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Organization Trends

NRDC: Biting the Taxpayers Who Feed Them

It's Easy Being Green With Lawsuits and Government Grants

By David Healy

***Summary**: The Natural Resources Defense Council is the most successful litigation group in the environmentalist movement. But why should taxpayers support an advocacy group that raises millions from scare campaigns and lawsuits?*

The Natural Resources Defense Council (NRDC) is known for self-righteous and relentless litigation. (See "Natural Resources Defense Council," by Bonner Cohen in Organization Trends, August 2003.) An environmental group that specializes in taking its opponents to court, NRDC and its team of lawyers have sued individuals, corporations and government agencies that, in their view, fail to safeguard the earth. By its own affirmation, the thirty-four-year-old group "…seek(s) to win the environmental battles that matter most."

Those battles are frequently partisan, and recently NRDC has been thrashing the Bush Administration, politically and legally.

On the political front, NRDC has been unremitting—and over the top—in its public attacks on the Bush Administration's environmental policies. On its Web site page devoted to "The Bush Record," the group charges, "This administration, in catering to industries that put America's health and natural heritage at risk, threatens to do more damage to our environmental protections than any other in U. S. history." For NRDC senior attorney Robert F. Kennedy Jr., the President and his appointees "are engaged in a campaign to suppress science that is arguably unmatched in the Western world since the Inquisition." NRDC Board member and film icon Robert Redford even speculates, "They seem to almost enjoy dismantling the environment."

NRDC Senior Attorneys Robert F. Kennedy Jr. (left) and Erik Olson constantly attack and sue the Bush Administration, while their group receives millions of dollars from agencies within the Administration.

The organization is campaigning actively to defeat President Bush and to elect his Democrat opponent, Senator John Kerry. It has joined the Sierra Club and the League of Conservation Voters to mount anti-Bush efforts in key battleground states. NRDC is also spearheading a new Environmental Accountability Fund—a "soft money" or "527" political advocacy project (donors include Hollywood activists Laurie and Larry David). This political entity, which shares office space with NRDC in New York City, will use advertising, celebrity events and a campus speaking tour to highlight local effects of Bush environmental policies.

Incredibly, taxpayer money is subsidizing these efforts. Federal grants to green groups that engage in anti-Bush activism have increased substantially over the past four years, and NRDC has received a generous helping of federal funds. During the

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CONTENTS

first three years of the Bush Administration, NRDC received more than $1.6 million from the Environmental Protection Agency alone—the most recent grant in September of 2003.

Meanwhile, the group goes after the Administration, suing in court to hamper, halt or reverse Bush environmental policies. These lawsuits—many ruled frivolous by the courts—have imposed further costs on taxpayers. Ironically, they also have drained the resources and diverted the attention of the very agencies that are supposed to focus on environmental protection. And on those relatively rare occasions when NRDC does win in court, the results are often harmful—to taxpayers, to our national security, and to the environment itself.

Taxpayer-funded lawsuits

NRDC litigation and advocacy frequently "bites the hand that feeds it." NRDC takes millions in federal grant money, then, ironically, rushes off to sue the government. Uncle Sam's feeding hand was bitten frequently during a two-year period, 2001-2002, when NRDC sued the federal government ten times. During that same period NRDC accepted $1,591,570 in grants from the Environmental Protection Agency alone.

For the organization, suing the government is a good deal. Taxpayers bear the court costs when a government agency must defend itself in court—even if NRDC loses. If it wins, it is usually awarded a financial judgment—also paid for by the taxpayers. Heads or tails, NRDC wins…and taxpayers lose.

Adding insult to injury, many of these suits are without legal merit. A review of NRDC financial and court records discloses that a large percentage of its cases against government agencies eventually are dismissed as frivolous and thrown out of court. Still, NRDC pursues these cases because it has a political agenda and is indifferent to questions of mere legal merit. It never says never.

In 2001, NRDC unsuccessfully sued the federal government four times. In each case, the petition was denied or dismissed by a federal court because it was groundless, or lacked merit or standing, or the court itself lacked jurisdiction. But that same year NRDC was collecting and spending federal grant money. In the fiscal year 2001, NRDC spent $679,319 in federal grants, and in fiscal 2002 (half of which ran in 2001) it spent another $672,394.

