

DEFENDING

the gains



Earthjustice
June 2004 Report



Defending the Gains: June 2004 Report

Aided by its allies in Congress, the Bush administration has tried to reward its industrial contributors by weakening the laws that protect our air, water, forests, wildlife, and public health. In response, Earthjustice has taken the Bush administration to court and intervened in industry-inspired litigation to defend our laws when the administration refused to stand up for them. In the last year alone we have won major victories preventing development of public lands, defending endangered species, and upholding key protections for clean air and water. We prompted and mobilized widespread opposition that thwarted the appointment of anti-environmental, ideological extremists to lifetime seats on the federal judiciary. Our policy and communications staff worked closely with our attorneys and clients to help prevent legislative and regulatory actions that threaten our courtroom victories. This advocacy often attracted media attention that spurred community organizing and political mobilization to preserve the laws that protect the environment.

This report illustrates the breathtakingly comprehensive approach the administration is taking to unraveling a century of environmental gains—and the wide-ranging challenges that Earthjustice has met.

Payback: The Bush Administration in Context

“You did everything you could to elect a Republican president. You are already seeing in his actions the payback.”

—William D. Raney, president, West Virginia Coal Association, at the association’s annual meeting, May 2002

To understand the current administration’s attacks on the laws and regulations that safeguard the nation’s natural heritage, we must recognize more than a century of progress. The growth and westward expansion of the United States led to increasing energy consumption and resource extraction. Eastern coal powered industrial development. The continent’s forests were felled from East to West to provide raw material for homes and businesses. But many people, valuing the frontier as a major force in shaping American character, wanted to preserve wild lands. In *The Significance of the Frontier in American History* (1896), historian Frederick Jackson Turner discussed the role of pioneer contact with wilderness in fostering individualism, independence, and thus self-government.

So a struggle played out in the twentieth century. The National Park Service protected the national parks Congress created out of former national forest lands. At the same time, the Forest Service managed public lands for multiple uses—in theory, a balance of recreation, conservation, logging, and grazing. When the Forest Service proved much more interested in logging, Congress passed the Wilderness Act of 1964, eventually designating over 100 million acres of public land to be left in its natural state. Growing public interest in environmental conservation in the 1960s and ’70s led to the passage and strengthening of such landmark legislation as the Clean Air Act, the Clean Water Act, and the Endangered Species Act.

Earthjustice opened for business as the Sierra Club Legal Defense Fund in 1971. We used litigation as a tactic in a broad strategy to hold corporations and government agencies accountable to the law, to strengthen environmental protections, and to create policy change.

By the time Ronald Reagan became president, Frederick Jackson Turner’s individualism, independence, and self-government had formed the basis of a libertarian belief system. Conservative libertarians railed against government regulation as a hindrance to personal freedom, giving a thin veneer of intellectual cover to the extractive industries that saw government regulation as a hindrance to profits. President Reagan’s Interior Secretary, James Watt, fresh from advocating the oil industry’s interests at the Mountain States Legal Foundation, began a backlash against environmental laws. But his clumsy efforts to open the Arctic National Wildlife Refuge to oil drilling and to sell coal on public lands for a penny a ton (“We will mine more, drill more, cut more timber”) energized effective public and Congressional opposition.

In 1994, Newt Gingrich’s “Contract with America” polarized the nation, in no small part because of the Contract’s corporate, anti-environmental, agenda. President Clinton enraged industry and its Congressional allies by following President Carter’s example, using presidential power under the Antiquities Act to protect more than six million acres of federal public land as national monuments. And he shut down government rather than pass a budget that would open the Arctic National Wildlife Refuge to oil development. In his last month in office, Clinton signed the National Forest

Roadless Area Conservation Rule, protecting 58.5 million acres of national forest roadless areas—about 30 percent of the National Forest System. He also created new national monuments and strengthened protections for water and air quality.

The extractive industries were fighting mad. Their Congressional campaign contributions were meant to keep public lands out of public hands. Endangered species threatened cheap access to public resources. And they were sick and tired of being told they couldn't dump their wastes into air and water. In the 2000 presidential election, the oil and gas industry donated \$17 million to the Bush-Cheney campaign; chemical and manufacturing industries, \$18.6 million; timber, \$3.4 million; mining, \$3 million; coal-burning utilities, \$2 million. Millions more flowed to Congressional candidates.

President George W. Bush wasted no time paying back his supporters. Within an hour and a half of taking office, he suspended more than 300 of President Clinton's environmental regulations. Then he and the industry lobbyists and corporate lawyers he installed in top government positions set about turning back the clock on a century of environmental progress. Four months into the new administration, *The National Energy Policy*, written behind closed doors by former oilman Dick Cheney and industry allies, presented a "long-term, comprehensive strategy" for "meeting America's energy challenges."

Limiting Irresponsible Energy Development

"Coal is the cornerstone of President Bush's energy policy, and the U.S. Department of the Interior is committed to supporting that plan."

—Deputy Interior Secretary J. Steven Griles, at the Western Mining Conference, February 2003

As the cornerstone of the national energy policy, coal is a good place to begin to look at Earthjustice's achievements. As *The National Energy Policy* notes, "about 74 percent of U.S. low-sulfur coal reserves are located in Montana and Wyoming. Demand for clean coal from Wyoming's Powder River Basin is expected to increase because of its environmental benefits." Coal is intricately linked with oil and natural gas, with public lands and fresh water and endangered species. And because coal is not "clean," it is also linked with air quality.

