

ENVIRONMENTAL & TOXIC TORTS LAW BULLETIN

December 2013

Starnes Davis Florie LLP's Environmental Litigation, Environmental Regulation, and Toxic Torts practice groups publish this newsletter to review important recent developments and to provide notice of other items of interest in these practice areas.

Agencies Seek to "Clarify" Scope of Clean Water Act Jurisdiction

In September, the U.S. Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("USACE") jointly submitted to the White House Office of Management Budget for interagency review a proposed rule addressing the scope of "waters of the United States" under the Clean Water Act ("CWA"). According to EPA, "[t]he purposes of the proposed rule are to ensure protection of our nation's aquatic resources and make the process of identifying 'waters of the United States' less complicated and more efficient" by "increasing CWA program transparency, predictability, and consistency." The proposed rule was developed in response to the U.S. Supreme Court decisions in *United States v. Riverside Bayview Homes*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, and *Rapanos v. United States*, which addressed the scope of the federal government's jurisdiction under the CWA.

The proposed rule would revise the current definition of "waters of the United States" to read as follows:

- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters, including interstate wetlands;
- (3) The territorial seas;
- (4) All impoundments of waters otherwise defined as waters of the United States under this definition;
- (5) All tributaries of waters identified in paragraphs (1) through (3) of this section;
- (6) All waters, including wetlands, adjacent to a water identified as waters of the United States under this definition; and
- (7) On a case-specific basis, "other waters", including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1) through (3) of this section.

¹474 U.S. 121 (1985).

²531 U.S. 159 (2001).

³547 U.S. 718 (2006).

The key changes to the definition include subsection (a)(5), which provides that all tributaries of navigable waters, interstate waters, and territorial seas would be considered "waters of the U.S." and subsection (a)(6), which states that all adjacent waters are "waters of the U.S." Therefore, under the proposed rule, all tributaries of traditional navigable waters, interstate waters, and the territorial seas as well as all adjacent waters, including wetlands, would be considered jurisdictional waters *by definition* with no need to make a case-specific significant nexus determination. Under subsection (a)(7), "other waters" may also be considered jurisdictional based on an analysis of the waters' nexus with traditional navigable waters, interstate waters, and territorial seas.

The proposed rule is based, in part, on a draft report released by the agency in September titled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. A copy of the draft report is available at [http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/\\$File/WOUS_ERD2_Sep2013.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf). The draft report "provides a review and synthesis of the scientific information pertaining to chemical, physical, and biological connections from streams, wetlands, and open-waters such as oxbow lakes, to downstream waterbodies such as rivers, lakes and estuaries in watersheds across the United States and the strength of those connections." Based on this research as well as other literature and agency expertise, EPA has determined that tributaries and adjacent waters have a significant impact on the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and territorial seas sufficient to categorically assert federal jurisdiction over these waters.

Despite EPA's characterization of the proposed rule as a "clarification" and reported statement that it "would not expand federal jurisdiction or protect any new waters that have not historically been covered under the Clean Water Act during the past 40 years," the potential for expansion of jurisdiction under the rule cannot be ignored. The proposed rule would render certain waters—tributaries and adjacent waters, as defined by the rule—subject to CWA jurisdiction *automatically*. The fact-intensive inquiry currently used to determine whether these waters in fact have a "significant nexus" to traditionally navigable waters, interstate waters, or territorial seas would be omitted. Therefore, it is conceivable that some tributaries or adjacent waters that do not meet the currently accepted "significant nexus" test, would be subject to CWA jurisdiction under the proposed rule simply because they fall within the definition of tributaries or adjacent waters.

The draft proposed rule has been submitted to the Office of Management and Budget for interagency review and the EPA Science Advisory Board ("SAB") Staff Office has scheduled a public meeting of the SAB panel to review the draft report in mid-December. EPA is expected to solicit comments on the proposed rule once it is finalized.

