THIRD JUDICIAL DISTRICT AT ANCHORAGE

CITY OF VALDEZ,	)	
	)	
Appellant,	)	
v.	)	
	)	
STATE OF ALASKA,	)	
DEPARTMENT OF REVENUE,	)	
	)	Case Nos. 3VA-00-00022 CI
Appellee.	)	3VA-10-00084 CI
	)	3AN-11-07874 CI

DECISION ON APPEAL

I. Introduction.

These consolidated administrative appeals concern the taxability of numerous marine vessels associated with the Valdez Marine Terminal ("Terminal") and the procedures by which the State of Alaska, Department of Revenue ("DOR") handles taxability disputes. The City of Valdez ("City") contends the DOR has adopted a test that differs from the statutory definition of taxable property, thus depriving the City of tax revenue.

The Terminal is a facility at the southern end of the Trans-Alaska Pipeline System. Oil that has been transported through the pipeline is stored at the Terminal and then loaded onto tankers to be shipped to refineries outside of Alaska. There are separate oil spill response plans required for the operation of the

Terminal and the tankers.[1] The plans require that certain marine vessels[2] be on call to respond in the event of an oil spill.

To be taxable, property must have a defined relationship to the production or pipeline transportation of oil or to facilities used in that production or transportation. Whether property is taxable depends upon its "primary use." The statutory definition of primary use is amplified by regulation. In general, property primarily associated with the Terminal is taxable, whereas property associated with tankers is not. Prior to 1997 the DOR considered property used at the Terminal to be taxable but excluded oil spill response vessels.

In 1997 the DOR changed its policy and determined that taxable property would include some, but not all, oil spill response vessels. It adopted a bright line test to determine the primary use of oil spill response vessels. If the vessel is required by a Terminal oil spill response plan, then it is taxable. If it is required by a tanker oil spill response plan, then it is not taxable. The City of

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[1] Operation of an oil terminal facility or a tank vessel is conditioned upon the creation of an oil spill prevention and contingency plan that is approved by the Department of Environmental Conservation. AS 46.04.030(a) (oil terminal facility) and (c) (tank vessel). The Valdez Terminal Oil Discharge Prevention and Contingency Plan is often referred to as the Terminal C-Plan. The Prince William Sound Tanker Oil Spill Prevention and Response Contingency Plan is often referred to as the Tanker C-Plan.

[2] At various times the parties refer to the allegedly taxable property as ships, vessels, or equipment. For present purposes the specific description of the property is unimportant. For the sake of simplicity the Court will refer to all disputed property as vessels.

Valdez argues that this test is unfaithful to the statutory and regulatory definitions of taxable property.

The parties also have a procedural dispute over what governmental entity is authorized to hear the City's appeal of the DOR's taxability decisions. The City argues that the State Assessment Review Board ("SARB") has jurisdiction over taxability disputes. The DOR contends that SARB has jurisdiction over questions of the valuation of taxable property, but not over questions of taxability. The DOR contends taxability disputes should go to its administrative hearing and appeals process.

Finally, the City contends the DOR erred by not permitting it to conduct more discovery regarding the nature of disputed property. The DOR allowed the City only limited discovery once it concluded that the question of the validity of the bright line test was a question of law. Once it determined that the use of the spill response plans to determine if vessels were taxable complied with the statutory and regulatory definitions of taxable property, the DOR concluded that there were no remaining factual questions about which to conduct discovery since there was no dispute about what vessels were included in the oil spill response plans.

The Court concludes that the DOR was correct in its interpretation of the jurisdiction of the SARB. However, the DOR erred in its substitution of its bright line test for the statutory definition of taxable property, although the DOR

may use the test and the oil spill response plans to assist in the application of the statutory definition. Finally, the Court concludes that the DOR erred in not permitting the City to pursue more extensive discovery.

Before addressing the substance of the disputes, the Court will briefly summarize the taxation scheme and mechanism as defined by statute and regulation. It will then chronicle the parties' litigation odyssey. For fifteen years the City has been challenging the DOR's annual taxation decisions in various administrative forums and in two appeals to the superior court. Along the way the City has changed its arguments and focus somewhat. There have been subtle, but significant changes in the reasoning of the DOR. Thus, the Court will trace the parallel developments in some detail.

II. Statutory and Regulatory Framework.

The Alaska Constitution grants the legislature authority to set "[s]tandards for the appraisal of all property assessed by the State or its political subdivisions[.]"[3] Alaska Statute 43.56.010-43.56.210 defines taxable property used in oil and gas exploration, production, and the pipeline transportation of oil or gas; establishes a procedure for the assessment of the taxability and valuation of property; and authorizes municipalities to tax property that the DOR deems taxable and for which it sets a value.

[3] Alaska Const. art. IX, § 3.

Subject to specific exemptions,[4] "taxable property" is defined to be

> real and tangible personal property used or committed by contract or other agreement for use within this state primarily in the exploration for, production of, or pipeline transportation of gas or unrefined oil (except for property used solely for the retail distribution of liquefaction of natural gas), or in the operation or maintenance of facilities used in the exploration for, production of, or pipeline transportation of gas or unrefined oil[.][5]

The DOR has adopted a regulation that defines property with the requisite "primary use" to be property:

> (1) which is dedicated to purposes described in AS 43.56.210(5)(A) by contract, specification, or other expressed intentions of the property owner: or
>
> (2) which is actually used more than 50 percent of its total operational time in the year preceding the assessment year for purposes described in AS 43.56.210(5)(A).[6]

Municipalities may levy a tax on the taxable property.[7] But it is the DOR that determines whether property is taxable, and, if so, its value.[8] The DOR

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4 The definition of "taxable property" excludes specific types of property. AS 43.56.210(5)(B). In addition, AS 43.56.020 exempts certain otherwise taxable property from local taxes.

5 AS 43.56.210(5)(A).

6 15 AAC 56.075(b) (1983). When the regulation was adopted the statutory definition of taxable property was found at AS 43.56.210(6)(A). It was renumbered in 2002.

7 AS 43.56.010(b).

8 AS 43.56.060.

may require property owners to file an annual return describing taxable property.[9] It may investigate the status of property whether or not included on a return.[10] The DOR identifies taxable property and its value in an annual assessment roll.[11]

If the DOR learns of taxable property not included in the initial assessment roll for a particular year, then it may issue a supplementary assessment roll.[12] The supplementary roll is subject to the same objection procedures that are applicable to the initial roll.[13]

A municipality "may object to the assessment"[14] and the DOR "may adjust the assessment and the assessment roll."[15] If dissatisfied by the DOR's response to its objection, a municipality may appeal to the State Assessment Review Board (SARB).[16]

However, the SARB has limited authority. "The only grounds for adjustment of assessed value is proof of unequal, excessive, or improper valuation

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9 AS 43.56.070.

10 AS 43.56.080(a).

11 AS 43.56.090.

12 AS 43.56.140.

13 *Id.*

14 AS 43.56.110(a).

15 AS 43.56.110(c).

16 AS 43.56.120 and 040.

or valuation not determined in accordance with the standards set out in [AS 43.56], based on facts stated in a written appeal timely filed or proved at the hearing."[17] If dissatisfied by the SARB's decision, a municipality may appeal to the superior court and is entitled to a trial de novo.[18]

The City contends the SARB may hear its appeal of a taxability decision. The DOR contends the SARB does not have jurisdiction over taxability issues but is restricted to valuation disputes.