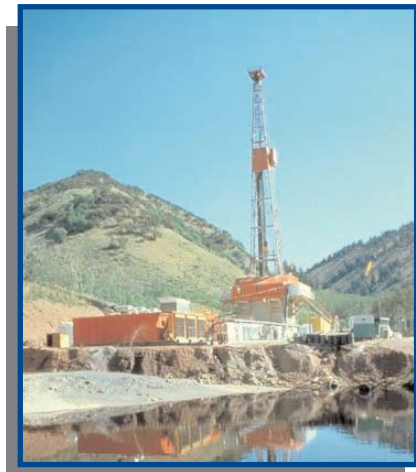
Challenging Coalbed Methane Development in the Rockies.

Earthjustice's Denver and Bozeman offices are litigating several cases to limit irresponsible energy projects in the West. Of particular concern, the Bureau of Land Management (BLM) authorized 82,000 new oil and gas wells in April 2003. These leases, straddling Wyoming and Montana in the Powder River Basin, achieve three objectives. First, they provide immediate access to coalbed methane, a form of natural gas the value of which has increased because it is the least air-polluting fossil fuel for new generating capacity. (As *The National Energy Policy* points out, "90 percent of all new electricity plants cur-



Coal plant spewing pollutants (USGS)

rently under construction will be fueled by natural gas.”) Second, by requiring new roads and infrastructure, the leases develop public land so it can’t ever be added to the National Wilderness Preservation System. And third, once the gas is exploited and the area developed, the unprotected land can be mined for coal.



Coalbed methane extracting machinery (BLM)

This plan for the Powder River Basin represents the largest oil and gas project in BLM history. The project authorizes 66,000 coalbed methane wells, three times the current number of wells in the entire United States. But there’s a problem with coalbed methane drilling. It’s decimating ranches and wild lands in Wyoming and Montana with water, air, and noise pollution. Coalbed methane extraction, a uniquely destructive process, involves pumping water from aquifers into the wells to force gas to the surface. The water, laced with salts and minerals, follows the gas and is spilled into unlined ponds or into streams. In combination, new and existing wells will spill four trillion gallons of wastewater onto the ground over the next 15 years. The wastewater kills native plants and farmed crops along the waterways; recharge of local aquifers, needed for drinking water, may take centuries.

In the arid West, the movement of all this water from aquifers to the surface will drastically change the environment and even the climate. Yet BLM’s environmental impact statements failed to consider the projects’ cumulative impacts on water, air, and wildlife or to consider a reasonable range of alternatives. Acting on behalf of Wyoming farmers, ranchers and conservationists, we filed suit against the project in Montana federal court last May. Oil and gas interests intervened, asking the court to dismiss the case or to move major portions of it to Wyoming, where they expect a friendlier hearing. We argued against this motion. The court decided to split the case, considering whether BLM should have issued a single environmental impact statement in Montana, while transferring the Wyoming claims to that state. Opening briefs have been filed in both cases and oral arguments in Wyoming are scheduled for this month.

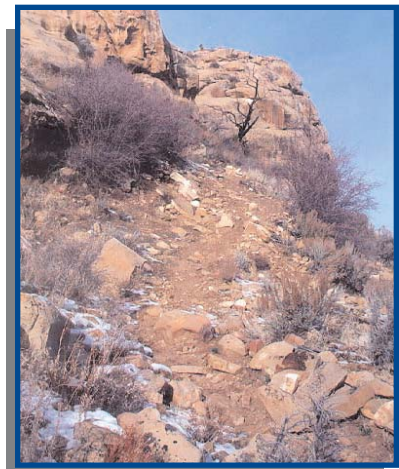
Protecting Federal Wilderness from Right-of-Way Claims. *The National Energy Policy* states that BLM “estimates that 90 percent of the oil and natural gas pipeline and electric transmission rights-of-way in the western United States cross federal lands. These lands are principally managed by either the BLM or the U.S. Forest Service.” It continues, “BLM administers 85,000 rights-of-way, including 23,000 for oil and gas pipelines and 12,000 for electric transmission lines. It processes over 1,200 pipeline and electric system right-of-way applications a year, with an increase in applications over 10 percent a year in recent years.”

A central theme of *The National Energy Policy* is that more public land, chiefly in the Rocky Mountain West, should be made available to industry for fossil fuel development. To achieve this end, the Bush administration has made it a priority to allow roads and development to despoil wilderness candidate lands. Once the land’s natural character is destroyed, it is disqualified from inclusion in the National Wilderness Preservation System. This explains why the administration has backed efforts to exploit a law from 1866, Revised Statute

(RS) 2477. Legislated as a stimulus to the mining industry, RS 2477 granted the right to construct highways across public lands; it was repealed in 1976. Now state and local politicians, off-road vehicle enthusiasts, and development interests contend they are still entitled to build highways or operate off-road vehicles anywhere there was a trail or cow path before 1976. To the advantage of industry, these claims, when successful, allow the oil and gas industry to gain rights-of-way without paying for them.

Earthjustice made important headway this past year in our effort to protect Western wilderness from unsubstantiated claims for federal rights-of-way under RS 2477. A significant victory came last summer, when the Tenth Circuit Court of Appeals ruled in favor of Earthjustice and our clients, Southern Utah Wilderness Alliance and the Sierra Club. In this case, Earthjustice challenged three Utah counties for illegally grading and improving jeep trails in several of Utah's Wilderness Study Areas and in the Grand Staircase-Escalante National Monument (one of President Clinton's last-minute creations). The court let stand a lower court ruling defining a "right of way" under RS 2477 as a route constructed using physical labor and connecting the public with "identifiable destinations." The appeals court's decision will impede efforts to use RS 2477 to bulldoze roads across public lands.

