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BEFORE THE MISSOURI CLEAN WATER COMMISSION
STATE OF MISSOURI

MISSOURI CLEAN WATER COMMISSION PUBLIC HEARING

10 CSR 20-7.031

TRANSCRIPT OF PROCEEDINGS

May 6, 2009

9:00 a.m.

Department of Natural Resources

Lewis & Clark State Office Building

LaCharrette/Nightingale Creek Conference Rooms

1101 Riverside Drive

Jefferson City, MO 65102

COMMISSIONERS PRESENT:

- Ms. Kristin Perry, Chair
- Mr. William Easley, Jr.
- Mr. Frank Shorney
- Mr. Samuel Hunter
- Mr. Ron Hardecke

REPORTED BY:

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1 Department will review the testimony presented along with
2 any further comments on the proposed rule received during
3 the comment period that ends on May 13th, 2009. The
4 Commission plans to review the Department's final
5 recommendation on the proposed rule at the meeting
6 scheduled for July 1st, 2009. The Commission will decide
7 at that meeting whether to accept the Department's
8 recommendations.

9 The court reporter will now swear in anyone
10 wishing to testify at this public hearing before the Clean
11 Water Commission today. All those wishing to provide
12 testimony, please stand.

13 (All people wishing to testify were sworn to tell the
14 truth, the whole truth, and nothing but the truth.)

15 COMMISSIONER PERRY: We'll begin with Staff.

16 PHIL SCHROEDER,
17 being first duly sworn to testify the truth, the whole
18 truth, and nothing but the truth, testified as follows:

19 MR. SCHROEDER: Good evening, Madam Chair. Good
20 morning. My name is Phil Schroeder. I'm Chief of the
21 Water Quality Monitoring and Assessment section of the
22 Department of Natural Resources.

23 I'd like to present testimony on behalf of the
24 Department in favor of the Commission's adoption of
25 changes to the water quality standards 10 CSR 20-7.031.

1 What I'd like to do is just give you a brief
2 summary of the major elements that we're proposing for
3 changes in those standards. You've heard these before in
4 previous meetings, so I won't go into a lot of detail
5 unless you'd like to ask some questions about those.

6 We're looking at some changes to criteria for
7 copper and zinc, which would appear in Table A.
8 Basically, what we're wanting to do is line these criteria
9 up with the federal -- recent federal guidance for
10 protection of aquatic life on these pollutants.

11 We're also changing the criteria for bacteria to
12 line that up with more recent guidance from EPA in terms
13 of what's protective of recreational uses from pathogens in
14 the waters in the state.

15 We're also looking at changes to the ammonia
16 criteria. These would just simply clarify the criteria and,
17 how they are calculated based on temperature and pH in the
18 presence of early life stages of fish. We made some changes
19 proposing some changes to Tables G and H, where water bodies are
20 identified in terms of the classified segments. This is a way of
21 making those classifications more accurate in terms of their start
22 and end points or boundaries.

23 There's a few waters that we added to Table H as
24 a result of a Petition we received on a few streams in the
25 St. Louis area. We're also adding a new Table K. New

1 Table K sets out some site-specific criteria for dissolved
2 oxygen on a couple of streams in Missouri, namely, East
3 Fork Locust Creek and the Sullivan County area and Sni-a-bar
4 Creek in the Jackson/Lafayette County area.

5 We're also adding Tables L and M, which is the
6 addition of nutrient criteria for lakes in the State of
7 Missouri. This has been a process that's been long in the
8 making, and through a lot of stakeholder discussions, a
9 big step in terms of meeting some goals and priorities of
10 EPA of state's developing nutrient criteria in their states.

11 We're also adding Table N to the water quality
12 standards. This is to specifically address how total phosphorus
13 criteria apply to the tributary arms of major reservoirs in the
14 State of Missouri.

15 And, lastly, we're correcting a number of
16 typographical errors that we normally find as we go
17 through and are trying to review the water quality
18 standards.

19 Unless you have any questions and want to have
20 any discussion on those major topics, I'll just simply say
21 that, as Chair Perry said, we plan to address any comments
22 that we receive up until May 13th, the end of the public
23 comment period, bring those comments to you along with the
24 Department's responses and any possible changes to our
25 proposed, proposal on July 1st. That's your next

1 Commission meeting.

2 What you have in your packet doesn't reflect any
3 changes from what we've been proposing to the Commission.
4 However, we have been having some discussions with some
5 individuals who indicate that they may have some comments
6 to us.

7 We haven't yet received anything in writing just
8 yet, but we expect that we will by May 13th. So I suspect
9 some of those comments made lead to some changes that
10 we'll bring back to you in July.

11 You have in your packet a copy of the Missouri
12 Register, which appeared in that March 2nd. Also
13 following that is a -- the schedule of the rule-making
14 which would indicate if things remain in progress without
15 any major issues, then we should have this rule in effect
16 by sometime in October of this year.

17 With that, I'd be happy to answer your questions
18 that you might have at this time.

19 COMMISSIONER PERRY: Go ahead, Frank.

20 COMMISSIONER SHORNEY: Phil, on cost estimates
21 in the document, there's -- there seem to be two different
22 ones. Is that just showing the range of the potential
23 impacts of this?

24 MR. SCHROEDER: Well, we have a private fiscal
25 note and public fiscal note. Those are distinguished

1 differently. But I suspect that's not what you're talking
2 about. Can you be more specific with your question?

3 COMMISSIONER SHORNEY: Okay. On page 512,
4 there's indication of cost of public entities of over
5 300 million. And then on page 520, there's 31 million
6 mentioned. Is that just the range of potential cost
7 impacts of these revised regs?

