

## Court Closes Pesticide Loophole



Alonnie Hancy

*NELC helped residents stop a state plan to apply toxic aquatic pesticides to Lake Boon in Stow, MA. The Bush administration regulation was a response to efforts like this.*

Cincinnati, OH — On Jan. 7, NELC helped remove a dark vestige of the Bush administration when a federal appellate court invalidated a 2006 EPA regulation that exempted applications of aquatic pesticides — many of which contain harmful chemicals or biological agents — from the Clean Water Act's permit program.

Significant negative effects have been documented in areas where pesticides have been sprayed into lakes, ponds and streams. But in the early 2000s, pesticide manufacturers and agribusiness groups began pressuring the EPA to allow them, without a Clean Water Act permit, to spray chemical and biological pesticides into the nation's waters.

When Bush regulators adopted the industry position in 2006, NELC filed a petition on behalf of Environment Maine and the Toxics Action Center to challenge the EPA's regulatory exemption. NELC's lawsuit was consolidated with several other challenges to the regulation and was transferred to the U.S. Court of Appeals for the Sixth Circuit in Cincinnati.

In a forcefully-worded, unanimous opinion, the Sixth Circuit rejected the EPA's efforts to contort the law and the pesticide industry's attempt to escape regulation. It ruled that the EPA's exemption violated "the plain language of the Clean Water Act" and was "contrary to the purpose of the permitting program, which is to prevent harmful discharges into the nation's waters."

The court's ruling should help avoid these harmful impacts. Under a permit program, pesticide dischargers will have to comply with in-stream water quality standards and may be required to consider non-toxic alternatives to chemical pesticides. Monitoring and reporting the effects of pesticide applications should improve, and the public will have greater input in establishing and enforcing pesticide discharge standards.

However, while the new EPA administration has accepted the opinion and is moving to develop a comprehensive permit program for pesticides, the industry has requested the Sixth Circuit to "rehear" the case and may well seek Supreme Court review if rebuffed. ♦

## Hope For R.I. Beaches

Newport and Middletown, R.I. — NELC's Clean Water Act lawsuits against the municipalities of Newport and Middletown, R.I., are beginning to bring results. The suits, filed in 2008 on behalf of Environment Rhode Island and four long-time local residents, seek to end decades of illegal sewage overflows and storm water discharges that have repeatedly closed two popular public beaches on Easton's Bay and shellfish beds in Newport Harbor.

The chief culprit has been the high bacteria counts that often accompany the illegal discharges. Because the bacteria pose a threat to human health, the Rhode Island Department of Public Health closes the beaches to swimming once bacteria levels in the water rise above health screening levels.

However, real improvement may be on the horizon. City of Newport officials are working with consulting engineers to design a system to treat the city's storm water before it is released from a holding pond into the bay. Currently, they intend to use an ultraviolet treatment system to kill the great majority of the bacteria prior to release.

"While we believe that Newport may also need to address how the storm water becomes contaminated in the first place," noted NELC's Theresa Labriola, "treatment is a good first step."

After receiving NELC's notice of intent to bring suit, the Town of Middletown made a preliminary commitment of several million dollars to address its own storm water issues, and commissioned a study to evaluate alternatives. Middletown is also preparing a proposal to address its sewer system overflows—one source of bacterial contamination in Newport's storm water holding pond.

NELC is continuing to meet with city, state, and federal officials to negotiate a lasting solution to sewage overflows into Newport Harbor. ♦



# New Violations Discovered At Power Plant

Nearly two years after initiating a federal court lawsuit against a coal-fired power plant for discharging illegal levels of metals into the Conemaugh River in western Pennsylvania, NELC attorneys have notified the operator of the plant, RRI Energy, of their intent to add newly discovered violations of the federal Clean Water Act and the Pennsylvania Clean Streams Law to the lawsuit.

The runoff was so laden with metals, including iron, that it had a distinct orange color when NELC attorneys and their consulting engineer inspected the facility several months later.

DEP also discovered that RRI was routinely dumping lime, ferric chloride, and hypochlorite into the river, as a cheap – but illegal – way of treating the river

water before running it through the plant’s cooling system.

“The DEP investigation showed that RRI’s disregard for clean water laws is even more extensive than we realized,” explained NELC attorney Josh Kratka.

The Clean Water Act and the Clean Streams Law prohibit the discharge of pollutants into the Conemaugh River from a point source unless authorized by, and in compliance with, a wastewater discharge permit. Because RRI never applied for and does not have such authorization, each and every discharge from these sources is a violation of both state and federal laws.

Although two years have passed since the DEP conducted this site investigation, the agency has not initiated any enforcement action against RRI Energy for these new violations. NELC plans to fill this regulatory gap by adding these claims to its enforcement suit. ♦

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*In response to NELC’s lawsuit, the Pennsylvania Department of Environmental Protection conducted a site investigation at RRI’s Conemaugh Generating Station, revealing that, unbeknownst to DEP officials, runoff from the station’s enormous exposed coal pile is discharging directly into a tributary of the Conemaugh River.*

*“The DEP investigation showed that RRI’s disregard for clean water laws is even more extensive than we realized,” explained NELC attorney Josh Kratka.*

In a January 2009 letter to RRI Energy—sent on behalf of PennEnvironment and the Sierra Club—NELC alleged that the company, without the required permit authorization, is illegally discharging pollutants into the Conemaugh River from two recently discovered locations.

