NORTHWEST DEFENSE

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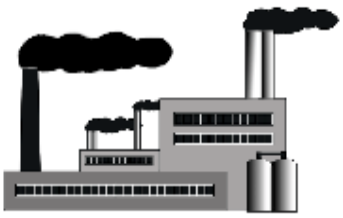
Owens Corning: Local action, global implications

Late last year, NEDC led a coalition of environmental groups and concerned citizens in an effort to stop Owens Corning Corporation's unpermitted and illegal construction of a new facility in Northeast Portland. Although Owens Corning had applied for a "Construction Permit" required under the Clean Air Act, it nonetheless began constructing without the permit. What began as a clear-cut violation of statutory law has quickly metamorphosed into a case study of how agencies and polluters work to undermine public participation, environmental protection, and the rule of law. It also demonstrates flaws in Oregon's administration of the Clean Air Act and the need for immediate, significant reform within the agency.

Owens Corning has proposed to construct (and unlawfully commenced construction of) a polystyrene foam insulation board manufacturing facility. The plant, if allowed to operate, would convert polystyrene pellets into rigid insulation board. To convert the pellets into the board, Owens Corning uses a "blowing agent," which creates the air bubbles found in plastic insulation and helps the board-formation process. Owens Corning has proposed to use hydrochlorofluorocarbon (HCFC)-142b as its blowing agent.

HCFC-142b is a known ozone-depleting substance and a significant greenhouse gas. The United States Environmental Protection Agency (EPA) states that HCFC-142b is 2,000 to 2,400 times more potent than carbon dioxide as a global warming gas. HCFC-142b is regulated under the Montreal Protocol, an international treaty governing the phase-out of chlorofluorocarbons (CFCs), halons, and other ozone-depleting substances, and Title VI of the Clean Air Act implementing the Montreal Protocol. In these laws, the United States and the international community recognized that the economic value of using ozone-depleting substances was far outweighed by the ecological and human-health risks caused by ozone depletion. The laws therefore establish dates by which the regulated substances may no longer be produced, and, in certain cases, used. HCFC-142b is subject to these laws.



Under both Oregon law and the federal Clean Air Act, all facilities that emit or have the potential to emit 250 tons or more of any air contaminant must first apply for and receive a permit authorizing the construction of the facility. This process is called "new source review" (NSR). During NSR, the facility must demonstrate, in its permit application, that it will implement Best Available Control Technology (BACT) for the pollutants regulated under the Clean Air Act. The facility may not begin construction until it has received a permit authorizing the construction. None of these requirements have been met in the Owens Corning permit process.

When Owens Corning initially applied for a permit, it declared that it had the potential to emit 283 tons per year of HCFC-142b. As both DEQ and Owens Corning admitted, at the time of the permit application, the facility was subject to NSR. Despite this, Owens Corning proposed to implement no treatment controls, claiming that the cost of treatment was too expensive. Without ever requesting financial information or conducting its own review, DEQ simply concurred with Owens Corning. DEQ thus proposed to allow Owens Corning to build a major emitting facility with no pollution controls and without any clear understanding of the impacts of the facility's emissions.

From the outset, the permitting process was flawed. DEQ skipped required steps when it scheduled public information meetings and hearings. DEQ published incorrect information in public notices and failed to voluntarily correct the information. For example, DEQ stated in its initial public notice that HCFC-142b was a "weak" greenhouse gas and that the greenhouse emissions from Owens Corning would be equivalent to adding 100 cars on the road. When a chemistry professor notified DEQ at the public hearing that Owens Corning's emissions would in fact be like adding 100,000 cars to Oregon's roads each year that Owens Corning operates, DEQ acknowledged that it had made an error. Although DEQ apparently knew of the significant error well before the public hearing, it did nothing to correct the information. Serendipitously, however, a handful of concerned citizens, including NEDC member Dona Hippert, attended the meeting and learned the truth about the Owens facility.

