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ALABAMA

Environmental Update

ALABAMA ENVIRONMENTAL MANAGEMENT
COMMISSION MEETING OF JUNE 17, 2005

Director's Report

Director Trey Glenn began the meeting by noting that the Department is operating within its budget and is working to obtain the necessary federal funds. He also highlighted several recent personnel changes at the Department. First, Darlene Gregory, long-time executive secretary to the Director, will be leaving the Department to join the staff of the Governor's legal advisor, Ken Wallace. Also, the Director noted that Tracy Piper has joined the Department as the new Director of Human Resources. ADEM has also hired additional personnel in the External Relations division. Next, Director Glenn explained that the Contract Oversight Committee is currently processing all ADEM contracts.

Turning his attention to implementation of ADEM's Strategic Plan, the Director discussed the proposed financial assurances and tipping fee legislation, which failed to pass during the regular legislative session. This legislation would have imposed new requirements on solid waste landfills. Given the importance of these bills to the viability of ADEM's solid waste program, the Director affirmed his commitment to working toward passing these bills during the upcoming special legislative session. In response to a question by Commissioner Smith, Director Glenn explained that both bills are necessary to ensure that ADEM retains the authority to operate the State's EPA-approved solid waste program. The Director introduced Edward Harteson who will assist the Department with environmental justice issues. ADEM is also exploring new, cost-effective means to incorporate technology into the Department's operations. For example, the Director explained that ADEM is moving toward an electronic file review process. Also, ADEM plans to increase its use of remote sensing, air surveillance, and satellite imagery in order to improve the Department's compliance monitoring efforts.

Director Glenn detailed the Department's ongoing efforts to deal with potential environmental concerns surrounding the McIntosh community, noting that a public meeting was recently conducted by ADEM in McIntosh to present the preliminary results of a study indicating that mercury levels in the community were below the action levels established under federal and state law. The Director also noted that the Commission should expect to hear significant debate in the coming weeks over a proposed quarry in Shelby County, but the majority of public debate appears to center around factors that ADEM is not authorized to consider when reviewing a permit application.

Finally, Director Glenn explained that he recently met with representatives from both the environmental and regulated communities to discuss the final report issued by the Enforcement and Administrative Penalty Stakeholder Committee. The Director said he agrees ADEM should improve the way administrative consent orders are written. In response to a question by Commissioner Hairston, the Director assured the Commission that future consent orders will include a discussion of the penalty factors and how they are applied to determine a particular penalty. Commissioner Phillips thanked the Director for his leadership in moving forward on these issues of importance to the Commission.

Commission Actions

Following the Director's Report, the Commission addressed several agenda items. First, the Commission voted unanimously to send to rulemaking proposed revisions to ADEM Administrative Code Rule 335-2-3-.03. This rule governs the Commission's election of Chair and Vice-Chair. If the proposed revisions are eventually adopted, the Chair and Vice-Chair would serve one year terms (instead of three year terms) which could be renewed as long as their terms as Officers do not exceed their terms of Commissioners. Also, the proposed revisions would allow the Commission to hold elections for these Officer positions at any meeting, instead of the current requirement that such elections be held in October.

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Next, at the request of Commissioner Byington, the Commission discussed ADEM's mercury policy and regulations. Commissioner Byington explained that ADEM has yet to update the new water quality criteria for methyl mercury (found at ADEM Admin. Code r. 335-6-10-.07), which were revised by the United States Environmental Protection Agency (EPA) in 2001. See 66 Fed. Reg. 1344 (Jan. 8, 2001). He urged ADEM to take two steps: (1) revise the water quality criteria for mercury in accordance with EPA's 2001 regulations; and (2) request the Alabama Department of Public Health to also use EPA's mercury criteria instead of its current practice of employing FDA guidelines. Director Glenn expressed his commitment to the Commission to develop the necessary regulations to implement EPA's 2001 mercury criteria.

Third, the Commission considered the recommended order issued in *Black Warrior Riverkeeper v. ADEM*, EMC Docket No. 05-01. On November 18, 2004, ADEM and Vulcan Construction Materials LP entered a consent order resolving various alleged NPDES violations related to Vulcan's limestone quarry in Bessemer, Alabama. The consent order required Vulcan to, among other things, conduct an environmental self-audit of all of its facilities, pay a civil penalty in the amount of \$50,000, and complete all necessary corrective actions within 120 days. On December 17, 2004, Black Warrior Riverkeeper, Inc. ("Riverkeeper"), filed a request for hearing with the Commission, alleging that the consent order was deficient because it failed to "indicate findings of fact relied upon by [ADEM] in determining the amount of civil penalty" and imposed a "penalty amount [that] is grossly under valued." Without holding a hearing, the Hearing Officer issued an order recommending that the Commission grant summary judgment in favor of Riverkeeper. Specifically, the Hearing Officer recommended that the EMC: (1) "set aside" the consent order; (2) require ADEM to explicitly apply the statutory factors in writing in its issuance of NPDES consent orders; and (3) require ADEM to impose a civil penalty against Vulcan based on the statutory factors. Both Vulcan and ADEM filed objections to the recommended order. After hearing arguments by all parties, the Commission voted 5 to 0 to reject the recommended order. This has the practical effect of remanding the case back to the Hearing Officer for a hearing on the merits of the consent order. Commissioner Sanders was absent, and Commissioner Smith abstained from voting since the case involved an NPDES-related matter.

Fourth, the Commission considered the recommended order issued in *Clark v. ADEM*, EMC Docket Nos. 05-02, 05-03, 05-04, 05-05, 05-06, 05-07. Like the Riverkeeper case, this case involved challenges to consent orders entered between ADEM and several parties (including Alabama Electric Cooperative, Joe Calloway, Phenix Lumber Company, L&R Development LLC, Pioneer Materials LLC, and Cagle's Inc.) resolving various alleged violations of ADEM's regulations. The Hearing Officer issued a recommended order denying ADEM's motion to dismiss for lack of standing, holding that any person who files comments on a proposed consent order automatically has standing to request a hearing before the Commission. ADEM filed objections to the recommended order. After a motion by Commissioner Wainwright to reject the recommended order failed to pass, the Commission voted 3 to 2 to adopt the recommended order, with Commissioners Phillips, Byington and Hairston voting in the majority. As a result, the petitioner's challenge to the consent orders will move forward.

Public Comments

Before adjourning, the Commission listened to comments by Ms. Jayme Hill (Alabama Environmental Council) speaking on behalf of the ADEM Reform Coalition concerning a recent report by the Enforcement and Administrative Penalty Stakeholder Committee. The final report of the Stakeholder Committee is available online at <http://www.adem.state.al.us/EMCInformation/PenaltyPoliciesDraft.pdf>. Ms. Hill applauded the report and urged ADEM to begin implementing its recommendations as soon as possible.

Next Meeting

The Commission will hold its next regularly scheduled meeting on August 12, 2005.

Questions about items appearing in this Update may be directed to Bill Satterfield at (205) 226-3423 in Birmingham or Jim Byram at (334) 269-3159 in Montgomery, or our website can be accessed at www.balch.com. This publication is intended to provide general information. It is not intended as a solicitation and, in the event legal services are sought, no representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.