upon millions of Americans. The landmark environmental protection laws passed by Congress since 1970 have, taken together, been among the most popular and successful legislative initiatives ever. These laws, and the regulatory safeguards they spawned, have worked to improve the quality of life in America, reducing unhealthful smog in our cities, stemming the flood of sewage and toxics into our rivers, reducing the level of lead in children's blood, bringing the bald eagle and the gray whale back from the brink of extinction, revolutionizing hazardous waste disposal, helping to clean our coastlines and protect our wetlands, saving public lands for all Americans to enjoy, and preserving some of the last of our country's spectacular wild areas.

Today, however, the bipartisan environmental laws and programs that made this progress possible are very much at risk. The threat is less from an open effort to weaken these popular laws in Congress, than a quiet campaign to subvert the fundamental government structure that is vital to making them work. Sadly, it is increasingly clear that the Bush Administration is employing the full force of the Federal Government in a sweeping campaign to undermine the programs that protect our air, water, lands, and wildlife.

The leading edge of this onslaught is a wide-ranging effort at the federal agencies with environmental responsibilities -- including the Interior Department, the Forest Service, the Environmental Protection Agency, and the Corps of Engineers -- to weaken the formal rules that translate Congress' mandates into specific requirements for industry. The examples span the spectrum of environmental law. NRDC's new report, *Rewriting the Rules: The Bush Administration's Unseen Assault on the Environment* documents an extensive list of more than 60 environmental retreats on issues ranging from clean air, to clean water, to protection of National Parks, wildlife, wetlands, and forests. (I would like to submit this document for inclusion in the hearing record.)

But the changes in formal agency rules, which under the law must involve an open public process, are only the tip of the iceberg. The Administration is relying extensively on other destructive tacks that are comparably damaging, but far less visible.

The failure to aggressively enforce environmental requirements is one important example. Actions undermining the credibility of clean air act enforcement were of course highlighted with the high profile resignation last week of a senior EPA enforcement official. The Administration's proposed 2003 budget would cut EPA enforcement

capabilities substantially, eliminating over 200 EPA enforcement personnel.

Similarly, we've seen extensive use of highly technical agency "guidance," rather than changes in formal rules, to avoid an open public process when backing away from high profile environmental programs. A prime example is the Corps of Engineers "regulatory guidance letter" issued last November with absolutely no public input, which effectively eviscerated the cornerstone of U.S. wetlands protection, the national commitment to "no net loss" of wetlands. Along the same procedural lines, the Agriculture Department has issued a series of "interim directives" that fundamentally undermine forest protection policies through changes in the Forest Service manual, a tactic that once again minimizes public attention and involvement.

Another stealth approach is the simple failure to defend environmental requirements in court. Examples include the Forest Service decision last March not to defend the landmark "roadless" forest protection rule from challenge by the timber industry and its allies**,** and the Fish and Wildlife Service's willingness before a federal court only last month to forgo protection for 500,000 acres of "critical habitat" in California, which had previously been considered essential for the continued survival of endangered species. Along these same lines, last June the Interior Department hastily capitulated to a lawsuit the International Snowmobile Manufacturers Association brought to delay implementation of a rule barring snowmobiles from Yellowstone National Park.

The failure to assure funding for vital environmental programs is yet another stealth approach. The most prominent example is the Administration's failure to seek reauthorization of the Federal Superfund tax on oil and chemical feed stocks. With the clean-up of hazardous waste sites required to be fully subsidized by taxpayers, and the fund running out of money, EPA officials have publicly warned that we now face a major slow-down in the clean-up of our most contaminated hazardous waste sites.

Finally, and in some ways most disturbingly, we come to the effort at the White House Office of Management and Budget to stack the deck in the federal agency rulemaking process, blocking environmental safeguards with new procedural hurdles, biased analytical assumptions, and unwarranted political interference. The controversial new chief of regulatory review at OMB, John D. Graham, has a long history of promoting controversial cost benefit assumptions that devalue environmental protection. Most notable are assumptions suggesting that the life of an elderly person should be considered less valuable on the thesis that quality of life is lower, and there is less long to live, and assumptions that devalue lives lost due to carcinogens in the environment on the theory that death in the future from current toxic exposures should be discounted.

To promote adherence with these views Dr. Graham has employed a new bureaucratic weapon, the "return letter," to send rules back to environmental agencies for additional cost-benefit analysis. This tool can be applied to derail a regulatory safeguard even where Congress has decreed that agencies should act without regard to costs or benefits, for example where the environmental statutes require standards to be based on the best available technology or the level necessary to assure protection of human health. Using this new tool, Mr. Graham has already returned several rules to agencies for "improved analysis." While better analysis is a fine objective, no one seriously expects rules to be strengthened as a result of this exercise. To date, this approach has only been used to sidetrack rulemakings like EPA's proposed rule for reducing emissions from off-road vehicles like snowmobiles.

