

3M Can't Duck Enviro's Tennessee River Pollution Suit

By **Christine Powell**

Law360, New York (February 10, 2017, 9:56 PM EST) -- An Alabama federal judge rejected 3M Co.'s bid Friday to duck an environmental group's lawsuit alleging one of its largest manufacturing plants has been discharging hazardous and solid waste containing chemicals that do not break down easily and that are linked to cancer into the Tennessee River.

The Tennessee Riverkeeper **sued 3M** under the Resource Conservation and Recovery Act in June, claiming the company has disposed of waste containing perfluorooctanoic acid, perfluorooctanesulfonic and other chemicals — byproducts of its "nonstick" carpet cleaning products Stainmaster and Scotchgard — from a manufacturing plant in Decatur, Alabama, on the banks of the Tennessee River, polluting surface water and groundwater.

3M's discharges of those chemicals, which have no known environmental breakdown mechanism and which studies have shown the human absorption of may cause cancer, thyroid disease, high cholesterol and other health issues, reach levels that exceed the U.S. Environmental Protection Agency's May health advisories for their presence in drinking water, the green group claimed.

On Friday, U.S. District Judge Abdul K. Kallon denied three separate motions to dismiss brought by 3M and co-defendants BFI Waste Systems of Alabama LLC and the city of Decatur, both of which own and operate nearby landfills that Tennessee Riverkeeper alleges have accepted the company's "contaminated sludge," resulting in groundwater contamination.

The judge categorized all the motions as being premised on two primary arguments, the first being that Alabama is already dealing with the Tennessee Riverkeeper's concerns under an EPA-approved program that allows it to implement and enforce RCRA's provisions, and the second being that the chemicals at hand do not constitute hazardous or solid waste under RCRA.

With respect to 3M's motion, Judge Kallon rejected its argument that the Tennessee Riverkeeper's claims are moot because they are absorbed by a remedial action agreement the company has inked with the Alabama Department of Environmental Management, which remains in effect until 2019.

"Based on the court's review of the RAA and the injunctive relief the Riverkeeper seeks, because the RAA's terms do not encompass all of the relief the Riverkeeper seeks, the court agrees with the Riverkeeper that live controversies remain," the judge wrote. "Therefore, 3M's mootness argument fails."

Judge Kallon additionally shot down 3M's argument that the court should abstain from the matter because the claims "involve highly technical or scientific knowledge within the purview of the ADEM," citing an apparent lack of ongoing Alabama Department of Environmental Management proceedings, and that Tennessee Riverkeeper has failed to state a claim given that its discharges are not solid waste under RCRA.

"While 3M may ultimately succeed in establishing this fact, this matter is currently before the court on a motion to dismiss," the judge said, adding that, "in the absence of any controlling authority indicating that 3M's discharges fit within the cited exception to the RCRA's definition of 'solid waste,' the court must accept as true the Riverkeeper's well-pleaded factual allegations."

With respect to the city's and BFI's motions, Judge Kallon said their arguments that they have permits to operate their respective landfills and that the Tennessee Riverkeeper can't sue them for conduct they have permission to carry out fails, among other things.

"3M has always operated in compliance with its legal and regulatory obligations," William A. Brewer III of Brewer Attorneys & Counselors, representing 3M, said in a statement Friday. "The company voluntarily ceased the manufacture and use of these chemistries well over a decade ago. Since that time, 3M has worked in close collaboration with state regulators to address the environmental presence of these compounds."

Brewer continued: "3M believes the actions of the Tennessee Riverkeeper are premised on an incorrect understanding — that the mere presence of these chemicals equals harm. 3M will defend its record of environmental stewardship, and looks forward to bringing the facts of this case into public view."

William Matsikoudis of Matsikoudis & Fanciullo LLC, representing Tennessee Riverkeeper, said in a statement Friday that "we are excited to have passed this first hurdle and look forward to continuing our fight to compel these corporate polluters to clean up the Tennessee River."

The Tennessee Riverkeeper is represented by William Matsikoudis and Derek Fanciullo of Matsikoudis & Fanciullo LLC and Mark E. Martin.

3M is represented by William A. Brewer III, Stephanie LeeAnn Gase and Michael Lee Smith of Brewer Attorneys & Counselors and William S. Cox III, William H. Brooks, M. Christian King and Harlan Irby Prater IV of Lightfoot Franklin White LLC.

BFI Waste Systems of Alabama LLC is represented by Joshua S. Thompson and John W. Scott of Scott Dukes & Geisler PC, and William G. Beck and Andrew L. Schulkin of Lathrop & Gage LLP.

The city of Decatur, Alabama, is represented by David W. Langston, William E. Shinn Jr. and Barnes F. Lovelace Jr. of Harris Caddell & Shanks PC.

This case is Tennessee Riverkeeper Inc. v. 3M Co. et al., case number 5:16-cv-01029, in the U.S. District Court for the Northern District of Alabama, Northeastern Division.

--Editing by Catherine Sum.