



NORTHWEST DEFENSE

The Newsletter of the Northwest
Environmental Defense Center

WINTER 2015

REDUCING WATER POLLUTION CAUSED BY URBAN RUN-OFF

Nearly thirty years ago Congress required cities large and small to reduce the discharge of stormwater runoff. This mandate came in response to the acknowledgment that runoff from our cities presents one of the most significant threats to the health of our Nation's surface waters. Since that time NEDC has been working to see that the Clean Water Act's mandate is realized. Continuing that effort, our work recently has focused on the steps necessary to reduce stormwater runoff in Oregon's mid-sized metropolitan areas, like Bend, Springfield and Medford.

To manage stormwater, most urban areas use what are known as municipal separate storm sewer systems (MS4) to collect and divert runoff to nearby streams, rivers, lakes, and coastal waters. As stormwater flows across the pavement and soil and into the MS4, it picks up contaminants, including heavy metals, algae-promoting nutrients, used motor oil, raw sewage, pesticides, and trash. Historically, this water was not treated or managed

properly, and as a result, urban stormwater is a major cause of water pollution nationwide and is the single largest source of pollution in coastal waters.

The solution under the Clean Water Act is to require cities to develop systems that will reduce the amount of pollution in the stormwater before it is discharged. The steps towards this goal are laid out for cities in a National Pollutant Discharge Elimination System permit, issued in Oregon by the Department of Environmental Quality. These permits must include the minimum measures necessary to ensure the communities are reducing stormwater pollution to the maximum extent practicable.

This goal can be reached by reducing the amount of stormwater that enters the MS4, and then by ensuring that stormwater is as clean as possible before it is discharged. While there are many possible avenues to

(Continued on page 7)

IN THIS ISSUE:

Intel Update	Pg 2
Westwind Review	Pg 3
2015 Fall Semester Review	Pg 3
Interview with Thane Tienson.....	Pg 4

Support NEDC Today	Pg 4
Columbia River Crude Oil Terminal Lawsuit Update	Pg 5
Water Quality in Johnson Creek	Pg 7
Save the Date for Westwind 2016.....	Pg 8

Attorney Board Members

Karl Anuta, *President*
Peggy Hennessey, *Treasurer*
Dona Hippert, *Secretary*
Lori Ann Burd
Marcel Gesmundo
Allison LaPlante
Dan Mensher
Don Potter
Melissa Powers
Laurie Rule
Ryan Shannon
Lizzy Zultoski

Student Board Members

Becca Fischer
Andrew Futerman
Hannah Lew
Chelsea Punian
Cooper Warner

Staff

Mark Riskedahl, *Executive Director*
Andrew Hawley, *Staff Attorney*
Maddie Allen, *Law Clerk*

Project Coordinators

Tyler Lobdell
Kat McIntosh
Danielle Miller
Ben Muzi
Ben Swerdlow

Student Directors

Emma Bruden
Gabe Hinman
Becca Fischer

Contact NEDC

10015 SW Terwilliger Blvd.
Portland, OR 97219
p. 503.768.6673 | f. 503.768.6671
www.nedc.org



INTEL UPDATE

BY NEDC STAFF ATTORNEY ANDREW HAWLEY

In 2010, the Intel Corporation announced plans to expand its manufacturing facilities in Hillsboro, Oregon, where it creates computer components. These processes result in the emissions of numerous chemicals including various volatile organic compounds and other hazardous air pollutants. The emission of these pollutants from the existing facilities have long been regulated under a Clean Air Act permit issued by the Oregon Department of Environmental Quality. DEQ relied on that permit to fast track the authorization of the Intel's expansion plans, allowing the company to move forward with the construction of the D1X facility with little oversight or community involvement.

That all changed in 2013, when Intel revealed that for decades it had been emitting fluorides into the air. Intel had not disclosed these emissions previously. Fluorides are toxic, and in fact the fluoride ion is a cellular poison. Fluoride in the human body inhibits oxygen consumption, blood clotting and processing of nutrition, and can result in chronic health effects such as dental and skeletal fluorosis, weight loss, malaise, anemia, discoloration of teeth and brittle bones and calcified ligaments.

