BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF REVENUE

In the Matter of City of Valdez's Objection to Assessment of Crowley Marine Services' Property	)	OAH No. 06-0250-TAX Informal Conf. Dec. No. 05-56-A2
In the Matter of City of Valdez's Objection to Assessment of Prince William Sound Oil Spill Response Corp.'s Property	)	OAH No. 06-0251-TAX Informal Conf. Dec. No. 05-56-A1

DECISION ON SUMMARY ADJUDICATION

I. Introduction

In this consolidate appeal the City of Valdez challenges the Department of Revenue, Tax Division's decisions from informal conferences concerning the taxability of certain oil spill prevention and response equipment under amended and supplemental assessments for 2001 and 2002. 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 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.

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

> (1) reliance on how the 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.

These assertions raise legal questions regarding the division's methods of investigating taxpayer reporting of taxable property.

Summary adjudication should be granted to the division. No disputed fact issues need to be resolved to determine that the primary use analysis for the amended and supplemental assessments was not improper because of the division reliance on the spill response plans' lists in preference to the spill response scenarios. Reliance on the plans' lists as a cross check against the taxpayers' reporting of taxable property was not a delegation of taxing authority. The division had the discretion to investigate the taxpayers' reporting of taxable property using any means available to it, including review of third-party documents, even if such documents serve a separate regulatory purpose in another department of state government. Absent a statutory or regulatory imperative to use such documents in a particular way, or to not use them at all, the division was free to use the plans' lists as an administratively convenient means of allocating equipment between the taxable pipeline operation and the non-taxable maritime operation.

II. Facts

During the tax years in question, Crowley and Prince William provided oil spill response services to Alyeska, and those services included supplying vessels and other equipment to be used in the event of a spill, as well as to stand by in case of spills and for training and preparedness drills.[1] Vessel charters establish that the charter arrangement relates to spill response and preparedness in the Prince William Sound area, but they do not indicate which vessels were meant to be used for spills and preparedness at the Valdez terminal facility as opposed to elsewhere in Prince William Sound.[2]

Alyeska's spill response plan for the terminal facility in effect during the tax years in question contained a section titled "Response Equipment."[3] The introduction to this section stated:

---

[1] *See* DOR 004359-004360 (Statement of Contractual Terms between Alyeskz and Crowley dating to 1997 and made part of 2000 terminal plan); *also* Master Time Charter between Crowley Marine Services, Inc., and Alyeska Pipeline Service Company, Master Bareboat Charter Party between Crowley Marine Services, Inc., and Prince William Sound Oil Spill Response Corporation, and various amendments and charter orders (all filed under seal January 4, 2007).

[2] *See generally* Master Time Charter between Crowley Marine Services, Inc., and Alyeska Pipeline Service Company, Master Bareboat Charter Party between Crowley Marine Services, Inc., and Prince William Sound Oil Spill Response Corporation, and various amendments and charter orders (all filed under seal January 4, 2007). From the charters' class of service descriptions for certain vessels, it is possible to deduce that the vessels could be used for spill response but not specifically where the vessels would be deployed.

[3] Appellant's Exh. 6, attached to February 5, 2007 Opposition to Motion for Summary Adjudication.

> 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 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 supplemental equipment.[4]

According to the plan itself, therefore, Alyeska would use equipment not listed in the terminal plan to respond to a terminal-area spill, but only if the circumstances or magnitude of the spill required supplemental equipment. Which particular equipment in the tanker plan in fact could and would be used to respond to such an event cannot be determined in the abstract, without knowledge of the specific conditions and equipment needs of the spill that actually occurs.

The terminal plan's Subsection 1.4 on "Primary Equipment" includes a table listing vessels and other equipment, and describing location, ownership and specifications such as length, power and capacity.[5] The narrative introducing the table 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 Department of Environmental Conservation.[6] The division determined that this equipment was 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.[7] The division 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.[8]

As to equipment not required to be available continuously for terminal spill response—for instance, equipment that might be incidentally used for such a response if a particular

---

4 *Id*. at 1 (exhibit excerpt from June 1, 2000 revision of the terminal plan). For tax years 2001 and 2002, the terminal plan approved in 2000 governs. November 21, 2005 Affidavit of Susan Harvey at ¶ 9.

5 *Id*. at 2.

6 *Id*.

7 Appellant's Exhs. 4 at 6 & 5 at 6, attached to February 5, 2007 Opposition to Motion for Summary Adjudication (December 22, 2005 Informal Conference Decision Nos. 05-56-A1 & 05-56-A2).

