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

QANIRTUUQ, INC. Requestor, v. ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF SPILL PREVENTION & RESPONSE Respondent.	)	OAH No. 12-0087-DEC DEC File No. 2441.57.001

DECISION

I. Introduction

The Division of Spill Prevention and Response (division) issued a "clean up complete" determination for the Old Quinhagak Airport in Quinhagak, Alaska.[1] The local ANSCA tribal corporation, Qanirtuuq, Inc., contested that decision. The Commissioner of Environmental Conservation granted a hearing and this matter was referred to the Office of Administrative Hearings.

There were two significant motions prior to the hearing. The first was the division's Motion to Exclude Expert Witness, and the second was Qanirtuuq's Motion for Summary Determination.[2] The rulings on these motions limited the testimony and issues considered during the hearing. The remaining issues were presented at an evidentiary hearing held on March 29, 2013. Based on the prior rulings and the evidence presented, the division's clean up complete determination is upheld.

II. Facts

The Old Quinhagak Airport in Quinhagak, Alaska is owned by the Qanirtuuq Native Corporation.[3] The property had been leased for many years to the Alaska Department of Transportation and Public Facilities (DOT&PF), and it is undisputed that the property was

[1] Quinhagak is a rural community located near the mouth of the Kanektok River and Kuskokwim Bay.

[2] In responding to this motion, the division cross-moved for summary determination, agreeing there were no facts in dispute, but reaching a different conclusion from the undisputed facts.

[3] Respondent 00140 (Qanirtuuq submitted some documents labeled as "respondent" though it is actually the requestor in this action).

contaminated as a result of activities conducted at the airport. The airport is adjacent to the Kanektok River, which has partially eroded the runway and apron area.[4]

In 2005, Shannon & Wilson, Inc. conducted a Phase I Environmental Site Assessment.[5] Shannon & Wilson identified several known or potential hazardous substances on the site:

- The use over the years of numerous above ground fuel storage tanks, including two that were still existing;
- Four 55 gallon drums containing unknown liquids, as well as other unlabeled buckets;
- Stained soil in the grader storage building, and a report from a prior assessment of surface staining around the airport apron and near fuel storage tanks;
- Potential asbestos and lead based paint in existing buildings;
- The potential for contamination in and around the apron area from prior airport operations.[6]

In 2009, SLR International Corporation (SLR) prepared a Corrective Action Plan (CAP) for the airport property, which stated:

> The purpose of this CAP is to provide background, regulatory, and remedial option information appropriate for advancing the Site through the cleanup process to ensure that the site does not pose a risk to human health and the environment, and render the site ready for reuse or redevelopment. This environmental investigation of the Old Quinhagak Airport targeted the identification of any potential environmental hindrances that could limit the beneficial reuse of this Site.[7]

As part of its investigation, SLR conducted interviews with community members. Qanirtuuq's general manager, Warren Jones, told SLR that Qanirtuuq was interested in using the airport site either for a science camp or it would lease the property to another entity.[8] Mr. Jones noted that there were two berry patches used for subsistence near the airport property.[9] He also noted that surface water from the river is used for fish cleaning and drinking, but that no ground water wells were in use at the airport or elsewhere in the community.[10]

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4 Agency Record, ADEC 001488.
5 Exhibit 6 b, ADEC 001203 – 001240.
6 Exhibit 6 b, ADEC 001211 – 001212.
7 Exhibit 7, ADEC 001480.
8 Exhibit 7, ADEC 001485.
9 *Id.*
10 *Id.*

Shannon & Wilson performed the corrective action work, and submitted a draft report in February of 2011.[11] Shannon & Wilson submitted a final corrective action report to the division in May of 2011.[12] Shannon & Wilson found tetrachloroethene (PCE) in one soil sample from inside the grader storage building. It concluded, "Considering that tetrachloroethene was the only [volatile organic compound] constituent detected in Sample S9 and was not detected in other samples, it appears that the magnitude and extent of tetrachloroethene contamination is limited."[13] Also detected in the grader storage building were residual range organics at less than clean up level criterion, and arsenic at what Shannon & Wilson thought was within the range of the naturally occurring background level.[14]

