NORTHWEST DEFENSE

The Newsletter of the Northwest Environmental Defense Center

SPRING 2004

CLEAN AIR ACT MONITORING LAWSUIT

NEDC recently joined six other environmental groups challenging the Environmental Protection Agency's (EPA) "reinterpretation" of its monitoring regulations. The new interpretation essentially does away with EPA's authority to require monitoring under the Title V permit program of the Clean Air Act.

The Environmental Integrity Project, the lead plaintiff, was founded by Eric Schaeffer in March 2002. Until 2002, Schaeffer directed EPA's Office of Regulatory Enforcement. He resigned that position due to frustration with the Bush Administration's efforts to weaken the Clean Air Act and other environmental laws. The other five groups involved in the suit are the Sierra Club, Natural Resources Defense Council, Physicians for Social Responsibility, Clean Air Council, and Our Children's Earth Foundation.

The new monitoring interpretation would apply to all facilities required to obtain a Title V operating permit. EPA previously interpreted its monitoring rules as giving it the authority to require monitoring sufficient to assure compliance with the Act. Now, pursuant to a settlement with the United Air Regulatory Group (UARG), an industry coalition, EPA wants to reinterpret its rules. This settlement is, by the way, pursuant to a suit that is identical to one that was recently thrown out of court for lack of standing and ripeness by the D.C. Circuit. Now, rather than challenging UARG's authority to bring the suit, EPA settled with the industry group by issuing this new interpretation. EPA's current position is that it's authority is limited to requiring industry monitoring only once or more during the five year life of a permit

If a facility only monitors its emissions once or twice during the five year life of its permit, there is a tendency for it to do so just after the emissions control equipment has been properly adjusted. At that point, the equipment is operating at optimum performance, and emissions will typically be within the permit's requirements. However, the equipment can malfunction at any time. Theoretically, this could occur the day after the equipment was calibrated and the facility could then operate in violation of its permit without any detection of that violation until the next monitoring requirement. In all likelihood, the malfunction would not occur the next day, but malfunctions do commonly occur. Under the new rule, the detection time will be significantly longer, allowing substantially more air pollution to enter the atmosphere before the malfunction is corrected.

Our suit alleges that this is contrary to the plain language of the Clean Air Act. The 1990 amendments to the Act allowed for enhanced monitoring requirements and the submission of compliance certifications. The Act states that these monitoring requirements and compliance certifications are mandatory for facilities that operate under the Title V program, and are optional for all other facilities. The monitoring amendment was added because Congress recognized that the previous provisions of the Act were insufficient to remedy the nation's existing air pollution problems, largely due to the failure to require sufficient monitoring.

Essentially, EPA's actions will send us back to the pre-1990 monitoring system, which only required a one-time stack test at start-up of the facility. Its new interpretation is that "enhanced monitoring," required by the 1990 amendments, only means monitoring more than once during the five year life of the permit.

NEDC's standing is based upon its comments in the renewal of the Title V permit for the Wah Chang facility in Millersburg, Oregon. In those comments, NEDC requested a daily monitoring schedule on one of the stacks because the facility had a history of violations. We requested enhanced monitoring to determine the extent of the violations at the facility. Also, other stacks at the same facility were required to perform monthly or quarterly monitoring. Oregon's Department of Environmental Quality granted our request, and it is now contained in the permit. If EPA's new interpretation goes into effect, frequent monitoring will no longer be possible.

In order to issue an interpretation with such a significant change of course, EPA is normally required to undergo formal rulemaking, subject public notice and comment requirements. However, EPA effectively allowed industry to rewrite the rules. A similar self-policing program for polluters was instituted in Texas under then Governor Bush. Texas then gained the distinction of having the dirtiest air in the nation. We will keep you posted on the progress of the suit.

~Dona Hippert

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SLOUGHIN' IT: THE JOY OF "RECREATIONAL ENFORCEMENT" IN THE COLUMBIA SLOUGH

Let's go boatin' . . . in the city. In order to clock out from their day jobs, most Portland area boaters drift in their internal combustion monsters to put-ins well away from the city limits. But wait: there is plenty of boatin' in Portland! And you don't need to leave your day job.

