

# Waterways

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## Bad news on the river getting lots of coverage in media

There's an old and cynical axiom in many newsrooms that says, "No news is bad news, and bad news is good news." And that perhaps explains why so many reporters and media outlets have decided that the low river levels that are threatening Mississippi River commerce are a big story.

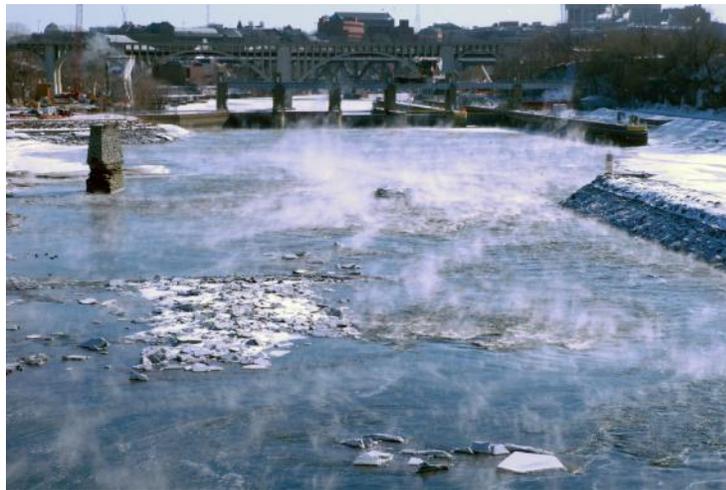
The [\*Southeast Farm Press\*](#) is among the few media outlets which understand the river system's importance and regularly cover it. But their recent headline summarized what other media types are now writing and reporting about the drought lowered river: "Halt to Mississippi Barge Traffic Would Slam U.S. economy."

### A \$7 billion hit

Tracy Grondine of the American Farm Bureau Fed-

eration says in the headline story that, "In December and January alone, it's estimated the economy could take a \$7 billion hit. Included in this

losses even further, showing that over 7 million tons of agricultural products worth



*Above: UMWA members know what low river levels look like. In 2008 the St. Anthony Pool was intentionally lowered*

projection is the loss of up to 20,000 jobs and \$130 million in lost wages."

### A loss breakdown

Most of the reports carry those figures, which were compiled by The American Waterways Operators (AWO) and Waterways Council, Inc. (WCI). The two organizations broke out the potential

products worth \$1.8 billion; 1.3 million tons of petroleum products worth over \$1.3 billion; over 700,000 tons of crude oil worth \$534 million; and 3.8 million tons of coal worth \$192 million were part of the

overall figures.

### Other modes limited

As UMWA has frequently pointed out, AWO and WCI pointed out that rail and truck modes have finite capacities and that transferring the billions of dollars' worth of bulk cargoes off the river will be much more expensive in terms of cost and environmental impact.

Two politicians, Senators

*(Continued on page 4)*

## From the Executive Director...

### Reduced Missouri River Flow

With the national press consumed by stories and articles about the decreased flow from the Missouri River and its part in the water shortage threatening to halt navigation on the Mississippi River, we did a little investigating to better understand the issue.

Each spring, the Missouri River has historically flooded its basin causing economic and environmental hardship and damage. So much so, that in 1944 Congress authorized the construction of a system of dams and reservoirs on the upper river to control flooding. In addition to flood control, Congress foresaw the need to provide water for local irrigation projects, hydroelectric power generation, steady release into the river to support downstream navigation and lake recreation. Accordingly, the Flood Control Act (FCA) of 1944 delegated construction and management of a six-dam reservoir system in Montana and the Dakotas to the Corps of Engineers.

In the Background portion of an appeal heard by the 8th Circuit Court of Appeals in 2005, the Court recalled that challenges to the Corps' operation of this reservoir system come from two sources. The first is that persistent drought in the Missouri River basin leads to recurring conflicts between upstream and downstream water-users. The second is that the Corps' operating plan for the system must not jeopardize the continued existence of any protected species or its habitat.

### Decision in Support of Navigation

In 2002 when the Corps planned to release water from one of its four dams, South Dakota obtained an injunction in federal court preventing the Corps from taking any state waters until after the spawning season.

To protect its interests, Montana also obtained an injunction to prevent releases

from its single dam. Contrarily, to defend its commercial interests, Nebraska, located downstream of the reservoirs, obtained an injunction ordering the Corps to make releases to support navigation as called for in the Corps' 1979 Master Manual.

These appeals were consolidated and heard by the 8th Circuit Court which ruled in favor of the Corps. Specifically, the Court said that the FCA gave the Corps discretion to balance competing water-use interests. That, and because of the FCA's legislative history and its interpretation by the Supreme Court indicating that the Corps' primary concerns should be flood control and navigation, "... we upheld the Corps' decision to follow the 1979 Master Manual and draw down the reservoirs to support downstream navigation."

A subsequent support of navigation from the 8th Circuit Court was in response to a claim by North and South Dakota that because damage to the recreation industry would have a more dramatic impact than would damage to the navigation industry, recreation should receive special priority. The Court noted, however that nothing in the history of the FCA "... suggests that Congress intended the priority of interests under the FCA to shift according to their relative economic value."

