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BEFORE THE MISSOURI CLEAN WATER COMMISSION
STATE OF MISSOURI

PUBLIC HEARING

IN RE: PROPOSED 2008 303(d) List

TRANSCRIPT OF PROCEEDINGS

January 7, 2009

9:00 a.m.

Department of Natural Resources

Lewis and Clark State Office Building

LaCharette/Nightingale Creek Conference Rooms

1101 Riverside Drive

Jefferson City, MO 65102

COMMISSIONERS

PRESENT:

Ms. Kristin Perry, Chair, via telephone
Mr. Ron Hardecke, Vice-Chair
Mr. Sam Hunter
Mr. Jan Tupper
Mr. William Easley

REPORTED BY:

Monnie S. VanZant, CCR, CSR, RPR
Midwest Litigation Services
3432 W. Truman Boulevard, Suite 207
Jefferson City, MO 65109
(573) 636-7551

1 The Commission plans to review the Department's
2 final recommendations on the proposed list at the meeting
3 scheduled for March 4th, 2009. The Commission will decide
4 at that meeting whether to accept the Department's
5 recommendations.

6 The court reporter will now swear in anyone
7 wishing to comment at this public hearing before the Clean
8 Water Commission today. All those wishing to provide
9 comments please stand.

10 JOHN FORD, ROBERT BRUNDAGE, REBECCA LANDEWE,
11 being first duly sworn to testify the truth, the whole
12 truth, and nothing but the truth, testified as follows:

13 VICE CHAIRMAN HARDECKE: Okay. Do we have a
14 staff report first?

15 MR. FORD: Good morning, Chairman Perry,
16 Commissioners. My name is John Ford. I work in the
17 Monitoring Assessment Unit of the Water Pollution Control
18 Program. Thank you.

19 I'm here this morning to introduce the proposed
20 2008 Section 303(d) list in its current form. The list
21 was placed on public notice on September 23rd in four
22 public meetings on the list between June and November,
23 2008 that preceded this hearing.

24 This hearing is for informational purposes only
25 and to hear comments from the public. No action from the

1 Commission is requested at this meeting.

2 Your proposed list as given in the September
3 23rd public notice is on pages 13 through 21 and is
4 labeled as Tables 1-A and 1-B. Also, part of this public
5 notice was a list of 65 waters with low levels of
6 dissolved oxygen but no obvious pollution sources that
7 were not proposed for listing. And these waters are shown
8 as Table 2 on pages 23 and 25.

9 Because our proposed list for the first time
10 included several waters with high levels of mercury and
11 fish tissue, we wanted to show a more complete picture of
12 the mercury levels in Missouri waters. Table 3 on pages
13 26 and 27 shows the 92 locations in this state where we
14 have at least three samples of mercury for a species of
15 fish most likely to accumulate high levels of mercury.

16 41 percent of those locations, 38 sites, exceed
17 the 0.3 milligram per kilogram national mercury criteria.
18 Table 4 on page 28 and 29 shows waters and pollutant pairs
19 on the proposed Missouri 2006 list that we were proposing
20 to de-list in 2008.

21 Now, beginning on page 31, there are the changes
22 that we are proposing to make to the September 23rd public
23 notice based upon comments from the public we have
24 received so far during the public notice period.

25 Attachment A includes 45 water pollutant pairs

1 we are proposing to add to the public notice list.
2 Four of the additions are corrections of data assessment
3 errors made by DNR, and one is based on new data provided
4 during the public notice process.

5 The remaining 40 additions are due to EPA's
6 release of its proposed 2006 303(d) list which was
7 unavailable at the time that our 2008 list was placed on
8 public notice.

9 These 40 waters are those where the Department
10 does not have the data to demonstrate good cause for
11 de-listing these waters from the 2008 list. Some waters may
12 be added or deleted to this group of 40 pending EPA's
13 final decision on their 2006 list.

14 Attachment B on page 33 shows four waters on the
15 September public notice list we are proposing to remove
16 from the proposed list based upon new information we have
17 received during this public notice period so far.