III. Proceedings Below.

A. 1997 Supplemental Assessment.

The City objected to the DOR's December 1997 supplemental assessment roll.[19] The City alleged that property on the supplemental roll was undervalued,[20] and that taxable property had been left off the roll.[21]

The DOR denied the valuation objections and directed the City to appeal to the SARB.[22] The DOR denied the taxability objections. It reasoned that some vessels could be used for either or both oil spill prevention and oil spill

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17 AS 43.56.130(f).

18 AS 43.56.130(g).

19 Exc. 133-36.

20 Exc. 134 at ¶ D.(a).

21 *Id.*, at ¶ D.(b).

22 Decision No. 98-1 (Exc. 143-47).

cleanup either around or away from the Valdez terminal. Vessels not sufficiently related to the terminal were not taxable property.[23] Furthermore, the DOR concluded that "[t]o the extent that the City of Valdez is arguing that [certain taxpayers] have other property that should be taxed under the auspices of AS 43.56, this is not the proper forum for an appeal because there is no appropriate provision under the governing statutes and regulations for the relief requested."[24]

The City appealed the valuation and taxability decisions to the SARB.[25]

B. 1998 Assessment.

The City made a similar objection to the DOR concerning the 1998 assessment roll.[26] Again it alleged the DOR had undervalued property[27] and left property off the roll.[28] In response, the DOR increased the value of one vessel nearly tenfold.[29] It denied the taxability objection. [30] Despite its 1997 statement

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23 *Id.*

24 Exc. 147.

25 Exc. 148.

26 Exc. 165-69.

27 Exc. 166.

28 Exc. 166-67.

29 The Crowley Barge 500-2 was increased in value from $451,040 to $4,218,860. Exc. 174.

that there was no forum for a taxability challenge, the DOR advised the City that if it did "not agree with this determination," then the City should appeal to the SARB.[31] The City did.[32]

In May 1998 the City and DOR stipulated to withdraw these two appeals from the SARB.[33] They agreed that the SARB "does not have jurisdiction to decide issues of whether property should be designated as taxable property under AS 43.56."[34] They stipulated that:

> in a future judicial action regarding issues of whether property should be determined taxable property under AS 43.56 for the 1997 Supplemental Assessment Roll or the 1998 Assessment Roll,

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30 *Id*. The DOR's explanation was somewhat confusing. Referring the claim that property had been left off the roll, it explained:

> Although there is no forum in the statutes and regulations under Title 43 for the City of Valdez to make known its objections, the City of Valdez should make a showing to the Division [of Taxation] that details the specific nature of its objections.
>
> Second the City of Valdez indicates that additional SERVS [Ship Escort/Response Vessel System] related equipment and vessel should be included on the 1998 Assessment Roll. This matter involves whether additional SERVS properties are subject to AS 43.56. This matter is currently the subject of an appeal within the Division's administrative appeal process and a decision is pending.

Id.

31 Exc. 175.

32 Exc. 176-79.

33 Exc. 180-83.

34 Exc. 181.

> [neither party] will assert or raise as a defense that the [other party] failed to exhaust administrative remedies by withdrawing their appeals from the [SARB].[35]

C. Revision of 1997 Supplemental Assessment.

On 22 July 1998 the DOR revised its 1997 Supplemental Assessment.[36] It revised it policy and added some property (oil response vessels) not previously deemed taxable. But the DOR did not apply this new policy to revise or supplement the assessment rolls for the years prior to 1997. It is the application of this new policy in subsequent annual assessments that has generated the years of litigation and these appeals.

D. 3VA-00-00022 CI.

The City sought to have the new policy applied retroactively to the years 1974 through 1996. In early 2000 the City sought declaratory and injunctive relief from the superior court in 3VA-00-00022 CI.[37] It sought declaratory relief for the years 1974-1996 and injunctive relief for future years as long as the statutory taxing scheme remained the same.[38]

In August 2000 Judge Donald Hopwood concluded that the City should utilize the DOR's supplemental assessment procedure (if not time barred)

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35 Exc. 182 at ¶ 3.

36 VZ8 REC_004332-4337.

37 Exc. 86-94.

38 Exc. 92-93.

and DOR's internal administrative appeal process before resorting to the superior court for direct relief.[39] Without reaching the merits Judge Hopwood dismissed the claims for the years 1974 to 1996, returning them to the DOR.[40] The claims for the years after 1997 survived.[41] However, in November 2000, the parties stipulated to stay the post-1997 claims.[42] The parties returned to administrative proceedings.

E. Administrative Proceedings.

1. 1974-1996 Appeals (OAH 04-0322-TAX).

In April 2001 the City again brought its objections about the assessments for 1974-2000 to the DOR. It later objected to the 2001 and 2002 assessments.[43] In all of these challenges the City claimed the DOR had left taxable property off the assessment rolls. The DOR treated these as taxability rather than valuation objections. Believing that the SARB had no jurisdiction to hear taxability appeals, the DOR assigned them to a hearing officer pursuant to 15

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39 Exc. 78-85.

40 Exc. 85.

41 *Id.*

42 Order on Joint Stipulation to Stay Litigation Pending Administrative Process (20 November 2000). A copy is attached as Exhibit C to the Motion to Strike City of Valdez's Invalid Notice of Change of Judge (18 November 2010) in 3VA-10-00084 CI.

43 The DOR consolidated these challenges. Exc. 242.

AAC 05.001-15 AAC 05.050.[44] It assigned the challenges to Appeals Officer Martin A. Bassett.

On 30 August 2002 Officer Bassett issued his Informal Conference Decision.[45] In describing the controversy he explained that:

> The Department has been aware of spill prevention and response vessels in the Valdez harbor since the mid-1970s, but did not consider them to be taxable property under AS 43.56 In 1997, however, the Department adopted a new interpretative policy that includes the vessels as "taxable property" if they are sufficiently connected to operations of the Valdez Marine Terminal. The new policy was affirmed in Informal Conference Decision No. 98-56-3.[46]

He observed that this change in 1997 "reversed 23 years of interpretative agency policy."[47] Referring to the decision that had announced this change he stated:

> The petroleum property tax assessor made it clear in the notice of the 1997 Supplemental Assessment, dated December 15, 1997: "This is not a case of 'missed' property. While the Division has prior knowledge of SERVS**,** my determination of taxability results from a change in administrative policy that should be prospectively applied."[48]

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44 "The provisions of 15 AAC 05.001-15 AAC 05.050 govern the procedures for all hearings relating to (1) tax, tax credit, and license fee matters under AS 43 except objections to assessments made under AS 43.56 which are within the jurisdiction of the State Assessment Review Board[.]" 15 AAC 05.001.

45 Exc. 238-47 (Informal Conference Decision 02-56-A11).

46 Exc. 238.

47 Exc. 242.

48 Exc. 242-43 (citation omitted).

Officer Barrett denied the appeals of the 1999 and 2000 assessments as time barred.[49] He granted the 2001 and 2002 appeals in part, adding certain vessels to the tax roll.[50] He did not determine whether the pre-1997 claims were time barred; instead he denied the claims "because the vessels were not escaped property."[51]

The City appealed to the Commissioner.[52] The Commissioner appointed Mark Handley, Revenue Hearing Examiner to hear the appeal.[53] Handley granted the DOR's motion for summary judgment, dismissing the 1974-1996 appeals.[54] However, he concluded there were factual issues that precluded dismissal of the 1997-2002 appeals.[55] In December 2007 the Commissioner

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49 Exc. 246.

