

MISSISSIPPI Environmental Update

MISSISSIPPI COMMISSION ON ENVIRONMENTAL QUALITY MEETING OF JUNE 26, 2003

COMMISSION ACTIONS:

The meeting opened with a recommendation for the Lignite Mining Fee for the 2004 state fiscal year to be set at \$120,000. The Commission approved the fee. This fee paid by mining companies helps to defray the costs the state incurs in administering the lignite mining program.

The meeting continued with the Commission granting a request to forgive a 10% late fee charged to Attala Generating Co., LLC for failing to pay its assessed FY-2003 Title V fee of \$1666.50 by September 1, 2002. The commission forgave the fee since the payment was only late because Attala mistakenly sent the payment to the MS Dept. of Insurance instead of the MDEQ. The Dept. of Insurance verified that the payment was timely received.

The Staff then made an important digression to discuss the state's compliance with EPA Ozone requirements. The Staff reported that in 2002 Desoto County was the only county in Mississippi to be designated as a Non-Attainment area. The EPA intends to place Desoto County into the Memphis Non-Attainment Area that would include the Memphis area and parts of Arkansas. Gov. Musgrove, however, intends to propose to the EPA on July 1 that it place Desoto County into its own non-attainment area since it is believed that Desoto's problems are a result of the Memphis area problems drifting into the state. A separate designation for Desoto County will allow the county to deal with the Ozone problems more effectively.

Importantly, the Staff also reported that although Hancock and Harrison Counties maintained the proper compliance level for 2002, concerns exist for these counties for the upcoming year. Recent air monitoring data reflects increasing ozone readings for the two counties and Staff believes at this time the problems are the result from air transport into the two affected counties from the New Orleans and surrounding areas. Without 2003 data, the Staff, however, refused to draw any conclusions. Nonetheless, the agency expressed heightened concern for Hancock and Harrison County this year.

The Commission next approved a Brownfield agreement between the Commission, Intex Plastics Corporation, and Intex Acquisition Company for the remediation of Brownfield property in Corinth, Mississippi. The Commission also approved Alpha Services LLC out of Brandon, MS as a Brownfield Consulting Firm. The final approval was for SCS Environmental Group, LLC from Olive Branch, MS to be listed as an Approved Immediate Response Action Contractor for the period July 1, 2003 to December 31, 2003.

The Staff provided a preview for an evidentiary hearing that will occur during the August 28, 2003, Commission Meeting. The hearing will address a complaint filed by residents in Marshall County objecting to the proposed plan to locate a rubbish landfill in Marshall County. The Commission has already approved the plan, but the hearing will address the plan afresh and will allow the residents the opportunity to voice their concerns and their legal objections to the plan. The Commission has decided to take pre-filed testimony from all parties involved in order to expedite the August 28 hearing. The hearing will only include opening and closing statements and cross-examination of the parties and witnesses. The August 28 hearing will begin at 10 a.m.

The Commission denied a request for a hearing over a dispute between Whitehall Water Assoc. and an adjacent landowner to the Whitehall water treatment facility. The Commission found that the two parties have already reached an agreement that does not leave open any substantive issues that a hearing could address. The dispute arose from the landowner's complaint that Whitehall was discharging materials that contained some iron into the water sources outside of its facility. The DEQ conducted an investigation at the Whitehall facilities and the surrounding water sources. The DEQ concluded that the discharges were not hazardous. However, the landowner did request that Whitehall get a permit. The agreement between the two parties is conditioned on Whitehall meeting all of the permit requirements.

NEXT MEETING:

The Commission's next regular meeting is scheduled for July 24, 2003 at 9:00 a.m. at the Southport Center in Jackson, Mississippi.

OTHER ITEMS:

Court issues decision in TVA New Source Review case

The 11th Circuit Court of Appeals issued a decision on June 24, 2003, in the New Source Review case filed against the Tennessee Valley Authority by the Environmental Protection Agency. The appeal came after the Environmental Appeals Board informally reviewed an EPA administrative compliance order and found TVA violated the Clean Air Act by undertaking fourteen rehabilitation projects at nine coal-fired electric power plants without permits.

