ADDRESS TO THE MISSOURI CLEAN WATER COMMISSIONERS

Nov. 3, 2010
by
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Dear Commissioners:

Thank you for granting me time to speak today. Since I left the Commission over a year ago, I have continued to follow the issue of the Corps of Engineers projects that want to dump millions of tons of dirt into the Missouri River.

As a citizen of Missouri, I would like to update you about some recent developments and share some thoughts on the Corps action. I am also here representing a client who is located just down the road from me in Louisiana, Missouri. His facility operates a marine terminal, a sand and gravel business and a limestone quarry located directly on the banks of the Mississippi River. Unlike the Corps, he is not dumping anything into the river. Yet, EPA has issued a miserable enforcement order against him for storm water discharges having small amounts of the same nitrogen, phosphorus, and aluminum that EPA has let the Corps dump at will. Finally, I will ask you to modify his permit as justice requires.

The Corps' NAS report

I bet that you all received copies of the National Academy of Science Report called Missouri River Planning: Recognizing and Incorporating Sediment Management (I am calling it the Corps NAS report). It's 135 pages long and the Corps has jumped out with lots of press releases on how it supports the Corps' position. Here's a few points that I would like to highlight:

- There is nothing in the Corps NAS report says that the sediment is beneficial to the shallow water habitat projects. The shallow water habitat projects are what has been authorized by Congress. There is no Congressional authority to increase the sediment load of the Missouri and Mississippi Rivers. This Commission made it abundantly clear that we were not stopping the projects. Nor does it appear that Commission action interfered with the projects' benefits.

- There is nothing in the Corps NAS report that talks about the value of soil as a resource to the people of Missouri. USDA-NRCS tells us that it takes a thousand years to create one inch of soil. The people of Missouri voted to tax themselves 47 million dollars a year to pay for soil conservation measures. That money is further matched in 50% cost share by the farmers of this state. The report did not discuss whether throwing away 40,000 to 60,000 acres five feet deep is the best use of what Missouri values as an important natural resource.

- The Corps NAS report does say that the Corps projects will account for a 6 to 12% increase in the phosphorus load in the Gulf.(p. 95 and p.105). It further states that the phosphorus contribution of the Missouri River is between 16.8 and 20 percent of the

Gulf's load.(p. 95). That means that the Corps projects could account for up to 60% of the total Missouri River phosphorus load.

- The Corps NAS report says that the Corps loading (the 12%) is small compared to current loads and therefore unlikely to influence the extent of the hypoxic zone. (p.99). This has been the mantra of the Corps since their NAS study has been released.

  But I haven't seen them quote the next few sentences that say these projects and future ones will deliver nutrients to the Gulf at a time that federal and state agencies are seeking ways to reduce nutrient loadings across the Mississippi River.

  The scariest sentence of all to me is the last full sentence on that page. "Increases in nutrient loads from any source, including that associated with sediment discharges from mitigation and restoration projects, may have to be avoided or mitigated..." (p. 99) I think that this recognizes that EPA will have to clamp down with tighter nutrient standards on the rest of our citizens to pay for the phosphorus load from the Corps projects.

- The Corps NAS report stated that "some parties have asserted that private entities are held to a higher standard of permitting and monitoring than a federal agency such as the Corps of Engineers". They said to get more complete information, the discharged sediment should be similarly monitored by both governmental and private sectors.

- The Corps NAS report summarizes the nutrient section of the report by saying that all actions of the Corps should be subject to monitoring for physical and chemical characteristics. If my memory is correct, a few years ago the USGS had something like 44 monitoring stations in the Missouri River in this state. Now, we have one. The Corps spent $658,000 on their NAS study. A phosphorus test is less than $10, but we don't have very many of them from the Corps, because the only monitoring the Corps has done is those that this Commission required. Maybe EPA doesn't really want to know what the Corps is dumping.

Do you all remember how difficult it was to get someone from EPA to address the Corps NAS committee? I kept wondering how come EPA won't take a stand on the Corps' nutrient loading? Finally a spokesman for EPA did address that last NAS meeting, in Kansas City on October 22, 2009. When asked about nutrients, he said that was above his pay grade. And then he added "The bottom line is that we are not going to let the Clean Water Act impede these projects." When you (the Commission) sent a letter asking the acting head of Region 7 EPA about that, he answered that the spokesman was there to only discuss the nutrient criteria process.

