

NORTHWEST DEFENSE

The Newsletter of the Northwest Environmental Defense Center

Winter 2013

Photo by Mark Riskedahl

CRC: THE ZOMBIE MEGA-PROJECT

On June 29, 2013, Oregon Governor John Kitzhaber declared that because Washington had failed to approve its share of the funding for the Columbia River Crossing mega-project, the CRC staff would “close down the project.” The next day, the project managers informed project staff that both governors had instructed them “to develop and implement a plan to close down the project, effective immediately.” They sent out stop work orders to many project consultants and partners, and announced that “the Columbia River Crossing Project is closing down.” The CRC was pronounced dead.

As it turned out, the reports of the CRC’s death were exaggerated. Instead, Governor Kitzhaber has floated a new plan to revive at least a portion of the currently suspended project. This “Oregon only” option, which has a host of problems and faces too many hurdles to discuss here, has left NEDC with no choice but to continue its fight to halt this mega-project before it irreversibly alters the landscape of the Columbia River, the Columbia Slough and Hayden Island.

In 2012, along with our partners Coalition for a Livable Future and the Northeast Coalition of Neighborhoods, and represented by Earthrise Law Center, we challenged the CRC project in federal court alleging violations of the National

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PROTECTING FLOODPLAINS

BY NEDC STAFF ATTORNEY ANDREW HAWLEY

Intact floodplains provide critical flood storage capacity, protect water quality, and provide habitat for fish and wildlife. Preserving and restoring these vitally important areas is essential, both for the protection of imperiled species, and for the protection of human health and safety.

In 2010, NEDC, along with several partner organizations, reached a settlement with the Federal Emergency Management Agency resolving a lawsuit over FEMA’s duties under the Endangered Species Act. The litigation centered on FEMA’s

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DEVELOPING AND TRANSPORTING DIRTY OIL

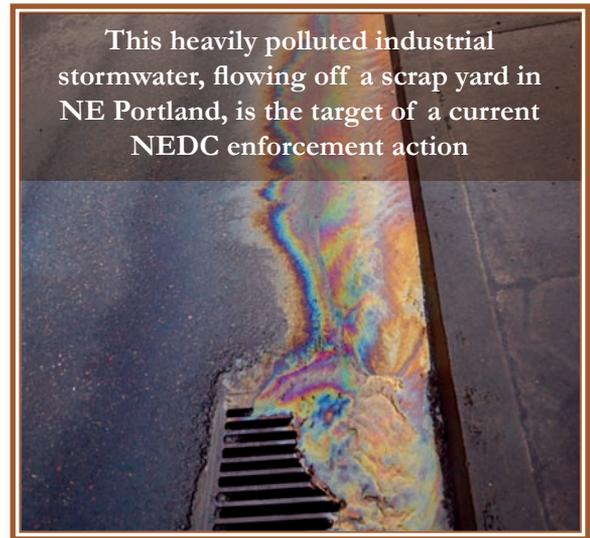
BY NEDC'S LEGAL FELLOW MARLA NELSON

This summer the Port of Vancouver Washington's Board of Commissioners voted to approve a lease to Tesoro-Savage, to build and operate a crude oil by rail transit terminal adjacent to the Columbia River. NEDC, along with Columbia Riverkeeper and the Sierra Club, challenged the Commissioners' process as violating Washington's Open Public Meetings Act, alleging that the Commissioners improperly deliberated and made the final lease decision during a closed-door executive session.

As that legal battle continues, the project is also undergoing review in front of Washington's Energy Facility Siting Evaluation Council (EFSEC) for construction and operation of the crude oil terminal. If approved, this would become the largest oil by rail project in the Northwest. With the capacity to receive over 360,000 barrels of crude daily, the facility would be nearly half the size of the Keystone XL pipeline. Major concerns about the proposed terminal include the associated induced demand for such oil as well as climate change impacts resulting from the export of massive amounts of oil to foreign countries.

Beyond the propriety of foreign export and climate change policy choices, there are also crucial questions about safety. In the wake of the tragic rail accident at Lac Megantic, Canada, which resulted in 47 deaths, the dangers of

This heavily polluted industrial stormwater, flowing off a scrap yard in NE Portland, is the target of a current NEDC enforcement action



transporting crude oil by rail have become ever more apparent. Sending crude by rail increases the risks to public health and the environment by, among other things, creating a greater risk of oil spills along both the railways and waterways (specifically, the Columbia River), causing traffic delays due to increased rail use, and delaying emergency response times.

