Florida's St. Lucie Estuary Environmental Disaster and the Clean Water Act

A toxic algae bloom in the St. Lucie River and Caloosahatchee River estuaries in Florida has caused an unfolding environmental disaster of enormous proportions. The algae outbreaks are triggered by fertilizer sewage and manure pollution that the State has failed to properly regulate. "It's like adding miracle grow to the water and it triggers massive algae outbreaks," Earthjustice spokeswoman Alisa Coe told CNN. The Miami Herald describes the devastated area as being engulfed in blue-green colored water that resembles "guacamole." NPR reports that the smell of hundreds or thousands of dead animals and fish baking in the sun has created a stench that is unbearable.

A State of Emergency was declared over to July Fourth weekend, emptying the beaches and bringing fishing, boating and swimming to a halt, as the waters covered by green slime were declared too toxic to touch. The tourist industry in the Stuart and Port St. Lucie areas rapidly ground to a complete halt, thus decimating by far the largest industry in the area. According to the Florida Department of Environmental Protection, toxic blooms can damage the gastrointestinal system, liver, nervous system and skin. The blue-green algae is called cyanobacteria. It can release toxins that affect the liver and nervous system. No wonder that the tourists and many residents have fled the area.

While Governor Rick Scott has insisted that the problem is primarily a water storage issue, and that the federal government had been negligent in failing to properly fix the aging dike system and to provide for sufficient water storage in Lake Okeechobee during the wet season, there can be little question that the source of the toxic algae bloom is the huge amounts of

fertilizer-related nitrogen and phosphorous from the Big Sugar companies and other polluters that has ended up in the Lake and then been released into the St. Lucie and other estuaries.

Most of the public and press attention has focused on the Army Corp's decision to release polluted lake water into the estuaries to the east and west, rather than permitting more of the natural flow of water southward from the Lake through the drainage basin and complex canal system that has been developed there. The area to the south of the Lake includes the Everglades Agricultural Area, comprising former wetlands that were converted into farm use and have become dominated by what has become known as "Big Sugar," primarily the U.S. Sugar Corporation, Crystal Sugar and the Sugar Cooperative Corporations. The Army Corp, which maintains jurisdiction of the dike system and the regulation of water releases under the Rivers and Harbors Act of 1899 and the Clean Water Act, has responded by stating that these huge releases of polluted waters were necessary to prevent a breach in the old and outdated Herbert Hoover Dike system surrounding the southern shore of Lake Okeechobee.

Serious allegations have been made that the Army Corp. has failed in its mission to properly regulate and maintain the infrastructure that was designed to keep this complex and delicate ecosystem in balance. There have been many calls for reforms, including the February 2014 letter from the Florida Senate to Congress requesting that it transfer authority over water releases from the Lake from the Army Corps to the Florida Department of Environmental Protection (FDEP). Meanwhile, Governor Rick Scott, who was forced to recently declare a State of Emergency in the area due to the dangerous concentrations of toxic algae in the area, has sought to focus on the need to upgrade the septic systems of property owners and businesses in the area.

However, neither the Army Corp nor the homeowners and residents of the area are primarily responsible for the dangerous build up in the levels of nitrogen and phosphorous "nutrients" in the Lake Water. Rather the primary parties responsible for the agricultural "run-off" of these chemicals are the Big Sugar interests controlling thousands of acres of cane sugar south of the Lake in the Everglades Agricultural Area (EAA). These huge sugar companies are the continuing beneficiaries of the 1981 Farm Bill, repeatedly renewed in Washington, which guarantees sugar prices for the corporations at levels that are sometimes twice the price of the world market.

Under the federal Clean Water Act, polluters such as the Big Sugar companies, are required to clean up waters polluted by fertilizers or pesticides that are part of the agricultural process before such waters are permitted to be released back into navigable water system. Nevertheless, the Big Sugar companies have failed to adequately clean up the huge quantities of water that they use as part of the cane sugar agricultural process, resulting in the release of significant quantities of pollutants back into the Lake and eventually, the St. Lucie River and other estuaries.

