

NORTHWEST DEFENSE

THE NEWSLETTER OF THE NORTHWEST ENVIRONMENTAL DEFENSE CENTER



FALL 2005

Is Oregon's Environmental Reputation Well-Deserved?

Thoughts on Oregon's New Source Review Program

It is always refreshing to hear an outsider's perspective on a familiar subject. When I committed in late August to spend a full day with Bruce Buckheit, former head of air enforcement for EPA with 20 years of Clean Air Act experience, I knew I would be in for some interesting feedback on how Oregon stacked up against other states. What I was surprised to learn, however, is that a major component of Oregon's air quality program, its New Source Review process, may well be the least stringent of any state in the nation. I was also troubled to hear from an outside observer that Oregon has a reputation for being a say-anything, do-nothing state when it comes to environmental protection.

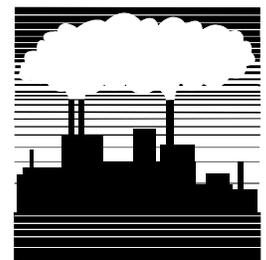
The federal Clean Air Act sets forth a scheme in which large sources of air pollution such as pulp mills and power plants are required to go through New Source Review in order to upgrade emission controls whenever their facilities undergo major modifications. These upgrades are often costly, and industry often seeks to avoid those costs in various creative ways. One of the easiest ways to avoid triggering New Source Review obligations is to argue that a plant's prior emissions (known as its baseline) is as high as possible. Since New Source Review is only triggered if proposed new emissions from increased production at a facility exceed specific thresholds, the more a plant can artificially inflate its baseline, the less likely it is to have to go through New Source Review.

After sitting down and reading through Oregon's rules recently, Bruce was shocked to learn that those rules tie the baseline of older facilities to maximum emission estimates set in 1978 or even earlier. This means that facilities that convinced Oregon's Department of Environmental Quality (Oregon DEQ) to use grossly exaggerated emission estimates from the 1970s have never had to install the best available pollution control technology, despite several substantial modifications that have increased the facilities' actual emissions, simply because the actual emission levels remain below the sky-high maximum emissions estimates set way back in the 1970s. As one example, a pulp and paper mill in Oregon has repeatedly modified its facility without undergoing New Source Review because the mill's 1978 baseline was set so high that it is unlikely that the facility will ever reach that baseline and thus trigger New Source Review. *(continued on page 6)*

Litigation Update - Owens Corning

NEDC continues to work with the Pacific Environmental Advocacy Center (PEAC) to ensure that the Oregon Department of Environmental Quality (DEQ) appropriately reviews a recent air pollution permit application from the Owens Corning Corporation to build a new polystyrene foam board plant in Gresham, Oregon. Owens Corning continues to push for the use of HCFC-142b, a potent greenhouse gas and ozone depleting substance, in its manufacturing process. U.S. EPA is requiring that HCFC-142b be phased out by 2010, and companies throughout Europe have already been required to switch to safer alternatives without technological or economic harm. Some companies are even using water-blown carbon dioxide in the production process, an alternative that is particularly non-toxic and environmentally sound.

At this point, unfortunately, Oregon DEQ seems convinced that it has no authority to deny this permit, to mandate the use of a less harmful alternative, or even to require any emissions monitoring or emission controls at the facility at all. Despite considerable public opposition over this permit application, the agency continues to assert that its only job in the air pollution permitting process is to ensure that permit applications are complete prior to providing a rubber-stamp of approval to any applicant who wishes to degrade the air quality of the region, and in this case, the planet. There are many ways that you can get involved in NEDC's efforts concerning this new plant. Please contact our Executive Director, Mark, at msr@nedc.org if you would like to help.



(For more information about the lawsuit against Owens Corning, see our website at: www.nedc.org)

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-Water and Air-



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Westwind 2005!

Join us for NEDC's Annual Retreat on the Oregon Coast

Westwind... the name itself conjurs up fond memories for NEDC students and Lewis & Clark alumni around the country. The beautiful Camp Westwind, on the rugged and dramatic Oregon coast, plays host to NEDC's annual retreat each fall. The 3-day gathering is attended by approximately 100 law students, environmentalists, and NEDC board members and friends. We conduct environmental workshops, hold our annual meeting and board elections, and introduce law students to the environmental issues affecting the Pacific Northwest. In addition to this educational aspect, the retreat offers a relaxing atmosphere with ample opportunity to hang out with like-minded nature lovers. Those who make the effort to attend will be greatly rewarded - they will dine on delicious vegetarian and mostly organic food, sip tasty micro-brewed beers from local breweries, play ultimate frisbee on the beach, go on nature hikes, and hang out with enthusiastic environmental folks.

