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Surveying the Wreckage: Lessons from the 104th Congress

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SURVEYING THE WRECKAGE: LESSONS FROM THE 104TH CONGRESS

*Victor M. Sher**

INTRODUCTION

Thank you, Dean Feerick, for including me on this program. A beautiful day like today makes even a confirmed Californian enjoy New York City.

Last November I traveled to Japan. A group of aspiring environmental lawyers asked me to give a series of lectures to bar associations in Tokyo and Osaka, as well as to deliver the keynote address at the founding meeting of the Japan Environmental Lawyers Federation (JELF). JELF hopes to become Japan's first public interest environmental law firm.

I was terribly impressed by the lawyers I met in Japan. They expressed deep interest in our environmental laws generally, and, in particular, in our tradition of allowing citizens access to the courts to enforce those laws against polluters and the government. Japanese environmental law — with the exception of some well-known cases involving toxics — is in its infancy, and the challenges facing lawyers seeking to build an environmental practice there are profound. Japan has no Freedom of Information Act (FOIA),¹ no National Environmental Policy Act (NEPA),² no Endangered Species Act (ESA),³ and no citizen suit provisions.⁴ Japan lacks even rules governing civil discovery! Yet the lawyers I met were uniformly creative, dedicated, and inspired. I have no doubt they will succeed.

My trip to Japan and my conversations there led me to reflect on our own country's first twenty-five years of citizen-enforced environmental law. Virtually all of our important environmental statutes date from the late 1960s and early 1970s, a period that

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1. 5 U.S.C. § 552 (1996).
2. 42 U.S.C. §§ 4321-4370 (1994).
3. 16 U.S.C. §§ 1531-1544 (1994).
4. *See, e.g.*, 33 U.S.C. § 1365 (1997).

gave us NEPA,⁵ the Clean Water Act of 1977,⁶ the Clean Air Act,⁷ the ESA,⁸ the National Forest Management Act,⁹ and other key laws.

We indeed have much to be proud of in this history. No institution has been so important to the environment as the courts, and no aspect of the judicial system has been so important as citizen enforcement of our environmental laws. Examples are legion:

- Last summer, President Clinton announced that a massive gold and silver mine proposed for just outside of Yellowstone National Park, and which threatened to destroy rivers running through the Park, would not proceed.¹⁰ In its coverage of the announcement, however, the media missed a key point. After public officials declined to act, citizens brought a lawsuit under the citizen suit provisions of the Clean Water Act¹¹ and forced the mining conglomerate to the table. Only then did a "win-win" settlement that saved the Park result.¹²
- Litigation to protect the ancient forests of the Pacific Northwest¹³ resulted in what the *American Lawyer* magazine called the "most important public lands management litigation in this country's history,"¹⁴ and revolutionized management of millions of acres of federal forests in three states.¹⁵

5. See *supra* note 2.

6. Pub. L. 95-217, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C.).

7. 42 U.S.C. §§ 7401-7671.

8. See *supra* note 3.

9. 16 U.S.C. § 1604 (1985).

10. See John F. Harris, *That Near Yellowstone, A Deal Saves the Land*, WASH. POST, Aug. 13, 1996, at A4; Todd S. Purdum, *Clinton Unveils Plan to Halt Gold Mine Near Yellowstone*, N.Y. TIMES, Aug. 13, 1996, at A10.

11. 33 U.S.C. § 1365.

12. See *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168 (D. Mont. 1995).

13. See, e.g., *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705 (9th Cir. 1993); *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699 (9th Cir. 1993); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991); *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff'd*, 80 F.3d 1401 (9th Cir. 1996).

14. Roger Parloff, *Liti-slating, How the Timber Industry Gets Its Local Congressman to Fix Its Cases*, AM. LAW., Jan. 1992, at 80.

15. See generally Victor M. Sher, *Travels With Strix: The Spotted Owl's Journey through the Federal Courts*, 14 PUB. LAND L. REV. 41 (1993).

