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NELC Reliant Suit Spurs State Action

Pittsburgh, PA—As reported in our last newsletter, NELC filed a Clean Water Act enforcement suit in April against Reliant Energy to address long-standing industrial pollution of Pennsylvania's Conemaugh River.

For the past three years, the company's Conemaugh

detailed in NELC's February 2007 pre-suit notice letter, even though DEP had entered into a 2004 consent agreement with Reliant promising to allow the company to commit such violations without fear of enforcement.

At the same time it filed suit, the DEP proposed to



Theresa Labrida

Conemaugh Generating Station: Reliant Energy's 1,700-megawatt, coal-burning power plant near New Florence, PA.

maugh Generating Station, a 1,700-megawatt coal-burning power plant, has been regularly violating its discharge limits for toxic heavy metals.

Just days before NELC filed suit in federal court, however, the Pennsylvania Department of Environmental Protection (DEP) quietly filed a nearly identical enforcement suit against Reliant in Pennsylvania state court. DEP's lawsuit focuses exclusively on the violations

reissue—and weaken—Reliant's wastewater discharge permit by suspending, for three years, the very effluent limits DEP was now purporting to enforce.

The Pittsburgh Post-Gazette, reacting to these obvious inconsistencies, ran the following headline: "DEP sues firm over pollution that it allowed."

"This headline precisely captured the Alice-in-Wonderland nature of

Judge Declines To Order EIS For Dioxin Landfill

Bay City, MI—In May, Judge Thomas L. Ludington of the U.S. District Court for the Eastern District of Michigan ruled that the U.S. Army Corps of Engineers complied with the National Environmental Policy Act (NEPA) by preparing only a brief environmental assessment of its plans to build an uncapped, unlined landfill to dispose of 3.1 million cubic yards of dioxin-contaminated sediments that will be dredged from the upper Saginaw River. The judge rejected NELC's argument that the project requires a full environmental impact statement (EIS) because of its significant effect on the environment.

"The judge accepted most of our legal arguments, and adopted standards for reviewing NEPA disputes that should make it easier for environmental plaintiffs to win future EIS cases in Michigan," explained NELC Attorney Stephanie Matheny. "However, he simply did not agree with us on the facts of this case." Although plaintiffs Environment Michigan and Lone Tree Council dispute the judge's factual conclusions, they opted not to appeal the decision because a reviewing court would be unlikely to overturn his findings. Nonetheless, the

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Sewage Overflows Contaminate Narragansett Bay

Providence, RI—Each year, an estimated 3,500 people suffer from illnesses caused by recreational exposure to sewage overflows at U.S. beaches.

of stormwater can overwhelm treatment plants during heavy rainfall, causing untreated wastewater to be diverted to the nearest lake, river, stream or coastal waterway.

Subsistence fishers, who consume more seafood than the general population, are also at increased risk. Although consumption advisories have been posted, the bay is dotted with families raking for clams and oysters and consuming their catch.



Theresa Labriola

Youth congregate at Elm Street Pier, an unofficial swimming area a few hundred feet from a sewer overflow outfall in Newport, R.I.

“The state has listed Narragansett Bay as an impaired water body due to excessive amounts of pathogens and nutrients. These pollutants can pose a major hazard to public health, causing infections, dysentery, hepatitis A and gastroenteritis.”

This estimate, from a 2004 EPA report, likely captures only a fraction of the total number of illnesses attributable to sewer overflows, because “unrecognized” beaches and recreational activity, such as fishing and boating, were excluded from the study.

Sanitary sewer systems are designed to carry only raw sewage from residences and industry, whereas combined sewer systems are designed to carry stormwater runoff as well.

While the Clean Water Act requires both systems to provide treatment prior to discharge, large volumes

NELC has been working with Environment Rhode Island to prompt local and state officials to take concrete steps to eliminate the discharge of untreated sewage into Rhode Island’s Narragansett Bay.

The repercussions of sewer overflows in the bay are severe. Rhode Island has 76 sewer overflow outfalls, and all of them discharge into the Narragansett Bay watershed. The state has listed the bay as an impaired water body due to excessive amounts of pathogens and nutrients.

Waterborne pathogens from sewer overflows can pose a major hazard to public health, causing infections, dysentery, hepatitis A and gastroenteritis.