You will love the location, guaranteed - situated just a few hundred yards from the Pacific Ocean, near the mouth of the Salmon River, Camp Westwind is a remote and beautiful place. A delightful main lodge is the hub of activity, with space for gathering and dining, as well as a massive deck. You have the option to sleep in one of many rustic cabins; tent camping is also available.

Announcement of NEDC's Annual Meeting

NEDC will hold its annual meeting at Westwind, on Saturday, October 8th at 5:30pm. We will hold elections for board members whose terms expire in 2005, and we will also fill two student board member vacancies. If you are unable to join us at Westwind, but would like to vote in the elections, please contact Jamie at jsaul@nedc.org for a ballot.

For current information about Westwind, visit our website: www.nedc.org

Westwind Annual Retreat *October 7-9, 2005*

Write it on your calendar now!

Westwind 2005 Registration Form

(please detach and mail by September 23 if you would like to join us!)

Name: _____ Phone: _____

Address: _____

Crossing Time: Friday, 5:30pm Saturday, 12:30pm

Would you be willing to help out with other NEDC members in the kitchen? Y/N

Cost: \$75 per person (both nights), \$45 per person (1 night only)

Number of people: _____ Total Cost: _____

(please make checks payable to NEDC)

NEDC Student Project Group Updates

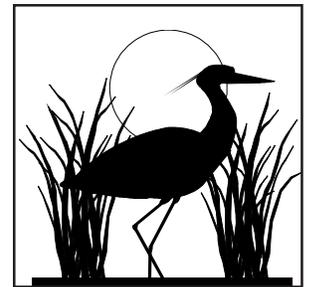
NEDC's student volunteers are organized into two project groups: Lands & Wildlife, and Air & Water. Both project groups hold a weekly meeting, run by the project group coordinators, during which current and pending student projects are discussed. The coordinators review potential projects and assign them based on student interest and availability. Each project group will host several speakers throughout the year, and occasionally the groups will meet for a field trip outside of school. All students are invited to attend one or both weekly meetings, even if they don't have time to tackle a project. Some projects take as little as a few hours to complete; others may be more complex, lasting a month or more and allowing the student to get thoroughly involved in a particular issue.

Lands & Wildlife

The Lands & Wildlife group anticipates the Forest Service, Bureau of Land Management (BLM), and U.S. Fish and Wildlife Service will keep things as busy for the group this year as these agencies have kept the group in the past. Last year, students working with the Lands & Wildlife group commented on numerous timber sales, proposed rule changes, and agency actions involving Endangered Species Act (ESA) issues, including last spring's proposed Oregon Wolf Plan, as well as many, many more topics. This year, we plan to continue in our role as forest watchdogs by commenting on timber sales and grazing plans, working for forest reform, and encouraging restoration projects. The group will also continue to be involved with ESA work, and comment on wildlife management proposals, including critical habitat designations, species recovery, and species reintroduction efforts.

As the school year begins, the agenda for our first few meetings includes an introduction to public commenting and an overview of the ESA. We'll also be scheduling a variety of exciting and interesting guest speakers to share their expertise on topics ranging from salmon recovery and grazing to the Healthy Forests Initiative. The Lands & Wildlife group plans to organize day-hikes to view Forest Service land on which logging projects have been proposed, as well as to just get away from the library for the day to enjoy being in the woods. And, of course, there will continue to be copious commenting opportunities.

~ Sherry, Jessica and Chris



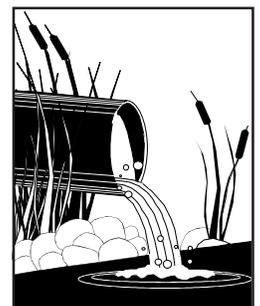
Air & Water

Last year, students had the opportunity to work on several diverse issues. Katherine was involved in a scientifically-oriented mini research project on stratospheric ozone-depleting substances in the Owens Corning case (*see page 1*). Several students submitted comments on EPA's Air Compliance Agreement for Concentrated Animal Feeding Operations (CAFOs), which essentially acted as a free-ride for CAFOs participating in this research-focused initiative potentially contributing to future EPA regulations. Additionally, several group members attended an Oregon Senate Committee Hearing on tightening standards for vehicle emissions to align with California and Washington standards.