NEDC is tracking Tesoro-Savage's application to EFSEC and submitted comments regarding the scope of EFSEC's environmental analysis in November. Based on the assessment of environmental impacts under Washington's State Environmental Policy Act (SEPA) and other siting certification requirements, EFSEC will make a recommendation to Governor Inslee, who ultimately holds the power to approve or deny the facility.

REFLECTIONS ON WESTWIND

BY NEDC STUDENT DIRECTOR JORDAN SCHOONOVER

NEDC's annual Westwind retreat took place on October 18th–20th this year. Warm sunny weather during the day and a full moon at night made for a beautiful weekend, as NEDC's board members, staff, student volunteers, and alumni gathered at the Oregon Coast. Attendees enjoyed delicious, organic

food all weekend, including Executive Director Mark Riskedahl's Egyptian lentil soup and former Law Clerk Laura Kerr's black bean chili, which were both crowd-pleasers.

We were honored to be joined by several distinguished environmental attorneys who
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COMPLIANCE SEMINARS

BY NEDC'S LEGAL FELLOW MARLA NELSON

Environmental litigation under our nation's pollution control statutes, and specifically the Clean Water Act, focuses on addressing pollution problems that are ongoing. Much of NEDC's work is thus reactionary in nature. In an effort to augment that approach, NEDC has recently been working to prevent stormwater pollution before it starts through educational seminars and written guidance.

On August 7th at Gonzaga Law School in Spokane, Washington, and November 5th in Kelso, Washington, NEDC hosted "Rain Ops" seminars. These seminars are directed at industrial stormwater dischargers, and speakers have included a broad mix of academic, regulatory, and consulting professionals, such as Dan Mensher, Associate Clinical Professor of Law at Earthrise Law Center, Lisa Rozmyn of the Washington Stormwater Center, and Jeff Killelea from Washington's Department of Ecology.

The goal is to provide an understanding of the legal and regulatory framework under the Clean Water Act to the regulated community, highlight critical aspects of Washington's and Oregon's industrial stormwater discharge permits, and supply resources for achieving compliance. Because permit compliance tends to require permittees to prevent or reduce the pollutant concentrations in stormwater discharges, the seminars highlight best management practices.

*"Without a beginning, there is nothing to worry about the end."
- Buddhist saying at Wat Phra Singh,
Chiang Mai Thailand*

Essential to the success of the "Rain Ops" project has been funding that resulted from settlement in an environmental enforcement action by Columbia RiverKeeper. Under a supplemental environmental project (SEP), an alleged violator may voluntarily agree to undertake or fund an environmentally beneficial project related to the violation in exchange for mitigation of the penalty to be paid. In this case, the alleged violator agreed to fund a SEP for an environmental compliance promotion project to reduce stormwater pollutants in the Columbia River basin. Collaborating with Earthrise Law Center, NEDC is implementing "Rain Ops" to achieve that purpose.

In addition to the seminars, Lewis and Clark Law School and Gonzaga Law School student volunteers have also been developing a Clean Water Act permit guide to assist permittees in navigating the various permit requirements. A final draft is expected before the final seminar, which will be hosted at the Lewis and Clark Law School campus in the Spring of 2014. We hope that the guide will become a useful tool for permittees in reducing stormwater pollution at the source, thereby reducing the need to worry about, or be subject to enforcement against, such discharges at the end of pipes.



Photo by Jordan Schoonover

(Reflections on Westwind...Continued from page 2)

spoke about their work—Courtney Johnson and Maura Fahey from Crag, Tom Buchelle from Earthrise, Tanya Sanerib from the Center for Biological Diversity, Laurie Rule from Advocates for the West, Stephanie Parent from Oregon DOJ, and alumni Lizzy Zultoski, Marcel Gesmundo, and Lori Ann Burd, who discussed "Life After Law School."