18 Attachment C on page 35 shows a revised list of
19 water pollutant pairs we are proposing to de-list from our
20 2006 proposed list. This table shown in your packet has
21 been updated. I think in the blue folder you have,
22 there's a -- a new Attachment C. And I think there are
23 something like 18 or 19 waters now on that list. Yes,
24 this list contains 18 water pollutant pairs we are
25 proposing for de-listing.

1 Also, in your packet beginning on page 37 is a
2 copy of the 2008 listing methodology as approved by the
3 Commission in January 2008. And beginning on page 71 are
4 copies of written public comments received and Department
5 responses.

6 There are several waters on the proposed 2008
7 list that utilize the weight of evidence approach. Due to
8 the newness of this procedure, the Department believes it
9 is important to provide -- excuse me -- a more thorough
10 explanation of the weight of evidence approach.

11 Beginning on page 117 and bound upside-down, I
12 think for your convenience, is a discussion of how the
13 weighted evidence analysis was made for various types of
14 narrative criteria data.

15 Biological data, primarily aquatic and
16 vertebrate monitoring and fish tissue data for mercury
17 were the sole basis for listing several waters on the
18 proposed list. Other pollutants using the weight of
19 evidence analysis were rarely the sole justification for
20 listing decision.

21 In most cases, listing waters for these criteria
22 were also justified based upon biological or numeric water
23 quality criteria. No waters were listed solely due to
24 either coloring, chlorine, PCBs or lead and fish tissue.
25 Three waters were listed solely due to sediment

1 contamination and one due solely to fine sediment
2 deposition.

3 This concludes my remarks, and I would be happy
4 to try and answer any questions at this time. Anyone have
5 any questions?

6 COMMISSIONER HUNTER: No.

7 VICE CHAIRMAN HARDECKE: Questions, Kristen?

8 CHAIRMAN PERRY: No.

9 MR. FORD: Thank you.

10 VICE CHAIRMAN HARDECKE: Okay. We'll start with
11 Robert Brundage.

12 MR. BRUNDAGE: Good morning, members of the
13 Commission. My name is Robert Brundage with the law firm
14 of Newman, Comley & Ruth here in Jefferson City. And I
15 represent various clients, and I'm going to make some
16 general comments today. I'm going to make more specific
17 comments in writing, but I want to go back and provide you
18 a little bit of history about what has happened regarding
19 the listing methodology and the 2008 303(d) list over the
20 last year and a half or so.

21 When we were working on the listing methodology
22 for this 2008 list, which was approved almost a year ago
23 on January 9th by this Commission in Columbia, there was a
24 lot of discussion about what should be put in that listing
25 methodology.

1 I had brought to the Commission's attention at a
2 meeting, again, a year and a half or so ago about federal
3 case law that talks about what EPA and, consequently, what
4 the states should be using to determine what goes on a
5 303(d) list.

6 And the simple matter is that you have to look
7 solely at the water quality standards. And I have brought
8 to the Commission's attention that the case law and the
9 Sierra Club v. Levitt case in Florida where the Court of
10 Appeals for the Seventh Circuit, United States Court of
11 Appeals for the Seventh Circuit ruled that Florida's
12 listing methodology rule, and they called it something
13 else, but I'll just use the same term we used, had
14 various items in that rule -- pardon me -- that -- well,
15 it was a rule, that were not in their water quality
16 standards.

17 And the Court ruled that EPA did properly --
18 properly did not look at those other non-water quality
19 standard issues to list things on the 303(d) list in
20 Florida. So I brought that to the Commission's attention.

21 At the time, in the draft 2008 listing
22 methodology, there were several different criteria in the
23 listing methodology that you could not find in our water
24 quality standards.

25 So at the time, the comment was from me and

1 others, Hey, these are not in the water quality standards,
2 so, therefore, this should not be in the listing
3 methodology. And one of the suggestions at the
4 time was, well, if they exceed these non-water quality
5 standard criteria, why don't we go ahead instead of not
6 putting them on the 303(d) list, put them on Category 2-B
7 or 3-B, which means you need some heightened scrutiny on
8 these water bodies, you need to collect some more data,
9 look at these more closely, maybe go out and do some
10 studies using the criteria that are in the water quality
11 standards and then, and only then, should you put it on
12 the 303(d) list if you find an exceedance. So that was
13 the comment at the time.