Another member of the public also revealed that Owens Corning had already completed a substantial amount of construction at the unpermitted facility. DEQ officials acknowledged that they were aware of that fact, but seemed utterly unphased by the revelation. As noted above, the Clean Air Act unambiguously prohibits any facility subject to NSR from commencing construction without a permit. Despite this, it was later revealed, DEQ had in fact told Owens Corning to begin construction without a required permit. Owens Corning, an international company that currently operates pursuant to several Clean Air Act permits, should have known the law. DEQ, Oregon's own air quality agency, is charged with knowing, implementing and enforcing applicable federal law.

On November 24, 2004, Melissa Powers, staff attorney at the Pacific Environmental Advocacy Center (PEAC), filed suit on our behalf in federal district court alleging that Owens Corning had violated the Clean Air Act when it began constructing its facility without first obtaining a permit. PEAC was able to secure an injunction prohibiting Owens Corning from engaging in further construction. The case is now in discovery and will be briefed later this year.

Shortly after suit was filed, Owens Corning submitted a revised permit application in which, astonishingly, the company states it is now able to reduce its emissions to just below 250 tons. The revised application, claims the company, allows the facility to avoid BACT and other federal requirements applicable to facilities subject to NSR.

Throughout the process, Owens Corning has insisted that it cannot use an alternative blowing agent because the alternatives are not technologically available. However, the company has steadfastly refused to conduct an alternatives analysis that may otherwise be required under the Clean Air Act.

Continued on reverse.

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Strikingly, Owens Corning has claimed in documents distributed to the public that alternatives are "harmful." These assertions, from a company that steadfastly refuses to conduct an alternatives analysis, are unfounded. In fact, companies throughout Europe have switched to safer alternatives to HCFC-142b, in the exact same processes, without any technological or economic harm. Several companies now use water-blown carbon dioxide as their blowing agent, in a process that is non-toxic and environmentally sound. The EPA, moreover, has listed several available alternatives to HCFC-142b that are less damaging.

NEDC and PEAC have more recently submitted comments on DEQ's proposed permit authorizing Owens Corning to construct and operate a facility that would emit 245 tons of HCFC-142b. During the public hearing, DEQ informed us that it had no authority to deny the permit or to modify it in a way that would protect public health and the environment. Our comments encouraged DEQ to recognize its authority and to act in a manner consistent with its name.

At this point, unfortunately, DEQ remains convinced that its only job is to ensure that permit applications are complete. In response, we have argued that the Owens application remains woefully inadequate. In response to many questions raised at the public hearings, DEQ responded that it did not know about potential emissions from the Owens facility, that it lacked adequate information to justify certain emissions calculations that Owens Corning had made, and that it lacked other information underlying Owens Corning revised emissions estimates. Oregon law requires DEQ to have a complete application well before it releases a permit for public comment. We have asked DEQ to enforce this law.

We are also exploring other channels to hold Owens Corning and DEQ to their legal obligations. PEAC's new attorney, Allison LaPlante, has joined Melissa Powers in the Owens Corning litigation, and it promises to be an active case on many levels.

Coburg Power Plant

We know the pollution is staying here, but where is the power going?

Quite controversial, and seemingly unnecessary, a new natural gas-fired power plant in Coburg, OR, just north of Eugene, may begin construction as early as the end of 2005. This will not be just any ordinary power plant; the 900 MW facility nearly matches the output of the now closed and highly contentious 1100 MW Trojan Nuclear Power Plant. The energy will go somewhere, but not to Eugene, yet the air pollution will stick in the local residents' lungs. And then there is the Enron factor: the company is a main partner and financier of the proposed plant, a corporation that has probably already cost the state of Oregon billions.

