



# ALABAMA ENVIRONMENTAL UPDATE

## ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION MEETING OF OCTOBER 16, 2009

### Elections

Chair Gardner called the meeting to order. The Commission voted unanimously to elect Commissioner Archie as Chair and Commissioner Lester as Vice-Chair. The Commission also voted to table the election of Chairs and Members for the Commission's Rulemaking and Personnel Committees until the December meeting.

### ADEM Director's Report

Director Glenn reported that the Department was now operating under its fiscal year 2010 budget, which contained only minor funding increases over the 2009 budget. The Department is still in the process of closing its books on fiscal year 2009. State budget controls, including a hiring freeze, are still in place.

Director Glenn focused the bulk of his report on the Department's 2010 Operating Plan, which implements the overall Department Strategic Plan. The 2010 Operating Plan focuses on four areas of performance: compliance, resource utilization, information availability, and internal management. Some action items under these four areas for 2010 are particularly noteworthy. Under compliance, the Director noted that the Department would focus on providing information and guidance to regulated entities through its Regulatory Conference in order to improve compliance rates. Under resource utilization, the Director reported that the Department would strive to reduce by ten percent in 2010 the time it takes to implement certain actions, including permit issuance and enforcement decisions. Under information availability, the Director announced that the Department would include in all future civil penalty orders additional information and detail on how the Department calculated the civil penalty under the applicable penalty factors. This additional detail would be provided in a separate penalty worksheet.

### Other Commission Actions

The Commission considered and adopted revisions to four provisions of its regulations. All four revisions were presented to the Commission by Mr. Gerald Hardy, Chief of the Land Division.

First, the Commission unanimously adopted proposed amendments to the Water Quality Program's Underground Storage Tank (UST) regulations, ADEM Administrative Code Chapter 335-6-15, "Technical Standards, Corrective Action Requirements and Financial Responsibility for Owners and Operators of Underground Storage Tanks." The proposed amendments provide updated regulations to meet the requirements of the Secondary Containment Provisions of the Federal Energy Policy Act of 2005. Specifically, Rule 335-6-15-.02 is being amended to include new updated definitions and to include requirements for cathodic protection tester recertification every three years. In addition, Rule 335-6-15-.10 is being amended to include testing

requirements for all UST systems equipped with cathodic protection systems. Finally, Rules 335-6-15-.13 and 335-6-15-.46 are being amended to require recordkeeping of operator training.

Next, the Commission unanimously voted to adopt proposed amendments to Chapter 335-6-16 of the UST regulations, “Administrative Guidelines and Procedures for the Alabama Underground and Aboveground Storage Tank Trust Fund.” The proposed amendments adjust the Trust Fund charge and scope of coverage to ensure that necessary resources are available to perform required actions at sites impacted by releases of motor fuels. The annual Trust Fund Charge in Rule 335-6-16-.07 is being amended from \$0.01 per gallon to \$0.0125 per gallon. The Scope of Trust Fund Coverage, Rule 335-6-16-.09, is also being amended to provide a “per occurrence indemnification limit” and to change the indemnification limit for a release from \$1 million to \$1.1 million per incident, beginning January 1, 2010.

The Commission also voted unanimously to add Chapters 335-13-12 and 335-13-13 to the Solid Waste Program regulations. Chapter 335-13-12 establishes the procedures to be followed for the implementation of a certification program for solid waste landfill operators. Chapter 335-13-13 establishes a statewide solid waste reduction and recycling goal of 25 percent. Attainment of this goal will be determined on an annual percentage basis using a proposed formula. The Department will calculate the statewide solid waste reduction percentage by April 15, 2011, for the baseline calendar year of 2010. Annually, thereafter, the Department would replicate this calculation for the previous calendar year. The Department would also evaluate the percentage goal on a triennial basis. Under Rule 335-13-13-.02(d), any public or private entity involved in solid waste management within the State is required to support the attainment of the statewide solid waste reduction goal by implementing measures such as waste reduction and recycling programs and recording/reporting the amount of recycled or beneficially reused materials.

Finally, in the matter of Black Warrior Riverkeeper, Inc. v. ADEM, and Shepherd Bend, L.L.C., EMC Docket No. 09-04, the Commission voted to adopt ADEM’s recommendation that the matter be returned to the Administrative Law Judge (ALJ) for a hearing on the following questions: (1) whether the Riverkeeper is “aggrieved” by the Department’s administrative action, and (2) whether “there is preponderating evidence that the administrative action of the Department authorizes discharges of pollutants which, upon discharge, will either cause or contribute to a detectable contravention of State water quality standards.” This matter will now be returned to the ALJ for further proceedings consistent with the Commission’s order.

### **Other Items**

On September 22, 2009, U.S. EPA Administrator Lisa Jackson signed the Final Mandatory Reporting of Greenhouse Gases Rule. The rule requires reporting of greenhouse gas (GHG) emissions from large sources and suppliers in all sectors of the economy, including upstream production sources such as fuel suppliers and downstream sources directly emitting GHGs. Under the rule, suppliers of fossil fuels or industrial GHGs, manufacturers of vehicles and engines, and facilities that emit 25,000 metric tons or more per year of GHG emissions are required to submit annual reports to EPA. The new reporting rule is intended to provide a better understanding of where GHGs are coming from to inform and assist future policymakers on how to reduce emissions. Monitoring will begin on January 1, 2010, and the first annual GHG report must be submitted to EPA by March 31, 2011.

Recently, two pending CO2 nuisance suits have been decided. On September 21, 2009, the Second Circuit Court of Appeals issued a decision in *Connecticut, et al. v. AEP et al.*, upholding the right of the states of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin, and the City of New York to bring nuisance claims against AEP, TVA, Xcel Energy, Cinergy and Southern Company. In vacating the Southern District of New York's decision and remanding the case for further proceedings, the Second Circuit held: (1) that the district court had erred in dismissing the complaints on political question grounds, (2) that plaintiffs have standing, and (3) that plaintiffs' allegations that defendants' CO2 emissions contributed to global warming stated claims under the federal common law of public nuisance.

In contrast, on October 15, 2009, the Northern District of California in *Native Village of Kivalina, et al. v. Exxon Mobil, et al.*, granted defendant's motion to dismiss plaintiffs' public nuisance claims. Plaintiffs in this case alleged that defendants' GHG emissions increased global temperatures that created a public nuisance by melting sea ice adjacent to the village and thereby exposing the village to winter storms. Unlike the Second Circuit, the Northern District of California ruled that plaintiffs' claims were barred by the political question doctrine, a constitutional doctrine that reserves certain issues to the executive and legislative branches of government. In addition, the Court held that plaintiffs' lacked standing because plaintiffs' injury was not "fairly traceable" to defendants' conduct.

### **Next Meeting**

The Commission will hold its next regularly scheduled meeting on December 11, 2009.