EPA's NAS report

This started to make sense recently. On October 14, a few weeks ago, the EPA released their NAS report called "Improving Water Quality in the Mississippi River Basin and Northern Gulf of Mexico: Strategies and Priorities". I call this one the EPA NAS report. And guess what? The same Jeff Jacobs was the NAS Study Director of both studies.

- The EPA NAS report said that the collective nutrient pollution from thousands of farms and municipalities across the Mississippi River Basis has significant environmental consequences in the northern Gulf of Mexico.
- The EPA NAS report blames the high nutrient yields on the farmers along the Mississippi and Ohio Rivers.
- The EPA NAS report does not have one word about the 12% phosphorus loading from the Corps. Couldn't the Study Director have mentioned it? Couldn't the two groups have met together? The whole EPA NAS paper talks about how EPA should act aggressively to ensure improved cooperation to reduce nutrients in the Gulf.

But I think what is actually happening is that EPA is deciding how to allocate the phosphorus load on their own, according to whom they choose and the activities that they favor. They are doing this by selecting who should have a more stringent permit and by selecting the people they should bring an enforcement action against.

Lack of fairness to Missouri Citizens

Unfairness to Missouri citizens was this Commission's biggest concern back in 2007. In the spring of 2007, the DNR staff explained to this Commission that the Corps was not required to have nutrient limits because there are no numeric nutrient criteria standards on the Missouri and Mississippi Rivers.

"What about those that have limits in their permits?" we asked. The DNR staff said that they would not take enforcement actions against them. But, apparently not so, for EPA.

For three years, while the EPA has refused to address the nutrient loads of the Corps, they have continued to bring very expensive enforcement actions against private citizens and companies. On August 18, 2009, the EPA issued a press release about a consent decree with Cooper Land Development and said how much sediment was released and what the company had been fined. An equivalent fine for the Corps' 34 million metric tons of sediment that they dump annually would cost the Corps $4.027 billion dollars each year.

Well, EPA has targeted another Missouri business for phosphorus, nitrogen and aluminum in their effluent, the same substances that the Corps released in their dumped soil. Mr. Mike Stevenson is here today as a representative of that company. The names is SSS, Inc, but I will call it Mike's company. The small family owned business that Mike works for handles dirt, stone, sand and gravel, just like the Corps. But Mike's company doesn't intentionally dump it into the river. They actually try to sell the materials for a beneficial land use.

Until Mike came to me, he had no idea that there were no numeric criteria for discharges on the Mississippi River, because his latest permit approved in 2008,(a year after the Corps dumping became known) has, among other things, effluent limits of 1.0 ppm phosphorus, 50 ppm TSS, .75 ppm AL.

Mike was required by his permit to sample his outfalls and had several exceedances of his permit limits. The EPA is now taking enforcement action against him for those excursions, which included exceeding his phosphorus limits by just one tenth of a part per million. Compare that to the Corps sample at Dalbey Bottoms (KS) was 447 ppm and in Missouri, they had 901 ppm phosphorus at Rush Bottoms and 960 ppm phosphorus at Barney Bend.

EPA's lawyer, Sara Hertz Wu, says Mike's company has an industrial permit with numeric limits, the Corps does not. It is a distinction without a difference because both are putting the same substances into the River (TSS, Phosphorus, Nitrogen, Aluminum, COD, BOD, and settleable solids.) Ms. Wu also tried to differentiate by saying the Corps soil is going into the Missouri River, not the Mississippi River. That's another distinction without a difference. If the Corps' soil won't affect hypoxia in the Gulf, Mike's levels certainly won't either.

The reason Mike has that permit is that is what DNR/EPA gave him. There are no numeric criteria for the Mississippi, so someone at DNR or EPA made up the limits, even at the same time that they knew that they had issued the Corps a permit without numeric limits for the same elements. Not just the same elements, but they knew the Corps was dumping tremendous quantities of those elements into the Missouri River.