Each year the Coburg plant, as proposed, would emit 401.2 tons of nitrogen oxide, 325.9 tons of particulate matter, 286.1 tons of carbon monoxide, 86.1 tons of volatile organic compounds, and 51.8 tons of sulfur dioxide. The facility would also emit 5.4 tons of "hazardous air pollutants" per year, including arsenic, formaldehyde, and mercury. Thousands of tons of CO_2 would also be added to the already warming atmosphere. Although emissions from the plant are proposed to be within the threshold levels of state and federal air pollution standards, the local air shed will likely be pushed dangerously close to the EPA "cut-off" for poor air quality. But those in charge claim that the plant will *not* be a health risk to its nearest neighbors, even to those within a quarter-mile of the 200-foot stacks of the natural gas facility. But what about the discharge into the Willamette, further increasing water temperatures? And the consequences to filled wetlands, or the infiltration of nitrates into the groundwater from their wastewater land application? The questions, concerns, and environmental and health effects seem to be endless with this mega-facility. Are the 25 new jobs really worth it?

The controversy does not stop with the air pollution levels. Nor did it stop with me when the state agencies bounced me around the phone lines, deflecting any questions of involvement and oversight. And the controversy does not end with the company's lip service that the plant might be scaled down to a 300 MW facility due to the public outcry, when the Lane County Regional Air Pollution Authority has stated that a proposal for a 900 MW facility still stands. The problem really involves the unwanted, unneeded extra energy supply that will cost the locals their air quality. EWEB, the local power company in Eugene has stated, "the local utility company will not purchase power from the Facility, now or in the future." So then where will this energy go? And why should local residents have to suffer from another "negatively rated" energy company's profits?

Many speculate that the energy will go to California, but the cost of transmission lines and sending the energy that far may prove to be inefficient. The alternative game plan may be for Washington to buy the power. Local opposition, however, remains high, and NEDC intends to continue tracking and voicing concern over this ill-conceived proposal.

~ Jared Kahn

Proposed Legislation Will Close Clean Water Loophole

Oregon Considers a Ban on "Toxic Mixing Zones"

Despite the unique frontier history and natural beauty of Oregon City, peering down at the river near Willamette Falls can be a rather depressing activity. Massive factories disgorge huge quantities of foul air, while liquid effluent drains without remorse into the already murky water. Yet what is perhaps the most startling environmental affront is far less apparent to the naked eye.

Much of the river near Willamette Falls flows through a series of Toxic Mixing Zones (TMZ), areas where protective water-quality standards are completely suspended. These TMZs are premised on the theory that "dilution is the solution to pollution". That theory, however, is a gross oversimplification, to which the generally fetid state of our urban waterways can attest.

The federal Clean Water Act, which is administered in Oregon by the state's DEQ requires rivers and streams to meet water quality standards that protect both aquatic life and public health. In its administration of the Act, the Oregon DEQ requires dischargers to obtain a permit that includes limitations on various known toxics. Where quantities exceed the river's maximum limit for a specific toxic, the permit would ideally call for the discharger to take steps to reduce or eliminate that toxic from its effluent. When the Clean Water Act was passed in 1972, it was intended that by 1985 the practice of discharging polluted effluent into our waters would cease completely. Thanks in no small part to Toxic Mixing Zones, that goal has not been reached.

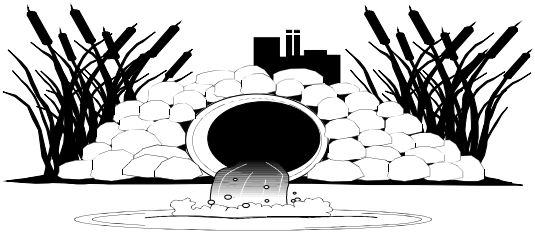
Toxic Mixing Zones create a loophole through which dischargers can avoid meeting otherwise applicable water quality standards. When effluent from an industrial complex or wastewater treatment plant is piped to the river, it is often contains highly toxic pollutants such as arsenic, mercury and lead. Oregon law allows the DEQ to "suspend all or part of the water quality standards… in the defined mixing zone," (OAR § 340-41) so that a discharger need only meet the standard at the outer edge of the TMZ. And while the DEQ is advised to design each TMZ so that it is as small as feasible, in reality these areas frequently measure thousands of square feet and can span nearly the full width of the river. Functionally, these Toxic Mixing Zones give dischargers huge leeway in effluent treatment, allowing them to skirt compliance with water quality standards. The DEQ typically describes the dimensions of the TMZ in the discharge permit – dimensions generally requested by the discharger itself, and often with inadequate testing and little regard to science.

