

ADEM Announces Construction General Permit: The Alabama Department of Environmental Management has developed and implemented a Construction General Permit which became effective on April 1, 2011. The Construction General Permit is intended to replace the permit-by-rule program utilized by ADEM for the past decade. The General Permit is designed to protect the quality of Alabama waters from harmful impacts that result from construction activities where more than one acre of land is disturbed. According to ADEM Director, Lance LeFleur, it is ADEM's belief that the General Permit will result in increased efficiencies for the ADEM staff and enable ADEM to better manage budget constraints.

The General Permit authorizes, subject to specified conditions, discharges associated with construction activities that will result in land disturbance of one acre or more or from construction activities involving less than one acre which are part of a common plan of development or sale equal to or greater than one acre if those activities occur on or before and continue after the effective date of the permit. Therefore, new construction sites and existing construction sites that have not renewed their expired registration notices are subject to the new General Permit. Coverage under the General Permit is not required, however, for discharges associated with minor land disturbing activities such as individual home landscaping and gardens, repairs, maintenance work, fences and other related activities that result in minor soil erosion, normal agricultural practices and silvicultural operations. See Permit No. AL100000 at 3.

The new General Permit, under Part I, specifically prohibits certain types of discharges from coverage, including: stormwater discharges that are mixed with sources of non-stormwater unless such stormwater discharges are (a) in compliance with a separate NPDES permit or (b) determined by ADEM not to be a contributor of pollutants to waters of the State of Alabama; stormwater discharges currently covered under another NPDES permit; wastewater from washout of concrete, unless managed by an appropriate control; wastewater from washout and cleanout of stucco, paint, form release oils, curing compounds and other construction materials; fuels, oils or other pollutants used in vehicle and equipment operation and maintenance; soaps or solvents used in vehicle and equipment washing; discharges from dewatering activities, including discharges from dewatering of trenches and excavations, unless managed by appropriate controls; discharges to surface waters from sediment basins or impoundments unless an outlet structure that withdraws water from the surface, except where not feasible, is utilized; and certain other discharges identified under Part I.C. of the General Permit. See Permit No. AL100000 at 4.

Under Part II, the new General Permit requires any person desiring to obtain coverage to submit a Notice of Intent (NOI) either before construction activities are initiated (for new construction sites), before construction activities are continued (for construction sites that have an expired registration or for which a complete and correct NOR has not been submitted to ADEM, or at least thirty (30) days prior to the expiration of the NOR (for sites where a complete and correct NOR has been submitted to ADEM). The NOI must comply with content requirements set forth in Part II.C. of the Permit. If a General Permit is not reissued or replaced before the expiration date, the General Permit will be administratively continued in accordance with ADEM Administrative Code Chapter 335-6-6 and will remain in force and effect if the Permittee submits and updated NOI meeting the requirements of the General Permit. See Permit No. AL100000 at 5-6.

Under Part III of the General Permit, specific stormwater control requirements, which are technology-based, non-numeric effluent limitations and conditions, apply to all discharges from construction projects eligible for coverage under the General Permit. See Permit No. AL100000 at 8-14. The requirements contained in Part III are in accordance with the national effluent limitations guidelines and new source performance standards found at 40 CFR Part 450.

Part IV sets forth standard and general permit conditions. See Permit No. AL100000 at 15-21. Part V requires any permittee whose site involves the disturbance of ten (10) acres or more at one time to conduct turbidity monitoring starting six months after the date of the permit. See Permit No. AL100000 at 22-23.

The new Construction General Permit application and all related forms can be found and downloaded from ADEM's website at <http://www.adem.alabama.gov>.

EPA Publishes National U.S. Greenhouse Gas Inventory: The U.S. Environmental Protection Agency released its 16th annual U.S. greenhouse gas inventory final report which shows that overall emissions during 2009 decreased by 6.1 percent from the previous year. According to the EPA, the decrease was attributed to a reduction in fuel and electricity consumption across all U.S. economic sectors. While emissions have grown by more than 7.3 percent from 1990 to 2009, emissions in 2009 represent the lowest total U.S. annual greenhouse gas emissions since 1995.