As a result of this information, NEDC and its partner organization Neighbors for Clean Air notified Intel that the company was in violation of the Clean Air Act, and the groups were preparing litigation to bring the facility into compliance. At the same time the groups began talking with people who live near Intel in Washington County, and it became clear that there was significant concern about the potential health risks posed by Intel's current and future operations in the area. To address this concern, NEDC and NCA agreed to forego bringing a lawsuit in return for Intel committing to conduct a comprehensive assessment of the potential risk to the community from the toxic chemicals emitted from the facility.

That health risk assessment, the first of its kind to be conducted in Oregon, was completed in November 2015. After a year of study of the chemicals emitted from the facility, the pathways for exposure to those chemicals for those who live and work near the facility, the most vulnerable people (*children and the elderly*) near the facility, and the prevailing weather patterns to identify where the chemicals may travel, the assessment calculated the potential additional cancer risks, and the non-cancer acute and chronic health risks caused by the emissions from the facility. The results from the study can found at www.ORAQAC.com.

Now that we have some idea of both the potential risk to the community, and the types of emissions from the facility that pose the greatest risk to the community, NEDC and NCA are taking the next step of working with the community to push Intel to reduce this risk and ensure that it continues to be safe to live and work near the facilities.

WESTWIND REVIEW

BY NEDC STUDENT LAW CLERK MADDIE ALLEN

NEDC's annual retreat brought law students, attorneys, friends and family to the beautiful Oregon Coast October 2nd – 4th. The weather was amazing, gloriously sunny almost the entire weekend.

Friday evening, NEDC's Executive Director, Mark Riske-dahl, faced off against last year's law clerk, Becca Fisher, in a delicious soup cook-off. After dinner, Courtney Johnson and Maura Fahey from the Crag Law Center educated attendees about the current drought in the Pacific Northwest while highlighting cases Crag is involved in.

Saturday morning the sun was bright and the sky was clear so people wandered the beach, discovered tide pools and hidden caves, hiked further out to explore the gorgeous cove where Westwind is tucked, went fishing in the Salmon River estuary or did yoga on the beach. The first speaker of the day was Melissa Powers who spoke to a packed deck of eager listeners about climate change law, energy law, and the clean power plan. Despite the daunting and often depressing subject matter she managed to instill some hope for the future. At lunch time elections took place, attorney board members and three first year law students were elected to NEDC's board of directors. Congratulations to Ryan Shannon, new attorney board member; and Andrew Futerman, Hannah Lew and Chelsea Punian, new student board members!

In the afternoon a super panel of attorneys was convened to discuss various aspects of the Endangered Species Act. Our own Andrew Hawley introduced the basics of the Act; Stephanie Parent, attorney for the Center for Biological Diversity, talked about the operation of the dam system and the Columbia River's impact on salmon; Allison LaPlante, attorney and clinical professor at Earthrise, discussed water quality standards and their impact on endangered fish; and Laurie Rule, senior staff attorney for Advocates for the West, talked about her recent efforts to combat grazing and its impacts on endangered

fish habitat. Later in the afternoon attorney board members Karl Anuta, Marcel Gesmundo and Peggy Hennessy, led an informal discussion about how to pay for your "environmental habit." They each have their own practice and use other more lucrative practice areas to fund their environmental work.

And finally after a delicious pasta dinner, Jamie Saul, attorney and clinical professor for Earthrise, introduced lis-



teners to the new "waters of the United States" rule promulgated by the EPA and Army Corps of Engineers. This rule elaborates on the Clean Water Act's definition of "navigable waters" as "waters of the United States" and determines which bodies of water are subject to federal regulation under the CWA. The new rule is the subject of 15 different legal challenges in district courts across the country as well as circuit courts due to a question regarding which court has original jurisdiction. The evening was closed by Olivia Aubrey's beautiful music and a bonfire on the beach.

