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Lawsuit Focuses On Reliant Water Pollution

Pittsburgh, PA—On April 10, 2007, NELC attorneys filed a lawsuit in the federal district court in Pittsburgh against Reliant Energy, the multi-billion dollar energy company that owns and operates a coal-burning power plant on the banks of the Conemaugh River

ed by the company's own monitoring reports.

Our complaint details over 200 violations of the company's Clean Water Act permit occurring over the past two years. It also alleges that Reliant is failing to properly monitor its mercury discharges.



Theresa Labriola

Reliant uses a system that removes hazardous air pollutants from its smokestack emissions and discharges the pollutants with its wastewater into the Conemaugh River.

in West Wheatfield, Pa. Representing PennEnvironment and Sierra Club, NELC is suing Reliant for persistent violations of the federal Clean Water Act and the Pennsylvania Clean Streams Law.

The suit charges that Reliant Energy is discharging illegal levels of toxic metals, including selenium and boron, into the Conemaugh River.

The charges are support-

The company does not use a sufficiently sensitive analytical test for detecting mercury in its wastewater, making it impossible to tell whether Reliant is discharging more mercury than is allowed by its permit.

The Reliant plant discharges, on average, more than 3.5 million gallons of wastewater into the Conemaugh River every day. The highest concentrations of metals

Pacific Seafood Bound By 5-year Consent Decree

Portland, OR—A Clean Water Act enforcement suit brought by NELC ended in victory recently as the Pacific Seafood Group, the third largest seafood company in North America, agreed to be bound by a comprehensive court order that requires substantial improvements at the company's flagship seafood processing facility in Warrenton, Ore.

The facility is located near the mouth of the Skipanon River, which drains into the Columbia River roughly 10 miles from the Pacific Ocean. On March 13, Judge Ancer L. Haggerty of the United States District Court for Oregon signed a negotiated court order, known as a consent decree, requiring the company to: implement numerous pollution reduction measures; pay \$200,000 to remediate the effects of past pollution; and refrain from any further wastewater discharges into the Skipanon River.

The Warrenton facility is operated by two wholly-owned subsidiaries of Pacific Seafood that process various seafood products, including shrimp, crab, and "surimi," a fish paste made from Pacific whiting.

For years, the facility had operated in violation of

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BDA Brings Pollution Controls Into 21st Century

Providence, RI—Last November, Chief Judge Ernest C. Torres of the U.S. District Court in Rhode Island signed a consent decree negotiated by NELC attorneys in settlement of a



Sean D. Elliott

BDA is expected to spend in excess of \$500,000 on studies, upgrades, and enhanced monitoring of its air and water pollution control systems as a result of the consent decree NELC negotiated.

Six months later, BDA has fulfilled most of its obligations under the consent decree, and the air and water pollution control systems at the plant have been transformed.

Clean Water Act and Clean Air Act enforcement suit against Bradford Dyeing Association, Inc. (BDA), which operates a 95-year-old textile finishing mill in Westerly, R.I.

Six months later, BDA has fulfilled most of its obligations under the consent decree, and the air and water pollution control systems at the plant have been transformed.

By December, BDA had already increased the height and exit velocity of exhaust stacks to prevent chemical odors from settling in the surrounding neighborhood. In March, BDA completed two different upgrades to its main boilers: one to reduce soot coming out of the factory's main smokestack,

the other to reduce greenhouse gas emissions.

And on May 5, the company notified plaintiffs Toxics Action Center, Environment Rhode Island and Sierra Club that it has installed the new "smoke abater" required by the consent decree to reduce air pollutants from its textile finishing operations, and that it has decided to go beyond the requirements of the decree and put in a second smoke abater to further reduce air emissions

Improvements to the company's wastewater should be equally dramatic. Highlights include:

- **Copper Removal:** BDA discharged illegal levels of copper, a toxic metal, into the Pawcatuck River for many years. Thanks to a Copper Reduction Study required by the consent decree, BDA will embark on a product substitution effort to eliminate copper-containing products and chemicals from its finishing operations, and will improve its sludge removal practices to get rid

of historic residues of the pollutant.

- **Toxicity Reduction:** BDA has finally determined why its wastewater is toxic to aquatic organisms; high levels of sodium (from a chemical used in the bleaching process) combined with an absence of calcium and magnesium in the intake water (making the sodium more potent). BDA is starting a project to remove sodium and increase calcium and magnesium.

