



NORTHWEST DEFENSE

The newsletter of the Northwest Environmental Defense Center
Fall 2010

NEDC FILES SUIT TO PROTECT OREGON'S CHETCO RIVER

BY ANDREW HAWLEY

When the question of who 'owns' the Chetco River was posed to the representatives of the various federal and state agencies gathered at a recent public meeting in Brookings over a proposed permit to allow commercial gravel mining on the river, the answer was easy: the public. The follow-up question of why the public has been shut out of the conversation on whether and how mining should occur on the river was more difficult to answer. Indeed, when pressed by local residents on how any decision to allow continued gravel mining could be made through closed-door meetings between the mining industry and the regulatory agencies, the agency representatives defended their actions by noting that the process has been a long one—but not stating that it has been effective—and that future regulation may be more protective of the river and its resources than it was in the past. These answers were unacceptable to the citizens in Brookings who have seen what gravel mining has done to their river, and are equally unacceptable to NEDC.

Gravel Mining on the Chetco River

In-stream gravel mining operations have been removing sand and rock from the Chetco River for nearly a century. In 1994, Oregon declared the Chetco River navigable, and thus publicly owned, and imposed royalties on gravel mined from the river. In part due to these royalty fees, increased regulatory oversight by the state and federal agencies, and market demand, today only three companies continue to mine the Chetco River:

Freeman Rock, Inc., Tidewater Contractors, Inc., and South Coast Lumber Company. These three companies, however, have continued the long history of over-extraction of gravel from the river. Over the past 15 years, for example, nearly 800,000 cubic yards of material have been removed from the lower reaches of the Chetco River. Most recently, from 2000 through 2008, the mining companies removed 214,000 cubic yards more material than had been recruited into the system over that time. This mining has left the Chetco River highly degraded.

The Teams

Around 2007, the Army Corps of Engineers and the Oregon Department of State Lands, the federal and state agencies primarily responsible for permitting instream gravel mining,

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NEDC

10015 SW Terwilliger Blvd.
Portland, OR 97219

p. 503.768.6673

f. 503.768.6671

www.nedc.org

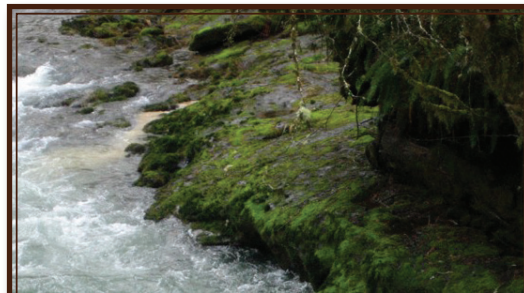
For frequent updates
on NEDC's work...



WORKING TO REDUCE WATER POLLUTION FROM LOGGING ROADS

BY PAUL KAMPMEIER

NEDC secured a landmark victory for clean water this August, when the U.S. Court of Appeals for the Ninth Circuit ruled that discharges of polluted storm water from pipes, ditches and channels along logging roads require National Pollutant Discharge Elimination System (“NPDES”) permits. The ruling came in Northwest Environmental Defense Center v. Brown, et al., a Clean Water Act



*Stormwater being delivered to the South Fork Trask River from the Trask River Road, Tillamook State Forest, Oregon.
Photo courtesy of Chris Winter*

citizen suit NEDC filed in 2006 against the Oregon State Forester, the members of the Oregon Board of Forestry, and four timber companies. After documenting discharges of heavily polluted storm water from pipes and ditches along two logging roads in the Tillamook State Forest—some discharges of sediment exceeded receiving stream background levels by more than 2000%—NEDC filed suit, alleging that the road owners (the state defendants) and those hauling timber on the roads (the timber companies) were generat-

ing and then discharging pollutants without a permit in violation of the Clean Water Act. Although the Clean Water Act clearly defines pipes, ditches, and channels as point sources, the U.S. District Court dismissed the lawsuit, relying on an EPA regulation to rule that the pollution was “natural runoff” from “non-point source silvicultural activities” that is not subject to the NPDES permit requirement. In ruling for NEDC, the Court of Appeals reversed that ruling and substantially limited the scope of EPA’s permit exemption for logging activities.