Over the last quarter-century, litigation has protected our air, water, and land from poisons; preserved priceless wilderness areas; held countless polluters accountable for their actions; forced government agencies to fulfill their ecological responsibilities; and saved millions of acres of habitat crucial to the survival of endangered species.

Yet this twenty-five year tradition actually is both recent and fragile. Two years ago, my talk at this conference would have focused on developments in these and similar cases under a defined and seemingly stable body of substantive and procedural laws that apply to management of federal natural resources. Litigators and scholars would ordinarily focus on issues such as: an agency's obligation to consider the effects on threatened and endangered species of programmatic decisions under ESA;¹⁶ the adequacy of plans to manage the ancient forests of the Pacific Northwest;¹⁷ the President's right to engage in *ex parte* efforts to influence the Endangered Species Committee on decisions to proceed with federal actions likely to jeopardize the survival of an endangered species;¹⁸ the obligation to address a reasonable range of alternatives for proposed logging under the NEPA;¹⁹ the need for an Environmental Impact Statement (EIS) in connection with critical habitat designation under ESA;²⁰ and the like.

The 104th Congress, however, changed all that. Between January 1995 and December 1996, the major issue was whether *any* laws intended to protect the environment, *or indeed, any laws at all*, applied to vast tracts of our federal lands. It is not an overstatement to say that during this period the most important characteristic of the management of public resources, especially timber, was either the absence of law or the threat that otherwise

16. *See, e.g., Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290 (9th Cir. 1992).

17. *See cases cited supra* note 13.

18. *See Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993).

19. *See, e.g., Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723 (9th Cir. 1995).

20. *Compare Catron County Bd. of Comms. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996) (holding the EIS required), *with Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995) (holding that EIS not required), *cert. denied*, ___ U.S. ___, 116 S. Ct. 698 (1996).

applicable law would disappear altogether in response to environmental litigation. This period illustrated with unprecedented drama how the future of public lands depends on the relationship between the courtroom and the Congress, and the tenuous grasp of our federal environmental laws on continued existence and meaning.

The most dramatic act of the 104th Congress concerning public natural resources, and perhaps the most anti-environmental legislation this country has ever seen, was the so-called Rescissions Act of 1995.²¹ In my talk this afternoon, I want to tell you about the Rescissions Act, discuss some of the litigation brought under the Act, and offer some thoughts and lessons about where we go from here.

THE MOST ANTI-ENVIRONMENTAL LAW OF THEM ALL

The sponsors of the Rescissions Act made no secret of their hopes that it would elevate logging above all other uses of our public forests and eliminate bothersome suits by citizens attempting to enforce environmental laws. As Charles Taylor (R-N.C.), one of the bill's original sponsors in the House of Representatives, summed up:

This means, for example, that the . . . [Forest Service] cannot be sued for violation of the Clean Water Act; the provisions of the National Forest Management Act concerning species' viability, unsuitability, or consistency with the resource management plans, or the jeopardy or take standards of the Endangered Species Act [Finally], a sale can be offered even if it would be barred under any decision, injunction, or order of any federal court.²²

21. Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act of 1995, Pub. L. 104-19, 19 Stat. 194 (codified as amended in scattered sections of 16 U.S.C.). The Rescissions Act is not the first suspension of environmental laws by Congress. For a general discussion of previous site-specific interventions with the general operations of otherwise applicable environmental laws, see Victor M. Sher & Carol Sue Hunting, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws*, 15 HARV. ENVTL. L. REV. 435 (1991).

22. 141 CONG. REC. H3233 (daily ed. Mar. 15, 1995).