Of course, this is a small portion of the almost $52 million NRDC received in private contributions and other forms of direct support, or of its $72 million in total 2001 assets. Still, why should EPA give NRDC federal grants at the same time that NRDC is suing the EPA?

The EPA lawsuit, *NRDC v. Muszynski*, concerned federal agency approval of the amount of phosphorous that the state of New York intended to let flow into its waters. In January 1995, the New York State Department of Environmental Conservation (NYSDEC) reported to EPA that 19 of the state's reservoirs were prone to have excessive algae due to accumulated phosphorous. NYSDEC submitted to EPA a report on total maximum daily loads of phosphorous allowed in the reservoirs. On April 2, 1997, the EPA approved eight of those submissions as in compliance with the Clean Water Act.

NRDC's lawsuit argued that the EPA had no discretion to make the approvals, and it appealed a lower court ruling that supported the agency. The crux of the case concerned EPA's right to exercise its best judgment in setting an appropriate "margin of safety" in regulating chemical emissions into water. In her opinion, Circuit Appeals Court Judge Rosemary S. Pooler observed, to NRDC's chagrin:

> NRDC takes issue with the adoption of a ten percent margin of safety, arguing that no scientific or mathematical basis prescribed this percentage as opposed to any other. As EPA explained, because "there is no 'standard' or guideline for choosing a specific margin of safety, best professional judgment and the available information are used in setting [it]." …As long as Congress delegates power to an agency to regulate on the borders of the unknown, courts cannot interfere with reasonable interpretations of equivocal evidence.… But simply to reject EPA's efforts…because it must respond to real water quality problems without the guidance of a rigorously precise methodology would essentially nullify the exercise of agency discretion in the form of "best professional judgment."

In other words, the law sides with the agency unless its rule-making is arbitrary or capricious. The principle is a cornerstone of administrative law. But NRDC doesn't care about principles of administrative law. As political activists, NRDC attorneys were eager to push the envelope. They would create new "standards" and then insist that government agencies enforce them.

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Or how's this for another egregious example of "biting the hand that feeds it": NRDC was spending $150,000 in grants from the Department of Energy (DOE) for "energy efficiency & renewable energy information dissemination outreach training," at the same time that it sued Spencer Abraham, the Secretary of Energy.

In *NRDC v. Abraham* (2001), the group challenged a DOE order concerning the process for determining whether or not radioactive waste is "high-level." NRDC thought the order should be scrapped because it stipulated that "waste incidental to reprocessing" was not "high-level." That violated the Nuclear Waste Policy Act (NWPA) of 1982, said NRDC in its brief to judges for the Ninth Circuit Court of Appeals.

The court quickly decided that it lacked jurisdiction. The DOE facilities in question predated the 1982 law, and thus were not subject to the court's review. But even had the court heard it, NRDC's case was paper-thin. The government's attorneys pointed out that the Act's provisions did not apply to "atomic energy defense activity" or "to any repository not used exclusively for disposal of high-level radioactive waste or spent nuclear fuel resulting from atomic energy defense activities…"

In other words, the court found it had no business with DOE order 435.1; that the scope of NWPA did not include management of radioactive waste at a federal defense facility; and that complaints from a prodding environmental group could not change these legal realities. (The following year, NRDC successfully sued the DOE by tightening its arguments. A federal judge ruled that DOE would violate federal law if it reclassified and failed to move the waste at the Savannah River Site in South Carolina.)

In yet another case, *Water Keeper Alliance v. United States DOD* (2001), NRDC argued that the U. S. Navy breached the Endangered Species Act by conducting battle simulations off the coast of Puerto Rico. According to the environmental group, the National Marine Fisheries Service and the U. S. Fish and Wildlife Service (FWS) did not conduct formal meetings or biological tests to assess the Navy's impact on critical habitat and endangered species.

However, a lower district court ruled that NRDC failed to demonstrate "potential irreparable harm" and dismissed the case. Asked to again review the ruling, Circuit Judge Norman Stahl replied, "Water Keeper's contentions to this end essentially boil down to the fact that the Navy did not consult two available studies on brown pelicans, an omission that is not sufficient to find the consultation package inadequate…"

"Endangered" logic?

Natural Resources Defense Council v. United States DOI (2001) is another demonstration of how NRDC never gives up. What the law says doesn't matter. What matters is that government agencies play by NRDC's rules.