8 Appellant's Exhs. 4 at 6 & 5 at 6, attached to February 5, 2007 Opposition to Motion for Summary Adjudication (December 22, 2005 Informal Conference Decision Nos. 05-56-A1 & 05-56-A2). The terminal plan's narrative did not say that the "Recovery Equipment" could not be taken out of service without notice, but an employee of the Department of Environmental Conservation testified in a deposition that she had told the division the recovery equipment is required equipment as well. Appellant's Exh. 7 at 5-6 (testimony of Rebecca Lewis). The relevant regulation (18 AAC 75.475) does require notice if "any major response item" is taken out of service. The deposition testimony indicated that both the primary equipment and the recovery equipment listed in the plan would be subject to the notice requirement.

scenario were to occur—the division found no taxability.[9] Regarding equipment required in the tanker plan to be available continuously for tanker spill response, the division reasoned that any use made of the equipment for a terminal spill would be secondary to the equipment's "primary commitment for tanker spill response."[10] The division concluded that "references in the oil spill scenarios of the Terminal Plan do not render the Tanker Plan equipment taxable."[11]

Relying on the "Primary Equipment" and "Recovery Equipment" lists in the two plans, the division's amended and supplemental assessments reclassified some equipment as taxable and some as not. As a result, a vessel and a barge were added to the tax rolls, and two barges, two skimmers and 22 mini barges were removed from the rolls.[12]

Valdez appealed the division's informal conference decisions, and the Commissioner of Revenue referred the appeals to the Office of Administrative Hearings pursuant to AS 44.64.030(b).[13] Similar appeals concerning several prior tax years were already pending, but because the two most recent appeals were subject to a then-new statute permitting no-cause change of administrative law judge, one of the parties exercised the right to a change of judge, and these the appeals for the 2001 and 2002 amended and supplemental assessments proceeded before a different judge, using somewhat different procedures from those applicable to the earlier appeals.[14] The division moved for summary adjudication.[15] Valdez opposed the motion.[16]

---

[9] Appellant's Exhs. 4 at 7 & 5 at 7.

[10] Appellant's Exhs. 4 at 7 & 5 at 7.

[11] Appellant's Exhs. 4 at 7 & 5 at 7.

[12] Appellant's Exhs. 4 at 1 & 5 at 1.

[13] Unlike tax appeals within the original jurisdiction of the Office of Administrative Hearings as the successor agency to the former Office of Tax Appeals, Valdez's challenges to the division's taxability determination do not fall under AS 43.05.405 *et seq.* As such, they are voluntary referrals under AS 44.64.030(b) in which the commissioner, not the administrative law judge, is the final decisionmaker.

[14] Other then-new statutory procedures that apply to these appeals but not to the prior ones include the requirement that a proposed decision be issued and the parties be afforded an opportunity to react by filing proposals for action before a final decision is made. AS 44.64.060.

[15] The division's motion also purports to move for "judgment" under three rules of civil procedure (Alaska R. Civ. P. 12(b)(6), 12(c) and 56), none of which apply to appeals to the commissioner from informal conference decisions. Absent statutory or regulatory extension of those civil rules to this specific category of executive branch appeals, or a stipulation between the parties (approved by the administrative law judge) to apply such rules, they simply do not apply; by their own terms, the rules govern the procedures of certain judicial branch courts, not appeals either to or from administrative agencies. *See* Alaska R. Civ. P. 1 (explaining that the civil rules govern "procedure in the superior court and, so far as applicable, in the district court"); *also* Alaska R. Civ. P. 12(b)(6) (authorizing parties in civil actions to assert by motion a defense of "failure to state a claim upon which relief can be granted"); Alaska R. Civ. P. 12(c) (authorizing parties in civil actions to seek a judgment on the pleadings—e.g., based on the complaint and answer); Alaska R. Civ. P. 56 (authorizing parties in civil actions raising claims to seek summary judgment).

[16] The two taxpayers participated (through a single counsel) purely as observers, not parties, and thus have expressed no position on the motion specifically or on the merits of Valdez's appeal generally.

With the summary adjudication briefing, Valdez submitted a report consultant Susan Harvey prepared based on her review of the two spill response plans.[17] In Ms. Harvey's opinion, some of the spill response scenarios indicate that additional or different equipment than that listed as Primary Equipment and Recovery Equipment in the terminal plan would, in fact, be needed to respond to the terminal scenarios if they were to occur. Based on the Harvey report and Alyeska's statement in the terminal plan, some equipment not listed in the terminal plan likely would have been used to respond to spills of certain types or magnitudes if such spills had occurred at the terminal.