8 MR. SCHROEDER: I'm still trying to track where
9 you're speaking from.

10 COMMISSIONER SHORNEY: Let's see. 512 is --
11 under 2, Summary Of Fiscal Impact, top of page 512. And
12 520.

13 MR. SCHROEDER: I see summary of fiscal impact
14 on page 512.

15 COMMISSIONER SHORNEY: Right.

16 MR. SCHROEDER: And you're comparing that
17 with --

18 COMMISSIONER SHORNEY: 31 million on page 520?

19 MR. SCHROEDER: Yes.

20 COMMISSIONER SHORNEY: The two costs. What are
21 the significance of the two costs?

22 MR. SCHROEDER: Right. So if you look on -- at
23 511, the preceding page, it says fiscal note public cost.
24 And then if you look on page 519, it says fiscal note
25 private cost. So it's a difference between the public --

1 COMMISSIONER SHORNEY: Public and private. All
2 right.

3 MR. SCHROEDER: And private costs.

4 COMMISSIONER SHORNEY: So the total of the two
5 is the total impact?

6 MR. SCHROEDER: Yes. That's correct.

7 COMMISSIONER PERRY: Since -- since we're
8 looking at 329,809,576, that cost is over what period of
9 time? I'm -- I'm back on page 512.

10 MR. SCHROEDER: And that's the public --

11 COMMISSIONER PERRY: That's the public cost.

12 MR. SCHROEDER: Okay. The bulk of that cost is
13 estimated as the cost to the Metropolitan Sewer District
14 and their entities they serve for protection of
15 recreational uses in the waters which CSO -- are affected
16 by the CSOs. So that cost is construction cost, \$279,000.
17 So that's a one-time cost there.

18 And then you have an operation and maintenance
19 cost of \$21 million. That would be an annual cost. So
20 initially, \$279,000 construction to address the CSOs that
21 are going into those water bodies that are receiving new
22 recreational use destinations and an annual \$21 million
23 cost to operate that additional technology for our system
24 for -- for addressing CSOs.

25 COMMISSIONER PERRY: And I see there's a --

1 there's a -- I speak to the period of time. It's a --
2 that's a whole bunch of money, isn't it?

3 MR. SCHROEDER: Yeah. Anywhere that it
4 indicates construction cost would indicate a one-time --
5 the first cost. Whenever that construction occurred -- it
6 may occur, you know, in accordance with the compliance period of
7 the permit, which may be up to three years, or it could be in
8 accordance with -- in this case, when talking about CSOs,
9 it would be talking about a long-term control plan.

10 So some of those control costs may play out
11 many years as the long-term construction plan is implemented
12 over that period. But, generally, those are considered
13 one-time costs. O&M is always considered as an annual cost.

14 COMMISSIONER PERRY: Okay. Are there any other
15 questions?

16 MR. SCHROEDER: Thank you.

17 COMMISSIONER PERRY: Is there anyone else from
18 staff to speak?

19 MR. SCHROEDER: No.

20 COMMISSIONER PERRY: Thank you very much, Phil.
21 Ashley Spence? And following her will be Loren Smith.

22 MS. SPENCE: Hello. My name is Ashley Spence,
23 and I'm an undergraduate student consultant with the
24 Interdisciplinary Environmental Clinic at Washington
25 University in St. Louis.

1 I am reading a statement on behalf of the
2 Missouri Coalition for the Environment. The coalition is
3 concerned about the public health impacts of combined
4 sewer overflows and sanitary sewer overflows in Black
5 Creek, Deer Creek and the River Des Peres in St. Louis.

6 The discharge of untreated domestic sewage from
7 CSOs and SSOs is a serious public health threat, which has
8 been thoroughly documented by the US EPA and other
9 scientific studies.

10 The untreated sewage found in CSOs and SSOs can
11 release pathogenic bacteria, viruses and parasites into
12 receiving streams, and these pathogens can then cause
13 illness in people who recreate in these waters.

14 People who recreate in these streams have an
15 elevated risk for skin rashes, respiratory infections, ear
16 and eye discharges as well as gastrointestinal illness,
17 which is the most significant risk.

18 In addition, some of these pathogens that are
19 found in domestic sewage can cause more serious illnesses,
20 including diseases like Hepatitis, meningitis. Bacteria, viruses
21 and parasites can all occur in very high concentrations in
22 untreated domestic sewage, but infection can occur in
23 individuals who are exposed to only a few virus particles
24 or only a few parasites.

25 Therefore, it is possible that even incidental

1 contact with the contaminated water could lead to illness
2 in the individual. Children are especially at risk for
3 serious illness following recreation in a stream affected
4 by CSO and SSO discharges.

5 First, they are the population that is most
6 likely to play in the streams, splash in the water or
7 touch their mouths after coming into contact with the
8 water.

9 Secondly, their immune systems are not as
10 resistant to infection because they are not fully
11 developed and they have a greater risk of exposure to path
12 -- greater risk of infection following exposure to these
13 pathogens.

14 And if a child does develop a gastrointestinal
15 illness, he or she is much more likely than an adult to
16 suffer potentially serious dehydration as a result of the illness.

17 Lastly, these public health risks can impose
18 public costs on the communities in which the affected
19 streams are located. The costs of an illness can include
20 medical expenses and lost productivity for the affected
21 individual as well as for their care providers.

22 These effects are not limited to only those
23 people who recreate in the stream. Secondary transmission
24 can lead to illness in people who come into contact with
25 individuals who have chosen to recreate in a contaminated

1 water body.

2 This shows that CSO and SSO discharges can
3 affect an entire community. Missouri Coalition for the
4 Environment encourages the Commission to adopt total body
5 contact recreation use designations for the entirety of
6 the River Des Peres as well as its tributaries in order to
7 protect the St. Louis community against these health
8 threats. Thank you.

9 COMMISSIONER PERRY: Can you tell me what the
10 status is of -- what is being proposed in the rule
11 compared to your statement?

12 MS. SPENCE: What is being proposed in the rule?

13 COMMISSIONER PERRY: Right. You're talking
14 about River Des Peres, right?

15 MS. SPENCE: Yes.

16 COMMISSIONER PERRY: And I'm asking you -- this
17 is a comment on -- on this rule right here.

18 MS. SPENCE: Yes.

19 COMMISSIONER PERRY: Where in the rule does --
20 what does the proposed rule say as to whole body contact
21 for the River Des Peres?

22 MS. SPENCE: The changes to Table H and the
23 proposed amendments have downgraded River Des Peres from
24 whole body contact recreation to secondary contact
25 recreation. And the new segment that's being proposed for

1 classification also has River Des Peres as a secondary
2 contact recreation.