The primary focus of the timber provisions of the Rescissions Act was the "Emergency Timber Salvage" sale program.²³ In passing these provisions, Congress said it intended to expedite the logging of a "backlog of dead and dying trees in [the] National Forests and other public lands"²⁴ The Act provided for a streamlined sales process²⁵ and an expedited and extremely limited judicial review process.²⁶

To streamline timber sales, the Rescissions Act left all environmental documents and information — including specifically those ordinarily required under both the National Environmental Policy Act of 1969²⁷ and the Endangered Species Act of 1973²⁸ — to the "sole discretion" of the agencies.²⁹ Moreover, any documents and procedures undertaken by the agencies were expressly deemed to satisfy NEPA, the National Forest Management Act of 1976, the Endangered Species Act of 1973, and all other environmental laws normally applicable to timber sales.³⁰

The Rescissions Act purported to allow judicial review of salvage sales, albeit in limited ways. On the face of the Act, a court could permanently (but not preliminarily) enjoin, modify, or void a salvage timber sale if, after a "review of the record," the court found that the decision to allow the salvage timber sale was "arbitrary and capricious or otherwise not in accordance with applicable law"³¹

President Clinton vetoed the bill once, citing the extent which it unnecessarily sought to override existing environmental laws.³² However, he then signed it on the mistaken understanding that the Act would allow the agencies the discretion to follow existing law.³³ The President promised that the Forest Service, the Bureau

23. Rescissions Act § 2001, Pub. L. No. 104-19, 109 Stat. 240 (codified at 16 U.S.C. § 1611).

24. H.R. REP. NO. 104-124, at 134 (1995).

25. See Rescissions Act § 2001(b)-(c).

26. See § 2001(f).

27. See 42 U.S.C. § 4332(C).

28. See 16 U.S.C. § 1536(a)(2).

29. Rescissions Act § 2001(c)(1)(C).

30. See § 2001(i).

31. § 2001(f)(4).

32. See 141 CONG. REC. H5683 (daily ed. June 7, 1995).

33. See *id.*; see also Deanne E. Parker, *Backdoor Tactics to Forest Management: The Emergency Salvage Timber Rider of H.R. 1944*, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. 216, 216 (1996).

of Land Management and other government agencies would fully comply with all environmental laws governing logging on federal forests.³⁴ The President subsequently issued a formal directive instructing federal agencies to implement the logging rider "in accordance with . . . existing forest and land management policies and plans, and existing environmental laws."³⁵

Pursuant to the President's directive the Departments of Agriculture, Interior, and Commerce, and the Environmental Protection Agency (EPA), entered into a formal Memorandum of Agreement,³⁶ the purpose of which was "to reaffirm the commitment of the signatory parties to continue their compliance with the requirements of existing environmental law while carrying out the objectives of the timber salvage activities authorized by the [Rescissions Act]."³⁷ The agencies expressly pledged "to implement salvage sales under the [Act] with the same substantive environmental protection as provided by otherwise applicable environmental laws."³⁸

THE RESCISSIONS ACT IN PRACTICE

Did the President's efforts to preserve the existing environmental standards (in agency practice, if not in law) work? Well, no.

In *Inland Empire Public Lands Council v. Glickman*,³⁹ plaintiffs unsuccessfully challenged the Forest Service's decision to proceed with the Kootenai salvage sales, which will log right through grizzly bear management units and prevent those units from complying with the agency's own bear management standards until well

34. See Paul Maynard Kakuske, *Clear-Cutting Public Participation in Environmental Law: The Emergency Salvage Timber Sale Program*, 29 LOY. L.A. L. REV. 1859, 1891-92 (1996).

35. Memorandum from William J. Clinton, President of the U.S., to Secretaries of Interior, Agriculture, Commerce and EPA Administration Re: Implementing Timber-Related Provisions of Public Law 104-19 (Aug. 1, 1995).

36. Cover Letter Re: Salvage Sale Provisions of P.L. 104-19 and Memorandum of Agreement (Aug. 18, 1995), *reprinted in* 141 CONG. REC. H8788-01 (daily ed. Sept. 12, 1995) (Enclosure 2 & 3).

