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Brazen Environmental Upstart Brings Legal Muscle, Nerve to Climate Debate

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A tiny activist group with a shoestring budget and an aggressive attitude is fast becoming a rising power in environmental policy.

The Center for Biological Diversity, an organization focused on saving imperiled species, chalks up victories even as it rebels against much of the environmental community. It secured Endangered Species Act protection for the polar bear. It won a court decision forcing federal agencies to look at climate change repercussions as part of environmental reviews. It pushed Wal-Mart to make green concessions as it opens new stores.

Started by a philosopher, physician, psychology major and biologist who met while tracking spotted owls, the group eschews both traditional inside-the-Beltway tactics and fringe group approaches. It does not lobby, negotiate or campaign for climate legislation. It rejects showy protests like taking over coal plants or unfurling banners on national monuments.

Instead, CBD relies on a strategy of relentless lawsuits. It is controversial, with critics charging that the tactic clogs up the courts, burdens federal agencies and fails to bring a comprehensive solution. It is also highly successful. The center has won 93 percent of its cases. "They have convinced courts that agencies have ignored or improperly implemented a whole host of environmental and natural resource management statutes," said Robert Glicksman, a professor of environmental law at George Washington University

Law School. "They have taken the initiative to bring these lawsuits. They have done their homework in terms of making convincing claims."

Now CBD wants to see just how hard it can push, working to force agencies, local governments and even businesses to look at how their actions affect the climate. It is petitioning U.S. EPA to set a national limit on heat-trapping gases blamed for warming. As it does so, it is aggravating fellow green groups, the government and some lawmakers.

The Center for Biological Diversity says it likely won't support comprehensive climate legislation -- an effort backed by most large environmental groups -- unless the bill fully preserves EPA's authority to regulate greenhouse gases under the Clean Air Act. The center this month blasted the bill being drafted by Sens. John Kerry (D-Mass.), Lindsey Graham (R-S.C.) and Joe Lieberman (I-Conn.) after learning that it would limit EPA's authority.

Bill Snape, senior counsel for CBD and its only Washington, D.C., employee working on federal issues, called the EPA restrictions a "deal killer."

Groups like the Natural Resources Defense Council and Sierra Club have said they could support a climate bill that forces EPA to relinquish some power, including the ability to set national limits for greenhouse gases.

CBD leaders condemn that and other positions of big environmental groups.

"Many of them are so desperate to pass a climate bill that they're willing to tolerate a bad bill," said Kieran Suckling, 45, the center's executive director and founder. "There's a certain giving up that we can actually get something that will work."

While declining to talk specifically about CBD, larger environmental groups and moderate lawmakers argue they are attempting a delicate balance as they work to build support for sweeping climate legislation.

"We may have different strategies. We may have different tactics. But the overall goal is the same," said Tony Kreindler, Environmental Defense Fund's national media director for climate. The goal, Kreindler said, is policy that makes carbon emissions drop.

In CBD's view, tactics used by EDF compromise too much and fail to secure policies that will force emissions cuts.

"A group like EDF, their approach to a problem is to go and sit down with the heads of the corporations and see what you can get them to do," Suckling said. "You're fully within the system. You're barely distinguishable from the corporations."

Even beyond politics, the center pushes boundaries. On Valentine's Day, the group's volunteers went to grocery stores, bars and concerts to hand out 100,000 condoms enclosed in colorful packaging with images of polar bears, spotted owls, jaguars, snail darters, coqui frogs and burying beetles.

The group's goal was not just to make people think about the species. The center wanted to flag the controversial issue of human overpopulation -- a topic avoided by most other environmental groups but which CBD blames for air and water pollution, loss of wildlife habitat and global warming.

The condoms' wrappers bore slogans like "Wrap with care, save the polar bear," and "Use a stopper, save the hopper."

Strategy

Launched on the national level in 1998, the Tucson, Ariz.-based center decided early on that the courts were the best tool for protecting species. It initially pursued mostly straightforward lawsuits over the Endangered Species Act, many centered on catching agency missteps like missed deadlines.

Out of 700 lawsuits the center has filed, Suckling said, it has won 93 percent. Those cases have forced the federal government to list 350 species under the Endangered Species Act and protect more than 120 million acres of habitat from Alaska to Florida.

“We get our power really fundamentally from the legal system, from filing litigation,” Suckling said. “The legal system has tremendous power.”

CBD has gained protections for everything from the Lane Mountain milk vetch, a small plant the grows only in the West Mojave desert, to beluga whales in Alaska’s Cook Inlet.

The polar bear became its highest-profile case. It also led to CBD shifting to its current, broader strategy.