Located in North Portland, the Columbia Slough (Slough) is the humble martyr for our twenty-first century lives. Most folks cannot imagine an escape from the North Portland industry, outside of skippin' town. But the Slough provides a beautiful inner-city paddle. Just don't fall in.

NEDC Executive Director Mark Riskedahl and several NEDC student volunteers had the chance to enjoy the fruits of the Slough throughout the winter. These NEDC urban adventurers had more on their minds than just enjoying the bald eagles, blue herons, and rich riparian vegetation. They were also on a mission to gather data concerning Clean Water Act noncompliance.

Whereas many bemoan the rain and change their recreational plans because of it, NEDC takes the opposite approach. The more rain, the better-at least for gathering data for permit violations. Therefore, almost every time rain was in the forecast this winter, Mark would zap an enthusiastic email asking who wanted to 'slough it' for the afternoon. A motley bunch would inevitably show their faces at the Columbia Slough Watershed Council office, decked out in raingear. The group would drift along the serene waterway and take samples. They tested the turbidity levels on site and took other samples to a lab for more testing. They found various polluters greatly exceeding turbidity and practically every other permit benchmark, including lead and *E. coli*. Over a few months, the group gathered data and thankfully never fell into the soup. Recently, the group used the data to send out a pair of sixty-day notices. This spring and summer, NEDC will be actively "encouraging" the polluters to make the basic but necessary changes to their stormwater runoff systems in order to keep the toxics out of the Slough by the time the rains begin again next fall.

Wanna go boatin' yourself and help revitalize this picturesque inner-city treasure? Begin with some research at DEQ. Or just take a drift on the Slough with your eyes open. Remember, it's handy to have some marking tape and a GPS device. These will help you find the outfalls again and will aid in your research of the outfalls' owners. Also, take detailed notes, use proper sampling procedure, and bring a camera so you can show all your friends. Enjoy the inner-city paddle. The Slough and its resilient wildlife thanks you.

If you need any more assistance for your recreational enforcement trip, feel free to contact NEDC.

~Geoff Evans

A LIVING LEGACY

NEDC is assisting the Western Rivers Conservancy to restore valuable floodplain habitat along the Willamette River. With seventy percent of Oregon's population residing in the Willamette Valley, the floodplain has become a nearly uniform landscape of tilled acres and urban centers. As a result, flood events have increased in frequency and severity, while the diversity of habitat and wildlife has dwindled. However, opportunities exist to restore portions of the river's former floodplain, enhance fish and wildlife habitat, and reduce the severity of flood events. One such area is the Luckiamute River confluence, where the Western Rivers Conservancy has purchased two properties totaling 312 acres with over a mile of river frontage. Funding for the acquisitions came from NEDC, the North American Wetlands Conservation Act, and the Oregon Watershed Enhancement Board.

NEDC secured funding for the project through a Clean Water Act lawsuit settlement with the Blue Heron Paper Company, negotiated by attorney Brent Foster. A court order required Blue Heron to provide funding for Willamette River preservation efforts. The Oregon Department of Parks and Recreation now owns and manages the two properties as part of the Luckiamute Landing Natural Area. According to local habitat biologists, the property contains one of the best "gallery" forest stands of Oregon ash, black cottonwood, and oak remaining in the Willamette Valley. Please contact Mark at msr@nedc.org to arrange a visit to the area.

AIR & TOXICS

Let's get the negative stuff out of the way. After three years at Lewis and Clark, I've taken a lot of environmental law courses and experienced the day-to-day practice of pollution control environmental law (in NEDC, PEAC, and the EPA). I've undertaken more intellectually demanding challenges and endeavors which required a far more Spartan lifestyle. But I've never done anything as tiring as practicing environmental law. I don't mean to imply that there aren't good times, but my day-to-day experience of working the the CAA, CWA, and RCRA is full of plodding acts of sheer will. Maybe it's just me. Few professions can match the practice of environmental law for effort devoid of enjoyment. According to Jason Giambi, I shouldn't be doing environmental law at all. He says that you shouldn't choose a career doing something because it is the right thing to do, but because you enjoy doing it. That's generally good advice. So what is the pay-off?

