



BALCH & BINGHAM LLP

ALABAMA

Environmental Update

ALABAMA ENVIRONMENTAL MANAGEMENT
COMMISSION MEETING OF NOVEMBER 4, 2005

Introductory Business

After calling the meeting to order, Commissioner Phillips announced that Commissioner Sanders tendered his resignation from the Commission. Commissioner Phillips then introduced, and the Commission unanimously adopted, a resolution honoring Commissioner Sanders for his service to the State. Next, Commissioner Lester made a motion to re-elect Scott Phillips as Chair and Pat Byington as Vice-Chair of the Commission, which unanimously passed. Also, Commissioner Smith was elected chair of the Commission's rulemaking subcommittee.

Director's Report

ADEM Director Trey Glenn reported that ADEM ended the 2005 fiscal year in the black. Director Glenn then provided an update on ADEM's extensive work in responding to the effects of Hurricane Katrina. He noted that ADEM recovered 243 drums, 28 tanks, 305 cylinders, 152 batteries, 2,939 small containers in Mobile and Baldwin Counties over a ten-week period. ADEM is also continuing to work with the U.S. Coast Guard, FEMA, the Alabama Emergency Management Agency, the U.S. Army Corps of Engineers, and other parties to recover grounded vessels to minimize impacts to coastal wetlands and to prevent spills of oil and hazardous materials.

The Director also provided an update on the construction of the new ADEM analytical laboratory, which is scheduled for completion in June 2006. The construction plans for the lab have been modified to include a methyl-mercury facility. The Director also asked the Commission to pass a resolution to honor the service to ADEM of Mr. Freddie Thomas, who unexpectedly passed away on October 20, 2005. Mr. Thomas was a long-time ADEM employee who most recently managed the ADEM Decatur office. Mr. Edward Poolos is now the senior employee at the Decatur Office. Director Glenn commented that Mr. Gerald Hardy, the Chief of ADEM's Land Division, was chosen to be the next president of the Association of State and Territorial Solid Waste Management Officials.

Director Glenn then discussed Alabama Circuit Court Judge Price's recent modification of an earlier decision in order to allow ADEM to continue permitting landfills without a Regional Planning Commission statement of consistency. The case is currently on appeal to the Alabama Court of Civil Appeals, but the Director explained that ADEM has filed a motion to place the appeal on the administrative docket to allow time for the parties to reach a resolution outside of court.

Noting that the last day of ozone season was October 31, 2005, Director Glenn informed the Commission that the raw data for Summer 2005 indicated that all monitors in Alabama now show attainment for the federal air quality standards, including the Shelby County monitor. Once the raw data has been quality assured, ADEM plans to petition EPA to formally redesignate Jefferson and Shelby counties as "attainment." The Director anticipates that this process will be concluded within the next six months. Ron Gore of ADEM's Air Division indicated that no changes in the fuel mixture requirements applicable to motor vehicles in those areas currently designated non-attainment would result from redesignation. Finally, the Director explained that ADEM asked EPA to reconsider an earlier decision to exempt Georgia from certain air quality requirements.

Commission Actions

Commissioner Byington updated the Commission on the strategic plan process, and provided information on the recent town hall meetings held in 7 cities across the state. Cumulatively, over 230 people attended and over 50 people gave public comments. Commissioner Byington also thanked Director Glenn for attending every meeting and commented that all minutes to these meetings are available to the public. Commissioner Wainwright expressed frustration over the lack of information provided to other Commissioners about the on-going strategic planning committee process. In response, Commissioner Phillips requested Commissioner Byington to provide the other Commissioners with information pertaining to the strategic plan process and the recent town hall meetings.

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Commissioner Byington next provided an update on the standards applicable to mercury fish consumption advisories. According to Commissioner Byington, the Alabama Department of Public Health may ask ADEM to conduct a study to determine whether changes in ADEM mercury advisory standards are necessary. Noting that ADEM's current standards are based on a 1994 comprehensive study, Commissioner Byington asked that ADEM seek approval from the Commission before participating in any new mercury advisory studies. The current ADEM mercury standards are, according to Commissioner Byington, the most stringent in the southeast.