ADDITIONAL ITEMS OF INTEREST

Civil Enforcement

Chromium Chemical Manufacturer Fined Over \$2.5 Million for TSCA Violations

On November 12, an administrative law judge determined that Elementis Chromium, Inc. violated the Toxic Substances Control Act ("TSCA") by failing to disclose the results of a study regarding impacts to human health from exposure to hexavalent chromium. Elementis was ordered to pay a \$2,571,800 penalty.

Criminal Enforcement

Georgia Emissions Inspectors Plead Guilty to CAA Violation

In early September, Jerome Clarence Barnes, Jr. and Jared F. Walker, emissions inspectors in Georgia, pled guilty to charges of wire fraud and the Clean Air Act violations as a result of a scheme in which they issued fraudulent emissions certificates indicating that vehicles passed the required emissions tests when they would otherwise have failed. Barnes was sentenced to four years and six months in federal prison and three years of supervised release. Walker was sentenced to six months in federal prison and one year of supervised release.

Alabama Pest Control Company Charged with Unlawful Use of Pesticide

A Pelham, Alabama company, Bio-Tech Management, Inc. and its owner, Steven A. Murray were indicted in federal court in Georgia on September 11 on counts of conspiracy, making false statements, falsifying records, mail fraud, and unlawful use of a pesticide after allegedly misusing the pesticide Termidore contrary to the manufacturer's label instructions. The indictment also alleges Murray directed employees to falsify company reports to obstruct the investigation.

Illinois Village Officials Sentenced for 20-Year Concealment of Use of Well Water to Supplement Drinking Water Supply

On November 21, former Crestwood, Illinois water officials Frank Scaccia and Theresa Neubauer were sentenced in federal district court to probation and home confinement for concealing from the government for twenty years its use of water pumped from a well to supplement its drinking water supply, which primarily came from Lake Michigan or purchased from a neighboring city. The water pumped from the well was not tested for organic contaminants, inorganic contaminants, or radiological contaminants as required by the Safe Drinking Water Act.

Agency News

Study Shows Over 360,000 Acres of Coastal Wetlands Lost Between 2004 and 2009

In October, the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration released a study, *Status and Trends of Wetlands in the Coastal Watersheds of the Conterminous United States 2004 to 2009*, that found that between 2004 and 2009, wetland area in the coastal watersheds declined by approximately 360,000 acres. An estimated 70% of the wetland losses occurred in the coastal watersheds of the Gulf of Mexico. The report is available at <http://www.fws.gov/wetlands/Documents/Status-and-Trends-of-Wetlands-In-the-Coastal-Watersheds-of-the-Conterminous-US-2004-to-2009.pdf>.

Third Year of Data Shows Decline in GHG Emissions

On October 23, EPA released its third year of greenhouse gas ("GHG") data collected through the Greenhouse Gas Reporting Program, which includes data from over 8,000 facilities, including the largest emitters of GHGs. According to the data, emissions from power plants in 2012 were 10% lower than in 2010 when the program was implemented. The complete report is available via EPA's online data publication tool, FLIGHT, available for download at <http://www.epa.gov/ghgreporting>, and through EnviroFacts, available at <http://epa.gov/enviro/>.

FDA Proposes to Ban Trans Fats

On November 8, the U.S. Food and Drug Administration ("FDA") announced a tentative determination that partially hydrogenated oils ("PHOs"), which are the primary dietary source of industrially-produced trans fat, are not generally recognized as safe for use in food. FDA proposes to treat PHOs as food additives which could not be sold, either directly as or as ingredients in other food products, without prior FDA approval. According to the FDA, the current scientific evidence identifies significant health risks caused by the consumption of trans fat. Trans fats are already the source of litigation in the context of deceptive labeling practices, where plaintiffs allege that company claims of "Zero grams of trans fats" are misleading because the claim is based on unreasonably small serving sizes. The FDA is accepting comments until January 7, 2013. A copy of the notice is available at <https://www.federalregister.gov/articles/2013/11/08/2013-26854/tentative-determination-regarding-partially-hydrogenated-oils-request-for-comments-and-for>.