Sunday morning we ate one more delicious meal and packed up to leave. Thank you to everyone who helped make Westwind a success, our fascinating speakers, volunteers who cooked and cleaned throughout the weekend and especially those who helped clean Sunday morning to ensure that we left Westwind as clean as we found it. We hope to see you out there the first weekend of October 2016!



If you are an Amazon shopper, there's a new way to shop online AND donate to a good cause at the same time. You can donate to NEDC through Amazon Smile. **amazon**smile
It's easy.

- Go to smile.amazon.com
- Sign in to your Amazon account.
- Select NEDC as your preferred charity at the top left hand corner.
- Complete your holiday shopping!

NEDC receives 0.5% from each purchase made, no strings attached. Contact us at nedc@clark.edu if you have any questions.

2015 FALL SEMESTER REVIEW

Many students come to Lewis & Clark Law School with the goal of practicing environmental law, though most come with very little prior legal experience. Becoming involved in NEDC is a great way to gain experience as students are able to take on real life environmental law issues and projects. In order to give students an introduction to environmental law, we started off the school year with an educational speaker series.

After an introduction to NEDC and a commenting workshop, the first batch of weekly speakers included some of Lewis & Clark's top environmental law professors. The first was Tom Buchele, Earthrise's managing attorney and clinical professor, speaking about the National Environmental Policy Act (NEPA). Tom's overview gave students insight into the NEPA process, enabling them to take on future projects evaluating or commenting on Environmental Assessments or Environmental Impact Statements. The following week, Craig Johnston, professor of law and director of Earthrise, spoke about the Clean Water Act (CWA). This background knowledge helped several students to conduct file reviews of polluting facilities in the Portland area as well as comment on various types of permits issued under the CWA. Next, Melissa Powers, associate professor of law, introduced students to the complicated Clean Air Act (CAA). A few students used this foundation to comment on Air Permits being issued to facilities in Oregon. And finally Dan Rohlf, professor of law and of counsel for Earthrise, introduced students to the Endangered Species Act.

2ND ANNUAL PEDAL PURSUIT

NEDC's first annual Pedal Pursuit, held last spring, was an incredibly fun event, and we're busy working up some new twists and turns for Pedal Pursuit 2016. *Please check our website shortly after the beginning of the new year for event registration details.* We're looking forward to seeing you out there on your bike!



Once the statutory highlight series was over, Marla Nelson, who recently transitioned to open a Portland office of WildEarth Guardians, came back to tell us about her current work as a "Rewilding" attorney. The following week Miles Johnson, Clean Water Attorney for Columbia Riverkeeper, joined us to talk about the organization in general and their current campaign against fossil fuel transportation on the Columbia River. A huge thank you to these hardworking professors and illustrious NEDC alumni for taking the time to speak to us!

INTERVIEW WITH THANE TIENSON

By NEDC Student Law Clerk Maddie Allen

NEDC was recently involved in a navigability case, *Hardy v. Land Board*, where a section of the Rogue River, between river miles 68.5 and 157.5, was in dispute. Under the “equal footing doctrine,” Oregon gained title to the beds of waters, the land below the ordinary high water mark, within its borders that were navigable when it became a state in 1859. The state can therefore allocate and govern those lands according to state law subject only to federal power over navigation in interstate and foreign commerce. Whether or not a river was navigable at the time of statehood is a federal question and the test was established way back in 1870 in *The Daniel Ball*; a river passes the test when it is “navigable in fact,” which means it was used, or was susceptible of being used, in its ordinary condition, for trade or travel. The state of Oregon vests the power to assert title over submerged or submersible lands in the Land Board. Those aggrieved by the Land Board’s decision can seek judicial review, which is how this case came to be.

NEDC has been a party in navigability determinations for a few Oregon rivers over the years in order to insure the public trust is protected. The Public Trust Doctrine provides broad recreational rights to the public in all waters. The public trust is well recognized in the context of our beautiful Oregon coast, but less so in the context of rivers. Our hope is that maintaining state ownership and control over a specific stretch of river will limit developers and preclude individual landowners from excluding access for users that have an interest in fishing, floating, and recreating in them.

