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

TOM LAKOSH,	)	
	)	
Requester,	)	
	)	
v.	)	
	)	
ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF SPILL PREVENTION & RESPONSE,	)	OAH No. 18-0755-DEC
	)	
Respondent.	)	

RECOMMENDED RULING ON REQUEST FOR ADJUDICATORY HEARING

I. Introduction

Requester Tom Lakosh seeks an adjudicatory hearing to challenge the June 2018 approval of Amendment 2017-2 to the Valdez Marine Terminal ("VMT") C-Plan by the Division of Spill Prevention & Response ("Division"). Upon a full review of the request and the parties' briefing, the request is deficient both procedurally – because it fails to conform to the requirements of 18 AAC 15.200 – and substantively – because the issues it raises about the VMT C-Plan do not pertain to changes made by the June 2018 amendment. The request for an adjudicatory hearing should therefore be denied.

II. Factual and Procedural History

A. The C-Plan

State law requires an oil terminal facility to have a DEC-approved oil discharge prevention and contingency plan, known as a "C-Plan," for use by responders during the first 72 hours following an oil spill.[1] The C-Plan at issue in this appeal is Alyeska Pipeline Service Company Valdez Marine Terminal Oil Discharge Prevention and Contingency Plan, Plan No. 14-CP-4057, referred to by the parties as the VMT C-Plan.

B. Amendment 2017-1

The Division approved a major amendment to the VMT C-Plan – Amendment 2017-1 – in October 2017.[2] Amendment 2017-1 made substantive changes to various components and requirements of the plan, including substantive revisions to the sensitive area protection decision

---

[1] AS 46.04.030(a); 18 AAC 75.400(a)(1).

[2] SOA 46.

matrix and to Response Scenario 4. An administrative appeal concerning that amendment is underway, with an adjudicatory hearing scheduled for December 2018. Requester unsuccessfully sought to intervene in that litigation in February 2018, but his motion to do so was denied as raising issues beyond the scope of the existing appeal.[3]

C. Amendment 2017-2

The Division approved amendment 2017-2 to the VMT C-Plan on June 18, 2018.[4] Significantly narrower in scope than Amendment 2017-1, Amendment 2017-2 authorizes Alyeska to change its marine service provider from one company to another. The marine service provider provides vessels and crews necessary to support the prevention and response strategies set out in the C-Plan.

Amendment 2017-2 authorizes Alyeska to transition from its current provider, Crowley Marine Services ("Crowley"), to Alaska Ventures LLC ("ECO").[5]

> New vessels are replacing some of the aging existing vessels. The change includes new personnel to man these new and existing vessels. The number of marine assets to support the plan remains the same.[6]

However, "[t]he response tactics and procedures being used by the vessels being incorporated throughout [Amendment 2017-2] have already been established and remain in the plan."[7] Only "[m]inor changes and updates to operational considerations based on the new equipment have been made to these tactics."[8]

D. Respondent's request to appeal Amendment 2017-2

On July 19, 2018, Requester submitted a lengthy email titled "appeal of VMT amendment #2." Attached to the email was Mr. Lakosh's unsuccessful request to intervene in the appeal on Amendment 2017-1. *That* request was submitted, as is required by regulation, on the DEC form designated for adjudicatory hearing requests.

In his July 19 email, Mr. Lakosh asserts that he was unable to prepare a new hearing request on the appropriate form, and therefore "ask[s] that you apply the information and issues compiled in my prior attached request with additional issues on appeal as follows." Mr. Lakosh

---

[3] To the extent requester's appeal raised issues already within the scope of the existing appeal, intervention was denied because requester's interest as to those issues are adequately represented by the existing parties.

[4] SOA 1-7.

[5] SOA 45.

[6] SOA 11.

[7] SOA 5.

[8] SOA 5.

than lists seven additional issues, in numbered paragraphs labeled 4 –10, as to which he claims Amendment 2017-2 was "arbitrarily and capriciously approved."

The list of issues is described further below, but generally involves issues that requester believes should have been examined before approval of the amendment. While the Amendment is limited in scope to a change in marine service providers, Mr. Lakosh believes that DEC erred in approving it without:

- "[E]xamining the recovery rate of skimming systems" (Issue 4);
- "[R]equiring a scenario amendment to include ballasting the response barges to a 20-foot depth" (Issue 6);
- "[P]erforming a proper escort and salvage tug quality analysis" (Issue 7);
- "[A]ddressing the question of response barge maneuverability" (Issue 8);
- "[C]onsidering the process of debris handling in each of the Ocean Buster booms" (Issue 9); and
- "[C]onsidering the need for BAT leak detection and real time tracking of the spill." (Issue 10).

