



BALCH & BINGHAM LLP

ALABAMA

Environmental Update

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION MEETING OF DECEMBER 2, 2005

Director's Report

After the Commission approved the minutes from the November 4, 2005 meeting, ADEM Director Trey Glenn reported that ADEM has started a new fiscal year and is accepting requests for the new budget. He also provided a list of contracts that have been executed over the last month to the Commission. Director Glenn indicated that ADEM may analyze potential rulemaking issues for the Clean Air Interstate Rule and the Clean Air Mercury Rule. ADEM is also intending to initiate the triennial review process for Alabama's water quality standards.

The Director was pleased to announce that ADEM's analytical laboratory is already 50% completed and is scheduled for completion in June 2006. Director Glenn also reported there are 32 grounded shrimping vessels still remaining due to Hurricane Katrina, of which FEMA has only agreed to remove three. While ADEM is seeking the funds to remove the other twenty-nine vessels, the Director noted that these vessels currently pose no known environmental hazards.

Director Glenn provided the Commission with background information on Alabama's mercury consumption levels, and the Director reported that he met with Dr. Williamson of the Alabama Department of Public Health concerning fish consumption levels. The Director advised the Commission that ADEM will be looking at the mercury values used for issuing advisories and the possibility of implementing EPA values for mercury.

Next, the Director clarified certain issues raised in public comments at the previous Commission meeting, noting that some information provided in a presentation by LEAF was misleading, including the use of EPA's Risk Screening Environmental Indicator (RSEI). Also, in response to Dr. Joseph Leahy's public comments at the previous meeting concerning Crow Creek, Director Glenn explained that ADEM was already involved in litigation concerning those issues.

Director Glenn explained that the Department is currently reviewing the impact of the recent 11th Circuit ruling in Sierra Club v. TVA, which involves the state's opacity standards. Also, Director Glenn noted that a recent decision by the Cleburne County Circuit Court, which held that certain NPDES permits issued by the Department were unlawful, was made moot by the Commission's recent adoption of the anti-degradation regulations. Furthermore, the Director stated that the recent decision to deny class certification against Olin Corporation primarily due to lack of evidence of mercury contamination re-enforced the credibility of the employees working at ADEM. The Director closed his report by commending ADEM biologist Lisa Huff for being selected as the State Biologist of the Year.

Commission Actions

Following the Director's report, Commissioner Phillips explained that he met with Mr. Turner from the Attorney General's office to discuss ways to improve the administrative hearing process. Next, the Commission voted to accept the proposed amendments to Division 1 - General Administration Regulations, which increased the permit application fees by 15%. The Commission unanimously approved the proposed amendments to the Division 6, Underground Storage Tanks regulations.

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Commissioner Wainwright proposed a recommendation for rulemaking to add a new paragraph (6) to 335-2-3 requiring that the proceedings of the Commission and its committees be governed by Robert's Rules of Order, except where otherwise provided in Chapter 335-2-3. On the recommendation of Mr. Hagood, Commissioner Wainwright also proposed repealing sections 335-2-3-.07 and 335-2-3-.08 because those sections would be repeated in Robert's Rules of Order. Furthermore, Commissioner Wainwright proposed to eliminate 335-2-3-.05(5), which states that a Commission may only take up new business at a Commission meeting if a motion is made, seconded, and carried by a majority of those voting. The Commission voted 4-2 to send the proposal to public comment, with Commissioners Byington and Hairston opposing. Commissioner Wainwright also proposed adding a new chapter to the Commission's regulations regarding conflict of interest disclosures. The Commission submitted Commissioner Wainwright's proposal to the Rulemaking Petition Subcommittee for review.

Turning its attention to ongoing administrative proceedings, the Commission unanimously voted to deny the motion to compel recusal of Commissioner Lester in Legal Environmental Assistance Foundation v. ADEM, EMC Docket No. 05-17. Prior to the Commission's vote, on whether to accept the ALJ's recommendation to dismiss, Commissioner Hairston expressed concern over the exact requirements to have standing for a hearing. Commissioner Hairston believes that providing comments on a consent order is sufficient to confer standing, while the EMC and ALJ's have consistently required both comment and aggrieved status. Ultimately the Commission voted to accept the ALJ's recommendation to dismiss this matter, by a 3-2 vote, with Commissioners Byington and Hairston opposing and Commissioner Smith abstaining. Also, the Commission granted the motion for a stay in The Utility Board of the City of Opp, Alabama v. ADEM, EMC Docket No. 06-02. Finally, the Commission voted unanimously to approve the 2006 calendar for the Commission.

Public Comments

Commissioner Phillips began the Public Comment period by explaining that he is investigating new ways to handle requests for public comment. He hopes to avoid future conflicts if a presentation happens to discuss an issue potentially involving litigation before the Commission. Commissioner Phillips also noted that it may be appropriate to allow parties with different views to address the Commission.

Mr. Steve Perry of THE FORUM, which represents major industries in Southwest Alabama, addressed air quality in Mobile County, as a rebuttal to the presentation by the Legal Environmental Assistance Foundation at the previous Commission meeting. Next, Bill Klutz, Environmental Manager for Degussa Corporation, provided the Commission with clarification to the TRI emissions and risk study presented by LEAF at the previous Commission meeting.

Other Items

On November 14, 2005, the federal district court in Birmingham issued a long-awaited ruling in the lawsuit challenging the U.S. Fish and Wildlife Service's (FWS) decision in 2000 to list the Alabama sturgeon as an endangered species. See Alabama-Tombigbee Rivers Coalition v. Norton, No. CV-01-0194-VEH (N.D. Ala. Nov. 14, 2005). The Alabama-Tombigbee Rivers Coalition filed the lawsuit in 2001, arguing that FWS utilized an unlawful process in making its listing decision and that the Alabama sturgeon is not a unique species, separate and distinct from the Mississippi shovelnose sturgeon. In last month's decision, the court recognized that FWS violated the Endangered Species Act by failing to designate critical habitat concurrently with the listing decision. Nonetheless, the court refused to throw out the listing decision, choosing instead to simply order FWS to designate critical habitat for the Alabama sturgeon within one year. On December 1, 2005, the court granted the government's request to extend that deadline, giving FWS until December 15, 2006, to issue a proposed rule and until December 15, 2007, to issue a final rule designating critical habitat. The Coalition is considering whether to appeal to the Eleventh Circuit Court of Appeals. For more information about the Alabama sturgeon litigation, please contact Bill Satterfield (205-226-3423 or wsatterf@balch.com) or Rob Fowler (205-226-8733 or rfowler@balch.com).

Next Meeting

The Commission's next meeting is scheduled for 10 a.m. on Friday, February 24, 2006.

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 and does not constitute advice. 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.