EPA and USDA to Collaborate on Water Quality Trading

In early December, EPA and the U.S. Department of Agriculture ("USDA") announced a partnership to encourage water quality trading and other market-based approaches to improve water quality. Water quality trading allows entities to comply with the Clean Water Act requirements through the purchase of pollutant reduction credits generated by other sources in the same watershed. According to the agencies, these market-based approaches will lower the cost of compliance as well as provide new income and employment opportunities in rural areas.

Court Decisions

Train Derailment Case Remains in Kentucky Federal Court under CAFA

On September 17, a federal judge in the Western District of Kentucky held that claims resulting from a train derailment near West Point, Kentucky on October 29, 2012 will remain in federal court under the Class Action Fairness Act ("CAFA"), 28 U.S.C.A. § 1332. As a result of the derailment, hazardous chemicals were released into the surrounding area, homes within a 1.2 mile radius were evacuated, a no-fly zone was established, and maritime traffic on the Ohio River was stopped. Plaintiffs filed a class action suit in state court seeking compensatory and punitive damages for injuries to property interests, economic losses, personal injuries, and lost income, but defendants removed the case to federal court under the CAFA. The judge denied plaintiff's motion to remand holding that the defendant satisfied the CAFA requirements that there is minimal diversity of citizenship, the proposed class has at least 100 members, and the amount in controversy exceeds \$5 million. See *Brown v. Paducah & Louisville Railway, Inc.*, No. 3:12-CV-00818-CRS, 2013 WL 5273773 (W.D. Ky. Sept. 17, 2013).

11th Circuit Reverses District Court's Exclusion of Government's Experts in CAA Case

On September 19, the Eleventh Circuit Court of Appeals reversed the district court's exclusion of the expert testimony of two government witnesses—a power plant reliability engineer and an environmental permitting engineer—in a case against Alabama Power Company for alleged violations of the Clean Air Act ("CAA"). The government claimed that Alabama Power made major modifications to its facility without a permit in violation of the CAA and, to prevail on its claims, was required to prove that Alabama Power expected or should have expected that its modifications would result in a "significant net emissions increase" of sulfur dioxide or nitrogen oxide at each plant. In reversing the trial court's exclusion of these experts, the Eleventh Circuit noted that the criticisms of the experts' methodology could render the opinions unpersuasive at trial, but were insufficient for wholesale exclusion under *Daubert* and its progeny. See *United States v. Alabama Power Co.*, 730 F. 3d 1278 (11th Cir. 2013).

Federal Judge Orders EPA to Conduct Necessity Determination for Gulf "Dead Zone"

On September 20, a federal judge in the Eastern District of Louisiana ordered EPA to conduct a necessity determination in accordance with *Massachusetts v. EPA* in response to plaintiffs' petition for rulemaking under the Clean Water Act. Plaintiffs' petition, filed in July 2008, requested that EPA promulgate federal standards for nitrogen and phosphorus, the pollutants that plaintiffs allege contribute to a "dead zone" in the northern Gulf of Mexico near the mouth of the Mississippi River. EPA denied plaintiffs' petition in April 2011 stating that use of the agency's rulemaking determination would not be a "practical or efficient way to address nutrient pollution at a national or regional scale." The court granted in part plaintiff's motion for summary judgment and ordered EPA to respond within 180 days to plaintiffs' petition for rulemaking with the required determination under CWA § 303(c)(4)(B) whether new water quality standards for nitrogen and phosphorus are "necessary" to meet the requirements of the CWA. See *Gulf Restoration Network v. Jackson*, No. 12-677, 2013 WL 5328547 (E.D. La. Sept. 20, 2013).