Children are especially susceptible to pathogenic illnesses from sewer overflows. They tend to swallow the water during recreation, and to ingest large amounts for their size. Teenagers and adolescents also tend to congregate at “unrecognized” beaches, which are often closer to overflow discharge pipes and thus more contaminated.

Further, pathogens and nutrients from combined and sanitary sewer overflow threaten the survival of fish species by reducing dissolved oxygen levels and killing bacteria essential to aquatic ecosystems of the bay.

Technology to reduce the impact of sewer overflows is widely available. The city of Providence has nearly completed construction of an underground tunnel that will store excess flow during wet weather and transport the wastewater to a secondary treatment plant during dry weather. Numerous other municipalities in the Narragansett watershed, however, have not seriously addressed the issue. ♦

Bush Administration Undercuts Clean Water Act

Washington, D.C.—When Congress passed the Clean Water Act (CWA) in 1972, it made two things perfectly clear. First, industry is required—at a minimum—to use the best technology it can afford to protect the waterways it uses. Second, outside of a few exceptions, no one may discharge pollutants to a waterway without first obtaining (and complying with) a CWA permit. More than 30 years later, under pressure from a presidential administration that has been largely hostile to environmental regulation, the Environmental Protection Agency (EPA) has embarked on an effort to weaken these rules by regulatory fiat.

In June 2006, EPA issued a notice declining to set standards for cooling water intake structures at existing manufacturing facilities, despite a directive in the CWA to set such

standards, and despite the agency’s own findings that such standards would be economically and technologically feasible and would save millions of fish each year.

A few months later, in November 2006, EPA issued a rule that would exempt from the CWA’s permitting requirements the application of pesticides “directly into waters of the United States” or “over, including near, waters of the United States.” This new rule, which represents a wholesale reversal of the position taken by EPA in previous presidential administrations, would allow the discharge of known poisons into the country’s waterways without any CWA oversight.

In both cases, the agency’s justification rests with its own conclusion that the policies mandated by Congress are unwise. In

explaining its decision not to issue cooling water standards, for example, EPA cited its desire to avoid “unnecessary regulatory burdens.” This is not EPA’s call to make.

“While the proper scope of surface water regulation clearly is an important policy question,” noted NELC Litigation Director Charles Caldart, “Congress has already answered that question in the Clean Water Act, and EPA must follow that directive.”

Because of the importance of this issue to the enforcement work to which NELC has long been committed, NELC attorneys have joined with other environmental groups to challenge both of these EPA decisions in court. The cooling water case is now pending before the Fifth Circuit Court of Appeals in New Orleans, while the pesticide case is being heard by the Sixth Circuit Court of Appeals in Cincinnati.

“The key question in each case,” stated NELC’s Caldart, “is whether unelected executive branch appointees may override the legislative policies articulated by the branch of government to whom the Constitution has entrusted the principal responsibility for policymaking. The clear answer, under our system of government, is no.” ♦



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Under pressure from the current presidential administration, the Environmental Protection Agency has embarked on an effort to weaken the Clean Water Act by regulatory fiat.

Recent Litigation At A Glance



MICHIGAN

The District Court for the Eastern District of Michigan ruled that the Army Corps of Engineers is not required to perform an environmental impact statement prior to dredging and disposing of dioxin contaminated sediments from the Upper Saginaw River, 5/07.



LOUISIANA

EPA and industry filed their response in the Fifth Circuit Court of Appeals to environmental petitioners’ argument, co-authored by NELC attorneys, that EPA violated the Clean Water Act by failing to regulate cooling water intake structures at existing manufacturing facilities throughout the country, 7/07.



OHIO

NELC attorneys, working with other environmental groups, filed briefs and supporting documents in the Sixth Circuit Court of Appeals arguing that EPA violated the law by purporting to exempt pesticide discharges from the Clean Water Act, 9/07.



PENNSYLVANIA

NELC and the Pennsylvania Department of Environmental Protection entered into settlement negotiations with Reliant Energy in twin lawsuits to compel the company to reduce its discharges of heavy metals into the Conemaugh River in accordance with the Clean Water Act and the Pennsylvania Clean Streams Law, 5/07.

NELC Reliant Suit Spurs State Action (continued)

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DEP's actions in this case," noted NELC Senior Attorney Josh Kratka. "We all wanted to know whether the agency was trying to enforce—or to eviscerate—Reliant's permit."