One soil sample from test pit 6 contained residual range organics at less than the clean up criterion.[15] Arsenic was also detected, but was thought to be within the range of the naturally occurring background level.[16] Similar findings were made with respect to other soil samples.[17]

Groundwater samples were also tested. The only contaminates found were arsenic and lead.[18] Shannon & Wilson concluded that the arsenic was naturally occurring, and that the lead might also be naturally occurring. It noted "GRO and BTEX constituents were not detected, suggesting that the lead source was not from leaded fuel."[19] Shannon & Wilson went on to say that the water could be tested for tetraethyl lead, an additive to gasoline, to determine whether the lead was from a gasoline spill.[20]

The summary of the soil sample results shows that only two contaminates were found at greater than clean up level amounts: arsenic, which Shannon & Wilson thought was naturally occurring, and PCE, found in only one of six samples tested for that chemical.[21] The summary for water sample results show only lead and arsenic occurring at above clean up level amounts.[22]

In addition to the testing, the work performed by Shannon & Wilson included removal of contaminated soil from inside the grader storage building, constructing an off-site containment

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11 Exhibit 8.
12 Exhibit 9, ADEC 000233.
13 Exhibit 9, ADEC 000246.
14 Exhibit 9, ADEC 000247.
15 *Id.*
16 Exhibit 9, ADEC 000248.
17 *Id.*
18 Exhibit 9, ADEC 000249.
19 *Id.*
20 *Id.*
21 Exhibit 9, ADEC 000259 – 000260.
22 Exhibit 9, ADEC 000261. Test pit and monitoring well locations are shown in Exhibit 9, ADEC 000265.

cell for the removed soil, and disposing of several old drums containing various types and amounts of liquid.[23]

The airport property is now used for various subsistence activities.[24] Food and medicinal plants are collected on the property, berries are harvested there, and people use the site to clean fish. Some people also gather water from the river, which they access from the old airport property. The public water source for the village is the river, and the intake pump is about ½ mile downstream from the old airport.[25]

III. Discussion

A. Introduction

In addition to the requirements in AS 44.64 and 2 AAC 64.010 – 990, hearings concerning division decisions are governed by 18 AAC 15.200 – 920.[26] These regulations require that the party seeking a hearing provide a statement of each factual and legal issue "proposed for consideration" at the hearing.[27] Qanirtuuq provided its list of issues, and the Commissioner granted a hearing as to six issues of material fact.[28]

B. Motion to Exclude Witness

The division moved for an order precluding any expert witness testimony from Qanirtuuq. Qanirtuuq proposed to call its expert, Greg Dubois, to testify that

- Insufficient soil samples were taken to conclude that the PCE concentration found was an isolated footprint;
- The background levels of lead and arsenic are unknown, so it is not proper to conclude that the amount detected was attributable to naturally occurring levels;
- It was not proper to rely on the grader storage building to contain the contamination within that building;
- Discussion of contamination thresholds for drinking water sources;
- Groundwater sampling was inadequate;
- Failure to conduct well research on the depth to groundwater;
- That the Monitoring Well should have been retested for contamination;

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23 *See* Exhibits 9 and 10.
24 Testimony of Warren Jones.
25 *Id.*
26 15 AAC 75.385.
27 15 AAC 15.200(a)(3)(B).
28 April 12, 2012 determination, page 2.

- The grader storage building must be moved, and the contamination within it must be addressed.