For a startling example, consider the Blue Heron Paper Mill near Willamette Falls. The TMZ, as described in the mill's discharge permit, measures an incredible 88,320 square feet, and extends nearly halfway across the river. Within the TMZ, water quality standards are mostly ignored; mercury is discharged at 833% of the water quality standard, and lead at 860%. And it's all perfectly fine according to DEQ. Now consider the fact that there are 172 permitted dischargers in the Willamette Basin, and virtually every one uses a DEQ-authorized TMZ… its not hard to see why the Willamette harbor is a Superfund site!

Digging a little deeper, the use of Toxic Mixing Zones becomes even more suspect. It is widely understood that certain toxics have a tendency to 'bioaccumulate' in aquatic species; that is, they are stored in the living tissue of the animal until quantities approach a lethal level, as opposed to just passing through the tissue with time. Thus fish that spend even a small part of their lives swimming through a TMZ will have an increased chance of accumulating hazardous amounts of mercury and other toxics. The use of TMZ's also increases the likelihood that dangerous heavy metals will settle out of the effluent, building up dangerous quantities in the sediment of the river bed.

But thanks to the hard work of Willamette Riverkeeper, Sierra Club, OSPIRG, NEDC and others, the prevalence of TMZ's may soon change. Senate Bill 555, currently under consideration in the Oregon State Legislature, would eliminate the use of Toxic Mixing Zones except in a few specific instances. DEQ's common practice of acquiescing to the demands of big polluters would be forced to cease, and the health of the state's waterways would be much improved. Oregon would be the first western state to abolish the use of Toxic Mixing Zones, hopefully leading the charge for others to follow.

~ Jamie Saul



Industrial Stormwater Enforcement

Forcing Polluters to Clean Up Their Act

Industrial stormwater remains one of the most problematic and largely uncontrolled sources of water pollution in urban waterways across the nation. In Oregon, industrial stormwater permit violations are rarely enforced by the state Department of Environmental Quality (DEQ), leaving an enforcement void that is increasingly filled by NEDC. Under the Clean Water Act, citizens can initiate legal action against polluters by sending a 60 day notice of their intention to file suit, and NEDC has taken action against two companies already this year, with several others in the works.

Land O' Lakes and Pape' Machinery hold permits to discharge stormwater run-off from their sites into the Columbia Slough in industrial Northeast Portland. When I looked into the permit I expected there would be restrictions on the heavy metals and other pollutants the companies were allowed to discharge, but in actuality they only had to try and meet discretionary "benchmarks". Both companies had exceeded the benchmarks numerous times over the past few years for parameters such as zinc, copper, and lead, yet had taken only minimal corrective action. Though staff from the Portland Bureau of Environmental Services and Oregon DEQ had inspected both sites and found numerous problems, all they did was send letters informing the companies of their non-compliance with the permits.

Based on agency correspondence with these companies, their test results (which in both cases had been improperly recorded), and information contained in or omitted from their stormwater pollution control plans, NEDC sent them both 60 day notices. Along with discharging high levels of numerous pollutants and failing to update their stormwater plans, the companies had both sent DEQ test results from days when it hadn't rained. It is a violation of the permit to discharge anything other than stormwater, and one of the companies had actually written in its stormwater plan that it discharged wash water that had been used to clean its trucks. This type of activity allows companies to avoid sewer charges and externalize costs that are borne by local communities and the environment.