The center in 2005 petitioned the U.S. Fish and Wildlife Service to protect the bear, which it said was at risk as warming waters melt sea ice critical for hunting and caring for cubs. As a part of its research into the potential listing, the federal government conducted studies that showed the Alaska population of the bears could vanish by 2050.

The George W. Bush administration in 2008 listed the bear as a threatened species. The Obama administration last year proposed the largest habitat protections ever for the bear.

The bear’s protection gave environmental groups a mascot for global warming, offering visceral images of bears stranded on chunks of ice. Children filed into public hearings to ask the Bush administration for the bear’s protection. Environmental groups hailed the animal’s protection as a major victory.

Yet winning the bear’s protection has not fulfilled the center’s dream of caps on carbon dioxide emissions. While the Endangered Species Act requires formal consultations for federal projects that could harm protected species, both the Bush and Obama administrations have said it is too difficult to connect a power plant in Arizona, for instance, to melting ice in Alaska. CBD’s lawyers say they may file another lawsuit to challenge that point.

But it was while working on the polar bear case that the center decided it needed to broaden its legal approach.

“The warming crisis is so dire that we would be completely remiss if we did not use all tools at our disposal,” Suckling said. “Through working on the polar bear we came to see that this threat was much bigger, much scarier than the polar bear.

“We decided that we really needed to expand beyond species to get at real greenhouse gas reductions.”

Since the polar bear case, the center has filed a series of additional lawsuits seeking protection for other species at risk from climate change, including the Pacific walrus, seven penguin species and the mountain-dwelling American pika.

In total, it has asked the federal government to protect 85 corals and 21 other species from threats from global warming.

CBD now is using new tools, seeking action under a number of statutes beyond the Endangered Species Act. The center in February petitioned EPA to set pollution standards for black carbon, which accumulates on sea ice and glaciers and contributes to their melting.

Earlier this month, CBD won a partial victory in a separate attempt to make EPA address climate change through the Clean Water Act.

As part of the settlement, EPA agreed to address ocean acidification, a potential threat to marine life. Ocean water today is 30 percent more acidic than it was before use of fossil fuels became widespread, according to scientists’ estimates.

“If we can use every tool in the toolbox -- Clean Water Act, Clean Air Act, new climate legislation and state efforts to address it -- all those things are important,” said Miyoko Sakashita, a senior attorney at the center’s San Francisco office who managed the ocean acidification case.

The center’s victory in that EPA case is limited. EPA now will work with states to help them identify oceans as “impaired.” It made no commitments beyond that.

CBD had one of its biggest victories in a case not related to endangered species. In 2007, it led a group of 11 states, the District of Columbia, New York City and four public interest organizations that challenged the National Highway Traffic Safety Administration’s rule setting corporate average fuel economy, or CAFE, standards for cars and light trucks. NHTSA set that standard using fleetwide averages for model years 2008-2010. It also allowed carmakers to hit varying fuel economy levels depending on their fleet mix.

CBD in the case argued a number of points, but a key one became that NHTSA’s environmental assessment under the National Environmental Policy Act failed to sufficiently analyze implications for greenhouse gas emissions.

The court sided with CBD and fellow petitioners on that and several other claims. The case went to the 9th U.S. Circuit Court of Appeals, and the decision there has broad implications, said Dustin Till, attorney in the Portland office of Marten Law, a firm focused on environmental and energy cases.

The decision “strongly clarified that federal agencies have to look at [greenhouse gas] impacts as part of their federal reviews,” Till said, adding that the CBD case is the “seminal case on that right now.”

In deciding where to strike, CBD said it looks for lawsuits that have the potential to set the largest legal precedents.

“We are very strategic in what we put out,” Snape said. “We don’t like to bring losers.”

The owls, and jail

The Center for Biological Diversity has an origin almost worthy of a Hollywood screenplay, except that a studio executive might call it far-fetched.

As a philosophy student working toward a doctorate at the State University of New York, Stony Brook, Suckling was planning a dissertation on the relationship between the death of languages and extinction of species when research took him to the Southwest in 1989.

But before studying, he ended up in jail.

Joining a group attempting to block logging trucks from entering a timber sale in the Jemez Mountains in New Mexico, Suckling was arrested, along with a woman he met during the protest. After his release, he followed that woman to southern New Mexico, where she was working as part of a crew looking for Mexican spotted owls, a contract job with the Forest Service.

The woman’s boss was Peter Galvin, at the time an undergraduate studying politics after surviving cancer as a teen. Suckling found two owls, Galvin hired him, and they became fast friends. The owl crew also included Todd Schulke, a former psychology student who was running outdoor adventures for juvenile delinquents.