The defendants may seek rehearing and could also ask the U.S. Supreme Court to hear the case. But if the Court of Appeals’ ruling stands, NEDC will have created a very strong tool for protecting clean water and fish populations in the Tillamook State Forest. This very strong precedent should limit logging road pollution throughout Oregon, Alaska, Montana, Idaho, Washington, California, Nevada, Arizona, and Hawaii—the nine states in the Ninth Circuit. And if EPA accepts the decision, which appears likely, then the ruling could change the regulation of logging roads nationally—a very substantial win for streams and aquatic ecosystems across the country.

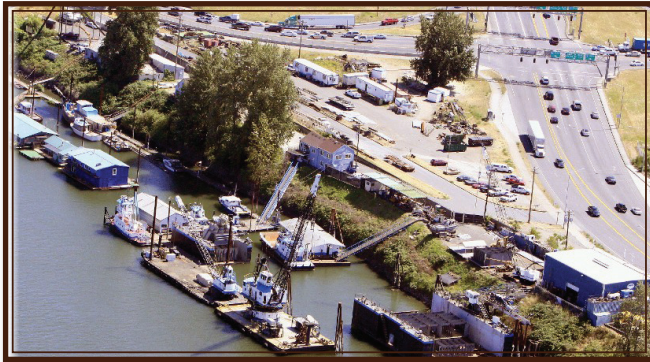
Paul Kampmeier, of the Seattle-based Washington Forest Law Center, and Chris Winter, of the Portland-based Crag Law Center, represent NEDC in the case. You can find the full decision and learn more about the case at www.wflc.org or www.crag.org.



NEDC 2010-2011 staff minus photographer Amy Van Saun.

INDUSTRIAL STORMWATER ENFORCEMENT

It's that time of year again – students have returned to campus; the rainy season has begun; and NEDC's Clean Water Act industrial stormwater enforcement work has begun to ramp up. Over the last several years, NEDC enforcement actions have resulted in stormwater infrastructure improvements at dozens of industrial sites, and generated hundreds of



thousands of dollars for habitat restoration, environmental education, and water quality improvement projects by organizations throughout the region.

This fall, our enforcement work will primarily target the Portland metropolitan area, with particular emphasis on Portland Harbor, the Columbia Slough, and Johnson Creek. Over a dozen law student volunteers will be integrated into this work in one form or another,

and many of their efforts will be coordinated by third-year law student Marcel Gesmundo.

On September 8, we initiated our first enforcement action of the season against Diversified Marine, Inc. for pollution issues related to the company's shipyard adjacent to the I-5 bridge in north Portland. Partnering with Columbia Riverkeeper, we are alleging dozens of violations of the Clean Water Act and Resource Conservation and Recovery Act. Our primary concern relates to the discharge of toxic heavy metals into the Columbia River. Dan Mensher, attorney at the Pacific Environmental Advocacy Center, is representing NEDC on this matter and has been integral in

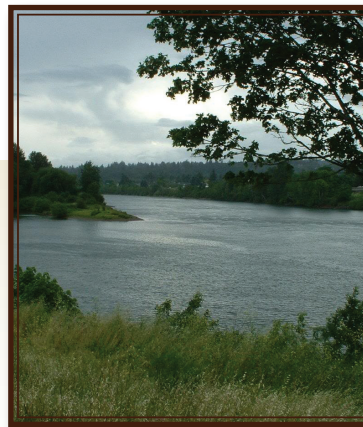
helping us deal with emerging issues related to the questionable handling and disposal of solid and hazardous waste in this case, as well as others.

NEDC's Clean Water Act enforcement work has been made possible due to long-standing support from Laureen and Dr. Rudi Nussbaum, the Bullitt Foundation, the Burning Foundation, and donations from NEDC members. Thank you for your support!

