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A L A B A M A
Environmental Update

**ALABAMA ENVIRONMENTAL MANAGEMENT
COMMISSION MEETING OF FEBRUARY 25, 2003**

DIRECTOR'S REPORT:

Director James Warr reported that, under the federal government's recently-passed Omnibus Budget, most of the program funding that supports ADEM's activities remains largely unchanged. However, the timing of federal funding availability may require ADEM to shift monies among its programs until the Department receives the funding it is due. The Director noted that while the overall outlook for the current fiscal year looks "pretty good," ADEM could face "serious" problems in 2004 if funding does not improve.

Director Warr next mentioned several legislative items receiving ADEM support. Two Brownfields-related bills are expected to be introduced in the upcoming legislative session. One of the bills includes a proposal for Brownfields revolving funds which will be similar to the current Clean Water Act revolving fund program. That bill is designed to provide state matches for federal grants to developers of Brownfields sites. The second Brownfields-related bill will contain various tax incentives for Brownfields developers. Director Warr also stated that ADEM was supporting a proposed scrap tire bill, which would regulate the management and disposal of scrap tires.

Director Warr also proposed a resolution supporting a local decision-making measure proposed by the Governor's Constitutional Committee to allow local governments "to provide for and accommodate development in some logical fashion." The Commission adopted the proposed resolution without discussion.

Finally, Commissioner Byington asked Director Warr about the effect of the recent decision by the Eleventh Circuit Court of Appeals in McAbee v. Fort Payne (discussed below in "Other Items"). Director Warr predicted that the net effect of the court's ruling would be to significantly slow down ADEM's enforcement activities due to the uncertainty now surrounding the legal effects of its administrative orders on alleged violators.

COMMISSION ACTIONS:

The Commission voted to adopt the Department's proposed amendments to its Division 3 Air Program regulations. The amendments incorporate by reference changes made by the EPA to the federal New Source Performance Standards (NSPS), National Emission Standards for Hazardous Air Pollutants (NESHAPS) and Acid Rain Program. They also revise the Department's regulations to incorporate a federal requirement for removal, handling, and disposal of asbestos-containing material.

The Commission also voted to adopt proposed amendments to the Department's Division 6 Water Use Classifications which revised the classification of a segment of Five Mile Creek, located in Jefferson County, from Agricultural and Industrial to Fish and Wildlife.

The Commission next adopted proposed amendments to the Department's Division 14 Hazardous Waste Regulations to clarify vague regulations in the existing rules and to conform to federal regulations on Maximum Achievable Control Technology standards.

The Commission finally considered three matters on appeal. In Teledyne Continental Motors, Inc. v. ADEM and Johnny Lee v. ADEM, the Commission approved the recommendations of the Administrative Law Judge to dismiss the pending appeal and to grant the Petitioner's motion to dismiss, respectively. In Gulf Towers Condominium Association v. ADEM, the Commission heard oral argument and then accepted the recommendation of the Administrative Law Judge to grant a variance for Gulf Towers to construct a bulkhead seaward of the coastal development line.

In other business, Commissioner Byington read into the record a letter asking the Commission to develop a strategic plan to outline priorities for the Department, increase accountability, and enhance ADEM's ability to protect public health and the environment. Several Commissioners expressed their opinion that ADEM, rather than the Commission, should develop any such plan, as ADEM had the relevant experience and expertise in such matters.

Finally, the Reverend Mark Johnson and Ms. Ann Smith spoke on behalf of the ADEM Reform Coalition, a coalition of citizen groups calling for changes in ADEM's structure and goals. The Coalition presented to the Commission a "Blueprint for Reform," outlining the Coalition's four main goals, including changes to the ADEM leadership structure, enforcement, Department resources, and public participation. The Coalition intends to meet with the Commission, Director Warr, and ADEM staff to discuss their reform effort in greater detail.

OTHER ITEMS:

The Eleventh Circuit Court of Appeals recently held that Alabama law governing the process for administrative enforcement actions is not sufficiently "comparable" to the process set out in the federal Clean Water Act ("CWA") to act as a bar to federal citizen suit claims. McAbee v. City of Fort Payne, No. 02-10149 (11th Cir. Jan. 23, 2003).

The court held that Alabama's penalty-assessment provisions are comparable to the CWA, but that the public participation requirements are not. The result of this ruling is that citizen suits may be able to proceed in federal court despite the fact that ADEM has commenced and is diligently prosecuting an administrative enforcement action seeking civil penalties for the same alleged violations. In other words, regulated entities (which includes all entities with water discharge permits such as cities, counties, various state agencies, and private industrial and commercial facilities) may now be faced with defending themselves in two separate forums for the same violation. For more information on this matter, contact Stephen Gidiere at (205) 226-8735.

On the heels of disputes that threatened to derail the **ACT and ACT interstate compact negotiations**, the three Republican governors of Alabama, Georgia and Florida have agreed to pursue further negotiations. The recent roadblock to progress on the ACT and ACF deals arose over the terms of a settlement of a lawsuit in Georgia regarding water usage and the operation of a major federal reservoir on the Chattahoochee. Alabama went to Federal District Court in Birmingham to stop the settlement, rekindling the litigation it originally filed in 1990 in response to similar actions in Georgia. The governors have agreed to continue negotiations and keep court actions on hold until June 30th. For more information on this matter, contact Grady Moore at (205) 226-8718.

NEXT MEETING:

The Commission's next meeting is scheduled for April 22, 2003 at 1:30 p.m.

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