

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

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**ALABAMA ENVIRONMENTAL MANAGEMENT  
COMMISSION MEETING OF DECEMBER 23, 2003**

**DIRECTOR'S REPORT:**

ADEM Director James Warr began his report by discussing the Department's budget situation for the first quarter of the new fiscal year. Beginning in October, ADEM reassigned solid waste personnel to other areas to accommodate the budget shortfall. In addition, the United States Environmental Protection Agency (EPA) will be providing funds equal to fifty percent of last year's budget. Director Warr noted that the Governor's Commission on Efficiency, Consolidation and Funding expects a 56% cut in ADEM's fiscal year 2005 budget, which will reduce the Department's funding level to 34% of the 1991 level. Moreover, Director Warr stated that the Department is currently litigating fifty cases.

Thereafter, the Director recognized companies that have embraced ADEM's Pollution Prevention Program. The following companies received ADEM's Achievement Award for their pollution prevention efforts: Michelin North America; Anniston Munitions Center; and Toyota Motor Manufacturing. In addition, three other companies received the 2003 Director's Award, including 3M Decatur, McNeil Nutritionals, and 3M Guin. The Director also requested that the Commission pass a resolution of continuance of practice to recognize ADEM's employees called to serve in active duty. This motion passed unanimously.

Finally, the Director explained that the ozone gauge in Jefferson and Shelby counties showed compliance with the one-hour ozone standard. As a result, ADEM has asked EPA for redesignation of these counties from nonattainment to attainment for the one-hour ozone standard. The Director stated that ADEM will begin working on attaining the new 8-hour ozone standard.

**COMMISSION'S ACTION:**

First, the Commission voted to adopt the recommendation of its Strategic Planning Special Committee to adopt the environmental stakeholder committee's recommendations, all public comments received, and Commissioner Byington's and ADEM's vision statements for use in developing a strategic plan. The Commission will meet on January 9, 2004, at 9 a.m. with ADEM to draft the strategic plan.

Next, the Commission voted to adopt proposed revisions to ADEM Admin. Code R. 335-2-3-.05 to restore the Commission's authority to take up new business at a Commission meeting upon motion by a member that is seconded and carried. Earlier this year, amendments to those regulations had restricted Commissioners' abilities to amend Commission agendas.

The Commission then approved a petition for proposed rulemaking regarding the National Pollutant Discharge Elimination System (NPDES) regulations and General Permit for concrete batch plants. The petition will now move forward in the rulemaking process.

The Commission voted unanimously to adopt proposed amendments to the Department's Water Quality Regulations, which will revise the water use classification for a segment of the Coosa River in the Logan-Martin Lake area in St. Clair, Calhoun, and Talladega Counties. The change is proposed to add the Public Water Supply use classification to the segment of the Coosa River extending from Broken Arrow Creek to Trout Creek. The segment is currently classified as Swimming and Fish & Wildlife.

In addition, the Commission voted to amend the Department's general administrative regulations to establish fees for the reproduction of certain documents. ADEM had proposed to charge 40 cents per copy. However, the Commission amended ADEM's proposal and reduced the charge to 30 cents per black and white copy.

Next, the Commission adopted proposed amendments to the Department's Drinking Water Regulations. In response to EPA's comments, the approved amendments: (1) change the monitoring requirements for chemical contaminants and radionuclides; (2) allow continuation of expired permits; and (3) modify consumer confidence report regulations to conform to federal requirements.

Finally, the Commission addressed various administrative cases. First, the Commission approved the petitioner's motion for voluntary dismissal in the matter styled City of Bessemer v. ADEM, No. 03-07. Next, the Commission approved the administrative law judge's recommendation to approve the petitioner's withdrawal of the request for hearing in Legal Environmental Assistance Foundation, Inc. v. ADEM, No. 03-08. Also, in Save Our Unique Land and Streams v. ADEM, No. 04-02, the Commission denied the intervenor's request for oral argument and tabled the petitioner's request for a stay until the next Commission meeting. Finally, the Commission approved the recommended order in Alabama Environmental Council v. ADEM, No. 04-01, which dismissed an appeal challenging the recently-adopted revisions to the Department's opacity regulations.

#### **PUBLIC COMMENTS:**

At the close of the meeting, Gary Hartline, representing Sand Mountain Concerned Citizens, gave a presentation regarding ADEM's alleged failure to enforce the hog concentrated animal feeding operations (CAFOs) regulations with respect to hog farming operations on Sand Mountain.

#### **OTHER ITEMS:**

Earlier this month, the United States Court of Appeals for the Eleventh Circuit held that **attorney's fees** may be awarded for post-judgment monitoring of EPA compliance with a consent decree to develop total maximum daily loads (TMDLs) under the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.* See Sierra Club v. Hankinson, No. 03-11263 (11th Cir. Dec. 5, 2003). In 1994, environmental groups filed suit to force EPA and Georgia to issue a complete list of water quality limited segments (WQLS) and to develop the necessary TMDLs. After the district court agreed with the plaintiffs, the parties entered a consent decree requiring EPA to update Georgia's WQLS list and to establish TMDLs. After EPA and Georgia failed to fully comply with the terms of the consent decree, the plaintiffs moved the district court to compel compliance. The district court found EPA to be in noncompliance, and in fact, awarded the plaintiffs its attorney's fees and costs associated with monitoring EPA's compliance – a figure which almost reached \$140,000. On appeal, the Eleventh Circuit affirmed the district court, reasoning that the plaintiffs were entitled to attorney's fees for monitoring EPA compliance with the consent decree because the work was relevant to the rights established by the decree and related to the terms of the judgment. For more information, contact Joel Gilbert at (205) 226-8737.

#### **NEXT MEETING:**

The Commission's next meeting is scheduled for Tuesday, February 24, 2004, 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.