NEDC RESOLVES CLEAN WATER ACT LAWSUIT AGAINST SALEM COMPANY

NEDC has reached a settlement with Ennis Traffic Safety Solutions over the company's alleged violations of its Clean Water Act stormwater discharge permit. On February 24, 2010, NEDC filed suit against Ennis, a Texas-based corporation, that operates a paint manufacturing and distribution facility in Salem. NEDC claimed that Ennis had failed to comply with its duties to manage the stormwater discharged from its facility into the Willamette River. On September 13, 2010, the District Court for the District of Oregon signed and entered a settlement agreement

between NEDC and Ennis, which requires that the facility will implement numerous measures necessary to ensure that it will come into compliance with its permit, conduct appropriate monitoring to ensure those measures are indeed working as intended, and fund several projects that will benefit local watersheds in the Salem area.



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responded to the growing recognition of mining's significant short-term and long-term impacts on many of Oregon's rivers by beginning a process of reviewing whether and how mining should continue on each system. This process, however, was conducted through closed-door meetings between the agencies and the mining industry, effectively preventing meaningful public participation in decisions that will affect Oregon's rivers for years to come. Specifically, the Corps and DSL established an Executive Gravel Team and a Technical Gravel Team, comprised of representatives of federal and state agencies and the mining industry. These teams are charged with evaluating, on a watershed basis, which rivers can continue to support gravel mining, with the overall goal of developing permits for commercial gravel mining activities throughout the state. The Chetco River was the first river evaluated under this scheme, and the teams have met regularly over the past several years to develop a permit for the river.



Photo by Aaron Stark

The initial result of these meetings was a set of recommended permit measures from the technical staff setting out the limits on mining necessary to give the river at least a chance to recover. Many of these recommendations were dropped from the proposed permit, however, as the industry and the Corps used the process to dismiss—or simply ignore—the best available science on what is necessary to protect the Chetco River. Evidence of this is replete in the information that has made its way out of the back-room meetings and into the public domain. For example, the mining industry's critique of the recommended permit measures demonstrates the industry was more interested in semantics and its bot-

tom line than addressing the impacts its operations have had and will continue to have on the river. The Corps, in turn, showed it had pre-determined the outcome of this process through its com-

ments earlier this year demonstrating the agency had decided to issue a permit long before all of the information had even been collected and then halting any debate on what was necessary to protect the river before the public was even allowed to enter the conversation.

The Public Meeting

On September 7, 2010, at NEDC's request, the Oregon Department of Environmental Quality, along with the other agencies involved in permitting mining on the Chetco River, held a public hearing in Brookings to discuss the proposed instream mining. A group of local citizens who, despite the agencies' best ef-

orts to control the conversation on the Chetco River, have remained engaged and informed about the issues surrounding continued gravel mining attended this meeting. This meeting, in fact, gave the public the rare opportunity to address the decision makers directly and demand answers to the many questions that have been raised, but largely ignored to date.

The people of Brookings seized this opportunity. One after another, they called the agencies to task for failing to allow the public the same access to the process granted to the mining industry and for failing to follow the best available science on what is necessary to protect the river and its resources. The agencies, in response, relied on tired excuses predicated on the prospect that the proposed permit may (or may not) provide a marginal improvement over previous mining permits. Despite this, those of us who attended the meeting were hopeful that we had delivered the message that the agencies could not ignore all other concerns in an effort to appease

the mining industry's desire to continue business as usual. Unfortunately, however, it appears we fell short of that goal—for now.

The Proposed Permit

On July 7, 2010, the Corps released a final iteration of its proposed permit. Despite the vigorous objections from the many community members and groups who have managed to participate in the permitting process, and the earlier complaints by several state and federal agencies—some of which would later sign-off on the permit without ensuring those complaints were addressed—this permit,

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SUCTION DREDGE GOLD MINING: BACK IN COURT

Few environmental issues have been as controversial in Oregon over the past year as suction dredge gold mining. Last year, the California legislature passed a moratorium on this activity in California waters pending the outcome of a rigorous environmental review. The editorial boards of most of Oregon's major newspapers, and an emerging number of Oregon state legislators have declared that such a moratorium is appropriate for Oregon as well, particularly given the growing number of out-of-state miners targeting Oregon's rivers and streams due, in large part, to lax state agency oversight.

