

# Journal of Environmental and Sustainability Law

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Missouri Environmental Law and Policy Review  
Volume 11  
Issue 1 2003-2004

Article 9

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2003

## Recent Environmental Law News

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### Recommended Citation

*Recent Environmental Law News*, 11 Mo. Env'tl. L. & Pol'y Rev. 111 (2003)

Available at: <https://scholarship.law.missouri.edu/jesl/vol11/iss1/9>

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## RECENT ENVIRONMENTAL LAW NEWS

## SUMMARY OF

## “GRAVEL MINING IN MISSOURI: FROM A REPORT BY RONALD L. CRUNKLTON”

The Missouri Smallmouth Alliance’s website summarized a report by Ronald L. Crunklton on Gravel Mining in Missouri. Gravel and sand production, in which Missouri ranks 20th nationally, directly affects fish and wildlife and indirectly affects those who enjoy those resources for recreational activities (fishing, boating, etc.). Together, the Missouri River, Mississippi River, and Ozark region give Missouri an endless supply of sand and gravel production. In 1980 alone, eight million tons of these resources were mined in Missouri through either open pit excavation or dredging.

Open pit extraction does not have as much potential to directly damage stream channels. However, requirements that sand and gravel be washed to remove silt and other residue are the primary source of environmental problems. There are environmental dangers from off-river excavation in that “site clearing on the floodplain and removal of riparian vegetation may lead to alteration of the runoff pattern, increased erosion, bank destabilization, sedimentation and turbidity.”<sup>1</sup>

Dredging a stream is an operation that varies depending on size but can include “suction or bucket-type dredge mounted on boats or barges,” “crane and dragline dredge bucket to a front loading or earthmover that can operate in shallow streams.”<sup>2</sup> Various adverse effects arise from such operations, including modifications of the stream channel, modifications of water quality, modifications of aquatic populations, and modification of recreation. These problems are compounded if an open pit is expanded to the point where it becomes located by a stream.

This industry is regulated in Missouri, and the Missouri Land Reclamation Act mandates all active mines to be registered.<sup>3</sup> Reclamation of sites is required, although there are no guidelines on the extraction process itself. The Missouri Clean Water Law regulates two categories: effluent standards and water quality criteria.<sup>4</sup> Gravel dredging is also regulated under the Federal Clean Water Act, Section 404.<sup>5</sup>

Case studies from the 1980s on the lower Osage River and the Little Piney were reviewed, and it was concluded that temperature increases (due to decreased riparian vegetation resulting from dredging) were potentially lethal to trout. These temperature increases were also responsible for damaging the water clarity of

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<sup>1</sup> *Id.* at ¶ 3.

<sup>2</sup> *Id.* at ¶ 4.

<sup>3</sup> *Id.* at ¶ 6. “Regulation of the industry in Missouri is based on the Missouri Land Reclamation Act, the Missouri Clean Water Law, and the Federal Clean Water Act.”

<sup>4</sup> Missouri Smallmouth Alliance, *Gravel Mining in Missouri*: From a report by Ronald L. Crunklton. Fisheries Research, Missouri Department of Conservation 1110 College Avenue, Columbia, Missouri 65201 <<http://www.smallmouth.org/MissouriGravelMining2.html>> (last updated September 29, 2003). “Effluent standards pertain to point source discharges such as any discernable, confined or discrete conveyance where pollutants may be discharged. Point source discharge require NPDES (National Pollution Discharge Elimination System) permits which set maximum allowable levels of pollutants that can be discharged. Non-point cannot be regulated under existing state law.” *Id.* at ¶ 1. “Water quality criteria apply in relation to mining operations specifically to turbidity and temperature changes caused by their activities.” *Id.* at ¶ 2.

<sup>5</sup> *Id.* at ¶ 3. A permit is required on any action that would result in “fill” in any waters or wetland in the United States. The U.S. Corps of Engineers administers this program.

these rivers, a quality for which the Ozarks is renowned.<sup>6</sup> Moreover the turbidity from dredging in these streams not only has aesthetic downsides, but it impairs other recreational uses such as canoeing and fishing.

