



# Alabama Environmental Update

## Alabama Environmental Management Commission Meeting of June 29, 2007

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### Director's Report

ADEM Director Trey Glenn began his report by announcing that ADEM received \$1.5 million dollars from the State Legislature, with \$700,000 earmarked for environment justice programs, the advancement of e-government, and ADEM's Combined Animal Feeding Operations ("CAFO") program. Also during the most recent legislative session, the Legislature passed the Uniform Environmental Covenants Act, which will standardize institutional controls and/or land use controls related to remediation of contaminated property. The Director recognized the Department's hard work in improving the water quality in the Flint River which led to the Flint River recently being taken off the 303(d) list of impaired waters. As to the air sector, the Director noted that EPA proposed to strengthen the level of ground level ozone from 0.084 to 0.070 and that ADEM has

90 days to submit comments responding to this change. Director Glenn stated that EPA anticipates it will issue the final standard by March 12, 2008. Lastly, Director Glenn gave two Pollution Prevention Awards to Lafarge and Toyota Motor Manufacturing of Alabama.

### Report from the Commission Chairman

Commissioner Phillips noted to the Commission that there may have been a procedural problem with a motion from the Commission's last meeting and that he was in the process of determining whether it amounted to a violation of Robert's Rules of Order.

### Commission Actions

The Commission addressed several agenda items. First, the Commission voted unanimously to approve the proposed amendments to Division 6 – Underground

1710 Sixth Avenue North  
Birmingham, Alabama 35203  
(205) 251-8100

1901 Sixth Avenue North  
Birmingham, Alabama 35203  
(205) 251-8100

105 Tallapoosa Street  
Suite 200  
Montgomery, Alabama 36104  
(334) 834-6500

30 Ivan Allen Jr. Blvd., N.W.  
30 Allen Plaza, Suite 700  
Atlanta, Georgia 30308  
(404) 261-6020

1310 Twenty Fifth Avenue  
Gulfport, Mississippi 39501  
(228) 864-9900

401 East Capital Street  
Suite 200  
Jackson, Mississippi 39201  
(601) 961-9900

1275 Pennsylvania Ave. N.W.  
10<sup>th</sup> Floor  
Washington, D.C. 2004  
(202) 347-6000

Storage Tank Regulations. Then the Commission turned its attention to two petitions to amend certain ADEM regulations.

The first rulemaking petition was submitted by various Alabama environmental groups seeking to amend ADEM Administrative Code Rule 335-6-10-.07 by revising the risk level used to calculate numeric water quality criteria for over fifty carcinogens. The rulemaking petition as submitted would revise the risk level used to calculate numeric water quality criteria for 58 carcinogens from  $1 \times 10^5$  to  $1 \times 10^6$ .

Currently, ADEM employs a risk level of  $1 \times 10^5$ , which is consistent with the EPA guidelines. The Commission voted unanimously to deny the petition to amend the regulations reasoning that the adoption would affect the overall regulatory scheme of the Department and because there was a lack of substantive, credible and relevant evidence that would reasonably support the adoption of the rule. Further, much of the information submitted on cancer risk levels and the economic impact of the same was contradictory in nature. Therefore, a motion was made for the Department to develop an Advisory Board to gather information and submit its findings to the EMC. Commissioners Felker and Gardner advocated for an update to the current regulations and questioned how quickly a Board would be able to gather information and present its findings to the EMC. Director Glenn explained that an Advisory Board could be created as early as July 6 and suggested that representatives from certain sister agencies—such

as the Department of Public Health and the Alabama Department of Conservation and Natural Resources—participate on the Board as well as any other members the EMC suggests. Once the Board is established, Director Glenn suggested a timeline that would involve the Board having its first meeting in late July or early August and then spend a month gathering information to present to the Board in an organized fashion. Also during this time, the Department will solicit economic impact statements from certain industries that will be affected by the implementation of a new cancer risk rule, such as the Business Council of Alabama and Alabama Pulp and Paper Association. The Board would then present its final opinions and findings to the EMC by October 12, 2007. Once the information is presented to the EMC, the EMC will determine whether to initiate a new rulemaking on the matter, which is expected to occur at the December Commission meeting. The EMC agreed with Director Glenn's timeline and voted unanimously to approve the Department's development of an Advisory Board to examine and gather all information related to cancer risk levels and their economic impacts.

The second petition sought to amend the reference dose for acrolein and phenol found in ADEM's water quality regulations. Acrolein and phenol are chemicals commonly used by various industries in Alabama. ADEM's current reference dose ("RfD") for these chemicals is consistent with EPA's 2006 National Recommended Water Quality

Criteria. The rulemaking petition would amend the RfD for acrolein from 0.0156 mg/(kg-day) to 0.0005 mg/(kg-day) and the RfD for phenol from 0.6 mg/(kg-day) to 0.3 mg/(kg-day). Similar to the outcome above, the Commission voted to deny the petition to amend the reference dose for acrolein and phenol, but directed the Department to create a board to examine information and present such information to the EMC.

Turning its attention to ongoing administrative proceedings, the Commission noted that the request for hearing was withdrawn in *Adair v. ADEM* and *Gulf Highlands Development*, EMC Docket No. 07-04. Finally, in *Hall v. ADEM*, EMC Docket No. 07-01, the Commission unanimously voted to approve the ALJ's recommendation to grant the Joint Motion for Consent Order and approve the proposed Consent Order.

### **Other Business**

Commissioner Phillips reminded the Committee heads to be prepared to provide an update on current activities in their respective committees at the next meeting.

### **Other Items**

On June 25, 2007, the U.S. Supreme Court issued an opinion in *Home Builders v. Defenders of Wildlife*. At issue was EPA's decision to approve Arizona's water quality permitting program. Specifically, the Court considered whether EPA was required to consult with the U.S. Fish and Wildlife Service under Section 7 of the Endangered Species Act regarding EPA's

decision to approve the state program. In a 5-4 opinion, the Court held that Section 7 consultation was not required.

On June 5, 2007, EPA and the Corps of Engineers released guidance on how to identify jurisdictional "waters of the United States," including wetlands, in light of the Supreme Court's decision in *Rapanos v. United States*. Under the guidance, "traditional navigable waters" as well as adjacent wetlands and "non-navigable tributaries that are relatively permanent" remain jurisdictional. With respect to other waters and features—such as non-navigable tributaries that are not relatively permanent, and wetlands that are adjacent to but do not directly abut non-navigable tributaries of navigable waters—jurisdiction is determined case-by-case, based on whether there is a "significant nexus" to traditional navigable waters. The guidance is effective immediately, but agencies will also accept public comments until December 5, 2007.

### **Next Meeting**

The Commission will hold its next regularly scheduled meeting on August 24, 2007.

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.