37. *Id.*

38. *Id.*

39. 911 F. Supp. 431 (D. Mont. 1995), *aff'd*, 88 F.3d 697 (9th Cir. 1996).

into the twenty-first century.⁴⁰ Despite the obvious departure from existing legal standards and current forest plans, the Ninth Circuit held that the Forest Service “did not need to consider the effect on the grizzly bear” of the sale.⁴¹ Indeed, the court concluded, the Act gave the Forest Service “discretion to disregard entirely the effect [of logging] on the grizzly bear.”⁴²

In *Idaho Conservation League v. Thomas*,⁴³ the Forest Service decided to proceed with the Thunderbolt salvage sale over the objections of all other expert agencies (including the EPA, the National Marine Fisheries Service (NMFS), the U.S. Fish & Wildlife Service (USFWS), and the Idaho Department of Fish and Game).⁴⁴ The sale, located in the South Fork Salmon River drainage in central Idaho, was the site of the single largest producer of spring and summer Chinook salmon in the Columbia River Basin. However, since the 1950s the area has suffered severe erosion and stream sedimentation caused by mining, grazing, logging and associated road building.⁴⁵

The Forest Service’s decision to proceed with the sale drew what the district court called “harsh and substantial criticism” from every agency with environmental expertise.⁴⁶ The expert agencies objected to the sale on grounds that the logging would further aggravate the already critically degraded habitat for threatened salmon.⁴⁷ As the court summarized the record:

The EPA recommended against the Project, noting that the proposed action was inconsistent with collective agency decisions and resource protection goals for the South Fork Salmon River watershed. The EPA concluded that the logging sale would further aggravate the already critically degraded habitat for threatened salmon. NMFS also strongly opposed the Project, concluding that [it], and the logging activity in particular,

40. *See id.* at 434-35.

41. *Inland Empire Public Lands Council v. Glickman*, 88 F.3d 697, 701 (9th Cir. 1996).

42. *Id.*

43. 917 F. Supp. 1458 (D. Idaho 1995), *aff'd*, 91 F.3d 1345 (9th Cir. 1996).

44. *See id.*

45. *See id.* at 1460.

46. *Id.* at 1461.

47. *See id.* at 1461-62.

will likely jeopardize the continued existence of the endangered salmon and will likely result in the destruction or adverse modification of their critical habitat. The USFWS similarly opposed the salvage sale on the ground that it would likely result in adverse impacts to fish and wildlife. The USFWS opined that the proposed salvage actions would generate additional sediment in the already-impacted watershed, negating or delaying the benefits from the restoration actions. The Idaho Department of Fish and Game also criticized the proposal to use logging to fund restoration projects.⁴⁸

The court went on to say:

The Forest Service readily concedes that the proposed Salvage Sale, which will log from landslide prone . . . areas, is inconsistent with established management policies for the watershed. Indeed, but for the Rescissions Act, the Salvage Sale could not be implemented without amending the Land Resource Management Plans for the Boise and Payette National Forests.⁴⁹

On appeal, the Ninth Circuit agreed that under the Rescissions Act "the sale is not subject to any federal environmental or natural resources laws."⁵⁰ Therefore, the court concluded, "the Forest Service did not act arbitrarily or capriciously" in approving the sale.⁵¹

Inland Empire and *Idaho Conservation League* demonstrated dramatically the illusory nature of government "commitments" to follow environmental laws in the absence of citizen enforcement. Despite explicit promises from the President, the secretaries, and the agencies to continue to follow existing plans and laws, the agencies failed to do so. Ordinarily, citizens would have held them accountable in court. Under the Clearcut Rider to the Rescissions Act,⁵² however, nobody could do so. The result was injury to endangered grizzly bears and salmon.

48. *Id.* at 1461-62.

49. *Id.* at 1465-66.

50. *Glickman*, 91 F.3d at 1349.

51. *Idaho Conservation League*, 917 F. Supp. at 1465.