The article concluded that off-stream mining should be encouraged for its lesser adverse affects on the environment of Missouri streams wherever buffers of vegetation were maintained between the mine and stream. It noted that the gravel and sand industry has operated without interference in Missouri, but “[c]oncern for development of the resource needs to be properly balanced with available technology that will also protect fish, wildlife and recreational use.”<sup>7</sup>

NATHAN A. STEIMEL

### FROM FLYING FOXES TO PIG FARMS: THE MALAYSIAN NIPAH VIRUS OUTBREAK OF 1998

The Nipah virus outbreak of 1998 and 1999 was both deadly and mysterious. As was the case with the Ebola and SARS viruses, it is important for doctors and researchers to extract the trigger of such a deadly virus. Only by identifying the cause can a cure be found, or in environmental policy considerations, can human behavior be altered to avoid such contagion in the future. Figuring out the source of the transmission will help protect the world environment as well as keep humans safe.

Peter Fritsch, in the June 19, 2003 edition of the *Wall Street Journal*, explored the implications of human interference in a complex chain of ecosystems. In his article: “Deadly Riddle: Scientists Search For Human Hand Behind Jungle Virus—Did Asia’s ‘Flying Fox’ Bat, Forced From Its Habitat, Trigger Nipah Outbreak[?],” Fritsch tracked down one possible theory to the cause of the terrible outbreak of the Nipah virus in Malaysia—flying foxes.

The Nipah virus, named after the Malaysian village where it was first isolated, is thought to result from human and animal contact. The leading theory was built upon the notion that burning 12 million acres of virgin forest in Borneo and Sumatra in the fall of 1997 cast an extreme haze over a huge swath of Southeast Asia for months. That haze blocked sunlight, reducing the ability of trees to flower and bear fruit. This caused giant bats to travel great distances in search of sustenance. They settled on fruit trees fertilized with the manure of pigs on huge Malaysian farms cut out of the forests where the so-called “flying foxes” roost. The virus was then transmitted to the pigs by way of saliva-coated fruit dropped from the trees above the pigs. Humans interacting with the pigs contracted the virus, resulting in the deaths of 40% of the 257 people that caught it, as well as the eventual extermination of 1.1 million pigs to stop its spread.

But was the fire in 1997 the cause? Dr. Peter Daszak, a parasitologist and executive director of the consortium that organized the study on the Nipah virus, said, “In the case of almost every emerging disease, complex human changes to the environment drive emergence.” Dr. Daszak also commented that the migration of the bats was probably “dark poetic justice” for the human encroachment into the bats environment. The consortium was faced with two major hurdles to establishing their theory. First, that the forest fire of 1997 could really have caused “atmospheric conditions disruptive enough to so alter the migratory movements of the giant bats.” Second, that the bats were in fact the primary transfer of the virus to the pigs by means of eating habits.

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<sup>6</sup> Missouri Smallmouth Alliance, *Gravel Mining in Missouri*: From a report by Ronald L. Crunkilton. Fisheries Research, Missouri Department of Conservation 1110 College Avenue, Columbia, Missouri 65201 <<http://www.smallmouth.org/MissouriGravelMining3.html>> (last updated September 29, 2003).

<sup>7</sup> *Id.* at ¶ 8.

The consortium is currently working on several tests that will either challenge or support the theory of the flying fox. The only tangible success of the theory thus far has been that the extermination of the pigs stopped the spreading. However, if the thesis of the great fire does not hold up, the 1997 outbreak will have to be reconsidered so that further human intervention can be prevented.

DAVID RINGHOFER

### **ENCAPSULATED FOAM AT THE LAKE OF THE OZARKS: POLLUTION SOLUTION OR UNDUE BURDEN?<sup>1</sup>**

AmerenUE, the company that owns the Lake of the Ozarks, has proposed regulations that would eliminate the use of non-encapsulated foam flotation material in boat docks at the lake. Non-encapsulated foam flotation material that has broken away from docks or has been discarded is the largest source of man-made debris at the lake. In fact, in a recent cleanup effort around the lake, over 90% of the 170 tons of trash and debris collected was non-encapsulated foam from boat docks. As a result, AmerenUE has proposed regulations that would require the exclusive use of encapsulated foam, or foam that is enclosed in a protective shell, in all docks on the lake. AmerenUE initially banned the use of non-encapsulated foam in new docks in 1995, but allowed existing docks to keep it if they were in good condition.

AmerenUE spokesman Mike Cleary said the proposed regulations would give dock owners until December 2008 to replace any unapproved foam flotation materials. "I think people at the lake pretty much know that something has to be done," Cleary said. "It gets frustrating when year after year you continue to remove foam from the shoreline, so it's going to take an actual deadline to get rid of this stuff."

