



LEAF-LET

LEAF lawsuit asks court to declare **ADEM** policy & mining discharge permits invalid

On October 29, 1999, Legal Environmental Assistance Foundation, Inc. filed suit against the Alabama Department of Environmental Management and three mining companies - McCartney Construction Company, Rogers Group, Inc., and HarGal Mining Partnership. The suit seeks to have **ADEM's Implementation Procedures for Tier 2 of the Antidegradation Policy** and the mining companies' discharge permits declared invalid because ADEM did not adopt the *Implementation Procedures as rules*. The Alabama Administrative Procedure Act prohibits **ADEM** from relying on procedures if they have not been adopted as rules, which require public notice and opportunity for comment.

The purpose of Tier 2 of the antidegradation policy (**ADEM** Admin. Code R. 335-6-10-.04(3)) is to protect high quality waters from suffering degradation caused by new or increased discharges. Such degradation is prohibited unless the discharge is "necessary for important economic or social development." **ADEM's Implementation Procedures** purport to prescribe (1) what are considered to be waters which "exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water high quality waters," (2) what is considered to be a "necessary" discharge, and (3) how an applicant should demonstrate that his project will result in "important economic or social development."

High Quality Waters: Tier 2 is intended to apply to all waters which "exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water high quality waters." In its *Implementation Procedures*, however, **ADEM** has modified the **waters** subject to Tier 2 protection to those waters which (1) are not identified on the most recent 303(d) list of impaired waters, (2) do not require implementation of effluent limitations more stringent than technology-based controls (BPT, BAT, and secondary treatment), and (3) are not assigned the **Outstanding** National Resource Water classification. This redefinition of waters subject to Tier 2 **requirements** fundamentally changes the scope of Tier 2 protection and should not be implemented without public notice and opportunity for comment.

Necessary Discharge: Tier 2 is intended to prohibit degradation of high quality waters except where the discharge is "necessary." This requires that alternatives be considered. In the *Implementation Procedures*, ADEM has prescribed that any alternative which has a cost that does not exceed 110% of the pollution control costs that would otherwise be required is a "viable" alternative, making the discharge unnecessary. Conversely, an alternative which has a cost that exceeds 110% of the pollution control costs that would otherwise be required is not a "viable" alternative, making the discharge necessary. This definition of "necessary" in Tier 2 of the **antidegradation** policy establishes the scope of Tier 2 protection and should not be implemented without public notice and opportunity for comment.

Important Economic or Social Development: Tier 2 is intended to prohibit degradation of high quality waters except where the proposed project will result in "important economic or social
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development.” In the *Implementation Procedures*, ADEM has prescribed the types of facts which an applicant should present to demonstrate that a project will result in “important economic or social development,” such as increased employment, increased production, etc. However, the *Implementation Procedures* do not require consideration of the negative economic or social impacts of water quality degradation and appear to allow the applicant to determine what level of economic or social development is sufficiently “important” to justify water quality degradation. The prescription of how an applicant can demonstrate that his proposed project will result in “important economic or social development” should not be implemented without public notice and opportunity for comment.

WHAT CAN YOU DO?

- ☛ Monitor future ADEM rulemaking activities that might occur as a result of LEAF’s lawsuit. Express your views during the comment period. To get on notification lists, contact ADEM Water Quality Branch, P.O. Box 301463, Montgomery, AL 36130-1463; (334) 271-7823 (phone); H2omail@adem.state.al.us (email); <http://www.adem.state.al.us/proprule.html> (web).
- ☛ Notify LEAF if you become aware of any proposed permits for new or increased discharges into high quality waters. LEAF may be able to assist you in developing comments to submit to ADEM. Contact David Ludder, (850) 681-2591 (phone); dludder@lewisweb.net (email).
- ☛ Learn how the antidegradation policy (ADEM Admin. Code R. 335-6-10-.04) is supposed to work so that you can recognize when ADEM is not implementing it correctly. For a copy, contact the Water Quality Branch or <http://www.adem.state.al.us/rules.html>.