



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AUG - 9 2006

Karl J. Sandstrom, Esq.
Perkins Coie LLP
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

RE: MUR 5752
Environment2004, Inc.
Environment2004 Action Fund

Dear Mr. Sandstrom:

On April 7, 2004, the Federal Election Commission (the "Commission") notified your clients of a complaint alleging that they violated the Federal Election Campaign Act of 1971, as amended (the "Act"), and provided your clients with a copy of the complaint.

After reviewing the allegations contained in the complaint, your clients' response, and publicly available information, the Commission, on September 28, 2004, found reason to believe that Environment2004 PAC, and Miranda Anderson, as Treasurer, and Environment2004, Inc. violated 2 U.S.C. §§ 434, 441a(f), 441b(a) and 11 C.F.R. §§102.5, 104.10, 106.1 and 106.6, provisions of the Act and its implementing regulations. A copy of the Factual and Legal Analysis that sets forth the basis for the Commission's determination was provided at that time.

Additionally, on July 19, 2006, the Commission found reason to believe that Environment2004, Inc. and Environment2004 Action Fund violated 2 U.S.C. §§ 433, 434, and 441a(f), provisions of the Act, by failing to register as political committees with the Commission; by failing to report their contributions and expenditures; and by knowingly accepting contributions in excess of \$5,000. Additionally, the Commission found reason to believe that Environment2004, Inc. violated 2 U.S.C. § 441b, by knowingly accepting corporate contributions. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

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In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. We look forward to your response.

Sincerely,


Michael E. Toner
Chairman

Enclosures

Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

**RESPONDENTS: Environment2004, Inc. and
Environment2004 Action Fund**

MUR 5752¹

I. INTRODUCTION

This matter was initiated by a complaint filed with the Federal Election Commission (“the Commission”). *See* 2 U.S.C. § 437g(a)(1). The complaint alleged that Environment2004, Inc. (“E04”) violated federal campaign finance laws by spending funds raised outside the limitations and prohibitions of the Federal Election Campaign Act of 1971, as amended (“the Act”), to influence the 2004 presidential election. The Commission previously found reason to believe that E04 and Environment2004, Inc. PAC, an associated federal political committee, violated 2 U.S.C. §§ 434, 441a(f), 441b(a) and 11 C.F.R. §§ 102.5, 104.10, 106.1 and 106.6 by failing to properly deposit and report federal contributions and by failing to properly allocate various expenses required to be paid with federal funds. During the course of the investigation of E04, the Commission became aware of evidence indicating that the Environment2004 Action Fund (“E04 Action Fund”), which is associated with E04, also may have violated the Act.

E04 and E04 Action Fund (“Respondents”) are not registered with the Commission as political committees and have not filed disclosure reports concerning their 2004 election cycle activities. As discussed below, E04 and E04 Action fund both received more than \$1,000 in contributions and made more than \$1,000 in expenditures. Further, the Respondents’ self-declared purpose was to defeat George W. Bush in the 2004 general election. Respondents solicited contributions by promising to use the funds received to target voters in a handful of presidential election “battleground” or “swing” states to defeat Bush and electing John Kerry.

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Such funds were contributions under the Act. Respondents also made more than \$1,000 in expenditures for fundraising communications containing express advocacy as to Kerry's election and Bush's defeat.

Based on these facts, there is reason to believe E04 and E04 Action Fund violated 2 U.S.C. §§ 433, 434, and 441a(f), by failing to register as political committees with the Commission, by failing to report their contributions and expenditures, and by knowingly accepting contributions in excess of \$5,000. Because E04 also accepted corporate contributions, there is reason to believe E04 violated 2 U.S.C. § 441b(a) by knowingly accepting corporate contributions.

II. FACTUAL AND LEGAL ANALYSIS

A. **FACTS**

The Environment2004 family of organizations includes: (1) E04, an incorporated entity organized under Section 527 of the Internal Revenue Code;² (2) Environment2004 PAC, a political committee registered with the Commission;³ and (3) E04 Action Fund, an unincorporated entity organized under Section 527 of the Internal Revenue Code.⁴ Statements made in organizational mission statements, bylaws, fundraising solicitations, as well as the

² E04 originally was called Democratic Alliance for Energy and the Environment, Inc., and filed its articles of incorporation on March 21, 2003. The organization filed its initial report with the IRS on April 9, 2003. The organization amended its articles of incorporation to change its name to Environment2004, Inc. on May 29, 2003 and filed the name change with the IRS on June 9, 2003.

³ Aimee Christensen is the treasurer of record of E04 PAC. The E04 PAC originally registered as the Democratic Alliance for Energy and the Environment, Inc. PAC on April 9, 2003. An amended Statement of Organization, renaming the organization, was filed with the Commission on June 9, 2003.

⁴ E04 Action Fund was established as an unincorporated entity and filed its Notice of 527 status with the IRS on August 6, 2004.

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activities and spending of the organizations, taken together, clearly establish that E04's and E04 Action Fund's major purpose was to defeat George W. Bush.

