January 9, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
711 Hart Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate
433 Russell Office Building
Washington, D.C. 20510

Dear Senators:

Judge Samuel Alito has been nominated to fill the Supreme Court seat being vacated by Justice Sandra Day O'Connor, who has frequently been a swing vote in environmental cases. In recent years, the Supreme Court has limited many of the nation's most important environmental safeguards, and in those cases where environmental protections have withstood challenge, it has often been by one or two votes. Usually, one of those votes was Justice O'Connor. The environmental stakes for this nomination are extremely high.

After reviewing all of his opinions that bear directly or indirectly on environmental laws, we believe that, if confirmed, Judge Alito's judicial philosophy would pose a threat to the very existence of many federal environmental laws, and to the ability of citizens to obtain redress from the federal courts.

Our foremost concern over Judge Alito's jurisprudence is his view of Congress' authority under the Commerce Clause. Congress relies on the Commerce Clause to enact environmental laws that may apply to arguably intrastate conduct, *e.g.* pollution of non-navigable tributaries, or protection of an endangered species that exists as a single population within one state. **As discussed below, at the same time that the Senate addresses Judge Alito's nomination, the Supreme Court will be considering whether Congress had such authority to enact the most significant parts of the Clean Water Act.**

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Judge Alito made clear his extremely conservative view of the Commerce Clause in his dissent in *U.S. v. Rybar*, 103 F.3d 273 (3rd Cir. 1996). Writing shortly after the Rehnquist court handed down *U.S. v. Lopez*, 514 U.S. 549 (1995), Judge Alito questioned Congress' power under the Commerce Clause to criminalize the possession of machine guns. Judge Alito's colleagues followed no fewer than five other federal appellate courts in deciding that *Lopez* did not invalidate this law. The majority found compelling evidence in the history of gun control laws that trafficking in such weapons posed a serious, national, *interstate* problem.

Judge Alito was not so persuaded, and began his *Rybar* dissent provocatively: "Was *United States v. Lopez* a constitutional freak? Or did it signify that the Commerce Clause still imposes some meaningful limits on congressional power?" *Id.* at 286. Judge Alito claimed that he was not asking for much:

> Moreover, the statute challenged here would satisfy the demands of the Commerce Clause if Congress simply added a jurisdictional element--a common feature of federal laws in this field and one that has not posed any noticeable problems for federal law enforcement. In addition, as I explain below, 18 U.S.C. § 922(o) might be sustainable in its current form if Congress made findings that the purely intrastate possession of machine guns has a substantial effect on interstate commerce or if Congress or the Executive assembled empirical evidence documenting such a link. If, as the government and the majority baldly insist, the purely intrastate possession of machine guns has such an effect, these steps are not too much to demand to protect our system of constitutional federalism. *Id.* at 287.

The problem with Judge Alito's purportedly modest requirement – that Congress just provide findings of interstate effects before enacting laws – is that it facilitates the kind of judicial activism that led the Rehnquist Court to follow *Lopez* with *United States v. Morrison*, 529 U.S. 598 (2000), in which it invalidated the Violence Against Women Act and set aside just such express Congressional findings because the Court did not think that they were good enough.

Judge Alito, an active Federalist Society member, appears unwilling to recognize that in the 21st century, "protecting our system of constitutional federalism" does not depend on judges divining case-by-case limits to Congress' Commerce Clause powers. As a nation we have been debating the appropriate balance of federal and state powers for more than 200 years and, prior to *Lopez*, no one believed that having the Supreme Court draw *ad hoc* boundaries around Commerce Clause authority was a useful way to achieve this balance.

Judge Alito's *Rybar* dissent is particularly worrisome to Sierra Club because of recent events at the Supreme Court. In the very first set of orders handed down after John Roberts was sworn in as the new Chief Justice, the Court granted certiorari in two cases – *Rapanos v. U.S.* and *Carabell v. U.S.* – both of which present the question of whether Congress has the Commerce Clause authority to regulate any waterway or

wetlands beyond "traditionally navigable waters." The Court is now in a position to draw the line of Congressional authority however far upstream from "traditionally navigable waters" it chooses. It is troubling that the Roberts' Court accepted these cases even though (1) it had previously declined to review *Rapanos*; (2) there is no split of authority in the lower courts warranting Supreme Court intervention; and (3) the Court agreed to decide the Constitutional question even though the Commerce Clause issue was neither raised nor decided in either appellate opinion (there was an accompanying, more limited statutory question in both cases).

