BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION

Cascadia Wildlands Project, William Black, Lauren Padawer and Gabriel Scott,	)	
Requestors,	)	
v.	)	
Department of Environmental Conservation, Division of Spill Prevention & Response, Joint Pipeline Office	)	
Respondent.	)	OAH No. 07-0496-DEC
	)	Contingency Plan Amend. No. 06-CP-4071

DECISION

I. Introduction

Cascadia Wildlands Project, William Black, Lauren Padawer and Gabriel Scott[1] (collectively, "Cascadia") requested an adjudicatory hearing to challenge the Division of Spill Prevention and Response's approval of the portion of the Trans Alaska Pipeline System (TAPS) oil spill prevention and contingency plan (C-plan) covering the Copper River watershed. The division had approved Alyeska Pipeline Service Company's TAPS C-plan, imposing conditions on that approval. One condition related to protection of environmentally sensitive areas[2] (ESAs) and areas of public concern[3] (APCs). Cascadia questioned whether ESAs and APCs had been adequately identified in the C-plan and whether the spill-response strategies in the C-plan would protect such areas against oil discharges from TAPS.

In their extensive filings and briefs in this matter, Cascadia, the division and Alyeska argued at cross purposes. Initially, there was no common understanding of the issues. Over the objection of the division and Alyeska, a hearing was held to afford Cascadia an opportunity to

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[1] Gabriel Scott, who acted as lead advocate for all of the requestors, was identified during the hearing as an omitted requestor. His name has been added to the caption.

[2] An "environmentally sensitive area" is a geographic area that the Department of Environmental Conservation has determined is "especially sensitive to change or alteration[.]" 18 AAC 75.990(35). This includes, among other area types, fragile natural habitats, areas of unique geologic significance, essential habitat, parks and wilderness areas. *Id*.

[3] An "area of public concern" is a geographic area that "in the department's judgment, deserves special protection from an oil discharge[.]" 18 AAC 75.990(5). This includes, among others, areas of unique cultural value or historical significance, and areas "significantly used for commercial, sport, or subsistence hunting, fishing, and gathering[.]" *Id*.

clarify issues and arguments by reference to the agency record, using witnesses to explore and amplify the record, and to allow the division and Alyeska to respond in the same fashion. The main purpose of the hearing was not to supplement the record, but some supplementation was allowed or unavoidable, as witnesses supplied context for record-oriented testimony and reacted to aspects of the C-plan approval decision not anticipated when they contributed to the agency record through public comments.

Using the agency record, as amplified and supplemented by the hearing testimony, Cascadia succeeded in showing that its constituents have identified seven natural features or locations within the Copper River watershed that have particular importance for commercial, cultural, environmental, recreational or subsistence purposes. Cascadia, however, did not prove that the presence of these candidates for ESA/APC status or other factors qualify the watershed as a whole as an ESA or APC within the meaning of 18 AAC 75.990(5)&(35). Nor did Cascadia meet its burden of going forward with reliable evidence proving that containment gaps exist with respect to the Gulkana, Tazlina and Klutina rivers.

The agency record, hearing evidence and arguments, however, did raise the issue of whether the C-plan demonstrates the ability to contain discharged oil, and thereby exclude it from ESAs and APCs, under two of the response scenarios. These two scenarios – number 11 (Milepost 676) and number 13 (Little Tonsina) – do not identify ESAs and APCs or demonstrate how they will be protected. I will address what action the division staff should take to address that issue at the conclusion of this decision.

II. Facts

A. The C-plan

Oil spill response preparedness begins with regional and area planning efforts between federal and state agencies, resulting in a "Unified Plan" for the state.[4] The Alaska "region" is divided into ten subareas and a subarea plan is prepared for each, to supplement the Unified Plan.[5] One such subarea is "Prince William Sound."[6] The Prince William Sound Subarea Contingency Plan includes the Copper River watershed and a portion of the TAPS corridor.[7]

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[4] Agency Record (AR) 5555-5559 & 5561 (*The Alaska Federal/State Preparedness Plan for Response to Oil and Hazardous Substance Discharges/Releases: Unified Plan*, Vol. 1 (May 1994)).

[5] AR 5559 & 5561.

[6] AR 5653.

[7] AR 5666.

Preparedness continues with industry. Facility-specific plans such as the TAPS C-plan are developed and revised over time by the plan holders, subject to agency review and approval. The TAPS C-plan incorporates the Unified Plan for Alaska and the Prince William Sound Subarea Plan.[8] It also incorporates an Environmental Atlas depicting the entire 800 mile pipeline corridor in 25 maps.[9] The Environmental Atlas overlays the maps with symbols identifying fish streams, hatcheries, recreation sites, scenic resources, "special areas" such as national parks and protected rivers, subsistence use areas, and wildlife areas of many types.[10]

The two Environmental Atlas maps (22 and 23) that encompass a portion of the Copper River together identify dozens of resources and special areas:

- 19 fish streams or stream segments;
- bison distribution and calving area;
- caribou winter and calving concentrations, and a migration zone;
- Dall sheep lambing area;
- eagle nest sites;
- moose winter concentration areas and a calving area;
- Sharptailed grouse display area;
- Trumpeter swan spring and fall concentration areas, and nesting and brood-rearing concentration areas;
- five recreation areas (state campground, trails, parking for access, state recreation site);
- two scenic overlooks and a scenic byway;
- five subsistence harvest areas (for plants, moose and a variety of resource); and
- several "special areas," including a national park, potential Trumpeter swan critical habitat, a potential recreation river, and designated settlement areas.

The legends for Maps 22 and 23 identify the Copper River (as well as the Gulkana, Klutina and Tazlina rivers) as C-plan priorities for fish. The fish streams depicted on the two maps and described in the maps' legends include the Klutina, Tazlina and Tonsina rivers. The Tazlina River is described in Map 22's legend as providing spawning habitat and a migratory corridor for sockeye and chinook salmon. The Klutina and Tonsina rivers are described in Map

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8 AR 1706-1707; June 11, 2008 Testimony of Rebecca Spiegel (Spiegel June 11 Testimony).

9 *See generally* AR 3577 (*Environmental Atlas of the Trans Alaska Pipeline System* (May 2002)).

10 *Id.*

23's legend as providing a migratory corridor and spawning habitat for several species of salmon and for resident species as well. The national park is Wrangell-Saint Elias National Park & Preserve, described in the maps' legends as located one to seven miles east of the pipeline.

Two additional maps—21 and 24—depict the TAPS corridor adjacent to Maps 22 and 23, covering areas through which the Copper River does not run but some of its tributaries do. Those maps detail resources of a similar variety and number as above, except that they list even more fish habitat (collectively, 50 streams, stream segments, marshes and the like). Map 21 specifically identifies the Gulkana Wild and Scenic River as a "special area" and lists certain segments of the Gulkana River for its fisheries resources.

The Prince William Sound Subarea Plan's "Response Procedures" section makes protection of "sensitive areas" a response objective.[11] The subarea plan contains a "sensitive areas" section and addenda that address some areas in the Copper River watershed.[12] The subarea plan identifies land management designations for the Copper River Delta State Critical Habitat Area, the Wrangell-Saint Elias National Park and Preserve, and the West and Middle Forks of the Gulkana River, which are designated as Wild and Scenic Rivers.[13] It categorizes areas of concern (major, moderate and lesser), and discusses habitat and biological resources.[14] It lists the Copper River delta as one of the most environmentally sensitive areas along the coast.[15] It discusses subsistence, personal use and commercial fisheries.[16] Finally, in an addendum, the subarea plan details geographic response strategies for the Copper River delta and flats specifically, describing land management designations, habitat types, biological resources, and human use resources (including subsistence, fishing and recreation) and indicating that part of the initial response will be for incident command to "[e]stablish sensitive areas protection strategies, tactics and resources."[17]

Like the subarea plan, the TAPS C-plan prescribes tactics for responding to oil discharges. These are presented in "containment actions" tables that include "containment

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11 Prince William Sound Subarea Contingency Plan at A-11 (July 1997) (AR 6158).
12 *Id*. at D-11 – D-126 (July 1997) (AR 6346-6463).
13 *Id*. at D-34 – D-35 (AR 6369-6370).
14 *Id*. at D-12 – D-13 & D-36 – D-66 (AR 6347-6348 & 6371-6401).
15 *Id*. at D-72 (AR 6407); *also* AR 6413-6415 (maps depicting area, including critical habitat and resources).
16 *Id*. at D-90 – D-92 (AR 6427-6429).
17 *Id*. at G-2 & G-107 – G-129 (AR 6829 & AR 6934-6948).