E04 and E04 Action Fund are separate legal entities, but they were established, financed, maintained, and controlled by the same group of persons and operated out of the same offices. Frank Loy was E04's chairman and E04 Action Fund's president, while Aimee Christensen served as Executive Director of E04, treasurer of the Environment2004 PAC, and "custodian of records" and "contact person" of the E04 Action Fund. Christensen ran day-to-day operations of E04 and the E04 Action Fund and raised funds for both organizations from the same donor pool, frequently seeking funds for both organizations in the same solicitation.⁵

1. **E04**

During 2003-2004, E04 raised and spent approximately \$1,200,000. It claimed to have over 4,000 "members," though nearly 50% of its funding (\$580,480) came from just twenty donors. Additionally, E04 received over \$60,000 in in-kind contributions from corporations. As described in greater detail below, the contributions to E04 were received in response to solicitations clearly indicating that the funds received would be targeted to the election or defeat of a clearly identified federal candidate.⁶ Further, as discussed below, many of these solicitations contained express advocacy.

⁵ For instance, in one letter, Christensen asks the donor to make "an additional contribution to E04 of \$10,000," and then states: "We are asking all large donors to wire contributions directly to the Action Fund (allows us maximum flexibility) and I can send wiring instructions to you." In another instance, Christensen sent an email with the subject line "Request re: Environment2004 billboards and TV ads," with the text saying, "I hope you will consider a financial contribution to Environment2004 Action Fund for our TV ads and our billboards in Florida and Wisconsin."

⁶ E04 asserts membership organization status, and on that basis, claims that it can communicate to its members with express advocacy. E04's claim to membership organization status is without merit; its members paid no dues to the organization, had no investment stake in the organization, and had no participatory rights in the governance of the organization. See 11 C.F.R. § 100.134.

Of the funds raised by E04, over \$100,000 was used to pay for communications such as billboard advertising, push polls, and “reports” which clearly identified federal candidates John Kerry or George W. Bush. For instance, E04 disbursed \$57,218 for billboards that were displayed in Florida, Wisconsin, and Minnesota from late October 2004 through the election in November. The billboards attack George W. Bush based on issues that E04’s polling demonstrated would influence voters to vote for Kerry.

The messages included:

- “Mercury. It’s What’s for Dinner. Served Up by the Bush Administration.”
- “Mercury. It’s What’s for Dinner. George Bush Just Doesn’t Get It.”
- “Global Warming = Worse Hurricanes. George Bush Just Doesn’t Get It.”

E04 also spent a total of \$44,150 for push polls were replete with criticism of George W. Bush. For instance, one push poll asked:

[T]ell me which ONE of these statements describes the best reason to vote AGAINST George W. Bush. 1. George W. Bush is putting our health at risk by allowing big corporations to increase the water and air pollution that causes illnesses and increases health care costs. 2. We need to reduce our dependence on foreign oil, but George W. Bush is siding with oil companies instead of developing renewable energy sources like ethanol, wind and solar power....

E04 acknowledged to potential donors that these polls persuaded undecided voters to vote for Kerry by providing them negative information about Kerry’s opponent, George W. Bush. The polls were conducted in the months immediately preceding the general election (late September – early October) in battleground states such as Wisconsin, and were targeted at voters

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identified as “undecided or weak” supporters of Bush or Kerry. As Aimee Christensen explained in a letter to a donor, E04 polled “a subset of the actual voters,” and “our poll messages moved voters and the mercury and ‘polluter pays’ messages raised serious doubts about Bush for over 2/3 of our voters.” Frank Loy explained that the polls resulted in a “move to Kerry [that] averaged 11 percentage points.”

Finally, E04 incurred an additional \$19,708 for the costs of publishing “reports” critical of President Bush. Specifically, E04 published a “national report” and “state reports” in five presidential election battleground states where E04 electoral efforts were targeted.⁷ The reports contain numerous references to the upcoming election, Bush’s “four years” in office, the “next resident” of the White House, and exhortations that the best “choice” is the election of a Democratic President.

The reports are replete with attacks on President Bush, his presidential administration, and his work with “allies” of the Bush administration. For example:

- President Bush’s bias in favor of corporate special interests is evident in his handling of many environmental issues, all of which have adversely affected the people of Minnesota.
- The Bush presidency has been the most anti-environmental in the modern era. In partnership with a compliant Congress, it is busily dismantling the framework of environmental laws, standards and enforcement that is the foundation for environmental protection and preservation in the United States.
- Bush lets polluters off the hook.
- Presidential candidate Bush pledged to support policies that would limit the four major pollutants from power plants After only sixty days in office, President Bush violated his campaign promise to support a mandatory cut in CO² emissions,

⁷ The five states that E04 targeted were Colorado, Florida, Minnesota, New Hampshire, and Wisconsin. The “reports” were distributed by E04 at public events and by mail to individuals who requested them; they were also made available on the E04 website. *See, e.g.*, http://www.environment2004.org/br_home.php.

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the primary cause of global warming.

Even the titles of the reports criticize Bush. For instance, the Wisconsin report is entitled "Trashing Wisconsin: The Bush Administration's Assault on Our Air, Water and Health," and the Minnesota report's title is "Poisoning the Land of 10,000 Lakes: The Bush Administration's Assault on Minnesota's Health and Heritage."