3 And we believe that this is not appropriate to
4 protect the health of those who recreate in the streams
5 because even this incidental contact with water could
6 cause -- or be a health threat to those who recreate in
7 the streams.

8 COMMISSIONER PERRY: Have you been to River Des
9 Peres?

10 MS. SPENCE: Yes.

11 COMMISSIONER PERRY: Have you seen anybody in
12 the water there?

13 MS. SPENCE: The day we went wasn't a good day
14 for recreation. But we have lots of reports from public
15 comments of people who recreate or know of people who
16 recreate in those waters.

17 COMMISSIONER PERRY: Okay. Are there any
18 further comments, questions? Thank you.

19 MS. SPENCE: Thank you.

20 COMMISSIONER PERRY: Loren Smith. If you could
21 focus on the actual rule changes --

22 MS. SMITH: Okay. Good morning. My name is
23 Loren Smith, and I'm a student attorney at the Washington
24 University. And I'd also like to read a statement on
25 behalf of Missouri Coalition for the Environment regarding

1 Black Creek, Deer Creek and River Des Peres, the streams
2 in St. Louis that Phil mentioned. First, the
3 Coalition supports the Department's proposal to classify
4 these three unclassified streams, and they also support
5 the Department's proposal to designate segments of the
6 Black Creek and Deer Creek for whole body contact
7 recreation use.

8 However, the Coalition does not support the
9 proposal to designate unclassified River Des Peres for
10 only secondary body contact recreation use. And the Coalition
11 urges the Commission to designate unclassified River Des
12 Peres for whole body contact recreation use.

13 There are several reasons for this. First, as
14 Ashley mentioned, there are several public comments
15 documenting whole body contact uses. There are public
16 comments from 2005 documenting swimming in this segment of
17 River Des Peres and recreational UAA public comments from
18 2008 reporting swimming and children playing 20 times a
19 year in the unclassified segment immediately upstream of
20 the segment proposed to be classified.

21 There is also a field survey conducted in June
22 2005 by the clinic. They interviewed the residents who
23 observed children swimming during high flow periods in the
24 segment immediately upstream from the segment proposed to
25 be classified.

1 Also, the general benefits of classification
2 such as protecting public health, improving the aesthetics
3 of the area and property values won't be fully recognized
4 for this segment if it's not protected by the full level
5 of pollution control of whole body contact recreation.

6 And, third, since there's no adequate use
7 attainability analysis for this segment, unclassified
8 River Des Peres must be designated for whole body contact.

9 The Department has accepted a UAA conducted in
10 2005 to remove whole body contact designation from River
11 Des Peres. The Commission should not accept the findings
12 of the 2005 UAA or the UAA itself as adequate for removing
13 whole body contact designation.

14 The first reason why the UAA is not adequate is
15 that the majority of the segment at issue is not surveyed
16 in the 2005 UAA. The UAA examined nine sites along
17 approximately 1.7 miles of the segment. The remaining two
18 miles of the segment proposed to be classified were not
19 analyzed in the 2005 UAA.

20 Second, the Commission should not accept the
21 2005 UAA as adequate because the Department's UAA internal
22 review committee found the UAA to be inconclusive, twice
23 in 2005 and again in 2008 stating that no stream surveys
24 have been conducted for this water body consistent with
25 the UAA protocol.

1 Therefore, the evaluation of whole body contact
2 recreation as an attainable designated use is
3 inconclusive. The US EPA also found a 2005 UAA did not
4 support the removal of recreational uses, and no new
5 information has been submitted to the Department since
6 that time which would warrant a change to that conclusion.

7 Lastly, the 2005 UAA is not adequate because it
8 failed to follow the 2007 UAA protocol. And there will be
9 several detailed examples of where the UAA deviated from
10 the protocol in the letter that we'll -- we will submit.

11 So in conclusion, the Commission should not
12 accept the 2005 River Des Peres UAA to remove whole body
13 contact recreation from this segment because the UAA did
14 not analyze the majority of the segment. It was found to
15 be inconclusive by the Department's internal review
16 committee.

17 The US EPA concluded that the UAA did not
18 support of the removal of recreational uses and the UAA
19 departed from the Department's protocol. Since there's no
20 conclusive UAA on this section -- this segment, the
21 Commission must classify this segment of River Des Peres
22 for whole body contact recreation.

23 COMMISSIONER PERRY: Are there any questions on
24 behalf of the Commission?

25 MS. SMITH: Thank you.

1 COMMISSIONER PERRY: Thank you. Next, we have
2 Karen Bataille. Did I say that right?

3 MS. BATAILLE: It's Bataille. But -- Madam
4 Chair, Commissioners, good morning. My name is Karen
5 Bataille. I supervise the Environmental Health section at
6 Missouri Department of Conservation.

7 And I'm here today -- well, first I'd like to
8 thank you for an opportunity to comment this morning. I'm
9 here today to specifically comment on Table K, for the DO criteria
10 for Little East Fork Locust Creek and -- Little
11 East Fork Locust Creek.

12 As some of you may recall, I testified before
13 this Commission in November of 2006 regarding MDC's
14 proposed -- MDC's opposition to the proposed site criteria
15 for these two creeks.

16 MDC continues to strongly oppose the proposed
17 average daily minimum DO criteria of 0.9 milligrams per
18 liter because it will not afford adequate aquatic life
19 protection within these streams and likely will result in
20 further degradation within those streams.

21 Of greatest concern to us is the selection of
22 reference streams that are within flood plains where row
23 cropping and pastures are of dominant use. These streams
24 do not reflect natural background conditions.

25 EPA guidance states that reference streams

1 should have no anthropogenic influences, and MDNR guidance
2 states that referenced water bodies should be selected that
3 have reduced levels of human activity.

4 MDC understands that most streams in Missouri
5 are impacted by human activities and recognizes the
6 difficulty associated with the selection of reference
7 streams.

8 However, MDC believes that it is not appropriate
9 to set criteria based on measurements taken in highly
10 altered streams. And we urge the Commission not to
11 approve the site-specific criteria recommendation for East
12 Fork and Little East Fork, Locust Creeks.