In a similar vein, docks on Table Rock Lake in Southwest Missouri have been required to use encapsulated foam for the past several years. According to Marilyn Jones, lake manager for the Army Corps of Engineers, older docks were permitted to keep the non-encapsulated foam until it needs repair or replacement. The Table Rock Lake restrictions do not apply to marinas and resorts, but these types of dock owners are moving towards encapsulated foam because it lasts longer and needs fewer repairs.

While the motives behind the proposed regulations are environmentally sound, the economic impact on dock owners would be significant. Encapsulated foam is substantially more expensive than non-encapsulated foam. According to Jim Reynolds, owner of Ozark Village Docks and chairman of the dock owners' association, replacing the foam in a two-well dock with a swimming platform costs about \$5,000. In addition, disposing of non-encapsulated foam now costs almost \$19 per cubic yard. The material has been classified as industrial waste by the Department of Natural Resources. This classification caused the disposal cost to jump from around \$3 per cubic yard.

In an effort to offset the increased disposal cost and promote shoreline cleanup, AmerenUE sponsored a free dock foam collection on Saturday, September 13, 2003, where shoreline residents could dispose of small amounts of discarded foam. The collection was limited to shoreline residents who needed to dispose of a small amount of foam that had accumulated on their property (up to one pickup truck load). Foam removed as part of residential or commercial flotation replacement jobs was not accepted.

Further fueling the debate over the propriety of the proposed regulations are the concerns of larger dock owners, such as marinas and resorts, that AmerenUE will only enforce the regulations against these larger dock owners and will not enforce the regulations against all dock owners from individuals to large businesses. Jerry Jansma, owner of the 67-slip Yacht Haven Marina said he supports the regulations, despite the significant cost he would incur, as long as they are enforced uniformly on all docks, large and small.

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<sup>1</sup> All information for this article is attributable to the Associated Press.

The regulations will be a part of a larger shoreline management plan AmerenUE will submit in 2006 when it renews its 30-year license with the Federal Energy Regulatory Commission (FERC) to operate Bagnall Dam and the Osage Power Plant. Given the dichotomy between the environmental concerns involved and the large economic impact of the regulations, this debate is only likely to increase in volatility as AmerenUE prepares to submit its plan to the FERC.

ANDREW J. ENNIS

## THE ENDANGERED SPECIES ACT AND WATER RIGHTS CONTRACTS

Over the summer of 2003, several federal court decisions were handed down that could seriously impact the management of the nation's waterways.<sup>1</sup> Multiple courts across the country ruled that the Endangered Species Act (ESA) must be considered in determining how waterways are managed. When asked to balance the needs of humans against the needs of endangered species and other obligations, the courts have shown they are siding with the endangered species.<sup>2</sup>

One such case is *Rio Grande Silvery Minnow v. Keys*.<sup>3</sup> In *Keys*, the court decided that, despite full allocation of the Rio Grande's water to agricultural and municipal uses through contracts predating the ESA, the ESA required the Bureau of Reclamation (BOR) to divert water for the preservation of the silvery minnow. This decision rested on the BOR's discretion to determine the "available water" under the water supply contract and on the premise that water needed for species preservation was not "available" due to the mandates of the ESA to preserve a listed species.<sup>4</sup> To support its conclusion that the BOR maintained discretion over water availability, the court cited several cases involving water rights contract negotiations occurring after the enactment of the ESA.<sup>5</sup>

In a dissenting opinion, Judge Kelly focused on two main points: the fact that the contracts in question were negotiated prior to the enactment of the ESA and that the BOR retained no property rights to the water under the contracts.<sup>6</sup> In relation to the first point, Judge Kelly pointed out that the ESA is a command to government agencies to exercise their discretion to protect a species, not a command to never take action that threatens a species.<sup>7</sup> Judge Kelly went on to point out that, since the rights to the water had been fully allocated in the pre-ESA contract, the BOR had no discretion as to the allocation of the water, but instead it must deliver as much as the contract customers demand.<sup>8</sup> As a result of this lack of discretion in water allocation, the ESA does not require the BOR to provide water to the silvery minnow.<sup>9</sup>

The finding of discretion in the BOR to determine "available" water when all rights belong to parties other than the BOR puts communities on notice that their supposedly secure water rights are not so secure when an endangered species inhabits the source of their water.