50 *Id.*

51 Exc. 247.

52 Exc. 670-80. This appeal was permitted by 15 AAC 05.030.

53 As of 1 January 2005 the functions that hearing examiners had been performing within the DOR were transferred to a newly created Office of Administrative Hearings within the Department of Administration. Handley was transferred to OAH as an Administrative Law Judge. He took this case with him. Exc. 587.

54 Exc. 574, 585.

55 *Id.*

adopted this decision.[56] Superior Court Judge Daniel Schally affirmed that decision in 3VA-08-00004 CI.[57]

2. 1997-2000 Appeals (OAH 04-00322-TAX.

Remaining from ALJ Handley's 2007 decision concerning the years 1974-1996, were the 1997-2002 appeals. Because the DOR had issued supplemental assessments for 2001 and 2002 that required separate consideration, ALJ Handley dismissed the 2001 and 2002 appeals. [58] For different reasons he dismissed the 1997-2000 appeals.[59]

ALJ Handley summarized the factual context of the parties' dispute as follows:

> The present motions deal with vessels that the Division did not include in the assessments after 1996 because the Division determined the vessels were not primarily dedicated to be spill response for the Valdez terminal.
>
> The Valdez Marine Terminal (Terminal) is a facility used for the pipeline transportation of oil which is subject to taxation under AS 43.56. The Terminal is the southern end of the Trans-Alaska Pipeline System, where crude oil that has been transported through the pipeline from the Alaska North Slope is stored and loaded into tankers to be transported by sea to refineries. The tanker ships that transport crude oil from the Terminal (Tankers) are not subject to taxation under AS 43.56.

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56 Exc. 586.

57 Appellee's Brief, Appendix C.

58 Exc. 1189. The City's subsequent appeal of the DOR's 2001 and 2002 supplemental assessments is described in section E.3, below.

59 Exc. 1189-1201.

> The Alaska Department of Environmental Conservation (DEC) requires separate spill response plans for operations for the Terminal and the Tankers (C-Plans). These plans require that certain vessels must be on call to respond in the event of a spill. Examples include barges that store spill response equipment, skimmer vessels that are deployed throughout Prince William Sound, Landing craft and mini-barges.
>
> Some of these vessels have other uses such as fishing or tanker escort. Some of these vessels are specially required under the plan to be constantly on hand to be deployed in Valdez harbor to respond to oil spills. Some vessels are required to be constantly on hand only to respond to Tanker spills. Some vessels are listed to respond only to Terminal spills
>
> The DEC C-Plan's primary and recovery equipment lists the vessels that are required to be constantly on hand to respond to spills. The equipment listed in the Terminal C-Plan's primary and recover equipment lists must be available for deployment in the event of a terminal spill. Both categories have requirements for notification to DEC in the even that a listed vessel becomes unavailable. DEC is to receive ten days prior to notification of planned unavailability in the case of equipment on the primary equipment list. DEC is to receive notification within 24 hours under the C-Plan if equipment on either primary or recovery equipment lists goes out of service for more than 24 hours.
>
> DEC does readiness inspections to ensure that the equipment on these lists is available to be deployed. DEC does not look to the readiness of equipment that is not on these lists to ensure Terminal C-Plan compliance. For example, in these inspections, DEC does not look at equipment listed on the Tanker response C-Plan that is not on the primary or recovery equipment list on the Terminal C-Plan, to ensure compliance with the Terminal spill plan.[60]

In determining whether vessels and equipment met the definition of taxable property in AS 43.56.210(5)(A), the DOR used what it called its "primary

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[60] Exc. 1190-91.

use analysis," as set forth in 15 AAC 56.075(b). ALJ Handley concluded this test was faithful to the statute.[61]

The City also challenged the DOR's use of the list of vessels contained in the Terminal C-Plan as a bright line test to determine which vessels were taxable. If the Terminal C-Plan specified a vessel as having to be continuously available to respond to Terminal spills, the DOR deemed the vessel to be primarily used for pipeline transportation and thus was taxable. Conversely, if the Tanker C-Plan specified a vessel as having to be continuously available to respond to tanker spills, the DOR deemed the vessel to be primarily used for tanker activities and not for pipeline transportation. Thus those vessels were not taxable.

A particular vessel could only be primarily used for one or the other C-Plan. If a vessel need not be continuously available for the Terminal C-Plan, but had to be available if called upon to deal with Terminal oil spills (including vessels primarily used for Tanker spills), then that vessel was not taxable. However, "if there was a Terminal spill, and the vessels that had been secondarily dedicated to terminal spill response were actually primarily used for terminal spill response would they become taxable under AS 43.56."[62]

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61 Exc. 1192-96.

62 Exc. 1197.

The City had filed various motions for discovery. ALJ Handley concluded that the parties' dispute was purely legal and thus there was no reason to permit discovery. He acknowledged that he had the authority to compel discovery.[63] However, he concluded that the City

> has not shown that discovery should be ordered. Valdez's claim is based on legal rather than factual issues. Having lost its challenge to the validity of the Division's primary use doctrine, Valdez has not raised factual issues that could show that the Division's application [of] that doctrine resulted in escaped property.[64]

The Commissioner of Revenue adopted ALJ Handley's decision on 27 August 2010.[65] Reconsideration was denied on 10 October 2010.[66]

The City timely filed its notice of appeal to the superior court on 3 November 2010 in 3VA-10-00084 CI.

3. 2001-2002 Appeals (OAH 06-0250/51-TAX).

On 7 January 2003 the DOR Issued a Notice of Supplementary and Amended Assessments for 2001 and 2002 for property owned by Crowley Marine Services, Inc. and located in the City of Valdez.[67] The City objected and the DOR

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63 Exc. 1199. ("Under 15 AAC 23.030(b)(3) a hearing officer may 'order discovery by the parties and issue protective orders.'").

64 *Id.*

65 Exc. 1202.

66 Exc. 1227-28.

67 Exc. 1383-84. In each year the DOR removed the vessel Responder 500-2 (valued differently each year but in both years at approximately $1.7 million) from

assigned Appeals Officer Martin A. Bassett. After an informal conference the City submitted a report by Susan L. Harvey "explaining her perspective of the requirements for oil spill response equipment under the Terminal Plan and Tanker Plan."[68] Basset then communicated with Becky Lewis of the DEC[69] "to confirm DEC's oil spill response equipment requirement under the [Plans.] The information provided by Ms. Lewis summarized the equipment requirements under the Terminal Plan as interpreted by the DEC, the agency with the authority and responsibility for administering the program."[70] Bassett issued an informal decision affirming the amendments to the assessment rolls.[71]

The City appealed. The case was assigned to ALJ Terry L. Thurbon. Thurbon did permit the City to engage in limited discovery, including a deposition of Lewis.[72] The DOR moved for summary disposition prior to any evidentiary hearing, although the parties did submit exhibits, including the Harvey report.[73]

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the roll and added Barge 570 (valued at $807,220 and $777,310 in 2001 and 2002, respectively). Exc. 1394.