On April 28, 2010 EPA Region 7 Director Karl Brooks wrote a cover letter and attached a memo written by William Spratlin, Director of EPA Region 7's water program. In that letter, he said that the Corps has sought and received NPDES storm water permits from MDNR and that EPA has no information that would indicate there have been any violations by the Corps of those permits.

I have here a copy of the Corps' Storm Water Permit, a copy which was given to this Commission in 2007. This permit expired on January 10, 2010. This Commission voted unanimously and instructed the Department in July 2009 not to issue any further permits to the Corps without first notifying this Commission. Do you know of any permit renewal by the Corps? The Corps has said they abandoned the projects. If that is so, they left hundreds of acres of disturbed soil with no soil runoff controls. They either control or own the property in question yet now, perhaps, they have NO EFFECTIVE PERMIT.

Last February, 2010, Colonel Wilson, the head of the Corps at Kansas City stated publically at the annual Missouri River and Drainage Districts Meeting that the Corps was not dumping anything into the rivers that anyone else could not do. He was wrong.

The Enforcement Action by EPA against a Missouri citizen

Mike's employer has various activities at the facility. The site is a river terminal. Mike says it is the best dock between St. Louis and the Quad cities. They load and unload bulk cargoes.

They quarry and crush limestone, for use in our roads, our concrete, and even our toothpaste and TUMS- of which Mike has been eating plenty of lately.

Their unique facility also offers covered storage of bulk materials, as well as utilizing the old quarry area for storage of road salt.

The facility also loads barges of ammonium nitrate for a neighboring manufacturer. Though ammonium nitrate had become infamous because it can be mixed with oil to be explosive, it is actually used by agriculture to replace the nutrient nitrogen that plants remove from the soil. If you look over the entire list, all of the elements from all of the materials that Mike's company handles are also contained in the soil dumped by the Corps.

Mike has had regular visits and oversight from DNR and he has worked hard to follow their advice and implement their suggestions. His permit levels are excruciating to meet and he believes that they were set by trying to apply wastewater treatment plant criteria to his business. The general permits for related industries such as a rock quarry, clay mining and clay pile storage, aggregate sand and gravel mining, and other barge terminals do not have anywhere near Mike's stringent requirements. Nor do other river terminals, at least not any for which he could find the permits.

The EPA inspector came to Mike's facility last January, 2010. When he left, the inspector told Mike that he had three issues:

1. His effluent limits. This includes the .1 phosphorus result. This became paragraph 53.
2. Failure to report the pH properly. Mike was using the laboratory pH results for his reports and the inspector said he needed to use a field pH digital meter within 15 minutes of taking the sample. This became paragraphs 71 and 72.
3. Reporting temperature in Fahrenheit instead of Celsius. This became four paragraphs numbered 58 through 61.

You can just imagine Mike's shock a month ago (ten months later) on October 4th, when he received an 19 page, 106 paragraph enforcement order for eight violations from EPA. Though asked, EPA has not indicated the amount of dollars that they expect the fine to be.

Mike's employer was cited for actual numeric criteria violations and for violations of his management practices. I have attached a copy of the EPA order for your review. It's lengthy but please don't let that make you think that the violations themselves are significant. Here are some examples:

- Mike's employer stores road salt for the highway road crews. Paragraphs 75, 76, 77, and 78 says the salt pile was not covered. There is no allegation of water quality violation for salt runoff, just that part of the cover was rolled back from the mound of road salt. The inspector came in late January. Mike had removed part of the cover to prepare for an onslaught of highway trucks that was to arrive that same day. Mike has the receipts to show that they came.
- Paragraph 67 said that he did not properly report a no-discharge event. Mike is not sure to what the inspector is referring. Mike believes his mistake was that he wrote "no observed discharge" instead of "no discharge".
- That seems pretty picky especially when you consider that the order misspelled the word "phosphorus" five times. Just for the record: Phosphorous is an adjective usually

attached to the name of another substance. (e.g. phosphorous pentoxide). Phosphorus is the element. No, spell check won't catch it.