instructions" for specific areas, and also provide information on ESA protection.[18] The C-plan sets out containment actions, including instruction, for the Gulkana River, Tazlina River, Klutina River and Copper River contingency areas.[19] It also describes actions—deployment of booms, construction of berms and the like—that can be taken to contain discharged oil or exclude it from sensitive areas.[20] The area-specific tables set out actions to be taken by season (summer, freezeup, winter and breakup), and identify "priority environmental areas" (e.g., Gulkana River for fish and waterfowl) and "environmental sensitivities" that set primary objectives such as keeping oil out of the Gulkana River, and keeping it from proceeding downstream if the oil has reached the river.[21]

To demonstrate preparedness to respond to oil discharges, the TAPS C-plan details 14 scenarios.[22] One is the requisite "response planning standard" scenario.[23] Of the 13 additional scenarios Alyeska has been required to develop, three are for hypothetical oil discharge incidents in the Copper River area—specifically: a November incident at Milepost 676 (Scenario 11); an August incident in the Gulkana River contingency area (Scenario 12); and an October incident in the Little Tonsina River contingency area (Scenario 13).[24] The C-plan also includes a winter, maximum discharge incident scenario in the Tazlina River contingency area (Scenario 14).[25] All of these scenarios discuss "environmental consideration" such as whether the affected or threatened waterbody is an important fish stream.[26]

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[18] Trans Alaska Pipeline System Pipeline Oil Discharge Prevention and Contingency Plan, Vol. 3 (Tactics) at 3-218 (AR 5061) (stating that "[c]ontainment instructions presented in Volume 3 provide detailed information on protection of environmental sensitive areas along the length of TAPS").

[19] Id. at 3-156, 3-160, 3-165& 3-167 (AR 2878-2879, AR 2882-2884 & AR 2887-2890).

[20] *Id*. at 4-1 – 4-22 (AR 2910—2931).

[21] *See, e.g., id*. at 3-157 (AR 2879).

[22] *See generally* Trans Alaska Pipeline System Pipeline Oil Discharge Prevention and Contingency Plan, Vol. 2 (Scenarios).

[23] *Id*. at 1-1 – 1-40 (AR 2347-2384) (detailing Minton Creek/Salcha River scenario). The "response planning standard" scenario refers to the scenario required to be included in the C-plan's response action plan to demonstrate the plan holder's ability to respond to the applicable response planning standard volume within required timeframes, using resources described in the plan. 18 AAC 75.425(e)(1)(F).

[24] *Id*. at 11-1 – 11-22 (AR 2616-2637) (Milepost 676 scenario); 12-1 – 12-24 (AR 2639-2662) (Gulkana River scenario); 13-1 – 13-13 (AR 2664-2676) (Little Tonsina River scenario); *also* June 10, 2008 Testimony of Rebecca Spiegel (Spiegel June 10 Testimony) (identifying the Milepost 676, Gulkana River and Little Tonsina River scenarios as Copper River area scenarios).

[25] *Id.* at 14-1 – 14-17 (AR 2693-2709) (Tazlina River maximum discharge scenario).

[26] *Id*. at 11-2 (AR 2617) (describing caribou wintering and game crossing areas, and an anadromous fish stream); 12-2 (AR 2640) (stating that the Gulkana River is an important anadromous fish stream, as well as home to resident species); 13-2 (AR 2665) (stating that the Little Tonsina River is an important anadromous fish stream, providing spawning and rearing habitat for Coho and Chinook salmon); and 14-2 (AR 2694) (describing the terrain, waterbodies and mammals present in the hypothetical discharge area).

The scenarios also include table-style scenario timeline matrices meant to illustrate the objectives, strategies and tactics for the response. The matrices include rows in which to record ESA-related information.[27] The Gulkana River scenario (number 12) timeline matrix's ESA row records information about the importance of the river as a fish stream, sensitivity to disturbance, and location within a National Conservation Area and relative to big game crossings. The Little Tonsina scenario (number 13) timeline matrix's ESA row does not indicate whether any ESAs are present but rather contemplates an ongoing process to identify ESAs within the spill path, and to mitigate impacts. The Milepost 676 scenario (number 11) timeline matrix's ESA row is blank. The closest Scenarios 13 and 11 come to perhaps noting whether candidates for ESA/APC status are present in the area of impact from the hypothetical spill incidents is by including maps depicting fish and bird symbols.[28]

B. The Approval

The division approved Alyeska's TAPS C-plan renewal, imposing several conditions on that approval.[29] In a three-part condition captioned "Protection of Environmentally Sensitive Areas – Copper River," the division's approval required Alyeska to provide hydrology information sources, conduct a survey of the Copper River area downstream of the confluence of rivers the TAPS pipeline crosses, in an effort to identify spill response areas of opportunity, and submit a plan amendment for department and public review that "includes a description of the area of opportunity concept and the base maps and containment instructions" for four Gulkana River sites.[30] If areas of opportunity for spill response were identified in the survey, Alyeska was to "develop base maps and containment instructions for those locations[.]"[31]

Regarding ESAs and APCs, the division's findings supporting the approval stated "the Copper River area represents a significant environmentally sensitive area and area of public concern that requires additional evaluation."[32] The findings described the amendment Alyeska was being required to submit for the four Gulkana River sites and any identified areas of

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[27] *Id*. at 11-9 (AR 2624); 12-9 (AR 2647); 13-8 & 13-11 (AR 2671 & 2674 [in hardcopy of record; pages 2670-2677 are missing from electronic copy]; and 14-8 (AR 2700).

[28] *Id*. at 13-5 (AR 2668); 11-5 (AR 2620).

[29] November 30, 2006 Letter from Schorr of the Division to Shoaf of Alyeska (imposing 26 conditions on approval).

[30] *Id*. at p. 9, condition 19.

[31] *Id.*

[32] November 30, 2006 Trans Alaska Pipeline System Pipeline Oil Discharge Prevention and Contingency Plan Renewal Application Final Findings Document ("Final Findings Document") at p. 18 (AR 157).

opportunity for spill response.[33] The findings document went on to explain that conditions imposed over the years had resulted in improvement of "processes, physical enhancements and protective strategies" for the Copper River area.[34] These included constructing river bank berms in areas of defined drainage to the Gulkana, Tazlina and Klutina rivers, improved access to the Gulkana and Klutina rivers, and mitigation strategies for potential impacts to the Village of Gulkana's drinking water.[35]

C. The Request for Adjudicatory Hearing

Cascadia challenged the division's approval on several grounds and requested an adjudicatory hearing.[36] The division and Alyeska opposed Cascadia's request.[37] The Commissioner of Environmental Conservation remanded the matter to division staff, ordering supplemental findings related to the ESA/APC condition and providing Cascadia with an opportunity to clarify its hearing request as to the two issues for which the commissioner intended to grant a hearing.[38]

In the supplemental findings, the division withdrew its prior statement that the Copper River area is an ESA and APC that requires additional evaluation.[39] The division acknowledged that this statement was ambiguous—the reason for the commissioner's remand—and explained that "the entire geographic area encompassing the Copper River watershed has not been identified as an [ESA] as defined by regulations …."[40] The division clarified that the "additional evaluation" called for in the ambiguous statement was not intended to require evaluation of the entire watershed for possible inclusion as an ESA but rather to require the survey through which "improved or enhanced response options" or "areas of opportunity" for spill response might be identified.[41] The division added that it required the downstream-of-confluence survey and the analyses of the four Gulkana River sites to identify potential areas of opportunity for spill response that would be additional to established containment sites.[42]

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33 *Id.* at pp. 18 & 20-21 (AR 157 & 159-160).
34 *Id.* at p. 19 (AR 158).
35 *Id.* at p. 20 (AR 159).
36 Undated Request for Adjudicatory Hearing (received December 29, 2006).
37 January 30, 2007 Staff Opposition to Request for Adjudicatory Hearing (division); January 30, 2007 APSC's Opposition to Request for Adjudication (Alyeska).
38 March 12, 2007 Decision by Commissioner Hartig.
39 April 7, 2007 Supplemental Findings Document at p. 3.
40 *Id.*
41 *Id.* at 3 &4.
42 *Id.*

After the remand and supplemental findings, Cascadia filed a document styled "Supplemental Request for Adjudicatory Hearing." That document set out Cascadia's view of the two issues for adjudication as follows:

> Whether the TAPS C-plan contains tactics, strategies, and resources that adequately demonstrate [Alyeska's] ability to protect environmentally sensitive areas and areas of public concern of the Copper River Watershed before oil reaches them.
>
> Whether [the division] improperly approved the C-Plan, given [Alyeska's] failure to demonstrate ability to protect environmentally sensitive areas and areas of public concern within the Copper River Watershed.[43]