DEP would vigorously enforce the law.

Fortunately, a Pennsylvania statute gives the citizen plaintiffs—here, PennEnvironment and Sierra Club—the right to join as co-plaintiffs in the

Act explicitly prohibits such "backsliding" if the weakened limits would result in a violation of state water quality standards.

"The backsliding clause applies to Reliant," explained NELC Attorney Theresa Labriola. "The discharge limits for the Conemaugh Station were set at levels necessary to prevent the company's discharge from causing further harm to this already impaired river."

"The Pittsburgh Post-Gazette headline, 'DEP sues firm over pollution that it allowed,' precisely captured the Alice-in-Wonderland nature of DEP's actions in this case."

*– Josh Kratka,
NELC Attorney*



NELC Senior Attorney Josh Kratka (at right) informs news reporters and other members of the public about proceedings in the case against Reliant Energy.

Under certain circumstances, a prior-filed agency enforcement suit will preclude citizen plaintiffs from maintaining a Clean Water Act lawsuit in federal court over the same violations.

But to have preclusive effect, the state enforcement action must be "diligently" prosecuted.

Given the inconsistency of the agency's actions up to that point, NELC had serious concerns as to whether

agency's state court suit.

NELC attorneys took immediate steps to protect PennEnvironment's and Sierra Club's legal rights, and to ensure that DEP's actions meet the pollution-reduction requirements of the Clean Water Act.

In response to the proposed permit reissuance, NELC prepared and submitted comments to DEP strongly opposing any weakening of effluent limits. The Clean Water

At the same time, NELC contacted DEP to suggest joining forces. The one-two punch of simultaneous state and federal enforcement suits appears to have captured the undivided attention of Houston-based Reliant Energy.

The company owns 37 power plants in the United States and had nationwide revenues of \$10 billion in 2005.

Shortly after the lawsuits were filed, Reliant contacted both NELC and DEP seeking to initiate settlement talks. As a result, both lawsuits and the potential permit reissuance have now been put on hold pending the outcome of settlement negotiations aimed at resolving all outstanding enforcement and permitting issues.

One very important and tangible step toward cleaning up the Conemaugh River has already

occurred. As a direct result of NELC's lawsuit, DEP conducted an in-depth, facility-wide compliance inspection of the Conemaugh Generating Station at the end of April.

That inspection uncovered previously unsuspected water pollution problems at the site. These include the unpermitted discharge of highly discolored runoff that could contain heavy metals, possible groundwater contamination from the coal storage pile, and the presence of oil and excess nutrients in the plant's wastewater discharge channel.

These new violations, as well as the violations outlined in NELC's complaint, will be addressed in settlement negotiations.

In March 2006, Penn-Environment released a



After decades of pollution from acid mine drainage, the Conemaugh River's recovery is now threatened by pollution from Reliant Energy's Conemaugh Generating Station.

study entitled "Troubled Waters," in which data gathered under the Freedom of Information Act revealed that Reliant's Conemaugh power plant was routinely discharging nearly three million gallons of wastewater per day containing illegal concentrations of aluminum,

boron, iron, manganese, and selenium. The report also showed that Reliant was violating its monitoring requirements for mercury.

The judges in the two cases have given the parties until late winter to try to reach an agreement. ♦

The inspection of the plant uncovered previously unsuspected water pollution problems, including an unpermitted discharge of highly discolored runoff, and possible groundwater contamination.

Salmon Industry Drags Feet On Regulation

Augusta, ME—In 2003, NELC won an industry-changing lawsuit that imposed strict pollution discharge limits and wild salmon protection measures on Maine's burgeoning salmon farming industry. Just months after the verdict, the Maine Department of Environmental Protection (DEP) followed suit, issuing precedent-setting Clean Water Act discharge permits to salmon growers.

Now, the industry is seeking to delay for two years the implementation of a key protection: the tagging of each farmed fish, so that escapees—fish that can spread disease and pollute the gene pool of endangered wild salmon—can be traced. Josh Kratka, one of the NELC attorneys who litigated the original case, submitted comments to DEP in August opposing the delay. ♦



Biomark is one of several companies that provide mobile fish tagging services to help track salmon migration.