This decision is timely in light of a controversial new rule that the Department of the Interior issued in January 2003. Interior may now give up ("disclaim") its interest in rights-of-way on public lands under RS 2477. Issued after much secrecy, Interior's "disclaimer of interest" rule could affect millions of acres on public land—national forests, BLM lands, wildlife refuges, national parks. Utah alone has identified 100,000 miles of rights-of-way across public lands, including every hiking trail in Zion National Park; the state recently filed the first 20 claims under the new rule. Interior is considering the first of these—a claim that will set a national precedent. It was generally expected that Utah would take pains to ensure that its first attempt to assert title would be unassailable. But we have found evidence that the "county" road at issue—the 99-mile Weiss Highway in the West Desert region—was not built by a county at all. Rather, federal employees constructed it at taxpayers' expense to provide access to federal grazing allotments. Juab County officials even signed away ownership rights to a section of the road in a 1936 easement. In early May, we filed dozens of pages of comments and evidence on behalf of The Wilderness Society, arguing that the disclaimer rule is illegal and that the Weiss Highway is an illegitimate RS 2477 claim. We will work to ensure that BLM rejects Utah's assertion and sets a high standard of evidence that will be required to support future RS 2477 claims under the disclaimer rule.



Cow path in the Grand Staircase-Escalante Monument targeted for RS2477 development (Bill Wolverton).

Defending Wilderness Study Areas. This June, the Supreme Court decided a case with far-reaching ramifications for Western wilderness. This case began in 1999, when Earthjustice and the Southern Utah Wilderness Alliance, working on behalf of eight conservation organizations, sued BLM for failing to control off-road vehicle abuse on wild lands under Utah's management. After we won, the U.S. government and off-road vehicle groups asked the Supreme Court to overturn a Tenth Circuit finding

that citizens have the right to sue to enforce Wilderness Study Area protections when BLM does not. In seeking to overturn the Tenth Circuit's favorable decision, the federal government argued that it



Impact of off-road vehicles (Southern Utah Wilderness Alliance)

alone has authority to protect, or to ignore, America's public lands. Oral argument before the Supreme Court was held on March 29, with the firm of Jenner & Block presenting for conservation interests and Earthjustice at counsel table. The Supreme Court ruled in the government's favor—thus allowing the Bush administration to ignore destruction of Wilderness Study Areas. We will deal with the ramifications of this ruling in future litigation as we work to protect the remaining wilderness that the administration is intent on developing.

Defending the Roadless Area Conservation Rule. Perhaps our greatest opportunity to protect undeveloped public lands continues to be the defense of the Clinton administration's Roadless Area Conservation Rule. Following its sue-and-settle strategy, the current administration invited industry lawsuits seeking to overturn the Roadless Rule and hasn't defended them. Earthjustice intervened in all nine lawsuits to do the work the Justice Department would not. An Idaho judge blocked the rule, but the Ninth Circuit Court of Appeals, the highest court to consider it, reinstated the rule after Earthjustice appealed. A Wyoming judge also blocked the rule; we are now appealing that decision to the Tenth Circuit Court of Appeals. The Bush administration's recent announcement that it intends to repeal the Roadless Rule does not end the controversy. We will continue to defend the rule as it was issued in 2001 and may challenge the administration's attempt to repeal the rule if it goes forward. The litigation is far from over, but the Roadless Rule has yet to suffer a lasting setback. After nearly three years, not one road has been built in any of the areas protected by the rule, nor has any timber in them been sold.



Logging roads & clearcuts (Pacific Rivers Council)

Challenging Oil and Gas Development in Alaska. The Western Arctic—home to caribou, polar bears, migratory birds, endangered waterfowl, and several thousand Alaska Natives—remains the nation's largest block of unprotected public land. In 1923, President Harding set aside 23 million acres of this fragile wilderness as Naval Petroleum Reserve No. 4; in 1976, Congress renamed it the National Petroleum Reserve-Alaska. The National Energy Policy Development Group recommends in *The National Energy Policy* "that the President direct the Secretary of the Interior to consider additional environmentally responsible oil and gas development, based on sound science and the best available technology, through further lease sales in the National Petroleum Reserve-Alaska."

Although the Reserve remains unprotected as Congressionally designated wilderness, the government was bound by law to evaluate the environmental costs of opening the Reserve to oil exploration and development.



ANWR Arctic Fox
(USFWS)

That evaluation takes the form of an Environmental Impact Statement (EIS). Earthjustice submitted more than 70 pages of comments critiquing the legal and factual deficiencies of the EIS. It fails to give real protection to one single acre, resource, or cultural value and allows the oil industry to set vague guidelines for itself. More than 95,000 Americans and 100 scientists have spoken out for a common sense balance between oil development and environmental protection in the Reserve. Even so, in January the administration opened nearly nine million acres in the Reserve to oil leasing and development. On February 17, on behalf a large coalition of clients, Earthjustice's Juneau office filed a lawsuit challenging the administration's decision. We are also advising groups on strategies to confront a host of additional administration initiatives to ease oil development in the Reserve.