Requester also asserts that approval of the Amendment moots the appeal of Amendment 2017-1, because the Amendment contains the same Scenario 4 that was modified by Amendment 2017-1, and that is being appealed, and the implementation of which is stayed pending that appeal. Requester argues that the issues raised in his unsuccessful attempt to intervene in that matter should now be considered as part of this appeal. Similarly, he avers that approval of the Amendment 2017-2 was improper because the Amended C-Plan contains the same Scenario 5 as previous iterations of the C-Plan, even though there is "an ongoing Scenario 5 workgroup" apparently addressing revisions to Scenario 5.

E. Procedural History

The commissioner conditionally referred the hearing request as to amendment 2017-2 to the Office of Administrative Hearings on July 24, 2018 for a preliminary determination as to whether an adjudicatory hearing should be granted. Alyeska filed an opposition to the request on August 9, 2018. Alyeska's opposition argues that the only changes made in Amendment 2017-2

> [i]nvolved the change of vessels and their operators from Crowley to ECO. This is all that has changed. The alleged C-plan deficiencies [identified in the request for hearing] do not stem from this change and are not proper for an appeal.[9]

[9] Alyeska Opp., p. 4.

The Division's August 16, 2018 Response and Opposition to the Request for Adjudicatory Hearing likewise asserts that Mr. Lakosh's complaints about the C-Plan are not related to the Amendment 2017-2.

On August 22, 2018, Mr. Lakosh filed a Reply to the Oppositions, stressing his view that the appeal of Amendment 2017-1 is now moot, and also requesting that this appeal be resolved through alternative dispute resolution in conjunction with an existing ongoing process to resolve issues related to a prior amendment.[10]

III. Discussion

A party who has participated in the public review process may, within thirty days of a reviewable decision, request an adjudicatory hearing as to that decision.[11] The request is then conditionally referred to the Office of Administrative Hearings to determine whether it meets the requirements of 18 AAC 15.200, and whether the requester has demonstrated that a hearing should be held. It is the requester's burden to comply with the regulation, and to show that the hearing requirements are satisfied.

A. The request does not comply with the requirements of 18 AAC 15.200.

As a threshold matter, the adjudicatory hearing request in this matter is deficient on its face because of its multiple failures to comply with the requirements of 18 AAC 15.200. The regulation requires that an adjudicatory hearing request contain specific supporting information, including:

> (A) a detailed factual statement of the nature and scope of the interests of the requester, or if the requester is an organization, the interests of the representative members of the organization;
>
> (B) an explanation of how and to what extent those interests would be directly and adversely affected by the contested issues in the decision, including a discussion of the factors in (d) of this section;
>
> (C) a clear and concise statement of the contested issues proposed for hearing, identifying for each contested issue:
>
> > (i) the disputed issues of material fact and law proposed for review;
> >
> > (ii) the relevance to the decision of those disputed issues of material fact and law identified under (i) of this subparagraph;

---

[10] This request is outside of the scope of the Administrative Law Judge's authority on this conditional referral, and will not be addressed herein.

[11] 15 AAC 15.200(a).

(iii) a detailed explanation of how the decision was in error with respect to the contested issue; and

(iv) the hearing time estimated to be necessary for the adjudication;

(D) a discussion of why the request for hearing should be granted; and

(E) if applicable, specific reference to the contested terms or conditions of the department's decision, as well as suggested alternative terms and conditions that in the requester's judgment are required to implement applicable requirements of law.[12]

Additionally, the request must be made "in writing on a form provided by the commissioner[.]"[13]

The DEC form requires a requester to specifically identify for each issue being raised in the appeal:

- The contested issue and location within the decision or permit where the issue appears;
- An explanation and reasons the contested issue is relevant to the decision being appealed;
- A description of the direct and substantive interest of the issue's effect on the requester;
- Suggested terms or conditions; and
- An explanation of why the hearing request should be granted.

Submission of an email list of grievances is not an appropriate substitute for the DEC form. Even assuming Mr. Lakosh's failure to use the actual form is excusable, his substitute email does not even attempt to meet the substance of either the form or the underlying regulation. Both the DEC form itself and the regulation's detailed substantive requirements are intended to provide the decisionmaker with a clear explanation of what issues are in dispute, and how the issues raised relate to the specific decision being appealed. Mr. Lakosh's emailed list of grievances does not comply with the regulation, nor does it provide the information identified on the DEC form.