Jared researched and outreached with legislators and environmental groups, which led to an article in the NEDC newsletter that discussed a proposed and unnecessary power plant that would pollute Oregon's air for another state's electricity – the grassroots advocacy efforts behind the proposal were probably the reason for its withdrawal.

The group's project areas for this next year include: Developing Clean Water Act and Clean Air Act enforcement actions; addressing the increase of acid rain in the Columbia River Gorge; the environmental costs from the combination of a coal power plant and a CAFO near Boardman, OR; investigating how heavy metals and toxic wastes are allowed in food fertilizers; tackling a RCRA issue that involves an illegal storage of solid waste; and improving pesticide laws. Plus there is always a need for comments to be written on proposed agency actions. We are always looking for new projects, so don't hesitate to contact us if you have any issues of concern.

~ Katherine, Kevin and Jared



NEDC Volunteer Experience Prepares Students for Meaningful Summer Internships

Katherine Lin, Water & Air project group coordinator, worked at the Environmental Integrity Project

This summer, I had the opportunity to work in Washington, D.C. at the Environmental Integrity Project (founded by former Chief of Civil Enforcement at EPA, Eric Schaeffer) under the guidance and supervision of senior attorney, Michele Merkel. The main focus of my summer was a state-specific analysis of the Clean Water Act pollution permitting program for concentrated animal feeding operations (CAFOs). Under Michele's supervision, I gained newfound comprehension of the human health, social, environmental and ecological impacts of CAFOs and CAFO pollution.

Part of my work encompassed a handful of Freedom of Information Act (FOIA) and state-level public records requests to fill in data gaps regarding state agency actions in the CAFO realm. Thus, an essential aspect of my summer was gaining conceptual understanding of the agency interactions and the sources and level of each relevant agency's authority over CAFOs.

The most exciting part for me was evaluating how

consequences of deficient laws in other states and the regulatory gaps in the focus state can be used to reveal how a more viable and effective environmental framework for CAFOs could exist.

Other smaller projects I worked on included research on opacity standards and monitoring under the Clean Air Act, agricultural tile lines/drains in light of the Clean Water Act, sanitary sewer operations in municipalities and CAFO air pollution. Together, these projects with the main focus of my clerkship helped reaffirm my decision to pursue additional knowledge and expertise in the realm of environmental law. Although the process may be daunting and even tedious at times, the heartfelt rewards of helping citizens and communities with real-world environmental problems more than compensates for all the earlier time commitments and efforts. If not for my experiences with NEDC throughout the year, I would not have been nearly as prepared for my summer clerkship.

Sherry Bosse, Lands & Wildlife project group coordinator, worked at the Center for Environmental Law and Policy

NEDC gave me the opportunity to gain experience working with environmental laws that I wouldn't otherwise have had during my first year of law school. My experience writing comments for NEDC prepared me for the many comment letters I would write this summer. It was largely because of my work with NEDC that I was able to spend my summer working as a legal intern at the Center for Environmental Law & Policy (CELP), in Seattle, Washington. CELP is a non-profit public interest organization dedicated to protecting and restoring the natural integrity and sustainability

of freshwater resources in Washington.

I had an amazing experience this summer. As a CELP intern, I attended litigation meetings, sat in on a conference on Washington water law, observed meetings on state water policy, and studied the state's new rule-making process for the Columbia River. It was a great opportunity to learn about state water law, the wide variety of parties with a stake in state water policy, and the strategic considerations involved when deciding to undertake environmental litigation.

Chris Mixson, Student Co-Director, worked for Defenders of Wildlife

During the Summer of 2005 I had the great privilege of going to Washington, DC to work for Defenders of Wildlife. (No, I was not required to wear a superhero's cape and mask.) I was a summer intern in Defenders' Conservation Litigation department. For those who may not know, Defenders of Wildlife's mission is to protect native wild animals and plants in their natural communities, focusing on the accelerating loss of biodiversity and on habitat destruction. Defenders of Wildlife is also a key player in the hugely successful endangered wolf reintroduction in the United States. While at Defenders this summer, I worked on diverse endangered species issues such as loggerhead turtles in Florida, oil and gas mining in Los Padres National Forest in California, and groundwater pumping in Nevada.