Meanwhile, the administration continues to try to grant oil leases in the adjacent Arctic National Wildlife Refuge—"an area of flat, white nothingness" in the eyes of Interior Secretary Gale Norton. *The National Energy Policy* "recommends that the President direct the Secretary of the Interior to work with Congress to authorize exploration and, if resources are discovered, development" of the Wildlife Refuge. The administration is pushing Congress to allow drilling there by 2006, but Congress continues to defeat this proposal as politically unpopular. Earthjustice has prepared, however, to oppose the plan in court if necessary.

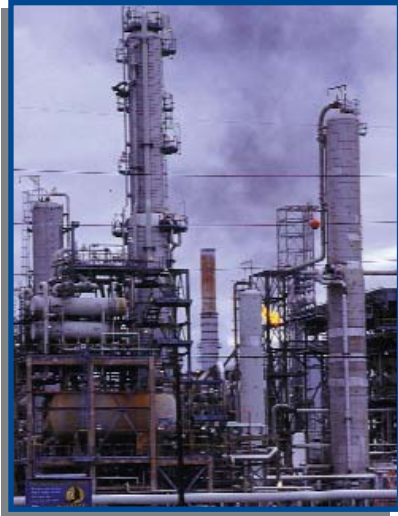
We are also evaluating prospects for litigation against the sale of offshore oil and gas leases in the Beaufort Sea, which Gale Norton recently offered for oil drilling. She was following the recommendation of *The National Energy Policy*, which suggests that the Secretary of the Interior "consider economic incentives for environmentally sound offshore oil and gas development where warranted." Among other issues, the Beaufort EIS fails to address the full impact of seismic exploration on marine mammals and fish.

Fighting For the Air We Breathe

"As we discussed, the real issue for industry is the enforcement cases. We will pay a terrible political price if we undercut or walk away from the enforcement cases; it will be hard to refute the charge that we are deciding not to enforce the Clean Air Act."

—EPA Administrator Christine Todd Whitman, in a memo to Vice President Cheney, May 2001

Defending the Clean Air Act's New Source Review Provisions. More than 90 percent of coal is used to generate electricity—and 53 percent of U.S. electricity comes from coal. *The National Energy Policy* authors suggested that the president should "direct federal agencies to provide greater regulatory certainty relat-



Refinery in Louisiana (Tom Turner)

ing to coal electricity generation through clear policies that are easily applied to business decisions.”

Most coal-burning power plants in this country are old. Utility industry representatives have said that new plants have not been built because the Clean Air Act has increased the expense of burning coal by requiring pollution controls. The second energy challenge (there are five) “is to repair and expand our energy infrastructure.” The infrastructure “is deteriorating, and is now strained to capacity. One reason for this is government regulation, often excessive and redundant.”

The Clean Air Act’s New Source Review program requires industrial facilities to install up-to-date pollution controls when equipment upgrades increase emissions (the upgraded plants are regulated just like “new sources”). The utility industry has flagrantly violated this government regulation for years, a violation that led the federal government to initiate dozens of enforcement suits. At the start of 2001, the Environmental Protection Agency was on the verge of inking settlements to force power plant compliance with New Source Review. But soon after EPA Administrator Christie Whitman took office, she signaled power companies not to sign any deals until the Bush administration assessed the cases.

The National Energy Policy says that because regulation “has become overly burdensome,” the president should direct the EPA administrator “to review New Source Review regulations, including administrative interpretation and implementation.” Its assessment complete, the administration provided “greater regulatory certainty” by publishing new regulations weakening New Source Review on the last day of 2002. As revised, the New Source Review rules insulate utilities from prosecution for past violations. The New Year’s Eve regulations create a variety of loopholes that allow major sources of pollution—17,000 oil refineries, chemical companies, and coal-burning power plants—to avoid updating pollution controls. And EPA attempted to force states to weaken their stronger pollution laws to conform to these new, weaker federal regulations. A coalition of environmental groups, including five represented by Earthjustice, filed suit challenging the December 2002 regulation.



An asthmatic child with respirator (© Les Stone/Greenpeace)

Then, in October 2003, the Bush administration issued a second major weakening regulation. Now thousands of older power plants, refineries, and factories may perform “routine maintenance” without installing up-to-date clean air controls—even when emissions increase substantially. Maintenance is defined as “routine” as long as its cost doesn’t exceed 20 percent of a generator’s value—a threshold almost never achieved.

Allowing old plants to avoid the expense of pollution control, this second rule, like the December 2002 rule, can be “easily applied to business decisions.” Both have been challenged in court by a coalition of environmental groups, including six represented by Earthjustice’s Washington, D.C. office. In a major blow to the Bush administration, the U.S. Court of Appeals stayed implementation of the October rule, two days before it was scheduled to go into effect. We are briefing the merits of our challenges to the December rule, and expect to brief the October rule in late 2004 and early 2005.

Compelling Compliance with Environmental Regulations on the Border. The National Energy Policy supports a “North American Energy Framework to expand and accelerate cross-border...electricity grid connections by streamlining and expediting permitting procedures with Mexico and Canada.” Two U.S. power companies have taken advantage of these streamlined and expedited procedures by building power plants three miles south of the U.S.-Mexico border to provide power to the U.S. market. Moving their operations to Mexico, a country with weaker standards, they avoided environmental regulations. The air and water pollution they produce will have serious public health and environmental effects on the border region of Mexicali, Mexico, and Imperial Valley, California.

