TESTIMONY OF CARL POPE
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SENATE COMMITTEE ON ENVIRONMENT
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Madame Chair, Senator Inhofe, members of the Committee,

My name is Carl Pope, and I am the Executive Director of the Sierra Club. Sierra Club is a national non-profit organization, founded by John Muir in 1892, whose 1.1 million members and supporters are dedicated to exploring, enjoying, and protecting the planet.

CHECKS AND BALANCES HAVE PREVAILED

The best news from almost eight years of Bush Administration stewardship of our air, our waters and our lands is that James Madison wrought well. In the environmental arena, the Executive dictatorship which the Vice-President attempted to erect on the foundation of a hyper-partisan, parliamentary Congress was repeatedly and consistently thwarted by the checks and balances built into our system.

EPA:
A PILE OF JUDICIAL SMITHEREENS

Over at EPA, it will be hard to know from the Code of Federal Regulations that this Administration ever existed.

The entire edifice of Administration policy on clean air lies shattered in judicial smithereens –and in its place a vigorous, state based air quality protection structure is being put in place in much, but sadly not all, of the country.

The Courts have thrown out the Bush EPA's mercury rules and interstate transport policy and blocked its efforts to repeal the requirements that power plants be cleaned up when they are expanded or modernized. During the period when the Administration's mercury rule was on the books, more than 20 states rejected its permissive emission limits and adopted much more effective rules of their own.

The Supreme Court ruled that carbon dioxide was a pollutant and must be regulated under the Clean Air Act. While this Administration has refused to comply, the states are moving on their own. First the Northeastern states with REGI, then California with AB

32, then the Western and Midwestern Governors and state after state are moving to put comprehensive CO2 emission limits in place.

For six years the Administration sat by while oil imports increased, gas prices rose and global warming became more and more threatening. It refused to set higher fuel efficiency standards for vehicles even when the data showed that the current trajectory was actually hurting the US auto industry, desiccating its market share. But California acted on its own, and other states virtually stampeded to follow it. When the auto industry challenged the right of California and other states to regulate tailpipe emissions of CO2 the Courts again sided with our federal systems. While EPA has yet to issue the needed waiver for those standards to take effect, that matter is before the Courts, and perhaps more important, both candidates for President have pledged that they will allow California and the 13 other states which have joined it to act on their own.

It is a little noted fact, but in the last three years, because of state action, recent Congressional initiatives, and citizen intervention, the United States put in place regulatory changes which will reduce our economy's long term emissions of carbon dioxide by more than 9%. More than 900 million metric tons a year of CO2 emissions which were projected three years ago to be part of our emissions inventory in business as usual projections will not occur. This is a conservative estimate which does not quantify state initiatives in the utility and building sector arena.

EPA for years had dragged its feet on setting emission standards for dozens of toxic air pollutants; it took a lawsuit to get a federal court order to put the Agency on a five years schedule to get the long overdue job done. Efforts to ignore toxic pollution from brick kilns and plywood plants were overturned by federal judges.

With regard to bringing public health standards for criteria air pollutants into line with modern science, the EPA has ignored the recommendations of its own scientific advisors.

In September 2006, EPA made modest revisions in its standard for particulate air pollution, but by far less than scientific advisors had recommended. Contrary to recommendations of the EPA's Clean Air Scientific Advisory Committee, the EPA chose not to tighten the annual PM 2.5 standard, 15 $\mu g/m^{3.}$ In a September 29, 2006 letter following the release of the standard, the scientific advisors wrote to Administrator Johnson: "*It is the CASAC's consensus scientific opinion that the decision to retain without change the annual PM2.5 standard does not provide an "adequate margin of safety … requisite to protect the public health" (as required by the Clean Air Act), leaving parts of the population of this country at significant risk of adverse health effects from exposure to fine PM.* (Italics in original.)

In March of this year, the EPA announced a revision in the health-based National Ambient Air Quality Standard for ozone pollution. Unfortunately, the new standard falls far short of the requirements of the Clean Air Act—and of what EPA's own scientific advisors had recommended. The expert science advisors recommended a range of 60 to 70 parts per billion of ozone in the air; the EPA's new standard is 75 parts per billion.

The lower standard recommended by the scientists would have protected many more people from an early death from their exposure to ozone.

