

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

PRINCE WILLIAM SOUND REGIONAL)	
CITIZENS' ADVISORY COUNCIL,)	
Requester,)	
)	
v.)	
)	
DEPARTMENT OF ENVIRONMENTAL)	
CONSERVATION, DIVISION OF SPILL)	OAH No. 22-0111-DEC
PREVENTION & RESPONSE,)	
Respondent.)	

**DECISION ON REQUEST FOR ADJUDICATORY
HEARING ON VMT C-PLAN APPROVAL**

I. Introduction

The Prince William Sound Regional Citizens' Advisory Council requested an adjudicatory hearing to contest the Division of Spill Prevention and Response's decision regarding the Valdez Marine Terminal oil discharge contingency plan. Because the Division's decision has been vacated in a related case, the Council's hearing request is denied. Nevertheless, the issues raised by the briefing of the Council and Division are briefly addressed here to provide guidance to the parties.

II. Factual and Procedural History

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

On November 5, 2018, Alyeska applied for renewal of the VMT C-Plan. The Division of Spill Prevention and Response (SPAR) initially approved the plan on November 15, 2019.² That Initial Approval included several numbered "conditions of approval."

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

² Letter from Graham Wood, Program Manager, SPAR, to Andres Morales, Director, APSC, titled "Oil Discharge Prevention and Contingency Plan Approval" (Nov. 15, 2019). This document, the program manager's approval, will be referred to as the "Initial Approval." It is important to distinguish the Initial Approval document from the *final* Division-level Oil Discharge Prevention and Contingency Plan Approval because the Division's final approval is the Initial Approval document *as modified* by the December 22, 2021 letter amending the Initial Approval.

The second condition of approval, called “COA 2: Secondary Containment Commitment Required Verifications,” addressed the adequacy of the liner under the Valdez tank farm that holds crude oil in storage for shipment. In general, COA 2 focused on ensuring the liner meets regulatory requirements for secondary containment in event of a spill.³ The integrity of the liner, and Alyeska’s eligibility for a “prevention credit” if the liner lacks integrity, are the main issues in contention in this hearing request.

The Prince William Sound Regional Citizens’ Advisory Council (“the RCAC”), a nonprofit organization made up of 18 member organizations,⁴ participated in public comment regarding the VMT C-Plan. Its comments raised concerns about the integrity of the liner, including whether the liner met regulatory requirements.

After SPAR issued the Initial Approval of the VMT C-Plan, both the Council and Alyeska requested a process known as “informal review.” Under this process, the division can review and amend its initial decision based on feedback from stakeholders without requiring stakeholders to undertake a formal hearing. The division granted the requests and undertook an informal review.

Informal review is generally expected to only take a short time, and the Division’s Initial Approval of a C-Plan is not a final appealable order until after any informal review is complete. Although informal review is generally expected to only take a short time, here, regrettably, the Division did not issue its informal review decision until December 22, 2021 – more than two years after agreeing to undertake the informal review as requested by the RCAC.⁵

In the informal review decision, the Division amended its Initial Approval of the VMT C-Plan. With regard to COA 2, the Division modified the requirements for Alyeska to evaluate the integrity of the liner. The Initial Approval had required that Alyeska test “1% (approximately 2,420 ft²) of the buried (or ballasted) membrane (CBA and other materials) of the East Tank Farm’s Secondary Containment Area.” The 2021 Informal Review decision increased that requirement to “no less than 10% (approximately 24,200 ft²) of the buried, or ballasted membrane

³ *Id.* at 2-3. DEC regulation 18 AAC 75.075(a)(2) requires that any liner used as part of a plan holder’s secondary containment system must be “(A) adequately resistant to damage by the products stored to maintain sufficient impermeability; (B) resistant to damage from prevailing weather conditions; (C) sufficiently impermeable; and (D) resistant to operational damage.”

⁴ RCAC’s Reply at 7.