After hearing all of the arguments on both sides, the Court concluded that EPA's administrative compliance order against TVA is unconstitutional, and that until EPA proves its allegations against TVA in a court of law, TVA is free to ignore EPA's administrative compliance order.

The court also concluded that EPA's Environmental Appeals Board decision, which EPA claimed had upheld its order, is null and void. "This is significant because EPA has been using the EAB decision to justify its enforcement actions against other companies across the country," said Gene Ussery, vice president and chief production officer, Generation, One Hancock Plaza. "The decision by the 11th Circuit calls into question those actions and previous decisions which rely heavily on the EPA's EAB decision. The 11th Circuit makes it clear that the EAB decision has no precedential value."

The 11th Circuit's characterizations of the EAB proceeding, obviously critical to their conclusions, are strong condemnations of EPA's proceeding and complete vindications of TVA's complaints to the court. For example, the Court says the Environmental Appeals Board and Administrative Law Judge "manufactured the procedures on the fly, entirely ignoring the concept of the rule of law."

"While this is a victory for TVA, the decision does not address the merits of the case. So, we will continue to remain cautious as far as New Source Review issues are concerned," Ussery said. "But the decision seems to be a step in the right direction." The only citation currently available is *TVA v. Whitman*, 2003 WL 21452521 (11th Cir. 2003).

Ruling in Ohio Edison New Source Review Trial Expected within 60 Days

On April 25, Federal District Court Judge Edmund A. Sargus Jr. told the United States government and Ohio Edison Co. that he intends to make a ruling on their pending case within 60 days. The EPA filed suit against Ohio Edison for not obtaining a new source permit under the Clean Air Act before the company made improvements to seven electric generating units from 1989 to 1998. The EPA contends that the unit changes were major renovations that could not be done without a permit. The EPA also argues that the changes resulted in increased air emissions. Ohio Edison counters that the improvements are not actually new source changes, but are rather routine maintenance of its facilities. Ohio Edison also argues that the changes have resulted in a reduction of air emissions. As of July 1 the court had not issued a ruling. The case is styled *United States v. Ohio Edison Co.*, S.D. Ohio, No. C2-99-181.

Federal Trial Opens in Clean Air Lawsuit Alleging Violations by Electric Utility

In a similar case, the EPA has brought suit against Illinois Power Co. for making improvements to its facilities without installing pollution controls. This case, like the *Edison* case, hinges on the characterization of the facility's modifications. The government in its opening statements likened the changes to open-heart surgery. The government contends that the changes were part of a major, costly, one-time only project done after extensive planning. Under the government's contention, Illinois Power would have been required to obtain a variety of permits for the projects, to perform an analysis of air quality around the plant, and to install best available control technology. Illinois Power defends the projects as maintenance to its facilities. The company also argues that the EPA's actions are a result of a change in policy by the EPA where the agency for so long had not required utilities grandfathered under the Clean Air Act to comply with the new source review standards. The case is styled *United States v. Illinois Power Co.*, S.D. Ill., No. 99-833-MJR.

EPA Issues Emergency Permit to Allow Dumping of Treated Wastewater in Gulf of Mexico

The EPA has issued an emergency permit allowing Florida to dump up to 534.7 million gallons of treated acidic wastewater from an abandoned fertilizer plant into the Gulf of Mexico. The wastewater will be treated before being released into the Gulf. The EPA issued the emergency permit as a result of its fear that the oncoming hurricane season could bring heavy rainfalls resulting in the failure of the containment dikes holding the wastewater at the abandoned facility in Manatee County. The EPA feared that a release of the untreated wastewater could be disastrous for the Tampa Bay area. The water once treated will meet all marine water quality criteria except for possibly ammonia-nitrogen. The EPA, however, believes that if the proper pumping techniques are used the ammonia will be rapidly diluted once the water is released into the Gulf. Officials will be notifying Mexico, Cuba, and other countries within the Caribbean Region before starting the project.

Questions about items appearing in this Update may be directed to Teri Wyly at (228) 864-9900 or Brad Moody at (601) 961-9900, 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 legal services to be performed is greater than the quality of legal services performed by other lawyers. The listing of any area of practice does not indicate any certification of expertise in the area as listed.