68 Exc. 1387-88.

69 Lewis is DEC's Section Manager of the TAPS JPO Section, Industry Preparedness Program of the Division of Spill Prevention and Response. Exc. 1388, n. 9.

70 Exc. 1388.

71 Informal Conference Decision No. 05-56-A2. Exc. 1385-96.

72 Exc. 1487-1524.

73 Exc. 1606.

The City again asserted that the DOR had improperly left property off the assessment roll. But its arguments were more finely honed. ALJ Thurbon described the basic dispute and the City's precise assertions of error:

> Taxpayers Crowley Marine Services, Inc., and Prince William Sound Oil Spill Response Corporation owned the equipment and made it available to Alyeska Pipeline Service Company for spill response. The [Tax Division] determined the primary use to which the equipment was committed based on which of Alyeska's two oil discharge prevention and contingency plans—tanker plan or terminal plan—listed the equipment on specific lists. Equipment allocated to tanker response was deemed non-taxable.
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> As a municipality with an interest in tax revenue from property involved in pipeline transportation of oil, Valdez challenged allocation of certain equipment to the tanker plan for tax purposes, asserting that
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> > (1) reliance on how spill response plans divided the equipment was an improper delegation of the Department of Revenue's tax authority to a sister agency, the Department of Environmental Conservation, and
> >
> > (2) reliance on the lists without regard to equipment needs for the plans' spill response scenarios was an improper way to determine whether the equipment was committed to pipeline-related versus maritime spill response because Alyeska might actually use tanker-plan listed equipment in a terminal spill response if one of the hypothetical scenarios in the terminal plan occurs.[74]

Thurbon explained why an evidentiary hearing was not required:

> An evidentiary hearing is not necessary to determine whether the division's primary use analysis lawfully implements the oil and

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[74] Exc. 1602.

> gas property taxability statute and whether reliance on the spill response plans' lists as a cross check against the taxpayers' own reporting of taxable property is permissible. Even assuming that some otherwise taxable oil and gas property might in fact escape taxation if the division does not look behind the allocation of equipment as between a pipeline-related and a maritime spill response plan, it nonetheless may be within the division's discretion to select the plans' allocations as an administratively convenient cross check against the taxpayers' reporting. If it is lawful for the division to rely on the plans, an interested third party such as Valdez could compel the division to look behind the plans' allocations only if a competing legal requirement so demanded. Thus, the dispute is legal, not factual.[75]

ALJ Thurbon held that the DOR had not delegated its assessment authority to the DEC.[76] Furthermore, in light of the objectives of the two oil spill contingency plans that Alyeska had prepared to meet DEC requirements, ALJ Thurbon concluded the DOR had acted reasonably in relying upon those lists of vessels in those plans to determine primary usage and commitment of vessels.[77] Nor had the DOR erred by declining to look to projected equipment needs and allocations in response to hypothetical oil spills when evaluating primary usage and commitment.[78]

ALJ Thurbon deferred to the DOR's discretion in its exercise of its expertise in a factually complex setting, particularly where the definition of

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75 Exc. 1606.

76 Exc. 1615.

77 Exc. 1612-13, 1615

78 Exc. 1613.

taxable property included property used in pipeline transportation of oil and thus presumably excluded property primarily used in tanker transportation of oil.[79] The DOR certainly had the authority to look beyond the representations of the use of property contained in the response plans.

> But the division [was] not required to [do] so—to second-guess the people with specialized knowledge of spill response requirements. Using an administratively convenient tool such as the lists of equipment required to be available continuously for a terminal spill response, to determine which equipment is committed for use on pipeline transportation of oil, is reasonable.[80]

The Commissioner adopted ALJ Thurbon's decision as DOR's final administrative decision.[81] The City timely filed its notice of appeal to the superior court on 24 May 2011 in 3AN-11-07874 CI.

F. Superior Court Proceedings.

On 28 July 2011 the Court granted consolidation of the three administrative appeals, 3VA-10-00022 CI, 3VA-10-00084 CI and 3AN-11-07874 CI. On 13 October 2011 the Court denied the City's request, pursuant to AS 43.56.130(i), for a trial de novo, and set a briefing schedule. The Court heard oral argument on 25 May 2012.

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79 *See* AS 43.56.210(5)(A) (defining taxable property) (quoted at footnote 3, above).

80 Exc. 1615.

81 Exc. 1642-44.

On 3 December 2012 the Court posed ten questions to the parties and invited additional briefing. It held another round of oral argument on 28 May 2013.

IV. Discussion.

The City identifies three basic issues and offers numerous arguments concerning each. First, did the DOR err in not assigning the City's AS 43.56 appeals to the State Assessment Review Board? Second, did the DOR err in its construction of the statutory definition of taxable property and the use of the oil spill response plans in determining whether property was taxable? Third, did the DOR err in concluding that the issue of taxability could be decided as a matter of law and thus limit discovery and not hold an evidentiary hearing?

A. The Role of the SARB.

The City argues that the SARB has jurisdiction to hear an appeal of an informal decision of the DOR on the taxability of property. The DOR argues that SARB's jurisdiction is limited to an appeal of issues of valuation. This dispute requires the Court to construe AS 43.56.130 and related statutes.

In *Matanuska-Susitna Borough v. Hammond,*[82] the Alaska Supreme Court identified the standard of review when an appellate court reviews an agency's interpretation of statutes.

> There are two standards under which this court has reviewed agency interpretations of statutory terms. The reasonable

[82] 726 P.2d 166 (Alaska 1986).

> basis standard, under which the court gives deference to the agency's interpretation so long as it is reasonable, is applied where the question at issue implicates agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions. The independent judgment standard, under which the court makes its own interpretation of the statute at issue, is applied where the agency's specialized knowledge and experience would not be particularly probative on the meaning of the statute.[83]

The Court must determine whether the interpretation of AS 43.56, in general, and the sections of AS 43.56 that define the role of the SARB, in particular, "implicates agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions."[84] In *Bullock v. State, Dept. of Comm. Affairs*,[85] the Alaska Supreme Court addressed the tax scheme that allows the State and municipalities to share revenues derived from taxation of certain oil and gas property. The DOR had to identify the property to be included in this tax base to which the tax rates and a cap applied. In resolving a challenge to the DOR's actions, the supreme court construed various sections of AS 43.56 and 29.45. It first had to determine the standard of review. It did so as follows:

> When the issue before us implicates "agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions," we review the agency's interpretation under the reasonable basis standard. We believe that in this case, determining the appropriate "portion" of the "tax base" that municipalities may tax is a matter that involves agency expertise. In addition, both AS 43.56.010 and AS 29.45.080 reveal the

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83 *Id*. at 175.

84 *Id*.

85 19 P.3d 1209 (Alaska 2001).

> legislature's intention to leave such determinations up to the Department. Alaska Statute 43.56.010 provides: "[i]f the total value of assessed property of a municipality taxing under AS 29.45.080(c) exceeds [the 225% valuation cap] ... *the department shall designate the portion of the tax base* against which the local tax may be applied." And AS 29.45.080 provides in relevant part: "[a] municipality may levy and collect a tax on the full and true value of taxable property taxable under AS 43.56 *as valued by the Department of Revenue*." This language evinces the legislature's intent to allow the Department to "utilize its expertise to decide" how to determine the municipal tax base under AS 29.45.080(c). Thus, because the statute involves agency expertise, and because the legislature intended to place the decision in the hands of the Department, we apply the reasonable basis standard.
>
> In applying the reasonable basis standard, we "consider factors of agency expertise, policy, and efficiency in reviewing discretionary decisions." And this standard of review, which is highly deferential to the Department, is similar to the "unreasonable, arbitrary and capricious" standard.[86]

As in *Bullock*, the present case ultimately involves the determination of a municipality's tax base. If the DOR excludes property that should be taxed pursuant to AS 43.56, then the City's tax base is reduced. This is precisely what the City claims DOR did in by using an allegedly erroneous bright line test to determine whether certain vessels were taxable.