⁵ Letter from Denise Koch, Director, SPAR, to Donna Schantz, Executive Director, PWSRCAC (Dec. 13, 2019).

catalytically blown asphalt (CBA) liner and other materials of the East Tank Farm’s single largest cell in the Secondary Containment Area.”⁶

The decision also addressed the issue of regulatory compliance and eligibility for the prevention credit, providing: “Failure to demonstrate the liner is sufficiently impermeable may require liner replacement to comply with 18 AAC 75.075(a)(2)(C), immediate removal of the 60 percent reduction credit under 18 AAC 75.432(d)(4), and an updated plan sufficient to meet the response planning standard under 18 AAC 75.432.”⁷

Under the Department’s regulations, 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.⁸ The commissioner may deny a request for a reason provided in law or vacate the decision and remand to the division that made the initial decision. If the commissioner conditionally approves the request, the commissioner will then refer it to the Office of Administrative Hearings for an initial determination of whether it meets the requirements of 18 AAC 15.200, and whether the requester has demonstrated that a hearing should be held. In general, this review requires OAH to determine whether the requester has standing to request an appeal, and whether the request complies with the strict requirements of § 15.200, including detailed descriptions of the alleged error and how the error affects the requester.

On January 21, 2022, the RCAC submitted its request for a hearing. The request listed eight “Issues to be Decided.” It then described three “Contested Issues.” The RCAC requested an oral evidentiary hearing of five to ten days length.

On January 23, 2022, Commissioner Brune conditionally approved two of the “Issues to be Decided,” and referred them to OAH. The two approved “Issues to be Decided” (Issue “G” and Issue “H”) directly alleged error in SPAR’s December 22, 2021 decision. The Commissioner disapproved the six remaining “Issues to be Decided,” noting that they were outside the scope of SPAR’s December 2021 amendments to the Initial Approval. The Commissioner did not discuss the RCAC’s three “Contested Issues.”

On February 22, 2022, the Division filed a response to the RCAC’s hearing request. The division agreed that the request was in compliance with 18 AAC 15.200. The Division did not

⁶ Letter from Tiffany Larson, director, SPAR, to Robert Archibald, President, and Donna Schantz, Executive Director, PWSRCAC and Allison Iverson, HSEC Director, APSC at 2 (Dec. 22, 2021).

⁷ *Id.*

⁸ 15 AAC 15.200(a).

object to the limitation of the hearing to Issues “G” and “H.” It noted, however, that the RCAC’s description of the three “Contested Issues” could be used “to provide context and specific information.”⁹ The RCAC timely filed a Reply, both broadly addressing compliance with 18 AAC 15.200, and expressing concern about the conditional referral of only certain parts of its hearing request.

In the meantime, and ultimately dispositive of the current request, Alyeska has filed its own request for an adjudicatory hearing on the same Informal Review Decision being challenged by the RCAC here. In a decision being issued contemporaneously with this one, the result of that request for adjudicatory hearing is that SPAR’s December 22, 2021 Informal Review Decision has been vacated and remanded to the Division.

III. Discussion

A. The RCAC’s Request for Adjudicatory Hearing on the December 22, 2021 Decision is Moot.

As noted above, a decision in Alyeska’s own appeal of the Division’s December 22, 2021 decision has vacated that decision and remanded it to the Division for further explanation and development.¹⁰ Although vacation was not a remedy requested in this particular appeal, since the decision at issue has been vacated, we no longer have a decision from which an appeal can be taken.¹¹ Accordingly, the referral of the RCAC’s request to the Office of Administrative Hearings for an adjudicatory hearing is moot.

Nevertheless, we recognize that this matter may well come back up for review following remand. To avoid any further delay in the process toward a final VMT C-Plan, this decision will address the issues raised by the RCAC and SPAR in the briefing on this referral. This will provide guidance to the parties to expedite the future process.

