

## The Clean Water Act: 40 Years Later

October 18, 2012 marked the 40th anniversary of the federal Clean Water Act (CWA), 33 U.S.C. § 1251 et seq., the primary statute regulating water quality in the United States. The CWA was enacted as the 1972 amendments to the Federal Water Pollution Control Act with the objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. Although the CWA's stated goal of completely eliminating the discharge of pollutants into navigable waters has not yet been attained, significant progress has been made.

Prior to the enactment of the CWA, only approximately one third of U.S. water was safe for fishing and swimming and nearly one third of drinking water samples exceeded federal limits for certain chemicals. The severity of the problem was highlighted when, in 1969, the Cuyahoga River in Ohio caught fire as a result of the industrial pollutants, waste products, oil and kerosene that were routinely dumped into the river. Similarly, in 1969 discharges from food-processing plants in Florida killed 26 million fish in Lake Thonotosassa, the largest fish kill on record. These events, and others like them throughout the country, brought national focus to the issue of water pollution and led to the eventual passage of the CWA.

In contrast, forty years later, nearly two-thirds of U.S. waters are safe for fishing and recreation, due in large part to the CWA's focus on regulating point source discharges from industrial, municipal, and other commercial facilities through the National Pollution Discharge Elimination System (NPDES) permit program. Progress has also been made in the conservation and protection of wetlands as a result of the Section 404 permit program. Prior to the enactment of the CWA, the U.S. was losing up to 500,000 acres of wetlands every year; this number has been reduced to less 60,000 in recent years.

Despite huge strides under the CWA in the last forty years, the Environmental Protection Agency (EPA) remains focused on protection of U.S. waters. EPA's Strategic Plan for FY 2011-2015 states as a goal: "Protect and restore our waters to ensure that drinking water is safe, and that aquatic ecosystems sustain fish, plants, and wildlife, and economic, recreational, and subsistence activities." The plan sets forth a strategy of continued implementation of core national water programs, including improving discharge permits and reducing pollution from nonpoint sources; improvements to water infrastructure; and watershed restoration and protection, including development of Total Maximum Daily Loads (TMDLs) and implementation of watershed cleanup plans. Similar plans are included in EPA's FY 2013 National Water Program Guidance.

In short, there is more work to be done. Additional CWA regulations are expected to be part of EPA's agenda in 2013. According to the EPA's website, the agency intends to propose a rule to strengthen national stormwater program in June 2013, with a final agency action by late 2014. Also, new CWA Section 316(b) standards for cooling water intake structures at power generating facilities and manufacturing and industrial facilities are expected in mid-June 2013. We may also see EPA regulation of hydraulic fracturing under the Clean Water Act in the coming years.

## ADDITIONAL ITEMS OF INTEREST:

### Agency News:

#### NRC to Conduct New Cancer Risk Study

The Nuclear Regulatory Commission (NRC) is planning a pilot study of the cancer risks of individuals living near nuclear power plants beginning with seven facilities in California, Illinois, Connecticut, New Jersey, Michigan, and Tennessee. The study, which will be conducted by the National Academy of Sciences and is expected to take two years to complete, will provide the NRC with more up-to-date risk information to address public health concerns. The NRC currently relies on a National Cancer Institute Report published in 1991 in the Journal of the American Medical Association titled "Cancer Risks in Populations near Nuclear Facilities," which showed no general increased risk of death from cancer for those living near nuclear facilities.

#### EPA Launches "How's My Waterway?" App and Website

To celebrate the 40th anniversary of the Clean Water Act, in October EPA launched the "How's My Waterway?" app and website which allow users to find information on the water quality in local water bodies. The tool utilizes GPS technology to provide user-friendly information including the date the waters were assessed, contaminants found, and cleanup plans. For more information, go to <http://www.epa.gov/mywaterway>.