One of the applicable hearing regulations provides that a party may not submit the opinion of an expert that was not submitted to the division before the division issued the contested decision.[29] There is an exception to this requirement when the party shows good cause for not submitting the information earlier.[30] Good cause includes

> 1. the party could not reasonably have ascertained the issues or made the information available within the time required by this chapter; or
>
> 2. the party could not have reasonably anticipated the relevance or materiality of the matter sought to be raised or the information sought to be introduced.[31]

Because the regulation uses the term "includes," it is interpreted as meaning that good cause includes, but is not limited to, the two listed reasons.[32]

The contested decision in this case is the division's cleanup complete determination, issued in February, 2012. It is undisputed that Qanirtuuq had not submitted any opinion of Mr. Dubois prior to the division's issuance of that decision. Qanirtuuq asserts, however, that it has demonstrated good cause for not doing so.

> Qanirtuuq did not know it should have hired an expert before the clean-up complete determination because its attorney never received the reports for the 2010 clean up and the 2011 clean up. DEC will argue that it sent the final report to Qanirtuuq itself. But DEC did not send the final report to Qanirtuuq's attorney, Ms. Hyatt. DEC knew Qanirtuuq was represented by Ms. Hyatt. DEC knew that Qanirtuuq relied on Ms. Hyatt to protect its rights. Qanirtuuq should not be responsible for preserving its rights to present expert testimony when DEC knows that it has an attorney for those purposes and chooses to send information to Qanirtuuq directly.[33]

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29 18 AAC 15.245.

30 *Id.*

31 *Id.*

32 *See* AS 01.10.040(b).

33 Qanirtuuq's Showing of Good Cause, page 7. Qanirtuuq also argued that its lease agreement and Memorandum of Agreement with the Department of Transportation and Public Facilities placed the burden on DOT&PF to ascertain the level of contamination, if any. The Memorandum of Agreement requires DOT&PF to conduct an environmental assessment, and prohibits any party from conducting any remediation without DEC approval. Neither document would preclude Qanirtuuq from conducting its own assessment if it disagreed with the results found by a different party.

While Qanirtuuq disputes receiving the Shannon & Wilson draft clean up action report, there is no dispute that it received the final clean up action report, issued in May, 2011.[34] That report was sent to Qanirtuuq's land manager.[35] There is no requirement for DEC to have sent an additional copy to Qanirtuuq's attorney, but it is significant that its attorney was notified that the report had been issued.[36] She thus had notice and an opportunity to obtain the report either from her client or from the division's web site, about eight months before the division issued the contested decision in February, 2012.

Exhibit 9 is the final corrective action report, dated May 2011. This report provided information that put Qanirtuuq on notice of the methods and conclusions reached by Shannon & Wilson. The issues that Qanirtuuq wished to have Mr. Dubois testify about are all raised in this report. Qanirtuuq knew the division would be using this report to reach its determination as to whether the clean up should be considered complete. There was sufficient time to retain an expert witness and raise these concerns before the division issued its determination in February of 2012.[37]

The only good cause asserted by Qanirtuuq for not providing Mr. Dubois' testimony earlier is that the Shannon & Wilson report was sent directly to Qanirtuuq, and not to its attorney. This is not a sufficient reason to establish good cause. Accordingly, the division's motion to exclude the expert testimony was granted in part.[38]

There is one area, however, where Mr. Dubois' testimony was permitted. The Shannon & Wilson report makes what could be viewed as recommendations for future testing. The report suggests the following:

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[34] *See* Second Affidavit of John Carnahan, ¶ 7, attached to the division's September 27, 2012 Reply to Requestor's Opposition to Motion to Exclude Expert, and division's Response to Description of Mr. Dubois' Testimony, dated October 15, 2012, pages 4 – 5.

[35] Neither party cited any regulation specifying who was entitled to notice. The division is required to seek public participation using methods it deems appropriate. 18 AAC 75.325(j). Sending a report to the property owner's land manager is a reasonable method for seeking the owner's participation.

[36] Second Affidavit of John Carnahan, ¶ 7.

[37] Qanirtuuq never asserted that it could not have obtained an opinion from Mr. Dubois within this time period. In addition, Qanirtuuq was well aware of the environmental assessments and clean up activities that had been occurring over several years. It could have retained an expert at any time to provide guidance to the division. That is what precisely what the division's regulations promote: the submission of information from interested parties before the decision is made so the division can make the most informed decision possible, instead of being second-guessed after a decision is made.

