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Before the Subcommittee
on Commercial and Administrative Law,
Committee on the Judiciary
U.S. House of Representatives

Midnight Rulemaking: Shedding Some Light

February 4, 2009

Thank you Mr. Chairman and Members of this Committee for the opportunity to testify today. My name is Robert F. Kennedy, Jr., and I am the Chairman of the Board of Waterkeeper Alliance, a non-profit, international organization of community advocates dedicated to protecting our waters and the communities that depend upon them. A large part of our mission involves advocating for effective administration and enforcement of environmental laws. I am testifying this morning on behalf of our members in the United States. I am also a senior attorney with the Natural Resources Defense Council, a non-profit organization dedicated to protecting wildlife and wild places and to ensuring a healthy environment for all life on earth.

We are extremely concerned by the recent flurry of environmental and public health regulations being proposed or finalized by government agencies such as EPA and the Department of Interior. In the coming weeks, the most environmentally damaging presidency in American history comes to its well-deserved end. However, President Bush left in his wake thousands of miles of polluted and degraded waterways across America. Even as its tenure drew to a close, President Bush's Administration continued to affirm its loyalty to industrial polluters by issuing rules that undercut environmental law and underfunded federal environmental programs. These regulations uniformly reflected the political ideology of the current, outgoing Administration, and sought to make permanent the anti-regulatory, self-policing, industry-friendly agenda that drove their approach to governing for the last eight years.

Waterkeeper Alliance, OMB Watch, Center for American Progress, and other organizations tracked the surge in last-minute rulemakings that the Bush Administration either finalized or sought to finalize in their waning days in office. According to OMB's website, 85 regulations were undergoing EO 12866 regulatory review at the time that President Obama assumed office. OMB completed review of a further 69 in the last two months of the Bush presidency. Twenty-one of these rules, both in review and final, were from EPA alone, and several of these have direct or indirect ramifications for our nation's water quality.

I am here today to draw attention to a handful of extremely significant regulations that have dramatic consequences for the protection of our Nation's waters. In addition to my remarks here before you, I have provided the Committee with formal written testimony that addresses these rule in far greater detail.

Stream Buffer Zone Rule

Perhaps the most dramatic assault upon America's waters occurs in the Appalachian Mountains, where entire mountain tops are blasted off and dumped into stream and river valleys so that coal companies can access coal reserves in the cheapest possible manner. This practice, known as Mountaintop Removal Mining has have buried or damaged more than 1,200 miles of irreplaceable headwater streams. What's left is a wasteland. Well over 400,000 acres of the world's most productive and diverse temperate hardwood forests have already disappeared, and it is predicted that that figure could increase to 1.4 million acres - 2,200 square miles - by the end of the decade if nothing is done to limit this practice. Since the first days of the Bush Administration, EPA, the Army Corps of Engineers and the Department of the Interior's Office of Surface Mining took every possible step to make this destruction easier.

On December 1, 2008, DOI issued a final **Stream Buffer Zone Rule**, officially referred to as the Placement of Excess Spill rule. This rule eliminates the standing prohibition against mining within 100 feet of streams if it will have an adverse effect on water quantity, water quality, and other environmental resources of the stream. In its place, the new rule merely asks coal operators to "minimize" harm to the extent possible. This is an open invitation to industry to ignore a rule that already, as a practical matter, has been routinely abused and violated as federal and state regulators looked the other way.

The final Stream Buffer Zone rule is a reversal of OSM's prior interpretation of legal requirements to protect headwaters. When it promulgated the original Buffer Zone rule in 1983, OSM chose to protect intermittent and perennial streams because they were especially significant in establishing the hydrologic balance. Even during the Reagan Administration, the Department recognized its responsibility "to protect streams from sedimentation and gross disturbances of stream channels caused by surface coal mining and reclamation operations." 48 Fed. Reg. 30312 (June 30, 1983).

Nearly ten years ago, in a court decision interpreting the previous rule, the Southern District of West Virginia, ruled that "[n]othing in the statute, the federal or state buffer zone regulations, or the agency language promulgating the federal regulations suggests that portions of existing streams may be destroyed so long as (some other portion of) the stream is saved." *Bragg v. Robertson*, 72 F. Supp.2d 642, 651 (S.D.W.Va. 1999). The Court held that the practice of burying valley streams under tons of blasted mountain top debris violated federal and state water quality standards. *Id*. at 661. The law has not changed. Instead, the new Stream Buffer Zone rule relies on polite legal fictions to eviscerate meaning and letter of the Clean Water Act and prioritize the convenience of the coal mining industry over the health and safety of Appalachian communities and their waterways.

For a more comprehensive discussion of this issue, please see the comments on the Proposed Stream Buffer Zone Rule, filed by Public Justice and Appalachian Center for the Economy and the Environment, on behalf of Waterkeeper Alliance, West Virginia Highlands Conservancy, Sierra Club, Ohio Valley Environmental Coalition, and Coal River Mountain Watch on November 20, 2007, attached at Exhibit A.