- Paragraphs 85 and 86 said drainage was not properly directed to collect runoff from the southern portion of the quarry. The inspector never actually saw this supposed violation, he just looked at aerial photos and old maps, from some source other than from Mike. If the inspector had really looked, or even called Mike to ask him, he would have discovered that his depiction of the flow direction of the runoff was physically impossible.
- One paragraph reported that Mike had not filed a report within five days when he exceeded his permit levels. He had reported a failing result in that five day period in the past (right after he started his new job), but stopped when DNR had directed him not to file it in five days but to send with his next Discharge Monitoring Report (DMR). The inspector must not be familiar with 10 CSR 20-7.015(9)(A)(4).
- Paragraph 82 said Mike had runoff from the sand and gravel pile. What it didn't add was that the inspector directed him to put that same gravel at outfalls 200 feet away to filter the storm water. .

If you read it the entire EPA order, I think that you will conclude that EPA was scraping the barrel for whatever they could find. And then ask, is EPA requiring the Corps to do the same thing? I don't think the Corps files any monitoring reports.

Comparison to the Corps' levels:

Next page, I have some charts. Mike made a chart comparing his effluent limits to other general permits in the industry. It is pretty telling. Looks like he has the most stringent permit of all.

As to the numeric criteria, I have compiled two charts. One compares the numeric criteria of Mike's permit to a comparison of what EPA is allowing the Corps to dump into the Missouri River. Mike's permit limits and his alleged violations are on the second page chart, so that you may compare them to his limits and to the Corps' levels.

EPA and DNR have told Mike to monitor and limit Total Suspended Solids, BOD, ammonia, nitrate, total phosphorus, and aluminum to low levels. You can see that.

Using records of his rainfall amounts, Mike has calculated the amount of water that actually runs off his site in a year. He then applied his limits to these amounts of water and determined that in a year's worth of time, he is allowed to have one and a half tons of TSS (sediment) leave his discharges. The Corps is putting 548 millions tons without restriction into the waters of the US for its shallow water habitat projects.

Mike is allowed 54 pounds of phosphorus to be discharged, the Corps has no limit. The Corps' 548 million tons of dirt contains 358,403 tons (not pounds) of phosphorus. There are similar numbers for the rest of the elements.

Now remember, Mike has a limit of one and a half tons of suspended solids than can leave his outfalls from 650 acres of monitored property. Hold that thought.

Prosecution

I called both DNR and EPA over the last three weeks and told them I did not think it was fair to prosecute Mike. Both knew I was planning to address you today. Both knew that I intended ask you to intervene on Mike's behalf.

I hope it is just a coincidence that Mike got a letter from DNR on Monday. Mike wants to expand the quarry to a new area of their property and applied on July 16, 2010 to add a new storm water outfall. But the reply came on Monday, two days before I was to talk about his operation.

Monday's letter from DNR told Mike that the application that they gave him to fill out in July is not complete. His application also requires the completion of U.S. EPA Form 2F- Application for Permit to Discharge Storm Water Discharges Associated with Industrial Activity. Unlike the Corps' application, no one marked Mike's storm water application like they did for the Corps. Remember that Corps' application? It asked "Is it Complete?" The "No" box was checked. "If not, explain." said the next line. DNR filled in that line of the Corps application with "Good Enough".

Monday's letter to Mike also said that the new application requires a developed Storm Water Pollution Prevention Plan (SWPPP) for the proposed outfall site. Those BMPs must have a structured analysis to serve as the Antidegradation Review, to fulfill the requirements of the Missouri Clean Water Commission's regulation 10 CSR 20-7.031(2).

Mike walked out of his office thinking about the new pile of forms and paperwork that he must complete by November 29. The quarry was really busy. They had just filled a special order for some fill dirt, dirt for a Corps' project.

They had taken quite a bit of dirt, over 600 tons for the day. The truck drivers hauling the dirt were pleased they were getting in lots of tons for the day. When asked how they were hauling so much so fast, they said, "Oh, it's 'cause we're just dumping it in the River."

Curiosity got the better of Mike, so he went for a drive. Yep, sure enough, the dirt had been dumped directly into the Mississippi River for a Corps' project. Honest, I am not making this up.

How is this different, EPA?

How many sets of rules are we playing with in this country?


11/01/2010