This summer, against a swelling tide of public opposition, the Oregon Department of Environmental Quality (DEQ) issued an under-protective discharge permit giving miners the green light to mine in Oregon waters. Individual miners can sign up for the permit, pay \$25, and enjoy a permit shield against enforcement action without having to submit even a simple report containing mining location, dates of operation, quantity of material mined, and without having to provide any information at all concerning the scope, duration or type of material

they are re-suspending into the water column as a result of their activity. The sediments underlying many of the rivers targeted by suction dredge miners contain elevated levels of elemental mercury, frequently attributable to past gold mining activity. Re-suspending or "flouring" this mercury back into the water column can present significant environmental and even public health risks.

Though NEDC, and a dozen other conservation groups, had intended to submit a written petition to Oregon DEQ requesting that the agency reconsider several under-protective terms in the newly issued suction dredge mining permit, the miners filed suit against the agency over the permit in state court. Recognizing the importance of participating in this dialogue, NEDC filed suit on Sept. 28 as well. Thanks to PEAC attorneys Allison LaPlante and Dan Mensher, and Western Environmental Law Center attorney Pete Frost for their hard work on this matter. We'll keep you updated as this controversy continues to evolve.

NEDC ENRICHES STUDENT VOLUNTEER'S INTERNSHIP

By ELIZABETH LIEBERKNECHT

This past summer I interned at the Charleston, South Carolina office of the Southern Environmental Law Center. Born and raised in the South, I wanted to reconnect with the region by learning more about the environmental issues confronting it. I had a great experience, thanks in no small part to my participation with NEDC. The substantive work I have done with NEDC over the last two years, such as commenting on Clean Water Act permits, researching standing issues, and delving into state agency administration, informed my approach to and analysis of my assignments this summer. My understanding of the issues I worked on this summer was enriched not only by my experience working on substantive projects with NEDC, but also by simply being involved with such an active group of concerned citizens and lawyers. This practical experience helped me communicate better with my co-workers and better serve our clients.

Working in different part of the country and on different issues than NEDC often focuses on allowed me to explore my experiences in environmental law thus far and further develop the skills I have acquired working with NEDC. For example, after one of the attorneys asked me if I knew anything about storm-

water, I participated in a stakeholders meeting held by the state environmental regulatory agency regarding triennial review of its water quality standards. This

gave me a glimpse inside the deliberative process, which allowed me to constructively reflect on my experiences working with agencies as a member of NEDC. On the more exhilarating side, I got to do some aerial reconnaissance (seriously) of a clear cut and apply the knowledge I have gained from my work with the Water Project Group to determine whether concerned citizens had any legal basis for challenging this troublesome activity. My work with NEDC and its wonderful members and staff certainly enabled me to take this position and I am thankful for the springboard NEDC provided to me to have such an enriching summer experience.



NEDC STUDENT VOLUNTEERS ARE BETTER PREPARED FOR ‘REAL WORLD’ ENVIRONMENTAL JOBS



Miles Johnson

As a summer intern with Greater Yellowstone Coalition (GYC), I investigated and opposed the construction of a new hydroelectric dam on the Bear River in southeastern Idaho. I researched ways that GYC could influence FERC’s decision to license the new dam, and, if necessary, challenge the dam’s construction in court. Even though I encountered issues that were totally new to me, my experience with NEDC helped me effectively research, analyze, and participate in FERC’s decision-making process.

Writing comments for NEDC taught me how to pick apart even complex agency rules and documents. With guidance from NEDC project coordinators and staff, I learned to find and interpret the laws and regulations that govern agen-

cies’ actions, and put those rules to work when writing comments. The practical skills I gained with NEDC helped me navigate the thicket of administrative law issues and procedural hoops that form FERC’s hydroelectric licensing process.



Bobbie Traverso/Estes

This summer I worked as a legal intern for the US EPA Region 1 (New England) in their regulatory enforcement office. After a year as NEDC’s law clerk, I looked forward to seeing the government side of environmental enforcement. Region 1 was excited to have an intern from Lewis & Clark Law coming in all the way from Oregon. While there, I worked closely with an attorney who focuses on RCRA and TSCA enforcement. I produced research memos, sat in on meetings with violators, and worked with an EPA inspector to draft

his affidavit in support of a motion for contempt against an industrial facility with major hazardous waste violations. I really enjoyed attending weekly brown bag lunches with the 9 other interns to discuss our work and learn about a different facet of EPA.

