



ALABAMA ENVIRONMENTAL UPDATE

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION MEETING OF JUNE 24, 2011

Introductory Business

The Commission meeting began with the approval of the minutes from the previous meeting. Six Commissioners (Davis, Richardson, Miller, Phillips, Lester, and Laier) were present at the meeting.

Director's Report

ADEM Director LeFleur began his report by discussing significant environmental legislation enacted during the 2011 Alabama legislative session. The first piece of legislation he discussed was Act 258, which removes an existing exemption from regulation for fly ash waste, bottom ash waste, boiler slag waste, and flue gas emission control wastes and authorizes ADEM to regulate these substances as solid wastes. The Commission also passed a resolution honoring Representative Greg Canfield and President pro tem Del Marsh for their help with the passage of this bill. Next, Director LeFleur discussed Act 297, which places a 24-month moratorium on the issuance of permits by ADEM and any state and local governmental agency to new public solid waste landfills which would receive or are intended to receive waste not generated by the permittee. The last environmental bill passed was Act 612, which removes the requirement to charge alleged violators a minimum penalty of \$100 per day for certain violations. Director LeFleur is working with the Department to revise their regulations to implement these new laws.

Next, Director LeFleur noted that since he's been director, 3 major disasters have occurred in the State: The Deepwater Horizon Oil Spill, extreme budget cuts, and the recent tornados. With respect to the oil spill, he indicated that ADEM has put 35,000 hours towards responding to the disaster and that the Department is now entering the final phase of its response. As to the budget cuts, the Director indicated that funds the Department received from the General Fund have been cut by 28% or \$1.55 million dollars. To recoup the decrease in funding, ADEM plans to have a 19% increase in its fees, which will be implemented in the next couple of months. The regulated community should expect the largest increase to occur in the water division. While discussing the water division, the Director noted that the stormwater division hired an engineer from the private sector and that the division consolidated the stormwater inspection division with the field operations division to eliminate overlap of duties. Lastly, Director LeFleur addressed the severe tornados that destroyed many areas of the state. He indicated that 10.3 million cubic yards of debris has already been removed and that ADEM was assisting in the removal process.

Commission's Actions

The citizen petition by Kids v. Global Warming for promulgation of a rule to regulate fossil fuel carbon dioxide emissions and to establish an effective emissions reduction strategy that will achieve a concentration of 350ppm atmospheric carbon dioxide by 2100 has been withdrawn.

Turning its attention to ongoing administrative proceedings, the Commission voted unanimously to approve the Administrative Law Judge's orders in both McClean Enterprises, LLC v. ADEM, EMC Docket No. 10-07 (NPDES-Related Matter) and Reef, LLC v. ADEM, EMC Docket No. 11-02 (NPDES-Related Matter).

Next Meeting

The Commission will hold its next regularly scheduled meeting on August 19, 2011.

Other Items

In addition to the legislative activity noted by Director LeFleur, the Alabama Legislature overwhelming voted to approve a constitutional amendment that would reauthorize the Forever Wild Land Trust for another 20 year. Approving a constitutional amendment allows Alabama voters to have the final say during the November 2012 election on whether to continue the program. The Forever Wild Program was established in 1992 to provide for the purchase of public recreational lands. Eighty-six (86) tracts totaling 222,771 acres located throughout the state have already been acquired.

On June 20, 2011, the U.S. Supreme Court reversed and remanded the Second Circuit's opinion in *AEP v. Connecticut* and held that the States, the City of New York, and three private land trusts could not use federal common law public nuisance claims against carbon-dioxide emitters. However, the opinion was not a complete victory for industry because the Court was split 4-4 (Justice Sotomayor recused due to her involvement with the Second Circuit panel) on whether the plaintiffs had Article III standing to bring the lawsuit. By failing to decide this issue, it leaves the door open for similar lawsuits should EPA ever cease to regulate carbon dioxide. The case was originally filed in July 2004 in the U.S. District Court for the Southern District of New York. The complaints alleged that certain utility companies' emissions of carbon dioxide, a greenhouse gas, contribute to global warming, which the plaintiffs assert is a public nuisance.

Balch & Bingham LLP's Environmental & Natural Resources Section continues to grow. We welcome Patrick Runge, who is joining us as a member of our section. Patrick previously worked in the firm's litigation section. Patrick received his undergraduate degree from Emory and his law degree from Notre Dame. We look forward to having Patrick as part of our team.