

NORTHWEST ENVIRONMENTAL ADVOCATES



December 2013

Winter 2013 Newsletter

Dear Friends:

With your help and support, in 2013 we continued our strong and effective advocacy for the environment and public health!

If there is a theme to NWEA's work described below it's this: while agencies can swiftly give the "okay" to pollution discharge permits, massive dredging projects, clear-cuts, wolf kills and the like, when it comes to programs to protect human health and the environment, these same agencies excel at dragging their feet. So often we see how agencies prevent their programs from being effective or providing the level of protection Congress intended. Stopping bad projects is important work but making sure good programs are in place is equally so. If we tolerate agencies' muddling along with ineffective programs we have allowed them to turn our federal environmental laws into mere paperwork exercises. When that happens, we all lose.

Knowing your concern about keeping water clean, protecting salmon habitat, reducing toxics in fish and drinking water, and protecting human health, I will highlight some of our recent success stories – made possible by you, our members. Your continuing support is both essential to our work and truly appreciated!

Surprise: The (Oregon) Emperor Has No Clothes!

Oregon has been bragging about its *Oregon Plan for Salmon and Watersheds* ever since then-and-now Governor John Kitzhaber created it in 1997, as the state's so-called "alternative" to the Endangered Species Act. In the 16 years since, all indications point to its being all talk and no substance. The Oregon Plan – which is really just a strung-together series of failed programs – has not played a meaningful role in actually protecting salmon or water quality. And the notion that Oregon has something so special that it's called the "Oregon approach" is, quite frankly, an affront to our intelligence.

That the Oregon Plan has spent state, federal, and lottery funds on stream restoration is not in question. That's all fine and good. But government money cannot solve Oregon's failure to adequately regulate widespread logging and farming practices that dump all manner of pollution into the state's streams and rivers . . . and now that proverbial chicken is coming home to roost.

Failure to Control Logging Pollution to Result in Federal Sanctions

If there is anything on which many agencies agree it's that Oregon's logging practices are wholly inadequate to protect fish and other aquatic life. Year after year since 1998, numerous federal agencies and an independent Oregon science team have confirmed and reconfirmed that Oregon's logging practices lag way behind those required by Washington and California. Seeking to force improvements in those logging practices, NWEA filed suit in 2009 under the Coastal Zone Act Reauthorization Amendments (CZARA). We settled the case based on

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Oregon's commitments to take certain actions and the federal government to meet certain deadlines. The Oregon commitments began to unravel early in the process.

By July 2013 the Oregon Department of Environmental Quality (DEQ) confirmed in writing what was already obvious: it was not honoring its commitments to control logging. Now it's up to the federal government to make an up-or-down decision on whether Oregon adequately controls logging and agricultural runoff in coastal watersheds. Under the terms of NWEA's settlement, the U.S. Environmental Protection Agency (EPA) and National Oceanic and Atmospheric Administration (NOAA) will jointly issue a proposed decision in mid-December and make a final decision next year. The federal agencies are poised to propose a first-in-the-nation *disapproval* of Oregon's failed program for controlling nonpoint source pollution in coastal watersheds, revealing the much vaunted Oregon Plan to be as naked as that emperor.

Check our website in January for information on submitting public comments.

NWEA is represented in the CZARA litigation by Paul Kampmeier of the Washington Forest Law Center and Allison LaPlante of the Earthrise Law Center, Lewis & Clark Law School.

NWEA Makes Waves on Water Quality Trading Concerns & Shines a Spotlight in a Dark Corner

Earlier this year, NWEA sent a letter to EPA outlining problems with water quality pollutant trading in Oregon, using the City of Medford's temperature discharge as an example. While NWEA does not oppose the use of trading to address temperature discharges, we are strongly opposed to actions that undermine the integrity of the Clean Water Act (CWA). NWEA's letter focused on two legal issues. The first was Oregon DEQ's false assumption that landowners who are getting paid to plant trees to offset the Medford heat discharge have no pre-existing obligation to plant them. The second issue concerned DEQ's having included in the Medford permit an unenforceable 19-year tree planting schedule when the law requires the actions to be both enforceable and "as soon as possible." NWEA's bottom line: the Medford trade does not comply with EPA regulations or EPA's trading guidance.

When President Obama issued an Executive Order concerning the Freedom of Information Act (FOIA), he quoted Justice Louis Brandeis as saying "sunlight is said to be the best of disinfectants." NWEA is using FOIA to disinfect a dark corner on trading issues in need of some sunlight. Two regional non-profits with a vested interest in the use of water quality trading received a \$1.5 million grant from the U.S. Department of Agriculture to promote trading in the region. These two groups, along with EPA and the States of Oregon, Idaho, and Washington, are conducting three years of closed-door meetings to develop regional trading policies. NWEA has used FOIA to request documents from this process and posted them on our website. We can't be at the decision-making table, but we can peek in through the window.

NWEA Files Petition to Make Sure Washington Completes its Long Overdue Effort to Update Toxics Standards

Fifteen years after acknowledging its water quality standards to protect human health from toxics fail to reflect actual levels of fish consumption of toxics, Washington still hasn't managed to update them. Mired in political controversy and opposition from polluters, it is not clear that the Washington Department of Ecology (Ecology) will ever finish the job. The primary issue is to decide on a new level of fish consumption of toxics to plug into the equations that generate new toxic criteria. But, as in Oregon which finished a similar process in 2011, Ecology's goal is to adopt as many regulatory off-ramps as possible, loopholes that will guarantee that toxics in fish and water are never cleaned up.