On October 15, the EPA is expected to announce a new National Ambient Air Quality Standard for lead pollution. In July, the Clean Air Scientific Advisory Committee raised a number of concerns about the Agency's Notice of Proposed Rulemaking. Some observers suspect that EPA will finalize the standard at (or above) 0.3 ug/m^3, 50 percent higher than the high end of the range recommended by EPA's science advisors. The science advisors recommended protecting against a 1 to 2 IQ point loss, calling such a loss significant from a public health perspective. A standard at 0.3 ug/m^3 would allow, not protect against, such a loss.

Similarly Administration efforts to weaken arsenic standards for drinking water had to be abandoned in a firestorm of public protest. FEMA's infamous toxic trailers were finally shut down by media investigations and testing conducted by the Sierra Club, and EPA has been forced to begin the process of regulating formaldehyde exposures. Lead in our children's Christmas toys is also, finally, being dealt with – because the Sierra Club petitioned EPA and the Consumer Product Safety Commission to act, and private enforcement under state consumer protection laws like California's Prop 65 finally got the attention of big retailers and importers.

On water quality, the story is similar. The Administration wanted to permit raw sewage to be dumped into drinking water without treatment simply by diluting it with fresh water; Congress and a public outcry put that bad idea to bed. The Administration wanted to issue a regulation that could have exempted almost 60% of the nation's waterways and some 20 million acres of wetlands from protection under the Clean Water Act – sportsmen's groups and the pendancy of the 2004 election scared the White House off.

When EPA let Florida ignore toxic contamination of its waterways with mercury, the courts intervened and made the state act; the Courts intervened to prevent the Kensington Mine in Alaska from dumping tailings into waterways, even though EPA and the Corps of Engineers refused to act.

So the good news is that little of the Bush Administration's affirmative environmental agenda has survived the challenges our system of checks and balances makes possible – Congress, the Courts, the states, and direct intervention by the public has undone most of the legal damage which the Administration sought to do.

THE FOREST SERVICE: SEVEN YEARS, SEVEN MILES OF ROADS

Begin outside your jurisdiction, with the National Forests. The Clinton Administration's signature Wild Forest Protection policy has been suspended by a federal court, replaced by a hurried and poorly crafted new rule, reinstated and then suspended again. But on the ground, among the groves, after seven years only seven miles of road have been built in previously pristine National Forest. And Deputy Undersecretary of Agriculture Mark

Rey's assaults on public participation in forest planning, on biological diversity in the Southeastern forests, his salvage policy, his efforts to clear cut the Tongass, to gut the Sierra Nevada framework – all rebuffed by the federal courts.

A cynical effort to begin disposing of the public lands by using National Forest sales as a temporary funding mechanism for rural schools was rejected by the President's own party in the Congress.

THE DEPARTMENT OF THE INTERIOR:
THE WORST JUDICIAL BATTING AVERAGE IN HISTORY?

Now let us look at the Interior Department.

We face a new, and hasty, assault on the Endangered Species Act from the Secretary. It simply eviscerates the common sense notion that biologists, not highway builders and civil engineers, should decide whether or not a project threatens wildlife. The proposed regulations would gut section 7 of the Endangered Species Act, eliminating the key scientific consultation that has served as the act's backbone for over 30 years. Why must the Administration attempt to undo the protection of the ESA by regulation? Because its efforts to undo them by inaction have been thwarted with embarrassing consistency; at last count the Administration had lost 85% of its Endangered Species cases, and lost them most often to judges appointed by Republican Presidents, including President Bush himself. So while the proposed rules make a mockery of the intent of the Act, they are a virtual invitation to federal judges to once again say to the Administration, "The Founding Fathers made it very clear that Congress, not the Executive, makes the laws. What part of Separation of Powers don't you understand?"

It is clear that mineral leasing program of this Administration has been carried out with a stunning lack of respect for the law and phenomenal corruption. We know this because another one of our system's checks and balances – this one the internal system of Inspectors General – has repeatedly blown the whistle on the Minerals Management Service and its conducting of the oil and gas leasing program on public lands, most recently in the infamous escapades at the Denver office of MMS.

The response from the appointed leaders of the Department is revealing. When the Inspector General several years ago brought 27 instances of corruption and ethical wrongdoing on the part of the highest ranking offices in the Department, including then Secretary Gale Norton, to the attention of the Administration, the allegations were quashed and no action was taken. Similarly the most that Interior Secretary Kempthorne can bring himself to say about the Denver situation is that he "may" fire some of the officials involved – the Justice Department has resolutely refused to take criminal action even when criminal behavior has been amply documented.