In 2007, in response to NELC’s federal lawsuit, the Pennsylvania Department of Environmental Protection had conducted a site investigation at RRI’s Conemaugh Generating Station. The investigation revealed that, unbeknownst to DEP officials, runoff from the station’s enormous exposed coal pile is discharging directly into a tributary of the Conemaugh River.



*RRI Energy’s coal-fired power plant is situated on the Conemaugh River, west of Johnstown, PA.*

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*If you want to find out more about our staff and the cases we’re working on, visit our Web site, [www.nelconline.org](http://www.nelconline.org).*



## NELC Interview: Luke Metzger, Director Of Environment Texas

Luke Metzger, the long-time Director of Environment Texas, describes his group as “a non-profit environmental organization dedicated to protecting the air, water, and open spaces of Texas through tough-minded advocacy, winning concrete results for our environment.”

In January 2008, Environment Texas joined the Sierra Club in a lawsuit seeking to compel Shell Oil Company to comply with the Clean Air Act at its refinery and chemical plant complex in Deer Park, Texas, about 20 miles east of Houston. The National Environmental Law Center represents both groups in the case.



Steve Ngo

*Why did Environment Texas decide to sue Shell for Clean Air Act violations at its facility in Deer Park?*

Shell is one of the largest polluters in the Houston area and has repeatedly violated the Clean Air Act at its Deer Park refinery and chemical plant. These violations caused the release of millions of pounds of excess air pollutants over the past five years.

Texas families have suffered long enough from air pollution, so we decided to take matters into our own hands.

*How can citizen groups like Environment Texas get involved when companies violate the law?*

The Clean Air Act allows citizen groups to file suit against polluters when the state fails to enforce the law. This right is especially important in a state like Texas, where the Texas Commission on Environmental Quality is notoriously lax in its enforcement.

*What effects do Shell's emissions have on air quality around Houston? What types of pollutants are being released, and*

*Oil refineries and chemical plants line the banks of the Houston Ship Channel.*

*why is it important to ensure violations don't occur?*

Houston's air is among the most polluted in America, in part because of frequent and flagrant violations of the Clean Air Act by the region's many petrochemical facilities. The air is so polluted that on certain days of the year it's just not safe to breathe.

Shell's illegal air pollution includes: volatile organic compounds and nitrogen oxides, which contribute to the formation of ground-level ozone—a major constituent in urban smog; sulfur dioxide, a lung irritant and precursor to acid rain; and cancer-causing chemical compounds.

A recent study by the University of Texas School of Public Health found elevated rates of leukemia in children living within two miles of the Houston Ship Channel and among children living in areas with elevated ambient air levels of 1,3-butadiene, a known carcinogen emitted by Shell's facility.

*Why is this case important? How does it compare to other Clean Air Act cases?*

To my knowledge, this is the first time citizens have sued a Texas refinery to stop “upset” air emissions. These are unauthorized releases of air pollutants that occur during “non-routine” incidents, such as equipment malfunctions. The trouble is that for many companies, like Shell, “upsets” have become standard operating practice—they are the routine.

I believe that a successful outcome in this case against a recognized industry leader could set a national precedent for air pollution control at chemical plants and refineries. ♦

*To read more about past cases and recent news, visit the NELC Web site at [www.nelconline.org](http://www.nelconline.org).*



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## Bad Supreme Court Ruling Limited In Scope

Washington, D.C. — On April 1, 2009, the U.S. Supreme Court issued an opinion interpreting a relatively obscure but important provision of the Clean Water Act—a directive to the EPA to set standards for cooling water intake structures based on “the best technology available for minimizing adverse environmental effects.”

Concluding that this language is “silent...with respect to all potentially relevant factors,” the court held that the EPA is free to consider the benefits of a particular technology in relationship to its costs when determining the “best” cooling water intake technology.

Because environmental benefits are often difficult to quantify, the use of cost-benefit analysis can weaken environmental standards.

This ruling, entitled *Entergy Corp. v. Riverkeeper, Inc.*, could therefore lead to regulations that allow significant numbers of fish, eggs, and other aquatic organisms to continue being destroyed

by getting drawn into industrial facilities with the intake of cooling water.

The court’s decision could have been worse, however. The industry groups who took this case to the Supreme Court had sought a much more sweeping ruling that would have opened the door to the use of cost-benefit analysis throughout the Clean Water Act and in other federal environmental regulations. NELC attorneys successfully helped forestall that result by filing an amicus (friend of the court) brief on behalf of Environment America and the Center for Biological Diversity.

In the brief, NELC urged the court not to disturb the technology-forcing structure of the Clean Water Act, which allows cost-benefit analysis only in a few specifically limited situations. Fortunately, the Supreme Court adopted this position. It explicitly declined to extend the reach of its opinion to other parts of the Clean Water Act and noted the differences between those provisions and the cooling water intake language. ♦



Tony Fisher, Corpe Dion Photography

*The outdated cooling system at Entergy’s Indian Point Nuclear Plant needlessly destroys millions of fish and eggs each year.*

### About NELC

*The National Environmental Law Center (NELC) is a nonprofit litigation center dedicated to enforcing anti-pollution laws and promoting long-term solutions to the nation’s most pressing environmental problems. Visit us online at [www.nelconline.org](http://www.nelconline.org), call us at (617) 747-4346, or e-mail [nelc@nelconline.org](mailto:nelc@nelconline.org).*

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