Concentrated Animal Feeding Operations (CAFO) Permitting Rule (EPA)

Over the past two decades, the rise in the number of factory farms (CAFOs) and concentration of the livestock industry has given rise to significant environmental and community health problems in rural America. Modern, industrialized agriculture is the number one cause of water quality impairment in the United States. Factory farms, or Concentrated Animal Feeding Operations (CAFOs), are a big part of this problem. According to EPA, agricultural operations that confine livestock and poultry animals generate about 500 million tons of animal waste annually or three times more waste than humans generate each year. USEPA, *National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs),* 68 Fed. Reg. 7176, 7180

(2003). Hogs in North Carolina alone produce more fecal waste than all people in **North Carolina, California, Pennsylvania, New York, Texas, New Hampshire and North Dakota combined.** Heather Jacobs & Larry Baldwin, *North Carolina Hog Vigil*, Waterkeeper Magazine (Summer 2007), http://switchstudio.com/waterkeeper/issues/Fall07/north-carolina.html. Meanwhile, Maryland raises 270 million chickens a year which generate one billion pounds of manure annually. Bill Gerlach, *State Secrets: What are they Hiding on Maryland Chicken Farms?*, Waterkeeper Magazine (Fall, 2007), *citing* Delmarva Poultry Institute, *Facts About Maryland's Broiler Chicken Industry* (2006). Pollution from industrial dairy and cattle operations produce similarly staggering amounts of waste. The estimated three million cows in the Central Valley of California create as much waste as a city of 20 million people. Natural Resources Defense Council, *America's Animal Factories: How State Fail to Prevent Pollution from Livestock Waste* (1998), http://www.nrdc.org/water/pollution/factor/stcal.asp. Yet, unlike human waste, most animal waste receives no treatment. Rather, it is stored in unlined manure pits and then spread onto land. CAFO waste contains nutrients and bacteria that affect human health and destroy ecology, particularly when manure overflows from storage pits or is over applied to land, where it seeps into groundwater or runs into our waterways. USEPA, *2003 CAFO Final Rule*, 68 Fed. Reg. 7181. Waste also contains toxic metal contamination, like arsenic in the poultry industry and copper and selenium in the hog industry. *See, e.g.*, Nachman, Keeve E. et al., *Arsenic: a Potential Roadblock to Animal Waste Management Solutions, Environ Health Perspect* 113:1123–1124 (2005).

In January 2001, one of the Bush Administration's first actions was to pull back a Clean Water Act regulation developed by President Clinton's EPA that would have required CAFOs to clean up their act. In February 2003, President Bush's EPA issued its own rule, which created huge loopholes for the industry, kept the public in the dark about impacts to their own homes and communities, and kept alive the sixteenth-century technology of spreading untreated manure on fields. We challenged this absurd Rule in court, and won on many counts. *See Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2d Cir. 2005). But EPA failed to strongly defend against Industry's most important challenge – against the Agency's decision that **all** CAFOs were required to obtain NPDES permits. As a result, the court sided with industry, ruling that EPA could only require permits when CAFOs had "actual discharges." *Id*. at 506.

In response, EPA should have used its ample authority and discretion to assemble all the evidence available to it, collect further data, and determine that all Large CAFOs discharge, based on the nature of their design and method of operation, or that some set of Large CAFOs, those in floodplains, or areas with sandy soils, or high water tables discharge because of their location. Instead, on Halloween, the Agency issued a new Final Rule that almost completely exempts the industry from any regulation whatsoever. 73 Fed. Reg. 70418 (Nov. 20, 2008).

EPA's new approach actually exempts almost all CAFOs from a requirement to apply for NPDES permits; only those that determine, based on the results of an unreviewed, unguided analysis that they discharge or "propose to discharge" are required to obtain permits. The vast majority of CAFOs can be expected to hide behind the myth that since they have no outlet pipes directly flowing into nearby rivers or streams, that they are "non discharge" facilities. As a result, few CAFOs will apply to state agencies or EPA for NPDES permits. In fact, CAFO operators are given the option of taking a further step, of "self-certifying" that their facilities do

not and will not discharge. This "no discharge certification" gives them a certain degree of immunity against prosecution in the likely event that they discover an "actual discharge."

However, even after an obvious discharge, CAFO operators are not required to obtain NPDES permits. Indeed, the existence of a previous discharge is just one of the factors that EPA advises CAFO operators to consider when deciding whether they need NPDES permits. Again, if the operator decides that a repeat discharge is unlikely, then he or she can decide not to apply for a permit. The decisions of these CAFO operators are never subject to public scrutiny, or reviewed by state environmental agencies. The entire scheme rests on the good word of an industry that claims in the face of all evidence to be responsible managers of the mountains of waste that they generate.

In creating this "hand-off" self-regulation scheme, EPA undermined the efforts of state regulatory programs, shielded the operators of CAFOs from close examination of their waste management practices, and unduly surrendered its legal obligations to regulate industries that pollute our common waterways.