III. Discussion

In administrative adjudications, the right to be heard does not require development of facts through an evidentiary hearing when no factual dispute exists but rather the disputed issue can be decided as a matter of law.[18] Summary adjudication of an administrative appeal uses the same standard as summary judgment in court: if the material facts are undisputed, they are applied to the relevant law and the resulting legal conclusions determine the outcome. Only if the parties genuinely dispute a material fact (not legal conclusion) is it necessary to hold an evidentiary hearing.[19] "All factual inferences are drawn in favor of the non-moving party…."[20]

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

---

17 Appellant's Exh. 10 at 17-25 (December 2, 2003 Analysis of Oil Spill Response Equipment Required by the State of Alaska for the Valdez Marine Terminal and the Prince William Sound Tanker Vessel Fleet, by Susan Harvey).

18 *See Smith v. Dep't of Revenue*, 790 P.2d 1352, 1353 (Alaska 1990).

19 A fact is not "material" unless it would make a difference to the outcome. *Whaley v. State*, 438 P.2d 718, 720 (Alaska 1968).

20 *Meyers v. Dep't of Revenue*, 994 P.2d 365, 367 (Alaska 1999).

An evidentiary hearing also is not necessary to address whether the division's reliance on the spill response plans constitutes an improper delegation to a sister agency's spill response plan approvers. This is a legal question. The fact that the division relied on the plans' lists to, in effect, allocate property between taxable and non-taxable categories is not disputed. Only the legal propriety of so using the plans is in dispute. That dispute can be resolved as a matter of law.

First, however, it is necessary to determine whether a particular standard of review applies to the commissioner's review of the division's decisions.

A. STANDARD OF REVIEW

This consolidated appeal challenges oil and gas property taxability decisions. As such, it falls within a category of tax cases expressly excluded from the original jurisdiction of the Office of Administrative Hearings.[21] The standards of review prescribed in AS 43.05.435 do not apply in AS 43.56 oil and gas property tax proceedings.[22]

No specific standards of review are prescribed in AS 43.56 for the commissioner's consideration of an appeal from informal conference challenging a taxability determination. AS 43.56.110 simply provides for an aggrieved taxpayer or municipality to object to an assessment and directs the department to "provide by regulation for notices of appeals to interested persons and municipalities." The implementing regulations for oil and gas property tax assessments do not prescribe standards of review either. As they existed prior to issuance of the supplemental assessments, and as they existed when the formal appeal was filed, the appeal procedure regulations in 15 AAC chapter 56 say nothing about the standard of review the commissioner should apply.[23]

Effective January 1, 2003, the oil and gas property tax regulations were amended to make clear that municipalities can file appeals alleging that specific taxable property has escaped assessment, and that the hearing process for such appeals follows the department's general regulations in 15 AAC chapter 5.[24] The general regulations address a number of subjects,

---

[21] AS 43.05.405(3) (exempting "property taxes assessed under AS 43.56" from the taxes for which the taxpayer can appeal directly to the office).

[22] *See* AS 43.05.435 (prescribing standards for cases heard by administrative law judges under AS 43.05.405 – AS 43.05.499).

[23] The regulations governing oil and gas property tax assessment appeals are found in 15 AAC 56.015 – 15 AAC 56.047. These regulations do not address standards of review.

[24] 15 AAC 56.015(c) (stating that "[a] municipality that believes certain property that should be taxed under AS 43.56 was not included in a notice of assessment may notify the department by filing an appeal under 15 AAC 05.001 – 15 AAC 05.050 …"). From the 1980s until amended on January 1, 2003, the 15 AAC chapter 56 regulations provided detailed instructions primarily for taxpayer appeals but were somewhat vague as to an affected

including evidence, subpoenas, the burden of proof, reconsideration, and finality for purposes of appeal to the superior court, but they do not set standards of review.[25]

Because the commissioner referred this appeal to the Office of Administrative Hearings pursuant to AS 44.64.030(b), certain provisions in AS 44.64 apply. AS 44.64 authorizes the administrative law judge to exercise the commissioner's powers in performing duties in connection with the hearing,[26] but it does not establish standards of review to be applied in cases heard on behalf of principal executive officers such as the Commissioner of Revenue. Thus, whatever standard of review would be appropriate were the commissioner hearing the case himself is the standard the judge must use in hearing the case on the commissioner's behalf and preparing a proposed decision for the commissioner's action.

In short, no specific standards of review have been prescribed for this type of appeal. The question, therefore, is whether in the absence of a specific standard of review requiring deference, the commissioner should defer to the division or is free to exercise his independent judgment.