One reason I find environmental law rewarding is that it is a fundamental social battleground. Entrenched polluting industries and forces tirelessly attack the perimeter fence of environmental regulation that has been built around them. They hatch bold schemes to tunnel underneath. They chip away little gaps on a thousand fronts. Public interest environmental lawyers, daily take upon themselves the less than glorious task of plugging those holes, of maintaining the fence line integrity. Perhaps that is why environmental law is often so tedious. It is all about loopholes.

The result of maintaining an airtight perimeter is that internal pressure is allowed to build in the market to a point where it becomes transformative. Instead of leaking out the sides, the pressure is applied to generating alternative, more sustainable ways of doing business. However, the exciting part is not the new economic opportunities, but the potential for ethical transformation, for true human freedom. Individuals experience moments of deeply felt satisfaction, immediate knowledge of what makes life so worthwhile. But it is the rare person who can sustain that knowledge enmeshed in a world created by cruel and careless gods. I, for one, cannot. Yet who knows what pureland of possibilities may await us if we emerge from that crucible having traded two car garages and meat 6 days a week for a primeval type of faith that makes sustained knowledge of the good and responsibility as easy as breathing. ~Eric Walts

LANDS & WILDLIFE

Lands and Wildlife members, commented on a host of natural resource management projects this semester, including numerous projects proposed through the Forest Service's Categorical Exclusion (CE) authority. CEs provide an exemption from the National Environmental Policy Act's (NEPA) requirement that the agency fully analyze a project's environmental effects. The CE authority is intended for types of projects that have no effect on the environment, such as mowing the ranger station's lawn.

The Bush Administration has decided CEs should be used for another purpose—avoiding NEPA analysis for large, controversial, and ecologically damaging projects. The Administration's new CE regulations permit and encourage the agency to use CE's for 1,000 acre hazardous fuel reduction projects. Under these regulations, the agency can circumvent NEPA and public review of sizable timber sales by producing only a vague scoping notice describing the project and its effects in a single page.

NEDC students commented on proposals to use the CE authority for a number of large projects, including three thinning projects, two located in protected Late Successional Reserves. The Rogue River-Siskiyou National Forests proposed to issue special use permits to two separate Off-Road Vehicle races through the forest, using CEs. The most egregious CE proposal was a 250 acre post-fire salvage sale in a Roadless Area adjacent to the Mount Jefferson Wilderness that contains critical habitat for the federally-listed Northern Spotted Owl. NEDC will continue to follow these projects to ensure that the Administration does not use the regulations to avoid environmental analysis for other environmentally damaging proposals. ~Sarah Uhlemann

WATER & WETLANDS

This spring semester, Water & Wetlands altered its group meeting format. For the first half of the semester, the group hosted speakers from a variety of organizations at each weekly meeting, in lieu of alternating between the weekly project meetings and speakers. This gave NEDC students an increased involvement opportunity with off-campus environmental organizations. Through W&W speakers, students became involved with organizations including Oceana, Friends of the Columbia River Gorge, and Northwest Environmental Advocates, enabling students to work on a broad range of issues of concern to local communities.

The spring semester also saw NEDC students achieve noteworthy success. John Randall working with Friends of the Columbia River Gorge, submitted a letter on behalf of NEDC opposing a Columbia River Gorge Commission's proposal allowing the destruction of stream buffers in the Gorge. Stream buffers are ecologically important for productive habitat areas and water quality integrity. After receiving feedback from NEDC and Friends of the Columbia River Gorge, the Commission voted to eliminate consideration of this detrimental proposal.