Cascadia proposed that it be permitted to adjudicate these and additional issues because of the reversal of position reflected in the supplemental findings' clarification that the entire Copper River watershed is not an ESA.[44] Essentially, Cascadia asked to adjudicate one issue about whether the C-plan adequately identifies ESAs and APCs and another about whether the decision not to designate the entire Copper River watershed downstream of TAPS as an ESA/APC was improper.[45]

The division and Alyeska opposed Cascadia's request, arguing that it should be denied.[46] The commissioner concluded that Cascadia had "made a good faith effort to identify [C-plan legal] requirements and to articulate issues, both factual and legal, as to whether the requirements have been met …."[47] Based on a preliminary review of the C-plan, the commissioner concluded that Cascadia had "raised a legitimate issue" which, stated broadly, was "whether the C-plan complies with legal requirements governing ESAs."[48] The commissioner granted Cascadia a hearing "as to that broad issue, as it applies to the Copper River area."[49] The commissioner was particularly concerned that the ESA-related row in the timeline matrix for Scenario 13 (Little

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43 Undated Supplemental Request for Adjudicatory Hearing at p. 5.

44 *Id.* at 6.

45 *Id.* at 6-7.

46 June 14, 2007 Staff Opposition to Supplemental Request for Adjudicatory Hearing at p. 21 (division); June 14, 2007 APSC's Opposition to Supplemental Request for Adjudicatory Hearing at p. 13 (Alyeska).

47 August 3, 2007 Commissioner's Decision on Cascadia's Supplemental Request for Adjudicatory Hearing at p. 1.

48 *Id.* at 2.

49 *Id.* Reconsideration was requested by the division and subsequently denied by the commissioner. *See* August 30, 2007 Commissioner's Decision on ADEC Staff Request for Reconsideration or Clarification of August 3, 2007 Decision.

Tonsina) appeared to defer ESA identification for the scenario to the future.[50] The commissioner's ruling in essence directed that the precise, more focused issues to be considered and the type of hearing to be allowed would be determined by the administrative law judge assigned to hear the matter on the commissioner's behalf.[51]

D. The Hearing Process

During the initial case planning conferences and in their filings required by 18 AAC 15.240, the parties continued to disagree—or argue at cross purposes—about the scope of the hearing granted by the commissioner and the specific issues to be adjudicated. Cascadia's section 240 filings contained several attachments, including a December 2007 report prepared by fisheries consultant James Brady and electronic copies of photos, maps and other graphics. The division and Alyeska maintained a standing objection to any supplementation of the agency record. Some supplementation nevertheless was allowed, partly as an unavoidable consequence of witnesses providing extra-record context for their record-oriented testimony, but also to afford Cascadia an opportunity to address the division's clarification that the Copper River watershed, as a whole, is not considered an ESA.

The parties worked cooperatively to identify the subset of the broader agency record for the full C-plan approval to be prepared and certified as the agency record for this specific, Copper River-related adjudication. They entered into a stipulation regarding the content and preparation of the agency record, including handling of confidential documents.[52] Pursuant to the stipulation, the division filed a certified agency record composed of 8,317 black and white pages, a DVD, and two color documents totaling more than 500 pages.

The parties briefed the legal issues raised by Cascadia's challenge to approval of the portion of Alyeska's TAPS C-plan covering the Copper River watershed. An interim (non-final) ruling on the legal standards applicable to C-plan requirements for the identification and protection of ESAs and APCs was issued.[53] One week was set aside for a hearing on whether the

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[50] August 3, 2007 Commissioner's Decision on Cascadia's Supplemental Request for Adjudicatory Hearing at p. 2.

[51] *Id.*

[52] October 23, 2007 Stipulation of the Parties Regarding the Agency Decision Record for Hearing.

[53] May 16, 2008 Ruling on Legal Standards. That interim ruling is not incorporated by reference here but rather has been refined to address additional legal argument and briefing, and is reflected in the Discussion below.

C-plan adequately identifies ESAs and APCs, and demonstrates that sufficient resources will be available to timely intercept discharged oil before it reaches such areas.[54]

The hearing consumed portions of four days. Ten witnesses testified: eight called by Cascadia and two by the division.[55] Alyeska called no witnesses. During the hearing, a few exhibits not part of the narrowed agency record certified for this adjudication were offer into evidence. Three letters—one dated June 11, 1999, and two dated October 21, 2005—from the broader agency record on the C-plan but not included with the certified record, and a January 11, 2007 Department of the Interior, Bureau of Land Management (BLM) letter, were offered by the division. The BLM letter was not admitted because it postdated the division's approval decision; the three others were not admitted for the reasons stated in the oral ruling.[56] These proffered exhibits were in addition to exhibits submitted with prehearing filings. Despite the standing objection by the division and Alyeska to any supplementation of the record, the graphics and reports submitted by Cascadia with its prehearing filings were treated as admitted, with some of the graphics being used by Cascadia as demonstrative exhibits.

No weight was given to opinions and conclusion in the Brady report outside Mr. Brady's area of expertise as a fisheries consultant. Though his testimony about education and experience showed Mr. Brady to be highly experienced in fisheries management and to have familiarity with interaction between oil and fisheries in the marine environment, due primarily to his experience responding to the *Exxon Valdez* spill in 1989, he was not qualified as an expert on fate and transport of oil discharged into the environment, nor did he demonstrate education or experience with oil discharged to land or river systems. To the extent that Mr. Brady's testimony included statements in the nature opinions for which expertise is required but was not established, it was given no more weight than the lay opinions expressed by other witnesses.

Cascadia characterized Kristen Smith as an "expert witness on the social and political aspects of the Copper River Watershed."[57] Cascadia did not qualify Ms. Smith as an expert witness. To the extent, if at all, that Ms. Smith's testimony included opinions for which expertise

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54 May 30, 2008 Fourth and Final Prehearing Order at pp. 1 & 2.

55 Cascadia's witnesses were: Nick Jackson; John Craig; Karen Linell; Linda Tyone; Brenda Rebne; Kristen Smith; Linda Tyone; James Brady; and Dune Lankard. The division's witnesses were Rebecca Spiegel and Lawrence Iwamoto.

56 *See* June 10, 2008 Recording.

57 December 17, 2007 Requestors' Opening Brief under 18 AAC 15.240(a) at 36.

is required but was not established, it was given no more weight than the lay opinions expressed by other witnesses.

Without exception the witnesses were credible in the sense that they appeared truthful, candid and forthcoming in their testimony. None were evasive or defensive. No obvious inconsistencies with other testimony or documentary evidence about material facts (as contrasted from opinions) were noted. Credibility alone does not prove facts. A witness' testimony may be credible but not reliable, for instance, if the witness has no direct personal knowledge of the facts to which the witness testifies or, in the case of opinions and suppositions, if the witness' knowledge base is insufficient to support the witness' conclusion. A witness' valuable first-hand experience—for instance, observing the meandering and flooding of a river over a decade—may be pertinent to considering certain fact questions—e.g., has the river meandered or flooded outside its present channel in the past ten years. But the witness' suppositions and personal opinions about what might happen to the river's course in the future serves to raise, not answer, fact questions.

The above considerations were taken into account in weighing the hearing testimony through which the parties explored and amplified the information in the certified agency record. The testimony, coupled with the underlying record, established the following:

1. Cascadia is genuinely concerned about protecting the entire Copper River watershed against physical or market-perception adverse effects from a TAPS oil spill.[58]
2. Cascadia did not point to or produce reliable evidence that the entire Copper River watershed would be impacted by a response planning standard-sized oil discharge from the pipeline.
3. Cascadia raised serious questions about whether discharged oil would evade effective containment and make its way to the Copper River via tributaries under certain hypothetical conditions.[59]
4. Cascadia did not point to or produce expert evidence on fate and transport of oil, but rather relied on lay opinion and "back of the envelope" type calculations to

[58] *E.g.*, June 9 & 10, 2008 Testimony of Kristin Smith (Smith Testimony).