14 There was some stakeholder meetings with the
15 DNR. And the DNR made the point, listen, there are -- and
16 this was the -- I guess the obvious example is that we had
17 the Taum Sauk reservoir collapse. Tons of sediment went
18 down the stream.

19 If you got 3 feet of sediment where there wasn't
20 sediment before, that's obviously an impairment because
21 the stream is basically ruined by all that sediment. And
22 we don't have a criteria on the books to list it. We'd
23 sure like to be able to list something like that where
24 it's absolutely obvious there's a problem there. And it's
25 hard to argue against something like that.

1 If you look at a stream and it's obviously got a
2 problem from 3 feet of sediment, it's impaired. And I had
3 a certain amount of sympathy for a position where we need
4 to have a mechanism to list something like that.

5 And when you list something like that, since we
6 don't have it in the numeric water quality standards, we
7 have the general water quality standards which are
8 typically referred to as free from water quality
9 standards, free from scum, unsightly -- I can't remember
10 all the words, bottom deposit and things like that.

11 And I guess the way I've always interpreted that
12 is if you walk up to a stream and you look at it and you
13 go, Oh, my God, that's terrible, then maybe you can go
14 ahead and use the general water quality criteria because
15 you can see an obvious problem with the stream.

16 If you go down to below Taum Sauk River, I'm sure
17 you can see an obvious problem with that stream. So I had
18 sympathy towards that type of position and tried to
19 cooperate and work through a resolution to -- to come to a
20 point where we -- where the State of Missouri could list
21 certain water bodies on the 303(d) list, even though there
22 was not a water quality standard on the book that had the
23 data to support a listing.

24 So how do you go about accomplishing that?
25 Through discussions with the Department and there was -- I

1 can't remember who floated the idea first. But there was
2 certainly discussions that, listen, if there is an
3 exceedance of one of these non-water quality criteria,
4 which I think you may recall now in the approved 2008
5 listing methodology had been taken out and put in a
6 separate section of listing methodology under Table 1.2,
7 if there is an exceedance of one of those, what do you do?

8 The suggestion was that, well, if there's an
9 exceedance of one of those, why don't you try to confirm
10 an impairment -- try to confirm an impairment by using
11 another parameter. And the most obvious one is to go out
12 and -- and collect macro and vertebrate data.

13 And as you know, macro and vertebrate data and
14 the criteria that has been established for that -- when I
15 say established, it's been established by biologists.
16 It's never been adopted as a water quality standard. So
17 it's another non-water quality standard type of criteria.

18 So if you've got two of them, it -- it can maybe
19 create a compelling case for listing. So through those
20 discussions, I told the Department that -- and I think
21 others did, but this is something that we could live with.
22 Because the other option is just take the listing
23 methodology and rip those pages out that have the
24 non-water quality standards and take them out completely.
25 That was the other option.

1 So we said, no, I think we can live with
2 something like that because that is a belt and suspenders
3 approach, and it's -- it's probably unlawful to even do it
4 that way. But in an effort to try and resolve this, that
5 was the position that I -- that I took on behalf of my
6 clients. And there was discussions to that effect.

7 Well, after those discussions, came to the
8 meeting on January 9th, and there was -- the Department
9 had proposed new language, and it was this weight of
10 evidence language that John Ford talked to you about
11 today, so this weight of evidence approach.

12 And at the meeting that day, I -- I had -- had
13 no inkling whatsoever that the Department would interpret
14 the weight of evidence the way they did. I -- I didn't
15 know that they rejected the idea that there had to be a
16 belt and suspenders approach where you had to use at least
17 two or more types of non-water quality criteria to place a
18 water body on the list.

19 John's comments today were that there were few
20 water bodies on the list that were based solely on one of
21 those non-water quality criteria in Table 1.2. And I
22 guess there are relatively few.