This one concerned the failure of the Fish and Wildlife Service (FWS) to designate a habitat for the "endangered" Tidewater Goby—a small, nearly transparent fish only found in the brackish waters of California's coastal wetlands. FWS cited budget constraints and administrative gridlock to explain why it failed to act decisively within one year after determining (on March 7, 1994) that the Goby was endangered—as required under the Endangered Species Act.

NRDC petitioned a federal district court in California, which in 1999 ruled against FWS. The courts said FWS must designate a critical habitat within 120 days.

FWS defended itself by explaining that it could not determine the Goby's habitat because in 1995 Congress put a moratorium on its spending, which would make it impossible for the Service to conduct the necessary studies. When the moratorium was lifted the following year, FWS had a smaller budget and faced a backlog of 243 species under consideration for Endangered Species Act protection. The agency had to develop a new system for setting priorities, which gave a lower priority to designating critical habitat.

According to Judge Harry Pregerson of the United States Court of Appeals for the Ninth Circuit,

> The service conceded that it had not designated the critical habitat, but argued that it could not comply due to budgetary restrictions.The Service contended that by granting injunctive relief, the district court would cause the Service to divert needed resources from higher priority activities—ultimately weakening the ability of the Service to comply with ESA as a whole…. The Service represented to the court…that the "number of ESA missed-deadline cases is growing at an explosive rate"…

Nevertheless, the district court ruled in favor of NRDC and granted its request for injunctive relief. While an appeal was pending, FWS went forward and did designate a critical habitat for the Tidewater Goby. By the time the case was again argued in 2001, the Tidewater Goby's designated critical habitat encompassed nine miles of rivers, streams and estuaries in Orange and San Diego counties in southern California.

Yet NRDC was not satisfied. It argued that when environmental organizations challenge FWS failures in the future, they need show only that it is reasonable to expect that the defendant would engage in similarly unlawful conduct.

Justices John Noonan and Barry Silverman rejected NRDC's argument and dismissed the case. Because NRDC "sought to remedy the defendants' failure to designate a critical habitat for the tidewater goby, and the defendants have now so designated, there is no remaining controversy for this court to decide. Moreover, it is well settled that a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." FWS had remedied its earlier failure to designate a critical habitat

for the Tidewater Goby. Yet NRDC continued to sue. It invented legal reasons why courts should take its word over its opponents'.

More grants, more grandstanding

In 2002, overall private contributions to NRDC declined, from about $52 million the year before, to a little more than $46 million. Meanwhile, its court-awarded fees dropped from about $900,000 to $641,945. But the number of federal grants to NRDC increased, from four to six, and funding from the EPA took a huge jump. In July and August of 2002 the EPA awarded NRDC two grants totaling $1,345,804.

According to the OMB audit that year, the grant money was allocated for "surveys, studies, investigations, special purpose grants, demonstrations, special purpose activities, children's health protection, water quality cooperative agreements and non-point source implementation grants."

Of course, "surveys, studies, [and] investigations" related to matters such as "children's health protection" are also mainstays of NRDC's litigation and political agenda. Its notorious 1989 public scare over "Alar on apples," for instance, is a classic example of how the group interweaves "research" with lawsuits and political advocacy.

When the government funds advocacy groups such as NRDC, even for "research," it opens itself up to all the other activities such groups undertake. "Money is fungible," and so too are the benefits money brings: visibility, clout, influence and public cachet. These are assets that nonprofit advocacy groups can transfer to their more controversial activities. If federal grantmakers trust NRDC with taxpayers' money, what can be wrong with NRDC's partisan, anti-Bush political activism during the election year?

Why should taxpayers be forced to fund groups like NRDC? The assault on the taxpayer is compounded when a grant recipient sues the government to block policies of an Administration it opposes politically, and obtains financial judgments that are billed to the taxpayer.

That's what NRDC does.

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While receiving increased funding under the Bush Administration in 2002, NRDC sued the federal government five times (vs. four times in 2001). It won two cases against the EPA, but lost a suit against the agency on behalf of the group San Francisco BayKeeper. In that case and two others, the courts denied or dismissed NRDC's filings, concluding that the group's positions were groundless or lacked merit, or that the court lacked jurisdiction, or that NRDC lacked legal standing.

