

BALCH & BINGHAM LLP  
A L A B A M A  
**Environmental Update**

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**ALABAMA ENVIRONMENTAL MANAGEMENT  
COMMISSION MEETING OF AUGUST 26, 2003**

**DIRECTOR'S REPORT:**

ADEM Director Jim Warr began his report by introducing Dr. John Christy, State Climatologist, who provided a Power Point presentation on global climate change. Some of Dr. Christy's more interesting points were: (1) the polar ice caps are not disappearing; (2) the global warming of the last 100 years has occurred at least six times over the last 1000 years, meaning the planet is not experiencing an unusual warming trend; and (3) although there has been a slight rise in the surface temperature of the planet, the troposphere is not warming. Overall, Dr. Christy explained that the media has blown the "global warming" threat out of proportion.

Director Warr then informed the Commission that the Department was on track with this year's budget. However, if ADEM is forced to live with the proposed budget for FY 2004, ADEM will likely see a 21-22% cut in its general funding. Director Warr explained that the Department will be forced to pull funding from its solid waste program to make up for the lost funds in other programs.

Next, the Director noted that the incineration of chemical weapons at the Anniston Army Depot is proceeding extremely well. The Director informed the Commission that the Department has an inspector at the site at all times. He noted that, as of today, 509 rockets carrying nerve agents have been destroyed.

Director Warr then explained that the Underground Storage Tank Trust Fund was being depleted. Specifically, he stated that if both the current rate of income and the current rate of payments from the fund remain the same, the Trust Fund will be depleted by the end of the second quarter of FY 2004. In an effort to replenish the Trust Fund, Director Warr explained that the Department has drafted legislation which he hopes will be introduced in Governor Bob Riley's upcoming special session.

At the conclusion of his report, the Director mentioned that the deadline for filing applications for ADEM's Pollution Prevention awards has expired. He noted that ADEM would make a determination of the winners by the end of this calendar year.

**REPORT FROM THE COMMISSION'S ATTORNEY:**

The Commission's attorney, Mr. Robert Tambling, reported that he has reviewed whether the Department can delegate part of its Phase II storm water inspection program to the Jefferson County Storm Water Management Authority ("SWMA"). Mr. Tambling concluded that Alabama law does not allow the Department to delegate any of its storm water management program to SWMA. He noted that SWMA could attempt to introduce legislation which would specifically allow SWMA to conduct inspections for the Department; however, he explained that such legislation was unlikely to pass.

**REPORT FROM THE COMMISSION'S STRATEGIC PLANNING COMMITTEE:**

Commissioner Scott Phillips introduced a resolution which clarified the role of the Strategic Planning Committee ("Committee").

Specifically, the new resolution provided that the Committee would “assist” the Commission in developing a strategic plan for the Department, rather than the Committee actually developing the plan itself. The Commission adopted Commissioner’s Phillips’ resolution unanimously.

### COMMISSION ACTIONS:

First, the Commission voted to accept the Rulemaking Subcommittee’s recommendation to deny a petition to amend ADEM Rule 335-1-1-.06, which would have decreased the costs of copying the Department’s public records. Commissioner Sam Wainwright explained that the Subcommittee recommended denying the petition because the Department will go to rulemaking on this matter after it determines the Department’s actual costs for copying documents. Commissioner Pat Byington abstained.

Next, the Commission voted to amend ADEM Rule 335-2-3-.05 in order to restore the Commission’s authority to take up new business at a Commission meeting upon motion by a member and a majority vote. Earlier this year, amendments to those regulations had restricted Commissioners’ abilities to amend Commission agendas.

The Commission then voted to amend the Department’s air regulations. According to the Department, the changes simply codify a fifteen year-old policy regarding the Department’s enforcement of opacity standards and a policy regarding open burning. Additionally, the amendments correct various administrative errors. Notably, the U.S. Environmental Protection Agency has already indicated that it will approve these amendments. Commissioner Pat Byington was the sole dissenting vote.

The Commission voted unanimously to amend Chapters 15 and 16 of the Department’s groundwater regulations. The new changes clarify the procedures the Department will use to establish corrective action limits at sites where releases have occurred from underground and aboveground petroleum and hazardous substance storage tanks.

Finally, on a motion by Commissioner Riley Smith, the Commission passed a resolution which recommends that Director Warr sign a Memorandum of Understanding (“MOU”) between two Federal Trustees, the Alabama Department of Conservation and Natural Resources, the Geological Survey of Alabama, the Alabama Department of Environmental Management, and the Ciba-Geigy Corporation. Commissioner Smith explained that the purpose of the MOU is to conduct studies to determine whether natural resource damages have occurred at Ciba-Geigy’s McIntosh, Alabama, Superfund site and, if so, to determine the extent of those damages. Commissioners Sam Wainwright and John Lester voted against the resolution.

### OTHER ITEMS:

On July 23, 2003, the United States Court of Appeals for the Eleventh Circuit held that the **Alabama-Tombigbee Rivers Coalition, Parker Towing Company, Inc, and Charles A. Haun** (collectively the “Coalition”) **have standing to challenge the decision of the U. S. Fish and Wildlife Service (“FWS”) to list the Alabama sturgeon as an endangered species.** The Eleventh Circuit opinion reversed a July 30, 2002, decision by U.S. District Court Judge Lynwood Smith. The Coalition had sued the FWS on January 18, 2001, alleging that the listing of the Alabama sturgeon was illegal because, among other things, it was based on a flawed conclusion that the Alabama sturgeon is a separate species and failed to designate the sturgeon’s critical habitat. The decision by the Eleventh Circuit was based on a straight-forward analysis of the traditional elements for standing which have been clarified by the United States Supreme Court in numerous court cases. The Eleventh Circuit concluded the Coalition has indeed suffered concrete injuries in the past and will continue to suffer injuries in the future as a result of FWS’ listing decision. As a result of the Eleventh Circuit’s decision, the lawsuit will now be sent back to the federal District Court in Birmingham for a decision on the Coalition’s substantive claims.

### NEXT MEETING:

The Commission’s next meeting is scheduled for October 28, 2003 at 1:30 p.m.

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Questions about items appearing in this Update may be directed to Steve McKinney at (205) 226-3496 in Birmingham or Jim Byram 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.