While the narrower procedural question about the role of the SARB does not involve directly the DOR's evaluation of the nature of particular property, the identification of the appropriate appeal process from such an evaluation does address and affect the validity of that evaluation. The appeal process is just as much a part of the determination of the tax base as is the DOR's

[86] *Id*. at 1213-14 (footnotes omitted) (italics in original).

original assessment of the tax roll. The Court concludes that the interpretation of the statutory authority of the SARB implicates agency expertise and "fundamental policies within the scope of the [DOR's] statutory functions."[87] Thus the Court reviews DOR's interpretation of the role of the SARB under the more deferential reasonable basis standard.

Alaska Statute 43.56.040 creates the SARB within the DOR. It consists of five members, "each of whom must be knowledgeable of assessment procedures."[88] The DOR has the initial duty and authority to assess property for taxation pursuant to AS 43.56.[89] The DOR prepares an annual assessment roll that describes the taxable property and assigns a value to it.[90] A municipality may pose an objection to the assessment with the DOR.[91] If dissatisfied by the DOR's response, then the municipality may appeal to the SARB.[92] However, the SARB's authority is limited. "The only grounds for adjustment of assessed value is proof of unequal, excessive, or improper valuation not determined in accordance with the

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87 *Id*. at 1213.

88 AS 43.46.040.

89 AS 43.56.060(a).

90 AS 43.56.090.

91 AS 43.56.110.

92 AS 43.56.120.

standards set out in this chapter, based on facts stated in a written appeal timely filed or proved at the hearing."[93]

The City observes that this limitation does not expressly preclude the SARB from addressing taxability questions. That is true, but it proves too little. Both parties agree that the SARB has jurisdiction over evaluation appeals. A taxpayer would claim an assessment is too high, whereas a municipality would argue it is too low. The SARB can grant the appeal if it finds the DOR's value is "unequal, excessive, or improper[.]"[94] That nature of that determination is why the SARB is comprised of persons "knowledgeable of assessment procedures."[95] The very different taxability question would focus on the nature of the property and whether the property fits the definition of taxable property. That determination is more likely to involve statutory construction and will not require the expertise of an assessor.

The City contends that the SARB has jurisdiction over taxability questions because AS 43.56.130(f) allows the SARB to adjust an assessed valuation if it finds the valuation was "not determined in accordance with the standards set out in this chapter[.]" The City argues that an assessment that violates the definition of taxable property (defined in AS 43.56.210(5)) is an

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93 AS 43.56.130(f).

94 AS 43.56.130(f).

95 AS 43.56.040.

assessment not made in accordance with the standards of AS 43.56, and thus one that the SARB can adjust.

The Court rejects this construction of AS 43.56.130(f). The SARB is authorized to make "an adjustment of an assessed value." The normal meaning of an adjustment of a value is a change in the value and not a decision that the property should not have been taxed. Property that falls outside of the definition of taxable property does not have zero value, instead it is not to be assessed at all. If the SARB did conclude that property was not taxable, it would not assign it a new value (indeed it might well agree with DOR's assessed value). Instead it would eliminate the property from the assessment roll without bothering to determine its value. A decision not to value an item is not an adjustment of a value.

The DOR has adopted regulations that address the appeal of an informal decision of the DOR. Valuation appeals by the taxpayer or municipality go first to the DOR and then to the SARB.[96] Taxability appeals must be pursued pursuant to 15 AAC 05.001-15 AAC 05.050.[97] 15 AAC 05.001 provides, in part:

> The provisions of 15 AAC 05.001-15 AAC 05.050 govern the procedures for all hearings relating to – (1) tax, tax credit, and license fee matters under AS 43 except objections to assessments made under AS 43.56 which are within the jurisdiction of the State Assessment Review Board[.]

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96 15 AAC 56.015(a) and .030(a).

97 15 AAC 56.015(b) and (c).

The taxability appeals are heard by a hearing officer appointed by the commissioner.[98] The hearing officer has subpoena power and may "order discovery by the parties[.]"[99] A party may ask the commissioner to reconsider the decision of the hearing officer.[100] Upon reconsideration the modified decision becomes the final decision.[101] If the commissioner denies that request the decision of the hearing officer is final.[102] An aggrieved party may appeal to the superior court.[103]

The Court finds the DOR's construction of the SARB's statutory authority to have a reasonable basis. While the DOR may well have construed AS 43.56.130(f) not to have excluded taxability from the SARB's jurisdiction, it had a reasonable basis for concluding that the SARB was better suited for valuation decisions and that the administrative hearing officer process with its possibility of discovery and a more formal trial-like proceeding was better suited for taxability disputes. That construction is not arbitrary or capricious.

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98 15 AAC 05.030(b).

99 15 AAC 05.030(b)(3).

100 15 AAC 05.035.

101 15 AAC 05.035(c).

102 15 AAC 05.035(d).

103 15 AAC 05.040.

The City points to two decisions of the SARB wherein it arguably concluded that it had jurisdiction over taxability. The Court need not parse those decisions to determine if they are as definitive, as the City claims, or only collaterally address taxability, as the DOR claims. Even if two panels of the SARB expressly proclaimed that SARB had jurisdiction over taxability appeals, the Court concludes that it is the interpretation of the DOR rather than the SARB that is entitled to judicial deference.

In conclusion, the Court affirms the DOR's interpretation of its authorizing statutes and its conclusion that the SARB does not have jurisdiction to address issues of taxability.[104]

B. Taxable Property and the Oil Spill Response Plans.

The City challenges the DOR's use of the Terminal and tanker oil spill plans. The City argues that the DOR effectively substituted vessels required

[104] One might ask what difference it makes whether the SARB or an administrative hearing officer considers a taxability dispute as long as the same substantive law applies in either forum. The Court is not privy to either party's view of that question but it can hazard a guess.

The difference may lie in the nature of the judicial review applied to the different decision makers. If the SARB hears taxability questions, a taxpayer or municipality (but apparently not the DOR) is entitled to a trial de novo in the superior court. AS 43.56.130(i). However, if the Commissioner of Revenue, after referral to an administrative law judge, is authorized to hear taxability disputes, the dissatisfied party, including the DOR, is entitled to an administrative appeal to the superior court. Appellate Rule 601(b). In such an administrative appeal, a trial de novo is not a matter of right, but left to the discretion of the superior court. Appellate Rule 609(b)(1). The superior court plays a vastly different role if it acts as the finder of fact in a trial de novo after full civil discovery, than it does if it is reviewing the actions of the administrative agency as a traditional appellate court, a capacity far more deferential to the agency.

by the plans for an actual application of the statutory and regulatory definitions of taxable property. The DOR agrees that it would be error to make that substitution, but argues that it did not do that. Instead, it contends it used the plans as perhaps the most important tool, but still one of many tools, when it applied the definitions to actual property.