23 But I represent some of those clients and
24 they're extremely concerned about that. In fact, they
25 don't think it's appropriate. And I'm here today to

1 oppose those listings based upon solely one criteria based
2 upon the Department's now interpretation of weight of the
3 evidence rule.

4 The other thing that -- that caused me a great
5 deal of concern was after the January 9th Commission
6 meeting, when the Department came with the weight of
7 evidence language to the meeting and proposed that, there
8 was absolutely no discussion that I recall about how they
9 would interpret the weight of evidence.

10 And like I say, I was under the assumption that
11 there was going to be the belt and suspenders approach, as
12 I'll refer to it. So after the weight of evidence was
13 approved by you, the language and the listing methodology
14 on January 9th, sometime thereafter, the Department issued
15 -- and I can't recall how long it is. I'll say a
16 three-page memorandum that discussed how they're going to
17 interpret and apply the weight of evidence rule as it
18 pertains to those non-water criteria in Table 1.2.

19 Now, where was that language during the day that
20 we adopted -- that you adopted that on January 9th?
21 It was nowhere to be found. Where does that belong? It
22 belongs in the listing methodology. It belongs -- it
23 should be placed up front for people for know exactly what
24 is being considered by the Clean Water Commission on
25 January 9th of last year. And it was not.

1 So I was very disappointed the way that came
2 out, and I think it's inappropriate. I don't think it
3 complies with federal law. And as we know, you are
4 preparing a proposed list for EPA. And I think the -- I
5 think the Commission should use their own interpretation
6 since you were not presented with a three-page memorandum
7 on January 9th to interpret that weight of evidence rule,
8 that you should go back to a belt and suspenders approach
9 for these non-water quality criteria.

10 Because like -- even as I said, that is probably
11 illegal to even do it that way. But in a -- in a -- in a
12 spirit of compromise, myself and I think others, and they
13 can speak for themselves whenever they want to, agreed to
14 this weight of evidence language.

15 And in hindsight, I guess it was a mistake. And
16 I will certainly address that issue in the draft listing
17 methodology that's coming up in this next -- next year.

18 Just to address a few of these criteria that are
19 in the -- the list, there are -- there are these non-water
20 quality criteria for things in the sediment, metals in the
21 sediment called probable effects concentrations.

22 EPA has -- has considered, I guess, for years
23 adopting a -- a criteria for that and they have chosen not
24 to do so because they don't -- at least -- I shouldn't
25 speak for EPA, but I would presume since they haven't done

1 so for years it's got problems. And I have submitted a
2 report prepared by a -- a scientist that critiques and
3 actually criticizes that approach, and we don't think it
4 is scientifically valid.

5 Regardless, my clients and myself had agreed to
6 allow that to stay in the listing methodology in Table
7 1.2. Maybe in hindsight that was a mistake.

8 Let's go on to lead and fish tissues. I am not
9 prepared to, nor am I an expert in this area, but I know
10 enough to say that our standard is based on people eating
11 fish and -- and having a certain amount of lead in fish,
12 but also taking into consideration those persons exposure
13 to lead from other sources, other terrestrial sources of
14 led.

15 And the methodology, I guess, in that criteria
16 in Table 1.2 for lead is based upon a certain population
17 of people who have access to terrestrial sources of lead
18 and they take that into account when then ratcheting down,
19 if you will, the amount of lead somebody could be exposed
20 to by eating fish.

21 Well, if you were the Department of Health &
22 Senior Services who works on these issues, I can
23 understand how they would take that approach. That is
24 their job to issue advisories to people out there saying,
25 Listen, you are exposed to lead from multiple sources,

1 from terrestrial sources and from when you eat fish. You
2 need to be aware that you shouldn't eat so many fish
3 because, statistically, there's so many people out there
4 that probably already have a certain amount of lead in their body
5 from terrestrial sources.

6 Well, that is appropriate. I'm glad they're
7 doing that to protect the citizens of the State of
8 Missouri. But what we're looking at is water quality
9 standards. And we're worried about what is in the water
10 and what is in the fish and you're looking at that source
11 alone.