For a more comprehensive discussion of this issue, please see the comments on the Revised NPDES Permit Regulations and Effluent Limitation Guidelines for CAFOs in Response to Waterkeeper Decision filed by Waterkeeper Alliance, NRDC, and Sierra Club on Aug. 29, 2006, attached at Exhibit B.

Gutting protections for wetlands: EPA/Army Corps of Engineers Guidance

On Tuesday, December 2, EPA and the Corps of Engineers release new Guidance on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision Rapanos v. United States & Carabell v. United States. This Guidance is critically important because it shapes the decisions that regional Corps of Engineers offices use to determine whether the protections of the Clean Water Act extend to local wetlands or streams (even stretches of rivers.) Unfortunately, the Guidance continues the Administration's previous history of limiting the reach of the Clean Water Act in order to reduce the impact of its requirements and regulations upon builders, agriculture and other industries.

As discovered by Representative Waxman this past July, EPA identified a dramatic drop in its own enforcement cases in the two year after the *Rapanos* decision. According to a memo drafted by EPA Assistant Administrator for Enforcement Granta Nakayama, EPA regions decided not to pursue formal enforcement in 304 separate instances where there were potential CWA violations because of jurisdictional uncertainty. In addition, the regions identified 147 instances where the priority of an enforcement case was lowered due to jurisdictional concerns. Finally, the regions indicated that lack of CWA jurisdiction has been asserted as an affirmative defense in 61 enforcement cases since July 2006. In total, between July 2006 and July 2008, the *Rapanos* decision or the Guidance negatively affected approximately 500 enforcement cases.

In one notable instance where the reach of the Act was unduly limited, the Corps' Southwest Regional Office determined that only portions of the Los Angeles River were within the

jurisdiction of the Clean Water Act. See James L. Oberstar, Henry A. Waxman, Letter to Hon. John Paul Woodley, Ass't. Sec'y. of the Army, Civil Works, Aug. 7, 2008, available at http://transportation.house.gov/Media/File/press/TNW.pdf. While EPA later responded to massive public pressure by reviewing the Corps determination, many of the nation's waters have not been so fortunate. *See id.*

After the *Rapanos* decision, EPA and the Corps made a promise to the American public – the agencies would use their legal authority to the maximum extent they could to protect water bodies. Washington State Water Resources Association, *Carabell* and *Rapanos* Rulings: How Will They Change the CWA? (July 26, 2006) (interview transcript with Ann Klee), available online at http://www.wswra.org/files_for_news_archives/carabell_rapanos_rulings.html. *Also*, Statement of Benjamin H. Grumbles, EPA Assistant Administrator for Water & John Paul Woodley, Jr., Assistant Sec'y of Army for Civil Works, Before the Subcommittee on Fisheries, Wildlife, & Water of the Senate Environment & Public Works Committee, at 4 (Aug. 1, 2006). However, as discussed in much greater detail in the documents submitted with my written testimony, the guidance issued by EPA and the Corps repeatedly and egregiously breaks this promise, leaving numerous waters unprotected or inadequately protected. It seems as though the agencies took nearly every opportunity to misinterpret the Court's opinions in a way that constrained, rather than maintained, protective jurisdiction.

One of the critical errors EPA and the Corps made in this guidance was to decide that the *Rapanos* decision placed limits on Clean Water Act protections for tributary streams. In fact, long established and still valid regulations do not qualify the inclusion of tributaries as regulated "waters of the United States." By contrast, the Guidance fails to categorically protect tributaries. In the case of streams that are less than "relatively permanent" the Guidance requires a case-by-case demonstration of a "significant nexus" with downstream traditional navigable waters.

The next major flaw with the guidance is its failure to provide meaningful instruction to field staff about how they should identify aquatic features that have a "significant nexus" to waters of the United States, and thus qualify for protection under the Clean Water Act. However, perhaps the most damaging aspect of the guidance is its unnecessary limitation on the consideration of the cumulative effect that wetlands have on water quality when evaluating whether a "significant nexus" is present. In so doing, EPA and the Corps go further than the Rapanos decision intended, and unnecessarily and disastrously limit the reach of the law's protective programs.

For a more comprehensive discussion of this issue, please see the comments on the Proposed Guidance on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision Rapanos v. United States & Carabell v. United States filed by Waterkeeper Alliance and other environmental organization on January 21, 2008, attached at Exhibit C.

Department of Interior Oil Shale Leasing Rule

One of the more egregious midnight regulations – a rule governing commercial leasing and production of oil shale on two million acres of public land in Colorado, Wyoming and Utah – was issued on November 18, 2008. This rule hastens the process for opening two million acres

of public land in Wyoming, Colorado and Utah for leasing to drill for oil shale and makes permanent a set of industry-friendly parameters for development. The Secretary of the Interior rushed the finalization of this rule even though no oil shale industry currently exists and, if one does exist in the future, no one currently has any idea what technology will be used or what the ultimate impacts will be. This rule was issued solely to benefit private oil companies at the expense of our environment, our climate, and local communities. Even the Bureau of Land Management has stated that insufficient information exists to fully plan for commercial oil shale production.

