



Alabama Environmental Update

Alabama Environmental Management Commission Meeting of August 11, 2006

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Director's Report

ADEM Director Trey Glenn began his report by stating that ADEM's budget remains on target for the 2006 fiscal year and that ADEM is currently working with the Governor's office on the 2007 fiscal year budget. He also stated that ADEM is currently working with EPA to establish Performance Partnership Grants ("PPG") for the State.

Director Glenn updated the Commission on several current cleanup projects being conducted in Alabama. An estimated 8 million tires will be removed from a site near downtown Attala in Etowah County. The Attala site is the first scrap tire facility scheduled for remediation funded through the Alabama Scrap Tire Environmental Quality Act. Director Glenn also noted that the cleanup at Camp Siebert is going well. Next, Director Glenn gave an update on the remediation efforts at the

Anniston Army Depot. VX nerve agent is currently being destroyed as part of these efforts. After processing VX, the facility will transition and destroy mustard agents. This will complete the destruction of all materials at the depot that are required to be destroyed.

The Director also discussed recent developments concerning landfills in Alabama. Director Glenn explained that, pursuant to a recent court decision, local approval and a Statement of Consistency will be required before ADEM can approve a new landfill. Next, the Director noted that Jefferson and Shelby counties were recently upgraded to attainment status for ozone. The EPA approval includes an endorsement of ADEM's maintenance plan for maintaining ozone attainment in the Birmingham area through 2017.

The Director then announced that Elvin Lang has been appointed

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Ombudsman of the Air Department. Before concluding his remarks, Director Glenn presented EPA Region 4 Excellence Awards for drinking water to the Fayette Water Board, Trussville Utilities, and the City of Huntsville.

Commission Actions

Commissioner Byington presented the Commission with a draft of the Strategic Plan from the Strategic Planning Standing Committee. Commissioner Byington stated that the Strategic Plan could be considered by the Commission at the October 6, 2006 meeting. If approved, the Strategic Plan would then go to public comment and could be ready for adoption by the Commission in December and implementation by January 1, 2006. (Note: The terms of Commissioners Byington and Smith expire next month.)

Next, the Commission voted unanimously to approve the Department's proposed amendments to ADEM Administrative Code Division 335-15 ("Brownfield Redevelopment and Voluntary Cleanup Program"). This amendment changes the maximum amount of funds that may be loaned from the Alabama Land Recycling Revolving Loan Fund, adds language to the regulations regarding the liabilities of the Department and others in managing the Loan Fund, and requires comprehensive testing to identify potentially contaminated groundwater plumes at sites being assessed or cleaned up under the Voluntary Cleanup Program.

The Commission also voted unanimously (with Commissioner Smith abstaining) to approve the proposed amendments to ADEM Administrative Code Division 335-6 of the Water Quality Regulations. This amendment repeals Chapter 335-6-7A, which includes the NPDES regulations governing concrete batch plants.

Last, the Commission noted for the record the withdrawal of the request for hearing in The Utility Board of the City of Opp, Alabama v. ADEM, EMC Docket No. 06-02. The Commission also voted unanimously to accept the recommendation of the Administrative Law Judge to dismiss the appeal in Frank Patterson v. ADEM, EMC Docket No. 05-15.

Public Comments

Before adjourning, the Commission was addressed by Senator Quentin Ross, who thanked the Commission for the work they had done in the area of Environmental Justice and expressed his hope that they would continue to do so.

Other Items

On June 19, 2006, the U.S. Supreme Court took further steps to rein in the U.S. Army Corps of Engineers' (Corps) common practice of asserting jurisdiction over wetlands lacking a significant nexus to "navigable waters." See *Rapanos v. United States*, 126 S. Ct. 2208 (2006). The split decision, which actually involved two appeals consolidated by the Court, reaffirms the principle that the Corps' jurisdiction under Section 404 of

the Clean Water Act (CWA) is limited, although the practical implications of this ruling are yet to be determined. In Rapanos, the Sixth Circuit Court of Appeals held that the Corps' jurisdiction extended to four wetlands near ditches or man-made drains which eventually emptied into traditional navigable waters located up to twenty miles away. For impacting these "jurisdictional wetlands," Mr. Rapanos faced up to five years in jail and hundreds of thousands of dollars in criminal and civil fines.

The Supreme Court reversed the Sixth Circuit and remanded this case to the lower courts for reconsideration, although the ultimate standard that should be applied upon remand was unclear. The plurality opinion authored by Justice Scalia explained that the Corps' jurisdiction includes wetlands having a "continuous surface connection" to an "adjacent channel" that contains a "relatively permanent body of water connected to traditional interstate navigable waters." However, the fifth (and deciding) vote in favor of reversing the Sixth Circuit was cast by Justice Kennedy, who offered a different rationale for reversal. Justice Kennedy took the position that the Corps has jurisdiction over wetlands and other non-navigable waters possessing a "significant nexus" to navigable-in-fact waters. According to Justice Kennedy, a "significant nexus" would exist if "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" The Corps is

expected to issue guidance on Rapanos in the near future.

Next Meeting

The Commission's next meeting is scheduled for 10 a.m. on Friday, October 6, 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. 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.