The Clean Water Act ("CWA") was originally enacted in 1948 to address the growing water pollution problems throughout the United States, with its primary enforcement authority given to the states. See Federal Water Pollution Control Act, Pub. L. No. 80-845, current version at 33 U.S.C. §§ 1251-1387. Since that time, Congress has amended the CWA on several occasions, including an amendment in 1972 establishing a system of effluent limitations, water quality standards, discharge permits and other regulatory mechanisms "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

One important issue addressed by the U.S. Supreme Court in 2006 was whether wetlands were "navigable waters" covered by the CWA. In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court narrowed the EPA's broad definition of "waters of the United States" to wetlands adjacent to traditional navigable waters, with Justice Kennedy establishing a test, known as the "significant nexus" test, requiring that for wetlands to be covered by the CWA, there must be "a significant nexus between the wetlands in question and navigable waters in the traditional sense."

One of the best known provisions of the CWA is Section 402, which regulates discharges of pollutants from "point sources", and any entity wishing to discharge pollutants into a water of the United States must obtain a National Pollutant Discharge Elimination System (NPDES) permit from the EPA or from a state agency authorized to run the program. In Florida, the EPA authorized the FDEP to manage the NPDES permitting program within the state. In addition, Congress left control over "nonpoint" and "agricultural" source pollution to the states to manage as each seed fit, so long as minimum federal water quality standards were met. In Florida, the FDEP developed these water quality standards and implemented them with the aid of the five water management districts. In addition, the Army Corps actually transferred operational control of the Lake Okeechobee watershed system to the South Florida Water Management District (SFWMD), including operational control of the complex network of canals and pump stations that artificially divert agricultural, industrial and residential runoff away from the agricultural lands to the south of Lake Okeechobee, which is where the Big Sugar lands are located, into the Lake itself.

Thus, the fertilizer contaminants in the water runoff from the Big Sugar plantations to the south of the Lake are theoretically regulated by the FDEP and SFWMD under the provisions of the CWA requiring states to create and implement water quality-based standards, including standards for nonpoint source pollution from agricultural properties, and must determine the "total maximum daily load" (TMDL) for each pollutant and allocate the allowable daily amount among all of the water body's polluters. However, since the FDEP and SFWMD claim that they have a lack of resources to properly enforce these standards themselves, they have largely relied upon Big Sugar and other agricultural polluters to "self-regulate" the degree to which they produce phosphorous and nitrogen laced polluted runoff, which is then pumped by the SFWMD into the Lake. In other words, Florida has basically put the wolves in charge of the henhouse leaving it up to the sugar companies themselves to decide whether or not they are in compliance with the state regulations regarding the release of potentially toxic pollutants into the Lake. Not surprisingly, the instances where Big Sugar has turned themselves into the regulators for failing to comply with these emission standards are rare or non-existent.

Adding further confusion and lack of public protection to this regulatory scheme, while the Florida state entities (FDEP and SFWMD) have responsibility for setting standards regarding pollution-levels from agricultural properties and the adjacent canals being dumped into the Lake, only the Army Corps has the responsibility for releasing polluted Lake waters into the St. Lucie and other estuaries. While the Army Corps and the state agencies are, in theory, supposed to coordinate together so that the pollution levels of the billions of gallons of water being released by the Army Corps are known, in practice, it appears that this coordination is far from perfect and that the Army Corps may have no precise idea how much in the way of harmful phosphorous and other pollutants are being released into the estuaries.

