



# ALABAMA ENVIRONMENTAL UPDATE

## ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION MEETING OF OCTOBER 21, 2011

### **Introductory Business**

The Commissioners began the meeting with the approval of the minutes from the previous meeting. Five Commissioners (Richardson, Miller, Lester, Brown, and Laier) were in attendance. Commissioner Lester opened the floor for nominations for the Chair and Vice Chair of the Commission. Dr. Lester was unanimously re-elected Chair, and Commissioner Brown was unanimously elected Vice Chair.

### **Director's Report**

ADEM Director LeFleur began his report by noting that this was the first meeting of the 2012 Fiscal Year. Director LeFleur first summarized the financial results of 2011, and stated that ADEM fell within the 2011 operating budget of \$62 million. This budget does not include funds from programs such as the underground storage tank program and the revolving loan program. Director LeFleur explained that ADEM is funded by federal funds to administer federal statutes, departmental fees, and state funds. State funds were reduced by 33% late into FY 2011, but this reduction was compensated for by stimulus funds—primarily used for upgrading municipal drinking water and sewer projects—as well as reimbursements from BP for clean-up along the Gulf Coast after the Deepwater Horizon Oil Spill. FY 2012 will see an additional 32% reduction in state funds, as well as the closeout of the BP Spill Response and the end of stimulus funding. In order to compensate for this reduction, Director LeFleur stated that ADEM was increasing permit fees by 19 percent.

One of the challenges ADEM faces includes converting to electronic filing. Out of 19 industrial general permits, ADEM plans to have 16 operating under the Electronic Discharge Monitoring Report (E-DMR) program by the end of FY 2012. This equates to 4,000 users of the E-DMR program by the end of FY 2012. In addition, ADEM plans on expanding the recycling scrap metal tire program, seeking attainment status of ozone and PM2.5, and developing a state-wide water use policy.

Director LeFleur highlighted six environmental successes from the previous year: (1) The Environmental Committee of the Coastal Resiliency Committee; (2) Passage of the Coal Ash Legislation; (3) The Marine Water Degradation Resolution; (4) The Alabama Treasures Lake Designations; (5) The TVA Clean Air Act settlement; and (6) The completion of the Chemical Weapon Demilitarization Project in Anniston.

### **Report from the Commission Chair**

The Commission passed a resolution honoring former Commission Member Marquita Davis, ADEM member-at-large from 2010–2011, who was recently appointed the Finance Director for the State of Alabama.

The Commission unanimously approved amendments to ADEM Admin. Code rule 335-1-1, which added 8 new forms, modified 20 forms, and deleted 1 form. In addition, the Commission unanimously approved revisions to ADEM Admin. Code rule 335-1-6 to increase permit fees by 19 percent. Prior to voting on the fee increase, Commissioner Richardson questioned whether there would be a need for such an increase if there were not so new many federal regulations being imposed on states. Director LeFleur indicated that the amount of federal grant money being received by ADEM is not changing, while federal mandates continue to increase, which Commissioner Richardson highlighted as being tantamount to “unfunded federal mandates.”

The next meeting will be held on December 9, 2011.

### **Other Items**

On October, 6, 2011, the federal district court for Washington D.C. held that EPA exceeded its authority by issuing guidance documents regarding its involvement in the issuance of Section 404 permits under the Clean Water Act for surface coal mining operations. Specifically, the EPA, the Corps, and the Department of the Interior had issued a “Memorandum of Understanding on Implementing the Interagency Plan on Appalachian Surface Coal Mining” (MOU) in June 2009. The MOU established “coordinated environmental reviews of pending permit applications,” and explained that EPA and the Corps would begin to implement a practice known as the “EC Process” to review pending and future applications. EPA issued two memoranda along with the MOU that detailed the EC process. The EC Process gave EPA significant discretion at the front-end of the permit process even though the CWA specifically identifies the Corps as the sole 404 permitting authority.

The Court held that the EC Process exceeded EPA’s limited role in the Section 404 permitting process. The Court found that EPA’s role was very limited in the Section 404 process, which did not include the authority exercised under the EC Process. The Court also determined that the implementation of the EC Process violated the Administrative Procedure Act because it had been done without the notice and comment process required by the Act.

The same Court has entered a scheduling order to review EPA’s July 21, 2011 guidance calling for the implementation of conductivity limits in NPDES permits issued for surface coal mining operations in certain Appalachian states. Briefing is scheduled to begin in December of 2011. In an earlier ruling, the court was skeptical as to the legality of EPA’s guidance. The case is styled as *Nat’l Mining Ass’n v. Jackson*, No. 10-1220 (D.D.C.).

Balch & Bingham LLP’s Environmental & Natural Resources Section continues to grow. We welcome Emily Crawford and Tal Simpson, who are joining us as members of our section. Emily received her law degree in 2011 from the University of Alabama. Tal received his law degree from Georgia State University in 2011. We are pleased to have Emily and Tal as part of our team.