Lastly there is the effort broadly known as the OMB hit list. OMB has reached out to the regulated industry and others to develop a controversial list of environmental and other safeguards that are to be re-evaluated and, potentially, weakened. Although the process of pulling this list together theoretically encouraged suggestions from all sides, the published list of rulemakings to be reviewed clearly reflects industry's high priority wish list. All but three of the 13 environmental rules included here were suggested by an industry-funded anti-regulatory think tank, with two of the others stemming from

industry trade associations. As a practical matter, the OMB hit list, which I would like to submit for inclusion in the record, is a road map for future regulatory battles over environmental rollbacks. It includes safe drinking water standards, controls on toxics, Clean Air Act requirements, water pollution limits, pollution from factory farms, and forest planning regulations.

I'd like to take a moment to review a few of the most troubling administrative actions in a bit more detail.

· **Clean Air.** There is no more fundamental requirement in the Clean Air Act than the mandate that new pollution sources install state-of-the-art pollution controls. Approved by Congress in the 1972 Clean Air Act Amendments, and affirmed in 1977 and again in 1990, the new source requirements are part of the fundamental compromise in our clean air law, one that allows older power plants and factories more leeway, while imposing tough requirements on new facilities. Older facilities, the authors of the law reasoned, will eventually be replaced with more tightly controlled new facilities, assuring long-term environmental improvement. To prevent power plants and factories from evading these requirements through piece-by-piece rebuilding, the Clean Air Act also subjects major "modifications" of factories and power plants to the new source standards. In recent years, this requirement has been especially important, as EPA has launched enforcement cases against old coal-fired power plants without pollution controls that have tried to escape the Clean Air Act by surreptitiously rebuilding under the guise of normal maintenance.

Sadly, the Bush Administration stands ready to carve up this program with new loopholes that would allow aging power plants and factories to rebuild and increase pollution without meeting the tough new source requirements. EPA is now involved in a major internal battle with the Department of Energy and the White House OMB, over this proposal, and it seems increasingly likely that an extremely damaging environmental proposal will emerge from this process.

Almost as troubling as the substance of this proposal, is the highly unusual, and almost certainly illegal, process EPA plans for this action. The Agency has indicated that it intends to eliminate the opportunity for the public to participate in the decision through "public notice and comment" by moving directly to a final rulemaking, and skipping the traditional "proposed" phase of the regulatory action.

The result would be more pollution from hundreds of the nation's oldest and dirtiest power plants and oil refineries, causing more acid rain, more smog and increases in tiny particles of soot called "particulate matter" that are especially hazardous to health. The health consequences of this retreat are staggering. White House signals regarding the intention to weaken this key requirement have, not surprisingly, derailed progress toward securing settlements that would curtail illegal pollution from numerous power plants. The opportunity to cut deeply into the toll of premature deaths from this pollution, estimated at 10,000 lives annually by EPA, has been delayed for a year as the White House review has dragged on.

· **Wetlands**. For more than a decade, the cornerstone of America's approach to the protection of wetlands has been a national policy calling for "no net loss," which originated with the first Bush Administration. In 1990, EPA and the Army Corps of Engineers signed a Memorandum of Agreement, outlining standards for mitigating destruction of natural wetlands in order to help achieve the "no net loss" goal. Last Halloween, however, the Corps effectively swept this policy aside, with no public notice or opportunity for comment, through issuance of an obscure policy document called a "regulatory guidance letter" that unilaterally abrogated the 1990 memorandum of agreement with EPA. Under this new policy, it will be considered acceptable to replace lost and destroyed natural wetlands with upland areas, stream buffers, and other areas that simply are not wetlands. Environmental advocates have termed this "new net loss" and anticipate that it will mean the loss of tens of thousands of acres of precious wetlands,

which are vital for flood protection, clean water, and wildlife habitat.

The stunning reversal of the "no net loss" policy is only one component of a broader Bush Administration effort to weaken wetlands protection. Another major blow came in January when the U.S. Army Corps of Engineers finalized a major relaxation of its "nationwide" permit program, which regulates smaller development and industrial activities in streams and wetlands. The proposed changes would make it easier for developers and mining companies to destroy wetlands, particularly in flood-prone areas, by allowing the Corps to waive crucial requirements that limit stream destruction to a 300 foot limit, impose restrictions on filling wetlands in floodplains, and secure acre-for-acre replacement of destroyed wetlands.

