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New Senate bill could eliminate minimum ADEM penalties

by Patrick McCreless

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Environmental regulation in Alabama may soon come at a discount.

A new state Senate bill would eliminate the minimum \$100 civil penalty the Alabama Department of Environmental Management can issue to violators of the state's environment protection laws.

Supporters of the bill insist it would help small, poor municipalities and businesses to spend more money on fixing their environmental violations instead of on penalties.

Environmentalists, however, say it would instead allow more violations to occur.

Alabama Senate President Pro Tem Del Marsh, who introduced the bill, said the legislation is not intended to impede ADEM's function as the state's regulator and enforcer of environmental protection law.

"This is in no way easing the restrictions on people who are polluting," Marsh said. "If someone is violating, we can fine them, but right now, people are being fined for trying to do the right thing."

Nelson Brook, member of the state environmental group, Black Warrior Riverkeeper, could not disagree more with Marsh.

"This is unfortunate legislation," Brook said. "The minimum fine is not successful at deterring polluters, so reducing it will not help communities at all," Brook said. "This is an effort to reduce the penalty amount, which equates to weakening the enforcement of the agency."

Marsh said the bill is designed to help small businesses, farms and municipalities that are trying to fix their violations, but are being hindered by mounting ADEM penalties.

Marsh noted an example of a small municipality that had trouble with a pump in its sewage treatment system and was trying to fix the issue, but in the meantime, racked up thousands of dollars in minimum penalty fees from ADEM.

"Because of the way the law reads, ADEM had to fine them where in essence, they could have used that money to pay the \$19,000 for a new pump," Marsh said. "This bill allows ADEM to help businesses and cities do the right thing."

Jerry Revis, utilities manager for the city of Roanoke in Randolph County, can relate to the problems ADEM's penalty system can create.

The city has accrued numerous ADEM penalties in recent years due to unlawful discharges from its wastewater treatment plant — so much so that ADEM has hit Roanoke with a more serious consent order complete with a \$35,500 fine. Roanoke is trying to get back into compliance, however, the penalties are hindering efforts, Revis said.

“If we didn't have to pay the penalty, we'd be able to correct the problem,” Revis said. “It's like a double penalty on us.”

According to the agency's current policy, ADEM can impose minimum civil penalties of \$100 per day for a violation or it can increase that penalty to as much as \$25,000 per day. ADEM'S policy states the amount of the penalty imposed is based on a variety of factors, including the seriousness of the violation, history of previous violations and the efforts made to mitigate the effects of the violation.

With those factors to stay in place regardless of the legislation, ADEM apparently does not see a problem with the bill, said ADEM spokesman Jerome Hand.

“We don't generally comment on impending legislation, but this department does not object to this bill,” Hand said. “The amounts we set on penalties ... there are so many factors, we don't see how it could impact those factors. The bill does not impose on the department's ability to issue fines.”

To Brook, the real problem is with ADEM itself and its apparent inability to issue proper penalties in the first place.

“ADEM goes out of their way to assess penalties as close to the minimum as possible,” Brook said. “Very rarely does ADEM go out of its way to impose heavy penalties — whether or not a facility has been violating for years. And very rarely does ADEM do significant penalties against municipalities.”

David Ludder, an environmental attorney based in Tallahassee, Fla., and a former general counsel attorney for ADEM, agreed with Brook's assessment of the agency.

“ADEM right now doesn't take enforcement action early enough and when it does it disregards violations to keep the penalty amount down,” Ludder said.

Ludder said the removal of the minimum penalty would compound the problem.

“My take on it is it's going to allow violators to accumulate many more violations than they should,” he said. “ADEM will have complete discretion of what they want to impose and that will be to the benefit of violators.”

Keith Johnston, managing attorney for the Birmingham office of the Southern Alabama Law Center, has experience with ADEM and agrees the department can be lax at times. The center is a regional conservation organization using law to protect the health and environment of the Southeast.

“I can’t speak to how they compare to other similar state agencies ... but there has been a lack of enforcement that we’d like to see ramped up,” Johnston said. “From clean water issues to storm water issues, from my personal experience, there is a history there (of lax enforcement) and it has been that way for some time.”

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