Suckling, Galvin and Schulke slept during the day and hiked through forests at night, hooting and listening for return hoots. They met Robin Silver, a Phoenix emergency-room doctor who photographed owls. The four founders of what would become CBD were now together.

The work felt rewarding, Suckling said, because Forest Service rules banned logging in areas where owls lived. But when the trio decided to check on what happened to owls after their habitats were found, Suckling said,

they discovered the Forest Service was allowing logging in those areas.

The Forest Service disagrees with his account. The agency’s rules in 1989 and 1990 established 100-acre circles around known nest sites of Mexican spotted owls, Forest Service Southwestern region spokeswoman Karen Carter said.

“This was treated as a ‘no touch’ zone,” Carter said in an e-mail. “Logging did not occur in these areas.” Outside of those core areas, Carter said, in the Southwestern region, “other projects did occur and could have included thinning projects to reduce wildland fires, tree plantings or other wildlife projects.”

Suckling, Galvin and Schulke went to local newspapers, which reported their version of the logging account. The following year, 1991, the trio’s contract with the Forest Service was not renewed.

“We lost our contract, but did not lose our passion for saving endangered species,” Suckling said. “We decided that we were just going to stay and form our own environmental group.”

Suckling, Galvin, now 45, and Schulke, who today is 50, created the Greater Gila Biodiversity Project, with the goal of protecting ecosystems in 10 million acres in Arizona. They shared a house in the Gila National Forest. They worked for free. Silver, now 58, kept working as a physician but volunteered and helped pay the expenses early on.

“It was really hand-to-mouth. It was a real labor of love,” Suckling said, adding, “actually having money at our disposal is a fairly new thing to us.”

The group became Southwest Center for Biological Diversity in 1994, then expanded in 1998 into the Center for Biological Diversity. Galvin by then had received a master’s degree in biology.

“We were announcing our national agenda,” Suckling said.

Many small environmental groups start as a result of someone believing that other organizations aren’t acting

aggressively enough, said Christopher Bosso, a political science professor at Northeastern University and author of the book “Environment, Inc.: From Grassroots to Beltway.”

The Wilderness Society, for example, began when its founders, who had been working in government, became frustrated that the Forest Service and Fish and Wildlife Service weren’t protecting land, Bosso said.

“The Center for Biological Diversity spotted an issue area where nobody was being as assertive as they liked,” Bosso said. “That was an opportunity that they took advantage of.”

The center today has 62 full-time employees and 10 part-time workers in 15 offices in Arizona, California, Nevada, New Mexico, Alaska, Oregon, Illinois, Minnesota, Vermont and Washington, D.C.

That’s a large staff for the budget, Suckling said. Most national environmental groups, he said, have four to five employees per \$1 million of budget, while the center has 11. Some of those workers, he said, took 40 percent pay cuts when they came to the center from larger groups.

The center’s budget is stretched in many ways. CBD enjoys free rent at its Phoenix office because the landlord, Roy Young, is a supporter. Young runs a gem and mineral business, and for a month each year, center employees work at home because he uses the space as a storefront during an annual gem show.

But Suckling, nearly 20 years after he lost that job watching owls for the Forest Service, marvels at what his activist group has become.

“I’m shocked and surprised by the whole thing,” Suckling said. “We had no idea where this was going when we started out.”

Evaluating CBD

There are many legal questions raised by CBD suits that are likely to end up

in appellate courts, said Glicksman with George Washington University Law School. Those include whether it has the right to sue if it's not directly harmed, known as legal "standing." Some of its cases have been filed on procedural grounds, arguing that the federal agencies failed to follow required steps.

But the suits CBD and others bring are forcing the courts to examine climate change issues, he said.

"It could have a major impact on the planning activities of federal agencies," Glicksman said. "That could significantly expand the scope of environmental analysis under the National Environmental Policy Act, in ways that require federal agencies to think about climate change."

There are some criticisms of the center's lawsuits as piecemeal and potentially irrelevant if Congress passes legislation that moots the group's actions, said Jay Austin, senior attorney at Environmental Law Institute, a nonprofit research and education think tank.

At the same time, Austin said, CBD's approach "has kept the pressure on. It has caused industry players to realize some regulation is coming, if not from Congress or the agencies, then from the courts."

But the Fish and Wildlife Service -- the agency that's the target of most of the center's legal work -- says the relentless petitions and lawsuits over endangered species have diverted too many agency resources to the courtroom, when agency staff could otherwise be working on addressing the administration's species priorities.