In this particular case we were represented by Thane Tienson who has a diverse practice in Oregon, Washington and Alaska with an emphasis on environmental and fisheries law issues, employment, personal injury, and

governmental affairs. I called him to find out why he believes these types of cases are important and therefore, worth pursuing. I was also interested in Thane’s perspective on why public trust issues are so much more controversial in the river context than beaches, even though the expansion of the public trust to include beaches was more recent. He explained that unlike beaches, many riparian landowners hold title that goes to the centerline of the river so they believe that it is their property. With beaches there is less of a privacy expectation and there are not landowners on both sides. In addition, river use has increased, there are more types of boats and boats and river recreation is more common.

Thane has a passion for protecting public access to resources and this passion informs his approach to navigability cases. He was especially interested in the *Hardy v. Land Board* case because it seemed like an opportunity to refine the law in Oregon regarding navigability and how it applies to public access to rivers. The case arose in a conservative area of Oregon, where people tend to be more impassioned about philosophical property rights, and Thane did not have a lot of faith in the state to protect the public interest over the strong property rights interest of the litigating landowners. Thane has found that environmental non-profits, such as NEDC and NW Steelheaders, intervening in navigability cases lends stature to the case, demonstrating to the court and the public that this is an issue with broader concern than just the landowners. He likes representing NEDC because we have a strong track record of being involved in navigability cases, so our involvement especially underscores the importance of the outcome for the judge and jury.

Before *Hardy v. Land Board*, the standard for determining navigability in Oregon was hazy. This is precisely what

(Continued on page 7)

During this season of giving, please support NEDC by donating today. NEDC has worked hard all year to protect the natural resources of the Pacific Northwest. From reducing polluted industrial stormwater runoff through stronger permit oversight and enforcement to creative challenges to dirty energy projects along the Columbia River, NEDC fights every day on your behalf for clean air and clean water. **Please donate today either by visiting our website or mailing a check in the enclosed return envelope. Thank you for your support!**



COLUMBIA RIVER CRUDE OIL TERMINAL LAWSUIT UPDATE



By JANETTE BRIMMER, EARTHJUSTICE STAFF ATTORNEY

Zero to sixty. That pretty much describes environmental advocacy and legal work on fossil fuel exports in the Pacific Northwest over the last three or so years. In that period of time Earthjustice has gotten involved with multiple coal export terminal proposals, as many oil export terminals, and rapidly increasing oil train traffic to terminals and refineries. And, we have done so on behalf of a large array of motivated and knowledgeable clients. NEDC is part of the amazing coalition that Earthjustice has been privileged to serve.

NEDC is the lead plaintiff in a particularly thorny case that involves an oil train and barge loading operation on the Columbia River that snuck in under the radar. The Global Partners/Cascade Kelly Holdings oil terminal in Clatskanie, Oregon started operations in 2012 without obtaining proper Clean Air Act permits on the site of an ethanol plant that had originally been built with public money but never operated. The conversion to a crude oil terminal transpired with no public notice or involvement. NEDC and the public became aware of the situation when Global and Cascade Kelly got in trouble for shipping large quantities of explosive Bakken crude oil far above the limits it had agreed to with the state. NEDC came to Earthjustice with partners Center for Biological Diversity and Neighbors for Clean Air seeking to ensure that the company obeyed the Clean Air Act. Trying to corral a polluter already in operation tends to be much tougher than stopping a bad idea before it gets started. But NEDC presented a strong and well-reasoned case and Earthjustice realized two things: (1) we can't let operators like Global get out from under their clean air legal obligations just because they decided to ignore the

Clean Air Act until they were caught and then talk their way out of it and (2) because we are fully committed to not letting the beautiful Pacific Northwest become a hub for transport of the world's dirtiest fuels from yesteryear, when the region is working hard to become a leader in renewable fuels for today and tomorrow. The Pacific Northwest will suffer some of the worst effects of climate change, from flooding to sea level rise to forest fires; we should not allow our neighborhoods and shores to be put at risk by the very industries and fuels that are causing it.