[59] June 9, 2008 Testimony of Brenda Rebne (Rebne Testimony) (expressing concerns about weather and darkness limits on responses during six months of the year, and about lack of year-round access to response materials storage sites).

illustrate why it believes discharged oil would evade containment and reach the Copper River.[60]

5. Cascadia identified seven natural features or locations in the Copper River area that could qualify as ESAs or APCs:
    - Abercrombie Rapids;[61]
    - Bremner Sands;[62]
    - Copper River, including the delta and flats;[63]
    - Gulkana River;[64]
    - Klutina River;[65]
    - Tazlina River;[66] and
    - Wrangell-Saint Elias National Park & Preserve.[67]

Nothing in the C-plan itself, or in the agency record or testimony by the division's witnesses indicates that the division has judged or determined the specific natural features and locations in 5 above to be ESAs or APCs within the meaning of the applicable regulatory definitions, except with respect to the Gulkana River's influence on the Village of Gulkana drinking water supply.[68]

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[60] June 9, 2008 Testimony of John Craig (Craig Testimony) (stating that he thinks most spills would make it to the Copper River before the response occurred); Smith Testimony (describing creation of the Copper River Watershed Project's map depicting the group's view of a mid-August spill scenario and stating that she thinks the leading edge of the spill would be past containment within six hours); June 10, 2008 Testimony of James Brady (Brady Testimony) (explaining that he did not use mathematical or quantitative modeling but instead used "back of the envelope calculations" on where he might expect to see oil, and that he based his predictions on observations from his *Exxon Valdez* spill response experience in marine waters).

[61] June 10, 2008 Testimony of Dune Lankard (Lankard Testimony) (explaining that Abecrombie Rapids is valuable for fishing and is a bear concentration area).

[62] Lankard Testimony (describing the sand bars and rapidly changing water levels at Bremner Sands).

[63] Brady Testimony (discussing the uniqueness of Copper River salmon and the river's high productivity, resulting in abundance for commercial and personal use/sport fishing, and the area's value as habitat for a unique goose population); Lankard Testimony (speaking about long-time value of the Copper River area for subsistence use by indigenous people—the river for fish spawning and the wetlands for bird harvesting).

[64] June 9, 2008 Testimony of Nick Jackson (Jackson Testimony); Craig Testimony; Brady Testimony; Environmental Atlas at Map 22 and accompanying narrative (AR 3577) (indicating that the Gulkana River is important for fish and waterfowl).

[65] Jackson Testimony; Craig Testimony; Brady Testimony; Environmental Atlas at Map 23 and accompanying narrative (AR 3577) (indicating that the Klutina River is important for fish).

[66] Jackson Testimony; Craig Testimony; Brady Testimony; Environmental Atlas at Map 22 and accompanying narrative (AR 3577) (indicating that the Tazlina River is important for fish).

[67] June 9, 2008 Testimony of Karen Linell (Linell Testimony) (expressing concerns about proximity of the park to the Copper River, and about availability of responders, such as her husband, whose work takes him to Valdez); Rebne Testimony (discussing park-related tourism); Environmental Atlas at Maps 22 & 23 and accompanying narratives (AR 3577) (listing Wrangell-St. Elias National Park & Preserve as "special areas").

[68] Spiegel June 11 Testimony (discussing Athna's comments on the river's influence on the groundwater well for the village and the resulting requirement that Alyeska develop protection strategies and amend the C-plan).

One division witness acknowledged that there are ESAs and APCs in the Copper River drainage but did not name specific ones.[69]

Following the hearing, the parties were permitted to file post-hearing briefs, including proposed findings and conclusions. All three filed post-hearing briefs. The record closed with the filing of those briefs in late-July 2008. Through no fault of the parties, preparation of the proposed decision in this matter was delayed unexpectedly and for a very long period. When preparing the proposed decision, the administrative law judge worked not just with the documentary record and notes from the hearing but also reviewed the oral recordings of testimony and arguments from the hearing.

On August 5, 2011, a proposed decision was issued. All three parties filed proposals for action under AS 44.64.060(e) on August 29, 2011. The proposals for action were considered in preparing this final decision.

III. Discussion

Cascadia contends that the TAPS C-plan fails to meet the regulatory requirements for ESA and APC identification and protection because the plan does not demonstrate the ability to exclude discharged oil from the entire Copper River watershed. Cascadia asks that the Commissioner of Environmental Conservation declare the watershed as a whole to be an ESA/APC because it contains many areas that individually qualify for such status. This discussion, therefore, must address two questions:

1. Can and should the Copper River watershed, as a whole, be judged or determined to be an APC or an ESA?
2. If not, must the TAPS C-plan nonetheless demonstrate the ability to exclude discharged oil from the specific areas identified by Cascadia as candidates for ESA or APC status?

A third subject was argued as if it constituted an independent issue—namely, do containment gap exists with respect to the Gulkana, Tazlina and Klutina rivers. Such gaps, if proven to exist , would be within the scope of the adjudicatory hearing granted. Despite raising serious questions about whether the C-plan underestimates response times or the speed with which oil would move downstream, however, Cascadia was unable to point to or provide expert

[69] Spiegel June 11 Testimony (acknowledging same while explaining that the division did not think designating the entire watershed as a single ESA would help spill responders).

evidence on fate and transport of oil to support its containment gaps theory. Thus, on this subject Cascadia failed to meet its burden of going forward and of proof. The analysis below, therefore, will address only the two questions above.

First, however, it is necessary to consider what standard of review applies to the commissioner's review of the division's C-plan approval decision, and to understand the spill prevention and response planning standards for ESAs and APCs.

A. Standard of Review

This is an executive branch adjudication in which the Commissioner of Environmental Conservation (or his delegee) is the final decisionmaker.[70] As such, the standards of review applied by the courts to an administrative appeal from an agency decision do not apply unless specifically made applicable by the rules governing this type of executive branch adjudication.

The department's administrative appeal regulations at 18 AAC 15.195 – 18 AAC 15.920 do not incorporate the judicially-applied standards of review (e.g., deferential standard on subjects implicating agency expertise; substantial evidence on questions of fact; substitution of judgment standard for questions of law). Neither do they speak to whether the commissioner, as final decisionmaker at the executive branch level, should ever defer to the discretionary decisions or interpretations of regulations by subordinates such as the division employee(s) who review and approve C-plans.

The department has "primary responsibility for adoption and enforcement of regulations setting standards for the prevention and abatement of … pollution."[71] Inherent in the commissioner's role as principal executive officer of the department is the power to supervise the work of subordinate employees and the divisions in which they work. Absent a statutory or regulatory rule that vests certain decisionmaking authority in subordinates, the commissioner is not required to defer to such decisions, though it would be within his discretion to do so if the circumstances warranted. For instance, if a decision is based on particular scientific or technical expertise, rather than on law or policy, the commissioner might choose to rely on the expertise of his staff, though he is not required to defer to their decision.

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[70] Under AS 46.04.030(h), the Department of Environmental Conservation is the state agency with the power to approve a C-plan. The Commissioner of Environmental Conservation is the principal executive officer of that department. AS 44.46.010. The C-plan regulations retain plan approval as a department function without delegating that function to the division. *See generally* 18 AAC 75.400 *et seq.* The appeal regulations provide for the commissioner to make the final decision. 18 AAC 15.300.

[71] AS 44.46.020(1)(2).

In sum, a deferential standard of review akin to that applied by the courts to review of administrative agency decisions does not apply at this adjudicatory level. The commissioner likely will give due regard to the expertise of his staff, but the decision whether to uphold the existing approval of the TAPS C-plan at this adjudicatory level will not turn on whether the approval decision made by the division implicates agency expertise of the type to which a court would defer.

B. Spill Prevention and Response Planning Standards for ESAs and APCs

The main difference between the parties on what legal standards govern the department's approval of the TAPS C-plan pertains to the role of spill response scenarios in demonstrating ability to contain, control and clean up spills, and thereby protect ESAs and APCs. The division takes the position that for approval "the applicant must demonstrate that sufficient resources are maintained and available for the specific purpose of preventing discharged oil from entering [ESAs and APCs] likely to be impacted …" by the hypothetical realistic maximum oil discharge, and that this can be accomplished without turning the C-plan into a cookbook-like manual containing a site-specific plan for each area that might be impacted by a spill.[72] The division asserts that it reasonably determined that ESAs and APCs need be identified only in the context of the response planning standard scenario.[73] Alyeska agrees, arguing that the response planning standard scenario and additional scenarios the division required provide a guide for responding to any size spill at any point along the pipeline corridor for different receiving environments and conditions.[74]

In contrast, Cascadia takes the position that though a "cookbook" approach is not required, some site-specific planning is, and that ESAs and APCs must be identified for site-specific planning and effective spill response to occur.[75] Cascadia asserts that the focus of the plan-approval inquiry should be on whether the response strategies will protect ESAs and APCs

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[72] February 29, 2008 State's [Division's] Opening Brief on Legal Issues at 2-3 & 4.