Big Oil's gross over-estimate claims that there are nearly 800 billion untapped barrels of oil trapped in the sedimentary shale of some of our most prized public lands. However, tapping into this unsustainable energy source will require between 2.1 and 5 barrels of water for each barrel of oil produced, not to mention the vast amounts of energy required for the process. There are even plans to build new coal fired power plants simply to provide the energy needed to transform rock into oil, essentially accelerating a natural process that takes millions of years. Ruthlessly advancing their enthusiasm for repeating a boondoggle of the 1970s oil crisis, Big Oil has aggressively lobbied the Bush Administration to put in place protections for their industry even though there's no compelling need for, or consensus around, this last minute rulemaking.

Congress itself acknowledged the infancy of oil shale technology last year when it prohibited taxpayer dollars from being used to issue this rule. Unfortunately, in the short-sighted panic over gas prices, this limitation was not renewed and the Bush administration was able to proceed with this ill-informed rule. This rule must be withdrawn and the current federal policy must be reviewed to ensure decisions regarding commercial leasing are based on data and analysis generated from the Congressionally-authorized research programs on federal lands. Even the oil companies have admitted this is at least a decade away.

The fate of this rule is vitally important because commercial development of oil shale on public land, using public resources, is bad for the environment, bad for taxpayers, and inconsistent with our need for a clean energy future for our nation. As the Department of the Interior (DOI) readily acknowledges, oil shale development will compromise the region's scarce water supplies, degrade sensitive wildlife habitats, and further alter local communities already impacted because of unprecedented oil and gas drilling. Impacts would also be felt nationally and globally as oil shale production would generate significantly more global warming pollution than conventional gasoline production. We are encouraged by recent statements by the new Secretary of the Interior, Ken Salazar about the Obama Administration's stance on this unnecessary and potentially destructive rule. In a roundtable meeting with reporters last week, Secretary Salazar described the rule as not being "the wise thing to do at this point in time because we have so many questions that still have to be answered." Without answers to these questions, Secretary Salazar stressed that "it made no sense to move forward with a commercial oil shale leasing program," and promised to closely review this and other midnight actions of the Bush administration.

For more details on the problems associated with oil shale extraction, and the necessity for vacating this rule, see my statement attached at Exhibit D.

The four rollbacks described above are among the most significant of a host of midnight rulemakings that undo legal protections for our waters or jeopardize public health. Other agency actions, or deliberate inactions, will perpetuate the Bush Administration's lack of regard for our environment for years to come. A quick roll-call listing some of these other rules reveals the breadth of this presidency's assault on our commonwealth.

CAFO CERCLA/EPCRA Exemption

Under the proposed rule change, large chicken production facilities, hog confinements, and cattle feeding operations would no longer have to report hazardous releases of ammonia, hydrogen sulfide, and other toxic gases. Despite protestations from big agriculture, CAFOs are significant sources of hazardous air pollutants. At the Threemile Canyon Farms in Boardman, Ore., EPA found waste from the operation's 52,000 dairy cows pumps more than 5.5 million pounds of ammonia into the atmosphere each year.

The reporting provisions in CERCLA and EPCRA require CAFOs to report releases of hazardous substances from animal waste. From a public health standpoint, the proposed exemption ignores the increasing body of scientific evidence which shows that ammonia, hydrogen sulfide, and other hazardous emissions from animal feeding operations may have significant impacts on human health and the environment. EPA has ignored such information in its determination that the source and nature of such pollution makes an emergency response "unnecessary, impractical and unlikely," and that the proposal is "is protective of human health and the environment." *See* Fed. Reg. at 73,700-04. Moreover, the proposed exemption is contrary to both the plain language and primary purposes of CERCLA and EPCRA, which were enacted to enable government officials to assess and respond to releases of hazardous substances, as well as to inform the public about contaminants in their communities. EPA has provided no legal justification that would allow it to carve out the proposed exemption from these statutory requirements. Waterkeeper Alliance is leading other environmental, animal welfare, and public health organizations in a legal challenge to this unlawful rule. The case is being heard before the Court of Appeals for the District of Columbia Circuit.

For more comprehensive discussion of this issue, please see the comments on the CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste at Animal Feeding Operations, filed by Earthjustice on behalf of Waterkeeper Alliance and other organizations, attached at Exhibit E.

Construction and Development Effluent Limitations Guidelines

Stormwater pollution, particularly from construction sites and new developments, is the fastest growing source of water quality impairment in the country. Excessive sediment is the leading cause of impairment of the Nation's waters (United States Environmental Protection Agency, 2000). In 1998, approximately 40 percent of assessed river miles in the U.S. were impaired or threatened from suspended and bedded sediments (United States Environmental Protection Agency, 2000). Construction activity is a major source of anthropogenic sediment loads to water

resources and a significant source of pollutants to adhere to sediment particles, including nutrients that cause eutrophication. An estimated 80 million tons of sediment enter receiving waterbodies each year from construction sites (Goldman et al., 1986, cited by United States Environmental Protection Agency, 2002).