Earthjustice’s International Program worked with the Border Power Plant Working Group to induce the Department of Energy to prepare a full Environmental Impact Statement (EIS) for the power plants before they were built. Although the plants have begun operating, as a result of Earthjustice’s work DOE recently announced that it is finally conducting a full EIS, the most comprehensive environmental and health review. We are monitoring the assessment and will take further action as required.

Meanwhile, Earthjustice’s Washington, D.C. office recently won a court order overturning EPA’s waiver of stronger limits on airborne particulate pollution in Imperial Valley—one of the most polluted areas in the nation. The court found there was no scientific support for EPA’s attempt to blame the pollution problem on Mexico, and ordered that stronger controls be adopted on the U.S. side. Local officials asked the U.S. Supreme Court to overturn the ruling, an effort that Earthjustice vigorously opposed. The Supreme Court declined to review the case on June 21, 2004, compelling EPA to enforce the Clean Air Act.

Upholding Clean Water Safeguards

“Well, as things are turning out, news of our demise was premature.”

—Jack Gerard, president and CEO, National Mining Association, addressing the West Virginia Coal Symposium, January 2004

Opposing Efforts to Ease Mountaintop Removal. The Clean Air Act’s provisions limiting sulfur dioxide emissions have pushed coal mining to the Western states, where coal has lower sulfur content. In a market flush with coal (we have 250 years’ worth in this country), Eastern coal operators struggle to keep costs down to remain competitive. But Clean Water Act provisions increase production costs—so the administration has set about rewriting those provisions.

On May 3, 2002, the Bush administration finalized changes to long-standing Clean Water Act rules. For the first time in 25 years, the U.S. Army Corps of Engineers may permit the use of industrial waste to fill and destroy the nation's waters. The most noticeable such use of industrial waste is found in the



Valleyfill from mountaintop removal site (Vivian Stockman, OVEC)

process known as mountaintop removal coal mining. In this form of mining common to Appalachia—West Virginia, Kentucky, Virginia—entire mountaintops are blown off to reach coal seams beneath. The resulting millions of tons of waste rock, dirt, and vegetation are dumped into the valleys and streams below. These valley-fills bury streams and aquatic habitat under piles of rubble hundreds of feet high, destroying the surrounding ecosystem, displacing generations-old communities of coalfield residents.

Earthjustice took the lead in generating public and Congressional opposition to the rule change, and has worked to build strong bipartisan support for legislation that would overturn the rulemaking. Earthjustice's senior legislative counsel testified

about the new rule before the Senate Environment and Public Works Committee and has developed one of the most comprehensive critiques of the rule change to date.

On May 29, 2003, the Bush administration released a long-awaited (and long-overdue) Environmental Impact Statement assessing the environmental destruction and social harm caused by mountaintop removal coal mining. The studies accompanying the draft EIS show that the harm caused by this practice is far more pervasive and permanent than previously believed. Yet, the EIS's "preferred alternative" suggests weakening existing environmental protections on mountaintop removal and valley fills. These changes include getting rid of the surface mining law's buffer zone rule, which prohibits mining activities from causing damage within 100 feet of larger streams. Earthjustice exposed the hypocrisy of the EIS alternatives and helped to generate 70,000 public comments in opposition to the proposal.

Just hours after the close of the public comment period on the EIS, on January 7, 2004, the Bush administration published in the Federal Register a proposal to rewrite the Reagan-era buffer zone rule. The proposed new rule, called a "clarification," tells mining companies to respect the buffer zone only to "the extent practicable"—which, in real practice, means they can dump their wastes directly on top of streams. Earthjustice is working with a coalition of environmental organizations to mobilize opposition in the media, in Congress, and in the public.

Defending Protections for Federal Wetlands and Streams. Earthjustice's policy staff is centrally involved in an important fight to save Clean Water Act protections for the nation's wetlands and streams. More than two years ago, a Supreme Court ruling limited the federal government's ability to regulate so-called "isolated" wetlands. Using the court's decision as an excuse, the Bush administration took additional steps last year to eliminate Clean Water Act protections from many streams, wetlands, and other waters.

First, the U.S. Army Corps of Engineers and EPA issued a policy directive (called a “guidance”) in January 2003. The guidance discourages their staff from asserting jurisdiction over certain ecologically valuable streams and wetlands that they erroneously called “isolated” (a term not used in the Clean Water Act).

Second, the administration announced its intention to revisit longstanding regulations defining which waters federal law protects. A leaked draft of the proposed regulatory revisions revealed that the Bush administration intends to exclude the majority of the nation’s streams, wetlands, and ponds from Clean Water Act safeguards—the most dramatic and extreme rollback of water quality protections in the 31-year history of the Act. In April, Earthjustice and ten other national groups filed 160 pages of comments on the proposed rulemaking with EPA. Our policy and communications teams worked on Capitol Hill and with environmental groups and the media to raise a groundswell of opposition that President Bush could not ignore. In mid-December, the administration announced its decision not to move forward with the proposed regulatory revisions.

