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

In the Matter of:	)	
	)	
TODD & JULIA PHILLIPS v. DIVISION OF SPILL PREVENTION AND RESPONSE	)	OAH No. 21-2406-DEC
	)	
	)	
(Last Frontier LLC Facility)	)	

DECISION OF THE COMMISSIONER

Todd and Julia Phillips are the current owners of a roughly one-acre lot in Ketchikan where a heating oil release occurred in February of 2018. The site is generally referred to as the Last Frontier site, named after the limited liability company belonging to Mr. and Mrs. Phillips that owned it at the time of the release.

According to the most recent and convincing evidence, this was a relatively small spill, with a release volume of about 200 gallons of which 115 gallons were recovered by the owners' response contractor. It occurred in an area where groundwater, if any, is not used for drinking water. Tidewater is nearby, and some leaked oil apparently caused sheening there in the immediate aftermath of the spill.

This case was originally framed as an appeal of three underlying decisions. First, Mr. and Mrs. Phillips contested an implicit determination that they are liable for state response costs on this spill that were incurred while with was owned by the limited liability company (these were oversight costs, not direct cleanup costs). Second, they contested what they characterized as a decision to deny them a waiver from repayment of state response costs. Third, they contested the refusal of the Division of Spill Prevention and Response (SPAR) to grant them site closure at this time; SPAR had instead demanded substantial additional site characterization as a prerequisite to closure.

In administrative appeals before this department, there is a preliminary process to determine whether a hearing should be granted under 18 AAC 15. After briefing and review of a truncated initial record, I issued a decision on January 6, 2022, that granted Mr. and Mrs. Phillips a hearing on the written record with respect to the first and third issues. I declined to grant Commissioner-level review on the second issue, based on the following reasoning:

> As SPAR has observed in opposing the hearing request, Mr. and Mrs. Phillips can point to nothing in the record that would show that the two of them formally applied for—much less were denied—such a waiver. There is no decision that could be reviewed at this time in an administrative proceeding.

The case then moved forward on the merits. After submission of a full record and briefing by both sides, an oral argument took place on May 18, 2022. One additional item was submitted to the record by stipulation on June 2, 2022, making the case ripe for decision.

For reasons explored more fully below, this decision will address all three issues encompassed in the Phillipses' original appeal, even though my preliminary decision granted a hearing on only two of them. This decision will fully resolve the appeal and will provide guidance for future management of the site.

I. First Issue: Potential Liability for Response Costs

In 2018-2019, while the Phillipses' lot was still owned by Last Frontier LLC, SPAR incurred and billed about $8,000 in response costs. No lien was recorded against the property. In the summer of 2021 these costs were re-billed to Mr. and Mrs. Phillips in their capacity as new owners.[1] Putting aside the issue of waiver—a downstream question that will be explored later—Mr. and Mrs. Phillips did not believe they were liable for these costs in the first place. They believed the only potential liability lay with the LLC, which had been dissolved.

Mr. and Mrs. Phillips argued this issue in their opening brief, but then stated in their reply that, based on new documents that had come to light, they "must withdraw" the entirety of their opening argument.[2] The reply brief goes on to say that the Phillipses do "not concede[]" that Mr. Phillips was an operator of the property (which is one of several potential bases for cost recovery liability), but no argument is presented to support this or any other ground for overturning the identification of Mr. and Mrs. Phillips as potentially liable parties.

In general, each "owner" of a facility from which a hazardous substance is released is "strictly liable, jointly and severally, for . . . the costs of response . . . incurred by the state."[3] The same liability attaches to the person who "operated" the facility at the time of the release.[4] It

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1 *See* A.R. 149-150. Some 2021 costs were also billed.

2 Reply Brief of Appellant at 14. The new documents indicate that Mr. Phillips affirmatively took responsibility for the site by stating that he, and not Last Frontier, was the owner.

