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)	)	

RULING ON REQUEST FOR ADJUDICATORY HEARING

I. Introduction

In general, parties who have asked for informal review of an appealable decision by a division of this Department may seek commissioner-level review of the underlying decision within 30 days of the conclusion of the informal review. This is accomplished by filing a request for hearing under 18 AAC 15.200, using the form prescribed for doing so.

Todd and Julia Phillips are the current owners of a roughly one-acre lot in Ketchikan where a heating oil release occurred in 2018. It is generally referred to as the Last Frontier site, named after the limited liability company belonging to Todd and Julia Phillips that owned it at the time of the release. The Division of Spill Prevention and Response (SPAR) billed the Phillipses in 2021 for about $8,000 in state response costs from 2018-2019 (plus late fees and interest) which had accrued while the property was under Last Frontier LLC ownership; the Phillipses contend, first, that they cannot be held liable for these state expenses, and second, that the expenses should be waived. Thirdly, the owners contend that they are entitled to site closure at this time. SPAR responded to the request for site closure by rejecting it and demanding substantial additional site characterization, a request the Phillipses view as unjustified.

On August 30, 2021, Commissioner Brune received a letter from counsel for Mr. and Mrs. Phillips requesting an adjudicatory hearing.[1] As will be described more fully below, this initial request for a hearing was rejected on October 2, 2021 because, despite prompting from the Commissioner's office, it had never been submitted on the required appeal form.

On October 4, 2021, Mr. and Mrs. Phillips filed a new Request for Adjudicatory Hearing on the proper Department form, seeking commissioner review of these three issues. Pursuant to 18 AAC 15.220(a)(2), the request was conditionally referred to the Office of Administrative

[1] Agency Record (A.R.) 154-160.

Hearings ("OAH") to prepare "a recommended decision whether the request meets the requirements of 18 AAC 15.200 and the scope of any hearing on the request."

The question of whether a hearing should be granted is now fully briefed. SPAR contends that the hearing request was late and that, in any event, none of the areas of apparent disagreement between the Phillipses and SPAR has yet been distilled into a reviewable decision. The Phillipses continue to assert that their request must be granted in full. The briefing presents four issues, addressed in turn below:

1. Was the hearing request timely?
2. Has a reviewable decision been made relating to liability for cost recovery?
3. Has a reviewable decision been made relating to waiver of cost recovery?
4. Has a reviewable decision been made on site closure?

Additionally, insofar as there has been a timely appeal of a reviewable decision or decisions, for each contested issue it is necessary to determine the scope of the hearing needed to resolve it.

II. The Untimeliness of the Request Should Be Excused

A somewhat convoluted sequence of events led to the dispute over whether the present appeal was timely filed. The sequence began with the underlying communications from SPAR to the Phillipses about site closure and cost recovery. The parties disagree about whether these were "decisions," and that issue will be taken up in Parts III-V below. But regardless of whether they rose to that level, these communications about SPAR's views were delivered to the Phillipses in July of 2021.

A person seeking to challenge a Division decision has the option to appeal immediately or to seek informal review under 18 AAC 15.185. If the latter option is chosen, the time for a formal appeal will then run from the date the division director issues a final decision in connection with the request for informal review.[2] Mr. and Mrs. Phillips chose the latter option. It is undisputed that they made that request timely, using the proper DEC informal review form.

On August 9, 2021, SPAR Director Tiffany Larson issued a letter denying the request for informal review. The letter identified itself as a final decision on the request for informal review, and stated that the time for requesting an adjudicatory hearing would be "within 30 days of this decision."[3] Several documents were enclosed, but no hearing request form was enclosed. The

[2] 18 AAC 15.200(a).
[3] A.R. 141.

necessity of using a particular form to initiate an appeal also was not mentioned in the letter.

Mr. and Mrs. Phillips attempted to initiate a formal appeal in a submission dated August 25, 2021, but they did so (through counsel) in a letter, rather than using the DEC form. This was an error: 18 AAC 15.200(c) is explicit that requests of this type must be "on a form provided by the commissioner." The requirement exists because hearing requests for DEC decisions have to meet an exacting set of criteria, and the form helps both requesters and the department to evaluate whether each criterion has been addressed and met.

The Commissioner's Office noted this deficiency and wrote to the Phillipses' counsel on September 7, 2021, giving them until September 14, 2021 to file their appeal on the proper form. The September 7 communication provided a copy of the form. After several more weeks went by without hearing anything further from the Phillipses or their counsel, the Commissioner denied the August 25 request on October 2, 2021.

Mr. and Mrs. Phillips resubmitted their appeal using the form, but they did not do so until October 4, 2021. The resubmission was dated September 13, but was not delivered until October 4. This may have occurred because of an administrative mistake in the law office of the Phillipses' counsel.

The 56-day gap between Director Larson's letter and the October 4 submission is the basis for SPAR's contention that this appeal should be rejected as untimely. Under the specific circumstances of this case, however, it is appropriate to relax the appeal deadline as a matter of sound discretion.