- **Operational Upgrades:** Under the guidance of an outside consultant, the company has instituted monitoring of key wastewater control parameters, upgraded the plant's antiquated wastewater treatment system, and formulated a written operating manual for BDA employees.

NELC will continue to monitor the company's performance, and BDA will continue to face automatic monetary penalties for any unresolved violations of its air or water discharge permits. ♦



Sarah Bergman

BDA's aeration basin, which is used to treat its wastewater, is one focus of pollution control improvements at the plant.

“Off-The-Books” Pollution Threatens Gulf Coast Air Quality

Allendale, TX—According to a study conducted by the Houston Chronicle in 2005, many residents of Houston are exposed to enough hazardous air pollutants to cause a 400-fold increase in their risk of contracting cancer.

The highest concentrations of butadiene, a carcinogenic air pollutant, were documented in Allendale, a predominantly Hispanic neighborhood of Houston that is home to industrial facilities owned by Texas Petrochemical and Good-year.

But Allendale is just one of many communities plagued by dangerously high levels of toxic and carcinogenic air pollutants along the Gulf Coast of Texas, one of the nation’s air pollution “hot spots.”

Why aren’t these air quality problems being addressed?

A major enforcement loophole enabled industrial facilities to release thousands of tons of air pollutants each year beyond the amounts allowed by their Clean Air Act permits.

This loophole has helped make national air quality standards, established by the Environmental Protection Agency (EPA), unattainable in numerous metropolitan areas.

The Texas Commission on Environmental Quality (TCEQ), with oversight

from EPA, issues permits designed to ensure that the total amount of air pollutants released in an area does not create violations of national ambient air quality standards.

TCEQ’s permitting scheme, however, often falls short of this objective because of the Commission’s failure to enforce permit limits and hold companies accountable for rampant “upset” emissions. “Upsets” are defined under Texas law as “unplanned and unavoidable breakdowns” at industrial facilities that result in unauthorized releases of pollutants into the atmosphere.

If a company claimed that emissions from an upset event could not have been foreseen or prevented, TCEQ typically did not fine it for the upset emissions.

BASF is one of hundreds of facilities along the Gulf Coast of Texas that has exploited this loophole. According to the Environmental Integrity Project, upsets at the BASF facility in Port Arthur resulted in the release of 174,665 pounds of two carcinogenic air pollutants during 2003, making the plant the sixth-largest emitter of butadiene and the twelfth-largest emitter of benzene in the country.

Although EPA and TCEQ have both taken recent steps to address the prob-

lem of hazardous upset emissions at large petrochemical facilities, much work remains to be done.

NELC staff have been working with Environment Texas and Sierra Club to document the extent of illegal upset emissions from facilities along the Gulf Coast.

We are investigating ways in which citizens can either pressure the agencies to enforce applicable rules and permits, or take legal action themselves against specific polluters. ♦

NELC Provides International Guidance

Boston, MA—On March 19, NELC staff met with Dr. Zhang Chen, Director of the Environmental Protection Bureau of Urumqi, the largest city in the western half of China. The meeting centered on tactics and legal frameworks NELC draws upon in citizen suits to enforce federal and state environmental statutes, and on the importance of allowing citizens to enforce environmental laws.

Dr. Zhang was particularly interested in NELC’s experiences curbing air pollution from industrial facilities, a critical environmental concern in Urumqi as the city rapidly becomes a major industrial hub. ♦

Recent Litigation At A Glance



MICHIGAN
Cross motions for summary judgement were argued in NELC’s case to compel the Army Corps of Engineers to prepare an environmental impact statement for dredging and disposing of dioxin-contaminated sediments from the Upper Saginaw River, 4/07.



LOUISIANA
NELC attorneys filed opening briefs in the Fifth Circuit Court of Appeals and the U.S. District Court in New York challenging EPA’s decision not to regulate cooling water intake structures at manufacturing facilities, 3/07.



OHIO
NELC attorneys filed a brief in the Sixth Circuit Court of Appeals in a challenge to EPA’s regulation exempting certain aquatic pesticides from Clean Water Act permitting requirements, 4/07.



OREGON
Consent decree entered as order of the court in NELC’s Clean Water Act case against Pacific Seafood Group, 3/07.



PENNSYLVANIA
NELC attorneys filed suit against Reliant Energy to enforce the Clean Water Act and the Pennsylvania Clean Streams Law for discharges of heavy metals into the Conemaugh River, 4/07.

