

Waterways

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Inside this issue:

New report on lock closing 1

Executive Dir's Report 2

Other items of interest 3

UMWA says new report's numbers on truck trips low

UMWA has some issues with a [recent report](#) from the Twin Cities Metropolitan Council which says that closing the St. Anthony lock in Minneapolis would mean the loss of 127 jobs and an annual financial hit to the area exceeding \$40 million.

Whether or not those financial figures are low, UMWA is sure that the Council's estimates on added truck trips is very low. Planners who put the

study together say there would be almost 5,000



Above: The St. Anthony locks make a big difference on the river, as a drawdown several years ago demonstrated.

more truck trips per season if the lock closed. But based on data from businesses that would be affected UMWA discovered

that more than 16,000 more truck trips would be generated and added to the area's already crowded streets and freeways. In a news release about the Met Council report, UMWA Chairman Al Christopherson said, "Minnesota is already struggling to keep the jobs we already have, yet this report shows that shutting down the lock would eliminate jobs and cost our economy millions of dollars each year. We understand the risk and potential threat invasive species may pose for the economy, but we

(Continued on page 4)

Can you hear us now? Impact of slow river traffic being reported

UMWA members have long felt that the only time the waterway industry gets attention is when there are problems. Case in point - this summer's severe drought which has report-

ers dredging up statistics on how important the river system is to the economy and what the [slowdown in river transportation](#) might add to food and other costs later.

And, as the organization has often noted, it is the nine-foot channel that keeps bulk commodities moving into and out of the Upper Midwest even dur-

(Continued on page 4)

From the Executive Director...

Section 404, Clean Water Act

The Corps of Engineer's St. Paul District is currently taking public comments on a proposal to require permits for agricultural tile and culvert installation, and for farmed wetland drainage projects in the state of Minnesota. The Corps' authorization to require permits for such activities is found in Section 404 of the Clean Water Act of 1972.

Admittedly, we do not have experience with Section 404 as it applies to agricultural drain tiles or wetlands, but we do have access to the record of an oral argument before the U.S. Supreme Court that may offer insight into how courts and agencies interpret and apply Section 404 language.

(Borden Ranch Partnership v. U.S. Army Corps of Engineers and Environmental Protection Agency; No. 01-1243, December 10, 2002).

Here are excerpts of that 55-page record.

COE must clear hurdles

Section 404 permits are required A, if there is an addition to waters of the U.S., including wetlands; B, if that addition is fill or dredge material; and C, if that addition is from a point source.

In the Borden case, EPA fined the developer for a violation of the Clean Water Act: Specifically for deep plowing wetlands.

Borden, owned by a prominent California real estate developer, sued the government in the 9th Circuit Court of Appeals and was able to bring its case to the U.S. Supreme Court.

Didn't 'add material' to wetland

Supreme Court sparing stated with the attorney for Borden admitting it had deep plowed three of the 30-odd wetlands in question; specifically that it made 358 passes over the wetlands ripping up the clay at its bottom. Borden contended that because the material moved was already in the wetland, it was not a violation even though the lower court ruled it was.

Borden further argued that because the lower court's penalty did not distinguish between passes that added material to the wetland, and those that did not, the issue of

added material was not the basis for the court's decision. While there were some occasions where a minimal amount of material was moved to the edge of the wetland, that small amount would not require an individual permit as the government here contends.

A little violation is still a violation

At this point a Justice explained his thought process that a violation is a violation: Suppose that you went in the middle of Lake Erie with a big punch and that you punched a hole in the bottom [a reference to ripping up clay] and all the water ran out. Would that violate the Clean Water Act? Both Borden and the Justice agreed that while draining Lake Erie would be prohibited by another statute it is not covered by the Clean Water Act.

Now, continued the Justice, suppose you had 1,000 trucks dump soil to fill in that lake. Would that violate the act? Both agreed that would fall under Section 404, to which Borden's attorney protested that they didn't fill the entire wetland, they only filled a small portion of it at the margins.

So your argument, said the Justice, is that you only brought in a little dirt and that you were mostly interested in punching the hole, therefore, you fall outside the act. The question is if you violate it even a little bit, why don't you lose?

Define 'point source'

The Supreme Court went on to argue that a truck, for example, and a plow, for that matter, both move material, and both are eligible to be considered 'point source', even though Borden contends regulations do not define that term. The Court questioned whether a truck moving material is itself a point source; Borden argued trucks are merely conveyances that confine the material being moved, but not, per se, a point source. In short, Borden suggests that the government has never adopted the definition that either a truck or a plow is a conveyance/point source and that the Court has "... just come up that argument for the purposes of this litigation."

