

**American Rivers • Clean Water Action
Community Rights Counsel • Defenders of Wildlife
Earthjustice • Environmental Working Group
Friends of the Earth • Greenpeace US
National Audubon Society • National Environmental Trust
Natural Resources Defense Council • Sierra Club
The Ocean Conservancy • The Wilderness Society
20/20 Vision • U.S. Public Interest Research Group**

February 7, 2005

Environmental Harm Cases Do Not Belong in Class Action Bill

Dear Senator:

Our organizations are opposed to the sweepingly drawn and misleadingly named “Class Action Fairness Act of 2005.” **This bill is patently unfair to citizens harmed by toxic spills, contaminated drinking water, polluted air and other environmental hazards involved in class action cases based on state environmental or public health laws.** S. 5 would allow corporate defendants in many pollution class actions and “mass tort” environmental cases to remove these kinds of state environmental matters from state court to federal court, placing the cases in a forum that could be more costly, more time-consuming, and disadvantageous to your constituents harmed by toxic pollution. **State law environmental harm cases do not belong in this legislation and we urge you to exclude such pollution cases from the class action bill.**

Class actions protect the public's health and the environment by allowing people with similar injuries to join together for more efficient and cost-effective adjudication of their cases. All too often, hazardous spills, water pollution, or other toxic contamination from a single source affects large numbers of people, not all of whom may be citizens or residents of the same state as that of the defendants who caused the harm. In such cases, a class action lawsuit in state court based on state common law doctrines of negligence, nuisance or trespass, or upon rights and duties created by state statutes in the state where the injuries occur, is often the best way of fairly resolving these claims.

For example, thousands of families around the country are now suffering because of widespread groundwater contamination caused by the gasoline additive MTBE, which the U.S. government considers a potential human carcinogen. **According to a May, 2002 GAO report, 35 states reported that they find MTBE in groundwater at least 20 percent of the time they sample for it, and 24 states said that they find it at least 60 percent of the time.** Some communities and individuals have brought or soon will bring suits to recover damages for MTBE contamination and hold the polluters accountable, but under this bill, MTBE class actions or “mass actions” based on state law could be removed to federal court by the oil and gas companies in many of these cases.

This could not only make these cases more expensive, more time-consuming and more difficult for injured parties, but could also result in the dismissal of legitimate cases by federal judges who are unfamiliar with, or less respectful of, state-law claims. For example, in at least one MTBE class action, a federal court dismissed the case based on oil companies' claims that the action was barred by the federal Clean Air Act (even though that law contains no tort liability waiver for MTBE). Yet a California state court rejected a similar federal preemption argument and let the case go to a jury, which found oil refineries, fuel distributors, and others liable for damages. These cases highlight how a state court may be more willing to uphold legitimate state law claims. Other examples of state-law

cases that would be weakened by this bill include lead contamination cases, mercury contamination, perchlorate pollution and other “toxic tort” cases.

In a letter to the Senate last year, the U.S. Judicial Conference expressed their continued opposition to such broadly written class action removal legislation. Notably, their letter states that, even if Congress determines that some “significant multi-state class actions” should be brought within the removal jurisdiction of the federal courts, Congress should include certain limitations and exceptions, including for class actions **“in which plaintiff class members suffered personal injury or personal property damage within the state, as in the case of a serious environmental disaster.”** The Judicial Conference’s letter explains that this “environmental harm” exception should apply **“to all individuals who suffered personal injuries or losses to physical property, whether or not they were citizens of the state in question.”**

We agree with the Judicial Conference that cases involving environmental harm are not even close to the type of cases that proponents of S. 5 cite when they call for reforms to the class action system. Including such cases in the bill penalizes injured parties in those cases for no reason other than to benefit the polluters. No rationale has been offered by the bill’s supporters for including environmental cases in S. 5’s provisions. We are unaware of any examples offered by bill supporters of environmental harm cases that represent alleged abuses of the state class actions.

More proof of the overreaching of this bill is that the so-called “Class Action Fairness Act” is not even limited to class action cases. The bill contains a provision that would allow defendants to remove to federal court all environmental “mass action” cases involving more than 100 people—**even though these cases are not even filed as class actions.** For example, the bill would apply to cases similar to the recently concluded state-court trial in Anniston, Alabama, where a jury awarded damages to be paid by Monsanto and Solutia for injuring more than 3,500 people that the jury found had been exposed over many years—with the companies’ knowledge—to cancer-causing PCBs.

There is little doubt in the Anniston case that, had S. 5 been law, the defendants would have tried to remove the case from the state court that serves the community that suffered this devastating harm. Even in the best-case scenario, S. 5 would put plaintiffs like those in Anniston in the position of having to fight costly and time-consuming court battles in order to preserve their chosen forum for litigating their claims. In any case, it would reward the kind of reckless corporate misbehavior demonstrated by Monsanto and Solutia by giving defendants in such cases the right to remove state-law cases to federal court over the objections of those they have injured.

The so-called “Class Action Fairness Act” would allow corporate polluters who harm the public’s health and welfare to exploit the availability of a federal forum whenever they perceive an advantage to doing so. It is nothing more than an attempt to take legitimate state-court claims by injured parties out of state court at the whim of those who have committed the injury.

Cases involving environmental harm and injury to the public from toxic exposure should not be subject to the bill’s provisions; if these environmental harm cases are not excluded, we strongly urge you to vote against S. 5.

Sincerely,

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