[73] April 21, 2008 State's [Division's] Reply Brief on Legal Issues at 2-5.

[74] April 7, 2008 Respondent Alyeska Pipeline Service Company's Response to State's Opening Brief on Legal Issues at 1-2.

[75] April 7, 2008 Requestor's Brief on Legal Issues at 11 (stating that "the C-plan is not required to be a cookbook for every possible spill"); *id*. at 5 (acknowledging that site-specific plans are not required for every spill but arguing that the regulations require the C-plan "to plan for and protect ESAs that are exposed to spills of a certain volume …"); *id*. at 7 (stating that a failure to identify ESAs necessarily implies a failure to ensure spill response strategies adequate to protect them); *id*. at 8 (acknowledging that use of scenarios is necessary but insufficient); *id*. at 19 (agreeing with the division staff's view that site-specific plans are not required for each possible point of impact from imaginable spill scenarios).

and that demonstration of ability to protect potentially impacted ESAs and APCs is required for all scenarios, not just for the primary (response planning standard) scenario.[76] To determine whether the law supports Cascadia's position, or instead permits the division to approve C-plans that identify ESAs andAPCs only for the response planning standard scenario, it is necessary to consider the applicable statutory and regulatory requirements.

1. Statutory Requirements

Compliance with an approved C-plan is a prerequisite for operation of a crude oil transportation pipeline in Alaska.[77] The same is true for operation of oil terminal facilities, tank vessels and oil barges, subject to some exceptions not applicable to pipelines.[78] The department has the discretion to attach terms and conditions to approval of a C-plan "to ensure that the applicant for a contingency plan has access to sufficient resources to protect environmentally sensitive areas and to contain, clean up, and mitigate potential oil discharges[,]" and to ensure compliance with the plan.[79]

This does not impose an absolute duty on facility operators or the department to prevent any and all impacts from oil to such areas. Instead, it gives the department the discretion to use conditions to require an operator such as Alyeska to obtain and maintain access to the resources needed to protect environmentally sensitive areas. What constitutes an "environmentally sensitive area" is not prescribed by statute.[80] "Areas of public concern" are not addressed in the spill prevention and response statutes at all.[81] Instead, they are creatures of regulation.

The touchstone for the department's exercise of its discretion to condition C-plan approval with respect to protection of environmentally sensitive areas (and containment, cleanup

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[76] *Id*. at 12 &14.

[77] AS 46.04.030(b) (stating that "[a] person may not cause or permit the operation of a pipeline … in the state unless an oil discharge prevention and contingency plan for the pipeline … has been approved by the department [of Environmental Conservation] and the person is in compliance with the plan"); AS 46.04.900(6)&(19) (defining, respectively, "department" and "pipeline").

[78] AS 46.04.030(a)&(c) (requiring approved C-plan); AS 46.04.030(n) (allowing exemption of spill response vessels); AS 46.04.050(a) (exempting from the section 030 C-plan requirements oil terminal facilities with storage capacities below certain levels).

[79] AS 46.04.030(e).

[80] *See generally* AS 46.04.030(r) (defining terms specifically for use in the AS 46.04.030 discharge prevention and contingency planning requirements but not including "environmentally sensitive areas"); AS 46.04.900 (defining terms for purposes of AS title 46, chapter 4 but not including "environmentally sensitive areas").

[81] *See generally* AS title 46, chapter 4.

and mitigation as well) is the applicable response planning standard in AS 46.04.030(k).[82] That standard requires a pipeline operator to maintain (or have available under contract) sufficient resources "to be able to contain or control, and clean up the realistic maximum oil discharge within 72 hours[.]"[83]

This 72-hours response planning standard is inextricably linked to the department's exercise of its discretion under AS 46.04.030(e). Whether that link extends to conditions meant to protect environmentally sensitive areas, or just to conditions meant to ensure appropriate containment/cleanup/mitigation, is debatable. The key phrase is "to protect environmentally sensitive areas and to contain, clean up, and mitigate potential oil discharges … as provided in (k) …."[84] The question is whether the "as provided" qualifier modifies both antecedents or just the second. Use of the conjunction "and" with no separating punctuation leaves open the possibility that it modifies both. But the plain meaning and purpose, informed by reason, practicality and common sense, arguably support the opposite conclusion., Most notably, nothing in subsection (k) refers back to the "environmentally sensitive areas" mentioned in subsection (e), whereas the textual connection between the control, containment and cleanup expectations of subsection (k) and the ability to condition approval to ensure sufficient resources "to contain, clean up, and mitigate" discharges is strong.[85]

In short, AS 46.04.030(e) is ambiguous: it clearly authorizes the department to impose conditions related to protection of environmentally sensitive areas, but it does not clearly indicate whether the department's authority to impose such conditions is limited or enlarged by the subsection (k) mandate for operators to maintain the resources to meet the response planning standards. For this answer, it is necessary to look to the department's implementing regulations.

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[82] *See* AS 46.04.030(e), providing, in pertinent part, that the department may attach terms and conditions it "determines are necessary to ensure that the applicant for a contingency plan has access to sufficient resources to protect environmentally sensitive areas and to contain, clean up, and mitigate potential oil discharges from the facility or vessel as provided in (k) of the section"). The shorthand reference to "facility or vessel" does not make this provision inapplicable to pipelines; "facility" is not a statutorily defined term in the context of AS 46.04 and the statutory definition of "pipeline" in that same context uses the plural form "facilities" in describing what constitutes a pipeline. *See* AS 46.04.900 & (19).

[83] AS 46.04.030(k)(2).

[84] AS 46.04.030(e) (emphasis added).

[85] A statute must be interpreted "according to reason, practicality, and common sense, 'taking into account the plain meaning and purpose of the law as well as the intent of the drafters.'" *Alaska Department of Commerce, Community and Economic Development v. Progressive Casualty Ins., Co.*, 165 P.3d 624, 628 (Alaska 2007) (citations omitted); *see also* AS 01.10.040(a) (requiring that words and phases be construed "according to their common and approved usage" and that technical words be construed according to their "peculiar and appropriate meaning" if they have acquired such a meaning).

2. Regulatory Requirements

The statutes largely leave the particulars of how the department will exercise its discretion to protect ESAs and APCs—both the statutorily recognized but undefined "environmentally sensitive areas" and the non-statutory "areas of public concern"—to the department's implementing regulations. The department was required to adopt "regulations that are necessary to carry out the purposes of [AS 46.04.]"[86] Such regulations cannot be inconsistent with the statutes they seek to implement or in excess of the authority granted.[87] Thus, if AS 46.04.030 had unambiguously directed that the department require an applicant to identify all ESAs and APCs that might be impacted by a spill and include site-specific plans for protecting them in the C-plan, the department's regulations would have to be consistent with that directive.

However, because the statute is ambiguous on this subject and vests the department with discretion regarding use of terms and conditions of approval, the department had the need and the authority to prescribe by regulation what kind of demonstration a C-plan must make about the operator's ability to protect ESAs and APCs. This the department did by adopting a regulation prescribing the contents for C-plans (18 AAC 75.425) and one setting forth the standards for C-plan approvals (18 AAC 75.445).

(i) C-plan content requirements for ESAs and APCs

The regulation prescribing C-plan contents—18 AAC 75.425—requires that the C-plan be "usable as a working plan for oil discharge prevention, control, containment, cleanup, and disposal[, and that it] contain enough information, analyses, supporting data, and documentation to demonstrate the plan holder's ability to meet the requirements of AS 46.04.030 and 18 AAC 75.400 – 18 AAC 75.495."[88] As discussed above, AS 46.04.030 does not dictate what a C-plan must include regarding ESAs and APCs, but it does establish (in subsection (k)) a response planning standard that governs how well prepared the plan holder must be to control, contain and

[86] AS 46.04.070.

[87] AS 44.62.020 (providing that "each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law"); AS 44.62.030 (providing that "[i]f, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute").

[88] 18 AAC 75.425(a).

clean up an oil discharge regardless of the receiving environment. This is reinforced by the response action plan information requirements in 18 AAC 75.425(e)(1).[89]

In addition to requiring information to guide the response to a discharge up to the response planning standard volume, section 425(e)(1) contains nine enumerated paragraphs listing, and sometimes describing, information that must be included in the response action plan component of the C-plan. Only one—the "response scenario" paragraph—mentions ESAs or APCs.[90] That paragraph requires that the response action plan component of the C-plan use a hypothetical spill incident and response to demonstrate ability to meet the response planning standard. It also requires that the scenario

> be usable as a general guide for a discharge of any size [and] must describe the discharge containment, control, and cleanup actions to be taken, which clearly demonstrate the strategies and procedures adopted to conduct and maintain an effective response[.[91]]

The paragraph reserves to the department the authority to require that the C-plan include "additional response strategies to account for variations in receiving environments and seasonal conditions[.]"[92] These general requirements, when combined, could lead to a demonstration of ability to protect ESAs and APCs, especially since "variations in receiving environments" might exist between an ESA/APC and another area, leaving the department with the option to require scenarios that demonstrate response capability for the particular receiving environment that is an ESA or APC, or is representative of one. They do not prescribe anything specific regarding ESA and APC identification or protection.