13 Thank you for your time this morning.

14 COMMISSIONER PERRY: Are there any questions?

15 MS. BATAILLE: Thank you.

16 COMMISSIONER PERRY: Is the standard dissolved
17 oxygen that you're concerned about?

18 MS. BATAILLE: Yes, ma'am.

19 COMMISSIONER PERRY: And you're aware we have a
20 problem with dissolved oxygen state-wide?

21 MS. BATAILLE: Yes, ma'am. And we work very
22 closely with the Department on the Sni-a-Bar in Table K.
23 And we -- you know, we worked with DNR, and we're on board
24 with that. But we cannot -- we cannot support the 0.9
25 because that is toxic to fish and other aquatic life.

1 And we feel that the reference streams used for
2 those determinations were not appropriate, and we would
3 prefer to move forward on that and take another look. But
4 0.9, fish cannot survive in those conditions. And when
5 you measure it as an average condition, it's going to
6 allow excursions to zero. And MDC cannot support that --
7 that -- that level of dissolved oxygen as a minimum
8 average.

9 COMMISSIONER PERRY: Thank you.

10 MS. BATAILLE: You're welcome. Thank you.

11 COMMISSIONER PERRY: John Lodderhose. And,
12 Trent, you're behind him.

13 MR. LODDERHOSE: Good morning. Madam Chair,
14 Commissioners, I'm John Lodderhose, the Assistant Director
15 of Engineering at the Metropolitan St. Louis Sewer
16 District.

17 I just want to make two quick comments. The
18 first is to clarify some things on the River Des Peres.
19 MSD did a UAA on River Des Peres back in 2005. EPA has
20 approved that UAA and said it was okay not to have full
21 body contact recreation there.

22 And there's been several public comment periods
23 which demonstrate there's no existing use. So you might
24 want to check the record on those hearings.

25 The second thing is on Maline Creek, the

1 State is proposing to add secondary contact recreation.
2 But EPA believes it should be whole body contact. And,
3 actually, both are right. There's a dam about half a mile
4 up from the mouth and upstream of the dam that's deep
5 enough for whole body contact. But downstream from the
6 dam, it's too shallow for whole body contact.

7 So what we would request is that Maline Creek
8 would actually be resegmented in the area upstream of the
9 dam and be whole body contact and the area downstream of
10 the dam, which is actually kind of sheet flow because it's
11 a concrete channel there, it should be classified as
12 secondary contact as the State has proposed.

13 That's all my questions, or all my comments.

14 COMMISSIONER PERRY: Do we have any questions?
15 I don't see any.

16 MR. LODDERHOSE: Thank you.

17 COMMISSIONER PERRY: Thank you. Trent? Behind
18 Trent will be Robert Brundage.

19 MR. STOBBER: Good morning. Trent Stober with
20 MEC Water Resources in Columbia, Missouri. We performed
21 the UAA in question in Maline and River des Peres and so
22 forth and concur with John Lodderhose's statements to
23 that effect.

24 I'd also like to comment on behalf of the City
25 of Blue Springs on the Sni-a-Bar Creek, specifically the site

1 specific dissolved oxygen criteria. As -- as Ms. -- or Ms.
2 Bataille mentioned, we've worked closely with several of
3 the resource agencies, including the Department of
4 Conservation and US EPA, MDNR to come up with a -- a -- a
5 mutually acceptable set of criteria.

6 We will propose some changes to the criteria in
7 the document as part of the formal comment period. I feel
8 we have -- we -- we have reached an agreement with all of
9 those resources agencies.

10 On behalf of the city of Milan, Missouri,
11 we support the -- the site-specific criteria as did -- in
12 the -- in the document. I would say that the City of
13 Milan is right now performing substantial upgrades to the
14 wastewater treatment facility to try to address the
15 dissolved oxygen concentrations and so forth and -- and
16 have really stepped up to the plate to try to mitigate
17 those issues. With that, any questions or comments?

18 COMMISSIONER PERRY: I have one question. What
19 we heard prior about the River des Peres, they said the
20 UAA did not cover certain parts of the river.

21 MR. STOBBER: Yeah. The primary focus of the --
22 of the original UAA was then classified, currently
23 classified section of the UAA. And I would say that there
24 was more data collection on -- on the river morphology and
25 so forth than any of these 2005 UAAs.

1 But we also went ahead and -- and monitored
2 river morphology well upstream and into the classified
3 segment on our own. So there was a good section of that
4 -- that segment that was surveyed in 2005 and -- and
5 basically was the same findings as the lower part of River
6 des Peres that was presently classified.

7 So we feel that given that that the morphology
8 within that segment would -- would be fairly uniform.

9 COMMISSIONER HARDECKE: Does the Department have
10 that data on the upper portion?

11 MR. STOBBER: Yes. It was all part of the -- of
12 the previous UAA. You know, we -- we try to be very
13 thorough in -- in that given the -- the -- the issues
14 potentially in the area. So we felt like we went beyond
15 the requirements back in those days.

16 COMMISSIONER PERRY: Any further questions?

17 MR. STOBBER: Thank you.

18 COMMISSIONER PERRY: Thank you. Robert? And,
19 John, do you feel it's necessary? Hey, Robert, you've
20 requested four segment. Do you have Power Points for all
21 four of them? Four items.

22 MR. BRUNDAGE: Three.

23 COMMISSIONER PERRY: What are those?

24 MR. BRUNDAGE: Are we ready? I was wondering if
25 we could go ahead and work on that and we can get the

1 comments.

2 COMMISSIONER PERRY: Mr. Herrmann, would you put
3 that on the record while we're doing that? Because that's
4 what makes the most sense.

5 MR. HERRMANN: I was not sworn.

6 COMMISSIONER PERRY: Well, you could be sworn
7 right there.

8 MR. HERRMANN: Okay. Can I swear to the truth?

9 MR. HERRMANN,
10 being first duly sworn to testify the truth, the whole
11 truth, and nothing but the truth, testified as follows:

12 MR. HERRMANN: I merely added that during the --

13 COMMISSIONER PERRY: Microphone.

14 MR. HERRMANN: Using my superior memory talents,
15 which I --

16 COMMISSIONER PERRY: You give me great hope.

17 MR. HERRMANN: Which I got from my mother. I am
18 reminded that during the testimony of MDC about DO, on
19 that particular stream, their own personnel reported that
20 they had indicated 18 species of fish above testing area
21 indicating toxicity of the DO at that level could be
22 inadequate. But the 18 species of fish belies that
23 conclusion.