The first issue raised here is whether the RCAC’s request meets the threshold requirements for a hearing. As SPAR does not dispute that the RCAC has met these four requirements, the discussion of these issues will be very brief. There is dispute, however regarding the scope of the hearing. That issue, therefore, will be discussed in more detail.

B. The RCAC’s request meets the requirements of 18 AAC 15.200(a) – (d), except that

⁹ Division’s Response at 8.

¹⁰ OAH No. 22-0110-DEC.

¹¹ One reason for vacation and remand of the December 22nd Decision was to allow the Division to explain why it made or did not make changes to the Initial Approval. The RCAC’s brief obliquely raises a similar concern, criticizing the decision for “not containing any analysis or reasoning.” RCAC Reply at 5.

it does not demonstrate standing on the issue of the credit.

18 AAC 15.200 sets forth several requirements that a requester must meet to be granted an adjudicatory hearing regarding issuance or denial of a permit: the requester must have participated in the public review process; the request must be timely; the request must include certain information; and the requester must have standing.¹²

1. The requirements of 18 AAC 15.200(a) (prior participation and timeliness)

To meet the requirements of 18 AAC 15.200(a), the RCAC must show that it participated in the public review process of the draft decision and that its request was timely. Here, the RCAC has documented that it participated in the process.¹³ With regard to timeliness, 18 AAC 15.200(a) requires that a requester submit its request *either* within 30 days after a final decision is issued after informal review *or* within 30 days of a decision that is reviewable under the department’s regulations — *whichever is later*. Here, the RCAC submitted its request on January 21, 2022, 30 days after the Division’s December 22, 2021 decision following informal review. Therefore, the request was timely.

2. The requirements of 18 AAC 15.200(c) (required content)

To meet the requirements under 18 AAC 15.200(c) regarding the content of the request, the hearing request needed to include the following information: (1) a description of the decision to be reviewed; (2) contact information for the requester and persons they represent; and (3) a clear and concise statement of the contested issues, including how the issues are relevant to the disputed law and facts; and (4) information on the interests and issues at stake and why the hearing request should be granted.¹⁴ Here, the RCAC has identified the decision under review as the Division’s final decision on the VMT C-Plan, focusing with particularity on “the issues of the integrity of the secondary containment liner and the appropriateness of a prevention credit.”¹⁵ It has provided contact information.¹⁶ It has identified three contested issues (relating to the integrity of the liner and the appropriateness of the credit), including the alleged errors in one of the plan’s conditions of approval (COA 2) and two bases of decision (Basis of Decision Issues #7 and #8).¹⁷ Although these issues are perhaps not as clear and concise as one might hope, as the

¹² 18 AAC 15.220(a), (c), (d).

¹³ RCAC Adjudicatory Hearing Request at 11-13.

¹⁴ 18 AAC 15.220(c).

¹⁵ RCAC Adjudicatory Hearing Request at 1.

¹⁶ *Id.* at 13; RCAC DEC Request for Adjudicatory Hearing Form at 1.

¹⁷ *Id.* at 2-3, 8, 11.

Division agrees, the request's identification of issues and explanation of their relevance demonstrate compliance with 18 AAC 15.200(c).

3. The requirements of 18 AAC 15.200(d) (standing)

Finally, the hearing request needs to demonstrate a basis for standing under 18 AAC 15.200(d). Specifically, the request must show (1) that the representative members of the Requester's organizations are directly and adversely affected; (2) the nature of the Requesters' interest; (3) whether that interest is protected by the applicable statutes and regulations; and (4) the extent to which the decision directly and substantially impairs those interests.¹⁸ Here, the RCAC describes its interests as follows:

The Prince William Sound Regional Citizens' Advisory Council (PWSRCAC) is an independent, non-profit corporation whose mission is to promote environmentally safe operation of the Valdez Marine Terminal and associated tankers. The Oil Pollution Act of 1990 (OPA90) and the Council's contract with Alyeska Pipeline Service Company guide our work. PWSRCAC's 18 member organizations consist of communities in the region affected by the 1989 Exxon Valdez oil spill, as well as commercial fishing, aquaculture, Native, recreation, tourism, and environmental groups.¹⁹