Courts apply a deferential standard of review when a legal question turns on an agency's interpretation of its own regulations if the interpretation implicates agency expertise or raises fundamental policy considerations over matters within the agency's discretion.[27] Even when a court applies its independent judgment to a question of interpretation, it may defer to an agency's long-standing interpretation.[28] Though not strictly applicable to reviews wholly internal to the executive branch, judicial standards of review may be instructive. Since they are used when courts review final executive branch actions, an executive branch reviewer making such a final decision may wish to look through a similar lens when reviewing an intermediate executive branch decision by a subordinate.

For instance, if the final decisionmaker is reviewing an intermediate decision that depends on expertise of the subordinate, the final decisionmaker may wish to defer to that

---

municipality's ability to appeal taxability (as contrasted with valuation) determinations. *Compare* 15 AAC 56.015, as amended through 1986, *with* 15 AAC 56.015, as amended January 1, 2003).

[25] 15 AAC 05.030 & 15 AAC 05.035.

[26] AS 44.64.040(b).

[27] *Palmer v. Municipality of Anchorage*, 65 P.3d 832, 837 n. 7 (Alaska 2003) (explaining that courts "review an agency's interpretation of its own regulations using [their] independent judgment, so long as that interpretation does not implicate the agency's area of expertise or questions of fundamental policy committed to the agency's discretion".

[28] *Id.* (explaining that even under the independent judgment rule, courts give some weight to long-standing agency interpretations).

expertise, both because that may be the best way to ensure that proper expertise is brought to bear upon the matter and in anticipation that a reviewing court might look through the final decision to the use of expertise by the subordinate. Borrowing from the judicial standards of review, therefore, the commissioner could, and possibly should, defer to the division's interpretation of the relevant regulation if the special tax expertise of the division were implicated by the interpretation question.

"A commissioner or final decisionmaker is never bound to defer to staff, however."[29] This is all the more true when a particular interpretation question does not involve expertise unique to the subordinate staff making the intermediate decision. Here, the tax expertise of the division is not needed to interpret either the guiding statute or the implementing regulation. Tax expertise is not required to determine whether an item of property is used or committed for use in pipeline transportation of oil. Tax expertise also is not required to decide how to investigate taxpayer reporting of taxable property based on whether it is used or committed for such use. Important tax policy considerations may be implicated in the exercise of discretion involved in deciding how to draw the line between pipeline transportation and other uses, but such policy considerations are not entrusted directly to the division; rather, they rest with the department—the entity with authority to adopt regulations.[30] The department (not a subordinate unit of it) is charged with enforcing the tax laws and assessing oil and gas property for tax levy purposes.[31]

The commissioner is the principal executive officer of the department.[32] As such, he has authority to organize the department into divisions (with the governor's approval), to adopt regulations and to appoint subordinates.[33] Though the commissioner has authority to delegate functions to subordinates,[34] the final executive branch decision, and any exercise of discretion that decision entails, rests with the commissioner unless a delegation in fact occurs. Thus, the commissioner can give due consideration to the division's interpretation of the department's regulations but should not defer completely to such interpretations when resolving finally, at the

---

[29] *In re Alaska Medical Development—Fairbanks, LLC, Kobuk Ventures, LLC, and Fairbanks Memorial Hospital*, OAH Nos. 06-0744-0746-DHS at 6 (Commissioner of Health and Social Services Oct. 9, 2007) (citing Alaska executive branch and out-of-state cases illustrating that according deference by rote to subordinates may be contrary to the purpose of allowing an executive branch appeal).

[30] AS 43.56.200 (authorizing the department, not the tax division, to adopt regulations to carry out the department's duties under AS 43.56).

[31] AS 44.25.020(1); AS 43.56.060.

[32] AS 44.25.010.

[33] AS 44.17.020 – AS 44.17.040.

[34] AS 44.17.010.

executive branch level, a legal question involving interpretation of a regulation implementing one of the commissioner's statutory duties and potentially raising important policy considerations.

B. TAXABILITY OF OIL SPILL RESPONSE EQUIPMENT

The oil and gas property tax statutes provide for taxation of oil pipeline transportation-related property if it is "taxable property" under AS 43.56.[35] A municipality may levy and collect tax for the "taxable property" within its jurisdiction but must do so using statutorily imposed methods that rely on the Department of Revenue's assessed value of the property.[36] This property tax is in lieu of other taxes a municipality might wish to impose on the property.[37]

To facilitate the assessment, the department is authorized to require those holding interests in taxable property to file a return and to provide additional information if the department so requests.[38] The department may investigate the property for which a return is filed, and it also may investigate "taxable property upon which no return has been filed."[39] "[T]he department may make its own valuation of the taxable property …."[40] The department must prepare an annual assessment roll describing all taxable property and including the assessed value.[41] It also must supplement the assessment roll by adding taxable property omitted from the original assessment roll.[42] These duties are performed, in the first instance, by the Tax Division.

