



BALCH & BINGHAM LLP

ALABAMA

Environmental Update

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION MEETING OF APRIL 20, 2004

DIRECTOR'S REPORT:

Director James Warr began by discussing ADEM's budget as of March 31, 2004. Halfway through the fiscal year, expenditures are approximately 44% of the yearly budget. While the time of year is approaching in which activity is expected to increase, the Director noted that ADEM should be in the black by the end of the fiscal year.

In other news, the Director noted that ADEM's contractual arrangement with the Health Department might be different next year due to budgetary constraints on both sides, and ADEM and the Health Department are working together toward a mutually workable agreement. In addition, the Director offered, and the Commission approved, a Resolution recognizing the efforts of Representative Terry Spicer and Senator Zeb Little for their efforts in the current Legislative session in sponsoring legislation to provide local tax abatement for brownfield development properties that are voluntarily cleaned up pursuant to the Alabama Land Recycling and Economic Redevelopment Act.

The Director also reported that ADEM is considering regulations to implement the brownfields revolving loan program and regulations adjusting the toxicity criteria for wastewater discharges under the National Pollutant Discharge Elimination System.

Finally, the Director reported that the EPA recognized the City of Birmingham for its efforts toward reducing the effects of diesel exhaust from school buses. EPA pointed to the City of Birmingham, in partnership with ADEM as the first community in the southeast to undertake a school bus retrofit project under the EPA's Clean School Bus project.

COMMISSION'S ACTION:

First, Commissioner Scott Phillips provided the Commission with the Strategic Planning Special Committee's final report, and the Commission approved a resolution adopting the report with minor changes from the draft report considered at last month's special meeting.

The Commission next approved an amendment to Rule No. 335-6-10-.09 replacing fecal coliform with enterococci as the bacterial indicator in coastal waters, a change which follows federal criteria. The Commission also approved an amendment to Rule No. 335-6-10-.11 to establish nutrient water quality criteria for eleven reservoirs, as well as to Rule 335-6-11-.02 to add the Public Water Supply use classification to Whitesides Mill Lake in Calhoun County. Following the Commission's vote, Commissioner Wainwright requested that the Water Division look into naturally occurring pathogens in coastal waters, as current bacterial indicators do not take such pathogens into account.

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Gerald Hardy, Chief of the Land Division, proposed amendments to the Division 14 – Hazardous Waste Regulations to reflect changes made to EPA’s regulations between July 1, 2002 and June 30, 2003. The amendments add language to clarify regulations in existing rules and correct typographical errors. The Commission approved the amendments.

Next, the Commission considered several motions in pending administrative cases. The Commission noted for the record the Petitioner’s withdrawal of its request for a hearing in Baldwin Pole & Piling Co., Inc. v. ADEM, No. 04-04. In Unifirst Corp. v. ADEM, No. 04-06, the Commission granted the Petitioner’s uncontested motion to stay proceedings. The Commission granted oral argument in Save Our Unique Land & Streams v. ADEM, No. 04-02, and denied the Petitioner’s Renewed Motion for a Stay.

The Commission also considered two rulemaking petitions offered by Wild South. The Commission denied Wild South’s first petition to amend Rule 335-2-1-.23, Stay of Action Pending Issuance of Order, and 335-2-1-.21, Disposition Without Hearing. The Commission also denied Wild South’s second petition, which was for adoption of the Rules for Best Management Practices for Forestry. Steve Jenkins, Chief of ADEM’s Field Operations Division, noted that ADEM already has a memorandum of agreement with the Alabama Forestry Commission concerning Best Management Practices, and the cooperative relationship between the two bodies is working effectively.

Finally, the Commission voted to hear a presentation by Bryan Burgess, Ph.D., Executive Director of Friends of Rural Alabama, Inc. Dr. Burgess, noting that the vast majority of Alabama’s Concentrated Animal Feeding Operations were not regulated, stated that ADEM could improve its oversight of these operations by improving enforcement, public participation, funding and administration. The Commission expressed its appreciation to Dr. Burgess, adding that it would further consider the information presented.

OTHER ITEMS:

In a major development in the Environmental Protection Agency’s Clean Air Act enforcement effort, EPA and Duke Energy filed a joint motion on Tuesday, April 13, 2004, asking the court to rule in favor of Duke in the agency’s New Source Review lawsuit. The motion notified United States District Judge Frank Bullock that the parties agree the government cannot prove its case against Duke at trial. EPA’s surrender stems from an August 2003 order by Judge Bullock denying separate motions for summary judgment, but agreeing with Duke that the Clean Air Act’s language regarding “routine maintenance, repair or replacement projects” refers to physical changes that were routine within the industry, rather than changes performed at a specific plant. In legal documents filed by the agency prior to Judge Bullock’s ruling, EPA acknowledged that it could not win at trial if the judge agreed with Duke on the routine maintenance issue. As expected, on Friday, April 16, 2004, Judge Bullock entered an order in favor of Duke and closed the case without a trial. The joint motion gives EPA the option to appeal Judge Bullock’s August 2003 order to the United States Court of Appeals for the Fourth Circuit.

NEXT MEETING:

The Commission’s next regular meeting is scheduled for Tuesday, June 29, 2004.

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. 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.