

# Environmental Update

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## ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION MEETING OF OCTOBER 28, 2003

### LACK OF QUORUM:

Commissioner Wainwright began the meeting, which lacked a quorum and was attended by only three commissioners (Commissioners Wainwright, Sanders, and Lester), by explaining that Commissioner Byington could not attend due to the scheduled birth of his daughter, Commissioner Phillips had business in New York, and Commissioners Smith and Hairston were unable to attend. Noting that the Commission is statutorily obligated to meet every two months, Commissioner Wainwright stated that this meeting would only cover information items and would postpone any voting matters until the next scheduled meeting.

### DIRECTOR'S REPORT:

ADEM Director James Warr introduced two employees of ADEM to give presentations. First, Ron Gore, Chief of ADEM's Air Division, gave a Powerpoint presentation regarding the new standards for ozone and particulate matter. The new ozone standard, also referred to as the "8-Hour Ozone Standard," is 20% more restrictive than the previous standard. Currently, only one monitor in Alabama shows an exceedance of the current ozone standard and ADEM expects that all other monitors will read attainment of this higher standard. Mr. Gore also discussed the new particulate matter standard, stating that at least five monitors in Alabama will exceed the new standard. These new standards, Mr. Gore explained, represent a change in philosophy nationwide from local emission reduction measures to regional and national measures to effect attainment.

Second, Steve Jenkins, Chief of ADEM's Field Operations, gave a presentation regarding ADEM's emergency response programs. ADEM currently divides its 24-hour emergency response programs into three categories: (1) Natural Hazards (hurricanes, tornados, etc.); (2) Technological Hazards (facility accidents); and (3) Terrorism. The second category, technological hazards, gains the most attention. Mr. Jenkins also explained ADEM's approach to minimizing the environmental impacts resulting from oil pollution incidents, hazardous material releases, and various other incidents such as petroleum truck accidents and train derailments.

Following these presentations, Director Warr emphasized the tremendous effort made by the coordinated state and local agencies to respond to these environmental emergencies. In relation to Mr. Gore's presentation, the Director noted that all environmental standards continue to become more restrictive. He stressed that these higher standards for ozone and particulate matter should not be seen as responses required by a failure of previous standards. Nonetheless, in light of these new standards, the Director told the Commission that new equipment may be needed to adequately monitor the regulated community.

Next, Director Warr discussed ADEM's budget situation. After noting that ADEM finished Fiscal Year 2003 in the black, Director Warr painted a gloomier forecast for the following years. Due to recent deep cuts in ADEM's budget ADEM moved resources and employees away from the solid waste program to other operations adequately funded by non-state sources. The Director also expressed concern that the next fiscal year could see additional cuts in ADEM's budget, which would obliterate any discretionary funds the agency currently receives and may jeopardize the ability of Alabama to receive matching grants from federal environmental programs. The Governor's Commission on Efficiency is expected to make its recommendations in December. Those recommendations may have serious implications for ADEM's budget allocation, according to Mr. Warr.

Director Warr then turned his attention to other recent developments of interest to the Commission. First, he expressed relief that ADEM's concerns over the recent legislation designed to ensure the solvency of the state's Underground Storage Tank Program were resolved prior to its final passage. Director Warr also expressed frustration at the lack of public participation in the various workshops

presented by ADEM during October in conjunction with Worldwide Monitoring Month. He also reported that significant fish kills occurred last month, including one incident off the Gulf Coast which resulted in a large number of catfish dying. ADEM is awaiting the results of tests performed to determine the cause of the fish kills.

Next, the Director described four actions ADEM expects to take in the near future. First, ADEM's Land Division is preparing new hazardous waste regulations. Second, ADEM is currently preparing new regulations to implement the recently-created Scrap Tire Program. Third, ADEM is preparing regulations to implement the U.S. Environmental Protection Agency's new changes to construction permit regulations. Finally, Director Warr told the Commission that ADEM is working on three new initiatives in the area of water quality, including the promulgation of nutrient criteria, bacteria standards for marine water, and a review of the toxic criteria for water quality. Director Warr expects to issue public notice for these actions in the coming months.

Director Warr also discussed the final enforcement statistics for 2003. He reported that ADEM issued 144 administrative orders resulting in a total of \$1.7 million in penalties. This sum was lower than each of the previous two years. The reason for this decline in enforcement orders, the Director explained, stems from an Eleventh Circuit decision in January which held that Alabama's clean water program was not comparable to the federal Clean Water Act. Since the Alabama Legislature resolved the problems identified by the Eleventh Circuit, the Director expects that the enforcement statistics will return to pre-2003 levels next year.

#### **REPORT FROM THE RULEMAKING PETITION SUBCOMMITTEE:**

Commissioner Wainwright stated that all comments received by the Subcommittee opposed the proposed rule change, which would have restored the authority of the Commission to place items on the agenda upon a Commissioner's successful motion to do so. The Subcommittee recommended that no action be taken on the proposal until a later date.

#### **OTHER ITEMS:**

Over the course of the summer and early fall, Balch & Bingham added **three new associates** to the firm's Environment & Natural Resources section. **Steven A. Burns** formerly practiced law with the Washington, D.C., office of Van Ness Feldman. He is a graduate of the Georgetown University Law Center. **Joel I. Gilbert**, a graduate of the University of Alabama School of Law, previously clerked with Alabama Supreme Court Justice Jean Brown. He also holds a Masters in Environmental Management from Samford University. **Jeffrey H. Wood** is a *magna cum laude* graduate of both Florida State University and the Florida State University College of Law.

On October 27, 2003, EPA published a final rule in the Federal Register amending the agency's **New Source Review rules**. The rule finalizes part of a proposal published last December and establishes a category of equipment replacements at existing major sources which would be automatically excluded from "modification" pre-construction permitting under the Clean Air Act's PSD and non-attainment NSR. EPA explains that the rule will provide certainty to companies seeking to maintain existing facilities. However, several northeastern states have already petitioned for judicial review of the rule. The new rule must be adopted into the Alabama State Implementation Plan to become part of the Alabama New Source Review permitting program. For more information, contact Grady Moore at (205) 226-8718.

In two recent Federal Register notices, the U.S. Fish & Wildlife Service (FWS) has proposed to make revisions to its regulations applicable to **Safe Harbor Agreements and Candidate Conservation Agreements with Assurances** and its generic enhancement of survival permit regulations. See 68 Fed. Reg. 53320 (2003); 68 Fed. Reg. 53327 (2003). The purpose of the revisions is to clarify several ambiguities in the existing regulations and to correct inconsistencies between those regulations and FWS' Safe Harbor and Candidate Conservation policies. The proposed regulatory changes should make it simpler and more attractive for businesses and landowners to enter into these types of conservation agreements with FWS and receive in exchange a permit that would allow development activities to proceed despite the presence of protected species. For more information, contact Stephen Gidiere at (205) 226-8735.

#### **NEXT MEETING:**

The Commission's next meeting will be December 23, 2003 at 1:30 p.m. All agenda items not voted on at today's meeting due to the lack of a quorum will be moved to the next meeting.

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Questions about items appearing in this Update may be directed to Bill Satterfield at (205) 226-3423 in Birmingham or Dorman Walker at (334) 269-3159 in Montgomery, or our website can be accessed at [www.balch.com](http://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.