The environmental law experience I gained through working on projects with NEDC undoubtedly played a large role in my ability to get such a great summer job. When employers begin considering resumes, NEDC students can stand out from other applicants because they will be able to demonstrate actual, substantive work with environmental laws and issues. Also, because of the experience I gained through NEDC, I was able to be a more effective environmental law intern because I already had a working knowledge of environmental laws.

I had a wonderful experience at Defenders of Wildlife this past summer in DC (except for the miserably oppressive heat and humidity), and I am grateful to NEDC for providing me with invaluable experience before I got there.

NEDC Explores Strategies to Reduce Global Warming

Increasingly, public interest groups are at a loss as to how best to combat the growing threat of global warming. In the wake of hurricane Katrina, it is likely that the issue will see increased public attention, as some scientists are already linking the severity of that storm with warmer water temperatures and altered ocean currents in the Atlantic and the Gulf of Mexico. However, courts across the country have consistently sidestepped the issue, on several grounds. This year's attempt by a group of state and local governments to force the EPA to take action by regulating several global warming agents under the Clean Air Act was rejected by the D.C. Circuit Court of Appeals.¹ Previous courts have wrestled mightily with the issue of standing, generally finding that the type of injury caused by global warming is not 'concrete and particularized' enough to provide any one person, or group of people, constitutional access to the court system,² preferring to yield to a legislative approach which has not been forthcoming.³

Against this backdrop NEDC has been researching an alternate legal strategy that may prove beneficial in the global warming context. Title VI of the federal Clean Air Act implements the Montreal Protocol, the purpose of which is to reduce or eliminate the release of substances which damage the ozone layer. As it happens, these "ozone-depleting substances" (ODS) are also typically very potent greenhouse gasses, believed to contribute significantly to global warming. While the most harmful of these ODS are on a federally-mandated timetable for complete elimination from commercial applications, today they remain in use in a variety of industry sectors. Federal regulations implementing Title VI are designed to ensure that such substances are used safely in the meantime. These regulations apply to a variety of industries which use ODS, for example commercial refrigeration or automobile air conditioning, and they often involve strict monitoring and reporting requirements. It is our goal to implement a strategy that ensures those businesses that use ODS do so safely, in a way that prevents their release into the atmosphere.

As you may be aware, NEDC is involved in ongoing litigation with the Owens Corning Corporation, which plans to use a potent ODS/greenhouse gas at a new facility in Gresham, Oregon. This lawsuit has spurred us to forage deeper into the complex and confusing world of the Clean Air Act, a statute that is dramatically underutilized in the Pacific Northwest. Over time our staff and students will build the expertise needed to fill a much-needed void in Oregon's environmental movement, with the dual results of reduced ODS and greenhouse gas emissions – the embodiment of the 'think globally, act locally' mantra.

~ Jamie Saul, NEDC Law Clerk

¹Commonwealth of Massachusetts, et al. v. EPA, 415 F.3d 50 (D.C. Cir. 2005); for reasons of administrative law the court granted deference to EPA's decision not to regulate.

²see Bradford C. Mank, Standing and Global Warming: Is Injury to All Injury to None?, 35 Env'tl. L. 1 (2005).

³The Climate Stewardship Act, co-sponsored by John McCain and Joseph Lieberman, would have required industrial plants to reduce their CO₂ emissions. The bill went down in flames in October 2003, but a modified 2005 version is pending in the Senate.

Battle to Protect the Deschutes Scenic Waterway Continues

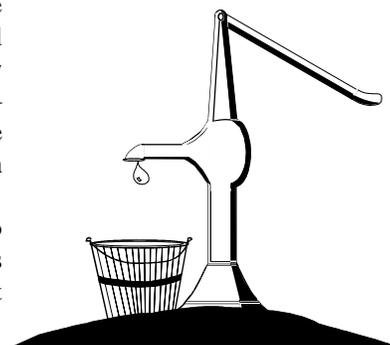
The spectacular Deschutes River in central Oregon is once again threatened by increasing development pressure and a seemingly unquenchable thirst for water in the basin. In May of 2005, a diverse group of environmental organizations, outfitters and individuals including NEDC, and led by WaterWatch of Oregon won a major victory in the Oregon Court of Appeals. In the opinion, the court held that the rules managing the withdrawal of groundwater in the Deschutes Basin violated the Oregon Scenic Waterway Act. The rules, adopted by the Oregon Water Resources Commission, violated the Act by failing to protect minimum instream flows needed for fish and wildlife, and other important river uses in the Deschutes Scenic Waterway from the effects of ground water development in the basin. The court opinion also included important rulings confirming certain principles related to the ability of the public to challenge agency decisions and clarified the standard the court uses when it reviews challenges to agency rules.