[38] Order dated October 25, 2012.

- "The groundwater samples may be tested for tetraethyl lead to verify whether the dissolved lead reported in the groundwater samples is caused by leaded fuel"[39]
- "Well MW4 and re-placement Well MW2 should be sampled at least once to confirm results of groundwater samples collected in 2006 and 2010."[40]

Qanirtuuq would have had no reason to anticipate that the clean up complete determination would be issued without those recommendations being followed. Mr. Dubois was allowed to testify about why these two tasks are important, and what impact, if any, the failure to perform these tasks should have on the division's clean up complete determination.[41]

C. Motion for Summary Determination

1. Summary Determination Standard

Any or all issues in dispute may be resolved on summary determination without a hearing if there is no genuine issue of material fact in dispute.[42] Summary determination is similar to summary adjudication in other administrative proceedings,[43] and to summary judgment in civil proceedings.[44] Summary determination may be granted where there are no material facts in dispute and one party is entitled to judgment as a matter of law.[45] The moving party has the burden of showing there is no genuine issue of material fact.[46] In opposing summary determination, the non-moving party need not show that it will ultimately prevail, only that there are material facts to be litigated.[47] All reasonable inferences of fact are drawn in favor of the party opposing summary determination.[48] If the moving party has supported its motion with affidavits or other admissible evidence, the opposing party must show "by affidavit or by other materials" that a genuine factual dispute does exist.[49] Affidavits submitted by either party must be made on personal knowledge, assert facts that would be admissible at the hearing,[50] and

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39 Exhibit 9, ADEC 000252.
40 *Id.*
41 Order dated October 25, 2012.
42 18 AAC 15.255(a).
43 *See* 2 AAC 64.250.
44 *See* Civil Rule of Procedure 56.
45 *Smith v. State*, 790 P.2d 1352, 1353 (Alaska 1990); 2 AAC 64.250(a).
46 *Alaska Rent-A-Car, Inc. v. Ford Motor Company*, 526 P.2d 1136, 1138 (Alaska 1974).
47 *Alaska Rent-A-Car*, 526 P.2d at 1139.
48 *Id.*
49 18 AAC 15.255(b).
50 Admissible evidence is evidence "on which a reasonable person might rely in the conduct of serious affairs." 18 AAC 15.270(c). *See also* 2 AAC 64.290(a)(1).

affirmatively show that the affiant is competent to testify to the matters asserted in the affidavit.[51]

The Commissioner granted a hearing on the following issues:

- Whether PCE concentration at one and a half times the clean up criteria for migration to groundwater is *de minimus.*
- Whether a two-foot layer of fill material will prevent the migration of the PCE to groundwater.
- Whether the grader building can be counted on to preclude PCE infiltration into the groundwater.
- Whether the water sample collected from the monitoring well is representative of future groundwater concentrations.
- Whether the conclusion of the Exposure Pathway Evaluation that there is no exposure to ecological receptors is a valid conclusion.
- Whether the conclusion that wild foods will not be harvested at the airport in the future is justified.[52]

2. Clean up Complete Determination

The site clean up rules are set out in 18 AAC 75.325 – 390. A responsible party, in this case DOT&PF, must clean up a "release of a hazardous substance caused by past activities."[53] The maximum level of containments remaining in the soil after clean up applicable to this case are set out in Table B1.[54] However, even if the hazardous substance exists at a greater concentration than the amount listed in Table B1, the division has discretion to issue a clean up complete determination if it determines

> that a discharge or release does not pose a threat to human health, safety, or welfare, or to the environment and requires no cleanup action according to information available at the time of the determination[.[55]]

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3. PCE Contamination

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51 18 AAC 15.255(c).
52 Decision on Request for Adjudicatory Hearing, page 2.
53 18 AAC 75.325(b)(2).
54 18 AAC 75.341(c).
55 18 AAC 75.325(d)(1).

