



BALCH & BINGHAM LLP

ALABAMA

Environmental Update

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION MEETING OF FEBRUARY 24, 2004

DIRECTOR'S REPORT:

ADEM Director James Warr began by discussing the Department's budget for the first four months of the fiscal year. Specifically, the Director stated that the expenditures through January are on track at approximately 30% of the yearly budget. In addition, the Director noted that the Legislature has proposed a further reduction to the Department's budget of approximately 7%. If approved, the additional reduction will equal the Department's lowest appropriation since fiscal year 1988.

The Director then informed the Commission that the Department is preparing to propose the "Brownfield Voluntary Cleanup" and the "Brownfield State Revolving Fund" regulations for rulemaking and will provide public notice in the near future. Also, the Director alerted the Commission that the so-called Brownfields Tax Incentive bill, which allows counties to provide tax breaks to Brownfields development sites, had passed committee review.

The Director then notified the Commission that on January 4, 2004, the Department held a hearing regarding the removal of Jefferson and Shelby counties from the EPA's 1 hour Clean Air Act non-attainment list. Furthermore, the EPA will provide public notice of the counties' removal in the Federal Register in March.

Next, Russell Kelley, ADEM's Chief of Permits and Services Division, discussed planned upgrades to ADEM's website. The server would be housed at ADEM's headquarters rather than continuing to be shared with several other agencies. Its memory would also be increased.

Finally, the Director provided the Department's 2003 Annual Report to the Commission for review.

COMMISSION'S ACTION:

First, Commissioner Scott Phillips provided the Commission with a report regarding the Strategic Planning Special Committee's status. Specifically, Commissioner Phillips informed the Commission that the special committee had compiled a draft report incorporating all the information obtained from meetings with the Department and comments received from the public hearings and stakeholders committee meetings. Commissioner Phillips requested that the Commission provide comments regarding the draft report by March 15, 2004. In addition, a special Commission meeting has been tentatively scheduled for March 19, 2004, to discuss the draft report's findings.

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Next, the Commission addressed various administrative cases. First, the Commission noted for the record the petitioner's withdrawal of the request for hearing in the matter styled Kerr-McGee Chemical, L.L.C. v. ADEM, No. 03-06. Next, the Commission approved the administrative law judge's recommendation to grant the petitioner's motion to dismiss in Pensacola Gulf Coastkeepers, Inc. v. ADEM and JSC Brewton, Inc., No. 02-07. Also, in Save Our Unique Land and Streams v. ADEM, and North Montgomery Materials, L.L.C., No. 04-02, the Commission granted the petitioner's motion for oral argument and tabled the petitioner's renewed motion for a stay until the next Commission meeting. Next, the Commission tabled consideration of the administrative law judge's report in Alabama Rivers Alliance and Friends of Hurricane Creek v. ADEM, and Tuscaloosa Resources, Inc., No. 02-06, until a special Committee meeting to be held on March 19, 2004. This delay will allow the Commission to consider a number of briefs timely filed late in this particular proceeding.

Finally, the Commission denied petitioner Wild South's petition to amend the Division 2 - Environmental Management's Commission Regulations, Rule No. 335-2-1-.23, "Stay of Action Pending Issuance of Order." The Commission recognized that the automatic stay provision proposed by Wild South would conflict with the statutory authority conferred on the Commission by the Alabama Environmental Management Act ("AEMA"). The AEMA states that only the Commission may stay a departmental action (such as a permit issuance) during an appeal of such action; Wild South's proposed rule would have made a stay of any challenged provisions or conditions automatic simply by virtue of the appeal being filed. Such an automatic stay would, therefore, exceed the AEMA's scope.

OTHER ITEMS:

On February 13, 2004, the United States Department of Justice, on behalf of the Environmental Protection Agency, filed with the United States Supreme Court a Petition for Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Tennessee Valley Authority v. Whitman*. The TVA case is one of several cases filed against a number of coal-fired electric utility plants throughout the United States alleging these plants conducted maintenance activities and projects at those plants without undergoing proper permitting requirements under a program known as New Source Review (NSR). The utilities vigorously dispute the allegations and the cases are at various stages of litigation. Some of the cases continue to be stayed pending the decision of the Supreme Court on whether to grant the government's position. A number of outcomes could result, depending on whether the Court grants or denies the government's petition. At a minimum, if the Court grants the petition, it will decide whether the Eleventh Circuit's rulings on several threshold issues were correct, but should not address the merits of the underlying case. If the Court does not grant the petition, TVA is free to ignore EPA's compliance order and EPA will be left with the option of filing suit in United States District Court as it has done with all of the other utilities involved in these cases. For more information, contact Steve McKinney at (205) 226-3496.

NEXT MEETING:

The Commission's next regular meeting is scheduled for Tuesday, April 20, 2004, although a special meeting is tentatively scheduled for March 19, 2004.