3 AS 46.03.822(a)(2).

4 AS 46.03.822(a)(3). This provision assigns liability to the person who operated a facility at the time of an unpermitted "disposal" of a hazardous substance. "Disposal" is broadly defined to encompass "spilling" and "leaking" and other inadvertent discharges. *See* 42 U.S.C. § 6903(3), adopted into Alaska law by AS 46.03.900(7).

is not disputed that Mr. and Mrs. Phillips are both owners of the property. Moreover, Mr. Phillips is clearly shown in the record to have been an operator at the time of the initial release, having monitored the heating oil tank, directed its filling and refilling, and directed the initial response to the spill.[5]

There are a few exceptions to the strict liability of owners and operators, but none of them apply here. The exceptions relate to Regional Education Attendance Area schools,[6] to response action contractors,[7] to acts of war or acts of God,[8] and to spills caused solely by the intentional or negligent conduct of third parties.[9]

Because Mr. and Mrs. Phillips have presented no arguments in support of their appeal point on basic liability other than arguments they have expressly withdrawn, and because they appear to fall within the scope of the strict liability set up by statute, their first point on appeal will not be sustained.

II. Second Issue: Residential Waiver of Cost Recovery

Alaska Statute 46.08.760 requires the department to seek prompt reimbursement of state response costs from liable parties except under circumstances set out in subsection (e) of that section. Subsection (e) permits the department to "waive all or a portion of the response costs" if it makes a four-part written finding regarding the factual basis for a waiver. The gateway element of the finding is that "the release was from . . . equipment used solely to provide heat or electrical power generation for a building used primarily for residential purposes . . . ."[10] The Last Frontier facility was used as both a restaurant (with limited hours) and a residence, and thus it was potentially eligible for this waiver. The additional elements for eligibility relate to whether the person acted responsibly in connection with spill prevention, reporting, and cleanup.[11]

SPAR's final statement on the waiver issue, prior to the inception of this appeal, was the following resolution of the Phillipses' informal review request: "The request to review the imposition of fees is unable to be appealed given that DEC has not made a written waiver

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5 *See, e.g.,* A.R. 585, 867.
6 A.S. 09.65.240.
7 A.S. 46.03.825
8 A.S. 46.03.822(b)(1)(A) and (C).
9 AS 46.03.822(b)(1)(B).
10 AS 46.04.070(e)(1).
11 AS 46.04.070(e)(2) – (4).

determination."[12] I accepted and relied upon this representation in denying the Phillipses access to a commissioner-level appeal on that issue. I believed the site owners needed to give SPAR an opportunity to rule on the waiver issue before appealing up the chain of command.

In the course of the proceedings on the remaining elements of the appeal, however, there were several completely unanticipated developments:

- In spite of the exclusion of the waiver issue from the scope of the appeal hearing, both sides addressed the waiver issue to some degree in their briefing, and more extensively (at my invitation) at oral argument.
- SPAR admitted that is has had no defined process whatsoever for a responsible party to apply for a § 760(e) waiver.
- SPAR admitted that it has been issuing waivers routinely without any formal decision document making findings.
- Most surprisingly, it was learned that SPAR had indeed made a determination regarding waiver for this site,[13] and had communicated that determination to Mr. and Mrs. Phillips in writing on August 8, 2018.[14] The determination and the communication seem to have met the same level of formality that SPAR has routinely used for these decisions on other sites.
- SPAR's determination was to *grant* a § 760(e) waiver.

Although there is no indication that SPAR has acted in bad faith in its dealings with the property owners and with me, the Division's conduct is nonetheless dismaying. It had granted the owners a waiver using the same informal process it used with other site owners, apparently making the required findings by implication rather than through the more formal process the statute envisions. But it then lost track of its decision and acted as though no decision had been made. There was, moreover, no procedure in place for the Phillipses to escape limbo. They were left with an informal decision in their favor that the Division was unwilling to acknowledge or honor. Only through an expensive legal process have they been able to untangle the confusion.