52. Pub. L. No. 104-19, § 2001(c)(2), 109 Stat. 240 (1995).

THE RESCISSIONS ACT AND THE ANCIENT FORESTS OF THE PACIFIC
NORTHWEST: DESTROYING A DECADE OF PROGRESS TOWARD LEGALITY,
CERTAINTY AND STABILITY

Between 1987 and 1993 the federal courts decided more than a dozen lawsuits involving the ancient forests of Oregon, Washington and northern California and the species that depend on them.⁵³ These cases revealed what the district court called a "remarkable series of violations of the environmental laws" involving "a deliberate and systematic refusal by [federal agencies] to comply with the laws protecting wildlife."⁵⁴

In 1994, following President Clinton's personal intervention and participation in an April 1993 Forest Conference in Portland, Oregon, the government prepared and adopted a management plan for these forests (known widely as "Option 9") that sought to reconcile current scientific information about species viability with existing legal standards.⁵⁵ In December 1994, a federal district court upheld the plan as being in minimal compliance with the law:

[A]ny more logging sales than the plan contemplates would probably violate the laws. Whether the plan and its implementation will remain legal will depend on future events and conditions.⁵⁶

Eight months later, the Rescissions Act threw gasoline on the nearly extinguished coals of this explosive and long fought controversy in at least two ways. First, it actually required the govern-

53. See, e.g., *Headwaters, Inc. v. B.L.M., Medford Dist.*, 914 F.2d 1174, 1184 (9th Cir. 1990) (Cal.); *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233, 1236 (9th Cir. 1989) (Or.); *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988) (Wash.). See generally *Sher, Travels with Strix*, *supra* note 15.

54. *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1089, 1090 (W.D. Wash. 1991), *aff'd*, 952 F.2d 292 (9th Cir. 1991).

55. See *Management for Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl; National Forests in Washington, Oregon, and California*, 59 Fed. Reg. 18,788 (1994). Option 9 is described in detail in *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1304-06 (W.D. Wash. 1994), *aff'd sub nom. Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996).

56. *Lyons*, 871 F. Supp. at 1300.

ment to sell timber even the agencies did not want to sell. Second, the Act insulated otherwise illegal timber sales from lawsuits by citizens.

A. *Forcing The Government To Sell Timber
Even It Did Not Want To Sell*

In *Northwest Forest Resources Council v. Glickman*,⁵⁷ arising from a lawsuit filed by the timber industry, the district court issued a series of rulings that eviscerated federal environmental laws, previous decisions by federal agencies not to sell timber for environmental reasons, past decisions by the federal courts declaring timber sales illegal under environmental laws, and even scientific protocols for determining the presence of threatened or endangered species.

First, the court held that the Act required the immediate release, without compliance with environmental laws, of all timber sales ever offered in Washington and Oregon.⁵⁸ In opposing the industry motion that led to the court's ruling, the government submitted declarations showing that these logging sales will irreparably harm the forests and adversely affect the ability of threatened and endangered species to survive.⁵⁹

Nonetheless, the Ninth Circuit affirmed on these points. Emphasizing that "[i]t is not our role to determine the wisdom of Section 2001(k)(1), only its meaning,"⁶⁰ the court of appeals

57. 82 F.3d 825 (9th Cir. 1996).

58. *See id.* at 836.

59. On appeal, Senator Patrick J. Leahy and ten Members of the House of Representative stated in an amicus brief filed with the Court of Appeals,

Contrary to the district court's orders, Congress meant for § 2001(k)(1) to release *only* timber sales previously offered or sold under section 318 of Pub. L. 101-121. The expansive interpretation adopted by the district court in no way reflects what Congress as a whole understood § 2001(k) to do.

Amicus Brief for U.S. Sen. Patrick J. Leahy, Reps. David E. Bonior, Elizabeth Furse, Jim McDermott, George Miller, David E. Skaggs, Gerry E. Studds, Bruce Vento, Sidney R. Yates, and Karen McCarthy, *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825 (9th Cir. 1996) (Nos. 95-36038, 95-36042).