In 2000, EPA responded to this crisis by listing construction and development as an industry category that required regulations, "effluent limitations," to reduce discharges of excessive volumes of stormwater, laden with sediment and other pollutants, from construction sites and new development. In 2002, the Agency unlawfully tried to change its mind, an effort that Waterkeeper Alliance, NRDC and the States of New York and Connecticut stopped in court. In November, EPA finally released its long overdue proposed rule, which largely relies on the same suite of inadequate technologies that have failed for decades to control erosion and sediment.

While there is some hope that the Agency's final rule, due out next December, will have improved performance and technology standards that meaningfully protect our rivers and streams from this scourge. However, there's little chance at this date that EPA will reconsider the most troubling aspect of its proposed rule – its decision to ignore the permanent pollution caused by runoff from these newly developed impervious surfaces. About 90 percent of precipitation or other water that falls on pavement is converted to runoff; roughly 5 to 15 percent of water that falls on grass lawns is converted to runoff (Schueler, T.R. 1987. Controlling Urban Runoff: A Practical Manual for Planning and Designing Urban Best Management Practices. Publication No. 87703. Metropolitan Washington Council of Governments. Washington, D.C.). Even at low levels of imperviousness, the ecological integrity of coastal watersheds declines rapidly (White, N.M, D.E. Line, J.D. Potts, W. Kirby-Smith, B. Doll, W.F. Hunt. 2000. Jump Run Creek shellfish restoration project. Journal of Shellfish Restoration. 19(1).) Suburban and urban stormwater carries oils and metals from motor vehicles; fertilizers, pesticides, and sediment from landscaping activities; and pathogens and excess nutrients from pets, improperly installed or maintained septic tanks, and combined sewer overflows (Environmental Assessment for the Proposed Effluent Limitation Guidelines and New Source Performance Standards for the Construction and Development Category. Washington, D.C.). Flooding, channel erosion, landslides, and degradation of aquatic ecosystems associated with urbanization have been documented for decades (*See, e.g.*, Wilson, K.V. 1967. A preliminary study of the effects of urbanization on floods in Jackson, Mississippi. Professional Paper 575-D. United States Geological Survey. Denver, Colorado.).

EPA's short-sighted proposal neglects to require developers to adopt low impact development, or better site design, approaches to reducing stormwater, many of which dramatically reduce stormwater while saving builders money and recharging local aquifers. By failing to think and act progressively, EPA has set back by decades our collective efforts to rein in this most serious threat to water quality and undercut important economic growth opportunities. We encourage all members of the House to convey their disappointment that EPA has chosen to disregard this significant and growing threat to our nation's waters, and to stress the need for meaningful measures to control stormwater runoff from newly developed areas.

For a more comprehensive discussion of this issue, including the necessity for post-construction stormwater controls, please refer to the proposal submitted by Waterkeeper Alliance and NRDC to EPA on November 30, 2007, attached at Exhibit F.

Perchlorate Standards for Drinking Water

The Bush Administration had a long track record of trying to rollback drinking water standards that put the public's health above industry profits. Nearly eight years ago, EPA attempted to raise the level of arsenic allowed in drinking water supplies to 50 micrograms/litter, a more permissive standard than the 10 micrograms/liter allowed in the Europe Union and recommended by both the World Health Organization and the United States Public Health Service. See, e.g., O'Connor, John, "Arsenic in Drinking Water; Part 1. The development of drinking water regulations," available at http://www.h2oc.com/pdfs/DW.pdf. When faced with the need to create standards for perchlorate, a toxic ingredient in rocket fuel that has been linked to impaired thyroid function and developmental health risks, particularly for babies and fetuses, EPA demonstrated a continuing reluctance to act in the public's interest.

After decades of study, last month EPA decided that there was no benefit to be gained by setting a "national primary drinking water regulation" for perchlorate as required by Safe Drinking Water Act. 78 Fed. Reg. 60262. Under this new standard, more than 16 million Americans are exposed to unsafe levels of perchlorate in their drinking water, and independent analysis shows anywhere from 20 to 40 million Americans at risk. *See* Eilperin, Juliet, "EPA Advisers Seek Perchlorate Review; Scientists Hope Agency Rethinks Decision Not to Issue Standard," Washington Post (Nov. 14, 2008), available at http://www.washingtonpost.com/wp-dyn/content/article/2008/11/13/AR2008111303906.html?nav=rss_nation. Perchlorate is particularly widespread in California and the Southwest, where it's been found in groundwater and in the Colorado River, a drinking-water source for 20 million people.