Interview: Sylvia Broude, Community Organizer For Toxics Action Center

Sylvia Broude and the New England-based Toxics Action Center (TAC) work side-by-side with neighborhood groups fighting environmental pollution in their communities. Sylvia provides strategic assistance to local activists as they confront threats to public health, including the growing use of toxic pesticides.

When the Bush administration tried to derail local opposition to pesticide use by exempting aquatic pesticides and certain aerially sprayed pesticides from the protections offered by the federal Clean Water Act, TAC joined NELC's court challenge to the new regulation (see Bush Administration Undercuts Clean Water Act, page 3).

Why are community groups so concerned about pesticide use?

Pesticides are typically composed of highly toxic chemicals that can persist in the environment. In addition to "active" ingredients—the synthetic chemicals developed specifically to kill a particular set of species—most pesticides also contain "inert" ingredients, used as binders or surfactants, that are themselves toxic but are rarely disclosed to the public.

Aerially sprayed pesticides, such as those used to kill adult mosquitoes, create the risk of direct exposure to people—frequently children—who are outside during spray-

ing. In addition, these chemicals usually end up in our water, either through runoff or by drifting into lakes, streams and wetlands.

Some of the aquatic pesticides used most frequently to kill off weeds in lakes and ponds have been linked to cancer, birth defects and other health problems like attention deficit hyperactivity disorder (ADHD). This is of particular concern in towns that draw their drinking water from lakes targeted for pesticide applications.

We were recently alerted to a situation in which a high school playing field in Connecticut was sprayed with 2,4-D, a major component of the notorious Agent Orange herbicide used during the Vietnam War.

How pervasive is the use of pesticides?

In Massachusetts alone, well over 200 lakes and ponds each year are treated with aquatic pesticides. Last summer the Massachusetts Department of Public Health and the state Mosquito Control Board approved the spraying of over 400,000 acres with pesticides to control mosquitoes – this was in addition to all the local mosquito spraying authorized on a town-by-town basis.

Adding to the inundation of toxic chemicals, railroads throughout the state and the Mass. Highway Department regularly spray powerful, broad-spectrum herbicides to kill off plants growing along railroad tracks and highways. And to this one has to add all the toxic pesticides used in agriculture

"We are swimming in an ever-expanding soup of pesticides that are more toxic and more persistent than most people realize."

—Sylvia Broude



Photo courtesy of Toxics Action Center

Sylvia Broude helped youth and other residents at Lake Cochituate, in Natick, Mass., speak out against pesticides in their lake.

and lawn and garden care.

We are swimming in an ever-expanding soup of pesticides that are more toxic and more persistent than most people realize.

Aren't pesticides effective at solving real problems – like invasive weeds and disease-carrying mosquitoes?

These problems are real, but we need to seek more proactive strategies for solving them. Pesticides aren't nearly as effective in solving these problems as they're advertised to be.

For example, dumping weed killers into a lake will certainly kill off invasive, non-native species of weeds – but it will wipe out native plants, too, destroying habitat for fish and other local species that depend on them and thus making it even easier for invasive weeds to come back with a vengeance in subsequent years. This creates a cycle of dependence: once you start down the pesticide road, it's hard to go back.

Mosquito spraying has similar limitations. Aerial spraying is almost completely ineffective in heavily wooded areas, where many mosquitoes breed. And there is some evidence that mosquito populations rebound faster and stronger after widespread spraying, possibly because spraying also affects the mosquito's predators and competitors.

Are there any alternatives to chemical pesticides?

Yes. In most cases, safe, long-term solutions that get at the underlying

problems, rather than the symptoms, already exist.

The problem of out-of-control aquatic weeds, for example, is usually caused by excess nutrient runoff from lawn fertilizer, the introduction of non-native plants, and the man-made expansion of natural lakes and ponds (in which sunlight reaches to the bottom of shallow new basins).

Long-term solutions therefore include: measures to control nutrient runoff; washing plant fragments off boats before they can be put into a lake; deepening lake basins; and drawing down water levels in the off-season.

Other non-toxic control methods exist, too. I worked with a group of lakeside residents in Natick, Mass., who convinced the town board of health and the local conservation commission to reject a state-sponsored plan to dump the pesticides fluridone and diquat into Lake Cochituate, which is located in a state park and provides drinking water for the town.