Valdez's appeal arises from amended and supplemental assessments for the 2001 and 2002 assessment rolls prepared by the division. Though the division added some items of terminal facility spill response equipment to the rolls, Valdez objected that other "taxable property" remained omitted, including some of the equipment removed from the rolls in the amended and supplemental assessments. The cause of the alleged omissions, according to Valdez, was the division's failure to look deeper than the spill response plans' listing of equipment, as approved by a sister agency without taxing authority, to determine whether the

---

35 AS 43.56.010(a) (levying an annual tax of 20 mills on the full and true value of property taxable under AS 43.56).
36 AS 29.45.080(b)&(c).
37 AS 43.56.030.
38 AS 43.56.070.
39 AS 43.56.080(a).
40 AS 43.56.080(b).
41 AS 43.56.090.
42 AS 43.56.140.

equipment is primarily used or committed for use in pipeline transportation of oil. Valdez thereby raised two issues:

(1) whether equipment listed in the tanker plan, but not the terminal plan, that might be needed to respond to hypothetical spill events at the terminal is taxable;

(2) whether use of the sister-agency-approved lists, but just the lists and not the scenarios, as means of allocating the equipment between uses or commitment for use is reasonable and not an improper delegation of taxing authority.

1. Taxability depends on primary use or commitment for use, not speculative use.

The department was given statutory authority to adopt regulations to carry out its oil and gas property tax-related duties.[43] The determination of what property is "taxable property" under AS 43.56 was not left entirely to the department's regulations. Instead, a detailed statutory definition of "taxable property," composed of a basic definition, an illustrative list of included property and a list of excluded property, was provided in AS 43.56.210(5). As it relates to pipeline transportation of unrefined oil such as occurs through the Trans-Alaska Pipeline System (TAPS), the basic definition provides that "taxable property" is

> real and tangible personal property used or committed by contract or other agreement for use within this state primarily in … pipeline transportation of … unrefined oil … or in the operation or maintenance of facilities used in … pipeline transportation of … unrefined oil[.[44]]

Thus, the spill response equipment of concern to Valdez would be taxable under this definition only if used or committed for use "primarily" at the TAPS terminal or along the pipeline rather than "primarily" for the tankers.

The word "primarily" is ambiguous in the context of use and commitment for use. It connotes something more than incidental or secondary use but not exclusive use. By choosing the word "primarily," the legislature left room for property having multiple uses to be taxed, even if some uses are not related to pipeline transportation of oil, but only if the pipeline transportation-related use is the primary one. The legislature, however, did not indicate specifically how to determine which of the multiple uses is the primary use.

Through its regulations adoption authority, the department addressed this ambiguity with respect to actual use. The department provided that property "actually used more than 50 percent

---

[43] AS 43.56.200.

[44] AS 43.56.210(5)(A).

of its total operational time" in pipeline transportation of oil is taxable.[45] This answered the dilemma whether to assess property with, for instance, three discrete uses—one consuming 45 percent, the second consuming 35 percent and the third consuming 20 percent of the operational time—if just one of the three uses is in pipeline transportation of oil. Even if the property is used in pipeline transportation of oil for the biggest percentage of time—*i.e.*, 45 percent—it is not taxable until that percentage exceeds 50 percent. Thus, if a piece of equipment listed only in the tanker plan, or not listed in either of the plans, was in fact put to use responding to a terminal spill, it would become taxable if the terminal spill response consumed more than 50 percent of the equipment's operational time.

Actual use responding to an actual spill is a relatively easy—and completely factual—determination to make. The determination becomes more challenging when, as here, the taxpayer makes equipment available to a third party to satisfy the requirements of a contingency plan, not solely to respond to an existing spill event. Is the equipment being used for spill response when on standby at a designated location in case a spill occurs, and in case the responder decides to use that particular equipment? If not, surely it is committed for use in such an event.

If the taxpayer, however, did not restrict Alyeska's right to deploy the equipment to a specific location, and Alyeska thus might use it at the terminal or somewhere out in Prince William Sound, is the equipment being used or committed for use in terminal spill response? This is the crux of the dispute between Valdez and the division. Valdez maintains that any equipment Alyeska might use for a terminal spill response under any of the hypothetical spill response scenarios in the terminal plan should be taxable, even if the equipment is listed as required to be at the ready for response to a spill under the tanker plan. In contrast, the division concludes that if the equipment is required to be kept available continuously for tanker spill response, it is committed for use (if not actually in use) in maritime, not pipeline, transportation of oil.