EPA rushed to finalize its decision in defiance of its own scientific advisers, who criticized the Agency's political appointees with ignoring data from the Centers from Disease Control in favor of the results of an untested computer model funded by the chemical industry. *See id*. Most perchlorate contamination is the result of defense and aerospace activities, and the Agency's refusal to set a protective standard was widely seen as a capitulation to the interests of the Pentagon and defense industry.

Uranium Mining Near the Grand Canyon

After an unconscionably short comment period, 15 days, on December 5th the Department of Interior issued a final rule that attempts to strip Congress of its authority to protect sensitive public lands from the ravages of mining. Stripping this House of its emergency withdrawal power will effectively open lands next to Grand Canyon National Park to uranium mining, providing another last-minute gift to the mining and energy industries that have formed the Bush Administration's agenda in these areas for the past eight years.

The immediate effect of this rule is to allow a British company to explore for uranium within three miles of the lookout point over the south rim of the Canyon, and potentially will allow dozens of mines to be developed in the area. This region still suffers from a legacy of past generations of uranium mines, and local residents oppose further mining in and around their communities. Mining in the region could pose a grave threat to the quality of the Colorado River and other regional lakes and streams. The Interior Department flouted these concerns by rushing the rule through with almost no opportunity for the public to have a voice, once again favoring the interests of a friendly industry over the public.

Again, thank you very much for inviting you to testify before the Committee this afternoon. As you have heard during today's hearing, the last months of the Bush Administration were spent cementing preferences for industry while undermining or delaying protections for our waterways and communities. While we look forward to a far more environmentally protective approach from the current Administration, the Bush legacy of depredation will take decades to undo. This effort will require concerted regulatory and Executive actions, as well as leadership from members of this House and the Senate. I encourage this Committee to further review the impacts of the Bush Administration's last-minute regulations, and to carefully consider all legislative and appropriations responses available to the Congress.

Endangered Species Act

For over 35 years, the Endangered Species Act (ESA) has provided unparalleled protections for our nation's wildlife, plant species, and the ecosystems that support them. Not only have hundreds of species been rescued from extinction, but our proven ability to recover a species to the point where they no longer require special protections under the ESA is an astounding achievement in itself. Both components provide the true essence of the Act.

The last eight years have greatly diminished the effectiveness of the ESA in protecting our wildlife, with the final blow coming in December when the Bush Administration announced final rules that dramatically undercut the ESA by allowing agencies with no expertise in conservation to decide for themselves whether a proposed action would adversely affect a threatened or endangered species. *See* 73 Fed. Reg. 76,272 (December 16, 2008). Under Section 7 of the ESA, federal agencies are required to work with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) when proposing an action to insure that it will not jeopardize the existence of a species or adversely change or destroy habitat critical to the species. (See generally Defenders of Wildlife's Jamie Clark's December 11, 2008 testimony before the House Select Committee on Energy Independence and Global Warming.) This has been one of the Act's most successful provisions as it forces other agencies to balance the need for species preservation with their other objectives.

The Bush administration midnight ESA rule severely undermines the ability of experts at the FWS or the NMFS to protect our plant species and wildlife. It allows agencies to avoid Section 7 consultation altogether for any action the agency unilaterally decides will have "inconsequential, uncertain, unlikely, or beneficial affects" on wildlife. (*Defenders of Wildlife Factshee: Endangered Species at Risk)*. Agencies already have the ability to make such

determinations, but they must be done with the approval of FWS or NMFS. The importance of FWS and NMFS oversight is to ensure that the protection of endangered or threatened species is not overrun by other priorities the proposing agency, such as the Energy or Defense Department, may have for a planned action. The specialists at FWS and NMFS have the expertise to shed light on the negative effects of an agencies action that may not be obvious to non-experts. Allowing an agency to substitute its own judgment on conservation issues that it knows very little about in lieu of a Section 7 consultation will not be sufficient to ensure that wildlife and their habitat are receiving necessary protections.

Several environmental groups, represented by NRDC and Earthjustice, have challenged the weakened ESA rule in court, for unlawfully exposing America's most vulnerable plants and animals to new threats by allowing conflicted federal agencies to self-consult about potential project impacts on endangered species. In a major break from typical national environmental policy, no environmental impact statement has been conducted. *See NRDC Press Release, Groups Fight to Save the Endangered Species Act, December 1, 2008*. Several states, led by California, later filed a similar to lawsuit to stop these regulations. Other state parties to that suit are Oregon, Connecticut, Delaware, Massachusetts, Maryland, New Jersey, New York, and Rhode Island.

Congress has also moved to overturn these regulations. On January 16, 2009, Congressman Nick Rahall led twelve other members in introducing a resolution under the Congressional Review Act to overturn these regulations.

This is exactly the type of action that is needed to restore the integrity of the Endangered Species Act. These last-minute rules were just the shameful culmination of eight years worth of efforts by the Bush administration to significantly weaken the Endangered Species Act. Congress and the Obama administration must act quickly to restore the Act to its full intent. Congress should enact legislation that will restore the protections of the ESA, particularly for Section 7 consultation and the definitions of what constitutes a threatened or endangered species. The ESA has protected hundreds of plants and animals from the brink of extinction, and must be preserved to do so for future generations.