LEWIS A. FLEAK

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<sup>1</sup> See Bill Lambrecht, *Judges are an Endangered Species' Best Friend, but Lawmakers are Seeking to Rewrite Law*, St. Louis Post-Dispatch A1 (Jul. 20, 2003) (available in 2003 WL 3595783).

<sup>2</sup> *Id.*

<sup>3</sup> *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10<sup>th</sup> Cir. 2003).

<sup>4</sup> See *Id.* at 1129-1130.

<sup>5</sup> *Id.*

<sup>6</sup> See *Id.* at 1143 (Kelly, J dissenting)

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1143-1144.

## NEPA TASK FORCE RECOMMENDS MORE CATEGORICAL EXCLUSIONS

In May of 2002, the White House's Council on Environmental Quality (CEQ) created a task force of eleven environmental law experts to create suggestions for modernizing the implementation of the National Environmental Policy Act of 1970 (NEPA).<sup>10</sup> On September 24th of this year, the NEPA task force published its recommendations to the CEQ in a 90-page document.<sup>11</sup>

The task force set out recommendations for the CEQ in six broad categories: Technology and Information Management Security, Federal and Intergovernmental Collaboration, Programmatic analyses [sic] and Tiering, Adaptive Management and Monitoring, Categorical Exclusions, and Environmental Assessments.<sup>12</sup> It further stated that the top priority should be given to updating the process for categorical exclusions.<sup>13</sup> If these recommendations are adopted by the CEQ and implemented by the federal agencies, then drastic changes as to what types of projects require detailed environmental analyses may be on the horizon.

The National Environmental Policy Act of 1968 requires federal agencies to conduct extensive analyses of the environmental impact of their actions and to draft impact statements in relation to the actions.<sup>14</sup> The Act also permits agencies to create categorical exclusions or exceptions to these requirements in "special circumstances," where there is an emergency or no significant impact to the environment will result from a particular type of activity.<sup>15</sup> For projects that fall into one of these exclusions, no environmental impact analysis is required prior to agency action. However, the agencies have been decidedly confused about when exclusions are permitted and what documentation is required to create such exclusions.<sup>16</sup>

The task force recommended that the CEQ create specific criteria to determine when categorical exclusions are allowed, and it also encouraged the increased use of categorical exclusions where they are appropriate.<sup>17</sup> Although the task force's recommendations may make the commencement of agency projects more efficient,<sup>18</sup> there is some fear among environmentalists that agencies will be able to take actions that may be detrimental to the environment without having to undergo any sort of analysis as to the effects of their actions.<sup>19</sup> In an apparent effort to combat that presumption, the task force also encouraged more public involvement in each of the proposed "modernizations."<sup>20</sup>

The NEPA task force is also expected to publish case studies in the future to support their recommendations.<sup>21</sup>

PATRICK A. BOUSQUET

<sup>10</sup> See John Heilprin, *Panel Advises Agencies on Environment*, Associated Press, <[http://news.yahoo.com/news?tmpl=story2&cid=544&u=/ap/20030924/ap\\_on\\_go\\_pr\\_wh/environmental\\_reviews\\_1&printer=1](http://news.yahoo.com/news?tmpl=story2&cid=544&u=/ap/20030924/ap_on_go_pr_wh/environmental_reviews_1&printer=1)> (9/24/2003).

<sup>11</sup> *The NEPA Task Force Report to the Council on Environmental Quality: Modernizing NEPA Implementation*, <<http://ceq.eh.doe.gov/ntf/report/finalreport.pdf>> (accessed Sep. 29, 2003).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 87.

<sup>14</sup> 42 U.S.C. § 4321 et seq (2000).

<sup>15</sup> *Id.* at § 2-5(c).

<sup>16</sup> *The NEPA Task Force Report* at 58.

<sup>17</sup> *Id.* at 62.

<sup>18</sup> i.e., certain types of activities will no longer require environmental impact analyses.

<sup>19</sup> See John Heilprin, *Panel Advises Agencies on Environment* (quoting Robert Smythe, ecologist, who voices his concern for allowing more categorical exclusions).

<sup>20</sup> *NEPA Task Force Report* at 59 (public involvement should extend beyond the requirements of notice in the Federal Register and opportunity for comment).

<sup>21</sup> *Id.* at vi.

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A Quarterly published in the Winter, Spring,  
Summer, and Fall of each year

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