60. *Glickman*, 82 F.3d at 828.

held that the Act's "mandatory language,"⁶¹ "direct[s] the [government] to release 'all timber sale contracts offered or awarded between October 1, 1990 and July 27, 1995, in any national forest in Oregon and Washington or [BLM] district in western Oregon'."⁶²

The court of appeals did qualify this ruling in two important respects. First, the court held that at least certain sales that had been declared illegal by the courts under their authorizing statutes were void from the outset, and therefore were not "sales" released by the Rider.⁶³ This ruling saved from the chain saws several particularly awful timber sales in the Northwest, which had been declared illegal in 1990 in earlier lawsuits.⁶⁴ On the other hand, the court held that a number of sales that the government had withdrawn pursuant to stipulation following the earlier declarations of illegality by previous courts must proceed under the Act.⁶⁵

Second, in a subsequent decision, the court allowed the government to protect habitat of the marbled murrelet.⁶⁶ This ruling was especially significant, since requiring the government to proceed with these timber sales would have affected greatly the assumptions about species viability that underlie the President's plan for the old-growth forests (Option 9).⁶⁷ This ruling saved about seventy-seven timber sales that the U.S. Fish & Wildlife Service had determined would jeopardize the continued existence of this species.⁶⁸

61. *Id.* at 831.

62. *Id.* at 828.

63. *Id.* at 830. The court's ruling was, however, ambiguous as to certain other timber sales that had been declared illegal for various reasons; however, the court denied a subsequent motion for clarification. *NFRC v. Glickman*, No. 96-35106 (9th Cir. Jul. 29, 1996) (Order denying motion for clarification and petitions for rehearing and rehearing en banc).

64. See cases cited *supra* note 54.

65. See *Glickman*, 82 F.3d at 834.

66. See *NFRC v. Pilchuck Audubon Soc'y*, 97 F.3d 1161, 1167 (9th Cir. 1996).

67. See *supra* note 56.

68. See *Pilchuck Audubon Soc'y*, 97 F.3d at 1167.

The long-term impact of these rulings on Option 9 remains unclear. The ultimate effect on the management plan of allowing some of the most environmentally egregious sales to proceed will change the environmental baseline, since Option 9 assumed the areas encompassed by these sales would be protected.

B. *Insulating Otherwise Illegal Sales From Citizen Suits*

In *Oregon Natural Resources Council v. Thomas*,⁶⁹ citizens sued over a group of timber sales in the Upper North Umpqua River Basin, an area famous for its stunning scenery and clear, jade-green rushing water. The case sought to enforce Option 9.⁷⁰ One of Option 9's primary purposes was to protect salmon and other fish and wildlife populations, requiring surveys of aquatic species and analyses of potential impacts on those species in proposed sale areas.⁷¹ Nonetheless, these sales were planned without aquatic surveys, and without any input from fisheries biologists, notwithstanding one biologist's conclusion that logging would severely degrade the aquatic habitat and make it inhospitable for fish.⁷²

In rejecting the lawsuit, the Ninth Circuit started with "the Act's manifest intent to eliminate environmental challenges to Option 9 timber sales"⁷³ and the need not to "frustrate one of the Rescission Act's primary purposes: to enable the logging of timber on Option 9 land."⁷⁴ The court noted that the Act

doesn't require *any* documents or procedures for Option 9 timber sales. The effect . . . , therefore, is to render sufficient under the environmental laws whatever documents and procedures, *if any*, the agency elects to use for an Option 9 sale.⁷⁵

The court emphasized that the Act "is best interpreted as *requiring the disregard . . . of environmental laws . . .*"⁷⁶ Indeed, the court suggested that the timber industry "could well have pre-

69. 92 F.3d 792 (9th Cir. 1996).

70. *See id.* at 794-95.

71. *See id.* at 795; *see also Lyons*, 871 F. Supp. at 1305.

72. *See Oregon Nat. Resources Council*, 92 F.3d at 795.

73. *Id.* at 797 n.10.

74. *Id.* at 795 n.7.

75. *Id.* at 795 (emphases added).

76. *Id.* at 796 (emphasis added).

vailed in a suit . . . [alleging] that .. the Rescissions Act *forbade the agency to consider environmental factors.*"⁷⁷ In response to the contention that the Forest Service had overlooked important environmental considerations under Option 9, the court explained:

Whether an agency has overlooked "an important aspect of the problem," however, turns on what a relevant substantive statute makes "important." In law, unlike in religion or philosophy, there is nothing which is necessarily important or relevant.⁷⁸

Under the Rescissions Act, the court concluded, environmental factors were "legally irrelevant," and the courts could not examine agency conduct because "there's no law to apply."⁷⁹

WHAT'S NEXT?