It was fun getting to know the many inspirational attorneys in the Region 1 office and what drives their work. I learned that the comfort and stability of a government job has a lot of perks but the tradeoffs may include less room for creativity, independent decision-making, and risk-taking. Though there is a lot of potential within the EPA to do great things for the environment, making changes and doing the “right” thing is not always as simple as we might think from the outside looking in. I am truly grateful to have had such a great summer experience with EPA and I definitely recommend it to anyone considering a career in environmental law.

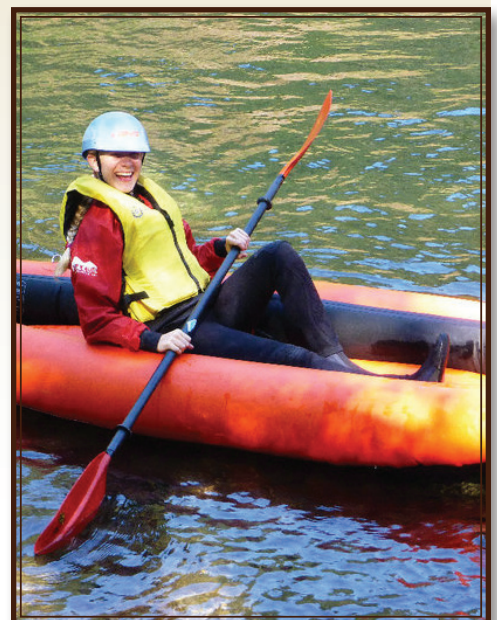
LEGAL TRAINING FOR AN ACTIVIST: NEDC AND CRAG LAW CENTER

BY TARA GALLAGHER

When I first came to Lewis & Clark, I was a burgeoning activist with the dream of becoming an environmental litigator. The first year of law school was intimidating. I loved everything I was learning, but I wasn’t sure I had what it took to be a lawyer, let alone an environmental litigator.

Then I got to know lawyers, students, and activists who are a part of NEDC. They inspired me, gave me the opportunity to work on real projects, introduced me to amazing people and helped me stay grounded when everything in my classes was abstract and hypothetical. The skills I learned and the connections I made through NEDC landed me my job at Crag Law Center this past summer where I was able to shadow some of the most talented environmental litigators in the nation.

The experience I had with NEDC will stay with me the rest of my life and throughout my career. Thanks to NEDC, my dream of becoming a successful environmental litigator seems more real every day.



(NEDC Files Suit to Protect Oregon's
Chetco River...Continued from page 4)

if implemented, will allow in-stream gravel mining that will adversely affect the critically imperiled coho salmon and its habitat, as well as the public's use and enjoyment of the river. The Chetco River provides wildlife viewing, fishing and other recreational pursuits, and supports many small businesses and sole proprietors in the region. All of these community members rely on the natural resources and aesthetic beauty that the Chetco River currently provides.

NEDC has begun to push back, however. On September 20, 2010, NEDC filed suit against the Corps for failing to comply with the Federal Advisory Committee Act when it established and relied on the closed-door Teams in developing the proposed mining permit. FACA requires that when an agency establishes any such advisory committee it must ensure creating the committee is in the public interest, and that the committee is fairly balanced and is not structured such that the committee may be inappropriately influenced by any special interest. NEDC contends that the Teams patently fail to meet these requirements. At the same time, NEDC has also challenged the National Marine Fisheries Service's decision, pursuant to the Endangered Species Act, that the mining under the proposed permit will not jeopardize the continued existence of the imperiled coho salmon, or adversely affect the species habitat. There, NEDC alleges that NMFS has failed to consider, as is required by the law, the impact of the mining on the species' chances of recovering to the point where it is no longer hanging on the brink of extinction. NEDC is committed to using this lawsuit, and the other advocacy and legal tools, to ensure that the Chetco River, and the other rivers in Oregon that face similar mining pressures, will be protected for the benefit of all Oregonians.

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Don't Miss Westwind 2010!

Friday (10/8) - Sunday (10/10)

Please contact NEDC law clerk Marla Nelson at msnelson@nedc.org with questions.

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