

Deepwater Horizon

Everyone should already be well aware of the April 20, 2010 explosion on the *Deepwater Horizon* off the coast of Louisiana; media coverage of the multi-faceted story has been impossible to miss. We are closely following this incident in terms of legal implications, governmental response, and resulting regulatory impact.

EPA Issues Air Permit for Alaska Drilling

In April, EPA issued an air quality permit to Royal Dutch Shell Plc that would allow Shell to conduct an exploratory drilling program in the Beaufort Sea off the coast of Alaska. The permit covers emissions from the drill ship and support vessels that will be utilized for drilling.

EPA Announces 2011-2013 Enforcement Priorities

EPA announced that it will double its enforcement priorities for the 2011-2013 time period by adding eight additional priorities to those established for 2008-2010. This expansion, made possible by the \$10.5 billion budget proposed by the president, includes the following national enforcement priorities:

1. Air Toxics
2. New Source Review/Prevention of Significant Deterioration
3. Concentrated Animal Feeding Operations
4. Municipal Combined Sewer and Sanitary Sewer Overflows
5. Storm Water
6. Mineral Processing
7. Financial Responsibility
8. Indian Country
9. Environmental Justice – Community Based Approach
10. Pesticides at Day-Care Facilities
11. Worker Protection Standards
12. Resource Extraction
13. Resource Conservation and Recovery Act Enforcement
14. Surface Impoundments
15. Marine Debris
16. Wetlands

EPA Releases U.S. Greenhouse Gas Inventory Report

The 15th Annual U.S. Greenhouse Gas Inventory Report shows that total U.S. emissions increased 14% from 1990-2008, but that emissions declined 2.9% from 2007 to 2008. The inventory tracks emissions of the six main greenhouse gases - carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride. For more information go to <http://www.epa.gov/climatechange/emissions/usinventoryreport.html>.

EPA to Phase-In Greenhouse Gas Permitting Requirements

Clean Air Act permitting requirements for greenhouse gases will be phased-in beginning in January 2011. By January, large facilities operating under Clean Air Act permits for other pollutants must include greenhouse gases in their permit if emissions increase by at least 75,000 tons per year. The second phase of regulation, which goes into effect July 2011, includes new facilities with greenhouse gas emissions of 100,000 tons per year and modifications to existing facilities that result in an increase of at least 75,000 tons per year. For more information go to <http://www.epa.gov/nsr/actions.html>.

ADEM Selects New Director

In April, the Alabama Environmental Management Commission selected Lance R. LeFleur to serve as the director of the Alabama Department of Environmental Management (ADEM). Mr. LaFleur took office on June 1, 2010.

Coal Ash to be Regulated Under RCRA

On June 21, EPA proposed two alternatives for regulation of coal combustion residuals (CCRs), commonly referred to as coal ash, under the Resource Conservation and Recovery Act (RCRA). One alternative involves listing CCRs as special wastes subject to subtitle C of RCRA when intended for disposal in surface impoundments or landfills. The other proposal involves regulation of CCRs under subtitle D of RCRA. Both alternatives include "dam safety requirements to address the structural integrity of surface impoundments to prevent catastrophic releases." EPA is accepting comments on the proposed rule through September 20, 2010.

Georgia Appeals Tri-State Water Litigation Ruling

Georgia filed an appeal with the 11th Circuit Court of Appeals asking the court to overturn Judge Magnuson's latest ruling in the ongoing litigation between Alabama, Georgia, and Florida over rights to withdraw water from certain water bodies, including Lake Lanier. Judge Magnuson ruled that the U.S. Army of Corps of Engineers had illegally reallocated water from Lake Lanier and limited the amount of water that Georgia could withdraw from the lake.

EPA Launches Community Engagement Initiative

In May, the EPA Office of Solid Waste Management and Emergency Response (OSWER) launched the Community Engagement Initiative (CEI) plan to help communities "meaningfully participate in government decisions on land cleanup, emergency preparedness and response, and the management of hazardous substances and waste." The CEI Action Plan and the CRI Implementation Plan are available on EPA's website at <http://www.epa.gov/oswer/engagementinitiative/>.

Public Comment Solicited on Regulations to Reduce SSOs

EPA plans to hold "listening sessions" to gather information regarding the agency's plan to propose modifications to the National Pollutant Discharge Elimination System (NPDES) program to more effectively address municipal sanitary sewer collection systems and sanitary sewer overflows (SSOs). Possible modifications include the establishment of standard permit conditions for publicly owned treatment works that specifically address SSOs and clarifications regarding the applicability of permit conditions to municipal satellite collection systems. EPA is seeking statements and input from the interested public through August 2, 2010.

Alabama Supreme Court Rejects Defense Based on Rule of Repose in Asbestos Litigation

In *Owens-Illinois, Inc. v. Wells*, 2010 WL 1640962 (Ala. April 23, 2010), the Alabama Supreme Court held that "Alabama's 20-year common-law rule of repose does not begin to run on a claim until all the essential elements of that claim, including an injury, coexist so that the plaintiff could validly file an action." In so holding, the Court stated that defendants, entities that produced or installed products containing asbestos, failed to present evidence of a "manifest, present injury" more than twenty years before the filing of the complaint as required for entry of summary judgment in their favor based on the rule of repose.

Alabama Supreme Court Affirms Judgment in Favor of Manufacturer on Wantonness Claims

In *Chestang v. IPSCO Steel, Inc.*, 2010 WL 1640981 (Ala. April 23, 2010), the Alabama Supreme Court affirmed the trial court's entry of judgment as a matter of law in favor of IPSCO Steel, Inc. on homeowners' claims of wantonness and held that the trial court did not err in refusing to submit to the jury the issue of mental-anguish damages. The Court held that plaintiffs failed to present substantial evidence that IPSCO had knowledge that it was invading plaintiffs' rights, as required to establish wantonness in a trespass action. Further, without evidence of IPSCO's knowledge, the Court held that "there is no substantial evidence of insult or contumely" to permit recovery of mental anguish damages.

ATTORNEY PROFILES

Richard E. Davis is a partner with Starnes Davis Florie LLP. Richard's practice is primarily devoted to environmental litigation and regulatory compliance. He represents clients in federal and state courts in Alabama as well as in matters involving federal and state regulatory agencies. Richard's practice includes CERCLA, Clean Air, Clean Water, and RCRA litigation; natural resource and property damage claims; and land and water use issues. He also defends personal injury actions based on chemical exposure. Richard is a Fellow in the Litigation Counsel of America Trial Lawyer Honorary, was listed in the 2008 - 2010 editions of *Alabama Super Lawyers*[®] magazine for Environmental Litigation, and is Chair of the Alabama State Bar Environmental Law Section for the 2010—2011 term.

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