"In essence, by bringing those lawsuits, it has really hamstrung our ability to run a listing program the way we see fit," said John Schmerfeld, acting chief of the Fish and Wildlife Service's office of ESA litigation.

Over the past three years, the Center for Biological Diversity and WildEarth

Guardians, another group that focuses on endangered species litigation, have petitioned for federal protection for 826 species, Schmerfeld said. Those petitions add considerably to the agency's workload. In 37 years of the Endangered Species Act, the service had previously listed only 1,372 domestic species.

Each lawsuit requires the agency to compile records and contribute to briefs and settlement memos. All of the legal work distracts from other efforts the service might pursue -- like addressing its own priority list for species, Schmerfeld said.

"The irony is that this provision for citizen lawsuits has in essence crippled our ability to put species on the endangered species list," Schmerfeld said.

Outside critics also see the group's suits as problematic. When Republicans on Capitol Hill attempted to overhaul the Endangered Species Act five years ago, one of their chief complaints was that lawsuits held the act hostage.

"They're a clear and present danger to rational public policy," said Kenneth Green, resident scholar at American Enterprise Institute, a think tank that favors market-based solutions.

"They don't acknowledge any other value that trades off against what they can get," Green added, including the needs of schools, other land-use plans, mineral extraction and "the economic consequences of walling off vast swaths of land."

The group's tactics and continual successes, however, have impressed even some lawyers they've opposed.

"Any fair observer would say they are excellent litigators," said Damien Schiff, an attorney with Pacific Legal Foundation, which often argues against center cases. "They win a great deal of their cases and put a lot of thought into how the lawsuits are set up and how they are prosecuted."

The center is sometimes "overly aggressive" in its attempts to stand by its principles, Schiff said, raising arguments

that challenge the government's underlying approach. But the group marshals technical and scientific expertise and shows a mastery of the law, he said.

Others suggest CBD's influence is limited.

"I haven't seen any real evidence that they're a major player either in advocacy at EPA or on the Hill," said Jeff Holmstead, an industry attorney who was EPA air chief during the George W. Bush administration.

While the center does a good job of keeping itself in headlines, Holmstead said, "I think that attention exaggerates their real importance in the debate."

CBD should be looked at as part of a larger environmental activist machine, analysts said. CBD and others that are "more radical and more activism-oriented" help other environmental groups that are negotiating to achieve change, said Jeffrey Berry, political science professor at Tufts University and author of the book "The New Liberalism," which examines the rise of activist groups.

"Groups like the Center for Biological Diversity give groups in Washington a lot of leverage," Berry said. Larger, more established groups can tell people, he said, that "you can deal with us or you can deal with them."

Suckling agreed that the center's work helps other environmental groups, and said that it goes beyond negotiating power.

When it was still Southwest Center for Biological Diversity in 1996, for example, the group sued the Bureau of Reclamation for harming the endangered Southwestern willow flycatcher at Theodore Roosevelt Dam in Arizona. As part of the settlement moved, the government set aside land on the San Pedro River, Suckling said. Instead of buying the land outright, Suckling said, the bureau paid Nature Conservancy to purchase and manage the property. Nature Conservancy said its records

show the Bureau of Reclamation paid it \$1.4 million.

"I raise more money for Nature Conservancy every year than for the Center for Biological Diversity," Suckling said wryly. "We're all part of one ecology of politics. You push a lever over here, money pops out over there."

Growing budget

Center for Biological Diversity is relatively small financially, with \$9.2 million in revenues for 2008, according to its tax return. Earthjustice, by comparison, took in more than three times that amount in fiscal 2008.

But the center's budget has grown steadily. Revenues topped out at \$3.4 million in 2005 and \$1.6 million in 2002. Suckling attributes that to both the group's legal successes and concern about climate change.

"We very quickly were able to develop a reputation as the people who will take action right now," Suckling said. "That really opened up a huge level of interest in the center."

Of the group's total \$9.2 million in revenue in 2008, \$7.6 million came from contributions and grants. And more than half of that came from two donors.

The center's biggest benefactor is Swiss entrepreneur Hansjörg Wyss, who runs the medical device and materials company Synthes Inc., according to Forbes. The magazine put his worth at \$5.7 billion and placed him 83rd in its 2009 listing of the world's richest people.

Wyss had been giving to the center since the 1990s, Suckling said, originally through his Wyss Foundation.

"We decided in 2006 that we really wanted to grow substantially in order to accomplish our mission," Suckling said. "We approached him at that point as an individual to make a very large donation."

Wyss pledged \$10 million, with the amount spread between 2007 and 2011.