In essence, the regulatory rule change was unnecessary, because the first threat remains: the Army Corps and EPA “guidance” is still in effect. It tells Army Corps staff to withhold clean water protection from “isolated,” non-navigable ponds and wetlands contained in a single state. It further directs staff to check with Washington before protecting other small intrastate streams and waterways. The guidance removes protections from many of the very same waters that EPA would have been exempted by EPA’s recently abandoned rule—up to half of all streams and, by EPA’s own estimate, 20 percent of the nation’s wetlands. Earthjustice continues its work with environmental groups, media, and Congress to put a stop to this effort to redefine “waters of the United States.”



photo: ADEC
Oil spill in an Alaskan river (Alaska Department of Environmental Conservation)

EPA’s posture toward streams and wetlands plays a critical role in two related cases in which Earthjustice’s Washington, D.C. office has intervened. The American Petroleum Institute, the Petroleum Marketers Association of America, and Marathon Oil have sued EPA over its revised oil spill prevention, control, and countermeasure rule. Even though oil spills in the ocean are more publicized, freshwater spills are more frequent and often more destructive to the environment. EPA estimates that about 24,000 oil spills happen in the U.S. every year—more than 70 spills on an average day, including one spill of 100,000 gallons or more every month. Citing the Supreme

Court ruling on “isolated” wetlands and a Fourth Circuit ruling that limited wetland regulation, the oil industry has sued, and entered settlement talks with, the administration. The industry claims that it should only have to prevent oil spills in navigable, “unisolated,” waters. If that theory is upheld, a majority of our waters could lose federal protection from all polluters. By intervening in the cases, Earthjustice forestalled a payback settlement. Seeking now to prevent a regressive ruling, Earthjustice will file briefs on behalf of the Natural Resources Defense Council and the Sierra Club later this year.

Protecting Endangered Species

“I’d like to go on record as saying I hate the Endangered Species Act.”

—Jeff Carroll, the Bureau of Land Management’s endangered species coordinator for Wyoming, at BLM’s National Fluid Minerals Conference, June 2004

The Bush administration was aware as it took office that opening more public lands to drilling, mining, and logging, and relaxing the rules that govern those activities, would meet an effective obstacle in the form of the Endangered Species Act. No statute has proven more useful in protecting public lands, natural ecosystems, plants, and animals. It has long frustrated industries seeking to take more from America’s public lands. The effectiveness of the Endangered Species Act has won it powerful enemies in Congress, too. The statute, and the wildlife and habitat it protects, are under steady and intense assault.

Defending Grizzly Bears. When the Forest Service and Bureau of Land Management granted three oil and gas leases in the Shoshone National Forest, Earthjustice’s Bozeman office sued. The leases are in grizzly bear habitat and the agencies should have consulted with the Fish and Wildlife Service on the leases’ impacts. In September 2003, the D.C. District Court accepted the Forest Service’s and BLM’s arguments that they could issue the leases on federal lands without first assessing the potential wildlife impacts on grizzly bears and other species. On behalf of the Wyoming Outdoor Council, Earthjustice has appealed the district court ruling.

Because this case will establish legal precedent governing interagency consultation in granting oil and gas development rights, the administration will put up a vigorous defense.



Oil & gas leases threaten Grizzly Bear habitat
(Galen Rowell)

Preserving the Northwest Forest Plan. A major focus of the past year has been defending the Northwest Forest Plan against administration and timber industry efforts to weaken it. This science-based ecosystem management plan was adopted in 1994 largely because of Earthjustice litigation to protect old-growth-dependent species like the northern spotted owl. By adopting the Plan, the Forest Service set a historic precedent in forest management by giving the needs of species and the environment priority over logging.

Seeking to triple the amount of timber cut from Northwest forests, the timber industry secretly went to the Bush administration with a five-point “roadmap” for weakening the Plan. Through a Freedom of Information Act lawsuit, Earthjustice in April 2003 uncovered the timber industry’s secret roadmap—and the fact that the Bush administration readily paid the timber industry back for its support.

In 2002, we intervened in two industry lawsuits seeking to weaken Endangered Species Act protections for the northern spotted owl and the marbled murrelet, and to end protections for millions of

acres of the birds' old-growth habitat. Over our objections, the court in 2003 approved the government's settlement. The government agreed to revisit the birds' endangered species listing in 2004 and the critical habitat designations in 2006 and 2007. A March 2004 report by scientists studying the status of the marbled murrelet found that the bird is indeed sliding toward extinction. Unhappy with the finding, the timber industry is pressing the government to delay until August its decision on whether to keep the murrelet's Endangered Species Act protections in place. Preliminary findings on the northern spotted owl's status are also gloomy, chiefly in Washington State, where scientists have found that owl populations are crashing. A final federal determination on the owl's status is expected in November (conveniently, after the elections). Earthjustice is ready to go back to court should the U.S. Fish and Wildlife Service downgrade the status of either bird.

In late May 2004, we filed a lawsuit on behalf of eight regional and national organizations, challenging the administration's amendment eviscerating the Northwest Forest Plan's Aquatic Conservation Strategy. This part of the Plan has proven a powerful tool in preventing harmful logging; indeed, Earthjustice has used it to block roughly 180 timber sales that would have harmed salmon habitat. Finalized in March, the administration's amendment eliminates prohibitions on logging outside the streamside corridor, no matter what the impacts on salmon or habitat. Rejecting science to support the timber industry, the administration ignored the views of key scientists involved in developing the Aquatic Conservation Strategy, who opposed weakening the rules.

Earthjustice is an integral part of a coalition of forest groups designing administrative, legal, media, and political responses to the rollbacks of the Northwest Forest Plan. We coordinate and lead the legal component of the coalition's work. We also recently produced a brochure explaining the history of the Northwest Forest Plan, the protections it provides, and Bush administration and industry efforts to undermine it. We seek to highlight the importance of the Northwest Forest Plan as the first science-based ecosystem management plan for our public lands. The coalition is distributing the brochure widely, especially to journalists, editorial boards, and members of Congress and their staffs.