EPA Air Pollution Rules

The Bush administration issued a handful of harmful rules under the Clean Air Act prior to leaving office, with one of those rules actually taking legal effect on January 20, 2009. The Clean Air Act rulemaking in question governs so-called fugitive emissions – those that cannot reasonably pass through a stack or vent. In this rule, EPA weakened the Act's "new source review" permitting program by allowing industrial sources and other polluters to ignore fugitive emissions that under prior, stronger law had to be included in determining whether a facility is a "major source" subject to Clean Air Act control programs. EPA acknowledges that the regulatory relief extends to power plants, petroleum refineries, chemical manufacturers, and mining and agri-business operations. Indeed, EPA's weakening rule change effectively will exempt mines and factory farms from important Clean Air Act regulations. See generally 73 Fed. Reg. 77,882 (Dec. 19, 2008).

As my NRDC colleague, John Walke, correctly predicted in December 11 testimony before the Select Committee on Energy Independence and Global Warming, EPA adopted another harmful Clean Air Act rule that allows emissions increases from oil refineries, chemical plants, and other major industrial polluters to escape review and control, by artificially separating – and thereby ignoring – emissions increases that occur at multiple pieces of equipment at a facility. See generally 74 Fed. Reg. 2376 (Jan. 15, 2009). The influential National Association of Clean Air Agencies, representing the country's state and local air pollution control officials, had urged EPA not to adopt this weakening rule at all, objecting that the rule change was "likely to encourage virtually unilateral economic decision-making on emissions increases and project aggregation by sources, with the result that [air pollution control] requirements are triggered less often and air quality may be adversely affected."

The rule is slated to become legally effective on February 17, 2009, but it is also subject to the request in the January 20, 2009 memorandum from White House Chief of Staff Rahm Emanuel asking agencies to "consider extending for 60 days the effective date of regulations that have been published in the Federal Register but not yet taken effect." We believe it is important for the new administration to extend the effective date of this rule with an eye toward abandoning the rule altogether, and returning to the stronger air pollution control practices that were long in place before the Bush administration's weakening rule.

Finally, it's worth mentioning a Clean Air Act rule in which the White House intervened with EPA fewer than 24 hours before the rule's signature, prohibiting EPA from monitoring lead emissions from facilities that emit more than 1,000 pounds per year of lead. Instead, the White House allowed EPA only to monitor facilities emitting more than 2,000 pounds of lead per year, resulting in more than 200 lead polluters nationwide that now will go unmonitored. For example, residents of Cass County, Indiana, Charlevoix County, Michigan, Lawrence County, Pennsylvania, Cuyahoga County, Ohio, Oswego County, New York, Harris County, Texas and Dakota County, Minnesota won't have the benefit of lead monitors downwind of the cement plants, oil refineries or lead smelters in their communities, thanks to the irresponsible White House intervention. (To find out if a community has a facility that should have a lead air monitor (but won't), check out NRDC's map of lead polluters here: http://www.nrdc.org/health/effects/lead/lead_emitters_maps.asp.)

EPA Global Warming Actions

On December 18, 2008, former EPA Administrator Stephen Johnson issued a memorandum declaring, unilaterally without any opportunity for public notice and comment, that officials reviewing permit applications by utilities to build new coal-fired power plants cannot consider the plants' global-warming CO_2 emissions. The specific intent of this action was to circumvent the natural consequences of a recent decision rendered by EPA's Environmental Appeals Board ("EAB"), so as to avoid any notice and comment on this issue. *See In re: Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB Nov. 13, 2008).

In that case, the EAB had held that EPA's regional office in Denver wrongly concluded that existing EPA interpretations precluded a determination that CO_2 is a pollutant "subject to

regulation" under the Clean Air Act. The EAB rejected the Region's argument that EPA had historically interpreted the phrase to mean only regulations that limit emissions, and remanded the permit back to the Region to "reconsider whether or not to impose a CO_2 BACT limit in light of the [EPA's] discretion to interpret, consistent with the CAA, what constitutes a 'pollutant subject to regulation under [the CAA].'"

In the December 18 memorandum, Administrator Johnson asserted disingenuously that the EAB's decision has thrown the entire Clean Air Act permitting program into confusion, and clarity was required — in the form of his new and deregulatory interpretive rule contained in the memorandum. Johnson declared that pollutants for which the Clean Air Act and/or EPA regulations require only monitoring and reporting, CO_2 in particular, are excluded from being considered "subject to regulation" under the Clean Air Act. His approach to addressing this problem, however, illegally side-stepped proper administrative procedures, and adopted a position that is substantively at odds with the Clean Air Act.

The former Administrator's pronouncements were a new substantive interpretation at odds with prior agency interpretations and the plain language of the statute. EPA has never before expressed this untenable interpretation of the Act, and to do so in a midnight memorandum, without the opportunity for public comment, was wholly inappropriate.