#### EPA Issues Guidance for "Good Samaritans" at Orphan Mine Sites

On December 12, EPA issued clarifications regarding Clean Water Act (CWA) requirements for the activities of Good Samaritans performing remedial work on abandoned or orphaned hard rock mining sites. The agency determined that a Good Samaritan, as defined in the 2007 guidance, that satisfactorily completes its obligations pursuant to the CERCLA tool would generally not be responsible for obtaining an NPDES permit during the response activities or after completion of the activities as long as he or she does not meet the requirements of an "operator."

### Criminal Enforcement:

#### German Shipping Companies Barred from American Ports

Nimmrich & Prahm Bereederung and Nimmrisk & Prahm Reedrei pleaded guilty on November 2 to two counts of obstruction of justice and one violation of the Act to Prevent Pollution from Ships based on repeated discharges of oily bilge waste water from the vessel *M/V Susan K* into the ocean without first treating the waste using an oil water separator. The chief engineer of the vessel also falsified the vessel's oil record book to cover up the illegal dumping. The defendants will pay a \$1.2 million criminal penalty and all vessels owned or operated by the companies will be barred from U.S. ports and waters for five years.

#### Charter Boat Captains Indicted for Trafficking Illegally Harvesting Striped Bass

In November, five charter fishing boat captains were indicted in the Eastern District of Virginia for violations of the Lacey Act, which makes it unlawful to sell fish and wildlife taken in violation of federal law. The captains – Jeffrey Adams, Raymond Carroll Webb, David Dwayne Scott, William W. "Duby" Lowery, and Nolan L. Agner – are charged with selling charter fishing trips and harvesting Striped Bass in violation of the 1984 Atlantic Striped Bass Conservation Act, under which Congress has imposed a moratorium on Striped Bass fishing in certain coastal zones. Convictions of the Lacey Act violations could result in forfeiture of the fishing boats, up to five years in prison, and a fine of up to \$250,000 per count.

#### Environmental Laboratory Owner Charged with Falsification of Records

Tennie White, owner of Mississippi Environmental Laboratories Inc., was charged with falsification of records and obstructing an investigation based on the alleged creation of false discharge monitoring reports that reflected results of testing that was not actually performed and alleged false statements made to agents during the investigation. Each of the charges could result in a prison sentence of five years or more and a fine of up to \$250,000.

#### Alabama Developer Faces Clean Water Act Charges for Filling of Wetlands

William R. "Rusty" Miller was indicted by a federal grand jury in November for the unpermitted filling of wetlands, which violated the Clean Water Act. Miller is alleged to have excavated and filled undeveloped property near Bay St. Louis, Mississippi in 2007 despite a wetland expert allegedly telling him in 2001 that as much as 80 percent of the property was federally protected wetland. Should he be found guilty, Miller could face up to three years imprisonment and a penalty of not more than \$250,000.

#### Two Men and Company Charged with Rattlesnake Trafficking

Robroy MacInnes, Robert Keszey, and Glades Herp Farm Inc. were charged in federal court in November with conspiracy to traffic in

endangered and threatened reptiles. In addition, MacInnes and Glades were charged with trafficking in protected timber rattlesnakes in violation of the Lacey Act. The indictment states that the men collected endangered and protected snakes in Pennsylvania, New Jersey, New York, and Florida and transported them across state lines. Certain snake species require a permit to own and the Lacey Act prohibits interstate trafficking in wildlife known to be illegally obtained.

#### [BP to Pay \\$4 Billion Fine for Oil Spill](#)

BP agreed to pay \$4 billion over five years and plead guilty to 14 criminal counts, including manslaughter, as a result of the April 2010 oil spill. According to the Justice Department the fine is the largest criminal payment in U.S. history. In addition, two supervisors have been charged with manslaughter and a former BP vice president was charged with hiding information from Congress and lying to law enforcement officials. While the settlement resolves the criminal charges, civil claims remain outstanding.

