

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

TOM LAKOSH,)	
)	
Requestor,)	
)	
v.)	
)	
ALASKA DEPARTMENT OF)	OAH No. 10-0168-DEC
ENVIRONMENTAL CONSERVATION,)	2009 BP Tank Vessel Operations Oil
DIVISION OF SPILL PREVENTION)	Discharge Prevention and Contingency
AND RESPONSE)	Plan (No. 09-CP-5140)
)	
Respondent.)	
<hr/>		

FINAL DECISION

I. INTRODUCTION

Tom Lakosh requested a hearing concerning the 2007 Prince William Sound Tanker Oil Discharge Prevention and Contingency Plans (C-plans). He was granted a hearing as to some but not all of the issues he raised. During the prehearing process Mr. Lakosh became concerned that any decision issued by the Commissioner would not be enforceable. He moved to dismiss his request for a hearing. After that motion was denied, Mr. Lakosh stopped participating in this proceeding. Accordingly, this case is dismissed due to Mr. Lakosh's failure to prosecute his request for a hearing.

II. PROCEEDINGS

The Commissioner granted a hearing to Mr. Lakosh. In doing so, the Commissioner stated:

In considering the factors listed in 18 AAC 15.220(b)(1)(A), Mr. Lakosh does not have the required interest in the decision to request a hearing. One other factor related to Mr. Lakosh's interests should be considered, however, and that is his long-standing involvement in oil spill prevention and contingency issues. Many individuals plan to hunt, fish, and recreate in Prince William Sound and they are interested in adequate protection of the Sound from oil spills. However, few of these other individuals have been as active as Mr. Lakosh in researching and commenting on oil spill prevention and mitigation issues, including C-Plans. One goal of a standing requirement is to ensure that the litigant has a sufficient stake in the controversy to guarantee adversity. While Mr. Lakosh does not meet the standing requirements of this regulation, his long-standing interest in this area, and his history of litigating similar cases, demonstrates that he has the requisite

adversity to fully prosecute these issues. The Commissioner has exercised discretion to relax the requirements of 18 AAC 15.220(b)(1)(A) and grant a hearing to Mr. Lakosh.^[1]

The Commissioner's order went on to grant or deny a hearing as to each specific issue raised by Mr. Lakosh. Mr. Lakosh filed a comprehensive motion seeking, among other things, clarification and reconsideration of most of the Commissioner's rulings. He specifically sought reconsideration of the portion of the decision quoted above that refers to his standing to request a hearing.² He also moved to consolidate this matter with two other similar C-plan hearings, OAH No. 10-0152-DEC and OAH No. 10-0178-DEC.

After all parties³ were given an opportunity to respond to this motion, an order was issued addressing each point raised by Mr. Lakosh. Most of Mr. Lakosh's arguments were rejected, but the three C-plan hearings were partially consolidated.

The Division gathered and certified the agency record in this matter. There then ensued a substantial dispute concerning the record. After extensive briefing, an order was issued on October 28, 2010, followed by a November 10, 2010 order denying reconsideration. Pursuant to the prior orders, the corrected agency record was certified on November 15, 2010.

The certification of the agency record triggered Mr. Lakosh's obligation to submit information pursuant to 18 AAC 15.240(a). This regulation requires the person who requested the hearing to provide a description of the factual and legal issues to be submitted at the hearing, information about each witness who will be called at the hearing, and copies of the documents to be submitted as evidence. This submission is often referred to as a "240 statement."⁴

Mr. Lakosh received an extension until February 18, 2011 to file his 240 statement. Instead of filing this statement, Mr. Lakosh filed a Motion for Entry of Final Judgment.⁵ His motion sought to have his hearing dismissed based on the Commissioner's determination that Mr. Lakosh did not have standing to request a hearing.

Although his motion was unopposed, it was apparent from the manner in which the non-oppositions were written, as well as from Mr. Lakosh's Reply memorandum, that the parties disagreed about the effect dismissal would have on Mr. Lakosh's ability to seek appellate review

¹ Order dated May 27, 2010 in OAH No. 10-0152-DEC, incorporated by reference in the Order entered the same date in this matter.

² Motion dated June 22, 2010, page 19.

³ The parties in this matter are Mr. Lakosh, the Division of Spill Prevention and Response, and C-plan holders Alaska Tanker Company, Inc., Polar Tankers, Inc., Tesoro Alaska Company, BP Oil Shipping Company USA, and SeaRiver Maritime, Inc. (collectively Shippers).

⁴ The other parties must also file a similar statement in response to the requesting party's statement.

⁵ Motion dated February 22, 2011.

of the Commissioner's decision related to standing.⁶ Mr. Lakosh's motion was denied.⁷ The order denying his motion noted that a hearing in this matter would not be futile as Mr. Lakosh would have the ability on appeal – assuming an appeal was necessary – to argue that he was entitled to a hearing, although for reasons different than those relied on by the Commissioner. In his motion for clarification, Mr. Lakosh made it clear that unless his motion for entry of judgment was granted, he would not participate in this matter.⁸

The decision to deny Mr. Lakosh's motion for entry of final judgment was reconsidered, but ultimately the prior order was not changed.⁹ Instead, the parties were directed to each file a status report.¹⁰ Mr. Lakosh did not file a status report. The other parties asked that this case be dismissed due to Mr. Lakosh's decision not to participate further.