Additionally, E04 incurred substantial costs from its "earned media" strategy pursuant to which it organized press conferences and other public events focusing on the presidential election. E04 incurred substantial salary costs, exceeding \$100,000, paid to certain full-time employees responsible for organizational fundraising and paid various consultants over \$300,000. It also incurred substantial overhead expenses such as rent, payroll taxes, and travel; some of this overhead included support for the related political activities of E04 PAC.⁸

2. E04 Action Fund

During 2004, E04 Action Fund raised approximately \$500,000 to fund its operations. Most of the funding came from just ten donors, who provided \$470,000, as well as \$30,000 another section 527 organization.⁹ As was the case with E04, the contributions to E04 Action Fund were received in response to solicitations clearly indicating that the funds received would be targeted to the election or defeat of clearly identified federal candidates.

E04 Action Fund spent approximately \$400,000 on television and print advertising in Florida, Minnesota, and Wisconsin, and approximately \$25,000 on print advertising published in

⁸ E04 PAC raised and spent an additional \$700,000. According to E04 PAC's disclosure reports, approximately \$550,000 of its disbursements were for independent expenditures expressly advocating the defeat of George W. Bush. These E04 PAC communications contained the same messages as the E04 and E04 Action Fund communications, while also including express advocacy.

⁹ E04 later disbursed \$30,000 back to claiming that the original payment from was a loan.

newspapers in Wisconsin and Florida. The advertisements, all of which attacked George Bush or praised John Kerry, were based on polling as to what messages would persuade voters, and were broadcast or published in the fall of 2004 up through the November elections.¹⁰ For instance:

- The television advertisement “Warning” states that 1/6 of American women of child-bearing age have unsafe mercury levels, linking this assertion to mercury-laden fish supplies caused by pollution from power plants. The advertisement states, “George Bush reversed efforts to cut more mercury pollution from power plants. Why does George Bush put polluters’ profits over people?”
- The television advertisement “Pay” cites the number of toxic waste sites in the relevant state (for instance, 38 in Wisconsin) and claims that George Bush has reversed a plan to make polluters pay for the cleanup of these sites, shifting the cost instead to taxpayers. The advertisement concludes by asking: “Why does George Bush put polluters’ profits over people?”
- The television advertisement “Interrupted Fishing Trip” depicts two fishermen reading a sign warning of mercury pollution. The advertisement’s audio portion asserts that 1/3 of American lakes are polluted, linking this assertion to mercury from coal-fired power plants. The advertisement concludes by stating, “John Kerry has fought for clean air and water. He said our commitment to the environment is a compact with our children, our grandchildren, and generations beyond.”
- The print advertisement “Interrupted Fishing Trip” claims that 100% of all fish in Wisconsin’s and Florida’s lakes contain mercury, and that mercury causes birth defects and brain damage. It concludes: “George Bush says mercury should not be treated as hazardous. *Why does George Bush care more about polluters than you?*” (emphasis in original).

¹⁰ A template letter sent to donors around October 12, 2004, describes certain polling findings and explains that “as a result of the above poll, we have decided to aim for a broader audience in Florida’s I-4 Corridor, by buying billboard space and by running two TV ads we had produced, one on mercury contamination and one on the polluter pays principle the President is flouting.”

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B. ANALYSIS -- E04

If, in fact, E04 is not the nonfederal account of E04 PAC but instead a separate entity, as it claims, then it should have registered as a political committee, filed disclosure reports, and adhered to the Act's limits and prohibitions on contributions. *See* 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b. The Act defines a "political committee" as any committee, club, association, or other group of persons that receives "contributions" or makes "expenditures" for the purpose of influencing a federal election which aggregate in excess of \$1,000 during a calendar year. *See* 2 U.S.C. § 431(4)(A). For the purpose of triggering political committee status, the Act defines the terms "contributions" and "expenditures" as including "anything of value made by any person for the purpose of influencing any election for Federal office." *See* 2 U.S.C. §§ 431(8)(A)(i), (9)(A)(i).

E04 exceeded the statutory threshold for political committee status in two separate ways. First, E04 received "contributions" exceeding \$1,000 in response to multiple fundraising solicitations clearly indicating that funds received would be used to target the election or defeat of a clearly identified candidate in the 2004 presidential election. Second, E04 made more than \$1,000 in "expenditures" for the purpose of influencing the general election for President in 2004 through fundraising solicitations containing express advocacy. As a result of these contributions and expenditures, and because E04 has the major purpose of engaging in federal campaign activity, E04 should have registered as a political committee, disclosed its receipts and disbursements to the public through reports filed with the Commission, and complied with the Act's contribution limits and prohibitions.

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1. **E04 Exceeded the Statutory Threshold for Contributions by Receiving over \$1,000 in Response to Solicitations Clearly Indicating that Contributions would be Targeted to the Election or Defeat of a Clearly Identified Candidate for Federal Office**

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Money received in response to fundraising solicitations clearly indicating that the funds being sought would be targeted to the election or defeat of clearly identified federal candidates constitute contributions under the Act. 2 U.S.C. § 431(8)(A); *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (“*Survival Education Fund*”); see also Complaint, *FEC v. Club for Growth, Inc.*, No. 1:05-cv-01851-RMU (D.D.C. filed Sept. 19, 2005). In *Survival Education Fund*, the court considered whether proceeds received in response to a fundraising solicitation mailed to the general public by two 501(c)(4) organizations during the 1984 Presidential race constituted “contributions” under the Act. The cover letter to the solicitation included this language:

Funds are urgently needed to help defray the enormous cost of mounting, organizing, publicizing, and coordinating this nationwide effort....