Mr. Lakosh's email fails to identify with any specificity disputed issues of fact and law as they pertain to the actual substance of Amendment 2017-2. Most of his listed "issues" neither identify where in the Amendment or the C-Plan the specific alleged error supposedly lies, nor provide any citation to controlling law to support his claims of error. Most notably absent from requester's submission is any specification of how the issues he raises actually relate to the

[12] 18 AAC 15.200(c)(4).

[13] 18 AAC 15.200(c).

decision he is ostensibly appealing – Amendment 2017-2. In omitting this explanation, he ignores the 18 AAC 15.200(c)(4)(ii) requirement to clearly identify disputed issues of material fact and law, and to explain the connection between those disputed issues and the disputed decision.

Because the hearing request email meets neither the form nor the substance of the regulation defining how a DEC hearing may be initiated, Mr. Lakosh has failed to perfect his appeal.

B. The issues raised by requester are outside the scope of Amendment 2017-2

Even if requester had satisfied the regulatory requirements, his request would also be unsuccessful for an equally fundamental substantive reason. The applicable regulations make plain that the adjudicatory hearing request process is not a vehicle for reopening the validity of a permit as a whole. Rather, in the case of an amendment, the hearing request must be related to the changes actually made.

> If the application was made solely for a permit amendment, a request for an adjudicatory hearing may not raise issues relating to … unrelated permit conditions for which an amendment was not sought.[14]

Requester's complaints about the VMT C-Plan do not involve changes made by Amendment 2017-2. Instead, Mr. Lakosh appears to be using the adjudicatory hearing request process to bootstrap onto a narrow amendment all of his complaints about the VMT C-plan generally, without regard to whether those complaints are fairly implicated in the actual amendment at issue.

Issues 1-3 are by their own terms part of requester's earlier hearing request regarding Amendment 2017-1. They do not pertain to Amendment 2017-2, as they all concern allegations raised prior the approval of that Amendment.[15] Briefly, Issues 1 and 2 of Mr. Lakosh's 2017-1 intervention request concerned whether the Division had approved spill scenarios that failed to "show the maximum possible migration rate of the spill under severe weather conditions" and "the maximum possible spill spreading rate under severe tide and weather conditions." As Amendment 2017-2 did not alter the conditions in spill scenarios, this is not an appropriate issue for hearing here. Issue 3 in Mr. Lakosh's 2017-1 intervention request concerned whether Alyeska had "falsely claimed" an ability to "timely detect spills," and whether, in turn, "all other

---

14 18 AAC 15.200(b)(2).

15 As discussed further below, there is no merit to requester's assertion that Amendment 2017-2 moots the appeal of 2017-1. Requester relies on this assertion to then urge that his issues 1-3 – previously raised in his unsuccessful intervention motion – should now be litigated as part of an appeal of 2017-2.

assumptions of response timeliness in the scenario must be considered delayed until the accidental discovery of the spill can be presumed to have occurred." Again, the issue(s) being raised is outside the scope of Amendment 2017-2, which is limited to the change in marine service providers. Thus, even if the issue were properly before the commissioner procedurally, the issue is not appropriately part of an appeal of Amendment 2017-2.

The rest of the issues identified by Mr. Lakosh are areas in which he believes the C-Plan is deficient. But they are also outside the narrow scope of Amendment 2017-2 – the shift from one marine service provider to another. The permit holder is not required to overhaul the C-Plan every time it amends any aspect of the Plan. These critiques are thus misplaced as an appeal of Amendment 2017-2.

Issue 4 addresses "skimmer system recovery rates," saying the amendment should not have been approved "without examination of the recovery rate of the skimming systems shown in the ECO scenarios." Amendment 2017-2 did not alter the skimming scenarios, however. Those were approved through Amendment 2017-1, which Mr. Lakosh did not timely appeal. Requester cannot belatedly raise 2017-1 issues through an appeal of 2017-2.

Issue 5 concerns whether response scenarios in Volume 2 of the C-Plan appropriately account for (1) the appeal in 2017-1 (namely, the stay imposed in that case), and (2) a 2015 C-Plan Condition of Approval (COA No. 6) under which Alyeska must review and update those scenarios during the plan renewal period, and which is the subject of an ongoing stakeholder workgroup. Mr. Lakosh argues that by approving an amended C-Plan that has not updated or modified these disputed items, the Division has acquiesced to Alyeska's view of the disputed items, and in doing so has usurped the various review processes that are currently underway.