NRDC appealed its losing case, *San Francisco BayKeeper v. Whitman*, claiming that EPA Administrator Christine Todd Whitman had failed to fulfill a mandatory duty to enforce Clean Water Act (CWA) standards. Specifically, NRDC argued that during 1980-1994, EPA had failed to make sure that California was in compliance with the Act.

EPA responded that the issue had been remedied eight years earlier because California had complied with CWA standards on its own accord. (The state had submitted standards for eighteen at-risk waters and created schedules for those remaining by the time of the litigation in 2002.) Additionally, EPA noted that California was already spending $7 million annually to compensate for its past CWA non-compliance.

But NRDC still insisted on retroactive relief against the EPA, demanding punitive damages on the agency for its past failures. This argument did not persuade the 9th Circuit Court, and on appeal it failed a second time.

A final example of how NRDC uses pointless litigation to harass government **agencies is** *NRDC v. FAA* (2002). Here NRDC lawyers contended that the National Parks Air Tour Management Act of 2000 prevented Vortex Aviation Inc., a small helicopter service, from operating a proposed sightseeing tour just outside the border of Wyoming's Grand Teton National Park. Vortex had sought permission to have a sightseeing helicopter take off and land at Jackson Hole airport, located inside the park; it promised that its sightseeing trips would never fly over the park. The Federal Aviation Agency (FAA) granted Vortex permission in several advisory letters.

NRDC sued, claiming that…

> the FAA failed to analyze Vortex's "self-serving assertion that the purpose of its flights while over the Park was only to takeoff and land from the Airport, despite clear evidence in the record...that Vortex's flights also had an undeniable sightseeing purpose,"…as indicated by Vortex's proposal to take a route that would prolong the flight time over the Park and thus provide a spectacular view of the Park's signature geographic feature…

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Judge Judith Rogers of the U. S. Court of Appeals for the District of Columbia dismissed NRDC's case as frivolous, ruling that "the issues raised in the NRDC's petition are not strictly legal in nature." Chiding NRDC for raising matters "based on evidence that was not before the FAA and is not before the court," the judge ruled that the National Parks Air Tour Management Act nowhere prohibits sightseeing flights operating outside national park boundaries. Nor does it prohibit federal agencies from drafting advisory letters about such proposed flights.

Wrote Judge Rogers: "As the FAA observes, the NRDC, to advance its challenges to the FAA's statutory interpretation, 'indulges in speculation regarding the probable routes of Vortex's flights, their likely duration and the quality of the scenery that might be visible from the windows of Vortex's helicopters,' and relies on a map of Vortex's proposed flight path and information placed on Vortex's website a year after the FAA's letters were issued…." She concluded that "the issues are not fit for judicial review because, in the end, they lack sufficient concreteness and they would require the court to conduct a purely hypothetical inquiry."

In other words, the judge rejected NRDC's invitation to accompany it on a legal fishing expedition.

Tip of the iceberg?

What does the history of recent litigation tell us about the Natural Resources Defense Council?

We know that federal courts dismissed or denied NRDC arguments in seven out of nine cases that the group filed against the federal government in 2001-2002. Courts found the cases were groundless or lacked merit, or that the court lacked jurisdiction or that NRDC lacked standing. In other words, almost eighty percent of NRDC's litigation operated on false premises.

We also know that, contrary to its proclaimed mission, NRDC failed to protect natural resources. Instead, it sunk its own resources—some of them taxpayer-funded—and the resources of federal government agencies charged with environmental protection, into a swamp of pointless litigation.

Finally, we know that the overarching objectives of NRDC are political. Taxpayers would find it ironic (at the very least) that the group is overtly hostile to the government agencies—and the Bush Administration—that so generously subsidize it.

Unfortunately, this case study of one highly political environmental nonprofit's assault on the American taxpayer is only the tip of the iceberg.

The path to reform

Audits by the White House Office of Management and Budget reveal that federal grant spending by disclosing environmentalist groups totaled $71,989,835 in 1998. But by 2003, during the Bush Administration, the amount of federal money spent by environmentalist organizations had doubled, to $143,266,852—a net gain of $71,061,883. This massive increase in federal grants did not prevent the green movement from declaring George W. Bush Public Enemy Number One—or from turning the Bush Administration's financial support toward the President's own defeat.