Your special election-year contribution will help us communicate your views to the hundreds of thousands of members of the voting public, letting them know why Ronald Reagan and his anti-people policies must be stopped. So, please, return your survey and your check immediately. Anything you can give at this time -- \$50, \$100, \$250, \$500, \$1,000, \$2,500 or more -- will help us reach more people, and increase the effectiveness of our election-year work.

Id. at 288-89. The Second Circuit considered whether the solicitation sought “contributions” and was subject to the Act’s disclaimer requirements under 2 U.S.C. § 441d(a).

Stating that it was unnecessary to consider whether the mailer constituted express advocacy, the court analyzed whether the mailer solicited “contributions” based on the Supreme

Court's statement in *Buckley v. Valeo* that contributions made to other organizations but earmarked for political purposes were contributions made "for the purpose of influencing elections" and, thus, were properly covered by the Act. *See id.* at 294 (quoting *Buckley v. Valeo*, 424 U.S. 1, 78 (1976)). The court interpreted the phrase "earmarked for political purposes," stating,

The only contributions "earmarked for political purposes" with which the *Buckley* Court appears to have been concerned are those that will be converted to expenditures subject to regulation under FECA. Thus *Buckley's* definition of independent expenditures that are properly within the purview of FECA provides a limiting principle for the definition of contributions in § 431(8)(A)(i), as applied to groups acting independently of any candidate or its agent and which are not "political committees" under FECA.... Accordingly, disclosure is only required under § 441d(a)(3) for solicitations of contributions that are earmarked for activities or "communications that expressly advocate the election or defeat of a clearly identified candidate for federal office." *Even if a communication does not itself constitute express advocacy, it may still fall within the reach of § 441d(a) if it contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office....* Only if the solicitation makes plain that the contributions will be used to advocate the defeat or success of a clearly identified candidate at the polls are they obliged to disclose that the solicitation was authorized by a candidate or his committee.

Id. at 295 (emphasis added). Based on this reasoning, the court held that the mailer solicited contributions within the meaning of § 441d, citing the mailer's statement, "Your special election-year contribution will help us communicate your views to the hundreds of thousands of members of the voting public, letting them know why Ronald Reagan and his anti-people policies must be stopped." *Id.* According to the court, this statement "leaves no doubt that the funds contributed would be used to advocate Reagan's defeat at the polls, not simply to criticize his policies during the election year." *Id.*

Like the solicitation in *Survival Education Fund*, the language used in fundraising solicitations sent by E04 in 2003-2004 clearly indicated that the funds received would be targeted to the election or defeat of a clearly identified federal candidate. In numerous fundraising letters and emails, E04 clearly explained to contributors that their contributions would be used to elect Kerry or defeat Bush. Examples of fundraising solicitations include:

- Environment2004 is a political organization *dedicated to defeating George W. Bush and his allies in the next national election*. We have an ambitious program to swing a small but significant number of voters in a handful of key states, one of which is Florida, to the Democratic side in November. We are writing to request your support for our Florida campaign (emphasis added).
- Environment2004 is not supporting any candidate in the Democratic presidential primaries, and *will focus on defeating Bush in November 2004 by supporting the Democratic nominee*. Our strategy is highly targeted. First, we expect to work principally in no more than five states, which are expected to be close in 2004 and where there are voters who can be moved by our message. In 2000 five states were decided by less than a 0.5% margin. Many experts believe that 2004 will be similar. (emphasis added).
- This may be our last opportunity to make a difference on November 2nd – and *help ensure that environmental leaders like John Kerry get elected*. There are only 15 days left and so I write to you today to ask for your help exposing the abysmal environment record of the Bush/Cheney administration. Those of us concerned about our environment can and must do our part to make a difference in November. (emphasis added).
- Following the successful Chapel Hill event [March 2004], we are writing to ask you for your continued involvement with Environment2004 to expose the Bush Administration's anti-environment record and make a difference in the November 2004 elections. *Our highly*

targeted strategy is to focus on persuading swing voters of the true effects of Bush and his allies' anti-environmental policies on their health, jobs, and quality of life. Environment2004 will do this through press conferences, events, public reports, internet, phone, many other activities. Remember, we only need to convince a relatively small number of voters in a few key states to swing them into the Democratic camp in November. (emphasis added).

- Visit www.johnkerry.com and support John Kerry's campaign. We could have no stronger advocate for the environment than Senator Kerry. Contribute, volunteer, and direct your friends and family to Kerry's website.¹¹

These solicitations clearly indicate that the funds received will be used to defeat George W. Bush and elect John Kerry in the 2004 general election through a "highly targeted" campaign focused on a "few key states." Further, these solicitations explain that E04's campaign will convince "swing voters" and "voters who can be moved by our message" to oppose Bush in the 2004 presidential election. As a result, all funds received in response to these solicitations, constituted contributions received by E04. *Survival Education Fund, Inc.*, 65 F.3d at 295.