24 COMMISSIONER PERRY: Thank you.

25 MR. HERRMANN: You're welcome.

1 COMMISSIONER PERRY: How are we doing?

2 MR. BRUNDAGE: Is there somebody else you can
3 call while --

4 COMMISSIONER PERRY: Yeah. There is. There is
5 someone who says if necessary. He says it's necessary.
6 All right. Okay. So John DeLashmit, please?

7 MR. DELASHMIT: Good morning, Madam Chair. Good
8 morning, Commissioners. My name is John DeLashmit, Chief
9 of the Water Quality Management branch of EPA, Region 7
10 office in Kansas City. And I just want to talk on a
11 couple of things today. First, the ammonia criteria and
12 then on the use attainability analysis that was done by the
13 Department of Natural Resources.

14 And we will be submitting a letter and written
15 comments as well. On the ammonia criteria, it was
16 originally published in 1999, and some new toxicity
17 testing, new data has indicated that the recommendations
18 that EPA made in 1999 may not be sufficiently protective
19 of some mussel species.

20 And so EPA and the US Fish & Wildlife Service
21 are working together in what we expect will be the revision of the
22 ammonia criteria sometime in the future. And EPA has
23 issued a memorandum with the Service stating that given
24 the time and resources that are involved in revising the
25 state water quality standards we are recommending that any

1 state that is considering revision wait until we've come
2 out with the new recommendations to avoid wasting time and
3 resources.

4 And so that's something I just wanted to make
5 sure you guys were aware of. On the use attainability
6 analyses, and the rule change associated with those what are
7 proposed, on maximum depth, we noticed that maximum depth
8 information was gathered during the 2005 and 2006
9 recreation seasons by Department of Natural Resources.

10 And the data is relevant information that should
11 be considered in assessing attainability, and we encourage
12 the Department of Natural Resources to revise the
13 recommendations appropriately and use the maximum depth
14 information, which is one of the criteria that's listed in
15 the protocol to determine what the appropriate level of
16 recreation is.

17 We also found that on the North Fork of the Salt
18 River, it had depth greater than a meter in the 2007 data
19 gathering exercise, and it's not clear to us why the
20 maximum depth was not considered in recommending the
21 recreational use for that particular stream.

22 For secondary contact recreation, we certainly
23 support MDNR's effort to consider the public's comments and
24 designate secondary contact rec uses where there's evidence to
25 suggest that use is existing. And the 2007 protocol identifies

1 one-half meter as the maximum depth criterion for evaluating
2 attainability of secondary contact recreation. And we
3 recommend that the State consider the maximum depth
4 measurement for secondary contact from all sampling seasons and
5 designate attainability secondary contact rec uses where
6 appropriate. There are some inconclusive UAAs that we've seen
7 on some waters. The interim goal in 101.a2 says, Wherever
8 attainable, the water quality should provide recreation in
9 and around the water. And there's a presumption that
10 waters are recreatable unless you demonstrate that they
11 are not.

12 Where the UAA was not sufficient to conclusively
13 determine that the attainment status is appropriate, then
14 the UAA has not rebutted that rebuttal presumption. So
15 water bodies with inconclusive use attainability analyses
16 should be designated with uses consistent with the interim
17 goal of the Clean Water Act, which would be a whole body
18 contact recreational use.

19 So we recommend that you make revisions to your
20 tables where the UAA is inconclusive to assign the highest
21 -- highest use. And, finally, recreation by children, the
22 protocol doesn't really clearly indicate how data
23 indicating actual or potential recreation by children will
24 be considered.

25 The UAAs contain much relevant information, the

1 location of -- or presence of parks, playgrounds, rope
2 swings, but it's really not clear to us how that
3 information was considered. And we recommend that the
4 State clearly indicate how evidence of potential for
5 recreational uses by children was considered in the
6 attainment decisions, especially in those instances where
7 the evidence suggests recreation may be occurring but the
8 measured depth doesn't meet the criteria for use
9 attainment.

10 COMMISSIONER PERRY: I think we -- didn't we go
11 through a long process of developing a procedure for UAA?
12 And do these comments address our procedure or what's in
13 this listing?

14 MR. DELASHMIT: Well, to us, I believe we -- we
15 believe they address what's in the listing. I think in
16 this case, it wasn't clear how you considered the evidence
17 of children's use, and that's why we're asking the
18 question. So we're not commenting on the protocol right
19 now. We're just commenting on the use of the protocol.

20 COMMISSIONER PERRY: Okay. So children's use is
21 a subcategory of use?

22 MR. DELASHMIT: In some states. Not in Missouri
23 that I know of.

24 COMMISSIONER PERRY: So -- but that's what
25 you're asking us to do, correct?

1 MR. DELASHMIT: Is -- what we're asking is just
2 to indicate to us how the evidence is used in your
3 decisions when there is evidence of children -- existing
4 children's play, even though the depth criteria may not be
5 met.

6 COMMISSIONER PERRY: Okay.

7 MR. DELASHMIT: And that's all I have.

8 COMMISSIONER PERRY: Thank you.

9 MR. DELASHMIT: Thank you.

10 MR. SCHROEDER: Care to hear a follow-up?

11 COMMISSIONER PERRY: Yes.

12 MR. SCHROEDER: Well, this is Phil Schroeder.
13 While we don't have children's play or child recreation as
14 a definitive use designation within our water quality
15 standards, we do have -- or we do make an effort obviously
16 to go out and use attainability analyses to look at any
17 recreation by any human being, whatever their age.

18 If there is existing use, whether it's by a
19 child or by an adult, that is generally information that
20 we bring to the Commission to support whole body contact
21 recreational use designation.

