



BALCH & BINGHAM LLP

ALABAMA

Environmental Update

ALABAMA ENVIRONMENTAL MANAGEMENT
COMMISSION MEETING OF AUGUST 12, 2005

Director's Report

Director Trey Glenn began the meeting by noting that the Department is continuing to operate within its budget and current year's budget is on track with two months left in the fiscal year. Federal grants that the Department had been waiting on are finally starting to come in. Director Glenn then announced that the Department received "level funding" in the most recent general fund budget and that the new laboratory has broken ground and construction is expected to be complete by the end of the year.

With respect to upcoming rulemakings, Director Glenn reported that the financial assurance and tipping fee bill which failed to pass during the regular legislative session, passed during the recent special session. This legislation imposes new requirements on solid waste landfills and will help ensure that ADEM retains the authority to operate the State's EPA-approved solid waste program. The Department intends to issue public notice of proposed rulemaking to implement certain portions of that bill within the next few days.

Director Glenn also reported that the Department continues to explore opportunities to develop an environmental justice program. As examples of this effort, John Hagood, Department Executive Counsel, and Edward Harteson, who is assisting the Department with environmental justice issues, recently attended an environmental justice training session and Director Glenn is working with the Environmental Protection Agency's environmental justice specialist to evaluate opportunities for ADEM in this area. Also, as part of ADEM's response to the Enforcement and Administrative Penalty Stakeholder Committee's recommendations, all new administrative consent orders will include a more detailed discussion of penalty factors and how they are applied to determine a particular penalty.

Director Glenn detailed the Department's ongoing efforts to deal with potential environmental concerns involving the McIntosh community. ADEM continues to collect and analyze samples of soil, water, and air from the area, and the Director noted that sampled mercury levels continue to be below federal and state action levels. Director Glenn reported that ADEM personnel had recently met with plaintiff lawyers involved in the matter to review and discuss the plaintiffs' data, but that there was no new information presented at that meeting. The Director also noted that ADEM was nearing the end of its review of the permit application for the proposed Middle Tennessee rock quarry in Shelby County and that public notice of the proposed permit should be issued soon.

Finally, the Director reported that the Scrap Tire Program is finally getting underway. The provisions of ADEM's rules that regulate the accumulation of scrap tire and provide for the cleanup and remediation of illegal scrap tire piles recently became effective. Thus far, ADEM has ranked scrap tire sites around the state and bids for the removal and remediation projects are set to go out soon.

Report From the Strategic Planning Committee

Commissioner Byington reported that the committee would like to continue to hold "town hall"-type public meetings around the state, similar to the ones that were held to obtain input for developing the strategic plan. However, unlike those earlier meetings which were held in urban locations, the committee proposes to hold future meetings in rural areas as well, beginning in September and October. Public notice of those meetings will be issued soon.

Discussion of Department of Health Fish Consumption Standards for Mercury

Commissioner Byington reported that he recently met with Dr. Don Williamson, state health officer, and read a joint statement from himself and Dr. Williamson concerning the state fish consumption standards for mercury. The joint statement informed the Commission that Dr. Williamson will continue to research and review the current Alabama Department of Health fish consumption standards and commits to implementing the standard most protective of human health.

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Commission Actions

The Commission unanimously approved proposed amendments to the Division 6 – Water Quality Standards Regulations, Rule No. 335-6-10-.07, Toxic Pollutant Criteria Applicable to State Waters, Rule No. 335-6-10-.11, Water Quality Criteria Applicable to Specific Lakes, and Rule No. 335-6-11-.02, Use Classifications. The proposed amendments to Rule No. 335-6-10-.11 establish nutrient water quality criteria for the following reservoirs: Inland Lake in Blount County; Lake Jackson in Covington County; Coffeeville Lake in Clarke, Choctaw, and Marengo Counties; Demopolis Lake in Hale, Greene, and Sumter Counties; and Gainesville Lake in Greene, Sumter, and Pickens Counties. The proposed amendments to Rule No. 335-6-10-.07 correct several clerical errors. The proposed amendments to Rule No. 335-6-11-.02 correct typographical errors in the regulations text and ensure that water body names are consistent with the Geographic Names Information System (GNIS) maintained by the U.S. Geological Survey. Also, the removal of the Public Water Supply (PWS) use classification is proposed for a segment of Shoal Creek in Calhoun County. The use was inadvertently added when this rule was revised on April 20, 2004, to assign the PWS use classification to Whitesides Mill Lake in Calhoun County.