Mr. Lakosh is incorrect that the Amendment runs afoul of the stay or moots the appeal of 2017-1. As noted in the Division's opposition, the stay continues to be honored by all parties pending the resolution of the appeal of 2017-1. Inclusion of the response scenarios from 2017-1 in Amendment 2017-2 is not improper, and does not moot the underlying appeal of that amendment. It simply ensures that Amendment 2017-2 will cover the 2017-1 scenarios if they survive the pending appeal. Likewise, Alyeska's ongoing obligations under COA No. 6 are not altered by Amendment 2017-2. Mr. Lakosh has not demonstrated that an adjudicatory hearing is appropriate as to the response scenarios.

Issue 6 raises concerns related to a C-Plan response tactic known as VMT-OW-1. VMT OW-1, which was substantively modified in Amendment 2017-1, is described in the C-Plan as a system "designed to contain, control, and recover large volumes of water in an open water environment" by skimming recovered oil to a barge for storage.[16] Mr. Lakosh now argues that Amendment 2017-2 should have required a scenario amendment to include ballasting the response barges to a 20-foot depth as part of VMT-OW-1. But this is fundamentally a criticism of Amendment 2017-1, or the C-Plan generally, and is not implicated in the subject of Amendment 2017-2: transition of marine service providers. The only further changes in Amendment 2017-2 were technical changes relating to the transition between marine service providers.[17] The changes in Amendment 2017-2 did not substantively change VMT-OW-1. The issues raised by requester are outside the scope of the amendment, and not a proper subject for an adjudicatory hearing on that amendment.

Issue 7 argues that it was error to approve Amendment 2017-2 "without performing a proper escort and salvage tug quality analysis nor requiring that permittee utilize the best available technology for its escort/salvage/firefighting/docking and or response barge tug(s)." First, escorting and salvage tug operations are not part of the VMT C-Plan at all. As to docking/undocking and firefighting capabilities of tugs, and capabilities of response tugs, these were analyzed in the Division's review for Amendment 2017-2.[18] Requester does not identify any ways in which these reviews were factually or legally deficient, nor any basis upon which to challenge their conclusions. The conclusory request does not justify an adjudicatory hearing as to this amendment.

Issue 8 criticizes Amendment 2017-2 for not addressing the question of response barge maneuverability. Again, this is not an issue implicated by the C-Plan changes in Amendment 2017-2. The barge maneuverability issue with which requester is concerned was part of Amendment 2017-1, and is not appropriately part of an appeal of Amendment 2017-2.

Issue 9 takes issue with the Division's approval of Amendment 2017-2 without "the evaluation of skimmer debris handling." Amendment 2017-2 did not alter the parts of the C-Plan

---

16 SOA 0776; 2017 Plan Approval, pp. 9-10.
17 SOA 0775-778 (2018) v Ex. F (2017).
18 SOA 21-22.

that address these requirements. This issue is therefore outside the scope of any administrative hearing right as to the amendment.

Issue 10 criticizes the Division for approving Amendment 2017-2 "without considering the need for BAT leak detection and real time tracking of the spill." Again, this is outside the scope of Amendment 2017-2, and is therefore not an appropriate topic for an adjudicatory hearing on that Amendment.

Of note, and related to the preliminary finding above, to the extent that any of Mr. Lakosh's identified issues may somehow actually pertain to the change of marine service providers, his emailed request for hearing fails to demonstrate the connection of his complaints to the substance of the Amendment. 18 AAC 15.200(c)(4)(C) places the burden on the requester to "clearly and concisely" identify for each contested issue (i) the disputed issues of material fact and law proposed for review; (ii) the of those disputed issues to the decision being appealed; (iii) a detailed explanation of how the decision was in error as to the contested issue; and (iv) the hearing time estimated to be necessary for the adjudication. Requester's email is not "clear and concise," and repeatedly fails to identify items (ii) or (iv), leading the reader to wonder and speculate about his intent and arguments. In failing to provide the information required by the regulation, Mr. Lakosh has failed to meet his burden of demonstrating that a hearing on Amendment 2017-2 is appropriate as to any of his identified issues.

IV. Conclusion

The Division's approval of a C-Plan amendment does not create a right to reopen or litigate the entire C-Plan through the administrative hearing process. Mr. Lakosh has not identified substantive changes to the C-Plan under Amendment 2017-2 as to which an adjudicatory hearing is appropriate, nor has he satisfied the hearing request requirements of 18 AAC 15.200. The request for an adjudicatory hearing should therefore be denied.

Dated: August 31, 2018

Signed
Cheryl Mandala
Administrative Law Judge

Adoption

A. The undersigned, in accordance with 18 AAC 15.220(c)(2), DENIES the request(s) for adjudicatory hearing.

Under AS 44.64.060(b), judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 10th day of September 2018.

By: *Signed*
Larry Hartig
Commissioner