22 We do look for any use by any person. There's
23 -- there's indications a lot of times where there's
24 tracks, human tracks along a water body. Whether it's a
25 child's tracks or human -- or an adult, it doesn't really

1 make any difference. We still look at that as potential
2 contact with the water.

3 Now, the question may be do -- does the criteria
4 we currently have in place to protect human health from
5 pathogens? Is it -- should it be reviewed in terms of
6 whether or not it's protecting an adult as opposed to a
7 child -- children? Is there a sensitivity issue there?

8 There's nothing like that in the federal
9 guidance that would suggest that that criteria needs to be
10 reviewed or considered or changed in that regard. So our
11 presumption is that the criteria that we have is both
12 protective of an adult as well as a child.

13 COMMISSIONER PERRY: Thank you. Thank you for
14 the clarification. Anything further? Ready to go,
15 Mr. Brundage?

16 MR. BRUNDAGE: Not on that. But I'll make some
17 other comments while we're still -- good morning, Madam
18 Chair, members of the Commission. My name is Robert
19 Brundage from the law firm of Newman, Comley & Ruth here
20 in Jefferson City. And I'm here to offer some testimony
21 on proposed water quality standard changes.

22 I'm representing several clients here today and
23 will be submitting some other written requirements -- written
24 comments, excuse me -- by the end of the deadline. And so
25 I won't take up too much of your time today.

1 One thing I want to do is discuss the
2 site-specific dissolved oxygen standard proposed rule,
3 Table K for East Fork Locust Creek.

4 I do represent Farmland Foods, who owns a
5 packing plant there in town. And we're here to support
6 the City of Milan in the quest to promulgate that as a
7 site-specific standard.

8 As you may recall, in -- and, Commissioner
9 Hunter, I'm not sure if you were on the Commission in
10 2005, but the water quality standards were changed in
11 regards to dissolved oxygen in 2005.

12 There used to be a state regulation that
13 basically took into account naturally low levels of
14 dissolved oxygen. EPA had concerns with that, so that
15 provision was taken out of the regulation. And in its
16 place, there was a provision put in the regulations that
17 allowed the Commission to promulgate site-specific
18 criteria for dissolved oxygen or any other cri -- any
19 other criterion.

20 So this is a prime example of where we're at
21 today in a follow-up on that 2005 rule-making. And now
22 it's an opportunity for the Commission to adopt a
23 site-specific standard. This would be Sni-a-Bar, the one
24 that -- Mr. Stober also represents them.

25 That would be the very first site-specific

1 criteria that you would have an opportunity to promulgate.
2 Karen Bataille, on behalf of the Conservation Department,
3 offered testimony today and back in November of 2006 opposing
4 this, and she strongly opposes the lower standards.

5 She made no reference of the average standard,
6 which was 3.6. And Karen, in her comments, talked about
7 that she had trouble with the selection of reference
8 streams. Previously, I think in September 2006, and I
9 think this is in the rule-making record, Trent Stober gave
10 a presentation to the Commission demonstration --
11 demonstrating how he carefully chose which water bodies in
12 that area to select.

13 He went through a complete selection process and
14 eliminated a whole number of water sheds and narrowed it
15 down to several few. So Trent did a good job of
16 justifying that. And the Conservation Department hasn't
17 suggested any other way to do that. And I -- I think that
18 it's well-founded in the way that Trent put it together.

19 There is also discussion from Karen about the
20 reduced levels of human activity in water sheds. The
21 whole goal that Trent went through when he chose these
22 water sheds is to look for those water sheds that have the
23 smallest amount of human impact.

24 And I submit to you, you can't go anywhere in
25 the State of Missouri where you're not going to find some

1 level of human impact on a water shed. And in this
2 situation, in north Missouri, Trent did that. Still,
3 there are farmers that are in the water sheds that he
4 chose. But the whole water shed I think only had 7 -- 7
5 percent in row crop. The rest of it was just hay pasture,
6 hay -- hay ground, pastures, CRP, woods, that type of
7 thing.

8 So I think we did a good job of trying to select
9 the water bodies. And for all water bodies in north
10 Missouri, this -- this type of one I think is about as
11 representative as you're going to get. So I submit to you
12 that the study is well-founded, and I don't think this is
13 a, quote, highly altered stream as Karen suggested, for
14 all the reasons I just went through.

15 So -- the other thing I'd submit to you is that
16 you have heard of no reported fish kills in East Fork
17 Locust Creek. This instantaneous minimum of 0.9 milligrams per
18 milliliter is just that, an instantaneous minimum. Excuse
19 me. That's how our standard is currently set up.

20 Any time that you drop below 5.0, even for a
21 minute, you know, that's supposedly -- supposedly a
22 violation of a water quality standards. So in this
23 instance, I think it -- the beneficial uses are being
24 protected. This is naturally low DO in the stream.
25 And I strongly encourage you to promulgate this

1 site-specific standard.

2 How are we doing on this? The other area I
3 wanted to offer some testimony on was the nutrient
4 criteria for lakes. Thanks. I don't have any specific
5 comments on how we arrived at the nutrient criteria for
6 lakes.

7 There was a very thorough scientific process
8 that we went through. But one of the things that we
9 really -- that kind of troubles me is that when we came up
10 with the site-specific standards through this process --
11 well, I shouldn't say we. I -- I just watched the
12 scientists and statisticians put it together. But it's --
13 it's not exactly clear how we're going to tie all of those
14 numbers for phosphorous, nitrogen and -- to the -- to the
15 beneficial uses of the water. It's not exactly clear.

16 I want you to realize that when this rule is
17 promulgated in the fiscal note, we already know that
18 there's about 55 lakes that are probably going to be
19 impaired and be on the 303(d) list as the next listed
20 cycle.

21 And according to -- I can't remember if it was a
22 fiscal note or regulatory impact report, 140 POTWs in
23 those water sheds and 235 subdivisions. That's a lot of
24 folks that are going to be affected by this rule-making.

25 And I titled this slide Implementation Issues.

1 I guess you can consider my comments in one way premature.
2 But any time this Commission is going to promulgate a
3 water quality standard, you're going to want to know what
4 is going to happen after that.