Next, the Commission voted unanimously to approve the proposed amendments to Division 3 - Air Regulations. The Commission also voted unanimously to approve the proposed amendments to the Division 7 - Drinking Water Regulations. Finally, the Commission voted unanimously to approve the proposed amendments to the Division 13 - Solid Waste Regulations, which were promulgated in response to recent state legislation authorizing ADEM to impose financial assurance requirements for municipal solid waste landfills.

Turning its attention to ongoing administrative proceedings, the Commission noted that the request for hearing was withdrawn in U.S. Corps of Engineers v. ADEM, EMC Docket No. 05-16. Finally, the Commission considered the recommended order issued in Garrison v. ADEM, EMC Docket No. 04-12, where the Administrative Law Judge held that ADEM properly granted a coastal property owner a variance to construct a beach house beyond the coastal construction line. The attorney for Mr. Garrison urged the Commission to overrule the ALJ's order, however the Commission voted unanimously to uphold the ALJ's order.

Public Comments

Before adjourning, the Commission heard comments from Dr. Bruce Stallsmith, a professor at the University of Alabama in Huntsville (UAH). Dr. Stallsmith provided the Commission with preliminary results of his ongoing study of the flame chub (*Hemitemai flammea*), a small minnow endemic to spring-fed streams in the Tennessee Valley. According to Mr. Stallsmith, his study indicates that the habitat of the flame chub has been decreased substantially in recent years. Another professor at UAH, Dr. Joseph Leahy, updated the Commission on the results of a study of fecal coliform concentrations in fecal waste runoff from a large swine facility into Crow Creek. His study indicated that the fecal material introduced a significant percentage of *E. coli* bacteria resistant to antibiotics in Crow Creek. Next, David Ludder of the Legal Environmental Assistance Foundation gave a PowerPoint presentation entitled "Cumulative Health Risks of Selected Air Pollutants and Implications for Environmental Justice in Mobile County, Alabama." Mr. Ludder used EPA's Risk Screening Environmental Indicator formula to calculate the risk in the air around Mobile. Mr. Ludder urged ADEM to amend its regulations to incorporate cumulative risk-based approaches to limiting environmental contamination. Finally, Ronda Walker, Director of Conservation Unlimited, commended the Commission for holding the seven town hall meetings.

Correction

In the August 12, 2005 Environmental Update, we reported that the "financial assurance and tipping fee bill which failed to pass during the regular legislative session, passed during the recent special session." This was incorrect. The financial assurance and tipping fee bills were separate. The financial assurance bill passed in the special session but the tipping fee bill did not.

Other Items

On November 1, 2005, EPA published a final rule establishing a regulatory definition of "all appropriate inquiries" for purposes of identifying possible contamination on property. A demonstration that one has made "all appropriate inquiries" at a contaminated site is one element of what is necessary to establish any of three defenses against CERCLA liability, namely, those for (1) the innocent landowner, (2) the bona fide prospective purchaser, and (3) the contiguous landowner. In addition, the "all appropriate inquiries" standards will be mandatory for those who use brownfield grants for site assessments. In short, the conduct of "all appropriate inquiries" requires that an "environmental professional" perform some of the necessary site analysis, and it includes a checklist of activities that must be undertaken.

Congress required EPA to promulgate this regulation in the 2002 brownfields law. Since then, the interim standard required by Congress to demonstrate "all appropriate inquiries" has been the ASTM E1527 standard. The new standard is more stringent than the interim standard in the sense that the qualifications for an "environmental professional" are stricter, and certain activities that are not always mandatory under ASTM E1527 will be required. However, the effective date of the rule is November 1, 2006. Until then, EPA will recognize either the interim or new standards as satisfying the requirements for the conduct of "all appropriate inquiries."

Next Meeting

The Commission will hold its next regularly scheduled meeting on December 2, 2005.