Instead of using chemicals, some residents are organizing an effort to hand-pull weeds; others have begun a pilot project, in conjunction with a technology company and a Tufts University professor, to study the effectiveness of solar-powered water circulators in controlling weed growth; and now the state is seeking a grant to pay for the introduction of native, weed-eating weevils, whose population will rise and fall with weed levels.

Mosquito control is another area where non-



Photo courtesy of Toxics Action Center

TAC activist and community organizer Sylvia Broude discusses the environmental and public health hazards of pesticide spraying by the Massachusetts Highway Department at a press conference in Worcester.

toxic alternatives are both safe and effective at slowing the growth of mosquito populations and the spread of disease.

Municipalities and pest control boards need to adopt non-toxic preventive control strategies, like spreading bacteria that only kill mosquito larvae and applying a type of soapy residue to the surface of swampy areas that keeps larvae from maturing.

How will the Bush Administration's new interpretation of the Clean Water Act, which removes many toxic pesticides from the definition of water pollutant, affect the communities you work with?

One of our biggest challenges is that most state and local agencies with authority over pesticide spraying are biased in favor of pesticide use as a first option, rather than as a last resort. They put few limits on spraying and frequently encourage unnecessary pesticide use.

The federal Clean Water Act offered one of the few tools private citizens could use to resist the push for pesticides. Unless pesticide users complied with a Clean Water Act discharge permit, any discharge of an aquatic pesticide into a lake or pond and any mosquito spraying over bodies of water was illegal – until now.

A couple of years ago, Toxics Action Center and NELC helped activists in Downeast Maine use the threat of a Clean Water Act citizen enforcement suit to end aerial pesticide spraying by Maine's two biggest blueberry growers, because spray drift was going directly into rivers that are home to endangered Atlantic salmon.

The farm lobby and the pesticide industry are now trying to expand the Bush Administration's new pesticide exemption even further, to exempt all agricultural spraying from Clean Water Act requirements. ♦



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R E P O R T

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Dioxins (continued)

Corps may still be required to conduct an additional NEPA review of the project. Documents obtained from the Environmental Protection Agency indicate that Dow Chemical Company may be planning to use the Corps' landfill to dispose of sediments from Dow's federally-mandated cleanup of the Tittabawassee and Saginaw rivers. The Corps did not evaluate this use in its environmental assessment, and did not design the landfill to accommodate the extraordinarily high levels of dioxins that have been found in the Dow sediments.

"The Corps' own documents acknowledge that Dow's sediments are 50 times more contaminated than those the Corps planned to put in the landfill," said Environment Michigan's Mike Shriberg. "Clearly, this would be a significant change in the scope of the project, and the Corps should prepare a full EIS before allowing Dow to use the landfill."

Despite the court's ruling, construction of the landfill has come to a halt

as a direct result of the Corps' poor environmental review. When it did its NEPA analysis, the Corps ignored requests from the public to prepare a hydrogeological study to determine the likelihood of groundwater contamination. Once the landfill site was purchased, however, Michigan's Department of Environmental Quality (DEQ) ordered the Corps to conduct such a study.

The study's results confirmed that dioxins could be released to groundwater through sand breaks in clay under certain parts of the landfill. As a result, the Corps was forced to reduce the size of the landfill by approximately 60 acres to avoid the most porous areas, limiting the project's ability to meet the Corps' long-term disposal needs. In addition, DEQ is now requiring the Corps to install a costly slurry wall to reduce the likelihood of groundwater contamination under the remaining portion of the landfill.

The numerous design changes have caused significant delays and cost overruns. As of August, the cost of the project had ballooned from the Corps'

initial estimate of \$1.5 million to as much as \$4.6 million. As a result, construction at the site—originally slated to have been completed in 2006—has stopped. The Corps also faces a completely unanticipated problem – the partially completed landfill is already full of water because of heavy rains. This calls into question whether the Corps will be able to comply with its water quality certification once the landfill is in operation.

"Ironically, the Corps initially justified the selection of this site with the argument that it would be less expensive than other alternatives and would meet the Corps' disposal needs for 20 years," said Lone Tree Council's Michelle Hurd Riddick. "If it had done its job right from the beginning, the Corps might instead have chosen a more economical alternative that was both better for the environment and better suited to the Corps' disposal plans." ♦