Regarding commitment for use, the regulation did not draw lines about commitments for multiple uses, but it attempted to give further meaning to the statute's phrase "by contract or other agreement." It added that a "specification" or "other expressed intentions of the property owner" would be treated as the necessary commitment.[46] The regulation gave taxpayers notice that if they expressed in some manner other than through a contract or agreement the intent that

---

45 *See* 15 AAC 56.075(b)(2), as written prior to the January 1, 2003 amendment.

46 *Id*. at subsec. (b)(1).

their property be used in pipeline transportation of oil, the department would treat the property as taxable. Accordingly, when Crowley or Prince William reported spill response equipment associated with the Valdez marine terminal on a schedule of taxable property, they could expect the department to include that equipment in the assessment.

Moreover, if they omitted from the schedule equipment that the division's investigation later revealed was required by Alyeska's terminal plan to be available continuously for spill response at the terminal, they could expect the department to add that equipment to the assessment. As entities engaged to assist Alyeska in meeting its spill response obligations, Crowley and Prince William could fairly be considered to have expressed their intentions that the equipment be used for pipeline transportation of oil if the terminal plan required the equipment to be available continuously for use in a terminal-related spill response. The same probably would be true if the investigation revealed that the terminal plan required the equipment to be physically present, on standby for spill response at the terminal, 51 percent or more of the time. Then the equipment arguably would be in use (not just committed) for a pipeline transportation of oil-related purpose—namely, satisfying a regulatory requirement of the terminal operation.

When, as here, the division's investigation revealed that certain equipment must be available continuously for tanker spill response and is not required to be used or committed for use at the terminal facility at all, let alone 51 percent or more of the time, the situation is different. Absent usage in fact, such equipment cannot be considered used or committed for use at the terminal. One can speculate that Alyeska might have to resort to redirecting tanker-committed spill response equipment to the terminal to help curtail a particularly bad spill event, but the statute and regulation do not contemplate speculation. They contemplate actual use or commitment for use by contract, agreement, specification or other expressed intention of the property owner.

In sum, speculation that non-taxable property might be reallocated to a taxable purpose does not convert it to taxable property. When the property's primary use or commitment is to a non-taxable purpose, the property may not be taxed unless and until reallocation to or actual use for a taxable purpose occurs. That does not end the inquiry, however, because Valdez's appeal calls into question whether allocation using the plans' lists was reasonable and proper.

2. Reliance on the plans' lists was reasonable and not an improper delegation of taxing authority.

The tax assessment authority in question here rests squarely with the Department of Revenue under AS 43.56.060. It was exercised by the department (acting through the division), not by the Department of Environmental Conservation. The division relied on how the terminal and tanker plans categorized the equipment. The plans in turn were subject to approval by the Department of Environmental Conservation, not by the division. This, however, does not undermine the reasonableness of relying on the plans' allocation of equipment or result in an improper delegation of taxing authority.

Compliance with an approved oil discharge prevention and contingency plan is a prerequisite for operation of a crude oil transportation pipeline in Alaska.[47] The Department of Environmental Conservation has the discretion to attach terms and conditions to approval of a plan "to ensure that the applicant for a contingency plan has access to sufficient resources to protect environmentally sensitive areas and to contain, clean up, and mitigate potential oil discharges[,]" and to ensure compliance with the plan.[48] A plan must be renewed every five years and the plan's approval may be modified more frequently to address changes.[49] The approval may be revoked if the plan holder "is not in compliance with the contingency plan and the deficiency materially affects the plan holder's response capability."[50]

The plan, therefore, is a dynamic document reflecting at any given point in time the resources, including spill response equipment, needed to satisfy regulatory requirements without which an oil pipeline such as the TAPS cannot lawfully operate. Allocation of equipment between potentially overlapping plans has real-world, legal consequences. Obtaining plan approval involves a rigorous review not easily susceptible to manipulation for a side purpose, such as to throw a tax advantage to a contractor. This is precisely why the terminal and tanker plans are credible sources against which to cross check taxpayer reporting of taxable property related to oil spill response and preparedness, and for parsing which equipment is used or committed for use in pipeline transportation of oil.

---

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

48 AS 46.04.030(e).

49 AS 46.04.030(d) & (f).

50 AS 46.04.030(f)(4).

Reliance on third party documents such as Alyeska's plans to make a factual determination about use or commitment for use of property is not a delegation to the regulatory agency that approves such documents. The division no more delegated taxing authority to the Department of Environmental Conservation by relying on the plans' lists than it would be delegating taxing authority to a taxpayer when relying on the taxpayer's contracts to determine how equipment has been committed. Though couched in terms of improper delegation, Valdez's argument really calls into question the reasonableness of the division's investigation of which oil spill response equipment owned by Crowley and Prince William is taxable.