The substantive position in the Johnson memorandum is also legally bankrupt. In *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), the U.S. Supreme Court concluded, among other things, that greenhouse gas emissions (including CO_2) are pollutants under the CAA. Moreover, CO_2 is already "regulated" under the Act, specifically in monitoring, recordkeeping and reporting provisions of Clean Air Act section 821; so CO_2 is already "subject to regulation" for purposes of Clean Air Act regulation and the law's permitting program.

The Bush administration's last minute abuse in issuing this memorandum is the culmination of eight years of inaction, evasion and irresponsibility concerning the greatest environmental threat of our time, global warming. It was not enough for the Bush administration to break the President's 2000 campaign pledge to reduce CO_2 emissions from coal-fired power plants; not enough to repudiate international climate treaties and damage the United States' relations with other countries; not enough to oppose Clean Air Act authorities it already possessed by fighting all the way up to the Supreme Court, in order to shackle those authorities under the prior administration and future ones. It was not enough for the Bush administration to watch CO_2 pollution from coal-fired power plants increase from the start of the administration to the finish, with annual CO_2 pollution from coal-fired power plants higher by over 170 million tons in 2007 than in 2001.

No, the Bush administration felt the irresponsible need to rush out a memorandum on December 18, 2008, in a desperate attempt to insulate these same coal-fired power plants from controlling their CO_2 pollution *and* to try to tie the hands of the incoming Obama administration – all to block responsible and required global warming solutions under the Clean Air Act.

Environmental groups including NRDC have petitioned the new administration to reconsider and reject Johnson's illegal interpretation, at the same time that they have filed a lawsuit seeking to

overturn the memorandum in court. In the name of tackling the critical challenge of global warming from the biggest source of those emissions domestically, coal-fired power plants, it is essential that the Obama administration abandon the Johnson memorandum and make clear that new coal-fired power plants must control their CO_2 pollution.

EPA Hazardous Waste Rules

In October 2008, the Bush administration issued a final regulation that exempted over 3 billion pounds of hazardous waste from protective regulation under the Resource Conservation and Recovery Act (RCRA). See generally, EPA, Revisions to the Definition of Solid Waste, 73 Fed. Reg. 64,668 (Oct. 30, 2008). The final rule became effective on December 29, 2008.

As noted by the environmental organization, Earthjustice:

> Under the new rule, EPA estimates that as much as 1.5 million tons of waste that is currently defined as hazardous will now be considered innocuous enough to be stored, transported, or processed by unlicensed and barely supervised companies. More than 5,000 facilities will take advantage of the loophole, including chemical companies, pharmaceutical manufacturers, and the industrial waste industry.[1]

The Bush administration rule allows over 3 billion pounds of hazardous waste to be exempted from RCRA hazardous waste regulation if the waste generator claims it is being recycled. The reality is that most hazardous waste that can be recycled is already being recycled, but by RCRA-licensed and closely supervised operators. Under the new rule, recycling takes place outside of RCRA, with hazardous waste generators periodically certifying that they are shipping to legitimate recyclers. EPA's rule replaces the protective regulation intended by Congress with self-regulation.

And unfortunately, the Bush administration rammed this terrible rule out so that it would take legal effect just before the Obama administration took office. Accordingly, the rule is not covered by the January 20 Emanuel memo that would offer the possibility of extending the rule's effective date. Nonetheless, this harmful rule must be a top priority for reversal by the Congress and Obama administration.

In another harmful hazardous waste rule, the Bush administration adopted a rule that reclassified over 200 million pounds of hazardous waste as "fuel," allowing it to escape RCRA's comprehensive regulation. Here is how Earthjustice rightly characterized this Bush administration action:

> Under this new rule, facilities across the country will be allowed to handle and burn certain hazardous wastes in their boilers instead of shipping those wastes to RCRA-licensed waste handlers for incineration. EPA justified deregulating the waste by claiming that emissions from burning the waste are "likely" not to differ from emissions from burning fossil fuels. 72 Fed. Reg. at 33289. EPA freely admitted, however, that

[1] EPA, Revisions to the Definition of Solid Waste, 72 Fed. Reg. 14171-14218 (proposed March 26, 2007).

> even when "burned even under good combustion conditions, emissions of hazardous organics may be somewhat higher than those from burning fossil fuel." *Id.* at 33,292. Cancer-causing benzene is among the substances EPA found to be higher in ECF emissions. *Id.*

With both of these hazardous waste regulatory abuses, EPA has abdicated the basic statutory purpose of RCRA, to "promote the protection of health and the environment." Congress expected EPA to adopt a "cradle to grave" approach to the regulation of hazardous waste because of the increased environmental and health risks from such substances. But with two last-minute, cynical re-definitions of "hazardous waste," the Bush administration exempted nearly 3.6 billion pounds of hazardous waste from protective RCRA regulation *each year*. Congress and the Obama administration must not allow these abuses to stand.