The Wyss Foundation also supports other green groups, giving \$12.5 million to Nature Conservancy and \$5,000 to Greenpeace in 2008, according to the foundation's tax return.

His foundation office in Washington, D.C., did not respond to requests for comment.

The California Community Foundation in 2008 gave the center \$3 million to be spent over five years. The center's work in California likely drove that contribution, Suckling said.

The center in 2006 filed a suit against San Bernardino County arguing that California's Environmental Quality Act required developers to consider mitigation of greenhouse gas emissions. The state's Assembly earlier had passed a law setting a target of reducing emissions to 1990 levels by 2020 and then 80 percent below 1990 levels by 2050.

Two days after CBD's suit, California Attorney General Jerry Brown (D) filed a similar case against the county. San Bernardino settled that suit by agreeing to inventory sources of greenhouse gases and total emissions, and to produce a target for reducing those emissions.

Taking on a strategy of agitation "is creating a space in the marketplace for yourself," Berry said. "It's difficult for a new group to compete against NRDC and Environmental Defense Fund."

"One way is to be abrasive and newsworthy," Berry added. "That, in turn, can help you attract some donations."

The center's pool of supporters has grown dramatically. The number of dues-paying members hit 43,000 in 2009, up from 43 people in 1993. The average amount someone paid was \$35, the center said, although some people gave far more.

Another \$1.4 million of CBD's 2008 revenue came as a result of cost recovery from the lawsuits it filed. Under the Equal Access to Justice Act, the federal government pays legal expenses for certain small entities that sue it.

That federal compensation has been a source of frequent criticism from Western Republicans, who say taxpayers are financing the environmental litigation industry. Lawmakers in the House and Senate recently introduced legislation that would require the Justice Department to publicly disclose reimbursements it pays to environmental groups under the act.

Rep. Cynthia Lummis (R-Wyo.), who introduced the House bill, identified the center as one of 14 environmental groups that have "hijacked" the act.

The center is using a law whose original purpose was to help citizens or groups file lawsuits against government actions that were directly affecting them, like people "in harm's way" of water or air pollutants, said Green with AEI.

"Those were a different kind of problem than what they're doing now with greenhouse gas controls," Green said.

The center spent \$3 million in 2008 on its land-protection and climate and energy programs, according to its tax return.

Suckling earned the most in 2008, with \$115,971 in total compensation. Galvin, who is a director, took in \$106,662.

Taking on EPA

In its latest bid to save endangered species, the center is urging EPA to utilize every available regulatory tool to combat climate change.

In December the group, along with the organization 350.org -- filed a petition (pdf) asking EPA to set a national limit for emissions of heat-trapping gases.

Mainstream environmental groups publicly criticized the approach. David Bookbinder, Sierra Club's chief climate counsel, said last year that the center's view was in the minority and that the petition was headed toward "well-deserved bureaucratic oblivion" at EPA.

EPA Administrator Lisa Jackson signaled that the Obama administration would also oppose such limits.

“I have never believed and this agency has never believed that setting a national ambient air quality standard for greenhouse gases was advisable,” Jackson said in December. Still, she said the agency would review CBD’s petition. “I don’t know that there’s anything in there that would change my view, but we’ll certainly do that,” she said.

Some of the more left-leaning environmental groups welcome CBD’s efforts to prod the administration and other groups.

“I think some groups are really focused on the political obstacles,” said Kyle Ash, a senior legislative representative at Greenpeace. “CBD is trying to highlight that President Obama has a lot more leverage to ensure effective climate policy than they’re talking about.

“Where they’re coming from is very much in the right.”

CBD also found common ground on the issue, perhaps surprisingly, with the industry-funded Competitive Enterprise Institute.

Both groups have argued that if EPA moves forward to regulate greenhouse gases under the Clean Air Act, the law could ultimately require EPA to set the nationwide limit for concentrations of the heat-trapping gases. Industry groups and many environmentalists want to avoid that outcome, but CBD says a heavy-handed regulatory approach is needed to get CO₂ emissions to a safe level.

CEI Senior Fellow Marlo Lewis said the center’s petition marked an “I told you so” moment for critics who have warned that environmentalists would prod the

administration to regulate greenhouse gases to the fullest extent possible under federal laws, instead of the more limited approach advocated by the Obama EPA.

“It vindicates our argument,” Lewis added. CBD, he said, isn’t allowing larger environmental groups “to pursue the only workable political strategy,” which is to enact changes incrementally.

The center, Suckling said, merely is urging the government to act in response to the science rather than politics.

“All of the big environmental groups have good scientists working for them,” Suckling said. “They know full well that the emission targets being proposed in Congress will not stop global warming.”