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WILDEARTH GUARDIANS
THE XERCES SOCIETY FOR INVERTEBRATE CONSERVATION**

July 19, 2010

The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Confirmation of Elena Kagan as an Associate Justice of the U.S. Supreme Court

Dear Chairman Leahy and Ranking Member Sessions:

We write to express our strong support for confirmation of Solicitor General Elena Kagan as an Associate Justice of the U.S. Supreme Court. General Kagan is extremely well qualified to serve on the Supreme Court and we endorse her nomination without qualification.

After graduating with distinction from Princeton University, Oxford, and Harvard Law School, Elena Kagan clerked for D.C. Circuit Judge Abner Mikva and Supreme Court Justice Thurgood Marshall. She worked in a leading law firm, and was a professor at the University of Chicago School of Law and at Harvard Law School, where she also served as Dean. Her public service includes work with the Senate Judiciary Committee and the Clinton White House and as President Obama's Solicitor General.

Her devotion to the law, temperament, breadth of experience, and stellar accomplishments have attracted bi-partisan supporters, including all Solicitors General from 1985 through her predecessor in 2009.

Ultimately, the Supreme Court decides the fate of lawsuits that attack safeguards for [clean air](#), [clean water](#), [endangered species](#), and special natural places. For example, Americans depend upon fair Justices to uphold anti-pollution and conservation laws against unjustifiable claims that their enactment exceeded Congress' [Commerce Clause](#) authority, and that these and other laws take away non-existent "property rights" to pollute.

The Court is narrowly and deeply split on critical constitutional and statutory environmental protection issues, as exemplified by dissenting justices' apt criticism of plurality opinions. In a 1992 [case](#) that threatened vital [access to courts](#) by redefining the Constitution's "[Cases and Controversies](#)" clause, Justice O'Connor joined a dissent that condemned the plurality opinion's "slash-and-burn expedition through the law of environmental standing."

Four dissenting Justices in the 2006 [Rapanos](#) case described how a "revisionist" plurality opinion displayed "antagonism to environmentalism.... The "impropriety of crafting these new conditions [on Clean Water Act jurisdiction] is highlighted by the fact that no party or amicus has suggested either of them [T]he plurality disregards ... its own obligation to interpret laws rather than to make them."

General Kagan's record and her Supreme Court confirmation hearing testimony demonstrate an essential understanding of the importance of fair Court decisions that uphold, enforce and correctly interpret laws that protect people, wildlife, and the environment.

As dean of Harvard Law School, Elena Kagan made environmental law a top priority. She helped found the [Environmental Law Program](#), and, in one of her most high-profile hires, recruited prominent environmental scholar [Jody Freeman](#) to lead it. [John Leshy](#), an environmental law professor at the University of California Hastings College of the Law, [said](#) that Harvard

environmental law “came from nowhere and became a respected program. I give her a lot of credit for that.”

Dean Kagan’s [letter in the summer 2008 Harvard Law Bulletin](#) described how “this program is fast becoming an international leader in showing how law schools (and lawyers) can actively shape a field that will in many ways determine the world’s future.” She discussed how the [Environmental Law and Policy Clinic](#) which she started was “the heart of our environmental program ... HLS students are involved in a growing array of placements that give them a chance to effect change in the real world. ... I hope you'll share my pride in the work that students, faculty and alumni are doing to tackle the environmental dangers we all face-and my determination that Harvard Law School continue to make a difference in this vital sphere of law and policy.”

General Kagan’s answers to questions at her Supreme Court confirmation hearing recognized the broad scope of congressional Commerce Clause authority (which is the basis for most federal environmental laws) and the importance of Court precedents that defer to Congress in this area. She described what

was really the great recognition of those New Deal years, was that deference to Congress was appropriate in this area. ... the current state of the law is to grant broad deference to Congress in this area, to assume that Congress knows what’s necessary in terms of the regulation of the country’s economy, but to have some limits. ... Congress has broad authority under the commerce clause to act.

Sen. Feinstein asked about “many environmental statutes, such as the Clean Water Act, the Endangered Species Act, the Clean Air Act,” in which Congress has included provisions permitting citizens or citizen groups to bring lawsuits to redress violations of the law. ... and ensure that our nation’s environmental protections are not ignored.” In responding, General Kagan appropriately emphasized the role of Congress in defining within broad limits who should have standing to enforce these laws.

[T]he court has also made clear that Congress can define, within broad limits, a set of people who Congress believes is injured by a particular practice such that they can bring suit. So the standing question is one that I think is not entirely, but to a great extent within Congress’s control, that Congress can say, look, there are, you know, some set of people, and it gets to define those people as it wants who are injured by some kind of action and who should have an entitlement to go to court to redress that action. ...

Congress does that in legislation, and if Congress does do that in legislation, within broad limits, as I say, but if Congress does, the court should respect that and should hold that such a suit complies with Article III.

Upholding and enforcing environmental and conservation laws, often requires courts to clarify ambiguous laws by relying on congressional purposes and real-world effects of varying interpretations, as General Kagan described in testimony.

[O]ne ... good and appropriate approach is to look to the purposes of the statute and to try to figure out which interpretation of the statute is more consistent with that congressional purpose.

And one way to do that is to say, well, what would that interpretation of the statute actually do in the world and is that consistent with what Congress thought ought to be done?

This focus on statutory purposes and effects is enhanced by her testimony that “courts have an important role to play in protecting people under the law who -- who are injured by corporate misconduct or by any other.”

General Kagan’s ability to understand and correctly interpret statutes and regulations should be enhanced by her years of work for the Senate Judiciary Committee and Clinton White House, and as President Obama’s Solicitor General. This included detailed analyses of environmental, conservation and administrative law and related issues.

Elena Kagan’s impeccable credentials, wealth of experience, and exceptional legal mind will benefit the Court and the nation. We urge her swift confirmation.

For more information, please contact Glenn Sugameli, [Judging the Environment](#) Staff Attorney, Defenders of Wildlife, at 202-682-9400.

Sincerely,

Rodger Schlickeisen, President
Defenders of Wildlife

Mike Daulton, Senior Director
Audubon

Trip Van Noppen, President
Earthjustice

Leda Huta, Executive Director
Endangered Species Coalition

Erich Pica, President
Friends of the Earth

Laird J. Lucas, Executive Director
Advocates for the West

Kyle Ash, Senior Legislative Representative
Greenpeace USA

Gene Karpinski, President
League of Conservation Voters

Debbie Sease, National Campaign Director
Sierra Club

William Meadows, President
The Wilderness Society

Toby Smith, Executive Director
Alaska Center for the Environment

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Rick Johnson, Executive Director
Idaho Conservation League

Kevin Lewis, Conservation Program Director
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Montana Environmental Information Center

Nina Bell, J.D., Executive Director
Northwest Environmental Advocates

Regna Merritt, Executive Director
Oregon Wild

Mike Hudak, Director
Public Lands Without Livestock

Dave Willis, Coordinator
Soda Mountain Wilderness Council

John DeVoe, Executive Director
WaterWatch of Oregon

John Horning, Executive Director
WildEarth Guardians

Scott Hoffman Black, Executive Director
The Xerces Society for Invertebrate Conservation

c: United States Senators