

# AT ISSUE

A REPORT FROM NORTHWEST ENVIRONMENTAL ADVOCATES

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## RAW SEWAGE DUMPING TO STOP: NWEA Wins Legal Victory

**AT ISSUE:** *NWEA's lawsuit to halt the City of Portland's annual discharge of 6 billion gallons of raw sewage sets a national precedent on the enforceability of Clean Water Act permits.*

**A**fter a tense year of waiting, a panel of the 9th Circuit Court of Appeals reversed its previous decision and ruled in favor of Northwest Environmental Advocates (NWEA) in a lawsuit against the City of Portland. NWEA had filed the suit in 1991 to stop the City's annual discharge of over 6 billion gallons of completely untreated sewage into the Willamette River and its tributary, the Columbia Slough. The source of the discharges, called Combined Sewer Overflows (CSOs), is the City's sewage collection system in which human sewage, some industrial discharges and storm water flow. Even a tiny amount of rain can overload the capacity of these collection pipes, causing the discharge of raw sewage directly to the river from 54 different outfalls. The CSO outfalls can also overflow when there is no rain, discharging disease-laden sewage at times of peak recreational use. Over 1,100 cities in the United States have combined sewer systems.

At the time NWEA filed its lawsuit, many cities had already taken action to halt, reduce and/or treat their CSO discharges. The City of Portland, however, had not even determined the volume of its CSOs, let alone taken action to solve the problem. The combination of a recalcitrant polluter and an ineffective regulatory agency presented a classic example of why Congress established a provision in the Clean Water Act allowing citizens to sue.

### Establishing a Critical Legal Precedent

NWEA alleged two alternative theories in the case. The first was that the City was discharging sewage without a permit, thereby violating the Clean Water Act. The 9th Circuit Court of Appeals ruled against NWEA on this theory, based on vague statements in the permit which allegedly required the City's collection pipes to have a certain capacity. In doing so, the court ignored the permit's clear provision restricting discharges to only two outfalls of the sewage treatment plant. The implication of this decision is that, when it comes to water pollution permits, what you see is not necessarily what you get.

NWEA's alternative theory, however, presented a winning case. If the discharges were deemed to be covered by the sewage treatment plant permit, NWEA argued, the discharges violated the permit's terms. Specifically, the permit prohibited any discharge covered by the permit from

causing a violation of state water quality standards. NWEA showed that each discharge of raw sewage caused a violation of water quality standards in the receiving water.

The City, supported by affidavits from staff of the Oregon Department of Environmental Quality (DEQ), claimed that NWEA could not enforce this pivotal condition because the water quality standards which apply to the water quality of the river had not been translated into numeric limitations of pollution loads which would apply to the discharge at the end of each pipe. The court rejected this argument and said that, "By interpreting [the law] to exclude citizen suit enforcement of water quality standards that are not translated into quantitative limitations, Portland would have us immunize the entire body of qualitative regulations from an important enforcement tool. Such a result would be especially troubling in this case, because no effluent limitations cover the discharges from Portland's combined sewer overflows."

The 9th Circuit ruled that NWEA could continue to sue the City of Portland over the city's on-going CSO discharges by affirming the right of private citizens to sue polluters which violate terms of their discharge permits. The decision has significance well beyond the Willamette River, because similar conditions are present in permits throughout Oregon and many other states. The court's decision means that permit holders can be held accountable if their discharges cause or contribute to violations of water quality standards.

### The Importance of Meeting Water Quality Standards

The water quality standards the court held were enforceable as a permit condition are adopted by each state under the federal Clean Water Act. The standards represent the "safe" levels of different types of pollution to people, fish and wildlife in the state's rivers, streams and lakes. While the City says it was legally irrelevant that its discharges had been causing violations of Oregon's water quality standards, the Ninth Circuit found otherwise. It made clear that these standards are legal requirements, not optional goals to be disregarded by dischargers whenever convenient. This case sets the stage to force regulatory agencies and dischargers into actually meeting the requirements of the Clean Water Act and the state's water quality standards, thereby cleaning up rivers and streams as originally intended by Congress in 1972.

## Next Steps in the Case

Although the litigation has taken years, from a practical standpoint NWEA won on the day the City of Portland was forced to commit to ending the discharges. Seeking to avoid the litigation, after receiving NWEA's required 60-day notice of intent to sue, the City of Portland sought and obtained an administrative order from the Oregon DEQ. The agreement, termed a Stipulation and Final Order (SFO), required the City to fix the CSO problem over a 20-year period. The terms of this agreement, which is not enforceable by any party other than DEQ, were subsequently relaxed in order to reduce costs.

In theory, the court's reversal sends the case back to the U.S. District Court in Portland, allowing NWEA to seek penalties and assurances that the discharges of raw sewage will be minimized and eventually virtually eliminated. Unfortunately, at this writing, the City of Portland, with the support of many other municipalities, has asked the court to reverse itself once again. Ironically, these municipalities seeking to undermine the Clean Water Act are engaged in slick public relations campaigns to convince the tax- and rate-payers of how much they care about the environment.

Assuming that the Ninth Circuit current decision stands, NWEA will seek to have the City's present CSO program commitments established in a federal consent decree. The advantage of such a decree is that it would be fully enforceable, unlike the current administrative order. A looming issue is the question of what environmental benefit will be obtained with the \$700 million price tag associated with this program. The City's current plans call for capturing most of the volume of the CSOs but providing very little treatment prior to discharge, making the current project potentially a large waste of money. What level of treatment eventually is chosen will in large part rest on the role of water quality standards in the law.

*If you would like a copy of the Ninth Circuit Court decision in NWEA v. City of Portland or a list of municipalities seeking to overturn this decision, please send your request to the office.*



*Northwest Environmental Advocates is a regional membership organization formed in 1969, working for renewable energy sources and the protection of water quality and habitat in the Columbia River Basin.*

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Eugene Rosolie — Green Power Project Director

Northwest Environmental Advocates  
133 SW Second Ave., Suite 302 • Portland, OR 97204-3526  
503/295-0490 503/295-6634 Fax

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133 SW Second Ave., Suite 302  
Portland, OR 97204-3526

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