A similar tragedy has not yet played itself out on America's coastlines, because until this summer both an Executive Order and a Congressional moratorium prevented leasing in some of the most critical areas. But it required a Sierra Club lawsuit to force the

Administration to conduct a proper environmental review of additional leasing activities in the Santa Barbara channel, and the Courts have yet to decide whether they will permit the oil industry to threaten the vital wildlife habitat of the Chukchi Sea without any review that took into account the threat leasing poses to the polar bear.

But while the Bush Administration has done everything in its power – and attempted a good deal as it turned out beyond its power – to make life easy for the oil and gas industry, it has thrown up road block after road block against renewable energy. Even the Department of Defense was pressed into service during 2006 to put in place a moratorium on the permitting of new wind farms, deliberately delaying the study which would have allowed wind farms to go ahead again for months and months until, once again, the Sierra Club sued and the Courts intervened.

THE COLLAPSE OF CAPACITY: NOT EVEN THE ROUTINE MAINTENANCE

But the bad news is that for eight years we have failed to pay attention to, or carry out, the routine maintenance that our common inheritance of air, water and public lands requires. The structure of checks and balances works better to stop bad initiatives than to facilitate such routine activities as paying our bills. The capacity of the federal government to monitor and measure the health of the American landscape has been seriously eroded. The integrity of federal science has been badly compromised. Congress has by and large not been able to act when changing circumstances on the ground indicated that new regulatory initiatives were desperately needed.

Begin with the money. The federal budget account which contains funding for investment in environmental protection has shrunk faster than any other line item, with the possible exception of certain forms of foreign assistance. As a result of this financial starvation of basic public health and natural resource functions, we face serious risk of ecological collapse. The accumulated deficit on maintaining sewers and sewage treatment facilities is now in the hundreds of billions of dollars, and as a result the progress we made from 1972-2002 in cleaning up the nation's waterways has gradually begun to reverse and may shortly go into dramatic backsliding. The National Park Service and the Fish and Wildlife Service have had to shut down routine public service functions, forgo badly needed infrastructure maintenance, and now, in the case of FWS, are actually shuttering units of the system. The Administration's routine plea when it is taken to Court for failing to carry out the ESA is, "we don't have the resources." Enforcement activities, whether of the Clean Air Act or the Surface Mining Reclamation Act, are a fraction of the level needed to deter violators.

And even where resources exist, scientists and other public servants have been censored, intimidated, muzzled, and driven from agency after agency. The most spectacular example, perhaps, was the shuttering of EPA's regional library system, even when Congress had appropriated funds for the system, and even after Congress specifically ordered the libraries reopened. Political interference with the wildlife biology at the Department of the Interior reached such heights under departed Assistant Secretary Julie

McDonald that the Department was forced to reopen and redo many of its most fundamental biological assessments under the ESA.

And the legal framework of environmental standards and citizen empowerment which existed and blocked most of the Bush agenda in areas like clean air and water was not complete when the Administration took office – it is in those areas, where Madison's concepts of distributed power were least fully fledged – that the real, on the ground environmental damage has been done.

One arena where Congress supinely has refused to play its role is in the regulation of oil and gas drilling on public lands, or private lands underlain by public mineral rights. In 2005 Congress exempted many of these operations from the protections of the Safe Drinking Water Act. As a result all over the West, irresponsible oil and gas operators using such potentially deadly technologies as coal bed methane extraction are destroying wildlife habitat and putting private landowners and ranchers at risk.

And the Administration's similar refusal to protect communities, private property and waterways from the ravages of mountain mining in Appalachia has left behind a similar legacy – here again, Congress has refused to play its role, and the Courts have not made up the difference – in part because the underlying legal framework inherited from previous administrations was inadequate.

Clearly in the area of hard rock minerals the virtually unregulated state of the industry continues as under previous Administrations – the Mining Law of 1872 in all its antique glory still reigns – but here, too, the fault is largely that of Congress.