What can be done to combat such abuses of the courts and the taxpayers?

A first step would be to*require OMB audits to describe government grants to nonprofits in greater detail.* It is absurd to have grant-making federal agencies pay for the lawsuits filed against themselves. Specific, concise language in OMB audits would shed more light on this process, while giving grant recipients like NRDC less incentive to bite the hands that feed them. So would tightening federal grant eligibility and putting caps on federal grants.

Another step: *Reduce the incentive in filing frivolous lawsuits by making the plaintiff pay the public's costs, when the suit is found to be without merit.*

Finally: Remember that nonprofits enjoy a tax exemption because they are supposed to serve a "public interest." NRDC enjoys its tax-exempt status as a public charity under section 501(c)(3) of the Internal Revenue Code. Yet its wide-ranging agenda of inherently interrelated activities—research, litigation, political advocacy and lobbying—hardly meet anyone's commonsense definition of "public charity."

If the activities of a nonprofit group do not meet the objectives of a "charity," then it is the duty of the IRS to investigate its tax-exempt status, and where necessary, to revoke it. **OT**

David Healy *prepared this article as a Summer Research Fellow at the Capital Research Center.*

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BrieflyNoted

NRDC loses – and wins again. The **United States Marines** at southern California's Camp Pendleton no longer have to step around endangered fairy shrimp when they train. That's because a little noticed provision of the 2004 defense authorization act has amended the Endangered Species Act so that national security must be considered before land is designated as "critical habitat." The **Natural Resources Defense Council** had sued the government to protect "vernal pools" (i. e., mud puddles) harboring the tiny crustaceans. But the law now exempts the Marines from **U. S. Fish & Wildlife Service (FWS)** authority, according to **Walter Olson's** invaluable website, www.Overlawyered.com. Unfortunately, wildlife officials do have authority over standing water near runways at Los Angeles International Airport, where unhatched – and unhatchable – eggs of the tiny creatures have been found. (It took scientists two tries before they hatched some of the eggs under laboratory conditions, reports the August 15 **Los Angeles Times**. Airport officials worry that standing water attracts birds that can be sucked into plane engines, causing accidents. NRDC is sure to hatch another lawsuit.

The National Education Association (NEA) has launched a new grassroots campaign, which it calls "**National Mobilization for Great Public Schools**" (www.greatpublicschools.org). The purpose of the campaign, not surprisingly, is more money for public schools. "Our schools need adequate and equitable funding, qualified teachers, and technology," proclaimed **Reg Weaver**, President of the NEA, in a conference call with reporters in August. However, to promote this campaign, the NEA is calling upon the assistance of a number of groups of the far Left, including **MoveOn.org, Campaign for America's Future** and **ACORN**. The NEA seems unconcerned. "I've always said we will work with anybody that has goals and objectives of increasing support for quality education," Weaver declared.

According to press reports, the **Federal Bureau of Investigation** is interviewing Muslims and Arab Americans across the country to discover information that may prevent another terrorist attack during the election year. In response, the Illinois branch of the **American Civil Liberties Union (ACLU)** has joined other Chicago-area legal groups to give free legal help to any Muslim or Arab approached by the FBI in "its latest round of dragnet interviews." The ACLU's **Dalia Hashad** said, "This dragnet technique used by the FBI is simply racial profiling and violates our most cherished fundamental freedoms." But FBI supervisory special agent **Donna Spiser** replied that the expanded interviews were "absolutely not" racial profiling. "Intelligence has dictated who we're going to attempt to contact," she said, adding that Arab and Muslim Americans weren't the only ones being questioned. **Justice Department** spokesman **Mark Corallo** also bristled at the accusation. Defending the interviews and the PATRIOT Act, he said that the ACLU has "opposed everything this department has done to protect the American people from terrorism."

Most **527 groups** are from the political Left. But **Swift Boat Veterans For Truth**, a group of over 200 men who served in military operations with Democratic presidential candidate **John Kerry**, has come under withering fire for TV ads that challenge his account of his service in Vietnam. Liberal 527s are leading these counterattacks. Ironically, "McCain-Feingold promised to take the money out of politics," writes columnist **Charles Krauthammer**. But campaign money has merely been diverted into 527 groups, "a system that is practically designed to produce negative ads." ***OT***