In its capacity as an appellate court the Court must determine whether the two administrative judges applied the proper legal standards to the questions before them. It must also determine whether the judges afforded the City procedural fairness, in particular, adequate access to discovery. It is not this Court's role to determine in the first instance whether the DOR came to a correct decision on the taxability of particular vessels. That taxation decision belongs initially to the DOR as long as it applies the correct legal definition of taxable property.

1. Definitions of Taxable Property.

Subject to specific exemptions,[105] "taxable property" is defined to be

> real and tangible personal property *used or committed by contract or other agreement for use* within this state *primarily* in the exploration for, production of, or pipeline transportation of gas or unrefined oil (except for property used solely for the retail distribution of liquefaction of natural gas), or *in the operation or maintenance of facilities used in* the exploration for, production of, or *pipeline transportation of gas or unrefined oil*[.][106]

[105] The definition of "taxable property" excludes specific types of property. AS 43.56.210(5)(B). In addition, AS 43.56.020 exempts certain otherwise taxable property from local taxes.

[106] AS 43.56.210(5)(A) (italics supplied).

The definition of taxable property presents several issues when applied to oil response vessels operating near the Terminal. The vessels must be primarily (thus not secondarily) used or committed for use in the operation of the Terminal (and not for tanker transport). In this case the parties do not have much difficulty with the actual use prong. Instead the problem lies with the treatment of vessels that are in different types of standby commitment for use if there is an actual Terminal spill.

At one extreme of the spectrum of commitments would be a vessel owned by the Terminal that is intended for no use other than to respond to a Terminal spill and that is barred, for some reason, for use on a tanker spill. Even if there were no oil spill in a particular tax year and the vessel did nothing but standby, it would be taxable because it was committed primarily (because exclusively) for Terminal operations. But a more typical scenario involves vessels, such as tug boats, not owned by the Terminal, that are used for a variety of purposes during a given tax year, but are under contract with the Terminal (or its contractors) to respond immediately to a Terminal spill. Here the problem would be to determine if the contractual obligation constituted the requisite "primary" commitment. The terms of the contract concerning the "commitment" to the Terminal's spill response would be quite germane to that analysis.

Some vessels might be under contract to the Terminal (or its contractors) for Terminal spills and also to another entity obligated to respond to a tanker spill. Here the first problem would be to determine if the vessel could be simultaneously primarily committed to both the Terminal and tanker responses. Second, if there can only be one primary commitment, then to which entity is that commitment owed?

The answers to these and other questions posed by similar scenarios of commitment for Terminal and tanker spill responses are not readily apparent from the statutory definition. The DOR sought to clarify some of these uncertainties by promulgating a supplemental regulatory definition of taxable property. It defines taxable property with the requisite "primary use" to be property:

> (1) which is dedicated to purposes described in AS 43.56.210(5)(A) by contract, specification, or other expressed intentions of the property owner: or
>
> (2) which is actually used more than 50 percent of its total operational time in the year preceding the assessment year for purposes described in AS 43.56.210(5)(A).[107]

For purposes of the "commitment" prong, the regulation adds little if anything to the statutory definition. It merely substitutes "dedication" for "commitment" without providing any guidance as to what constitutes primacy. In

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[107] 15 AAC 56.075(b) (1983). When the regulation was adopted the statutory definition of taxable property was found at AS 43.56.210(6)(A). It was renumbered in 2002.

light of the definitional lacunae the DOR had to decide how to evaluate the quality of a "commitment" and how to deal with vessels that may have dual commitments. What exactly does it take to be primarily committed to Terminal operations? And, if one assumes, as the DOR decided, that a vessel can only be primarily committed to one use, than how should it determine whether a vessel obligated to respond both to (at least some, if not all) Terminal or tanker spills is primarily committed to one or the other?

2. Mandatory Contents of the C-Plan.

It was in aid of resolution of these types of questions that the DOR turned to the Terminal C-Plan. It, like a contract, could be the source of the commitment of property to the operations of the Terminal. Thus, in order to discern the nature of the commitment created by the C-Plan one needs to understand its purpose and the criteria imposed upon its content.

Oil terminal facilities must submit an oil discharge prevention and contingency plan for approval by the DEC in order to operate.[108] The C-Plan requires the Terminal to anticipate various possible oils spills under different conditions and to craft a response plan for the hypothetical sills. Spills of greater volume or occurring under more challenging circumstances will require a more

[108] AS 46.04.030(a) and 18 AAC 75.400(a)(1). Tanker operators have to submit a plan as well. AS 46.04.030(c) and 28 AAC 75.400(a)(2). The extensive mandatory contents of the C-Plan are defined in 18 AAC 75.425.

complex response that will utilize more vessels and equipment. The C-Plan must identify the response vessels and equipment for the various hypothetical spills.

Part 1 of the C-Plan is the Response Action Plan.[109] It is to guide the response of the Terminal to "a discharge of any size" up to a discharge equal to the "applicable response planning standard."[110] The response planning standard states that the Terminal

> shall maintain or have under contract within the plan holder's region of operation or another approved location, sufficient oil discharge containment, storage, transfer, and *cleanup equipment*, personnel and other resources to
>
> (1) contain or control and clean up within 72 hours that portion of the response planning standard volume that enters open water[.][111]

For an oil terminal facility the response planning standard volume is "equal to the capacity of the largest storage tank at the facility."[112] The plan must identify a "response scenario," defined as "a written description of a hypothetical spill incident and response that demonstrates a plan holder's ability to respond to a

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109 18 AAC 75.425(e)(1).

110 18 AAC 75.425(e)(1).

111 18 AAC 75.432(a) (italics added). The response time is set by AS 46.04.030(k)(1).

112 18 AAC 75.432(b). Under the 1996 Terminal C-Plan the response planning standard volume was 535,000 barrels. Exc. 992. Under the 2000 Terminal C-Plan the volume was 203,300 barrels. Exc. 453.

discharge"[113] under various environmental conditions. The response scenario "must be usable as a general guide for a discharge of any size, 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[.]"[114]

In Part 3 the C-Plan must include a list of the response equipment that the Terminal will need to achieve the cleanup of the specified volume of discharged oil in the specified time.[115] The requisite equipment will dependent upon the nature of the scenarios that the plan holder has identified in the C-Plan.

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113 18 AAC 75.425(e)(1)(F).

114 *Id.*

115 18 AAC 75.425(e)(3)(F) provides:

> (F) response equipment - a complete list of contracted or other oil discharge containment, control, cleanup, storage, transfer, lightering, and related response equipment to meet the applicable response planning standard, and to protect environmentally sensitive areas and areas of public concern that are identified in (J) of this paragraph and that may be reasonably expected to suffer an impact from a spill of the response planning standard volume as described in the response strategies developed under (1)(F) and (1)(I) of this subsection; the list must include
>
> (i) the location, inventory, and ownership of the equipment;
>
> (ii) the time frame for delivery and startup of response equipment and trained personnel located outside the facility's primary region of operation;

The Terminal is required to maintain all spill response equipment identified in the plan in operational condition.[116] It must notify the DEC 10 days in advance of any "removal or inactivation of any major response item for maintenance or repair."[117] The Terminal must notify the DEC within 24 hours "if a significant change occurs in, or is made to, any component of a plan that would diminish the plan holder's response capability[.]"[118]

> (iii) the manufacturer's rated capacities, limitations, and operational characteristics for each item of oil recovery equipment, including any nonmechanical response techniques;
>
> (iv) each vessel designated for oil recovery operations, including skimming vessels and platforms and vessels designated to tow and deploy boom;
>
> (v) information on additional vessels available from other sources for oil recovery operations, including, if applicable, procedures for inventorying, training personnel, and equipping vessels;
>
> (vi) pumping, transfer and temporary storage, and lightering equipment for transferring oil from damaged or undamaged tanks; and
>
> (vii) the procedures for storage, maintenance, and inspection of spill response equipment under the immediate control of the operator when not in use, including procedures for periodic testing and maintenance of response equipment;

116 18 AAC 75.475(a).