The "response scenario" provisions, however, do require that a C-plan's *response strategies* include eleven specific items, one of which relates to ESAs and APCs:

> Response strategies must include … for a stationary facility or operation [includes a pipeline[93]] a <u>description of site-specific strategies</u> for the protection of environmentally sensitive areas and areas of public concern <u>identified under (3)(J)</u> of this subsection [425(e)], including, for a land-

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89 "The response action plan must provide, in sufficient detail to clearly guide responders in an emergency event, all information necessary to guide response to a discharge of any size, up to and including a discharge that is equal to the applicable response planning standard set out at 18 AAC 75.430 – 18 AAC 75.442." 18 AAC 75.425(e)(1). The response planning standard for crude oil pipelines is set out in 18 AAC 75.436, which implements the 72-hours-to-cleanup standard of AS 46.04.030(k) for oil that enters open water and provides for containment or control within 72 hours of oil entering "a receiving environment other than open water."

90 *Compare generally* 18 AAC 75.425(e)(1) *with* 18 AAC 75.425(e)(1)(F).

91 18 AAC 75.425(e)(1)(F), second introductory sentence.

92 18 AAC 75.425(e)(1)(F), third introductory sentence.

93 18 AAC 75.990(42) (defining "facility" or "facility or operation" as including a pipeline).

> based facility … protection of groundwater and public water supplies; if identification of those areas and site-specific strategies for protection of those areas are in an applicable subarea contingency plan, the plan holder may incorporate that information by reference[.[94]]

Subsection 425(e)(3)(J) provides as follows:

> The supplemental information section [of the C-plan] must provide background and verification information, including … identification of environmentally sensitive areas and areas of public concern that may suffer an impact from a spill of the applicable response planning standard volume; if identification of those areas and site-specific strategies for protection of those areas are in an applicable subarea contingency plan, the plan holder may incorporate that information by reference; whether prepared separately or incorporated by reference, the identification of and planned protection measures for those areas must be based on mapped predictions of discharge movement, spreading, and probable points of contact, based on expected local, seasonal, meteorologic, and oceanographic or topographic conditions; and for each probable point of contact, must include a description of each environmentally sensitive area and each area of public concern, including
>
> (i) the effect of seasonal conditions on the sensitivity of each area;
>
> (ii) a discussion of the toxicity effects and persistence of the discharge, based on type of product; and
>
> (iii) an identification of which areas will be given priority attention if a discharge occurs[.]

(Emphasis added.)

These section 425(e) provisions create an expectation that, together, the response action plan's response scenario(s) and the supplemental information

- will identify ESAs and APCs that might be impacted by the response planning standard scenario's hypothetical discharge;
- will identify the ESAs and APCs that might be so impacted based on mapped predictions of the movement and spreading of discharged oil and probable points of contact;
- will describe ESAs and APCs for each probable point of contact, giving them a priority ranking for attention in the event of a spill, and addressing seasonal sensitivity of the area, as well as toxicity and persistence of the product;
- will describe ESA-APC protection strategies on a site-specific basis;

[94] 18 AAC 75.425(e)(1)(F)(v) (emphasis added).

- will base planned protection measures encompassed in the site-specific ESA-APC protection strategies on mapped predictions of the movement and spreading of discharged oil and probable points of contact; and
- can satisfy the requirement to identify ESAs and APCs, and plan for their protection by incorporating an existing subarea C-plan.

In short, section 425's C-plan content requirements contemplate that a C-plan will (directly or through incorporation by reference) identify ESAs and APCs associated with the response planning standard scenario and describe protection strategies for them on a site-specific basis.

Not every ESA or APC in the vicinity of a facility must be identified. Only those that might be impacted by a response planning standard-sized discharge must be identified. For instance, if the mapped predictions of movement and spreading of oil and probable point of contact show that an ESA or APC is too far away, or too far up-gradient, from the discharge site to be impacted by discharge of the response planning standard volume of oil, those ESAs and APCs do not have to be identified in the plan. For ESAs and APCs that must be identified, the requirement that the site-specific strategies description be presented in the response scenarios section suggests that an applicant can, and perhaps should or must, demonstrate ability to protect identified ESAs and APCs through one or more scenarios.

Whether by "site-specific" strategies the regulation means that the plan must describe strategies for each unique site (e.g., Hatchery A or Wildlife Refuge B) specifically or can describe strategies for each specific type or category of site (e.g., any hatchery within X distance of the point of discharge) is arguable. Because a C-plan must be "usable as a working plan for oil discharge prevention, control, containment, cleanup, and disposal[,]"[95] and the range of facilities subject to regulation under 18 AAC chapter 75 is broad, with quite varied receiving environments for discharges from them, the most reasonable interpretation of the governing regulation is one that provides ample flexibility. For example, the C-plan for a small facility with just one or two ESAs within range of a response planning standard-sized discharge could readily present a scenario for response to a discharge threatening the specific ESAs without turning the C-plan into an unwieldy document that the responders could not use as a working plan.

In contrast, with a large facility or, as with TAPS, a long one that crosses hundreds of miles of varied receiving environments, if scenarios describing protection strategies were

[95] 18 AAC 75.425(a).

required for each and every identified ESA and APC, the plan document would be too unwieldy to be usable as a "working plan." It would be the "cookbook" that all parties to this adjudication agree is not required. For a large facility or long pipeline, representative scenarios showing planned responses to discharges to a range of receiving environments provides a good basis for training and response exercises, as well as a usable reference for responders in the event of an actual discharge. Instead of looking up the plan for responding to discharges near Hatchery A or Hatchery Z, the responders would have ready reference to a scenario reminding them of the steps to follow when the discharge threatens to reach a waterbody that is home to any hatchery (or to a marine mammal sanctuary, or a significant recreational area, or another ESA or APC).

For these reasons, the C-plan response scenario content requirement in 18 AAC 75.425(e)(1)(F)(v) for a "description of site-specific strategies for the protection of [identified ESAs and APCs]" can be satisfied by (i) a scenario that describes protection strategies to be applied to specific identified ESAs and APCs or (ii) representative scenarios that describe protection strategies to be applied to a receiving environment which does or could contain an ESA or APC that might be impacted by a response planning standard-sized discharge. The scenarios demonstrate the ability to respond in a manner calculated to protect the receiving environment, including any identified ESAs and APCs, but identification of ESAs and APCs as required by 18 AAC 75.425(e)(3)(J) is nonetheless a prerequisite for the applicant to satisfy the section 425 plan content requirements.

What section 425, standing alone, does not make clear is whether the department can approve a C-plan that uses one or more representative response scenarios to describe protection strategies for receiving environments that could or do include ESAs or APCs, or whether approval is contingent on some more detailed demonstration that all ESAs and APCs will be protected. For that it is necessary to look to the C-plan approval criteria.

(ii) C-plan approval criteria related to ESAs and APCs

Like the plan content requirements, the department's C-plan approval criteria—18 AAC 75.445—speak to identification and protection of ESAs and APCs in the context of response strategies.

> The response strategies must take into account the type of product discharged and must demonstrate that … sufficient oil discharge response equipment, personnel, and other resources are maintained and available for the specific purpose of preventing discharged oil from entering an [ESA/APC] that would likely be impacted if a discharge occurs, and that

> this equipment and personnel will be deployed and maintained on a time schedule that will protect those areas before oil reaches them according to the predicted oil trajectories for an oil discharge of the volumes established [in the response planning standards]; areas identified in the plan must include areas added by the department as a condition of plan approval[.[96]]

The department reviews the adequacy of a C-plan's response strategies under this standard.[97] The regulation does not explicitly say what may or must happen if the plan fails to meet the standard. Use of the phrase "approval criteria" in the regulation's title is no substitute for textual language showing that the department expects a plan to meet the standards of section 445 before approval.[98] The department has the authority to approve or modify a C-plan, as well as to attach conditions to its approval or modification.[99] Section 445(d)(4) in particular reinforces this. The department, therefore, can approve or disapprove a plan, or require changes to it, depending on how the plan measures up to the review standards in section 445.