Essentially, Valdez asks whether it was reasonable for the division to draw the line between taxable and non-taxable categories based on agency-accepted, third-party representations about which equipment is so crucial for spill response at the terminal as to be kept available there continuously and which must be available continuously to respond to tanker fleet spills. The department's final decision on the prior tax years' appeals concluded that this was a reasonable place to draw the line.[51] Valdez disagrees, not because of the reliance on the plans, but because the division did not second-guess the plan holder (Alyeska) and the approving agency about which equipment was crucial for terminal response.

The department's discretion to investigate whether a taxpayer has accurately reported taxable property is broad enough to allow the division to look behind and beyond representations made in a third-party document such as the terminal plan. But the division is not required to 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 in pipeline transportation of oil, is reasonable. Though some equipment not committed to the terminal likely would be used there in the event of a catastrophic spill, that equipment should not be declared taxable on the strength of speculation about possible future use. To give effect to the statutory limit on taxing oil and gas property, which precludes taxation of property used in tanker transportation, the equipment required to be available continuously for tanker spill response cannot reasonably be treated as taxable.

---

[51] *In re City of Valdez Notice of Escaped Property*, OAH No. 04-0322-TAX at 8-9 (Commissioner of Revenue Aug. 27, 2010), *recon. den.* October 4, 2010 (upholding the division's primary use analysis which relied on whether the equipment in question was listed such that it had to be continuously available for terminal spill response).

In sum, even when the facts are viewed in the light most favorable to Valdez, as the non-moving party, summary adjudication should be granted to the division. That equipment different from or additional to that listed as required in the terminal plan would have been needed, as Ms. Harvey concluded, to respond to certain spill scenarios had they occurred at the terminal, means only that some equipment might have become taxable through actual use if certain contingencies had arisen. If equipment allocated to the tanker plan in fact had been used for a terminal spill response requiring more than 50 percent of the equipment's operational time in the year, the equipment could have been added to the tax roll the following year based on actual usage.[52] The division's decision not to add equipment to the tax roll based on potential for use in hypothetical scenarios, but instead to assess only the equipment required to be available continuously for a terminal spill response, was reasonable. Accordingly, the commissioner should affirm the division's amended and supplemental assessments for 2001 and 2002.

IV. Conclusion

The undisputed material facts establish that some spill response equipment belonging to taxpayers Crowley Marine Services, Inc., and Prince William Sound Oil Spill Response Corporation, and then being used or committed for use in tanker transportation of oil, might have been diverted to spill response at the Valdez Marine Terminal for a catastrophic spill if such an event had taken place during the tax years in question. If that had occurred, and the equipment had been used at the terminal more than 50 percent of its operational time, the equipment would have become taxable. The same would be so in a future event if tanker-committed equipment were diverted to terminal use.

The division, however, acted reasonably when it determined that such property was not in use or committed for use in pipeline transportation of oil simply because some of the equipment likely would have been diverted from its primary use if emergency circumstances so demanded. Accordingly, upon adoption of this decision by the Commissioner of Revenue or his designee, summary adjudication is granted in favor of the Tax Division and the amended and supplemental assessments for 2001 and 2002, therefore, will be affirmed.

DATED this 9th day of March, 2011.

By: *Signed*
Terry L. Thurbon
Chief Administrative Law Judge

[52] 15 AAC 56.075(b)(2) (2002 and before); 15 AAC 56.075(a)(1) (2003).

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF REVENUE

In the Matter of City of Valdez's Objection to Assessment of Crowley Marine Services' Property	)	OAH No. 06-0250-TAX Informal Conf. Dec. No. 05-56-A2
In the Matter of City of Valdez's Objection to Assessment of Prince William Sound Oil Spill Response Corp.'s Property	)	OAH No. 06-0251-TAX Informal Conf. Dec. No. 05-56-A1

DECISION OF THE COMMISSIONER

After due deliberation, in accordance with AS 44.64.060(e)(1), the undersigned adopts the administrative law judge's March 9, 2011 proposed decision in this matter, and thereby grants summary adjudication in favor of the Tax Division, with the following additional explanation.

1. The proposals for action filed by the City of Valdez and the Tax Division were given due consideration, except that exhibits Valdez attached to its proposal that were not in the record or did not exist when the proposed decision was issued were not considered. A party opposing a motion for summary adjudication must offer its counter arguments and supporting documents with its opposition.[53] Submitting new documents (some of which did not exist when the opposition was filed[54]) after the proposed decision has been issued, and raising new arguments (some including incorrect or misleading assertions[55]) serves only to misdirect the decisionmaker's attention away from any merit that might exist in the relevant parts of the proposal for action.

