

## Alabama Fish to Receive Endangered Species Act Protection

In August, the U.S. Fish and Wildlife Service (USFW) determined endangered status under the Endangered Species Act (ESA) for the rush darter, a fish known only to exist in Alabama. The listing became effective on September 8th. The rush darter had been a candidate for listing as threatened or endangered on the federal list since 2002. According to the USFW, the fish is known or believed to occur in Blount, Cullman, Etowah, Jefferson, Lawrence, Marshall, Walker, and Winston Counties. The USFW states that the listing of the darter is based on the "imminent threat of water quality deterioration...."

The rush darter joins over one hundred other threatened or endangered plant and animal species known to occur in Alabama. Several species that occur in Alabama have been de-listed due to recovery in the past decade, including the bald eagle, brown pelican and the Eggert's sunflower. In addition, some endangered or threatened species have made a noted recovery in Alabama. The tulotoma snail was downlisted to "threatened" in July, fourteen years after its listing as "endangered." The Alabama Beach Mouse population has also slowly recovered after suffering the effects of housing construction and hurricanes in the mid-2000s.

President Nixon signed the Endangered Species Act into law in 1973. The USFW and the National Oceanic and Atmospheric Administration's Fisheries Service serve as the leading federal agencies in implementing the ESA. The law requires that any actions by federal agencies do not jeopardize the continued existence of any listed species or adversely affect the designated critical habitat of a species. In addition, commerce, including import and export, involving any listed species is generally prohibited.

Listing of a species also opens the door for potential funding from and action by the federal government to aid the recovery of or protect the species and its habitat. The USFW has an Endangered Species Recovery Program to help state and local agencies prepare and implement recovery plans. With the help of the recovery program, 99% of listed species have been prevented from going extinct since 1969.

The listing of the rush darter could present a problem for the Alabama Department of Transportation's (ALDOT) plan to connect Interstate 59, I-65, Corridor X and I-59/20 in Jefferson County. The proposed "Northern Beltline" would cross Turkey Creek tributaries, and the rush darter is known to exist in the Turkey Creek watershed. ALDOT will perform additional survey work to determine if the fish occurs in those areas.

### ADDITIONAL ITEMS OF INTEREST:

Automakers Agree to Increase Fuel Efficiency In July, President Obama reached an agreement with thirteen automakers to increase the fuel efficiency of cars and light duty trucks to 54.5 miles per gallon by 2025. The Administration believes that this step will help American families save money on gas and reduce U.S. dependence on foreign oil. Parties to the agreement include Ford, GM, Chrysler, BMW, Honda, Hyundai, Jaguar/Land Rover, Kia, Mazda, Mitsubishi, Nissan, Toyota and Volvo.

**EPA Seeks Comments on BPA Testing** In July, EPA issued an advance notice of proposed rulemaking seeking comment “on requiring toxicity testing to determine the potential for BPA [Bisphenol A] to cause adverse effects, including endocrine-related effects, in environmental organisms at low concentrations” as well as “requiring environmental testing consisting of sampling and monitoring for BPA in surface water, ground water, drinking water, soil, sediment, sludge, and landfill leachate in the vicinity of expected BPA releases.” Comments must be received by September 26, 2011.

**EPA Finalizes Cross-State Air Pollution Rule** Alabama is among the 27 states required to reduce power plant emissions that cross state lines under the Cross-State Air Pollution rule finalized by EPA in July. The rule replaces the Clean Air Interstate Rule (CAIR) adopted in 2005 and struck down by the D.C. Court of Appeals in 2008 and requires significant reduction of SO<sub>2</sub> and NO<sub>x</sub> emissions. Multiple challenges to the rule are expected. EME Homer City Generation, owner of coal-fired power plants in Pennsylvania, has already filed suit. The Texas Railroad Commission is asking state attorney general to challenge implementation of the rule citing significant threats to electric reliability as power plants are forced to limit or shut down operations.