NEDC, represented by recent Lewis and Clark Law School alum Erin Madden, received favorable settlements from both companies. The settlements each required roughly a quarter of a million dollars in site upgrades and resulted in contributions of just under $100,000 to local non-profit organizations such as the Columbia Slough Watershed Council and Lewis & Clark's Public Interest Law Project. Although state and local agencies charged with protecting the environment continue to fail to force industrial sites to clean up their act, NEDC will continue to protect the waters of the Pacific Northwest from illegal stormwater pollution.

~ Kevin Kerr

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NEDC PROJECT GROUPS KEEPING BUSY THIS SPRING

Lands & Wildlife

Draft Recovery Plan for Vernal Pool Ecosystems

Five student volunteers are working on comments for the US Fish and Wildlife Service's Draft Recovery Plan for Vernal Pool Species. Vernal pools are contained basin depressions that lack a permanent above-ground outlet. They typically have water only during the spring runoff. The pools support species that need water for only a part of their lifecycle, including the tadpole shrimp and the fairy shrimp, a relative of the beloved childhood science project, the Sea-Monkey. Vernal pools are threatened by the usual suspects: urban development, agriculture, nonnative invasive species, pollution, and grazing. In response to increasing threats from the above pressures, the Butte Environmental Council sued to enforce § 4(f) of the Endangered Species Act that requires the Secretary of the Interior to develop and implement recovery plans for the conservation and survival of endangered and threatened species. The resulting draft recovery plan is issued for California and Southern Oregon, but our comments will focus on Southern Oregon. One of our students has a special interest in this project: she was involved in keeping a UC-Merced campus from being built on vital vernal pool habitat. Hopefully, our comments will bring important considerations to US Fish & Wildlife Service's attention and the plan will work to protect vernal pool species from more destruction.

NEDC Comments on New Forest Planning Rules

Early this year the Bush Administration released new rules for managing national forests. These new rules eliminate fundamental wildlife protections; open up millions of acres of national forests to timber cutting, including old growth stands, roadless areas and sensitive wildlife habitat; disregard science; and shut the public out of meaningful input. While these new rules eliminate many protections outright, the administration did accept public comments on the rule adopting or changing forest management plans. Forest plans are long-term blueprints that govern how public forests and grasslands are managed. They also establish parameters for such management, including the amounts and locations of logging, oil and gas drilling, mining, road building, grazing and motorized recreation.

One of the most disturbing aspects of the new rules is their elimination of environmental safeguards. Under existing rules, agencies must analyze the environmental impacts of a new forest management plan, and revisions or amendments to existing forest plans. That process includes consideration of alternatives that may have less adverse impact, and allowing public review of the proposed plans, both of which are on the chopping block under the Bush Administration's rules.

Several NEDC students took the opportunity to submit comments on this proposal, urging the administration to reconsider its position, and to continue to allow public comment and conduct environmental analysis on forest plans. The Lands & Wildlife Project Group intends to continue monitoring the agency's decision on this matter.

Water & Wetlands

In May 1996, Talent Irrigation District applied an aquatic herbicide called Magnacide H to irrigation canals in Jackson County, Oregon without obtaining a Clean Water Act permit. The next day, 92,000 juvenile steelhead were found dead in nearby Bear Creek. Talent claimed that it did not need a CWA permit to apply a federally approved pesticide to water. Both EPA and the Ninth Circuit Court of Appeals disagreed and Talent was found liable for discharging pollutants in violation of the CWA. In its amicus brief, EPA argued that "pesticides containing pollutants may be discharged . . . only pursuant to a properly issued CWA permit."

Ten years later, the Bush Administration is proposing to reverse long-standing EPA policy by adopting a regulation to exempt federally approved pesticides from the permit requirements of the Clean Water Act. Under the proposed regulation, toxic pesticides such as Magnacide H could be directly applied to public waters without a permit. Led by third year NEDC student extraordinaire Alex Fidis, the NEDC Water & Wetlands Group recently submitted comments to EPA in opposition of its proposed pesticide exemption. Stay tuned for EPA's final decision.

