

**COMMUNITY RIGHTS COUNSEL  
DEFENDERS OF WILDLIFE  
EARTHJUSTICE  
SIERRA CLUB**

June 15, 2004

The Honorable Orrin Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
104 Hart Office Building  
Washington, D.C. 20510

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

**Re: Environmental Concerns with the Nomination of Judge David W.  
McKeague to the U.S. Court of Appeals for the Sixth Circuit**

Dear Senators:

We are writing to express our concerns with the nomination of federal district Judge David W. McKeague to a lifetime position on the United States Court of Appeals for the Sixth Circuit, which decides the fate of federal environmental and other safeguards in Michigan, Ohio, Kentucky, and Tennessee. Based upon a review of his record, we are concerned that, if confirmed by the Senate, Judge McKeague would unjustifiably seek to limit citizen access to the courts in environmental and other cases.

In *Help Alert Western Kentucky, Inc. v. Tennessee Valley Authority*, 1999 U.S. App. Lexis 23759 (6th Cir. 1999), Judge McKeague, sitting by designation on a Sixth Circuit panel, cast the deciding vote and joined in an opinion that denied a preliminary injunction sought by three environmental groups to prevent the TVA from logging in a national recreation area pursuant to a categorical exclusion. Under the National Environmental Policy Act (NEPA), agencies may adopt "categorical exclusions" that automatically exempt from the requirement that environmental consequences be evaluated "a category of actions which do not individually or cumulatively have a significant effect on the human environment . . . and for which therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4.

In the *Help Alert* case, Judge McKeague allowed the TVA to stretch beyond reason a categorical exclusion that was limited to "minor" activities including the "sale of miscellaneous structures and materials from TVA land," holding that this language covered the harvesting of some 2,147 acres of land without regard to the individual facts

or the cumulative effects of such large scale timber cutting. By comparison, in the late 1980s, the Forest Service limited the size of categorically excluded timber sales to 10 acres. The over 2,000 acres in the *Help Alert* case dwarfs even the controversial Bush administration's timber sale categorical exclusion limits of 70 acres for green trees and 250 acres for salvage of dead and dying trees. 68 Fed. Reg. 44598 (July 29, 2003).

Sixth Circuit Judge Karen Nelson Moore strongly dissented in the *Help Alert* case, stating that she was "disturbed by the agency's ability to circumvent [environmental review] through engaging in a strained reading" of the agency's categorical exclusion and "relying on its own internal review procedures" which "shelter the TVA's finding from public review and criticism." Judge Moore persuasively rejected on several grounds the result embraced by Judge McKeague. The exclusion "cannot reasonably be read to include the large-scale timber harvesting operations at issue in this case. I do not consider the TVA's logging operations covering 2,147 acres of land, to be 'minor.'" In addition, "[t]he TVA's proposed harvesting does not resemble the kind of minute intrusions onto the land that are contemplated by Categorical Exclusion 24, such as 'utility crossings' and 'rental of structures'; nor do the cutting and harvesting of trees for eventual sale qualify as the mere 'sale of miscellaneous . . . materials.' Furthermore, the harvesting of 2,147 acres of land does not appear to qualify as 'minor' when viewed in the context of the other activities that the agency has designated as being generally without significant effect on the environment . . . . The TVA's harvesting project in the Land Between the Lakes is simply different in kind from the other activities that the agency has described as 'minor.'"

In another case involving NEPA and timber harvesting, a Sixth Circuit panel unanimously reversed Judge McKeague's decision to allow the Forest Service to begin selective logging and clear-cutting in Michigan's Upper Peninsula. *Northwoods Wilderness Recovery v. United States Forest Serv.*, 323 F.3d 405 (6th Cir. 2003), reversing 2001 U.S. Dist. LEXIS 15973. In *Northwoods*, the plaintiffs charged that the United States Forest Service proposed to allow selection cutting of almost twice as much sugar maple tree acreage as allowed by the applicable Forest Plan. The plaintiffs challenged the Forest Service's decision under NEPA, that the timber cutting would have no significant impact on the environment. In the trial court, Judge McKeague adopted a strained reading of the Forest Plan to justify the Forest Service's proposal, and summarily dismissed the plaintiffs' allegations that the proposal violated NEPA.

On appeal, the Sixth Circuit rejected Judge McKeague's analysis, ruling that the Forest Service had acted arbitrarily and capriciously in approving cutting of hardwood acreage "without adherence to the statutorily-mandated environmental analysis." *Northwoods*, 323 F.3d at 412. According to the court, "[t]he Forest Service never demonstrated . . . that the environmental impacts of the current level of selection logging ever was analyzed, much less unlimited selection cutting of sugar maples. No meaningful consideration was given to unlimited cutting of this species of hardwood, and it is unclear how, by whom, or for what reason the sentence [purporting to allow unlimited cutting] was inserted [into the Plan]." *Id.* at 411.

In a third case, *Pape v. United States Army Corps of Engineers*, 1998 U.S. Dist. Lexis 9253 (W.D. Mich. 1999), Judge McKeague denied an environmental plaintiff

standing to challenge the Corps' mishandling of hazardous waste in violation of the Resource Conservation and Recovery Act (RCRA). Pape demonstrated that he had visited the area in question to enjoy wildlife viewing and photography and intended to do so in the future, but Judge McKeague denied standing in part because Pape failed to demonstrate a link between the Corps' actions and the alleged impact on wildlife populations. Although the decision was upheld on appeal, 1999 U.S. App. LEXIS 19769, the Supreme Court in a 7-2 ruling in 2000 made clear that such causal evidence was not required for constitutional standing. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167 (2000).

Access to the courts is essential to ensure that citizens have a meaningful ability to prevent environmental degradation and to redress the environmental harms they suffer. Citizens' access to the courts also ensures that environmental and other laws that protect the health and safety of all Americans, including a wide range of safeguards for clean air, clean water, and wetlands, are enforced. Judge McKeague's narrow view of standing and his willingness to waive environmental review and public participation in these and other cases gives our organizations cause for concern about his approach to environmental issues. We urge the Committee to explore these issues fully at his confirmation hearing.

Thank you considering these important environmental concerns with Judge McKeague's record and for taking seriously your constitutional advise-and-consent responsibility.

Sincerely,

Doug Kendall  
Executive Director  
**Community Rights Counsel**

Glenn Sugameli  
Senior Legislative Counsel  
**Earthjustice**

William Snape  
Vice President and Chief Counsel  
**Defenders of Wildlife**

Pat Gallagher  
Director  
Sierra Club Environmental Law Program  
**Sierra Club**

cc: Members, Committee on the Judiciary  
The Honorable Carl Levin, The Honorable Debbie A. Stabenow