Other weekend activities included yoga, a birding hike, a tide pool hike, ultimate frisbee on the beach, a talent show, and a musical performance by the Strangled Darlings. Good times were had by all! If you were unable to attend Westwind this year, ***we hope you will be able to join us October 17-19, 2014!***

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SUCTION DREDGE GOLD MINING: OUT OF COURT BUT NOT OUT OF MIND

This spring, Oregon's legislature recognized that "[m]ining that uses motorized equipment in the beds and banks of the rivers of Oregon can pose significant risks to Oregon's natural resources, including fish and other wildlife, riparian areas, [and] water quality," in addition to other impacts. See Senate Bill 838, Section 1(4). For example, discharges from dredging create plumes of sediment that can stretch over a mile downstream, covering benthic organisms and disturbing natural habitats. Suction dredging discharges mercury-laden sediments at hazardous levels, re-suspending those sediments in the water column. By dislodging streambed sediment and gravel to locate gold, suction dredging significantly alters the natural transportation and deposition of sediment within a stream, thereby negatively impacting water quality and surrounding riparian habitat. Finally, dredging adversely impacts federally listed salmon, bull trout, and their habitat.

In 2010, NEDC reported on the rise of suction dredge gold mining in Oregon as a result of California's moratorium. See Northwest Defense (Fall 2010) Suction Dredge Gold Mining: Back in Court, page 5. Those numbers have continued to rise, with many of the miners coming from out of state.

Also in 2010, NEDC and various other environmental group plaintiffs challenged the 700-PM suction dredge discharge permit issued by Oregon's Department of Environmental Quality (DEQ). Since that time, the groups reached a settlement agreement with DEQ requiring the agency to, inter alia, hold stakeholder meetings before the renewal process for the next permit iteration and to consider specific, more protective, permit terms.



Although NEDC is not involved in ongoing litigation on the subject, the saga of regulating suction dredge gold mining in Oregon is far from over. First, DEQ held its first round of stakeholder meetings this fall at three locations around the state. We will also be participating in a second round of meetings this December.

Second, a collaboration of environmental groups worked diligently in Salem during this spring's 2013 legislative session to garner support for two bills. Senate Bill 401, which did not pass, sought to improve protection of Oregon's streams and rivers by designating hundreds of miles of those waters as State Scenic Waterways. Mining with motorized equipment is prohibited in state scenic waterways. The success story, Senate Bill 838, directs Governor Kitzhaber to establish a work group that will, over the next year, develop and propose a regulatory process to control suction dredge mining within Oregon.

Senate Bill 838 also creates new restrictions for mining with motorized equipment in Oregon and limits the Department of State Lands (DSL) to issuing no more than 850 permits and authorizations for such mining. This fall, DSL proposed rulemaking to implement the new restrictions and 850 permit limit. NEDC and numerous environmental groups submitted comments on those rules.

As the various state entities struggle to respond to the growing threat suction dredging poses to Oregon's waters, NEDC will continue to offer creative regulatory solutions and push for more protective measures.

(CRC: The Zombie Mega-Project...Continued from page 1)

Environmental Policy Act and the Endangered Species Act. Specifically, we believe that the project will have significant, irreversible impacts on the landscape both during construction and once the bridge is completed. From the near-decade of in-water construction work that has the potential to harm generations of salmon, to the massive amounts of polluted stormwater runoff that will be directed off the bridge towards the

Columbia Slough, the CRC will do little to alleviate traffic congestion problems, but will certainly impact some of our most sensitive and at risk resources.

In addition to this litigation, NEDC has been actively involved in working to highlight the many risks from the project to various state and federal agencies charged with protecting our natural resources. In that effort, just this year alone NEDC has written nine separate

comment letters, raising issues over water quality, species impacts, the destruction of wetlands, project alternatives, and the public interests at stake with this project.

We are hopeful that these efforts will ultimately result in the CRC's demise and a shift towards a well-thought-out plan that will both address the region's ongoing transportation challenges and protect our region's invaluable natural resources.

PROJECT GROUPS

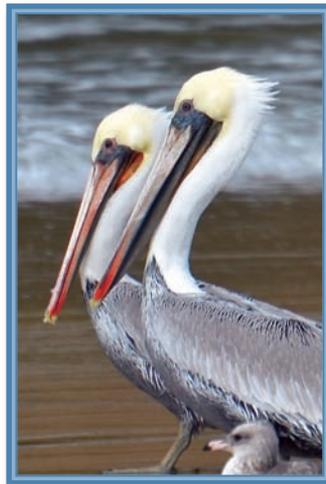
Air

With new power plants and fossil fuel export terminals being proposed in large numbers across the Northwest, NEDC's Air Group has no shortage of projects to work on this year. Fortunately, we have an enthusiastic and dedicated group of student volunteers. We are now writing our second comment of the year to DEQ pushing for stronger permits and regulation of new natural gas plants. We are also working with NEDC's Legal Fellow, the Lands & Wildlife Group, and the Water Group to jointly submit NEPA scoping comments on the Millennium bulk export terminal, which could allow millions of tons of coal to be exported to Asia every year.