E04 raised over \$1,200,000, far surpassing the \$1,000 statutory threshold for political committee status. *See* 2 U.S.C. § 431(8)(A). Although information was sought correlating the funds received to specific solicitations, E04 claims that it had no system for tracking contributions and linking them to specific solicitations;¹² however, based on E04's total receipts of \$1,200,000, there can be no doubt that the funds received in response to

¹¹ Although E04's counsel had labeled this solicitation as a "PAC solicitation," there is no mention of E04 PAC in the letter. At her deposition, Christensen testified that this mailing was for member recruitment, but after conferring with counsel suggested that it may have been intended exclusively for E04's "members."

¹² E04 did not use any direct mail vendors who may have tracked the solicitations in a more sophisticated manner. In-house, salaried employees, such as Executive Director Aimee Christensen and the Director of Development Christina Stackpole, conducted most of E04's fundraising.

these solicitations far exceeded \$1,000. Accordingly, based on contributions received, E04 was required to register as a political committee and commence filing disclosure reports with the Commission by no later than its initial receipt of contributions of more than \$1,000 in April 2003.

2. **E04 Exceeded the Statutory Threshold for Expenditures by Spending Over \$1,000 for Express Advocacy**

Under the Commission's regulations, a communication contains express advocacy when it uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" See 11 C.F.R. § 100.22(a); see also *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("*MCFL*") ("[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature.").¹³ Courts have held that "express advocacy also included verbs that exhort one to campaign for, or contribute to, a clearly identified candidate." *FEC v. Christian Coalition*, 52 F. Supp 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley*, 424 U.S. at 44, n.52, included the word "support," in addition to "vote for" or "elect," on its list of examples of express advocacy communication).

¹³ Commission regulations further provide that express advocacy exists where communications contain an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and about which "reasonable minds could not differ as to whether it encourages actions to elect or defeat" a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election. See 11 C.F.R. § 100.22(b).

E04 expressly advocated the election or defeat of clearly identified federal candidates in its fundraising communications. For instance, E04 insisted in one letter that, "This may be our last opportunity to make a difference on November 2nd - and help ensure that environmental leaders like John Kerry get elected. There are only 15 days left and so I write to you today to ask for your help exposing the abysmal record ... Those of us concerned about our environment can and must make a difference in November." In another letter, E04 encourages the reader "to expose the Bush Administration's anti-environment record and make a difference in the November 2004 elections." Another letter expressly solicits contributions for John Kerry's presidential campaign and gives instructions on how to reach the Kerry committee's website to make the contribution. In fact, E04's Executive Director acknowledged in her deposition that "we certainly told people how to get – our members how to get involved, how to volunteer for the Kerry campaign and how to contribute to Kerry. We did that a couple times."

These communications, which are a representative subset of E04 fundraising solicitations, constitute express advocacy under 11 C.F.R. § 100.22(a) because they reference an election and specific candidates, and they urge support for a candidate's election – through voting, campaigning, or contributing. These fundraising letters also constitute express advocacy under 11 C.F.R. § 100.22(a) because they urge the recipient to contribute funds to E04 to get Kerry elected, or in at least one instance, they urge that contributions be made directly to Kerry, both of which constitute "support." See *Christian Coalition*, 52 F. Supp. 2d at 62.

E04's fundraising was primarily conducted in-house by paid staff of E04, using E04's administrative resources. E04 fundraisers, who were paid more than \$100,000, spent considerable time in connection with solicitations that included express advocacy. In addition,

E04 disbursed \$3,050 to the U.S. Postal Service for “postage and shipping” and \$624 to fundraiser Christina Stackpole for “postage” – some portion of these costs also related to express advocacy fundraising communications and should be attributed to the \$1,000 expenditure threshold.

Accordingly, by financing express advocacy communications, E04 made expenditures in excess of \$1,000, which provides a separate and independent basis for concluding that E04 triggered the \$1,000 threshold for political committee status. *See* 2 U.S.C. § 431(4)(A).

3. **E04’s Major Purpose Was Federal Campaign Activity**

The Supreme Court has held that “[t]o fulfill the purposes of the Act” and avoid “reach[ing] groups engaged purely in issue discussion,” only organizations whose major purpose is campaign activity can be considered political committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79; *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) (“*MCFL*”). It is well-settled that an organization can satisfy *Buckley*’s “major purpose” test through sufficient spending on campaign activity. *MCFL*, 479 U.S. at 262-264 (political committee status would be conferred on *MCFL* if its independent spending were to become so extensive that the group’s major purpose may be regarded as campaign activity); *see also Richey v. Tyson*, 120 F. Supp. 2d 1298, 1310, n.11 (S.D. Ala. 2002) (“As a threshold matter, the plaintiffs inaccurately describe the activity to which the major purpose inquiry relates. The plaintiffs describe the relevant major purpose as one to ‘expressly advocate’ a particular election result, while the Supreme Court has described the relevant major purpose (under FECA) as ‘the nomination or election of a candidate,’ or simply ‘campaign activity,’ terms that comfortably reach beyond explicit directions to vote a particular way.”).