So, Earthjustice took the Clatskanie oil terminal case, and it has been quite a ride. We have worked with an expert engineer to comb through thousands of pages of documents and examine witnesses in order to assess the amount of air pollution expected from the oil terminal operation. We believe the evidence is clear: the Clatskanie oil terminal is a major source of volatile organic compound air pollutants because it has the potential to emit more than 100 tons per year of those pollutants. Under the Clean Air Act that means they were required to apply for and get a major source permit and they did not. It is our position that the law requires them to cease operation until they apply for and get a proper permit with proper pollutant controls. We tried the case in federal district court in Portland in October of 2015 and we will present final arguments in December with a decision likely sometime in the first half of 2016. We will continue to work with our partners, including NEDC, in the fight against using the Pacific Northwest as a dirty fossil fuel gateway.

(Reducing Water Pollution...Continued from page 1)

progress towards these ends, NEDC believes the incorporation of low impact design and green infrastructure building principles is an important first step. Simply put, the use of green roofs, green alleys, pervious pavement, and networks of vegetated bioswales and rain gardens, are the most efficient (*and cost-effective*) means for managing stormwater runoff.

Previously, NEDC has engaged heavily in the process of ensuring Oregon's largest cities took the steps necessary to properly manage stormwater runoff. While that work continues, our focus has moved to Oregon's mid-sized cities and counties that also maintain MS4 systems. Over the past year NEDC has been involved in the process leading towards the issuance of a new permit for these areas. Through that process, NEDC continues to push Oregon DEQ to develop a permit that protects water quality, promotes the use of low impact design and green infrastructure principles, requires adequate monitoring, reporting and public participation in management decisions, and focuses on the goal of reducing the volumes and concentrations of stormwater pollutants flowing out of municipal storm sewer outfalls into Oregon's rivers and streams.

(Interview with Thane Tienson...Continued from page 5)

Thane wanted to clarify while ensuring that public access was not undermined. *Hardy v. Land Board* held that navigability for title purposes can be established by showing that the river segment was *susceptible* of being used for trade and travel at the time of statehood. The landowners who sued the state attempted to argue that the "susceptibility of use" standard only applied where the area in question was essentially uninhabited at the time of statehood, but the court found that the test is not so limited. Therefore, the court held that the state's evidence of log drives and recreation on the river post-statehood were sufficient to support the conclusion that the section of the Rogue River at issue was indeed susceptible of being used for navigation at the time of statehood. This decision is important because it solidified the law in Oregon to include the susceptible use standard which allows for greater protection of public access because the state can more easily demonstrate navigability and thus claim title to the land underneath its many rivers.

WATER QUALITY IN SE PORTLAND'S JOHNSON CREEK BENEFITS FROM NEDC ENFORCEMENT ACTION

By DANIEL NEWBERRY, EXECUTIVE DIRECTOR,
JOHNSON CREEK WATERSHED COUNCIL

In the new Johnson Creek 2015 to 2025 Action Plan, we have identified stormwater management as one of our primary focus areas. The lower half of our watershed is highly urbanized. Surface runoff from the vast expanses of impervious surface is responsible for much of Johnson Creek's water quality issues, such as bacteria and heavy metals. Parking lots contribute a significant amount of surface runoff to stormwater systems. We are concentrating our efforts on working with commercial landowners to retrofit their existing parking lots to filter surface runoff with vegetation Best Management Practices. This will not only improve water quality, but help to reduce peak streamflows and flooding. The \$50,000 donation we recently received thanks to an NEDC Clean Water Act enforcement action against a local polluter will be dedicated to stormwater project management and engineering design and construction, and also to leverage additional grant funding in support of the Johnson Creek Watershed Council's stormwater work.



Northwest Environmental Defense Center
10015 S.W. Terwilliger Blvd.
Portland, Oregon 97219



NONPROFIT ORG.
U.S. POSTAGE
PAID
Portland, Oregon
Permit No. 438

*Printed on 100% post-consumer fiber
newsletter designed by eyeMotion Studio (www.eyemotionstudio.com)*



Westwind 2016

Save the Date! Join us September 30 - October 2, 2016.