Jessica Pendergrass and James Murphy commented on a proposed wastewater discharge permit for the City of Coquille's sewage treatment plant. In response to their concerns, Oregon DEQ eliminated a permit condition allowing the facility to discharge pollutants into the river in acutely toxic concentrations. DEQ also required the facility to monitor for chlorophyll-A, a pollutant found in the facility's discharge that was not previously monitored or sampled. Finally, in response to concerns raised over the discharge of heated wastewater and its effect on aquatic organisms, DEQ required the facility to evaluate and implement temperature reduction strategies.

Other NEDC students recently submitted comments on a variety of proposed activities, and are waiting the agency response. Erin Uhlemann commented on a new discharge permit for Bonneville Dam. Concern over the Army Corps of Engineers' operation of the Columbia River dam system has increased as a result of recurring oil spills into the Columbia River. Chris Mixson and Maja Haium submitted comments on the City of Molala's wastewater treatment system, a facility with over 113 fecal coliform and temperature violations in the past few years.

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Water, Continued from Page 3...

In sum, W&W's had a great year; a direct result of all the hard work and dedicated students. The students who helped and participated in W&W is too long to list, but the project coordinators would like to offer a general "thank you—you all kick ass" to all the students who helped make this such a great year. We hope everyone has an enjoyable and relaxing summer, you all earned it. In closing, if anyone is looking for a summertime water project, you know where to find us. ~Alex Fidis

Letter from the Executive Director:

NEDC continues to focus a considerable amount of its resources on protecting and restoring precious rivers and streams throughout the Pacific Northwest. In the past several months, we have resolved numerous Clean Water Act lawsuits against polluters across Washington and Oregon. Corporate wrong-doers, in each of these cases, have cleaned up their act and agreed to contribute thousands of dollars in mitigation payments towards watershed restoration and environmental educational efforts.

The deterrent effect of our approach is undeniable. We are proud to report that recent file review has shown that the Clean Water Act permit compliance rate achieved over the last four years at facilities against which we initiated litigation is 100 percent. This stands in stark contrast to EPA estimates over the past decade of nation-wide permit compliance rates which typically range between 45-65 percent. NEDC aggressively demands and obtains compliance with the law, though we have been doing so in an increasingly collaborative fashion.

When corporate polluters are called to task for their illegal activity, they typically respond with one of two approaches: either denial or willingness to accept accountability. One of the biggest hurdles we face in the dispute resolution process is getting stubborn violators past the point of denial into a position of willing cooperation. NEDC's thoroughly considered approach to potential litigation, coupled with the uncompromising protectiveness of the Clean Water Act, provide us with a strong upper hand in the negotiation process. Our solid track record enables us to stress that all we want is compliance with the law, and compliance is what we will achieve. It is up to the polluter whether compliance will be arrived at willingly or through the time-consuming, stressful, and extremely costly process of protracted litigation.

Dozens of law students have gone on file review field trips, site visits, and even water quality monitoring trips over the past academic year in our process of building Clean Water Act lawsuits against polluters. These hands-on opportunities are valuable learning tools, and are also crucial to NEDC's important work. Thanks to all the students who make NEDC such a dynamic and effective organization, and thanks as well to our supporting members across the country. Your generous donations enable us to fight for cleaner water throughout the region, and will assist us this summer as we move to extend the protections of the Clean Water Act into the upper reaches of Wild and Scenic Rivers such as the Chetco, Illinois, and North Fork of the John Day harmed by unregulated gold mining activity.

~Mark Riskedahl

Announcing NEDC's 2004-2005 Staff

The following is NEDC's recently selected 2004-2005 staff:

Student Directors:
Sarah Uhlemann
Jon Randall

Law Clerk:
Chris Mixson

Land & Wildlife Coordinators:
Chaitna Sinha
Mary Godwin
Alexander Hays (Ti)

Water & Wetland Coordinator:
Ian Boisvert

Air & Toxics Coordinator:
Alex Fidis

Also, a huge thanks to this years wonderful staff!! A special thanks is extended to Scott Nicoll, Erin Madden, and Eric Walts, who are taking the giant leap from the academic to the "real" world. Their presence will be greatly missed, and we thank them for three years of awesome NEDC dedication. Good luck!!

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