Once this case is closed, SPAR will need to develop regular, transparent procedures for addressing AS 46.08.760(e) determinations, including a process for recording and

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12 A.R. 141.
13 A.R. 1006, 1119.
14 A.R. 1010 ("You shouldn't expect to see any more invoices for ADEC costs incurred").

communicating the required findings in an appealable document. The procedures need not be—and probably should not be—elaborate, but there does need to be a process. In the meantime, however, Mr. and Mrs. Phillips have received their waiver determination with the same formality that was accorded to similar waiver candidates during the period they received it. In the interest of fairness and equal treatment, I will accept the waiver issue for decision and will affirm the 2018 decision to *grant* a waiver under AS 46.08.760(e) for state response costs.[15] Any subsequent decisions or equivocations, insofar as they are inconsistent with that decision, are vacated.

III. Third Issue: Site Closure

On May 7, 2021, the Phillipses submitted to SPAR what the Division has formally characterized as "a request for closure of the Last Frontier LLC contaminated site."[16] SPAR initially rejected the closure request on May 24, 2021, stating that "there is not adequate information to close this site."[17] This led to additional dialog between the parties, culminating in a July 15, 2021 letter in which SPAR stated definitively: "further characterization is required and the department has determined that the site is not ready for closure in accordance with 18 AAC 75.380(d) or eligible for an 18 AAC 75.350 determination."[18] SPAR requested "a workplan to address the contamination remaining onsite,"[19] a request that the Phillipses plausibly contend would cause them to incur substantial additional expense.[20]

The essence of Mr. and Mrs. Phillips's position is that in May 2019, the project manager assigned to the site at the time "approved" (the project manager's word) a site characterization report the owners had submitted, with certain comments, in a letter dated June 14, 2019 ("June 14, 2019 Letter").[21] The comments observed that there was stressed vegetation connected with the spill on the adjacent Fleenor property. They stated that "[t]his area will need to be evaluated

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15 SPAR should issue appropriate written findings consistent with those it must have implicitly made when it first granted the waiver. *See* AS 46.08.760(e)(1) – (4).

16 The quoted language is from a SPAR communication at A.R. 90. The date is from A.R. 145. The actual communication deemed to be a request for site closure seems to be the short email at A.R. 491, in which Mr. Phillips says "we're suppose[d] to get a closing letter" and asks that the letter be expedited.

17 A.R. 90-93.

18 A.R. 120.

19 *Id.*

20 The Contaminated Sites Program has apparently estimated that state oversight alone in connection with the additional work would cost $68,000. The actual work would be done by the Phillipses' contractor, presumably at even greater cost. *See* A.R. 711-712.

21 A.R. 1353-1355.

before the site can be considered for closure" and requested a workplan for an evaluation of the soils in that area.[22] No other additional work was mentioned. The Phillipses did not submit a workplan nor do further assessment on the Fleenor boundary (there is shared blame for this lack of follow-up[23]), but—importantly—they have reached consensus with SPAR in 2021 that the stressed vegetation on the Fleenor property probably is not spill-related.[24] Accordingly, they reason, the sole item of additional characterization mentioned in the June 14, 2019 Letter is unnecessary and the site should be closed.

SPAR appears to recognize that the June 14, 2019 Letter was not wholly clear and might have left a reader with the impression that just one hurdle needed to be cleared before the site could close as a matter of course.[25] SPAR apologizes for the confusion, but maintains that 2019 test results at the site did not meet the cleanup standards that apply to it based on available information about the site, and unless those standards are adjusted or addressed in some way, or shown to be met now throughout the area of the spill, the site cannot be closed.

The decision on whether to accept or reject a site closure request is made under 18 AAC 75.380. That regulation requires the responsible party to submit a report, prepared by a qualified environmental professional, that details the response to and extent of the contamination and provides information regarding compliance with applicable regulatory standards. It does not appear to be disputed that the 2019 site characterization report was sufficiently detailed and informative to meet the technical requirements of this regulation (at least in the context of a minor spill), *but for* the failure to address possible contamination on the Fleenor property. And since the indications of contamination on the Fleenor property are now recognized to have been caused by something other than this spill, the 2019 report was indeed adequate to set this property up for a decision on site closure.

This does not mean, however, that the closure decision had to be in the owners' favor. The regulation does not promise that a party who submits an adequate report will receive closure,

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22 *Id*.