**Missouri Sewer District Agrees to Extensive Improvements** The St. Louis Sewer District has agreed to spend \$4.7 billion over 23 years to improve infrastructure and reduce sewage overflows in settlement of a Clean Water Act lawsuit filed in 2007. The improvements will reduce the amount of raw sewage and contaminated storm water introduced into streams and lakes in furtherance of EPA's 2011-2013 national enforcement initiatives. Such suits have been filed in Alabama, and it is anticipated that, after the government has made the rounds of larger U.S. cities, a new round of similar litigation will focus on medium-sized and then smaller local governing entities.

**ADEM on Track to Achieve Regional Haze Goals** The Sipsey Wilderness area in north Alabama is on track to meet Clean Air Act visibility goals sooner than expected. The regional haze plan implemented by ADEM in 2007, which requires emissions reductions from certain industries in order to improve visibility, predicted an improvement by 2018. Measurements through 2010 place the area ahead of schedule. ADEM is required to submit an updated plan by 2013.

**Federal Agencies Committed to Environmental Justice** Federal agencies executed a “Memorandum of Understanding on Environmental Justice and Executive Order 12898” in August in which they agreed to work to develop environmental justice strategies to protect people in communities most affected by pollution. According to U.S. Attorney General Eric Holder, “[The] memorandum will reinforce the federal government’s commitment to the guiding principles of environmental justice – that the wealth, poverty, or race of any people should not determine the quality and health of the environment in which they live their lives.” A copy of the MOU is available at <http://epa.gov/environmentaljustice/resources/publications/interagency/ej-mou-2011-08.pdf>.

**DuPont Ordered to Cease Distribution of Imprelis Herbicide** Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA ordered DuPont to cease the sale, use or distribution of the herbicide, Imprelis, following reports of damages to certain trees including the Norway spruce and white pine. Imprelis is an herbicide used to control weeds and is registered for use in all states except California and New York.

**EPA Plan to Implement Stricter Ground-Level Ozone Standard Overruled** The Obama Administration requested that EPA withdraw its plan to adopt a more restrictive Clean Air Act standard for ground-level ozone prior to 2013. According to Cass Sunstein, the head of the White House Office of Regulatory Affairs, the new rule would lead to uncertainty for business and local government and is unnecessary when the rules are scheduled for reconsideration in 2013. The current standard will remain in place until 2013. However, EPA Administrator Lisa Jackson said in September that the agency would enforce an ozone standard adopted by the EPA in 2008 of 75 parts per billion which had been suspended.

**Environmental Group Seeks to Classify Diesel Exhaust as Hazardous Waste** In late June, the National Resources Defense Council (NRDC) notified rail owners of its intent to sue under the Resource Conservation and Recovery Act (RCRA) under the theory that particles in diesel air pollution are solid waste. The notice addressed rail yards across California owned by Union Pacific Corp. and Northern Santa Fe Railway. If successful, such a lawsuit could provide another avenue in addition to the Clean Air Act for suits against other sources of diesel emissions including ports and airports.

**ADEM Accepting Comments on Certification of Clean Air Act SIP** ADEM announced in September that it is requesting comments on the Department’s certification that the State Implementation Plan (SIP) meets the requirements of Section 110(a)(1) and 110(a)(2) of the Clean Air Act setting forth requirements for the 2008 Lead National Ambient Air Quality Standards. Comments must be received by October 28, 2011 and a public hearing must be requested no later than October 11, 2011. A copy of the SIP is available at [www.adem.state.al.us/PubHearings.htm](http://www.adem.state.al.us/PubHearings.htm).

## 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 - 2011 editions of *Alabama Super Lawyers*® magazine for Environmental Litigation, was selected by his peers for inclusion in *Best Lawyers in America*® for Environmental Law (2011), Litigation – Environmental (2012), and for Natural Resources Law (2011– 2012), and is Immediate Past Chair of the Alabama State Bar Environmental Law Section.

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