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An organization's "major purpose" may also be established through public statements of purpose. *See, e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004) (court found organization evidenced its "major purpose" through its own materials which stated the organization's goal of supporting the election of Republican Party candidates for federal office and through efforts to get prospective donors to consider supporting federal candidates); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("organization's [major] purpose may be evidenced by its public statements of its purpose or by other means. . . .").

E04's statements and activities demonstrate that its major purpose was to defeat George W. Bush. E04 described its mission as a "targeted effort to defeat George W. Bush and his allies in swing states." *See* <http://www.environment2004.org/mission.php>. Its bylaws emphasize that it was formed "to strongly support the eventual Democratic nominees in the 2004 elections" and that "[i]t shall be the policy of E04 to support only Democratic Party candidates in all general elections." E04's campaign efforts were focused on "battleground" states such as Minnesota, Florida, and New Hampshire, and its Executive Director acknowledged that E04's activities were "inextricably linked" to 2004 presidential election. E04 referred repeatedly in fundraising appeals to assuring the defeat of "President George W. Bush and his allies" and also referred to electing "leaders like John Kerry." Consistent with these statements, the funds donated to support E04 paid for an integrated political campaign. In addition to internal overhead devoted to fundraising, E04 hired research, polling and fundraising consultants to prepare its electoral message and used this message to influence the public through billboards, public events, "reports," press conferences, and other materials and activities featuring presidential candidates Kerry or Bush.

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E04 began active operations in October 2003 and did not have any other role with respect to environmental issues, such as lobbying local or federal officials on issues or participating in regulatory rulemakings; nor did E04 encourage citizens to contact elected officials on environmental issues outside the context of the Presidential Election. Indeed, the organization's name, which incorporates the year of the upcoming Presidential election, underscores its electoral intentions. Consistent with its sole purpose for existence, E04 ceased operation immediately after the November 2004 presidential election.

Thus, E04 satisfies *Buckley*'s major purpose test.

4. **E04 Was Not a Valid Membership Organization**

E04 contends that it is organized as a membership organization and that any express advocacy it has engaged in was only done in communication with members, exempting it from the definition of expenditure. 11 C.F.R. § 100.134(a). As explained below, E04 is not entitled to membership organization status.

The membership organization regulations specifically exclude entities that are primarily organized to influence federal elections. *See* 11 C.F.R. § 100.134(e)(6); Definition of "Member" of a Membership Organization, 64 Fed. Reg. 41266, 41268-69 (Jul. 30, 1999). As discussed above, virtually all of E04's solicitations state that E04's purpose is to defeat Bush and elect Kerry, and likewise, E04's activities are also focused on defeating Bush and electing Kerry. Further, the by-laws and mission statement of the organization make clear that it "support[s] only Democratic Party candidates" and maintains a goal to "defeat George W. Bush." Thus, E04 existed primarily to influence federal elections and is ineligible for membership organization status.

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In addition, E04's supporters do not qualify as "members" under the Act. The Commission's regulations limit the definition of "members" to persons who have some significant organizational attachment to the membership organization, such as a significant investment or ownership stake; pay membership dues at least annually, of a specific amount predetermined by the organization; or have a significant organizational attachment to the membership organization that includes affirmation of membership on at least an annual basis and direct participatory rights in the governance of the organization. See 11 C.F.R. § 100.134(f). Because E04 supporters may become "members" simply by providing contact information to the organization and had virtually no right to participate in the organization's governance, they do not meet the regulatory definition of "members."¹⁴

5. E04 Triggered Political Committee Status and had a Duty to Disclose its Receipts and Disbursements and to Comply with the Act's Contribution Limits and Source Prohibitions

Based upon the foregoing, E04 exceeded the \$1,000 threshold for political committee status set forth in 2 U.S.C. § 431(4) by receiving over \$1,000 in contributions in response to fundraising solicitations clearly indicating that the funds received would be targeted to the election or defeat of a clearly identified federal candidate and by making over \$1,000 in expenditures for express advocacy communications. As a result, and because it had the major

¹⁴ "Members" registered by merely filling out an online form requesting standard identification information. By registering, the members were placed on an email distribution list and received infrequent updates on the organization's activities. No participatory rights in the governance of the organization were provided to members such as the ability to vote on the organization's policy agenda or participate in annual meetings, although on one occasion in June 2004, E04 organized a vote for five (of thirty-five) positions on the board of directors. But, it appears that even this governance opportunity, in which only 300 members (or 5% of the membership) participated, was a pro forma exercise in which members may not have realized that they were voting - the email notification regarding the election invited "members" to "confirm our five nominees to the Environment2004 Board of Directors." (emphasis added). Board members had been added to the board both before and after the June 2004 confirmation.

purpose of federal campaign activity, E04 had a duty to register as a political committee with the Commission and disclose its receipts and disbursements to the public through reports filed with the Commission. Because it has not, the Commission finds reason to believe that Environment2004, Inc. violated 2 U.S.C. §§ 433 and 434 by failing to register as a political committee with the Commission and file the required disclosure reports.