Given Oregon's quickly increasing population, we are also researching the future of Oregon's energy needs to assess how future power production taken as a whole will impact air quality. We are working with attorneys at Earthrise, Neighbors for Clean Air, and other public interest minded individuals to compile a white paper to highlight the ways that Oregon's air quality program has been successful and ways that it can be improved. And finally, air group is investigating crematorium emissions that made headlines numerous times this year to lay the groundwork for a formal petition to DEQ for stronger oversight in this area. We are looking forward to staying engaged on these and other issues throughout the year!

Lands & Wildlife

Our first opportunity to comment this year came when an association of Hawaiian fishermen petitioned to have the North Pacific population of humpback whale delisted from the Endangered Species Act. The National Marine Fisheries Service promptly commenced a review of the status of that population and NEDC responded that any such delisting would be premature; highlighting the threats the species continues to face in the Pacific and throughout its range. Our comments discussed the importance of meeting the goals set out in the species' recovery plan in 1991, as well as the fact that the threats discussed in that plan—ship strikes, fishing entanglements, and anthropogenic sound disturbances—continue to affect these whales. We emphasized, too, that climate change and ocean acidification will create new challenges for the species to face in its struggle for survival.



The Lands & Wildlife Group has also been busy commenting on a proposal to place a large scale coal processing terminal along the Columbia River in Washington State. The project is currently at the scoping stage of NEPA and, as such, NEDC's comments have focused on potential direct and indirect impacts to local species and wildlife in the area. The aim of these comments is to force the Army Corps of Engineers to adequately address these potential effects and potential mitigation strategies to avoid harm in their required Environmental Impact Statement regarding the project.

Sustainable Agriculture

The Sustainable Agriculture group submitted a comment to the EPA Office of Pesticide Programs asking that EPA perform the proper NEPA and FIFRA analyses on an experimental use permit (EUP) that would allow baiting feral hogs with Warfarin poison on approximately 2,000 acres in Texas. Warfarin is a common rat poison and anti-coagulant that slowly accumulates and eventually kills the animal. While this action was not a local one, this EUP would represent the first use of Warfarin on feral hogs, which are present in portions of the Northwest. This practice poses many important concerns, including exposure of non-target species to Warfarin and human consumption of poisoned hogs.

On September 30, the group also hosted a blind taste test to gauge students' ability to distinguish natural foods from GMOs or other artificial foods. Students were given small samples of foods and drinks—one natural/organic and one artificial/conventional—and indicated which of each they believed were organic. The results were mostly positive: a majority correctly distinguished tomatoes, apples, red peppers, peanut butter, and apple juice. Strawberries, chocolate, and grapefruit soda were also used.

Water

Water Group has used the greater part of its time this semester formulating scoping comments for the proposed Millennium Bulk Terminal in Longview, Washington. The group's 1L student volunteers have identified several important water quality-related issues surrounding the project, and are working to ensure these issues are taken into consideration as the permitting process moves forward. In addition to providing written comments on the EIS, several members of Water Group attended a public hearing on the terminal in Vancouver where they had the opportunity to provide oral comments on the

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MY SUMMER EXPERIENCE



Corey Moffat

Last summer I interned with the Enviro Legal Defense Firm (ELDF) in Delhi, India. Organized through the Global Law Department at Lewis & Clark, this was a tremendous opportunity to gain first hand experience practicing environmental law in a foreign country. ELDF

maintains a broad environmental practice and over the course of my internship I was able to work on a number of different projects including the regulation of industrial development in the Bhagirathi River Valley (brought to light by the tragedy of recent flooding), the attempt to protect elephant corridors in the northeastern state of Assam, and the establishment/deregulation of national parks. I was also asked to contribute to a consulting project regarding the local ramifications of American and European illegal timber trade regulations.

Throughout this process, I found that while the laws were fundamentally different from those I had worked with previously, the legal writing skills I had developed through working with NEDC were invaluable. This was especially true when I was asked to draft applications to both the Supreme Court of India and the National Green Tribunal. In fact, reflecting on my experience, I believe that these writing skills were the most significant thing I was able to offer to ELDF.