12 So it's not the Clean Water Commission's job to
13 take into account other sources of health concerns that
14 don't have anything to do with water. That's the
15 Department of Health's job. So, therefore, I don't think
16 it's appropriate to solely use a -- the lead in fish
17 tissue non-water quality criteria on Table 1.2 as the sole
18 justification.

19 There should be something else to justify an
20 impairment listing for those reasons. So I wanted to come
21 to you today and express my concern about this and that I
22 -- I will have these concerns reduced to writing and to be
23 in the administrative record submitted to you by January
24 16th. And we will comment on other specific streams in
25 addition. So that concludes my comments.

1 VICE CHAIRMAN HARDECKE: Okay. Thank you. Any
2 questions? Rebecca Landewe, Landewe?

3 THE COURT REPORTER: Could you spell your last
4 name, please?

5 MS LANDEWE: Good morning. My name is Rebecca
6 Landewe, L-a-n-d-e-w-e. And I'm the Missouri Water
7 Quality Standards Coordinator with the Environmental
8 Protection Agency. It's okay. Everybody mispronounces
9 it.

10 I want to make three comments today. My first
11 comment relates to dissolved oxygen. In reviewing the
12 conclusions of MDNR's assessments as John Ford noted today,
13 there were several water bodies that were identified as
14 having violations of Missouri's water quality standards
15 for dissolved oxygen.

16 And pursuant to Section 303(d) of the Clean
17 Water Act, federal regulations require that each state
18 identify those waters within its boundaries for which the
19 effluent limitations or other pollution control
20 requirements are not stringent enough to implement any
21 applicable water quality standards. Where violations of the
22 State's water quality standards are documented, those waters
23 should be included on the 303(d) list.

24 My other two comments relate to the assessment
25 of bacteria data. First, Missouri's water quality

1 standards state that bacteria criteria are not met during
2 -- are to be met during the recreation season, which is
3 from April to October.

4 In reviewing the bacteria data for several of
5 the waters, I noted that one geometric mean was calculated
6 for multiple recreation seasons rather than attainment
7 being assessed for each individual recreation season.

8 My second comment relating to bacteria is that I
9 noted that waters designated for whole body contact,
10 Category B, were assessed against the E Coli criterion of
11 548 colonies per 100 milliliters, and this is a concern to
12 EPA because that criterion has not been approved by the
13 EPA.

14 I'm aware the Commission has approved an emergency
15 rule-making to adopt and provide E coli criterion, and
16 it's my understanding that MDNR is assembling the
17 necessary documentation for submittal to EPA.

18 In the meantime, I wanted to point out that this
19 was an -- an assessment issue of concern. We will be
20 preparing more formal comments in writing, but this
21 concludes my comments for this morning. Thank you.

22 VICE CHAIRMAN HARDECKE: Questions? Thank you.
23 Okay. I guess that concludes the comments.

24 The Commission will continue to accept written
25 comments on the proposed 2008 303(d) impaired waters list

1 until 5 p.m. January 14th, 2009. Please submit your
2 written comments to Malinda Overhoff, Secretary of the
3 Missouri Clean Water Commission, P.O. Box 176, Jefferson
4 City, Missouri, 65102.

5 On behalf of the Commission, I thank everyone
6 that participated in this process, and the hearing is now
7 closed.

8 (The proceedings were concluded at 9:20 a.m. on
9 January 7, 2009.)

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1 REPORTER'S CERTIFICATE

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3 STATE OF MISSOURI)
)ss.
4 COUNTY OF OSAGE)

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6 I, Monnie S. VanZant, Certified Shorthand Reporter,
7 Certified Court Reporter #0538, and Registered
8 Professional Reporter, and Notary Public, within and for
9 the State of Missouri, do hereby certify that I was
10 personally present at the proceedings as set forth in the
11 caption sheet hereof; that I then and there took down in
12 stenotype the proceedings had at said time and was
13 thereafter transcribed by me, and is fully and accurately
14 set forth in the preceding pages.

15

16 IN WITNESS WHEREOF, I have hereunto set my hand and
17 seal on January 19, 2009.

18

19

20

21 Monnie S. VanZant, CSR, CCR #0539

22

Registered Professional Reporter

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