BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	**)**	
	)	**MUR 5154**
Sierra Club, Inc.	**)**	

STATEMENT OF REASONS
VICE CHAIRMAN BRADLEY A. SMITH,
COMMISSIONERS DAVID M. MASON AND MICHAEL E. TONER

On October 21, 2003, the Commission voted 6-0 to dismiss this matter, after a vote of 3-3 on the substantive recommendations made by the General Counsel in the First General Counsel's Report in MUR 5154.[1] We did not approve the General Counsel's recommendations to find reason to believe the Sierra Club violated 2 U.S.C. 441b(a). We believe that conclusion rested upon a flawed application of the express advocacy standard to the Sierra Club's voter guide.

Corporations, including the Sierra Club, are prohibited from making federal election "expenditures." 2 U.S.C. 441b(a). For the Commission to conclude that a communication is an expenditure subject to our regulatory regime, that message must contain express advocacy – express terms advocating the election or defeat of a clearly identified candidate for federal office.[2] As noted in *Buckley v. Valeo*, "funds spent to propagate one's views on issues without expressly calling for a candidate's election or defeat are thus not covered."[3]

"Expressly advocating" is similarly defined in our regulations at 11 C.F.R. 100.22(a). Significantly for our purposes, that regulation finds express advocacy in "any communication using phrases such as "vote for the President" "Re-elect your Congressman" [or] "vote pro-life" or "vote pro-choice" accompanied by a listing of

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[1] Federal Election Commission, Minutes of an Executive Session at 7 (Oct. 21, 2003)(motion by Commissioner Thomas to find reason to believe Sierra Club Inc. violated 2 U.S.C. 441b(a) failed 3-3)(Commissioners McDonald, Thomas and Weintraub voting affirmatively, Commissioners Mason, Smith and Toner dissented); *Id.* at 8 (motion by Vice Chairman Smith to dismiss carried 6-0). Although the Commission "deadlocked," we note that the vote divided Republican appointees who did not wish to pursue a group known for its support of Democratic committees and candidates, from Democratic appointees favoring the General Counsel's approach, based on differences of philosophy rather than on partisanship.

[2] *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976).

[3] *Id*. at 44. This mailer was sent out before the November 2000 general election, and thus is not governed by the Bipartisan Campaign Reform Act.

clearly identified candidates described as pro-life or pro-choice . . . ." [4] Corporations are specifically allowed to publish voter guides under our regulations, see 11 C.F.R. 114.4(c)(5). Respondents argued that their voter guide was prepared in accord with this section. Since permissible voter guides may not contain express advocacy in any case, the threshold question is whether this communication is express advocacy.[5]

To determine whether speech is "express advocacy," we look to the communication's words. The mailing at issue in MUR 5154 contains two printed pages. The front depicts a picture of a child with the phrase "It's their world. Who will keep it clean?" The back is titled "Before You Vote on November 7 Know Their Record on the Environment." Below, a column on the left shows a picture of Senator Chuck Robb, with his name beneath, identified as "Incumbent", and a column on the right shows a picture of George Allen, with his name beneath, identified as "Candidate for Senate." Beneath each picture are descriptions of each candidate's environmental record on "Clean Water", "Clean Air", "Public Lands" and finally their "Environmental Scores" as calculated by the League of Conservation Voters. Incumbent Robb's record depicts three "check marks" indicating that on those topics he "supports Sierra Club position." Candidate Allen's record depicts but one "check" and two "thumbs down," which mean he "opposes Sierra Club position." Robb's overall environmental score is listed as 77%, Allen's is 13.5%. At the bottom of the page, the mailer reads "Sierra Club. Protect Virginia's Environment, for our families, for our future." Following that is a disclaimer: "This guide has been prepared to educate the public on the candidates' positions on environmental issues and is not intended to advocate the election or defeat of any candidate." Finally, the mailing provides an Internet URL for the Sierra Club with the phrase "Get the Facts."

This voter guide identifies candidates for federal office, leaving only the question of whether it also contains express advocacy. We conclude that it does not. It does not "unmistakably exhort the reader[] to take electoral action to support the election or defeat of a clearly identified candidate."[6] It lacks an explicit directive as required by court precedents.[7] It presents two opposing candidates, and information about their records. If

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[4] 11 C.F.R. 100.22(a). Our express advocacy definition contains a second prong at 11 C.F.R. 100.22(b) that has been declared unconstitutional. *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001*); Maine Right to Life v. FEC*, 98 F.3d 1 (1st Cir. 1996).

[5] Moreover, the General Counsel's Report only addressed express advocacy, so we need not discuss the potential application of the voter guide regulation here. Our enforcement of voter guide regulations has been the subject of litigation. *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997); *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991).

[6] *FEC v. Christian Coalition*, 52 F. Supp.2d 45, 61 (D.D.C. 1999).

[7] *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986); *see also FEC v. Central Long Island Tax Reform Immediately,* 616 F.2d 45, 52 (2d. Cir. 1980) (en banc) ("the words 'expressly advocating' mean exactly what they say."). Courts considering the parameters of "express advocacy" generally have defined it narrowly to include only communications with explicit words of advocacy. *See California Pro-Life Council Inc. v. Getman*, 328 F.3d 1088, 1097 (9th Cir. 2003) (citing *Chamber of Commerce v. Moore*, 288 F.3d 187, 193 (5th Cir. 2002); *Citizens for Responsible Government State PAC v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F. 3d 963, 969 (8th Cir. 1999); *FEC v. Christian Action Network, Inc.,* 110 F.3d 1049, 1051 (4th Cir. 1997); *Faucher v. FEC*, 928 F.2d 468, 470-71 (1st Cir. 1991)).

it asks the reader to do anything, it is to "Protect Virginia's Environment", "Know their Record" and "Get the Facts" from the Sierra Club. It does not tell the reader to vote "pro-environment" with a designation of the pro-environment candidate, to compare it with just one example of express advocacy set forth in our regulation.[8]

We acknowledge that the Sierra Club's guide contains a message that the environment is an important issue, and suggests to the reader that Robb's record is better from the Sierra Club's perspective. It also mentions voting, as would most (if not all) permissible voter guides. Were we to adopt the approach set forth in the General Counsel's report, however, then any group's voter guide that announced an upcoming election, set forth the records of candidates, and set forth the group's issue preferences would seem to become "express advocacy." This approach would effectively make it impossible for any group to publish a meaningful voter guide.

The better view is to conclude that this message does not fall within the narrow confines of "express advocacy" as articulated in cases and in our regulations. Accordingly, we respectfully decline to approve Counsel's recommendation to find reason to believe that the Sierra Club violated the corporate expenditure ban in 2 U.S.C. 441b(a).

December ___, 2003

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Bradley A. Smith
Vice Chairman

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David M. Mason
Commissioner

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Michael E. Toner
Commissioner

[8] *See* 11 C.F.R. 100.22(a) (express advocacy includes "vote 'pro-life' or vote 'pro-choice' accompanied by a listing of clearly identified candidates described as pro-life or pro-choice").