The first three factual issues accepted for a hearing are related to the presence of PCE. One soil sample had a PCE concentration of 0.0363 mg/kg.[56] Although that is significantly greater than the clean up criterion for migration to groundwater, Shannon & Wilson stated in its final report, "the presence of the building will likely mitigate leachability and the groundwater samples from nearby Well MW4 did not contain detectable PCE."[57] Shannon & Wilson's report then concluded:

> Based on these data, potential contamination in the grader storage building does not appear to pose an unacceptable risk to human health or to the environment, and the site appears to be eligible for a cleanup complete with institutional controls determination. The institutional controls would likely include a ban on on-site drinking water wells and a stipulation that the building remain in place.[58]

After receiving the Shannon & Wilson final report, the division made its clean up complete determination:

> DEC considers the single PCE concentration (0.0363 mg/kg) de minimis and indicative of a small and isolated amount of material located within the Grader Building footprint. The detectable concentration is far below the cleanup levels for direct contact (15 mg/kg) and outdoor inhalation (10mg/kg) pathways. The location from where the sample was collected was overlain with a 2-foot layer of imported "clean" fill material in 2010 and is additionally covered by the Grader Building, both of which will preclude infiltration. Additionally, as stated above, a water sample collected in close proximity to the Grader Building yielded non-detectable concentrations for analytes tested, include PCE; furthermore, it is not anticipated that water will be used as a drinking source in close proximity to the Grader building.[59]

The uncontested evidence in the record shows that several soil samples from within the grader storage building were tested for PCE, and only one of those samples tested positive for PCE contamination. When averaged over the total quantity of soil involved from those tests, the total amount of PCE in the soil is, according to the division, *de minimus*.[60] The division noted that none of the other soil or water samples taken from anywhere on the airport site contained PCE. The PCE was recovered from inside the grader building, and had been present in the soil for at least five years. After the PCE was found, Monitoring Well 4 was installed approximately 8 feet from the grader building. The water sample from that well did not detect any PCE. Based

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56 Exhibit 10, ADEC 000852.
57 *Id.*
58 *Id.*
59 Exhibit 18, ADEC 000005
60 Carnahan Affidavit, ¶ 19 (attached to division's Counter Motion for Summary Determination).

on all of this information, the division concluded there was only a small amount of PCE at the airport site, and that this small amount did not pose a threat to humans or the environment.

The division also concluded that even if the PCE did migrate to groundwater, the small amount of total PCE in the soil would immediately be diluted to a safe level.[61] Again, according to the division, this small amount of PCE did not pose a threat.

In seeking summary determination, and opposing the division's cross motion, Qanirtuuq did not present any evidence to show that the amount of PCE was not *de minimus.* Qanirtuuq's argument was simply that clean up cannot be complete as long as there is any quantity of contamination greater than the allowable limit. This argument ignores 18 AAC 75.325(d)(1), which specifically permits a clean up complete determination under these circumstances if the division determines that the contamination does not pose a threat to humans or the environment.

At the time the decision was made, the division reasonably concluded that the small amount of PCE did not pose a threat to human health, safety, or welfare, or to the environment. Because the total amount of PCE was small, whether either the fill material or the grader building could be relied on to prevent migration of that PCE was irrelevant. There was no evidence to rebut the division's evidence that, even if the PCE did migrate, it would pose no threat.[62] Accordingly, summary determination was granted in the division's favor on the first three issues for which a hearing was granted.[63]

4. Were Samples from MW 4 Representative?

In requesting a hearing, Qanirtuuq described this issue as follows:

> Whether the water sample collected from a monitoring well in close proximity to the grader building may be relied upon to conclude that non-detectable concentration for all "analytes" is justified given the likelihood that the building is temporary.[64]

The well "in close proximity to the grader building" is MW 4. The contaminant at issue is PCE, as that is the only contaminant for which the existence or non-existence of the grader building is relevant. The division presented Mr. Carnahan's affidavit to establish that, even if this sample is

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61 *Id.*

62 Though it is difficult to tell from Qanirtuuq's description of his proposed testimony, this may have been one of the issues that Mr. Dubois would have addressed if his testimony had not been limited. However, that limitation was caused by Qanirtuuq's failure to provide the opinion before the division made its determination.