The NEDC Water & Wetlands Group has also been focusing its attention on stormwater pollution, laying the groundwork for NEDC's industrial stormwater enforcement program, one of the most aggressive programs of its sort in the nation. First year student Kevin Kerr has taken the lead on many stormwater enforcement projects in the Columbia Slough, and two of the cases Kevin worked up were resolved in the first two months of 2005. The settlements in those two cases resulted in major facility upgrades, and also generated just under $100,000 in mitigation funding for watershed restoration and water quality advocacy work by local nonprofit organizations. Sherry Bosse, Nicole Johnson, Ellen Trescott, Sandra Kain, and Caroline Kincaid also sifted through DEQ files to locate stormwater permit violations, and drafted 60-day notice letters to polluters. Their work is extremely valuable in helping NEDC clean up local waterways, one messy industrial site at a time.

NEDC students also submitted comments on many proposed DEQ actions this semester. For example, Sherry Bosse prepared comments on a permit renewal for the City of Scappoose's Wastewater Treatment Facility, arguing that DEQ should not drop monitoring requirements and effluent limitations for pollutants of concern. Project Group Coordinator Thane Somerville commented on a proposed NPDES permit modification that would have unlawfully extended a compliance schedule for toxic discharges into a small creek in rural Oregon. Kevin Kerr and Caroline Kincaid prepared comments on a proposed permit for the City of Portland's Underground Injection Control (UIC) Systems. This permit authorizes the City of Portland to discharge stormwater into 8,500 separate UIC's throughout Portland, potentially affecting groundwater quality.

Finally, first year student Jamie Saul has been working with a coalition of local environmental groups to address the issue of toxic mixing zones. Jamie has been researching data that is being used to create maps of toxic mixing zones in the Willamette River. Thanks to Jamie and all the other student volunteers who gave generously of their time and helped to make this semester a valuable learning experience for everyone.

Air & Toxics

NEDC's Air & Toxics Group is off to a strong start in 2005. We joined a large and growing group of community organizations across the country concerned about pollution emitted from large industrial agricultural operations, more commonly referred to as factory farms. We are making efforts to eliminate Oregon's broad exemption of all factory farms from any air pollution laws. Under the Clean Air Act, all major sources of air pollution are required to participate in a regulatory permitting process designed to monitor and reduce releases of air pollutants. Not only does this exemption undermine the Clean Air Act, but it is also illogical since the only way Oregon can legally allow the exemption is to assert that no agricultural sources use it. The Air & Toxics Group is seeking to address the illegality and unsound nature of this exemption with the Environmental Protection Agency and the State of Oregon.

Air & Toxics members Katherine Lin and Jake Piehl recently submitted comments on EPA's proposed Air Compliance Agreement, an agreement that exempts animal feeding operations from the requirements of the Clean Air Act and federal hazardous waste reporting laws. The Agreement, as proposed, relieves animal feeding operations of all obligations under these laws for a period of 3 or more years, in return for a nominal penalty of $200 to $1000 and a promise to allow monitoring access to the "farm". NEDC's comments to the EPA focused on the Agreement's limitation of the ability of States and local citizens to enforce environmental laws against animal operations. Absent this enforcement ability, States and citizens have no means to require such animal feeding operations to comply with federal clean air and hazardous waste release reporting laws.

Air & Toxics member Jared Kahn has been following an Oregon legislative proposal to reduce automobile emissions in an effort to curb releases of carbon dioxide. Although the United States failed to ratify the international Kyoto Global Warming Treaty, Oregon can do its part to help reduce the release of harmful greenhouse gases. This legislative process has just begun and we encourage all citizens to play a part in making Oregon a leading example to States nationwide.