### Habitat Protection

The second point of conflict has to do with causing harm to the Missouri River's three protected species: the Piping Plover, the Interior Least Tern and the Pallid Sturgeon. To this end, the 8th Circuit Court noted that operation of the reservoir system puts the Corps under the jurisdiction of the Endangered Species Act that requires them to prepare a biological assessment and consult with the Fish and Wildlife Service (FWL) when any action endangers the continued existence of a protected species or its habitat.

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*“Congress authorized the construction of a system of dams and reservoirs on the upper river to control flooding...”*

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### Can of Worms

Compared to conflicts between upstream versus downstream interests, habitat protection appears to be the larger of two cans of worms. In brief, this is because the Corps, by operating the system to capture water in upstream pools to eliminate spring flooding and releasing it during the summer to enable downstream navigation, eliminates the very seasonal water fluctuations necessary to the survival of threatened fish and birds, as argued by FWL. This begs the question: in times of water use conflicts between commerce, recreation and animal habitat, which one prevails and at what expense to the others?

### A Conundrum

Unfortunately, past legal decisions are of little help in solving this riddle.

The FCA of 1944 authorized the Pick-Sloan Missouri Basin Program which approved a comprehensive plan that defined the intended beneficial uses of Missouri River waters. These beneficiaries were to include flood control, aids to navigation, wildlife protection, creation of recreational opportunities, and others. Some legal scholars argue that Pick-Sloan did not rank river uses but sought only to provide the widest range of benefits to the

largest number of people which must be compromised from time to time as imposed by the courts. The Corps disagreed arguing its actions are not subject to judicial review; however, this was rejected by the 8th Circuit Court's ruling that the Corps is inhibited by both the FCA and its own Master Manual.

There is also disagreement over whether the Corps has authority to operate the Missouri River for the benefit of the Mississippi. Some say the Corps has necessary authority and plenty of water is available, yet the Corps' 2004 Master Manual requires that under certain drought conditions, it can cancel the navigation season to hold water in reservoirs for recreation. This is reinforced by a Minnesota Court's decision that the FCA does not impose a minimum level of downstream navigation independent of other considerations.

No clear answer seems to be forthcoming any time soon.

If reduced flow off the Missouri is not enough of a challenge, the nature of river bottom geography is also complicit in blocking the Mississippi River. While the Corps is currently soliciting bids for this project, it has indicated that action to remove rock pinnacles on the Illinois side

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*“There is also disagreement over whether the Corps has the authority to operate the Missouri River for the benefit of the Mississippi...”*

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### Other river related items:

- A reminder that the Upper Mississippi Waterway Association's new email and web addresses are the only ones that are operational. The email address is [umwa@umwa.net](mailto:umwa@umwa.net) and the web site is housed at [www.umwa.net](http://www.umwa.net). You may also receive emails from [umwa@pressenter.com](mailto:umwa@pressenter.com), but these too come from the Association and sending messages through this account allows more sending options than the regular email
- [The St. Paul District](#) says 2012 was busy at the Upper and Lower St. Anthony Falls locks and dams. The Corps of Engineers says commodities moved increased to 822.5 kilotons, up from 2011's 759 kilotons. here were 1,356 lockages, with 1,932 vessels entering the locks. The locks were closed twice during the season because of high water.
- The navigation season on the Upper Mississippi River officially closed Dec. 3, 2012. Last tow out was the Mv. Show Me State which went through Lock and Dam 2, near Hastings, Minn., Nov. 28.

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of the river near Grand Tower and Thebes may not occur soon enough to avert additional impacts on navigation. Usually not a problem with ‘normal’ river depths, these formations are an increasing threat to navigation as water levels continue to drop.

With most of the low-hanging fruit of the solution-tree already picked, a quick or permanent solution to the low water issue does not appear to be at hand. While this is disturbing, even more so is the realization that without moisture, that tree may soon be bereft of fruit, low-hanging or otherwise.

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Dick Durbin and Mark Kirk of Illinois recently pointed to the September shutdown of the Chain of Rocks lock and dam north of St. Louis, [saying low water issues are part of a much bigger problem.](#)

In a letter to fellow lawmakers, the two said, “Unfortunately, a troubling lack of upkeep within the system has crippled our ability to move goods in a safe and efficient manner. Of particular concern is our deteriorating lock and dam infrastructure along the Mississippi River, which cannot meet the demands of the 21<sup>st</sup> century economy.”

#### **One failure away**

Wisconsin Congressman Ron Kind agrees. He told the [Wisconsin Radio Network](#) in a recent interview, “We’re just one major dam failure away from an economic catastrophe that could shut

down the transport of good and products on the Mississippi.”

Kind also told the radio network that another low moisture winter could mean problems on the Upper River and higher costs for agricultural shippers

“We’re in fairly good shape in the Upper Mississippi, but we need a good snowfall this winter. We lacked that last year, and if we get two winters like that back-to-back it’s going to start causing problems.”

#### **Reduced loadings**

Even as the season ends on the Upper River and shippers are experiencing reduced barge loadings mid river, one idea being discussed is a release of water being held in Missouri River reservoirs. For more on that complicated issue, be sure to read the Executive Director’s column in this newsletter.

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