· **Mining on Public Lands**. Mining activities have despoiled 40 percent of all Western watersheds, according to an Environmental Protection Agency estimate in 2000. A half-million abandoned or closed mines dot the nation's landscape, with cleanup costs estimated in the tens of billions of dollars. It is therefore especially tragic that Bush Administration rollbacks have been particularly brazen when it comes to the environmental restrictions that apply to mining on public lands.

In October, Forest Service Chief Bosworth formally asked the Interior Department to lift a two-year moratorium on new mining activities covering 1.15 million acres of federal land in southern Oregon, including a 700,000-acre area under consideration for national monument status. That same month, Interior Secretary Norton issued new final "hard rock" mining regulations that reverse the environmental restrictions that apply to mining for gold, silver, copper and other metals on federal lands. Shockingly, under the new rules, the Interior Department renounced its own authority to deny permits to mine on taxpayer-owned lands on the grounds that a proposed mine could result in "substantial irreparable harm" to the environment or nearby communities. The new rules also limit corporate liability for irresponsible mining practices, in the process undermining cleanup standards that safeguard ground water and surface water. The rules took effect last December 31.

· **Raw Sewage in America's Waters.** In 2000, EPA issued long-overdue rules minimizing raw sewage discharges into our waterways, and requiring public notification of sewage overflows. This is an extremely important problem nationally. EPA reports that there were 40,000 discharges of untreated sewage into waterways, playgrounds, streets and basements across the country in the year 2000. Sewage containing bacteria, viruses, fecal matter and a host of other wastes is responsible each year for beach closures, fish kills, shellfish bed closures, and human gastrointestinal and respiratory illnesses. Not surprisingly, the health consequences of this contamination are substantial. The Centers for Disease Control estimates that waterborne microbial infections cause up to 940,000 illnesses and 900 deaths each year in the U.S. (*Protecting and Restoring America's Watersheds*, U.S. EPA, 2001). These exposures pose the greatest risk for children, the elderly and those with weakened immune systems.

Despite a consensus between environmentalists and federal, state and municipal authorities on procedures to prevent sewage spills and the importance of warning citizens about the hazards of sewage exposure, the proposed rules were held up as part of the 60-day regulatory moratorium issued by White House Chief of Staff Andrew Card when the Administration first took office. After nearly a year, the Administration has still not issued the final sewage overflow rules. Technically, the rules remain under "internal review" at EPA, but in practice they remain in an indefensible regulatory purgatory. Meanwhile, Americans are swimming in sewage tainted waters, and being denied even rudimentary public notice of sewage contamination.

· **Forest Protection.** A little over a year ago, the U.S. Forest Service issued the Roadless Area Conservation Rule, perhaps the greatest American conservation measure of all time, protecting 58.5 million acres of inventoried roadless national forest areas from most logging and roadbuilding. This rule resulted from years of scientific and

expert review, more than 600 public hearings across the country, and approximately 1.5 million public comments in favor of the rule or even stronger protections. The rule allows for local input into many kinds of decisions about roadless areas.

In March 2001, Agriculture Secretary Veneman pledged to protect roadless forest areas. However, when the roadless rulemaking was challenged in federal court, the Administration declined to defend the rule against lawsuits brought by the timber industry and its allies.

Meanwhile, the Forest Service issued a series of "interim directives" over the ensuing months, each time further undercutting roadless area protections through changes in the Forest Service manual – an approach for affecting significant changes while minimizing public attention. These changes carve massive new loopholes into the requirements that roadless national forest areas be protected, allowing roadbuilding upon completion of a "roads analysis," or even without such analysis with the approval of the Chief of the Forest Service or his designee. As a practical matter, with these loopholes the agency has almost completely abandoned the special protections designed to prevent clearcutting in roadless areas. This is particularly evident in the Tongass National Forest, where the Forest Service is moving ahead with 33 timber sales in pristine roadless areas -- timber sales that are slotted to cut down over 650 million board feet of timber. This logging, and the irreversible destruction it will cause, is proceeding despite the fact that the Administration's new forest policies are the subject of significant litigation, especially as they apply to the Tongass National Forest.

These are just a few of the most high profile environmental retreats. As documented in the NRDC report, there are dozens of others.

Taken together this assault on the environment is the most serious threat ever to America's landmark environmental protection programs. If allowed to proceed unhindered, it will leave our bipartisan environmental laws technically unchanged, but dramatically undermine their credibility and effectiveness - in essence rending them mere words on paper, increasingly irrelevant to what polluters, developers, and those who drill, log and mine on public lands, do in the real world.

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