23 The Phillipses' consultant was slow to address the requested additional work, but did seek reasonable clarifications from SPAR about what was being requested. A.R. 1368. SPAR did not respond to the inquiry, and both parties seemed to lose interest for the next year and a half.

I reject the contention of SPAR's counsel that for SPAR to respond to the consultant's simple inquiry would have meant that SPAR had inappropriately "usurp[ed]" the consultant's role. It is the mission of SPAR to assist in the practical solution of environmental problems, not to conduct an opaque guessing game about what it is requesting.

24 *See* A.R. 715.

25 *See* A.R. 153.

and the June 14, 2019 Letter did not promise that, either. All she assured was that the site could then be "considered for site closure."

The Division has considered site closure, as contemplated by both the regulations and the June 14, 2019 letter, and has denied it. Fundamentally, SPAR has pointed out that 2019 soil sample results exceed the standard for migration to groundwater, that the site does have seasonal subsurface water flows toward the ocean that meet the broad regulatory definition of "groundwater,"[26] that it follows that the groundwater needs to be investigated in some way, and that as a regulatory matter this is a roadblock to closure because no such investigation has been done.

Mr. and Mrs. Phillips were not entitled to automatic site closure, and they have not demonstrated that the information they have submitted meets the regulatory minimum for closure. With that said, I am left with the impression that the resources being devoted to this site may have become disproportionate. In reaching this impression, I note that the spill appears to have been smaller than was originally thought (200 rather than 400 gallons, with less than 100 gallons unrecovered); that considerable time has passed since data was gathered; that the groundwater on the site is not used for drinking; and that contaminated groundwater is apparently no longer reaching tidewater. Further, I note that SPAR has communicated poorly with the site owners, both with the original Rodman letter for which SPAR has apologized and with the subsequent failure to respond to questions from the Phillipses' contractor. This has led to understandable frustration and a sense that the goalposts are lost in the fog and, even if discerned, subject to being moved farther and farther down the field.

To address this concern, I will affirm only the denial of site closure, not the determination regarding the additional work needed. I will remand this matter to SPAR to work with Mr. and Mrs. Phillips toward timely and cost-effective site closure. To bring this about, the Division shall:

1. Send a Division employee, at the Division's expense, to the site to meet with Mr. and Mrs. Phillips and any subsequent or adjacent owners, visually inspect the site and downgradient locations for evidence of ongoing contamination, and obtain a firsthand sense of where, if anywhere, additional investigation would be feasible and worthwhile. Assuming full cooperation from the principal site owners, this should occur no later than August 15, 2022.

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[26] *See* 18 AAC 75.990(46); *cf.* A.R. 1354.

2. Explore with the responsible parties the feasibility of an alternative cleanup level under 18 AAC 75.340 or 345, including, if one is desired, a way of applying for the same under which the costs are proportionate to the scale of the release and the site.

3. Using information gathered under item 1 and any other information available, explore with the responsible parties the feasibility of a determination under 18 AAC 75.325(d)(1).

4. Consider minimal groundwater sampling protocols as may be appropriate to the scale of the release and the site. Additionally, consider requiring groundwater sampling test pits to be excavated prior to the site visit, to expedite the process.

5. Report to me no later than September 15, 2022, providing a timeline of proposed steps, inquiries, and responses to date, furnishing a projected timeline of steps to resolution, and describing the environmental benefits achieved or to be achieved. If additional site characterization work by the Phillipses that exceeds a likely cost of $10,000 is contemplated, SPAR should provide substantial detail as to the justification for the work.

IV. Order

The first appeal point is not sustained. The second appeal point is sustained in part as set forth above. The third appeal point is not sustained, but the decision on that point shall not be construed as an endorsement of the particular components of additional work that the Division has requested. This matter is remanded to the Division of Spill Prevention and Response for further proceedings leading to potential site closure in accordance with numbered paragraphs 1-5 in Part III, above.

DATED: June 21, 2022.

By: *Signed*
Jason Brune
Commissioner

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