5 And when we put these streams or lakes on the 303(d)
6 list, what kind of impact is that going to have, and is
7 the Department of Natural Resources prepared to handle
8 that and handle all the permitting changes? How would
9 the MDNR permit these facilities?

10 If you have an impairment, how far up a stream
11 or the water shed do you go to consider whether or not a
12 permitted facility is going to have a permit changed to
13 reduce levels of nutrients?

14 One of the big areas I see, the big question is
15 will DNR allow offsets? When I say offsets, I'm going to
16 get to this in a minute with a more detailed description
17 of how the State of Minnesota handled it.

18 If one treatment plant implements improvements
19 that greatly reduces phosphorous, may the DNR and Clean
20 Water Commission permit another facility that is
21 increasing level of nutrients that go into the water shed
22 of a lake? Right now, that's an unanswered question
23 here in the State of Missouri.

24 The other thing I put on here is, Will DNR
25 implement a trading program? Currently, we have no

1 trading program in the state where you can trade credits
2 for nutrients. So there's a lot of unanswered questions
3 on where we're going to go after this rule is promulgated
4 if you decide to go that far.

5 So as I mentioned before, should the Commission
6 adopt a nutrient criteria for lakes that's not closely
7 tied to attainment of beneficial uses? And should the
8 Commission adopt nutrient criteria for lakes when there
9 are so many unanswered questions on implementation?

10 And the fourth, so what are the implications for
11 a 303(d) listing for a lake? What rules apply when you're
12 permitting a facility in an impaired water shed? I titled
13 this slide, No permit zone?

14 There is an EPA regulation that says, No permit
15 may be issued if the discharge will cause or contribute to
16 the violation of water quality standards. There's a
17 couple of exceptions, minor exceptions to that. But that
18 is the general rule.

19 So if we have a lake that has a 50-mile square
20 water shed, can -- can the DNR and the Clean Water
21 Commission permit a nutrient source in that water shed?
22 Some people might suggest that you can.

23 Several years ago in 2003, there was a Montana
24 case where the Ninth Circuit Court of Appeals upheld
25 restrictions where the issuance of a new permit or increased

1 discharges on water quality limited segments, which are in
2 violation of water quality standards you could not issue a
3 permit.

4 I mentioned that the Minnesota case. In the
5 State of Minnesota -- well, I've got three cases along --
6 two cases I want to talk about. One is the Minnesota case
7 here, and we'll get to the federal EPA case that was out
8 in the state of Arizona next.

9 Now, in the Minnesota situation, Lake Pepin was
10 put on the 303(d) list for phosphorous. There was 60
11 wastewater treatment facilities that were trying to be new
12 or expanded wastewater treatment facilities across half
13 the State that was within the water shed of this lake.
14 And many of them were just miles and miles away from Lake
15 Pepin.

16 There was no TMDL prepared at the time. And in
17 this lawsuit, nobody sought review or asked the Court of
18 Appeals or the Supreme Court of Minnesota to answer the
19 question, Can you issue permits before a TMDL was issued?
20 So that wasn't answered in this case.

21 The facts of this case -- this is the offset
22 example. One of the plaintiffs proposed a new treatment
23 plant to add 2200 pounds of phosphorous. So they're
24 increasing the loading in the water shed.

25 However, the Litchfield treatment plant had an

1 upgrade that removed 53,500 pounds of phosphorous. So the
2 difference between those two numbers is a huge -- huge
3 offset in the situation.

4 So the Court of Appeals read that EPA regulation
5 that I just showed you a few minutes ago and said, I'm
6 sorry. You cannot permit that facility for the 2,200
7 pounds because it will cause a contributory to the water
8 quality standards.

9 And the case was then appealed to the Supreme
10 Court of Minnesota. And they overturned the Court of
11 Appeals. And they said, Well, we don't quite think that
12 EPA regulation exactly means what it said. And they were
13 going to allow the Minnesota police control agency to make
14 a range of policy judgments based on scientific and
15 technical knowledge. And the bottom line is they allowed
16 the permitting offset to occur in Minnesota.

17 This is the Arizona case. There was -- there
18 was an impaired water shed out there for copper. EPA was
19 preparing a TMDL. And in the TMDL, they were going to
20 allow the Carlota Copper Company to apply for a permit
21 when they issued them a permit.

22 And EPA had completed a TMDL where they
23 basically said, We're working on a lot of non-point source
24 reductions in that water shed. That's going to offset any
25 increased loading from the Carlota Copper Company

1 facility.

2 However, the Ninth Circuit Court of Appeals held
3 that the EPA regulation prohibits that new sources in the
4 impaired water shed. EPA tried to argue that remediation
5 in these old abandoned mines that were reduced sources
6 were going to prepare for an offset of the copper
7 discharge.

8 But the Court held there is nothing in the Clean Water Act
9 that allows these offsets in water shed that remain
10 impaired.

11 I showed a couple of exceptions to the rule
12 before. And they're not entirely -- I want to move on to
13 the next slide. The exceptions to that rule, EPA -- or
14 the Court of appeals said that on Test No. 1, the TMDL
15 indicated that Pinto Creek could meet the water quality
16 standard.

17 It did not provide sufficient loading
18 allocations, did not prove sufficient load allocations
19 remained under the existing circumstances. So, basically,
20 they said they don't think the TMDL proved that the water
21 quality standards were going to be met. They still had
22 concerned about that.

23 Go to the next slide. It says if there are no
24 adequate point sources to reduce loadings, then a permit
25 cannot be issued until the State or copper company agrees

1 to establish a schedule to limit pollution from a
2 non-point source.

3 Let's go to the next slide. So I just wanted to
4 give you a flavor that out there in the United States,
5 there is kind of split authority on whether offsets are
6 allowed. And in my opinion, if we're going to go down a
7 road where we're going to 303(d) list about 55 lakes in
8 the state affecting hundreds of facilities, we really need
9 to think about how we're going to implement that and what
10 kind of answers we need to put in place and what kind of
11 provisions we need to put in place.

12 So I want you to consider and I'd like the
13 Department to consider before we come to a final order of
14 rule-making on this, should there be some amendments to
15 this rule to -- to allow offsets? Or should the
16 Department issue a policy that they will allow offsets?
17 Or the Commission?