#### [Federal Grand Jury Returns Indictment for Importation of Narwhal Tusks](#)

On December 14, Andrew L. Zaruskas of New Jersey was arrested and charged with conspiracy, money laundering, and smuggling violations for purchases of narwhal tusks illegally imported in the United States and attempts to sell the tusks after importation. A Tennessee man, Jay J. Conrad was also named in the indictment and has been ordered to appear in the District of Maine in early January 2013. The narwhal is protected by the Marine Mammal Protection Act and is listed on Appendix II of the Convention on International Trade in Endangered Species on Wild Fauna and Flora.

#### **Civil Enforcement:**

#### [Glass Container Manufacturer to Install Pollution Controls, Pay for Clean Air Act Violations](#)

The nation's largest glass container manufacturer, Owens-Brockway Glass Container, Inc., will pay \$1.45 million for alleged violations of the Clean Air Act at five of their plants in addition to reducing their output of nitrogen oxides, sulfur dioxide, and particulate matter. One of the EPA's 2011-2013 National Enforcement Initiatives is to reduce air pollution from the largest sources of emissions, which include glass manufacturing plants like those run by Owens-Brockway.

#### [Vehicle and Engine Importers Settle to Resolve Clean Air Act Violations](#)

Two California-based companies, Yuan Cheng International Group Inc. and NST Inc., were alleged to have imported over 17,000 RVs, motorcycles, and nonroad spark ignition engines without the necessary EPA Clean Air Act certifications to prevent excess emissions of pollutants. Both companies and their executives must pay a combined penalty of \$50,000 based on the limited ability for the parties to pay due to the dissolution of the companies.

#### [EPA Fines Firms for Violations of Lead Paint Rule](#)

The EPA fined 16 companies for violating the Renovation, Repair, and Painting Rule which is in place to minimize the amount of lead dust created during work on pre-1978 buildings. The violations included failing to follow lead-safe work practices and failing to obtain proper certification. The EPA assessed over \$50,000 in penalties.

#### [Alabama Appellate Court Holds that Petitioners Lacked Standing to Seek Additional Penalties Against Developer](#)

In *Alabama Department of Environmental Management v. Friends of Hurricane Creek and John Wathen*, No. 2110410 and *SDW, Inc. v. Friends of Hurricane Creek and John Wathen*, No. 2110411, the Alabama Court of Civil Appeals held that Friends of Hurricane Creek and John Wathen lacked standing to seek increased civil penalties against a developer where the Environmental Management Commission determined that the violations caused no objective injury to Hurricane Creek or its tributaries. In so holding, the court determined that Friends of Hurricane Creek and John Wathen failed to demonstrate causation and redressability, two essential elements of standing.

#### **Recent Lawsuits:**

#### [Soldiers Awarded \\$85 Million for Toxic Exposure in Iraq](#)

A federal jury in Oregon awarded 12 National Guard soldiers \$85 million for chemical exposure from KBR Inc., a private engineering and construction military contractor. The suit alleged that that KBR knew about contamination of an Iraq water plant in April 2003 but failed to provide adequate protection. The soldiers also claimed that KBR lied to them about the dangers of hexavalent chromium, which is a major carcinogen.

#### [Herkimer County, NY Residents Sue Wind Energy Operators](#)

Sixty residents filed suit against several wind energy companies in November because of the noise and disruption caused by the Hardscrabble Wind Power Project in Herkimer County. This is not the first time a noise issue has been raised because of the Hardscrabble project. Iberdrola Renewables, which owns the project, recently installed noise-reduction equipment on several wind turbines because of complaints.

## 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 - 2012 editions of *Alabama Super Lawyers*<sup>®</sup> magazine for Environmental Litigation, was selected for inclusion in the 2011, 2012, and 2013 editions of *Best Lawyers in America*<sup>®</sup>—in 2011 for both Environmental Law and Natural Resources Law and in 2012 and 2013 for both Litigation-Environmental and Natural Resources Law; was included by ALM (publisher of *The American Lawyer*, *Corporate Counsel*, and law.com) as a Top Rated-AV Preeminent Lawyer in Mass Tort Litigation; was selected by peer review as one of Birmingham Magazine's Top Attorneys in Environmental Law in 2012; and served as Chair of the Alabama State Bar Environmental Law Section for 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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