Under the review standard in section 445(d)(4), there would be no bar to the department's approval of the TAPS C-plan if the review established two seemingly independent requirements:

1. sufficient resources are available to prevent discharged oil from entering ESAs and APCs "that would likely be impacted if a discharge occurs"; and
2. those resources would be used on a schedule that "will protect those areas before oil reaches them according to the predicted oil trajectories for [a response planning standard-sized] discharge …."

If these were interpreted as independent requirements, the first standing alone and read literally would demand that resources be available to prevent a discharge of any size from entering an ESA or APC of any type, not just the ones required by section 425(e)(3)(J) to be identified in the plan. To interpret the regulation as imposing such a requirement would, in effect, write the "realistic maximum oil discharge" out of the response planning standard for pipelines by requiring that resources be maintained to respond to even an unrealistically high hypothetical

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[96] 18 AAC 75.445(d)(4).

[97] 18 AAC 75.445(a) (stating that "[t]he department will use the criteria set out in this section to review an oil discharge prevention and contingency plan submitted under 18 AAC 75.425").

[98] Alaska Dep't of Law, *Drafting Manual for Administrative Regulations*, p. 60 (17th ed. 2007) (instructing regulation drafters not to "rely on chapter, article, section, or subsection headings to clarify the text …").

[99] The department can even make exceptions to the requirement to meet the prescribed response planning standard under some circumstances. *See* AS 46.04.030(m) (allowing exception "to reflect the reduced risk of oil discharges" from implementation of special prevention measures).

discharge volume if an ESA or APC, indeed any ESA or APC, "would likely be impacted" by that discharge.

Such an interpretation begs the question, is it reasonable to conclude that ESAs and APCs (identified or not) "would likely be impacted" by a discharge when (i) an unrealistic-sized one is not expected to occur,[100] (ii) a realistic-sized discharge could be contained or controlled, and cleaned up, with the resources required by the response planning standard,[101] and (iii) the resources maintained to meet that standard would be available for use on a time schedule that should result in containing or controlling the oil's movement before it reaches ESAs/APCs.[102] It also would require a finding about likelihood of impact on any ESA or APC, not just the ones required to be identified pursuant to 18 AAC 75.425(e)(1)(F)(v)&(3)(J)—i.e., the ones that may suffer an impact from a response planning standard-sized discharge. Neither is reasonable; both are inconsistent with the limit on which ESAs and APCs must be identified in the plan and with the expectation (in statute and regulation) that the quantity and type of discharge response resources to be maintained is driven by the need to be prepared for the *realistic* maximum oil discharge.

Accordingly, the separate sentences and clauses of section 445(d)(4) cannot be read independently; they must be read together, and in context with the plan content requirements from section 425 and the statutory discharge response planning requirements the regulations implement. When so read, section 445(d)(4) does not change the standard for which ESAs and APCs must be identified or the expectation that a C-plan will use scenarios to show that response resources to be maintained under the plan should be sufficient to protect identified ESAs and APCs. It does, however, give meaning to what the department's review looks for in terms of protection of identified ESAs and APCs: sufficient resources to timely intercept discharged oil before it reaches the identified ESA(s) or APC(s), based on the trajectories for a response planning standard-sized discharge.

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[100] The "realistic maximum oil discharge" is "the maximum and most damaging oil discharge that the department estimates could occur during the lifetime of the … pipeline based on the size, location, and capacity of the … pipeline[;] the department's knowledge and experience with the … pipeline or with similar … pipelines[; and] the department's analysis of possible mishaps to the … pipeline or to similar … pipelines[.]" AS 46.04.030(r)(3). With that basis for estimating the size of the "most damaging" discharge and establishing it as the "realistic maximum," a higher volume discharge seems unlikely.

[101] AS 46.04.030(k)(2); 18 AAC 75.425(e)(1)(F).

[102] 18 AAC 75.445(d)(4) (contemplating time schedule for deployment of resources that will protect ESAs before oil is predicted to reach them); AS 46.04.030(k)(2) & 18 AAC 75.436 (requiring that sufficient resources be available to contain or control, and clean up discharged oil within prescribed time limits).

Additionally, section 445(d)(4)'s final clause, read in context and together with the remainder of the paragraph, allows the department to require that this protection be extended to areas not otherwise identified as ESAs or APCs. The department can, as a condition of plan approval, designate areas to receive an ESA-APC level of protection even if the applicant did not identify those areas in the supplemental information component of the plan.

Finally, nothing in section 445(d)(4) or section 425(e) would preclude the department from designating an entire watershed as an ESA or APC, if the watershed as a whole fit the applicable definition. The regulatory definitions of "environmentally sensitive area" and "area of public concern" control on this issue.[103] "Watersheds" as a general category are not singled out for ESA/APC status. Conceivably, the department could find that an entire watershed fits one of the use or environment types listed in the definitions, if established facts illustrated that the entire watershed possessed the characteristics for the use or environment type. For instance, if the established facts showed the entire watershed to be an area of substantial recreational value or an area of essential habitat, the department might judge or determine it to be an APC or ESA. Even if the watershed, as a single whole or as an aggregate of its several parts, falls into one or more of the use or environment types listed in the definitions, the department first would have to decide that the area "deserves special protection from an oil discharge" or "is especially sensitive to change or alteration" before the watershed would qualify as an APC or ESA.

C. Application of Standards to Cascadia's Contentions

The applicable statutes and regulations, taken together, establish the following principles and requirements for identification and protection of ESAs and APCs in a C-plan for a pipeline such as TAPS:

- ESAs and APCs should be given priority consideration in spill response planning.
- The applicant needs to identify ESAs and APCs that might be impacted by the response planning standard discharge, but the department also can require as a condition of plan approval that areas not identified by the applicant be added;
- The C-plan needs to demonstrate, through one or more incident and response scenarios, that the plan holder will have the ability to meet the applicable response

[103] *See* 18 AAC 75.990(5)&(35).

planning standard, and that the response strategies reflected in the scenario(s) include site-specific strategies for the protection of identified ESAs and APCs;

- The department has the authority to require strategies that are literally specific to the individual ESA/APC sites or to accept strategies reflected in representative scenarios for the category or type of receiving environment(s) contained in or containing the ESA or APC;
- The department has the authority to require that any or all response scenarios required of the applicant include identification of associated EPAs/APCs and measures to be taken to protect them;
- For identified ESAs and APCs and areas designated by the department, as a condition of plan approval, for inclusion as ESAs or APCs, the response strategies must demonstrate that sufficient resources will be available to timely intercept discharged oil before it reaches the ESA(s) or APC(s), based on the trajectories for a response planning standard-sized discharge;
- Subarea plans can be incorporated by reference into the C-plan to satisfy the ESA-APC identification and protection requirements;
- An entire watershed can be identified or designated as an ESA or APC, but only if it meets the regulatory definition of an "environmentally sensitive area" or an "area of public concern."

Applying these conclusions to the facts reveals that Cascadia has not proven that the division's approval of the C-plan is flawed, except with regard to two scenarios, as explained below.

1. Watershed as a Whole

The Copper River watershed as a whole could be identified as an ESA or APC only if the entire watershed fits the definition for the relevant term in 18 AAC 75.990. Under 18 AAC 75.990(5), to be declared an APC, the entire watershed would have to be found "deserv[ing] of special protection from an oil discharge." Under 18 AAC 75.990(35), to be declared an ESA, the entire watershed would have to be found "especially sensitive to change or alteration[.]" Cascadia's witnesses provided testimony which, coupled with information in the agency record,

could support the department, in its judgment or determination,[104] concluding that specific areas within the watershed may be deserving of special protection or may be especially sensitive to change or alteration. For example, regarding Abercrombie Rapids, Cascadia elaborated on its previous bare-bones nomination of the site for ESA/APC status in its public comments by producing Mr. Lankard's testimony about the abundance of fish resulting in a concentration of bear feeding at the site. While such evidence could assist the department in making a judgment that *the rapids* area deserves special protection from an oil discharge, it does not establish that the entire watershed deserves such protection—not even if several other natural features or sites in the watershed also meet the regulatory definition.

A small, confined watershed—perhaps for a creek or small stream—might warrant treatment as a single area for ESA/APC purposes. For example, if every inch of the watershed drained rapidly to an important fish stream, an oil discharge anywhere in the watershed might threaten the stream, and this in turn might support a judgment or determination by the department that the entire watershed, not just the important stream itself, should be identified as an ESA/APC. The same is not so for the Copper River watershed. The agency record and the testimony adduced by Cascadia show that the Copper River watershed is quite large, dynamic and diverse, and that the TAPS corridor runs though only a portion of it. Cascadia did not point to record evidence or produce testimony from a qualify expert showing the rate at which every part of the Copper River watershed drains to sensitive areas, or that every part is especially sensitive to change or alteration or deserving of special (rather than ordinary) protection against oil discharges.