To ensure that EPA acts if Ecology fails, NWEA has submitted an exhaustive petition to EPA, making the case that the federal agency must step in and take action. Although the petition is focused on updating the human health criteria, it also supports EPA's need to update Washington's water quality standards for the protection of fish, which are over 20 years old. Also, earlier this year, NWEA resigned from Washington Ecology's advisory committee process, the last of the environmental and tribal invitees to decline participation, and wrote a letter to Washington Governor Jay Inslee criticizing his decision to set up his own closed-door committee with an industry lawyer serving as his sole environmental advisor. What's up with that?!

NWEA Files Suit in Idaho, Washington is Next

Idaho presents another egregious case of federal agency foot-dragging. In 1994 – 18 years ago – Idaho submitted new water quality standards, ranging from temperature to toxics, to EPA for approval. EPA failed to obtain review of these standards under the Endangered Species Act (ESA). In the one instance where EPA started the ESA review, interagency squabbles prevented the federal fish and wildlife agencies from completing their analysis of whether 23 toxic criteria were adequate to protect Idaho's threatened and endangered species. NWEA and the Idaho Conservation League have sued EPA and the fish and wildlife agencies to make sure this process is finally completed and Idaho species are protected.

EPA has similarly failed to obtain ESA review of Washington's water quality standards to protect threatened and endangered species, including the orca whale. NWEA has notified EPA of its intent to sue over standards for temperature, dissolved oxygen, toxics, and more. In addition, NWEA has informed EPA it must act on the pending changes to Washington sediment contamination standards which govern the state's contaminated sediment clean-up actions.

NWEA is represented in the Idaho and Washington Water Quality Standards cases by Allison LaPlante and Kevin Cassidy of the Earthrise Law Center at Lewis & Clark Law School.

Temperature, Salmon, and NWEA Litigation

Salmon, steelhead, and bull trout depend on cold water and are listed as either threatened or endangered under the Endangered Species Act. Not coincidentally, more waters in Oregon, Washington, and Idaho are impaired by temperature than any other single pollutant. NWEA's over 20 year effort to establish protective temperature standards continues to ripple through Oregon's regulatory programs.

In 2012 a federal court found illegal an Oregon rule that allowed the state to automatically change its temperature standards without federal agency approval. Oregon has used the illegal provision to raise allowable river temperatures – often to temperatures lethal to salmon! Now NWEA has challenged each time Oregon has done this; ironically the state does this in its temperature pollution clean-up plans (called Total Maximum Daily Loads or "TMDLs"). These same TMDLs are a centerpiece of the failed Oregon Plan to save salmon.

NWEA is represented in the Oregon TMDL case by Bryan Telegin of Bricklin & Newman, and Allison LaPlante and Dan Mensher of Earthrise Law Center at Lewis & Clark Law School.

Some Short Updates

- NWEA recently sued EPA because – after three years – the agency found itself unable to respond to a FOIA request for public documents in which it set out its annual plans. *NWEA is represented in this case by Dave Bahr, Bahr Law Offices.*

- As a result of NWEA's Oregon's water quality standards lawsuit, EPA recently issued a damning critique of the state's water quality antidegradation policies. The purpose of antidegradation is to ensure water quality does not become worse than it was when Congress passed the Clean Water Act. In its review, EPA found Oregon's policies fail to protect uses of the water that existed in 1975, as required. EPA also found Oregon's policies do not protect water pollution that is currently at acceptable levels from creeping up to and over unsafe levels. *Allison LaPlante and Dan Mensher of Earthrise Law Center at Lewis & Clark Law School represented NWEA in this case.*
- Have you ever heard of a hyporheic zone? Hyporheic zones should be the coldest thing going on in a river because it's where surface waters mix with cold groundwater. Although they should be protected as thermal refuges for salmon and other cold-water species, Oregon municipalities are increasingly eyeing these ecologically important hyporheic zones as places to inject their warm and contaminated discharges. NWEA's July 2013 letter to EPA asks for federal agency involvement in protecting these zones.
- Fourteen years after we first filed a petition with EPA seeking regulation of ship discharges of invasive species in ballast water, NWEA is pursuing its fourth lawsuit against EPA to protect U.S. waters from further foreign invasions. *NWEA is represented in this case by Deborah Sivas of the Environmental Law Clinic at Stanford Law School and Allison LaPlante at Earthrise Law Center at Lewis & Clark Law School.*
- We want to thank the many indispensable law students from the environmental law clinics at the Lewis & Clark and Stanford law schools for their assistance.

From Lawsuits to Advisory Committees, NWEA is Working for You!

As always, please feel free to e-mail me with questions about NWEA's work on your behalf at nbell@advocates-nwea.org. I am happy to explain any of the projects we're working on or send you original documents. And our ever improving website will give you timely and helpful access to information about our activities: www.NorthwestEnvironmentalAdvocates.org. (Follow us on Twitter to find out when the website has been updated.)

When you support NWEA, you do more than make sure that the nation's environmental laws are upheld. Because we're often the "go-to" group on clean water issues, **you are helping the citizens groups and journalists across the region and the country who rely on NWEA.**

Please remember that Northwest Environmental Advocates does a lot with very few resources so we count on you for financial support. Contributions are tax deductible and much appreciated!

Sincerely,



Nina Bell
Executive Director

P.S. In enforcing federal environmental laws, **NWEA guarantees you an old-fashioned lean operation – giving you highly credible and energetic advocacy** without fancy slogans and glossy magazines. That means that your financial contribution supports getting what you want done. I hope that you will consider making a tax-deductible contribution to NWEA. We can guarantee you that your contribution will be put to good use!