As part of the 1972 amendments to the CWA, private citizens were permitted for the first time, to bring a civil action in federal court against any person or government that violated the requirements of the CWA. FWPCA § 505(a)(1), 33 U.S.C. § 1365(a). However, in order for an individual or group to bring a CWA suit under the citizen suit provisions, 33 U.S.C. § 1365 (a), that individual, business or group must have "standing to sue," which means that the individual business or group must have suffered an "injury in fact" that is actual or imminent, not just conjectural or hypothetical. *Sierra Club v SCM Corp*. 580 F. Supp. 862 (1984). Damage to a plaintiff's aesthetic or recreational interest is sufficient to confer standing, as long as the plaintiff can show that he or she "use[s] the affected area and [is a] person 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 183 (2000). In *Laidlaw*, the court found sufficient injury for standing in the testimony of the plaintiffs' members that they had ceased use of the river because of their concern that the defendant's discharges were polluting the river and causing a depreciation in the value of one of the members' homes. *Laidlaw,* 120 S. Ct. at 703. The loss of recreational and aesthetic benefits, or just the loss of enjoyment caused by the pollution, is sufficient to confer standing. See *Mt. Graham Red Squirrel v. Espy*, 986 F. 2d 1568 (9th Cir. 1992). Even the probability of future harm, even though none has occurred yet, is sufficient to confer standing. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,* 204 F. 3d 149, 160 (4th Cir. 2000).

There must also be a causal connection between the injury and the conduct complained of, but a plaintiff need not demonstrate that his or her injuries are caused specifically by the actions of the defendants. *SPRIG v. Tenneco Polymers,* 602 F. Supp. 1394 (1984). The plaintiff need only how that the defendant caused an unlawful discharge of pollutants; that the pollutants

were discharged into a waterway in which plaintiffs have in interest that are or may be adversely affected by the pollutant; and that this pollution caused or contributed to the kinds of injuries alleged by the plaintiffs. See *Public Interest Research Group of New Jersey v. Yates Industries* Inc., 757 F. Supp. 438, 443 (D. N.J. 1991).

The Clean Water Act requires that a citizen give notice of their claims to any person, including the United States, and/or any other governmental entity sixty (60) days before bringing suit against the alleged violator. See 33 U.S. C. § 1365(a)(1) and (b)(1). This is a mandatory provision and compliance must be pleaded in the complaint. *National Environmental Foundation v. ABC Rail Corp*., 926 F. 2d 1096 (11th Cir. 1991); *Walls v. Waste Resource Corp*., 761 F. 2d 311 (6th Cir. 1985). Notice of a violation must be served on the alleged violator or violators. 40 C.F.R. § 135.2(c).

If, after the date that the suit is filed, the defendant continues to violate the CWA, the plaintiff may request both injunctive relief and civil penalties under the Act. See *Weiszmann v. District Engineer*, U.S. Army Corps of Engineers, 526 F. 2d 1302, 1304 (5th Cir. 1976); U.S. v. Context-Marks Corp., 729 F. 2d 1294, 1297 (11th Cir. 1984). Injunctive relief may be granted under a common law standard to enjoin a continuing a abatable nuisance or trespass. A court may also award costs of litigation, including reasonable attorneys' and expert witness fees to the prevailing party. 33 U.S. C. § 1365(d).

In addition to statutory claims under the CWA, plaintiffs also have state common law damages claims for nuisance (interference with use and enjoyment of property), trespass (unauthorized entry on another's property), negligence (breach of a legal duty to conform to a

standard of conduct raised by the law for the protection of others against unreasonable risks of harm, and violations of Florida state statutory law.

It is unlikely that there would be a cause of action for damages to "riparian rights" since, in *Midenberger v U.S.*, No. 2010-5084 (U.S. Ct. of Appeals, Federal Circuit June 30, 2011), in a case brought by plaintiffs in the St. Lucie River area, the court found that the plaintiffs had failed to make a showing that Florida law permitted a cause of action for damages to riparian rights by property owners that was different or separate from the rights of the general public.

In short, individuals, businesses and associations who have suffered damages as a result of the toxic pollution of the St. Lucie Estuary have both federal and state law causes of action against the Big Sugar polluters, the relevant Florida state agencies and the Army Corp for the damages that they have sustained as a result of this major environmental disaster.