A Notice of Intent to Dismiss was issued on April 14, 2011. The parties were given until April 22, 2011 in which to file any objection to having this matter dismissed. None of the parties filed an objection.

III. DISCUSSION

After the Department of Environmental Conservation issues a permit, any person may appeal that permit decision and request a hearing.¹¹ After allowing time for other interested parties to comment on the hearing request, the Commissioner decides whether to grant a hearing based on standards set out in 18 AAC 15.220. If granted, the hearing may be a full adjudicatory hearing or a hearing on the existing record and written briefs.¹²

One factor to be considered when deciding whether to grant a hearing is whether the requestor would be “directly and adversely affected by the department's decision so as to justify an adjudicatory hearing.”¹³ The Commissioner found that Mr. Lakosh had not shown he would be directly and adversely affected by the decision, but still granted him a hearing based on Mr. Lakosh's long-standing involvement in oil spill prevention and mitigation, and his history of litigating similar appeals.

⁶ The Division explicitly stated that a dismissal at Mr. Lakosh's request would be a voluntary dismissal. Division's Response dated March 4, 2011. If viewed as a voluntary dismissal, Mr. Lakosh would have no opportunity to appeal any of the Commissioner's determinations.

⁷ Order dated March 14, 2011. This order noted that a Petition for Review could be filed with the Superior Court.

⁸ Motion for Clarification, pages 4 – 5.

⁹ Order dated March 22, 2011. The option of filing a Petition for Review was again mentioned. Order, page 2.

¹⁰ Order dated April 5, 2011.

¹¹ 18 AAC 15.200.

¹² 18 AAC 15.220(b)(1) & (3).

¹³ 18 AAC 15.220(b)(1)(A).

Mr. Lakosh has two objections to the Commissioner's finding on this issue. First, he believes he has established that he would be directly and adversely affected by the decision, and he is entitled to a hearing. Second, he believes that unless the Commissioner's ruling is reversed, any hearing would be futile as he would not be able to enforce any decision in his favor.

Mr. Lakosh has reached a conclusion as to the legal effect of the order granting him a hearing. He was given several opportunities to proceed to a hearing and then, if necessary, argue on appeal why he was entitled to that hearing. Mr. Lakosh has decided not to do that. Instead, he hopes to have a reviewing court rule that he was legally entitled to the hearing granted to him before spending time and money on that hearing.

Mr. Lakosh has clearly indicated his decision not to participate in any further proceedings in this appeal before the Office of Administrative Hearings. Under OAH regulations, when a party who filed a request for a hearing "the administrative law judge may order or propose the dismissal of the case or the affirmation of the decision contested."¹⁴ In *Copeland v. Ballard*, the Alaska Supreme Court noted that dismissing a case that could be adjudicated on the merits is disfavored.¹⁵ *Copeland* considered the dismissal of a C-plan appeal for non-payment of the cost for gathering and certifying the agency record.¹⁶ The court held that an appeal should not be dismissed unless the "violation of an order was prejudicial or otherwise unreasonable and [the agency] must [first] explore available alternatives to dismissal."¹⁷ Even though he has violated an order requiring him to submit his 240 statement, Mr. Lakosh's appeal should not be dismissed unless his refusal to participate is prejudicial or unreasonable, and there is no available alternative to dismissal.

Mr. Lakosh's decision not to participate in his appeal is unreasonable because the proceedings are not futile. If there is evidence to support his claims on appeal, then he has the opportunity to prevail on the merits. If the Commissioner's decision is appealed to Superior Court, Mr. Lakosh would have the opportunity to defend both the decision and assert his reasons as to why he had a right to a hearing initially.

Mr. Lakosh's decision not to participate is also prejudicial to the other parties. The failure to file his 240 statement prevents the other parties from knowing what issues Mr. Lakosh would assert, what witnesses he would call, and what documents and other real evidence he

¹⁴ 2 AAC 64.320(a).

¹⁵ *Copeland v. Ballard*, 210 P.3d 1197, 1205 (Alaska 2009).

¹⁶ *Copeland*, 210 P.3d at 1200.

¹⁷ *Copeland*, 210 P.3d at 1205.

would present. This would significantly hamper the ability of the other parties to prepare for a hearing. In addition, Mr. Lakosh has the burden of proof.¹⁸ If he does not appear, he cannot present evidence or argument, and he would necessarily fail to meet his burden of proof. The other parties should not have to wait for a hearing date to have a final resolution to this appeal when it is clear that Mr. Lakosh will not participate in that hearing.

No party has suggested any alternative path to obtain a hearing on the merits of Mr. Lakosh's appeal. The Shippers and the Division believe the case should be dismissed because Mr. Lakosh will not participate. Mr. Lakosh believes his case should be dismissed so he can obtain judicial review of the Commissioner's reasons for granting a hearing. No party believes a hearing should be held, and without Mr. Lakosh's participation a hearing on the merits is not possible.

IV. CONCLUSION

For the reasons discussed above, this case is DISMISSED due to Mr. Lakosh's failure to prosecute his appeal.

DATED this 27th day of April, 2011.

By: *Signed* _____
Jeffrey A. Friedman
Administrative Law Judge

¹⁸ 18 AAC 15.270(d).

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of the Department of Environmental Conservation and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

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 26th day of May, 2011.

By: Signed
Signature
Larry Hartig
Name
Commissioner
Title

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