63 Order dated March 5, 2013.

64 Memorandum in Support of Request for Adjudicatory Hearing, page 5 (included with OAH referral).

not representative of future contamination, and even if some PCE does migrate to groundwater, the total amount of PCE within the grader building is insufficient to pose any threat.[65]

Qanirtuuq did not provide any evidence to suggest there is more PCE at the site, or to contradict the division's evidence that the small amount that does exist will not pose a threat.[66] Because the amount of PCE is small, it is irrelevant that the grader storage building might be removed in the future. Accordingly, the division was granted summary determination on this issue.[67]

5. Issues Not Resolved on Summary Determination

Of the issues for which a hearing was granted, there were two issues for which summary determination was not granted. First, whether there is potential exposure of PCE to ecological receptors, and second, whether wild foods will be harvested at the airport. For both of these issues, the ultimate question remaining for the hearing was whether there was a risk to human health, welfare, or safety, or to the environment through ingestion of or contact with PCE.

D. Evidentiary Hearing

The issues remaining for the hearing had been limited in two ways. First, the issues were restricted by the Commissioner's ruling in granting the hearing request. Second, the issues were further restricted with the summary determination ruling. In addition, as discussed in section III B, the scope of the testimony from Qanirtuuq's expert witness was limited. Although Mr. Dubois was permitted to testify as to two issues, that testimony was only relevant to the extent Qanirtuuq was able to show that it related to PCE exposure through ecological receptors, including the harvesting of wild foods.

Qanirtuuq's lay witnesses also testified as to a wide range of topics. Again, however, that testimony was only relevant to the extent it related to PCE exposure through ecological receptors, including the harvesting of wild foods. Specifically, Qanirtuuq had the burden of showing that there was a risk to humans or to the environment from PCE.

Mr. Carnahan testified that PCE did not bioaccumulate. In other words, when absorbed into a plant or animal, including humans, it did not remain in that plant or animal and become more concentrated over time. According to Mr. Carnahan, hazardous substances that do bioaccumulate create more of a risk than those that do not.

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65 Mr. Carnahan also testified to that effect during the hearing.

66 Again, this may have been because of the limitations imposed on Mr. Dubois' testimony.

67 Order dated March 5, 2013.

Mr. Carnahan also testified that the total amount of PCE was small, so that even if it did migrate to plants, or get into the water supply somehow, it did not pose any risk.

Qanirtuuq has the burden of proof.[68] It did not present persuasive evidence that there was a larger quantity of PCE anywhere on the airport property, or that ingestion of the small amount of PCE through harvesting of plants or from drinking river water, if the PCE migrated to the river, would pose a risk to human health, welfare, or safety, or to the environment.

IV. Conclusion

The issue in this hearing was whether the division correctly issued a clean up complete determination. It is important to note that this determination is not permanent. If new information is obtained, the division remains free to require additional clean up efforts.[69] Nor does this decision address whether DOT&PF would have any remaining environmental liabilities towards Qanirtuuq in regards to the airport property. The only question resolved in this hearing is whether the division should have issued its clean up complete determination. Qanirtuuq had the burden to prove that it should not have issued that determination. As discussed above, Qanirtuuq did not meet its burden of proof in this case. Accordingly, the division's determination is affirmed.

DATED this 10th day of April, 2013.

Signed
Jeffrey A. Friedman
Administrative Law Judge

[68] 18 AAC 15.270(d).

[69] 18 AAC 75.380(d)(1) (clean up complete determination is subject to subsequent determination that clean up is not sufficiently protective).

Adoption

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 20th day of May, 2013.

By: *Signed*
Signature
Larry Hartig
Name
Commissioner
Title

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