After laughter from the bench, one Jus-

“While draining Lake Erie would be prohibited by another statute it is not covered by the Clean Water Act“

“I must say I never thought a plow was a conveyance either.”

Farming exemption

The Government’s attorney stated that while Congress created the ‘normal farming exemption’ in the Clean Water Act that exemption is limited to regulations imposed by agencies such as COE and EPA. For example, as defined, normal farming exemptions are ongoing activities that are part of a regular farming and plowing activity, none of which result in converting a wetland to dry land.

Borden violated those exemptions by, first, moving material from upland into the wetland and secondly, moving soil from beneath the impermeable clay layer up into the wetland itself.

Also, continued the Government, the equipment used by Borden in this case was a 50-ton bulldozer about the size of a 2-story house pushing a 16-foot blade and pulling a deep ripper, or shank. The shank is about a foot wide and 5 to 7 feet long which penetrates deep

into the ground. This process disgorges the clay material which is the lower boundary of the wetland and moves material into the above wetland. As such, this process added foreign material to the wetland – and, contrary to Borden’s assertion, IS subject to a Section 404 permit.

The Government continued: Borden would not have been subject to a 404 permit if they had simply avoided the small parcels of wetland, about 1 percent of the property; however, they chose not to do that. Because of this, the lower court found that what were once wetlands are now orchards – requiring a Section 404 permit.

How the Courts Ruled

The Supreme Court adjourned oral testimony after fifty-nine minutes. Their decision is unavailable. However, according to the Association of State Wetland Managers, Justice Anthony Kennedy had to recuse himself from the Borden case because of his acquaintance with the devel-

oper, leaving only eight justices to decide the case.

The ruling turned out to be a 4-4 tie. Accordingly, the ruling against Borden by the 9th Circuit Court of Appeals was automatically affirmed. That ruling is unavailable to us; that’s unfortunate since it contains interesting facts and arguments which led to the financial penalty against Borden that caused it to take this case to the U.S. Supreme Court.

Post Script by Carol J. Williams, [Los Angeles] Times Staff Writer July 18, 2011. Judges in the U.S. 9th Circuit Court of Appeals are more liberal than the Supreme Court justices, who reversed or vacated 19 of the 26 decisions they examined for the last term, at times sharply criticizing their legal reasoning. Appeals from the nine Western states of the circuit dominated the U.S. Supreme Court’s docket supplying more than 30% of the 84 cases taken up by the justices during the term that ended June, 2011.

“that exemption is limited to regulations imposed by agencies such as COE and EPA...”

Other river related items:

- St. Paul’s Seven Corners Hardware was featured in the June 12, 2012 print edition of *Popular Mechanics* as a “Hardware Store We Love.” The article discussed some of the interesting products carried by the store, “But the 2-inch thick manila rope used to tie off barges on the nearby Mississippi River is unique to the store. ‘It’s so thick, we cut it with a hacksaw,’” (General Manager Chuck) Reese says.
- Another reminder that UMWA has a new email address: umwa@umwa.net and communications sent to the old address are no longer getting through. The email address reflects our web address and work is underway to post future editions of Waterways directly to the web site. When that happens, we’ll send you an email with a link to the freshly posted newsletter.

(Continued from page 1)

need to make sure we have complete and accurate information before deciding to shut down a lock. If this report shows us anything, it's that we need to make sure we fully understand the entire economic picture before making any decisions about the locks."

Diverting commercial river traffic would increase transportation costs, which would be ultimately passed on to the consumer. The price of concrete for construction projects would skyrocket due to increased costs of sand and gravel, which are shipped on the river. Fertilizer prices would also increase because of added transportation costs that would affect the agriculture industry

throughout the state. You can read more about [UMWA's analysis of the report](#) on the Association web site. If you want to read the full [Met Council report](#), it too is available online.

(Continued from page 1)

ing severe drought.

And it's not just us saying it. A subhead to a recent [Dubuque Telegraph Herald](#) story says, "Thank the lock and dam system for keeping tri-state area barge traffic flowing."

Jennifer DeWitt, of the [Quad City Times](#) reports, "Low river levels on the Mississippi as well as the rivers that feed it are forcing barge operators to

lighten their loads, increase the number of trips and look for other ways to keep commerce moving safely."

Corps spokesman Ron Fournier told DeWitt, "Once you get outside the locks-and-dam system... you're at the mercy of Mother Nature."

There have been many [other recent stories](#) which also talk about the importance of the river system and [its economic impact](#).

The Corps of Engineers says they are doing round the clock dredging in the area which has seen levels about 13 feet below normal. The Corps says it is doing everything possible to maintain a minimum navigation channel of 9 feet, with a 300 foot width and closing the river is not an option.

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