18 What happens if there is litigation from some
19 environmental groups on permits that allow offsets?
20 Should this rule have a built-in provision in it that if
21 you -- you go into this rule and thought offsets were
22 going to be allowed, should there be a -- an opt out
23 provision in the water quality standards that in the event
24 that offsets are not allowed or a water quality trading
25 program never comes to fruition here in the State of

1 Missouri, should we suspend this lake nutrient criteria
2 until such time as that issue is clarified?

3 Otherwise, we're looking at a possible situation
4 where we could -- we could be in a train wreck on
5 permitting of these hundreds and hundreds of facilities
6 across the state if we don't come to a situation where we
7 understand how we're going to be permitting these in the
8 future.

9 COMMISSIONER PERRY: May I ask a question? You
10 mentioned 55 lakes would be affected and hundreds and
11 hundreds of facilities.

12 MR. BRUNDAGE: Yeah. I had a slide near the
13 beginning that -- that I --

14 COMMISSIONER PERRY: How many -- how many lakes
15 on the 303(d) list have wastewater treatment facilities?
16 Well, I put on that slide that -- and anybody from the
17 Department can correct me if I don't get these numbers
18 right.

19 But I thought I saw in there where 55 lakes
20 would be put on the 303(d) list if this lake nutrient
21 criteria regulation were to pass. And in those water sheds, of
22 those 55 lakes, there is 140 publicly owned treatment works and
23 235 subdivisions that had a wastewater facilities in
24 the subdivision. So --

25 COMMISSIONER PERRY: And the rule doesn't talk

1 about offsets. Are you proposing that they go back and
2 figure out offsets for this proposed rule or some method
3 that this might be considered in the future?

4 MR. BRUNDAGE: Well, if I were the Department
5 standing here, I would tell you that the only thing before
6 you was the water quality standard change, and that's the
7 only thing you need to consider right now. Don't worry
8 about it. We'll deal with the implementation later.
9 That's what they might tell you.

10 I'm saying I -- I don't know if I would feel
11 comfortable doing that if I were a Clean Water
12 Commissioner to say, Well, we'll deal with the issue later
13 when the implementation phase comes along.

14 I'd like to have some answers beforehand to know
15 the exact scope of what the potential impact is on these
16 hundreds of facilities out there.

17 COMMISSIONER PERRY: And may I ask you a
18 follow-up question? If we implement these water quality
19 standards, what impact will the back-sliding provisions
20 have on the potential to have offsets?

21 MR. BRUNDAGE: I'm not prepared to answer that
22 question. I'm not sure.

23 COMMISSIONER PERRY: Because there's some
24 regulations in the EPA that says you can't go backwards.
25 So once we set it, you can't ever go less, even if it

1 would enable something more positive in a scenario like
2 you showed.

3 MR. BRUNDAGE: I mean, I -- to EPA's credit,
4 they were trying to fight for offsets in that Carlota
5 Copper case. But the people that were litigating this,
6 the environmental group prevailed in that litigation. So
7 are we going to be in the same situation here in the State
8 of Missouri?

9 COMMISSIONER PERRY: Did you say the offsets are
10 at the Supreme Court level?

11 MR. BRUNDAGE: In Minnesota at State Court
12 level.

13 COMMISSIONER PERRY: Right.

14 MR. BRUNDAGE: A federal court where
15 this litigation might end up might look more favorably
16 upon a federal -- excuse me -- a sister court from the
17 federal system for that precedent. It's -- it's hard to
18 -- I mean, you understand that on that aspect.

19 COMMISSIONER PERRY: Okay. Anything further?

20 MR. BRUNDAGE: No.

21 COMMISSIONER PERRY: Do we have any more
22 questions?

23 COMMISSIONER HUNTER: Robert?

24 COMMISSIONER PERRY: Robert, we have a question.
25 Yes, Commissioner Hunter.

1 COMMISSIONER HUNTER: Can you tell me -- can you
2 tell me how many states have active trading programs at
3 this time?

4 MR. BRUNDAGE: Well, I haven't looked at it very
5 carefully in the last couple years. So maybe somebody
6 from EPA can tell me. But there was -- there's several
7 pilot projects around the east coast, and there was one
8 out in Montana or somewhere. So I don't know --

9 MR. STOBER: Ten.

10 MR. BRUNDAGE: Trent Stober says ten.

11 COMMISSIONER HUNTER: Not but active?

12 MR. BRUNDAGE: I suppose.

13 COMMISSIONER HUNTER: I just -- I just wondered
14 if they were.

15 MR. BRUNDAGE: They work. But they're -- it
16 takes a lot of work to put one of these trading programs
17 together because it -- you have to figure out what a
18 credit is worth, and you have to figure out credits for
19 point source and non-point sources. So it's not a real
20 easy thing to do.

21 If it was real easy, I'm sure the DNR would have
22 moved on before now. But at this point in time, they
23 really don't have the resources to -- I'm not speaking for
24 Mr. Pabst now, but he might tell you he doesn't have the
25 resources to put that together. But I hope that he can

1 certainly find the resources. Maybe we can get a little
2 bit of stimulus money over there.

3 COMMISSIONER PERRY: Anything further? Thank
4 you, Mr. Brundage. Is there anyone who did not speak on
5 this first item on the hearing?

6 The Commission will continue to accept written
7 comments on the proposed amendment to Rule 10 CSR 20-7.031
8 until 5 p.m. on May 13th at 2009.

9 Please submit your written comments to Phil
10 Schroeder, Water Protection Program, Missouri
11 Department of Natural Resources, P.O. Box 176, Jefferson
12 City, Missouri, 65102.

13 On behalf of the Commission, I thank everyone
14 who has participated in this process. This hearing is now
15 closed.

16 (The proceedings were concluded at 10:15 a.m.
17 on May 11, 2009.)

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1 REPORTER'S CERTIFICATE

2

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

5

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 May 11, 2009.

18

19

20

21 Monnie S. VanZant, CSR, CCR #0539

22

Registered Professional Reporter

23

24

25