Lawsuit Focuses On Reliant Water Pollution (continued.)

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come from the plant's air pollution control system, which contributes mercury and selenium to the wastewater, and from the plant's large cooling towers, which add a number

cause of high concentrations of metals.

Yet DEP agreed in 2004 to allow Reliant to continue its illegal discharge of metals to the river essentially unabated. In the agreement, the

Water Act discharge permit without following specified public procedures," noted NELC attorney Theresa Labriola. "And any attempt to substantially weaken the permit's limits for metals," she explained, "would run afoul of the Act's requirement that water quality standards be maintained."

Attaining and maintaining water quality standards for metals—which will happen only if the overall discharge of metals is reduced—will be essential to the river's continued recovery.

Some of the metals discharged by Reliant are especially problematic.

Dissolved aluminum is toxic to many aquatic organisms, including fish. Striped bass and brook trout, both of which are found in the Conemaugh, are especially sensitive to the toxic effects of aluminum. The wood ducks and mallards that frequent the river are also at risk.

Manganese can be acutely toxic to certain aquatic species even at low levels.

Boron and selenium can accumulate in aquatic plants and invertebrates consumed by waterfowl. Boron can adversely affect duckling growth and reproduction.

"Any attempt to substantially weaken Reliant's permit limits for metals would run afoul of the Clean Water Act's requirement that water quality standards be maintained."

—Theresa Labriola, NELC Attorney



Theresa Labriola

Wastewater from the cooling towers contains excessive concentrations of metals, such as aluminum, manganese and iron. The contaminated wastewater is discharged into the Conemaugh River.

of other metals, including aluminum, manganese and iron.

Although the discharge of these metals would be a concern for most water bodies, it is of particular concern for the Conemaugh River.

The Pennsylvania Department of Environmental Protection (DEP) has identified the Conemaugh as an "impaired" waterway precisely be-

cause of high concentrations of metals. Yet DEP agreed in 2004 to allow Reliant to continue its illegal discharge of metals to the river essentially unabated. In the agreement, the

agency pledged to waive enforcement of the applicable discharge limits for metals for years into the future. Fortunately, this side agreement, brokered without public participation, does not absolve Reliant of its Clean Water Act responsibilities—nor does it preclude NELC's citizen suit.

"DEP may not alter the terms of Reliant's Clean

At concentrations as low as 3 to 8 parts per billion in water, selenium can cause numerous life-threatening changes in freshwater fish, including reduced survival of larval offspring and juveniles.

Reliant's effluent regularly contains selenium at concentrations higher than 250 parts per billion. Selenium can also have reproductive effects on waterfowl.

The Conemaugh River begins in Johnstown, Pa., at the confluence of the Stoneycreek and Little Conemaugh Rivers, and winds through the western Pennsylvania mountains for 70 miles before joining the Kiskiminetas River.

The Conemaugh is slowly recovering from years of industrial pollution and acid mine drainage.

Diverse species of fish



Theresa Labriola

David Masur, Director of PennEnvironment, explains at a press conference how Reliant's chronic Clean Water Act violations jeopardize efforts to restore the Conemaugh River ecosystem.

and wildlife are returning to the river, including herons, bald eagles and otters.

The Conemaugh also supports a growing recreational community of kayakers, canoers and fishermen.

The continued presence of excessive metals, however, will pose a threat to

the healthy re-emergence of the river's natural ecosystem.

NELC's lawsuit against Reliant Energy will seek to reduce that threat by encouraging the company to implement the production or control technology necessary to significantly lessen the concentration of metals in its wastewater. ♦

Reliant's effluent regularly contains selenium at concentrations higher than 250 parts per billion (ppb). Even at concentrations as low as 3 to 8 ppb, selenium can cause numerous life-threatening changes in wild freshwater fish.

NELC Appeals Clean Water Act Exemption For Aquatic Pesticides

Cincinnati, OH—In 2004 and 2005, two of the largest blueberry companies in Maine agreed to stop the aerial spraying of pesticides in response to a notice of intent to sue served by NELC attorneys under the Clean Water Act.

Now, at the request of the pesticide industry, the U.S. Environmental Protection Agency (EPA) has issued a rule designed to signifi-

cantly curtail the use of the Clean Water Act to control pesticides. The EPA rule, issued on November 27, 2006, exempts the spraying of many types of pesticides into the waters of the United States from Clean Water Act permitting requirements.