As a political committee, E04 must comply with the Act's contribution limits and source restrictions. E04, however, accepted individual contributions in excess of \$5,000, as well as corporate contributions. Accordingly, the Commission finds reason to believe that Environment2004, Inc. violated 2 U.S.C. § 441a(f) by knowingly accepting contributions in excess of \$5,000 and 2 U.S.C. § 441b by knowingly accepting prohibited contributions.

C. ANALYSIS – E04 ACTION FUND

The evidence obtained in the investigation shows that E04 Action Fund also is a political committee under the Act, and as such, is subject to the Act's contribution limitations, source prohibitions, and reporting requirements. *See* 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b.

E04 Action Fund exceeded the statutory threshold for political committee status in two separate ways. First, E04 Action Fund received "contributions" exceeding \$1,000 in response to multiple fundraising solicitations clearly indicating that funds received would be used to help influence the election or defeat of a specific candidate in the 2004 presidential election. Second, E04 Action Fund made more than \$1,000 in "expenditures" for the purpose of influencing the 2004 presidential elections through costs associated with fundraising communications that included express advocacy. As a result of these contributions and expenditures, and because E04 Action Fund has the major purpose of engaging in federal campaign activity, E04 Action Fund

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should have registered as a political committee, disclosed its receipts and disbursements to the public through reports filed with the Commission, and complied with the Act's contribution limitations and prohibitions.

1. **E04 Action Fund Exceeded the Statutory Threshold for Contributions by Receiving over \$1,000 in Response to Solicitations Clearly Indicating that Contributions would be Targeted to the Election or Defeat of a Clearly Identified Candidate for Federal Office**

E04 Action Fund exceeded the \$1,000 statutory threshold for contributions by receiving funds in response to solicitations clearly indicating that the contributions would be targeted to the election or defeat of clearly identified candidates for the office of President. *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995). E04 Action Fund solicitations which were authored by E04 Executive Director Aimee Christensen and E04 Chairman Frank Loy, stated that E04 Action Fund's goal was to defeat George W. Bush and elect John Kerry; and explained how its television advertisements, which were based on messages testing positively in polls, would sway swing voters to Kerry. For example:

- An October 8, 2004 Christensen appeal to David Bonderman, which resulted in a \$50,000 contribution on October 14, 2004, cites favorable poll results with regard to E04 messages reducing support for President Bush, and requests that the recipient "consider a financial contribution to the Environment2004 Action Fund for our TV ads and our billboards in Florida and Wisconsin. These states are on the razor's edge right now, and our messages have demonstrated their effectiveness. *We are confident these additional funds will help us reach and move more voters in these vital states.*" (emphasis added).
- In an October 14, 2004 email, Christensen reports that polling results show "undecided target voters" moving from supporting President Bush to John Kerry and concludes, "*the messages in our TV ads are right on and can move these voters.*" The email then requests "an

additional contribution ... to enable us to [run more ads].” (emphasis added).

- In an October 17, 2004 email, Christensen wrote that “[The Action Fund’s] basic premise is that the Bush/Cheney environmental record is so destructive to our health and quality of life that *if persuadable voters are informed, they will be motivated to vote for Senator Kerry.*” (emphasis added).

These solicitations clearly indicate that the funds received will be used to defeat George W. Bush and elect John Kerry in the 2004 general election through television advertising aimed at “vital states” where polling indicated a close election. Further, specific solicitations, including the examples above, explain exactly how the activities that E04 Action Fund seeks to fund will cause “persuadable voters” and “undecided target voters” to oppose Bush and vote for Kerry in the 2004 presidential election. As a result, all funds received in response to these solicitations constituted contributions received by E04 Action Fund.

E04 Action Fund raised approximately \$500,000, far surpassing the \$1,000 statutory threshold for political committee status. *See* 2 U.S.C. § 431(8)(A). Although asked for information correlating the funds received to specific solicitations, E04 Action Fund claims that it had no system for tracking contributions and linking them to specific solicitations;¹⁵ however, based on E04 Action Fund’s total receipts, there can be no doubt that the funds received in response to these solicitations far exceeded \$1,000. Accordingly, based on contributions received, E04 Action Fund was required to register as a political committee and commence filing disclosure reports with the Commission by no later than its initial receipt of contributions of more than \$1,000 in July 2004.

¹⁵ One of the sample solicitations cited in this Analysis, sent to David Bonderman, did appear to result in a \$50,000 contribution. E04 Action Fund did not use any direct mail vendors who may have tracked the solicitations in a more sophisticated manner. In-house, salaried employees conducted most of E04 Action Fund’s fundraising.

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2. E04 Action Fund Exceeded the Statutory Threshold for Expenditures by Spending Over \$1,000 for Express Advocacy Communications

E04 Action Fund exceeded the \$1,000 statutory threshold for expenditures by making disbursements related to fundraising communications containing express advocacy which it distributed to the public. For instance, E04 Action Fund stated in one letter that it sought "to make a difference November 2nd" and repeatedly claimed throughout its correspondence to donors that it would convince undecided voters to vote for Kerry. These letters asked for donations to E04 Action Fund to fund television advertising designed to elect Kerry. Many of these E04 Action Fund's fundraising letters contain express advocacy under 11 C.F.R. § 100.22(a) because they reference an election and specific candidates, and they urge support for a candidate's election – through voting, campaigning, or contributing. These letters urge the recipient to contribute funds towards the goal of Kerry's election, which is a manner of "support." *Christian Coalition*, 52 F. Supp 2d at 62.