Congress must act to ensure that the mining of coal, oil and natural gas – and hard rock minerals – can only occur with proper environmental safeguards. It must give affected private property owners and communities the right to ensure enforcement of these regulations even in the absence of an Executive branch committed enforcement of these safeguards. In particular, those affected by these mining activities need a guarantee that a proper environmental assessment is done, and publicly released, before mining can begin, and that citizens have access to the Courts to ensure that mining companies do not ignore the rules when they find a complaisant federal or state executive.

Some in industry will lament that such regulation will reduce our supply of needed oil, gas and other minerals. But proper regulation will actually enable us more rapidly to exploit appropriate resources, such as many of the deep shale natural gas plays now adding so spectacularly to our supply. New York State just imposed a temporary moratorium on permitting such drilling – because it lacks an appropriate environmental assessment. If strong, effective regulations are put in place, then drilling companies can know what the rules are, where drilling is welcomed and where it is not, and bring new supplies to market more rapidly. Similarly, we have lots of coal we can mine safely – but in the absence of regulation, mining companies simply go after that which they can get most cheaply and easily, even if the cheapness is an artifact of the costs they impose on their neighbors.

THE BROADENING CONSENSUS

Another positive legacy of the last eight years is a far broader, deeper public consensus on most of these issues. Whether it is the need to complete the clean up of currently grandfathered, polluting power plants or the importance of places like Otero Mesa and the Road Plateau for wildlife, not hydrocarbons, the Bush Administration's stunning overreaching has engaged new, grass-roots, bipartisan forces to battle for the future of America's air, water and landscape. The churches – evangelical and liberal – have committed themselves on issues from sprawl to global warming in a much more fundamental way. Hunters and anglers, mostly conservative and Republican, are battling the BLM, not just the Sierra Club. A new generation of student activists are making climate change their generation's challenge. Major sectors of the business community are pouring billions of dollars into clean technologies. When Phillip Anschutz and Boone Pickens pour billions into wind power, it's no longer "alternative energy" – it's the future. Labor unions no longer see pollution as the smell of money, as they once did – they see clean, green jobs as the key to a revitalized manufacturing sector. It was the Teamsters who took the lead in cleaning up air pollution by modernizing the ways goods are shipped from crane to warehouse in the Ports of Los Angeles and Long Beach.

Which are the two states who have taken the strongest stand against coal fired power plants? California, yes, but rock-ribbed, red state Idaho second. Which Western Governor has most articulately called for us to abandon our dependence on oil? Utah's John Huntsman, the son of an oilman. What is America's wind capital? Sweet Water, Texas.

The forces of the past, the forces the Bush Administration tried to enthrone in power by creating a secretive, anti-scientific and unaccountable executive cabal, have indeed enjoyed preferential access to what seemed to be the corridors of power for the last eight years. The tale of the Vice-President's secret energy task force and Enron's influence over it have been told too many times. But while they were wining, dining, and, yes, bedding Interior Department executives, America was changing, and big oil, coal, and the mining companies were becoming isolated from those changes – they are on the wrong side of the future.

MADISON'S LESSON

Why have the checks and balances of our Constitution worked so well in the environmental arena? Why is the Bush legacy here – except for the loss of capacity – so relatively easy for the next Administration to undo? Why do we not have an environmental meltdown comparable to what has happened in health care of the economy?

I am going to suggest that the key reason is that most environmental regulations rests on statutes passed in the 1970's, not the 1930's, and these laws were imbued with a healthy

and Madisonian distrust of the Executive Branch of government. Far more than the economic regulatory framework which has failed us so spectacularly in the last few months, the environmental safety net has redundancy built in. Congress sets affirmative standards and objective outcomes, rather than trusting broadly to agency discretion. The word "Shall" and specific deadlines riddle the Clean Air, Clean Water and Endangered Species Acts, giving federal courts clear standards for when federal agencies have abused their discretion. States were clearly protected from unwarranted federal preemption by specific language establishing their right to go beyond the federal standards.

And most important, citizens were empowered, empowered by requiring public environmental reviews, and then empowered by being given access to the courts. Where that citizen access has been lacking – for example in the mineral leasing and mining areas – the system has failed.

It is not accidental that Vice-President Cheney has built his efforts to weaken environmental law on the framework of a unitary and unchecked executive and a parliamentary politics that Madison and the Founders would have abhorred.

The last eight years are a hopeful, but cautionary tale. Madison beats Cheney – but only when Congress turns Madison's vision into detailed legislative architecture. That is the challenge for the next Congress.