Because the application of pesticides to lakes, streams, rivers, and bays can pose real risks to aquatic life,

NELC lawyers have joined with other environmental and public health groups to challenge this rule in the federal courts.

A direct appeal of the rule is currently pending in the Sixth Circuit Court of Appeals in Cincinnati, Ohio, and a parallel challenge to the rule is also pending in the United States District Court in San Francisco, Calif. ♦

Interview: Sujatha Jahagirdar, Advocate, Environment California



Jan Pelton

Sujatha Jahagirdar has worked for five years at Environment California Research and Policy Center (“Environment California”) researching, developing and implementing policy solutions to protect California’s waterways and aquifers from degradation by pollution. Part of her current work centers on an ongoing dispute over perchlorate contamination of groundwater in Rialto, California. When Sujatha’s involvement in that dispute put her directly in the crosshairs of Gibson, Dunn & Crutcher, an 800-lawyer corporate law firm with a reputation for aggressive litigation tactics, NELC stepped in to help.

What’s the history of perchlorate contamination in Rialto?

Rialto is a city of about 100,000, located beneath the San Bernardino Mountains about an hour east of Los Angeles. In 1997, local officials discovered perchlorate—the major ingredient in rocket fuel—in the aquifer that supplies much of Rialto’s drinking water. According to studies, even very low concentrations of perchlorate in drinking water can lead to attention deficit disorder, learning disabilities, and decreased IQ.

Local, state and federal of-

ficials have indicated that they believe several companies, including Goodrich Corporation and Black & Decker, are responsible for much of Rialto’s perchlorate contamination. In July, the State Water Board will hold a hearing to determine whether to issue a cleanup order against these two companies and to determine what requirements such an order would contain. City officials estimate that the order could impose more than \$200 million in costs.

How did you become involved in this issue?

For more than two years, Environment California and community partner Center for Community Action and Environmental Justice (CCA EJ) have worked to convince the state to issue a strong cleanup order against

polluters shown to be responsible for perchlorate contamination in Rialto. We have petitioned the state, issued reports documenting the extent of contamination, and promoted public awareness of the situation. When the California State Water Board scheduled its July hearing, we decided to speak at the hearing as a “designated party,” in order to provide a formal voice in the decision-making process for average, everyday Californians who want to see the pollution in Rialto cleaned up. I was selected to do this.

My role will be to provide policy arguments in support of a strong cleanup order. Such an order would not only be of great benefit to the people of Rialto, but could also establish a model for future drinking water contamination

“The surprising breadth and detail of the subpoena led me to suspect that the upcoming deposition might be a tactic designed to intimidate Environment California into dropping out of the proceedings.”

—Sujatha Jahagirdar



Photo courtesy of Environment California

Residents of Rialto, Calif., demonstrate their concerns regarding the risk of perchlorate contamination of groundwater in the area at a press conference led by Sujatha Jahagirdar.

cleanup orders issued by the State Water Board.

How did Gibson Dunn first contact you?

Goodrich has hired one of the country's largest law firms—Gibson, Dunn & Crutcher—to represent it at the hearing. In March of this year, our Sacramento office was served with a subpoena from Gibson Dunn, issued under the authority of the State Water Board. The CCAEJ received a similar subpoena.

Not being a lawyer, I found the prospect of responding to this subpoena to be fairly daunting. The subpoena commanded me to show up at the firm's offices in Los Angeles for a deposition, and to be prepared to answer questions there under oath on a wide range of topics, including some that seemed to be just plain irrelevant to the state proceeding, such as who our members are and where we get our funding.

The surprising breadth and detail of the subpoena led me to suspect that the upcoming deposition might be a tactic designed primarily to intimidate Environment California into dropping out of the proceedings. We contacted NELC to see if one of their lawyers could represent me at the deposition.

What was NELC's role?

First, NELC attorney Joe Mann drafted a set of formal objections to inappropriate questions, such as those regarding Environment California's funding and membership. He then helped me prepare for the deposition, and alerted me to some of the tactics

that unscrupulous lawyers have used to intimidate or confuse witnesses. Throughout the deposition itself, Joe helped keep me focused, objected to improper questions, and generally kept the proceedings from getting out of hand.

What happened at the deposition?

