

Environmental UPDATE

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ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION MEETING OF DECEMBER 18, 2015

Director's Report

- **Budgets:** Director Lance LeFleur focused on the Department's proposed permit fee increases for the entirety of his report. The current proposed rulemaking would increase permit fees by 20% across the board, with the exception of well drilling permit fees and Title V permits under the Clean Air Act. The Director stated this increase is needed to replace recent funding cuts by the state legislature, as well as to avoid the U.S. Environmental Protection Agency ("EPA") seizing control of the National Pollutant Discharge Elimination System ("NPDES") program from the State. EPA has stated it will act on or before December 31, 2016, with regard to the State's NPDES program. The Director produced a chart that compared funding levels amongst the states. Only 5 states provide less funding to their state environmental agencies from state general funds, and only 9 states provide less income to such agencies through permit fees. Overall, Alabama ranks 49th in the total amount of state funding it provides to its state environmental agency. The Director said discussions with state leadership indicate the Department will face an even more challenging budget in FY2017.
- **Permitting:** The Director named three main areas of concern generated by the proposed permit fee increases: (1) exceedance of the statutory cap limiting Department fees; (2) undue influence on the Department through an increased reliance on permit fees; and (3) the resulting financial burden on the regulatory community after two previous permit fee increases (19% in 2011 and 50% in 2013). The Director stated that the Department actively solicited alternatives to the increased permit fees. These options included an offer from EPA to undertake a portion of inspections (with unknown consequences for reimbursement), creating new fees for unregulated activities, creating fees for current Department activities (a functional equivalent to raising permit fees), or delaying and/or doing nothing. Director LaFleur called delaying or doing nothing "a gamble" and said that losing this gamble would have greater consequences than recent funding cuts.

After a 45-day comment period, the Department received 11 comments on the proposed fee increases from 4 interest groups. The majority of comments came from the concentrated animal feed operation ("CAFO") industry. The CAFO commentators opposed the proposed CAFO fee schedule and the 20% increase. Since the CAFO program started in 1999, fees for the CAFO program have been suspended because of a line-item in the Department's budget. (The suspension decision is at the Director's discretion.) Director LaFleur labeled the proposed 20% fee increase as the "most responsible action" for the Department to maintain its level of performance and maintain control of its environmental programs. He thus recommended approval of the increased permit fees.

- **RCRA Dashboards:** Director LaFleur stated that further discussion of the Department's Resource Conservation and Recovery Act hazardous waste dashboards will be rescheduled for the next meeting.

Adoptions of Rules

- The proposed amendment to ADEM Admin. Code 335-1-6 to increase permit fees was adopted 6-0, with one abstention (Commissioner Richardson).
- In discussing the proposed amendment, the Commission expressed general sentiments of frustration that the state legislature placed the Commission in the current position to raise permit fees. Commission members expressed concern that the fee increases would bring the Department back to only FY2014 level and that there is no guarantee that even

with permit fee increases EPA will not revoke NPDES authority. The Commission urged its members, the Director, and the Department to work together and with the state legislature to avoid another permit fee increase in the future.

- A proposed amendment to the rulemaking was presented by Commissioner Richardson that would have added a sunset provision to the increase permit fees, with the 20% increase expiring one year after the rule's effective date or at the restoration of \$2 million to the Department's budget, whichever occurred first. The Commission sought advice of counsel on its ability to adopt such an amendment at the meeting. Counsel advised the Commission that it would be a significant change that would likely require public comment. The Director said an additional rulemaking process would take at least 100 days without a special Commission meeting. The amendment failed 5-2, with Commissioners Richardson and Miller voting for the amendment.

Personnel Committee

- Commissioner Laier was elected Chair of the Personnel Committee.

Rulemaking Committee

- Commissioner Phillips was elected Chair of the Rulemaking Committee.
- The December 18, 2015 Rulemaking Committee meeting addressed proposed revisions to Rule 335-2-3-.05, Sections (1) through (3) (Agenda). The Committee is postponing its recommendation until the February 19, 2016 meeting.

Future Business Meetings

- The Commission adopted the schedule for all 2016 meetings. The Commission's next meeting will take place on **February 19, 2016**, at 11:00 in the Alabama Room at ADEM.

Other Items

- **CERCLA: Air Deposition Theory of Arranger Liability.** On October 13, 2015, DOJ filed an amicus brief in the Ninth Circuit case, *Pakootas v. Teck Cominco Metals Ltd.*, 15-35228, outlining the Government's view on aerial deposition and disposal under CERCLA. Previously, the U.S. District Court for the Eastern District of Washington held that Defendant Teck's smelter emissions which had settled at the Upper Columbia River site constituted disposal under CERCLA. Teck argued that under Ninth Circuit precedent in *Center for Community Action and Environmental Justice v. BNSF*, air emissions cannot constitute disposal because a "disposal" occurs only when contaminants are first placed "into or on any land or water" and thereafter "emitted into the air." In its Ninth Circuit brief, DOJ responds that Teck's argument creates a new requirement unsupported by CERCLA's text and ignores the directive to courts to read the statute broadly to effect its main objective to fund cleanups. Teck filed its Reply Brief on November 18, 2015, in which Teck strongly emphasized the precedent of the *BNSF* case.

In its air deposition theory, EPA seeks to extend arranger liability far past the standard case where a facility hires a third party to remove waste offsite. With air emissions as "disposals," any facility that releases air emissions could face potential liability under CERCLA. EPA has stated that the North Birmingham Site is its first official test case for the theory. In response, the Alabama State Legislature passed a Joint Resolution, approved by Governor Bentley, opposing EPA's use of air deposition theory. The State contends that the air deposition theory is novel and overbroad, that EPA lacks CERCLA authority to use it, and that EPA is using air deposition theory to funding policy initiatives outside EPA regulatory authority. These initiatives include securing environmental justice efforts outside of the scope of CERCLA authority.

Balch has worked on a multitude of strategy options for congressional engagement concerning EPA's latest Superfund actions. Recently, Balch has met with Senator Jeff Sessions and presented to the National Mining Association on the emerging issues in Superfund, including the aerial emission deposition theory. We anticipate that key members of the Alabama congressional delegation will issue a letter on this topic shortly.

Questions about items appearing in this Update may be directed to Steve McKinney at (205) 226-3496 in Birmingham or Jim Byram 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.