117 18 AAC 75.475(c).

118 18 AAC 75.475(b).

3. The Terminal C-Plans.

The Third and Fourth Editions of the Terminal C-Plan are pertinent to these appeals.[119] The Fourth Edition summarizes the differences between it and the Third Edition, in part:

> The plan has been revised significantly over the contents of Edition 3, the previous version of the Valdez Marine Terminal Prevention and Response Contingency Plan….
>
> The structure of the plan has been altered to be consistent with the Prince William Sound Tanker Plan since Alyeska, and in particular SERVS, lead the responses under both plans. The similarity of the plans ensures responders are more familiar with contents of each plan.[120]

As required by 18 AAC 75.425(3)(F), each edition contains lists of response equipment.[121] The Fourth Edition structured its lists of response equipment differently than the Third Edition had. The Introduction to Part 3 of the Fourth Edition explains:

> The oil spill response equipment listed in this section is for responding to spills on or near the Terminal property. Subsection 1.4, "Primary Equipment" lists specific equipment necessary to meet the requirements of state and federal regulations. Other spill response equipment is owned and operated by Alyeska in various

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119 The Third Edition (10 April 1996) is found at VZ8 REC_004262-004326. Part 3 of the Fourth Edition (1 June 2000) is found at Exc. 454-511.

120 Exc. 453.

121 The Court has not located a Part 3 for the Third Edition, but Appendix C lists detailed specifications for certain vessels and equipment. VZ8 REC_004272-004281. The Fourth Edition states that, compared with the Third Edition, "The equipment lists have not changed very much, with the exception of the removal of one Marco Class V skimmer system[.]" Exc. 453.

> ports of Prince William Sound. This equipment is in addition to the equipment detailed in this plan to meet the Terminal Response Planning Standard (RPS) and is listed in the *PWS Tanker Oil Discharge Prevention and Contingency Plan*. It would be utilized should the significance of a spill problem from Terminal sources initiate the need for supplementary equipment. For more information see the *PWS Tanker Oil Discharge Prevention and Contingency Plan, Part 3, SID 1, Section 1 "Response Equipment."* [122]

Table 1-1, "Primary Equipment," "identifies Terminal primary response equipment. Primary equipment requires specific written notification in accordance with 18 AAC 75 to the [DEC] if it is taken out-of-service for repair, extended maintenance, or dry-dock service for more than 24 hours."[123] Additional response equipment is listed in Tables 1-2 ("Recovery Equipment"),[124] 1-3 ("Other Equipment"),[125] and 1-4 ("Recovered oil Transfer and Storage Equipment").[126] The document refers to yet other response equipment: "Information on additional vessels that would be made available may be found in

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122 Exc. 454. An example of the supplementation of the Terminal C-Plan by the Tanker C-Plan is noted in the Fourth Edition. After referring to the list of vessels in Table 1-1, (Exc. 459, ¶ 1.9), the C-Plan explains that "Information on additional vessels that would be made available may be found in *Part 3, SID 1, Section 1 "Equipment"*, of the *PWS Tanker Oil Discharge and Contingency Plan*." Exc. 459, ¶ 1.10.

123 Exc. 455.

124 Exc. 456-57.

125 Exc. 457-58.

126 Exc. 463.

Part 3, SID 1, Section 1 "Equipment", of the PWS Tanker Oil Discharge and Contingency Plan."[127]

The Terminal C-Plan explains how it is supplemented by the Tanker C-Plan:

> Oil spill prevention actions described in the Terminal Plan relating to tanker cargo transfer operations are an example of the close Terminal/Tanker interface. Because of this close interface, response equipment and personnel, including SERVS personnel, which are located at the Terminal facility will provide initial response actions for spills originating from Tankers under the PWS Plan. The Alyeska SERVS group will supplement or might relieve Terminal based personnel depending on the size, complexity, or duration of the spill response activity.
>
> The PWS Plan contains detailed supplemental information documents dealing with equipment locations and capacities, natural resources and environmentally sensitive area, alternate response techniques, etc. Because of the level of detail and the collaborative development process of these documents with the regulatory community and public, these documents are excerpted and included in the Terminal Plan by reference in specific section of the Terminal Plan.[128]

4. The DOR's Use of the Terminal C-Plan.

The DOR used the Terminal C-Plan as a short hand bright line test of the vessels and equipment that were primarily committed to the Terminal oil spill response. It determined that property listed in either of two tables was primarily committed. No other property identified in the Terminal C-Plan was

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127 Exc. 459, ¶ 1.10.

128 Exc. 1336.

taxable. To determine if the DOR's use of the Terminal C-Plan was reasonable, one must determine the criteria used to include property in the two tables.

Furthermore, the DOR distinguished to Terminal C-Plan from the Tanker-C-Plan and determined that only property in the Terminal C-Plan was taxable. Thus, to determine the reasonableness of the distinction one must understand the relationship of the two C-Plans to the Terminal's oil spill response

The response equipment listed on the Terminal C-Plan was committed to the operation of the Terminal. Other response equipment identified on the Tanker-C Plan would be used if an oil spill from the Terminal was sufficiently large. It too could be deemed to be committed to the Terminal operations. The question that Judges Handley and Thurbon addressed was how to determine if particular response equipment was *primarily* committed to Terminal or Tanker responses. The DOR used the Terminal C-Plan to determine primacy of the commitment.

ALJ Handley described the DOR's use as follows:

> Under the Terminal C-Plan only the listed equipment that the Division assesses is required to be continuously available in order for terminal operations to continue. The equipment not listed in the Terminal C-Plan as being required to be continuously available for terminal spill response does not become taxable, as Valdez argues, because those vessels are referenced as resources that could be called on in the event of major terminal spill. Such a designation is not enough to make Terminal spill response the vessel's primary use.[129]

[129] Exc. 1196.

This analysis is flawed in several ways. It substituted a "continuously available" standard for the definition of taxable property, more specifically, for the "primarily committed" prong of the statutory definition. The second flaw is that even if this substitute test were the appropriate one, the analysis errs in equating property that is listed on the Terminal C-Plan with property that must be continuously available. The DEC regulations define what must be in the Terminal C-Plan. The criterion for inclusion in the list of response equipment is not "continuous availability." Rather, 18 AAC 75.425(e)(3(F) requires " a complete list of contracted or other oil discharge containment, control, cleanup, storage, transfer, lightering, and related response equipment to meet the applicable response planning standard[.]"