Eleventh Circuit Vacates Preliminary Injunction on Florida Mining Permit: In *Sierra Club, Inc. v. United States Army Corps of Engineers*, 2011 WL 1334853 (11th Cir. April 8, 2011), the Eleventh Circuit Court of Appeals vacated a district court's preliminary injunction which remanded to the U.S. Army Corps of Engineers a mining permit the Corps had issued to a phosphate mining company. Suit was filed by the Sierra Club to enjoin the mining company from conducting operations approved in the permit. The U.S. District Court for the Middle District of Florida concluded that the permit's issuance did not comply with the requirements of the Clean Water Act, 33 U.S.C. § 1251 – 1376, and that the Sierra Club had demonstrated it was entitled to preliminary injunctive relief. The Eleventh Circuit held that the district court based the entry of the preliminary injunction entirely on letters from the EPA which expressed concerns with the permit and that the district court failed to apply the arbitrary and capricious standard in evaluating the Corps' practicable alternatives standard. Therefore, the district court's remand of the permit to the Corps was improper because it was effectively a final judgment on the merits.

Eleventh Circuit Reverses Class Certification in Groundwater Contamination Suit: In *Sher v. Raytheon Co.*, 2011 WL 814379 (11th Cir. March 9, 2011), the Eleventh Circuit Court of Appeals, in a case involving the alleged release of toxic substances into groundwater as a result of improper disposal and storage of hazardous waste, vacated a class action certification by a district judge in the Middle District of Florida, holding that the district judge erred as a matter of law by failing to sufficiently evaluate and weigh conflicting testimony of expert witnesses presented by the parties at the class certification stage. The district court previously held that "it is not necessary at this stage of the litigation to declare a proverbial winner in the parties' war of the battling experts or dueling statistics and chemical concentrations ... This type of determination would require the Court to weigh the evidence presented and engage in a *Daubert* style critique of the proffered experts' qualifications, which would be inappropriate ... At this state of the litigation, therefore an inquiry into the admissibility of Plaintiffs' proposed expert testimony as set forth in *Daubert* would be inappropriate, because such an analysis delves too far into the merits of Plaintiffs' case."

The Eleventh Circuit ruled that "it was error for the district court to decline to declare a proverbial, yet tentative winner. The Plaintiffs are required to prove, at the class certification stage, more than just a *prima facie* case, *i.e.*, more than just a 'pretty good case.'" *Id.* at *3. The Circuit Court concluded that, based upon the evidence before it, there was not enough evidence to support a class at that stage of the litigation. *Id.*

ATTORNEY PROFILES

Richard E. Davis is a partner with Starnes Davis Florie LLP. Richard's practice is primarily devoted to environmental litigation and regulatory compliance. He represents clients in federal and state courts in Alabama as well as in matters involving federal and state regulatory agencies. Richard's practice includes CERCLA, Clean Air, Clean Water, and RCRA litigation; natural resource and property damage claims; and land and water use issues. He also defends personal injury actions based on chemical exposure. Richard is a Fellow in the Litigation Counsel of America Trial Lawyer Honorary, was listed in the 2008 - 2011 editions of *Alabama Super Lawyers*® magazine for Environmental Litigation, was selected by his peers for inclusion in the 2011 edition of *Best Lawyers in America*® for Environmental Law and for Natural Resources Law, and is Chair of the Alabama State Bar Environmental Law Section for the 2010 – 2011 term.

J. Scott Dickens is a partner with Starnes Davis Florie LLP. Scott's practice is primarily devoted to environmental and construction litigation. He has represented clients in all State and Federal Courts in Alabama, in arbitration proceedings before the American Arbitration Association and Alabama Building Commission, and in the United States Court of Federal Claims. Scott's practice includes CERCLA and RCRA litigation; architect and engineer liability claims, particularly relating to environmental issues; and construction related matters. He also frequently speaks at environmental and construction seminars. Scott is a 1996 graduate of Cumberland School of Law where he was a member of the *Cumberland Law Review*.

Amber M. Whillock is an associate with Starnes Davis Florie LLP. Amber's practice is primarily devoted to environmental litigation and regulatory compliance. While attending Cumberland School of Law, Amber was the Executive Editor of the *Cumberland Law Review*, a Thomley Scholarship Recipient, a George M. Stewart Banking Award Recipient and the recipient of numerous Scholar of Merit Awards. Amber was also active in the Phi Alpha Delta Law Fraternity and served as a Judge Abraham Caruthers Legal Research and Writing Teaching Assistant. Amber is currently an associate member of the Environmental Law Institute, and a member of the Birmingham and American Bar Associations.

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