The Commission unanimously approved proposed amendments to the Division 6 – NPDES Regulations, Rule No. 335-6-6-.08, Application Format and Procedures for New Permits and for Permit Reissuance, and Rule No. 335-6-6-.10, Requirements Applicable to Particular Discharges. The proposed amendments to Rule No. 335-6-10-.08 reflect applicable application requirements of federal regulations that are applicable to facilities that employ a cooling water intake structure designed to withdraw water from waters of the state for cooling water purposes. The proposed amendments to Rule No. 335-6-6-.10 adopt by reference federal regulations that are applicable to facilities that employ a cooling water intake structure designed to withdraw water from waters of the state for cooling water purposes.

Next, the Commission noted for the record the Petitioner's withdrawal of the request for hearing in the following matters: G. KEITH CLARK V. ADEM, EMC DOCKET NO. 05-06 ; G. KEITH CLARK V. ADEM, EMC DOCKET NO. 05-08; G. KEITH CLARK V. ADEM, EMC DOCKET NO. 05-09; G. KEITH CLARK V. ADEM, EMC DOCKET NO. 05-10; G. KEITH CLARK V. ADEM, EMC DOCKET NO. 05-11; G. KEITH CLARK V. ADEM, EMC DOCKET NO. 05-12; and G. KEITH CLARK V. ADEM, EMC DOCKET NO. 05-13

Finally, the Commission took up the Alabama Coal Association's and Business Council of Alabama's Objection to Hearing Officer's Rulings on Motions to Intervene of Alabama Coal Association and Business Council of Alabama in the following consolidated cases: G. KEITH CLARK V. ADEM, EMC DOCKET NOS. 05-02, 05-03, 05-04. Commissioner Lester moved to reconsider the Commission's interim order issued at the June 17, 2005 Commission meeting which adopted the Hearing Officer's recommended order denying ADEM's motion to dismiss for lack of standing. Commissioner Sanders seconded the motion and the motion passed 4-2, with Commissioner's Byington and Hairston opposing the motion. After hearing oral argument from the Department, Petitioner, and counsel for Alabama Electric Cooperative, Commissioner Sanders moved to deny the Hearing Officer's recommended order denying ADEM's motion to dismiss, to adopt ADEM's alternative findings of fact and conclusions of law, and to grant ADEM's motion to dismiss. Commissioner Lester seconded the motion and the motion passed 4-2, with Commissioner's Byington and Hairston opposing. Having dismissed the petitions, the Commission determined it had relinquished jurisdiction to consider ACA's and BCA's objections to the Hearing Officer's denial of their motions to intervene.

ADEM's Antidegradation Policy Upheld

The Alabama Court of Civil Appeals issued a ruling today in the case of *ADEM v. Legal Environmental Assistance Foundation, Inc.* In an opinion by Judge Pittman, the Court reversed a lower court's ruling and upheld ADEM's antidegradation policy. The appellate court rejected all six of the procedural and substantive arguments raised by LEAF against the rule. ADEM's antidegradation policy allows ADEM to issue a permit for new or expanded discharges into waters that exceed the applicable water quality standard, but only if the discharge would not cause the water to exceed this standard, and only if the discharge is "necessary for important social or economic development." A copy of the opinion is available at the Balch & Bingham web site at www.balch.com/resources/news.cfm. For more information, please contact Rob Fowler at (205) 226-8736 or rfowler@balch.com.

Next Meeting

The Commission will hold its next regularly scheduled meeting on October 21, 2005.

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.