In *Copeland v. Ballard*, the Alaska Supreme Court noted that "given the potentially devastating effects of oil spills on the ecology and economy of the state" it considered "approval of contingency plans to protect Alaska's marine and coastal environments in the event of an oil spill" to be "a matter of utmost importance to the public interest."²⁰ Although it did not directly address the standing of private citizens to intervene in the administrative appeal of the contingency plan (because the Department had already found that the citizens had standing) it did hold that the agency's dismissal of the citizen's from the appeal (for failure to timely pay their share of the cost of the record) was an abuse of discretion.²¹ This decision tells us that the court will tend to look favorably on the standing of citizens or organizations to participate in proceedings about the VMT C-Plan when they can demonstrate an interest in the land or water likely to be affected by an oil spill.

In its filing, the RCAC demonstrates that the integrity of the liner affects its interests.²² The RCAC's member organizations have interests in fisheries, aquaculture, tourism, and

¹⁸ 18 AAC 15.200(d).

¹⁹ RCAC Request for Adjudicatory Hearing Form at 1.

²⁰ *Copeland v. Ballard*, 210 P.3d 1197, 1203 (Alaska 2009).

²¹ *Id.* at 1202, 1205.

²² *See, e.g.*, RCAC Adjudicatory Hearing Request at 5-6, 8, 10.

preservation of Alaska Native heritage. If the liner does not meet regulatory standards, and is not sufficiently impermeable to contain a spill, it creates a risk of contamination that could affect marine life, tourism, and other interests. In a 2018 case, after a careful and thorough analysis of the comments submitted by the RCAC regarding the proposed amendments to the VMT C-Plan, the Commissioner found that the RCAC had standing to request an adjudicatory hearing regarding the Division’s amendments to the plan.²³ Here, although the specific impacts on its interests are not as well developed as they were in the 2018 decision, the RCAC likely has demonstrated that it would have standing to request an adjudicatory hearing with regard to liner integrity.

With regard to the issue of the credit, however, the RCAC’s standing is attenuated at best. The RCAC assumes that grant of the credit “would create further environmental risk by reducing the amount of oil spill equipment and resources Alyeska was required to maintain.”²⁴ That statement, however, does not prove an interest in the grant or denial of the credit—it simply asserts that “more is always better.” In a future appeal, standing to appeal the granting of the credit will be denied unless the RCAC can directly tie its interest to the grant or denial of the credit.²⁵

C. Referral of “Issues to Decided (G) and (H)” would be consistent with due process

As noted above, the RCAC takes issue with the Commissioner’s referral of only (G) and (H) of its “Issues to be Decided.” It argues that the reason given by the Commissioner for this limited referral—to focus the hearing on the Division’s decision after informal review—could be improper if it prevents the RCAC from arguing error in the unchanged portions of the November 15, 2019, Initial Approval. The RCAC asks that all eight of its “Issues to be Decided” be considered within the scope of the hearing.

If the Commissioner’s referral had barred the RCAC from arguing error in the Division’s final approval – that is, the November 15, 2019 Initial Approval as amended by the December 22, 2021 Decision after Informal Review – then the RCAC would have a basis for concern. 18 AAC 15.200(e) makes clear that a request for informal review suspends the deadlines for requesting an

²³ *Prince William Sound Reg. Cit. Adv. Coun. v. Alaska Dep’t of Env. Con., Div. of Spill Prev. and Resp.*, OAH No. 17-1219-DEC (Dep’t of Env. Con., 2018).

²⁴ RCAC Hearing Request, at 8.