Third, the Terminal created four tables of response equipment in the C-Plan. It created criteria for the tables. It used a notification criterion for Table 1-1. The notification criterion is not necessarily equivalent to ALJ Handley's "continuous availability" standard. The Terminal did not identify the criteria for the other three tables of response equipment.

ALJ Thurbon made a more detailed analysis of the DOR's use of the Terminal C-Plan. But his shares the same flaws as that of ALJ Handley. He pointed out that the DOR had determined that the items contained in Tables 1-1"Primary Equipment" and 1-2 "Recovery Equipment" were taxable because "it had to be available continuously for a terminal spill response and thus could be

considered committed for use (if not actually used) for pipeline transportation of oil-related purposes."[130] He observed that the "narrative introducing [Table 1-1] characterizes the listed equipment as the 'Terminal primary response equipment' and explains that the equipment cannot be taken out of service without notice to the [DEC]."[131] He explained that the DOR 'made a similar determination as to property on the 'Recovery Equipment" list in the terminal plan because it, too, could not be taken out of service without notice."[132]

He is not quite right about notification to the DEC. The notification requirement is contained in 18 AAC 75.475(b). The plan holder must provide notice within 24 hours of "a significant change occurs in, or is made to, any component of a plan that would diminish the plan holder's response capability[.]" There is nothing in the regulation that expressly requires the Terminal to notify the DEC if response equipment from Table 1-1 is out of service. It may well be true that the Terminal must notify the DEC if equipment on the list unavailable, but that would only be required if, without that equipment, the plan holder's response capacity has been diminished. But there would be no need to notify the DEC if the Terminal had an equivalent replacement piece of equipment temporarily available while the listed equipment was unavailable. The point is not that the particular property in Table 1-1is not necessary or primarily committed or taxable, but that

130 Exc. 1604.

131 *Id*. (footnote omitted).

132 *Id*. (footnote omitted).

the criterion for inclusion on that Table is not determinative of taxability. The Terminal C-Plan gives no explanation of why it created the category of equipment it deemed to include in Table 1-1. But we know that neither the DEC nor the DOR crafted the criteria.

The DOR's use of Table 1-2 and ALJ Thurbon's approval of it is similarly flawed. The DOR thought Table 1-2 property was taxable because it could not be taken out of service without notice to the DEC. Again, the reason that the Terminal crafted that Table is unknown. The regulations do not require or define it. Judge Thurbon acknowledged that

> the terminal plan's narrative did not say that the 'Recovery Equipment" could not be taken out of service without notice, but [Rebecca Lewis,] an employee of the [DEC] testified in a deposition that she had told the [DOR] the recovery equipment is required equipment as well…. The deposition testimony indicated that both the primary equipment and the recovery equipment listed in the plan would be subject to the notice requirement.[133]

ALJ Thurbon thus allowed the DOR to substitute an imprecise notification criterion for the primary commitment prong of the statutory definition of taxable property. The Court acknowledges that the DOR and ALJ Thurbon were struggling with the difficult problem of construing the statutory and regulatory definitions of primary commitment and attempted to apply them to property that would almost certainly be available for either or both Terminal and tanker spills. The Court acknowledges that the C-Plans are significant evidence of

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[133] Exc. 1604 n. 8.

commitment of property for taxable or nontaxable purposes. But the Court disagrees with the conclusion of both Judges Handley and Thurbon that the DOR may, as a matter of law, use the Plans in the way that each describes.

Furthermore, the Court disagrees that the DOR can simply assume that property included on some, but not all, of the Terminal C-Plan tables is primarily committed to the operation of the Terminal and that other property in that Plan is not. Nor can it so easily assume that property not included in the Terminal C-plan is not primarily committed to the operation of the Terminal. The C-Plan requires the identification of oil spill scenarios and the responses to those spills of increasing, even if the likelihood of the larger spills occurring may be less than that of the smallest. Regardless of probability, the regulations require that the Terminal be prepared to respond. The DOR must evaluate the commitment of the response equipment for all spills that the C-Plan must address. The DOR must more carefully evaluate the relationship of the Terminal and Tanker C-Plans so that any response equipment contained in either Plan that is primarily committed to Terminal operations are identified and taxed.

The reason that the DOR, its administrative judges, and the parties have been litigating these issues for so long (aside from the financial consequences) is the difficulty in applying a vague definition to actual (and sometimes obscure[134]) facts. The determination of whether particular property is

[134] Some of the obscurity is the result of limited discovery permitted by the City.

taxable is quintessentially a factual one. Both administrative judges and the DOR erred in using the C-plan as a test for taxability as a matter of law. Genuine issues of material fact preclude the summary adjudications.

Put another way, the Court concludes that the DOR's use of the Terminal C-Plan did not have a reasonable basis, but was arbitrary and capricious. To be clear, it would have been reasonable to use the Terminal and Tanker C-Plans as evidence of commitment and the quality thereof (i.e., was it primary commitment?), but it was not reasonable to substitute portions of the Terminal C-Plan for the statutory definition of taxable property.

C. Discovery.

A related issue is the restriction on the City's use of discovery. ALJ Handley did not allow the City to pursue discovery once he concluded that he DOR's use of the Terminal C-Plan was reasonable as a matter of law.[135] ALJ Thurbon allowed limited discovery, including the deposition of the DEC employee Lewis), but he too concluded the use of the Terminal C-Plan was appropriate as a matter of law and thus there were no factual issues for which discovery was needed. This was wrong in two regards. First, he permitted an exploration of DEC's requirements for and use of the C-Plans through Lewis, but then disregarded the contradictory and, in part, fuller evidence supplied by the City's

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135 Nor did he permit discovery prior to coming to that conclusion.

expert, Susan Harvey, Lewis' former supervisor at DEC.[136] Second, the Terminal's categorization of response equipment into multiple tables and the DOR's acceptance of the property listed in only two of the tables as taxable was an improper conversion of evidence that was subject to much interpretation into conclusions of law without allowing the City an adequate opportunity to develop or present evidence as to the meaning of the various tables of equipment, the meaning the C-Plans, or the application of the statutory definitions to that and other evidence.

V. Conclusion.

The State Assessment Review Board has the authority granted to it by AS 43.56.120 and limited by AS 43.56.130(f). The SARB does not have authority to hear appeals of taxability decisions.

The DOR unreasonably relied upon the Terminal C-Plan to determine whether oil spill response vessels and equipment was taxable property pursuant to AS 43.56.210(5). Administrative Law Judges Handley and Thurbon erred in upholding the DOR's assessments of taxable property as a matter of law.

Administrative Law Judges Handley and Thurbon abused their discretion by limiting the ability of the City to pursue discovery in its informal and formal appeals to the DOR of the DOR's assessment rolls for taxation.

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136 Exc. 1544.

The appeals are remanded to the DOR for proceedings consistent with this opinion.[137]

DONE this 18th day of November 2013, at Anchorage, Alaska.

Signed
William F. Morse
Superior Court Judge

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

[137] The Court thinks the question of the proper use of the C-plans by the DOR is a close question in light of the deference owed to an administrative agency's interpretation of their own statutes and regulations. Almost as important is the need for this litigation to end. The parties have been disputing the DOR's treatment of oil spill response vessels since 1997. Final resolution of the construction of the definition of AS 43.56 taxable property can only come from the Alaska Supreme Court. The Court would encourage the DOR to petition for review prior to remand and respectfully suggests that the Alaska Supreme Court grant the petition.