To paraphrase Alyeska's point from its post-hearing brief, if every part of the watershed is equally important, then nothing in it is especially important. Giving the ESA/APC label to the watershed as a whole serves no useful purpose for the incident command and responders, who need to prioritize response efforts in light of the events happening on the ground. The division was not required to judge or determine the Copper River watershed as a whole to be an ESA or APC on the strength of the record before it when approving the C-plan, nor would it be prudent

[104] Under the 18 AAC 75.990 definitions, the department exercises "its judgment" to decide whether an area is deserving of protection such that it qualifies as an APC and makes a "determination" about whether the sensitivity of an area to change or alteration warrants identification of the area as an ESA.

for the department do so through this adjudication decision on the strength of Cascadia's showing.

2. Demonstrated Preparedness to Exclude Oil

The regulations require a C-plan to demonstrate preparedness to exclude oil from identified ESAs and APCs through the response planning standard scenario. For a pipeline such as TAPS, the C-plan must show that sufficient resources will be available and adequate strategies and tactics can be employed to allow responders to give priority to ESA and APC protection without undermining their ability to meet the 72-hour discharge control/containment and clean up standard. For a one-scenario facility, the single demonstration looks to the area that would be impacted by a response planning standard-sized discharge, in light of the scenario's assumptions. This focuses the inquiry as to what geographic areas within the scenario's area of impact should be identified as ESAs and APCs.

The Minton Creek/Salcha River scenario (number 1) is the response planning standard scenario for the TAPS C-plan—a hypothetical 51,599 barrel spill with ESA protection measures calling for incident command to give priority to containment of oil before it reaches the Salcha River, an important fish stream.[105] Through this scenario, the C-plan demonstrates preparedness to respond—what resources and which strategies and tactics could be used—in the event of a very large spill impacting a creek that is tributary to a river. As such, it demonstrates not only preparedness to control/contain and clean up the oil, but also to give appropriate priority to excluding oil from an ESA. This demonstrates not just preparedness to respond if the scenario's hypothetical discharge occurs but also to other oil discharge events, whether real or hypothetical.

For a fixed facility with a confined footprint, a single scenario demonstrating ability to exclude oil from ESAs and APCs necessarily would include identification of the specific ESAs and APCs at risk from the response planning standard-sized discharge, but there would be no need to identify others and develop site-specific strategies and tactics for them, as long as the department is satisfied that the demonstration's resources, strategies and tactics would translate to a different response including other special or sensitive areas that might need priority protection, depending upon the particulars of the discharge event.

[105] Trans Alaska Pipeline System Pipeline Oil Discharge Prevention and Contingency Plan, Vol. 2 (Scenarios) at 1-10 (AR 2356).

However, for a facility such as TAPS, with a long, linear footprint spanning 800 miles of varied terrain, a single scenario's demonstration of preparedness is inadequate to satisfy the department—hence, the requirement that the C-plan include additional scenarios, including the three Copper River-area scenarios (11, 12 and 13) and the maximum discharge scenario (14). Thus, the question posed by this adjudication is whether and to what extent the C-plan must identify ESAs and APCs for the additional (non-response-planning-standard) scenarios.

The division interprets the regulations as not requiring ESA/APC identification outside the context of the response planning standard scenario itself. Alyeska agrees, arguing that the protection for all of the many sensitive and special areas identified in the Environmental Atlas and other parts of the C-plan is through on-the-ground incident command and responder priority setting when the actual conditions of a real discharge event are known. This makes sense, and the language of the governing regulations, discussed above, supports the division's interpretation to a point. But the department's discretionary authority to require additional scenarios in the first place is also broad enough to require that they include the same level of preparedness demonstration as the response planning standard scenario must make—i.e., that they show ability to exclude oil from ESAs and APCs at risk from the hypothetical discharge. While such a requirement may not be automatic, as requestors advocate, it falls within the department's broad statutory and regulatory authority to attach appropriate terms and conditions to its C-plan approvals.

Section 425(e)(1)(F)'s "response scenario" requirements reserve to the department discretion to require "additional response strategies to account for variations in receiving environments and seasonal conditions." The "response strategies" plan approval criteria related to ESAs and APCs give the department discretion to add as a condition of plan approval areas from which the plan must demonstrate sufficient resources to exclude oil.[106] The department, therefore, has the discretion to require the additional scenarios, and to require when appropriate that they include a demonstration of ability to exclude discharged oil from identified ESAs and APCs in the areas of impact from the scenarios' hypothetical spills.The TAPS C-plan, directly and through the documents incorporated in it (Environmental Atlas, Prince William Sound Subarea Contingency Plan, and Unified Plan), identifies a great many "sensitive areas" having environmental or economic importance in the Copper River area. Some are referred to as

[106] 18 AAC 75.445(d)(4).

"ESAs." Cascadia has identified seven specific natural features or locations it maintains qualify as ESAs or APCs. Requiring the Copper River area-scenarios to identify which of these are ESAs or APCs within the meaning of 18 AAC 75.990(5)&(35), so that the scenarios' preparedness demonstrations can be evaluated for ability to exclude oil from such areas, is within the department's discretion.

The three Copper River-area scenarios are 11, 12 and 13. Scenario 12—the Gulkana River contingency area scenario—discusses ESA protection. The relevant containment instructions in the Tactics volume of the plan identify the Gulkana River as a priority environmental area for fish and waterfowl, and set objectives to keep oil out and, if that fails, to prevent oil from proceeding downstream. With due regard for the technical expertise of the division staff in reviewing C-plans for demonstration of preparedness, this decision accepts that the Unified Plan, the Prince William Sound Subarea Contingency Plan, the Environmental Atlas, the scenario response timeline matrix, and the containment instructions, taken together, satisfy the department's preparedness demonstration needs for Scenario 12.

Scenarios 11 and 13 stand in contrast to 12. The ESA row in the timeline matrix for Scenario 11 (Milepost 676) is blank, and for Scenario 13 (Little Tonsina) the row does not contain specifics about ESAs but rather contemplates an ongoing process to identify ESAs. The division needs to evaluate whether additional clarification of the presence of ESAs and APCs, and of how any identified ESAs/APCs are adequately protected under the proposed responses, is required for these two scenarios. Given the on-going process of C-plan renewal, this evaluation and clarification by the division can take place most efficiently in the context of that process, rather than through further proceedings in this matter.

IV. Conclusion

The Copper River watershed as a whole has not been shown to meet the regulatory definition of an ESA or APC. Cascadia succeeded in showing that seven natural features or locations within the watershed are candidates for ESA or APC status. Two of the TAPS C-plan response scenarios for the Copper River area may require clarification as to ESA/APC identification and protection, as they do not currently indicate whether ESAs or APCs might be impacted by the hypothetical discharges involved and, if so, whether the C-plan demonstrates ability to exclude oil from them.

Accordingly, upon issuance of this decision by the Commissioner of Environmental Conservation, the following order shall take effect:

1. The Division of Spill Prevention and Response's 2006 TAPS C-plan approval is affirmed.
2. In its decision on application for renewal of the C-plan for TAPS, the division shall consider:
   (a) whether any of the seven candidate ESAs/APCs identified by Cascadia through this adjudication might be impacted under any of the scenarios included in the renewed C-plan;
   (b) whether the hypothetical discharges in the scenarios could impact areas that are ESAs or APCs within the meaning of 18 AAC 75.990(5)&(35); and
   (c) whether the C-plan's preparedness demonstration shows the ability to exclude oil from the specific areas so identified.
3. The division shall document its consideration of these questions, as well as its rationale for whether or not to require that ESAs and APCs be identified for all the non-response planning standard scenarios included in the C-plan, in its decision and findings on the renewed TAPS C-plan.

This decision constitutes the final administrative determination in this matter. Reconsideration is not available.[107] Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 19th day of September, 2011.

By: *Signed*
Larry Hartig, Commissioner
Department of Environmental Conservation

[This document has been modified to conform to the technical standards for publication.]

[107] Notwithstanding 18 AAC 15.305, reconsideration of the merits of this decision is not available. *See* 2 AAC 64.350 (which supersedes 18 AAC 15.305). Post-final decision reconsideration is available only to correct typographical or other manifest errors. 2 AAC 64.350(b).