Over the past twenty years the Deschutes Basin has experienced tremendous population growth, and with growth comes increasing municipal and urban demand for water. The existing over-allocated state of surface water sources (where water rights and existing river protection designations claim all, or more than all, of river flow) has resulted in increasing reliance on ground water as a source to meet growing demands in the basin. The Oregon Water Resources Department, however, determined in 2001 that ground water withdrawals in the upper basin diminish flows needed for fish, wildlife and recreational uses of the Deschutes river system. The state subsequently adopted the challenged rules establishing a mitigation program for new ground water development in the basin that the court recently invalidated.

Unfortunately, the Court of Appeals victory was tempered by recent legislation. Several state legislators responded to the court decision by passing a law that reinstates the flawed rules until January 2014 when the Water Resources Commission is directed to repeal the rules. Under this new law, ground water use in the basin will continue to increase under the flawed mitigation program – a program that does not require mitigation to fully offset the effects of increased ground water use on fish, wildlife and recreational uses in the basin. Especially at risk are streamflows needed for fish in the early spring and late fall months – critical months for the Deschutes basin fishery.

NEDC will continue to work with WaterWatch and the other petitioners in a variety of forums to fight for protection of the Deschutes River and to increase public awareness of the threat to this crown jewel of the desert. For more information, visit the WaterWatch website at www.waterwatch.org.

~ Karen Russell, NEDC Treasurer



(continued from page 1)

The on-the-ground results of this flawed approach are significant. Facilities built before the Clean Air Act's pollution control technology requirements emit remarkably high amounts of hazardous and conventional pollutants into the air. Studies have documented that these older facilities cause higher rates of adverse health effects such as asthma in already at-risk communities, and contribute significant amounts of mercury and other contaminants to waterways across the nation. The New Source Review program was intended to bring these "dinosaurs" into the modern age, thereby limiting the harms they cause. Oregon's program, however, allows these aging facilities to continue spewing unchecked amounts of pollutants, regardless of the harms they cause.

Ironically, Oregon's approach to New Source Review runs afoul of even the Bush Administration's widely criticized revisions to the New Source Review regulations. Several years ago, the Bush Administration took the controversial step of requiring states to adopt rules that pegged a facility's baseline to the highest emissions rate during any 2 year period in the most recent decade. This was less stringent than the way most states were assessing baseline. Other states were taking the last two years of data and assessing whether a proposed emissions increase triggered New Source Review. Yet in Oregon, even the Bush proposal would be more protective of Oregon's air quality than the Oregon Department of Environmental Quality's outdated and outmoded method of calculating a plant's baseline. *(continued below)*

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Oregon Doesn't Walk Its Talk

Bruce also stated that, when it comes to environmental matters, Oregon state government had a reputation within EPA headquarters in Washington D.C. for talking the talk but not walking the walk. I am hearing more and more from concerned citizens across the state that Oregon DEQ is unresponsive to heart-felt citizen input on important environmental matters. I have seen this play out in person, time and time again. This is so despite the fact that there are substantial numbers of dedicated staffers within the agency trying to do the right thing.

When decisions are elevated to upper management at Oregon DEQ, they become politicized. As a result, the agency expends considerable time and energy to actively avoid crossing the polluters that have the closest ties to politicians holding the agency's purse strings. By putting budgetary considerations above its mandate to protect public and environmental health, Oregon DEQ has molded itself into the essence of regulatory captivity. Friendly, well-intentioned, well-reasoned input from Oregonians opposed to overly permissive pollution permits, outdated rules, and agency-authorized environmental harm is consistently disregarded. The only way concerned citizens gain any traction with the agency is when they push harder than industry. NEDC has routinely enabled citizens to play that role in the past, and with your help, we hope to do so long into the future. Thank you for your continued support.

~ Mark Riskedahl, Executive Director