The Unified Endangered Species Campaign. In the past year, Earthjustice joined Defenders of Wildlife, the Endangered Species Coalition, National Wildlife Federation, the Sierra Club, and the Center for Biological Diversity to form the Unified Endangered Species Campaign. The long-term goal of the campaign is to broaden and deepen the American public's support for imperiled species and to secure improved protection of those species. Through the Campaign, policy and communications staff work collaboratively across organizations to stop legislative, administrative, and judicial attacks on the Endangered Species Act by focusing coordinated efforts in several key states. Earthjustice leads the communications prong of this effort. After conducting national polling and focus groups, we have begun formulating messages designed to resonate with the American public.



Northern spotted owls depend on Northwest forests (Gerald & Buff Corsi, CAS)

Preventing Old-Growth Clearcuts

“Healthy forests don’t just happen.”

—American Forest & Paper Association website

Challenging the Biscuit Fire Salvage Sale. In a new matter of great significance in the Northwest and nationally, the U.S. Forest Service has just released its revised plans for an enormous timber sale in Oregon’s Siskiyou National Forest, scorched in a major fire in 2002. Under cover of the Bush administration’s “Healthy Forests Initiative,” the Biscuit Fire Recovery Project calls for logging 370 million board feet across almost 19,000 acres—one of the largest timber sales in modern history. Wildly excessive for legitimate salvage purposes, the Biscuit sale represents a direct assault on some of the Northwest’s—and the nation’s—basic forest protections. Of particular concern, more than half the timber to be cut would come from roadless areas, in defiance of the Roadless Area Conservation Rule. Another 30 percent would come from old-growth reserves protected under the Northwest Forest Plan. The Biscuit sale has become a hot-button issue in the Northwest because of the serious threat it poses to old-growth ecosystems and to the Siskiyou’s tremendous wilderness values. As the first attempt at roadless logging, the Biscuit sale could set a precedent that would echo across the national forest system while the Roadless Rule is litigated. Earthjustice and our

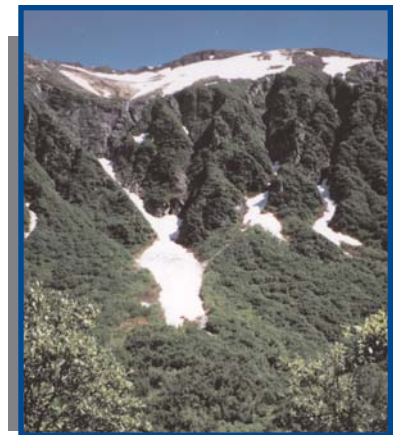


Future of the Siskiyou? (Gerald & Buff Corsi, CAS)

clients are analyzing the Forest Service plan in advance of the final Record of Decision, expected in early July. Should the federal government insist on paying back timber industry supporters by logging roadless areas and ancient forests, we will likely challenge their plan in court.

Preserving the Tongass. The Clinton administration’s Roadless Rule protected large sections of Alaska’s magnificent Tongass National Forest from logging. But on Christmas Eve 2003 the Bush administration’s Forest Service delivered an enormous gift to the timber industry: a final rule exempting the Tongass from the Roadless Rule. Although the new Forest Service rule is “temporary,” it has no end date. Earthjustice is evaluating potential legal challenges to the federal decision.

The administration’s assault on the Tongass doesn’t end there. The Forest Service recently released the first of several roadless area timber sales in areas with significant remaining old-growth trees. Our Juneau office has filed actions challenging eight of these sales, along with the 1997 Tongass Land Management Plan. This plan authorizes logging at more than double Forest Service projections of market demand for timber. We anticipate challenging more sales to be released this year. We have also challenged the first of the Forest Service’s new long-term timber contracts. We aim to limit



Snow in the Tongass (Janice Searles)

these long-term contracts, which entrench the timber industry in the Tongass and limit options for future protections. And we continue to defend the 1999 Tongass Plan provisions that protect another 500,000 acres of Tongass roadless areas. These protections were struck down because of an industry lawsuit; the government failed to appeal, so we stepped in to defend the half-million acres. This case became bogged down in procedural hurdles last year, but we have overcome those problems and are prepared to re-initiate our appeal to the Ninth Circuit.

Judging the Environment

“We should not be using the Endangered Species Act ... as a land management tool. It is not there as a tool for zoning on federal lands.”

—Interior Solicitor William G. Myers III

As we have seen, Earthjustice has been successful at defending the gains of the environmental movement much of the time. The most difficult cases to win are those heard in the courtrooms of ideologically biased judges. Rather than apply the law, they rule on the basis of personal philosophy to benefit industry at the expense of air, water, wildlife, and wilderness. A hostile Congress blocked scores of President Clinton’s judicial nominees, leaving an unusually high number of vacancies for President Bush to fill. Shaping the law of this country for decades to come, Bush’s lifetime appointees may be his most far-reaching legacy.

But Judging the Environment, a joint project of Earthjustice and Community Rights Counsel, has played a critical role in one of the most remarkable progressive victories of the past year. Working closely with environmental allies, alongside civil rights, women’s rights, labor, and disability rights organizations, we have helped prevent the confirmation of several of President Bush’s most extreme nominees to the U.S. Courts of Appeals. And we have raised the visibility and importance of the environment in the judicial selection debate.

