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FRIENDS OF THE EARTH ♦ GREENPEACE
LEAGUE OF CONSERVATION VOTERS
NATIONAL ENVIRONMENTAL TRUST
NATURAL RESOURCES DEFENSE COUNCIL
SIERRA CLUB ♦ THE WILDERNESS SOCIETY**

**ALASKA CENTER FOR THE ENVIRONMENT ♦ ALASKA COALITION
ALASKA WILDLIFE ALLIANCE ♦ ARKANSAS NATURE ALLIANCE
BUCKEYE FOREST COUNCIL
CALIFORNIANS FOR ALTERNATIVES TO TOXICS
CENTER FOR BIOLOGICAL DIVERSITY ♦ CENTER FOR NATIVE ECOSYSTEMS
CITIZENS FOR THE CHUCKWALLA VALLEY
CITIZENS PROGRESSIVE ALLIANCE ♦ CITIZENS FOR PUBLIC RESOURCES
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THE ECOLOGICAL CONSERVATION ORGANIZATION
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ENVIRONMENTAL LAW FOUNDATION
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FRIENDS OF THE INYO ♦ GIFFORD PINCHOT TASK FORCE
GREAT OLD BROADS FOR WILDERNESS ♦ GREEN DELAWARE
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NORTHERN CALIFORNIA COUNCIL, FEDERATION OF FLY FISHERS
NORTHWEST ENVIRONMENTAL ADVOCATES
OKANOGAN HIGHLANDS ALLIANCE ♦ OLYMPIC FOREST COALITION
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SODA MOUNTAIN WILDERNESS COUNCIL
SOUTHEAST ALASKA CONSERVATION COUNCIL
VALLEY WATCH, INC. ♦ WESTERN ENVIRONMENTAL LAW CENTER
WILDLANDS CPR**

January 25, 2006

Dear Senator:

The conservation and environmental community is writing on behalf of our millions of members and supporters to express our opposition to the confirmation of Judge Samuel A. Alito, Jr. to a lifetime seat on the United States Supreme Court.

Judge Alito's record shows that his confirmation would pose a serious threat to fundamental legal safeguards for public health and the environment, including the scope of Congress' authority under the Constitution's Commerce Clause – the legal basis for most federal environmental laws. His record also demonstrates that his confirmation would threaten Congress' ability to ensure that citizens have the right to go to court to enforce these laws. Unfortunately, Judge Alito did not alleviate these concerns during his recent hearing before the Senate Committee on the Judiciary.

Our organizations never undertake opposition to judicial nominees lightly, especially nominees to the U.S. Supreme Court. Conservation and environmental groups did not oppose President Bush's previous Supreme Court nominations of D.C. Circuit Judge John G. Roberts, Jr. and White House Counsel Harriet Miers. Indeed, we have not urged the Senate to oppose any of the eight Supreme Court nominations since Robert Bork, whom some of the undersigned groups opposed in 1987.¹

In recent years, the Supreme Court has often been a hostile forum for environmental litigants, issuing rulings that have limited many of the nation's most important environmental safeguards. In other cases, environmental protections have withstood challenges by a narrow majority. The stakes for public health and the environment in this nomination could hardly be higher.

Three of Judge Alito's decisions particularly concern us. First, Judge Alito wrote a dissenting opinion in *U.S. v. Rybar*, 103 F.3d 273 (3d Cir. 1996), arguing that a law signed by President Reagan that bans possession of machine guns is unconstitutional. His opinion was based on an extremely narrow view of Congress' Commerce Clause authority. Judge Alito's position stands in contrast to numerous decisions from other courts, including the Supreme Court. Despite ample opportunities and repeated questions at his Judiciary Committee hearing, Judge Alito refused to reconsider the result he urged in his extreme dissent, even though:

- nine different Circuit Courts of Appeal (including his own) rejected similar challenges to the law that Judge Alito argued was unconstitutional;

¹ While some of the undersigned groups raised concerns about the Supreme Court nomination of Judge Roberts based on his record on Commerce Clause and access-to court-issues, we withheld judgment on whether or not he should be confirmed.

- the Supreme Court rejected petitions to review *Rybar* and seven other appeals court decisions that upheld the law;
- in the Supreme Court's ruling in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), six Justices, including Justice Scalia, took a broad view of Congress' Commerce Clause authority; and
- the Supreme Court ordered an appeals court to reconsider in light of *Raich* the only decision (*U.S. v. Stewart*, 348 F.3d 1132 (9th Cir. 2003)) that agreed with the result Judge Alito urged in *Rybar*.

Second, in *PIRG v. Magnesium Elektron*, 123 F.3d 111 (3d Cir. 1997), Judge Alito imposed severe restrictions on citizen enforcement efforts under the Clean Water Act. Judge Alito was the decisive vote -- joining a 2-1 decision ruling that individuals could not sue a corporate polluter that had committed 150 uncontested Clean Water Act violations even though the individuals had stopped drinking water from, and swimming and fishing in, a polluted river. Even though it was clear that the victims had been harmed by the many violations of the Act, the standard Judge Alito embraced would have forced them to go farther, and also prove that the illegal pollution harmed the environment, in order to have their case heard. The Supreme Court rejected this unreasonably restrictive standing test in *Friends of the Earth v. Laidlaw*, 528 U.S. 167 (2000), holding that the proper measure of standing to sue "is not injury to the environment, but injury to the plaintiff" so that citizens need only show that they themselves have been harmed.

Third, Judge Alito joined a 2-1 decision to overturn an Environmental Protection Agency emergency cleanup order under the Safe Drinking Water Act. In *W.R. Grace v. EPA*, 261 F.3d 330 (3d Cir. 2001), a local water board and state and federal environmental officials developed a health-based plan for cleaning toxic pollution out of the City of Lansing, Michigan's aquifer -- the drinking water supply for 180,000 people. W.R. Grace sued to block the plan, and Judge Alito and a colleague ruled in favor of the company. The late Judge Carol Los Mansmann vigorously dissented, stating "Courts should not undermine the will of Congress by withholding relief." She stressed that "the high degree of deference we are to accord the EPA is a cornerstone to the EPA's power, enshrined in the SDWA, 'to protect the public, health, the environment, and public water supplies from the pernicious effects of toxic wastes.'"

The threat posed by Judge Alito's nomination is real. For example, before July, the Supreme Court will decide two major environmental cases that concern the constitutionality of existing Clean Water Act safeguards, and by extension, the fate of other national laws that protect our health and environment. If confirmed, Judge Alito could be the decisive vote that will determine whether Congress has the constitutional authority to prevent the pollution and destruction of the vast majority of America's streams and wetlands.

Please consider carefully Judge Alito's record on environmental and conservation issues, including the cases discussed in this letter, and oppose his confirmation.

Sincerely,

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