If confirmed, Judge Alito and his skepticism about the extent of Congressional authority would hear the *Rapanos* and *Carabell* cases on February 21, 2006 and participate in the decision. After these decisions, he would be ruling on any number of similar Commerce Clause challenges to environmental laws, which have proliferated in the wake of *Lopez* and *Morrison*. (Indeed, Judge Roberts' infamous "hapless toad" remark came in just such an Endangered Species Act case.) The framework of federal environmental law that we rely on to protect our health and America's natural resources -- the Clean Water Act, the Safe Drinking Water Act, the Clean Air Act, and many others -- may then fall victim to such misguided ideology.

Other Issues of Concern

Turning to the issue of citizen access to the courts, Judge Alito's decisions in a series of cases bode ill for the future of citizen enforcement of environmental laws. In *PIRG v. Magnesium Elektron*, 123 F.3d 111 (3rd Cir. 1997), Sierra Club and other groups sued -- and proved -- that the defendant had routinely violated the limits of its Clean Water Act permit. However, on appeal Judge Alito joined Judge Roth's notorious decision holding that the plaintiffs lacked standing to sue because they had failed to establish scientific proof of harm to the aquatic ecosystem. As the Supreme Court later ruled in *Friends of the Earth v. Laidlaw* (2000), this kind of logic has the effect of making it harder to establish standing than to prove the case itself. *Laidlaw* rejected this concept and held that injury means interference with the plaintiff's interest, *e.g.* recreating in clean water, not scientific proof of biological harm to the environment.

Another example of Judge Alito's antipathy toward citizen access to courts appears in *Kleissler v. U.S. Forest Service*, 183 F.3d 196 (3rd Cir. 1999). Judge Alito joined an opinion holding that issues raised by citizens in administrative appeals of two logging projects lacked the "required correlation" to the subsequent National Forest Management Act and NEPA claims in the lawsuit, and dismissed the case. The opinion is a highly technical, strict application of the doctrine of "exhaustion of administrative remedies," that makes it much more difficult for citizens to have their day in court.

Other cases show Judge Alito's seeming insensitivity to the plight of environmental claimants. One example is *Cudjoe v. U.S. Dept. of Veterans Affairs*, 2005 U.S. App. LEXIS 22067, in which Judge Alito joined Judge Scirica's exceptionally cramped view of citizen redress under the Toxic Substances Control Act ("TSCA"). After Cudjoe's two-year old son tested positive for elevated blood lead concentration, and the Department of Health confirmed that there were "dangerous levels of lead paint

and dust throughout the premises," Cudjoe sued the Department of Veterans Affairs, allegedly the record title holder of the property.

TSCA provides that the federal government "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural * * * respecting lead-based paint, lead-based paint activities, and lead-based paint hazards * * * ." Ignoring both this broad waiver of sovereign immunity and the remedial nature of the statute, the *Cudjoe* court found that a claim for money damages (as authorized by another federal statute, the Residential Lead-Based Paint Hazard Reduction Act) did not constitute a "substantive and procedural requirement" that could be enforced against the federal government.

Judge Alito's preference for the narrowest possible readings of environmental statutes is also seen in *United States v. USX Corp.*, 68 F.3d 811 (3rd Cir. 1995), where he joined a decision that strained to create a higher standard for establishing corporate officer/shareholder liability in cases involving "arrangers" and "transporters" of hazardous waste than for facility "owners" and "operators." And in *Acceptance Insurance v. Sloan*, 263 F.3d 278 (3rd Cir. 2001), Judge Alito held that Pennsylvania regulations requiring coal mines to obtain a liability insurance rider requiring the insurer to notify the Department of Environmental Protection 30 days prior to policy termination did not actually impose any duty on the insurer to notify DEP of such termination.

To be fair, not every opinion rendered by Judge Alito has produced bad environmental results. He has enforced the requirements of environmental laws strictly against government and corporate defendants in a number of instances in which he perceived the law to be straightforward. However, the enforcement of straightforward laws is not the province of the Supreme Court. Rather, it is called upon to make nuanced judgment calls about the scope and meaning of constitutional provisions, such as the Commerce Clause and Article III's standing requirements. In these areas, if Judge Alito's "federalist" philosophy were to prevail, it could threaten to severely curtail the protections afforded by our federal environmental laws.

For these reasons cited above, we believe that Judge Samuel Alito should not be confirmed to a lifetime position on our nation's highest court. We respectfully urge you to vote against his confirmation.

Sincerely,

Patrick Gallagher
Director, Environmental Law Program

cc: Members, Senate Judiciary Committee

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