A steadfast group of 45 to 47 senators has blocked more than a dozen attempts to obtain the 60 votes needed to end debate on six controversial nominees. One of these nominees, Miguel Estrada, has withdrawn—making the filibuster of his nomination the first in U.S. history to prevent confirmation of a lower-court judicial nominee. We are also playing a central role in the ongoing Senate filibusters blocking the nominations of Priscilla Owen, Janice Rogers Brown, and Carolyn Kuhl.

In response to our successes, President Bush upped the ante in the judicial nomination debates by making two highly unusual “recess appointments.” Charles W. Pickering, Sr., was re-nominated to the Fifth Circuit Court of Appeals after we blocked him once. Former Alabama Attorney General William Pryor was nominated to a seat on the Eleventh Circuit Court of Appeals. Both were filibustered and their confirmation seemed unlikely. In an end-run around the Senate while it was in recess, in January and in February 2004, President Bush appointed both of these nominees to their seats on the appeals courts. As recess appointees, they will serve short terms. Pickering will serve only until the end of the next Congressional session in January 2005. Pryor will serve until the end of 2005. Both will have to be re-nominated or leave the bench at the end of their interim terms.



William G. Myers III (U.S. Department of the Interior)

The Senate Judiciary Committee recently considered the nomination of William G. Myers III. Before he joined the Interior Department, Myers was an activist lawyer and lobbyist for the mining and beef industries. He argued in Supreme Court briefs that Clean Water Act and Endangered Species Act safeguards were unconstitutional and argued that ranchers' property rights are "as fundamental" as free speech.

Judging the Environment swung into action when Myers' nomination was announced. We organized a teleconference for the press, with speakers from Earthjustice, Alliance for Justice, Leadership Conference on Civil Rights, National Congress of American Indians, Natural Resources Defense Council, People for the American Way, and the Sierra Club. Following this call, feature articles focusing on environmental concerns with the Myers nomination appeared in *The New York Times*, *Los Angeles Times*, and many other publications. *The New York Times* opposed Myers in an editorial entitled "An Enemy of the Environment." Earthjustice's contacts generated many other major editorials and op-eds opposing Myers' nomination. We have compiled and distributed more than 100 pages of articles, editorials, and commentary on Myers' nomination and posted highlights on the Earthjustice website. Also included are links to radio coverage. Earthjustice was often quoted, interviewed, and mentioned as the environmental concerns with this nomination took center stage.

Because of Earthjustice's outreach, 180 national groups have formally opposed Myers' nomination. Earthjustice outreach also led more than 40 members of the House of Representatives from Ninth Circuit states to sign another formal opposition letter. Supplied with Judging the Environment's comprehensive research on Myers' record, the Senate Judiciary Committee grilled Myers at his hearing on February 5, 2004. Several senators cited the concerns we outlined about Myers in our letter to the Senate. On the day of the hearing, Senator John Kerry called on President Bush to withdraw the Myers nomination. By bringing the nomination into presidential politics, Senator Kerry's request drew attention to the hearing and made it more difficult for Myers to win confirmation. While Earthjustice did not have any contact with the Kerry Campaign on this or any other matter, our efforts helped raise the profile of this particularly egregious nomination to a level that garnered this attention.

On April 1, the Senate Judiciary Committee cast a 10-9 party-line vote in favor of the Myers nomination. Senate Minority Whip Harry Reid (D-NV) then announced that any Floor vote on Myers would be filibustered. Earthjustice, Community Rights Counsel, and People for the American Way consolidated opposition with a detailed post-hearing report. Myers' confirmation now looks extremely unlikely—making this the first time in history that a judicial nomination will be defeated primarily on environmental grounds.

The Judging the Environment project closely collaborates with Senate staff and with a broad coalition of progressive organizations working on federal judicial nominations. All of these groups and staff rely heavily upon our research and analysis. Our daily e-mail distributions provide comprehensive excerpts and links to news, commentary, editorials, and other resources. Earthjustice's website on judicial nominations and the environment was singled out in *National Journal's* Dec. 5, 2003 Special Report, "Guide to the Web," which featured "issue areas likely to be topical in 2004." The section "Web Sites

On Judicial Nominations” highlighted Earthjustice as one of only two progressive advocacy websites that were selected based upon the reporters’ “experiences and on interviews with experts in their fields.” In addition, Nominations in the News, Earthjustice’s joint e-newsletter project with the Leadership Conference on Civil Rights, provides the public with more selective excerpts and links that are distributed in daily e-mails and on the website <http://saveourcourts.civilrights.org/newsletter/>.

Conclusion

The work described in this report exemplifies the challenging atmosphere in which our nation’s environmental battles are being fought. We, the people, cannot rely on the Bush administration and federal agencies to defend environmental protections in court; they are becoming more aggressive in their effort to repeal those protections outright. In many instances, they have succeeded.

Earthjustice must therefore remain vigilant about defending our environmental laws in the courts. Our policy and communications teams must continue to work with a broad coalition of organizations to educate decision-makers, the media, and the public about the administration’s attacks, including the effort to pack the courts with anti-environmental jurists. At the same time, we have learned that we should not let up on our proactive litigation strategies, as they are winning important gains even in this hostile climate.

The legal services we provide free of charge would not be possible without the generosity of tens of thousands of individuals and institutional supporters. We are most grateful for this support as we defend the gains of the environmental movement.