Overall, I am proud to say that I had a tremendous time working with ELDF and exploring India. I learned a great deal, developed legal skills, and had some incredible experiences to boot. I look forward to continuing to learn and develop within NEDC.

(Project Groups....Continued from page 5)

project. Looking forward, the group plans on staying very involved in all phases of the permitting process for each of the proposed export terminals here in the Pacific Northwest.

The group has also begun work on several new projects that will be sure to keep them busy into the new year. First, student volunteers will be providing a comment on a section 404 dredge and fill permit for a new industrial park proposed by the Port of Portland near the confluence of the Sandy and Columbia rivers. Water Group members will be sure the U.S. Army Corps is well informed of their concerns regarding this important watershed. Second, group members have been looking into enforcement actions against Sand and Gravel General



Kara Tebeau

One of the major reasons I chose to come to Lewis & Clark was the opportunity for student involvement in NEDC. I volunteered for my first year with the Lands & Wildlife Group. Because of my interest in public lands and biodiversity protection, this turned out to be a great first

exposure to statutes I would begin to explore in detail in my second year, such as the Endangered Species Act, NEPA, and the Clean Water Act. In addition, it gave me the opportunity to practice my newfound legal writing skills with the oversight of more experienced law students. I also learned about the importance of commenting as a tool for exploring and preserving the scope of arguments which may be useful for purposes of litigation in the future.

Beyond these opportunities for skill-building, NEDC introduced me to a community of professionals in the field of non-profit and governmental environmental law. NEDC's weekly meetings and yearly retreat feature speakers from local organizations and government offices. It was at one of these meetings where I met the attorney who took me on as a summer law clerk after my first year. I am grateful to NEDC and its student leaders for getting me engaged in my first substantive environmental work as a law student!



NPDES permit-holders in Spokane, Washington. Sand and gravel mining in Spokane is especially problematic because the aquifer is very shallow, and students have begun researching specific sites in the hopes of reducing the likelihood of groundwater pollution from these activities. Third, the group has been helping put together educational materials for dischargers, consultants, and attorneys that help explain the stormwater permitting scheme for Oregon and Washington. And finally, student volunteers have been reviewing stormwater discharge permit files here in the Portland area, and have begun initiating enforcement proceedings against problem sites.

*(Protecting Floodplains....
Continued from page 1)*

failure to comply with the ESA in connection with the agency's implementation of the National Flood Insurance Program (NFIP) in Oregon. Under the NFIP, FEMA subsidizes insurance for buildings in flood-prone areas, providing insurance that is not available on the private market. Making this insurance generally available directly enables the development of Oregon's floodplains, which continue to be lost at an alarming rate.

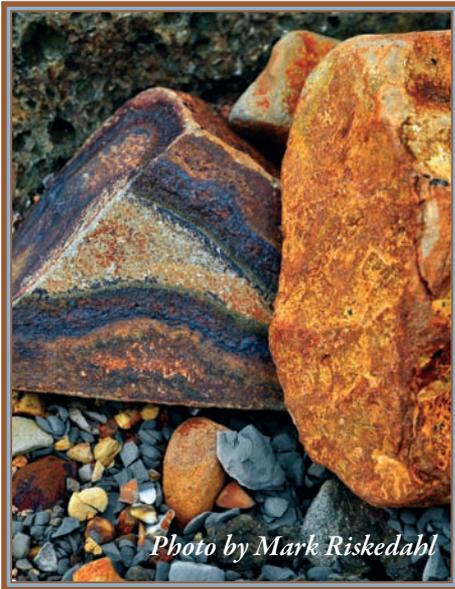


Photo by Mark Riskedahl

Prior to the lawsuit, FEMA had largely ignored the impacts of incentivizing and allowing development in floodplains on federally listed salmon and steelhead. In the settlement agreement, FEMA agreed to initiate consultation with the National Marine Fisheries Service, the federal agency charged with the protection of imperiled salmon, to consider those impacts and ways to improve the program to protect fish habitat.

Three short years later, FEMA and NMFS are preparing to announce the results of that review. While we are optimistic that the federal agencies have spent their time wisely, and are ready to move forward with a plan that will protect salmon habitat, NEDC is poised to once again act if FEMA continues to ignore its responsibilities.

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Westwind 2014

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