There were seven or eight lawyers waiting for us when we walked into the room, and most of them were working for companies accused of causing the Rialto pollution. The lead attorney at the deposition was from Gibson Dunn. I found this lawyer's approach demeaning and insulting throughout. At several points, he actually stood up and started shouting at me, eliciting objections from Joe. It felt like he spent most of the seven hours of the deposition trying to browbeat me into saying that I knew nothing about perchlorate and had no business addressing the State Board at the hearing.

When he asked questions about reports on the Rialto situation that I had co-authored, he seemed to imply that I had defamed Goodrich, and that I could be subject to a libel suit. I knew I couldn't take these threats lightly: Gibson Dunn was recently fined \$10 million for maliciously prosecuting a baseless defamation suit against one unfortunate individual who had displeased another of the firm's clients.

In fact, the Gibson Dunn attorney offered me a quid pro quo deal: after the deposition, he pointedly told me that if Environment California dropped out of



Sujatha Jahagirdar works on behalf of Environment California to convince the state to issue a strong cleanup order against polluters responsible for perchlorate contamination.

the hearing, I'd never see him again.

What have you learned from this experience?

When I was confronted by that room full of lawyers, it was reassuring to have my own attorney at my side. I told the truth, of course, but it was helpful to know where the potential pitfalls were. Had I not had my own lawyer there, I might have lost my temper in a way that could have come back to jeopardize the case later.

This whole ordeal shows why it's important to have public interest law firms like NELC to combat heavy-handed tactics by moneyed corporate interests. Without NELC's help, Environment California probably would have dropped out of the proceedings altogether. All of us need to speak out on issues of public concern, and we need to feel free to do so despite attempts to keep us quiet. ♦

“This whole ordeal shows why it's important to have public interest law firms like NELC to combat heavy-handed tactics of moneyed corporate interests.”

—Sujatha Jahagirdar



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— Pacific (continued.)

the federal Clean Water Act, discharging millions of gallons of oxygen-depleting wastewater into the tiny Skipanon. These discharges seriously impaired the health of that river and its ability to provide vital habitat for Coho salmon, Pacific lamprey, and other species of threatened fish.

NELC attorneys filed suit against the Pacific Seafood subsidiaries in July 2002, on behalf of the Oregon State Public Interest Research Group (OSPIRG) and two local residents, to bring the facility into compliance with the Clean Water Act. Rather than devote its resources to remedying the violations, the company chose instead to sink countless dollars into a lengthy court battle and a lobbying campaign to persuade the Oregon Department of Environmental Quality (DEQ) to ignore its violations.

These expenditures proved fruitless, as Judge Haggerty issued ruling after ruling against the company, including an injunction order in June 2005 that shut down the facility's surimi operations until the company could divert its wastewater from the Skipanon. In September 2006, just two weeks before trial, Pacific Seafood finally agreed to settle the case on NELC's terms.

The resulting consent decree, which will remain in effect for five years, contains numerous provisions to ensure that the company maintains sustained compliance with the law:

- Pacific Seafood must implement comprehensive best management practices (BMP) plans to reduce pollution in the facility's wastewater; progress will be evaluated in annual, independent reports submitted to NELC and DEQ.
- The company must retain a qualified wastewater consultant to design and

implement environmental compliance and pollution reduction training programs at the facility, and must incorporate them into similar programs at its other seafood processing facilities from Alaska to California.

- The company must investigate the sources of bacteria in the facility's wastewater, and evaluate and implement procedures to reduce bacteria concentrations.

- Wastewater monitoring practices at the facility must meet specified criteria.

- After one year (during which the BMP plans and other pollution reduction measures are being implemented), the facility must achieve and maintain substantial compliance with its wastewater discharge permits or face further court order.

- For the full five years of the decree, the company must pay increasingly stiff monetary penalties for violations of discharge permits. The company must also pay \$200,000 to the Skipanon River Watershed Council (a local environmental group dedicated to restoring the river's health) for Skipanon River restoration projects. This financial sanction is in addition to the substantial profits the company lost as a result of the 2005 shutdown order and \$200,000 in penalties and restoration monies that DEQ ordered the company to pay in 2005.

- The facility (which rerouted its discharge to the much larger Columbia River in 2006) will discharge no wastewater to the Skipanon River for the life of the decree.

"Some companies will only get serious about cleaning up their operations when you hit them in the pocketbook," said NELC attorney Joe Mann. "This consent decree sends a clear message to Pacific Seafood that it does not have free license to pollute."



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