²⁵ As the discussion of assumptions about potential future impacts of the credit suggests, the RCAC may well also need to address a more threshold question of ripeness as to the issue of the liner credit.

adjudicatory hearing after an initial approval. Moreover, due process requires that the agency not take action that would insulate its decisions from administrative or appellate review.²⁶

Nothing in the conditional referral, however, suggests that the RCAC would have been prevented from making all of the arguments that it has preserved through the public review process and its filing of a request for adjudicatory hearing. Indeed, and as the RCAC concedes, the allegations of error in its issues (G) and (H) are quite broad:

G. Did Director Larson err in modifying condition of approval 2B to only require evaluation of the integrity of 10 percent of the CBA liner of the East Tank Farm's single largest cell in the secondary containment area and by providing that any liner exposed during project work counts toward the evaluation?

H. Did Director Larson err in her informal review decision on the secondary containment liner and prevention credit issues presented in the PWSRCAC's informal review request?²⁷

Both parties have noted that the Commissioner's referral did not expressly address the RCAC's separately articulated Contested Issues 1-3. As the Division observes, these "provide necessary context and specific information" for the scope of the hearing on Issues (G) and (H).²⁸ It follows that the referral contemplates the possibility of a hearing on the RCAC's allegations – that the liner does not meet regulatory requirements, that the Division should have made additional changes to the approval, and (if standing could be established) that the credit was in error – *as framed* by its description of Contested Issues 1-3.

The RCAC's "Issues to be Decided (A) – (F)," on the other hand, were repetitive, vague, and peppered with loaded language. To the extent these items set out substantive allegations, they were simply subsets of the broader inquiry afforded the Commissioner's referral of Issues (G) and (H).²⁹ The focus on Issues (G) and (H) would be important because the inquiry would be on the following: whether the sampling ordered by the Division, and the directive given by the Division

²⁶ Cf., e.g., *State v. Lundgren Pac. Const. Co.*, 603 P.2d 889, 895 (Alaska 1979) ("We believe that a similar right to trial de novo is created if an administrative adjudicative procedure does not afford due process.").

²⁷ RCAC Adjudicatory Hearing Request at 2.

²⁸ Division's Response at 8.

²⁹ The RCAC admits that "Issues A – F are a sub-set of Issue H." RCAC Reply at 4. Accordingly, it was not necessary for the Commissioner to forward Issues A – F. The important point here is that the scope of the hearing would have been on the appropriateness of the 10 percent sampling decision. The RCAC would *not* have been precluded from making arguments that it has preserved, including arguments regarding the credit, the integrity of the liner, and the liner's compliance with regulatory standards. Those arguments clearly relate to the issue of the appropriateness of the 10 percent sampling decision.

as to the consequence of the outcome of the sampling (including the possible effect on the credit), are appropriate given the current evidence regarding the integrity of the liner.

In sum, because focusing on these two issues would promote an efficient hearing that comports with due process, the limitation of the scope of the hearing to Issues (G) and (H), as explained and contextualized by the RCAC's Contested Issues 1-3, would have been proper. The parties are advised to state issues for review succinctly and clearly, without unnecessary and argumentative verbiage.

IV. Conclusion

The conditional referral of the RCAC's request for hearing to OAH is vacated. Because the December 22, 2021 decision adopting a final VMT C-Plan has been vacated, no referral can be made until the Division issues a new decision on the VMT C-Plan. Any party desiring a hearing will be required to timely file a request for hearing after the Division issues its decision on remand—no carryover or relation back to the request at issue here will be granted. The parties are advised that any future hearing on this matter will be held in an efficient and timely manner.

The request for hearing is denied as moot.

RECOMMENDED: March 11, 2022

By: Signed
Cheryl Mandala
Administrative Law Judge

Adoption

The undersigned, in accordance with 18 AAC 15.220(c)(2), denies the request for adjudicatory hearing as moot for the reasons set forth above.

DATED this 11th day of March 2022.

By: Signed
Jason W. Brune
Commissioner

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]