---

[53] 2 AAC 64.250(b) (stating that "to defeat the motion a party may not rely on mere denial but must show, by affidavit or other evidence, that a genuine dispute exists on an issue of material fact for which an evidentiary hearing is required").

[54] Valdez's April 1, 2011 proposal for action filing included a recent newspaper article and a recent superior court order from an unrelated case.

[55] For instance, Valdez's proposal (page 4) asserts that Valdez was not allowed to brief "the interpretation of 'taxable property'." But nothing about the summary adjudication process prevented Valdez from addressing interpretation of that term in its brief. Also, Valdez's proposal (page 2) suggests that there is a mystery about the existence, adoption and notice of a "primary use analysis." The applicable regulation (15 AAC 56.075, pre-2003 amendment) on how primary use affects the determination of taxability was adopted in 1982. The informal conference decisions (pages 5-6) discuss the so-called "primary use analysis," and in so doing note that this phrase is a shorthand reference to that regulation.

2. Raising a question of fact about the efficacy of a spill prevention and response plan for environmental protection purposes is not the same as raising a genuine issue of material fact about whether specific spill response equipment is taxable property (used or committed for use at the Valdez terminal facility). Valdez raised questions through the Harvey report about whether Alyeska Pipeline Service Company needs to dedicate more spill response resources to the terminal facility to satisfy the environmental laws than reflected in the terminal plan's lists. But having a hearing on such questions would not change the non-taxable status of property committed to tanker spill response. If Alyeska chooses, or is forced by events or environmental laws, to reallocate some of the spill response equipment under contract with the taxpayers (Crowley Marine Services, Inc., and Prince William Sound Oil Spill Response Corporation) from being continuously available for tanker response to being available more than 50 percent of the time for terminal response, the reallocated equipment would become taxable.

3. In arguing that the Tax "Division's 'primary use' analysis was contrary to the language of the applicable version of 15 AAC 56.075(b) and AS 43.56.210(5)(A)" (page 5-6 of its proposal for action), Valdez appears to have misread a statement by the division. The division has not reinterpreted the law as "requiring property to be primarily used **and** committed to a taxable purpose …" as Valdez asserts. Determining that vessels required to be continuously available for spill response at the terminal are dedicated to the Trans Alaska Pipeline System **and** are also being used more than 50 percent of the time for a taxable purpose does not reinterpret the law to require both commitment and actual use. Such a determination simply means that terminal-dedicated property is taxable under both parts of the disjunctive test in the pre-2003 version of 15 AAC 56.075.

4. The informal conference is not adjudication. It is an opportunity for the person appealing an agency decision (e.g., a tax assessment) to confer with an appeals officer, to go over records and documents, so that the appeals officer can consider facts, information and argument, and issue a written decision.[56] The informal conference decision then can be challenged through the formal hearing process, at which point proceedings are conducted on the record, with *ex parte* contacts being prohibited, and if an evidentiary hearing is necessary, witnesses testify under oath, the right to cross-examine witnesses applies and evidentiary rulings are made.[57] Valdez was not prejudiced by the appeals officer conducting the informal conference in the usual

[56] 15 AAC 05.020.

[57] *See* 15 AAC 05.030; 2 AAC 64.260; 2 AAC 64.290.

way, rather than like a formal hearing. The appeals officer's interview of Ms. Lewis did not constitute an inappropriate *ex parte* contact in the context of an informal conference. His method of recording information from such an interview, by taking notes rather than making a verbatim (e.g., audio) recording, was not improper at the informal conference stage.

5. If Valdez's appeals had not been resolvable through summary adjudication, a hearing on issues of material fact would have accorded the parties the opportunities for discovery and examination of witnesses Valdez suggests are necessary to remedy the shortcomings of the informal conference process. But the appeals are resolvable on summary adjudication for the reasons explained in the March 9, 2011 proposed decision and above. The undersigned is not persuaded that this matter should be returned to the administrative law judge for an evidentiary hearing, as Valdez proposes.

This document, together with the March 9, 2011 decision document, constitute the final decision of the Commissioner of Revenue in these consolidated appeals. Judicial review of the commissioner's 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 this decision is mailed or otherwise distributed.

Dated this 25th day of April, 2011, at Anchorage, Alaska

By: *Signed*
Bruce Tangeman
Deputy Commissioner
Alaska Department of Revenue

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