Disbursements for direct and indirect costs related to such communications constitute expenditures under the Act. The costs of these express advocacy communications include the indirect costs of prorated salaries and office expenses. E04 Action Fund did not incur any administrative costs directly, since it was operating from E04's offices, but it did reimburse E04 approximately \$30,000 for the use of E04's administrative support.

Accordingly, by financing express advocacy communications, E04 Action Fund made expenditures in excess of \$1,000, which provides a separate and independent basis for concluding that E04 Action Fund triggered the \$1,000 threshold for political committee status.

3. E04 Action Fund's Major Purpose was Federal Campaign Activity

Like E04, E04 Action Fund, which only operated between July and November of 2004, had federal campaign activity as its major purpose. E04 Executive Director Aimee Christensen handled day-to-day operations of E04 Action Fund, and Frank Loy served as the Chairman/President of both organizations. Further, the two 527s operated from the same offices, shared a website,¹⁶ and solicited funds from the same donor base. In correspondence from Christensen or Loy to potential donors, they referenced the two organizations interchangeably, blurring any lines that may have existed between them. For example, in one Christensen email regarding "Request re: Environment2004 billboards and TV ads," she identifies herself as E04's Executive Director and, while in the process of requesting a contribution to the E04 Action Fund, describes E04's purpose and activities.¹⁷ Thus, much of the evidence demonstrating that E04's major purpose was campaign activity can also be ascribed to the E04 Action Fund.

In addition, E04 Action Fund's own statements and activities show that its major purpose was to elect John Kerry and defeat George W. Bush. See *MCFL*, 479 U.S. at 262-264, *Malenick*, 310 F. Supp. 2d at 234-36. For instance, E04 Action Fund solicitations, prepared by the same fundraisers who wrote E04's materials, stressed the organization's "basic premise" to motivate "persuadable voters" "to vote for Senator Kerry." In its filings with the IRS, E04 Action Fund described its purpose as being: "to undertake voter mobilization activities and

¹⁶ Although a website domain was assigned to the E04 Action Fund, at www.environment2004actionfund.org, this site contained very limited information (one page of background information about the organization) and is identical to the site located at www.environment2004.org/actionfund. Items such as press releases concerning E04 Action Fund activities were published exclusively on the E04 website. Files containing footage of E04 Action Fund television advertising were posted on the E04 website, although they could also be accessed through a link from the E04 Action Fund's website.

¹⁷ The correspondence later cites to "our TV ads in Florida," implying that these are E04-sponsored commercials, when in fact the E04 Action Fund paid for them. The request also suggests a contribution to the E04 Action Fund for billboards (and TV ads), even though it was E04 that paid for billboards, not the E04 Action Fund.

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inform and engage the public about environmental issues and the environmental position of the candidate, officeholders, and political parties.” The E04 website describes E04 Action Fund’s purpose with more particularity, as “dedicated to educating voters about the importance of environmental protection in *this upcoming election*” and noting that E04 Action Fund intends “to expose the destructive environmental agenda of the Bush administration and its allies in *key swing states.*” www.environment2004.org/actionfund (emphasis added).

Finally, E04 Action Fund’s spending and activities demonstrate that its purpose was federal election activity. E04 Action Fund spent over 80% of its budget funding television and print advertising attacking George W. Bush or supporting John Kerry. These ads were targeted to battleground states and broadcast in the weeks before the election. As with E04, E04 Action Fund engaged only in activities related to the elections, and it ceased operating immediately after the November 2004 presidential election.

Thus, E04 Action Fund satisfies *Buckley*’s major purpose test.

4. **E04 Action Fund Triggered Political Committee Status and had a Duty to Disclose its Receipts and Disbursements and to Comply with the Act’s Contribution Limits**

Based upon the foregoing, E04 Action Fund exceeded the \$1,000 threshold for political committee status set forth in 2 U.S.C. § 431(4) by (1) receiving over \$1,000 in contributions in response to fundraising solicitations clearly indicating that the funds received would be targeted to the election or defeat of a clearly identified federal candidate and (2) by making over \$1,000 in expenditures for communications containing express advocacy. As a result, and because it had the major purpose of federal campaign activity, E04 Action Fund had a duty to register as a political committee with the Commission and disclose its receipts and disbursements to the

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public through reports filed with the Commission. The Commission finds reason to believe that Environment2004 Action Fund violated 2 U.S.C. §§ 433 and 434 by failing to register as a political committee with the Commission and file the required disclosure reports.

As a political committee, E04 Action Fund must comply with the Act's contribution limits and source restrictions. Because it accepted individual contributions in excess of \$5,000, the Commission finds reason to believe that Environment2004 Action Fund violated 2 U.S.C. § 441a(f) by knowingly accepting contributions in excess of \$5,000.

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