The Rescissions Act expired at the end of 1996. Congressional efforts to renew it, or to enact similar provisions, failed in the face of election-year politics.

The issues surrounding the Rescissions Act, however, are far from dead. Senator Larry Craig (R-Idaho) has introduced a new bill that is nothing short of a bald attempt to turn our National Forests into tree farms.⁸⁰ The bill would accomplish this by (1) severely weakening existing environmental safeguards, (2) undermining the system of checks and balances that holds government agencies and the timber industry accountable, (3) limiting public participation in forest policy, and (4) making logging the dominant use of the National Forests at the explicit expense of non-consumptive uses like water quality, fish and wildlife, and recreation.

The Craig Bill would turn the entire management framework for National Forests upside down. Congress adopted existing law, the National Forest Management Act (NFMA), in 1976 in an explicit policy decision to end timber dominance.⁸¹ The NFMA sought to establish standards that would protect the forests from damage caused by historical excesses of logging, mining and

77. *Id.* at 798 (emphasis added).

78. *Id.*

79. *Id.*

80. Public Lands Management Improvement Act of 1997, S. 1253, 105th Cong. (1997).

81. 16 U.S.C. § 1604.

grazing.⁸² Thus, the NFMA required the Forest Service to protect fish and wildlife habitat and water quality, while imposing strict limits on clearcutting and other activities that harm forests.⁸³ The Craig Bill reverses that approach by proposing to turn current environmental standards into unenforceable "policies," while at the same time making logging and other commodity outputs mandatory and enforceable.⁸⁴

The bill attempts to set up a catch-22 scheme guaranteeing that, once a forest plan is in place, all logging, road building, mining, grazing and other activities go forward with virtually no possibility of stopping them in court — no matter how much damage they might cause. The bill would accomplish this by:

- 1) prohibiting *any* legal challenges that are based on laws or safeguards that were in effect at the time a forest plan was adopted⁸⁵ — including, for example, the Clean Water Act;⁸⁶
- 2) requiring any challenge based on a new law or new information to be preceded by a petition to amend the plan — a process that could take from 90 days (if the petition is rejected) to two years (if it is accepted and a plan revision process ensues);⁸⁷
- 3) barring courts from stopping *any* on-the-ground activities while a plan amendment or revision process is underway — no matter how much damage that may be causing;⁸⁸
- 4) allowing the agencies to proceed with any activities that would have been allowed under a prior forest plan — even if the current forest plan is declared illegal and even if the old forest plan was worse than the one declared illegal;⁸⁹ and
- 5) requiring the agencies, when revising a forest plan, to maintain the same overall balance amount forest uses that was contained in the plan being changed — in other words, if the original plan was being revised because new information showed the agency had been overcutting the forest to the detriment of fish, wildlife, and recreation, the Craig/industry Bill would nonetheless force them to maintain the same balance between

82. See § 1604(g)(3)(D)-(F).

83. See § 1604(g)(3)(B)-(C).

84. See S. 1253 § 107(a).

85. See *id.*

86. See *id.* § 204.

87. See *id.* § 113.

88. See *id.* § 107(b)(2).

89. See *id.* § 107(d).

logging and those other resources that was in the original plan.⁹⁰

The bill would also allow the Forest Service and BLM to meet in secret with representatives of the timber, mining, and livestock industries to cut deals regarding timber contracts, mining permits, or grazing leases — or even the rules governing those activities.⁹¹ Such meetings were all too common in the past. In fact, a 1994 investigation by the U.S. Agriculture Department's Inspector General found that for many years, top forest Service personnel met privately with industry representatives.⁹² The Inspector General concluded that the meetings "give the appearance of undue influence on Forest Service policy."⁹³ The Craig/industry bill attempts to allow a return to the good old days of backroom deal making out of the public eye.