West Virginia Court Holds CAFO Discharges of Litter and Manure Exempt Agricultural Stormwater Discharges

On October 23, a federal district court judge in the Northern District of West Virginia held that litter and manure washed from a Concentrated Animal Feeding Operation farmyard to navigable waters by a precipitation event is an agricultural stormwater discharge exempt from the Clean Water Act NPDES permit requirements. According to the court, the manure and litter, which had been tracked or spilled in the farmyard or blown by the ventilation fans from the confinement houses to the farmyard, would remain in place and not become discharges of a pollutant unless and until stormwater conveyed the particles to navigable waters. See *All v. EPA*, Case No. 2:12-cv-00042, N.D.W.V. (Oct. 23, 2013).

11th Cir. Affirms Judgment in Favor of City on Clean Water Act and Inverse Condemnation Claims

On December 3, the Eleventh Circuit Court of Appeals affirmed the U.S. District Court for the Northern District of Alabama's judgment in favor of defendant City of Lincoln, Alabama on Clean Water Act ("CWA") and common law inverse condemnation claims asserted by neighboring landowner Woods Knoll, LLC. According to the court, plaintiff Woods Knoll failed to establish that the City discharged any stormwater or sediment from a "point source" to prove a violation of the CWA. Despite plaintiff's claims that clearing and grubbing operations on the City's property resulted in flooding on Woods Knoll's adjacent land, the court determined that there was no evidence that the work altered the land in a manner that caused stormwater to be collected or channeled so as to be discharged from a "point source." The court also affirmed the lower court's finding that the plaintiff failed to establish a causal connection between the City's actions and the alleged injury, which allegedly occurred over fourteen months later. See *Woods Knoll, LLC v. City of Lincoln, Alabama*, No. 13-10011 (11th Cir. Dec. 3, 2013). *Richard Davis and Amber Whillock of Starnes Davis Florie LLP were attorneys for the City in this case.*

ATTORNEY PROFILES

Richard E. Davis is a senior partner with Starnes Davis Florie LLP. He represents clients in federal and state courts in Alabama as well as in matters involving federal and state regulatory agencies. Richard's environmental practice includes Clean Water Act, Clean Air Act, and CERCLA litigation; natural resource and property damage claims; land use and water use issues; and the defense of corporations and individuals accused of environmental crimes as well as regulatory enforcement and compliance matters. Richard also defends personal injury actions based on alleged chemical exposure (so-called "toxic torts"). Richard is a Fellow in the Litigation Counsel of America Trial Lawyer Honorary; was listed in the 2008 - 2013 editions of Alabama Super Lawyers® magazine for Environmental Litigation, was selected for inclusion in the 2011 - 2014 editions of Best Lawyers in America®—in 2011 for both Environmental Law and Natural Resources Law and in 2012 and 2013 for both Litigation-Environmental and Natural Resources Law; and served as Chair of the Alabama State Bar Environmental Law Section in 2010-2011.

J. Scott Dickens is a partner with Starnes Davis Florie LLP. Scott's practice is primarily devoted to environmental and construction litigation. He has represented clients in all State and Federal Courts in Alabama, in arbitration proceedings before the American Arbitration Association and Alabama Building Commission, and in the United States Court of Federal Claims. Scott's practice includes CERCLA and RCRA litigation; architect and engineer liability claims, particularly relating to environmental issues; and construction related matters. He also frequently speaks at environmental and construction seminars. Scott is a 1996 graduate of Cumberland School of Law where he was a member of the *Cumberland Law Review*.

Amber M. Whillock is an associate with Starnes Davis Florie LLP. Amber's practice is primarily devoted to environmental litigation and regulatory compliance and includes defense of Clean Water Act and Clean Air Act claims; litigation of Comprehensive Environmental Response, Compensation, and Liability Act Contribution and cost recovery claims; defense of common law property damage claims; and defense of personal injury claims based on exposure to chemicals and other pollutants. While attending Cumberland School of Law, Amber was the Executive Editor of the *Cumberland Law Review*, a Thomley Scholarship Recipient, a George M. Stewart Banking Award Recipient and the recipient of numerous Scholar of Merit Awards.

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