A section titled "Wildlife Protection" would actually jeopardize fish and wildlife by attempting to eliminate one of the most important checks and balances on arbitrary or illegal government actions: the requirement that a government agency consult with independent scientists from the Fish and Wildlife Service or the National Marine Fisheries Service *before* taking actions that might lead to the extinction of a threatened or endangered species.⁹⁴ Senator Craig and the timber industry want to let the Forest Service and BLM just consult with themselves before taking such actions.⁹⁵ They might call it "self-consultation," but we call it "self-abuse" because the agencies' record of abuse of similar authority under the Clearcut Rider was abysmal: they repeatedly ignored the warnings and recommendations of state and federal fish, wildlife, and water quality officials.

A section titled "Water Quality Protection" could put water quality at risk for tens of millions of Americans by letting the

90. *See id.* §§ 105, 107(a), 117(d); *see also* 143 CONG. REC. S10,319-06, 10,326, 10,328 (1997) (description of §§ 107, 117 by Sen. Craig).

91. *See* S. 1253 § 206.

92. *See* Michael Doyle, *Forest Service Warned of Getting Too Close to Logging Foes*, SACRAMENTO BEE, May 11, 1994, at B1, *available in* 1994 WL 5232993; Scott Sonner, *Forest Service Now Investigated for Talks with Timber Industry*, SEATTLE TIMES, May 2, 1994, *available in* 1994 WL 3624349; *see also* *Senator Says Forest Service, Timber Industry Hold Pacts*, OREGONIAN, Mar. 13, 1994, at C02, *available in* 1994 WL 4544135.

93. Doyle, *supra* note 93.

94. *See* S. 1253 § 203.

95. *See* 143 CONG. REC. S10,319-06, 10,328 (1997).

Forest Service and BLM decide for themselves whether the timber industry's logging and road building activities on the national forests comply with key state and federal water quality protections.⁹⁶ States could be cut out of the process for ensuring that important water quality safeguards are followed and that their rivers, lakes, and streams aren't polluted by runoff from logging operations.⁹⁷

A section titled "Air Quality Protection" is similarly misnamed.⁹⁸ It seeks to undermine efforts to reduce air pollution by allowing the Forest Service and BLM to ignore state and federal clean air standards for setting fires, known as prescribed burns, on the national forests.⁹⁹ Once again, the States could be barred from ensuring that those activities don't cause smoke inversion over local communities that could harm their citizens.

CONCLUSION: LESSONS FOR THE 105TH CONGRESS

Let me put all this in perspective with five final points:

First, strong environmental laws — enforceable in court by ordinary citizens — are more important today than ever as the keystone of environmental protection. The pitfalls of weak laws are perhaps self-evident. But even strong laws can prove largely meaningless in the absence of citizen monitoring and enforcement in court, as our experience under the Rescissions Act demonstrated clearly.

Second, precisely because of the effectiveness of the combination of strong environmental laws and citizen access to the courts to enforce them, anti-environmental interests now explicitly attack both. In the 104th Congress, this attack was especially strong on public lands management issues, and especially concerning timber. But look for the assault to widen.

Third, Congress can quite effectively change or even suspend the laws — including the rights of citizens to enforce them — if it wants to.

96. S. 1253 § 204.

97. *See* 143 CONG. REC. S10,319-06, 10,328 (1997).

98. S. 1253 § 205.

99. *See id.*

Fourth, strong laws will not last without the will to enforce them. That will must exist both inside and outside the courtroom.

Finally, we have made progress since the start of the 104th Congress. The budget fights of early 1996 elevated environmental concerns to prominence, a trend that continued in the end-of-term defeat for several efforts to undermine environmental laws (including a proposal to make the Clear-cut Rider permanent). But the bad news is that the environment has become a political wedge issue in a way that it never has been before, and that we now face in Congress an explicitly anti-environmental constituency that has targeted citizen-enforced laws to accomplish its ends. Unfortunately, much of that constituency is back in the current Congress.