Although the Phillipses failed to use the proper form, they did timely submit fairly detailed documents indicating an intent to request an adjudicatory hearing. While the need to use the correct form was included in the regulation describing the appeal procedures, SPAR did not provide a link to the required form and was not explicit in its correspondence that a particular form was required. When the Phillipses were specifically alerted to their failure to use the proper form, they appear to have made a good faith attempt to provide the information on the form, but an administrative error apparently caused another delay.

Moreover, with the exception of permitting decisions,[4] Alaska's Administrative Procedure Act (APA)[5] governs DEC cases "except to the extent that" its case-initiation

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[4] *See* AS 46.03.880(b); AS 46.04.890. 18 AAC 15.196 does not expand these statutory exceptions.

[5] AS 44.62.330-630.

procedures "are inconsistent with the manner in which proceedings are initiated under . . . AS 46.03 and AS 46.14."[6] The purported decisions being challenged here are not permitting decisions, and therefore the APA applies to administrative appeals from them except to the extent that an aspect of APA case initiation is inconsistent with case initiation under AS 46.03 or AS 46.14. One principle of the APA, found in AS 44.62.370(c), is that when appeal rights are granted, the agency should send out its decision "together with the form for notice of defense" ("notice of defense" is how the APA refers to a request for hearing). To comply with this requirement, Alaska agencies send out a form for requesting an appeal whenever they issue a party a notice of appeal rights. Whether this requirement applies to the particular appeal that the Phillipses are attempting to initiate here is a complex question we need not address at this time. But this APA principle does suggest that the best practice, as least for an agency that expressly requires a certain form, is to provide that form (or an electronic link to it) when the appeal rights are conferred.[7]

The Phillipses attempted to appeal on August 25, only 16 days after Director Larson's decision, and their only error was the type of error that providing an appeal form would likely have prevented. Once the appeal form was provided, they seem to have suffered from a short period of administrative confusion, but they nonetheless appealed less than 30 days later. In the context of long-term site remediation and cost recovery, where time is not of the essence, this is a set of circumstances where it is proper to extend the appeal deadline by the 26 days necessary to entertain the Phillipses' second appeal.

III. With Respect to Cost Recovery, There Is an Issue that Is Ripe for Review

In 2018-2019, while the Phillipses' lot was 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 the Phillipses in their capacity as new owners.[8] Mr. and Mrs. Phillips do not believe they are liable for these costs, nor for any interest or other charges that may have accrued on them. They explain their first issue for appeal as follows:

> Whether the fees from 2018-2019 were waived or are due from the Last Frontier, LLC in connection with the site, and whether the Phillipses are responsible for fees assessed prior to their ownership of the property when there was no lien for

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6 AS 44.62.330(a).
7 DEC will consider adopting that practice going forward.
8 The operative invoice appears to be at A.R. 149-150.

the fees or other notice to them when they purchased it.[9]

Notably, in this aspect of their hearing request Mr. & Mrs. Phillips do not ask the tribunal to evaluate a waiver of response costs under AS 46.08.070(e) (allowing waiver for certain residential spills) nor under 18 AAC 75.910(g) (allowing reduced billing on the basis of hardship). Instead, what they challenge is the *legal* determination that they are liable for these costs.

SPAR opposes this aspect of the hearing request on two, and only two, grounds. First, it points out that it has never made a waiver determination under AS 46.08.070(e)—whether favorable or unfavorable—in response to a request from the Phillipses. But that is not what the Phillipses are appealing in their first appeal point. Second, it argues that AS 46.03.822 makes Mr. and Mrs. Phillips strictly liable for these costs incurred under prior ownership, regardless of equitable considerations or lack of notice. This is certainly a plausible legal argument, but it is an argument on the merits. It tells us nothing about whether the requesters have met the requirements to have their own legal contentions considered by the Commissioner.

The recent billing of these response costs to Mr. and Mrs. Phillips was a determination that the Phillipses are legally responsible for them. The bill warned that unpaid charges may accrue interest.[10] While responsible parties can apply for a waiver under certain limited circumstances, nothing requires them to do so. What the Phillipses contest here is whether they are liable in the first place. There is no further process for contesting that determination within SPAR. This means there is a ripe agency decision for review. With the Director having completed the informal review process, the matter has passed through all steps preceding adjudication.

In opposing the request for a hearing, SPAR has chosen not to contend that DEC decisions about a responsible party's underlying liability can be adjudicated solely in court, and are not subject to administrative appeal. This certainly could have been argued, for neither AS 46.03.822 nor AS 46.08.070 explicitly mentions a right to challenge cost recovery bills administratively.[11] DEC regulations of the subject are ambiguous.[12] However, neither SPAR

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[9] A.R. 178.

[10] A.R. 150.

[11] These provisions lack an express grant of adjudicatory hearing rights, such as the one found for air permits in AS 46.14.200.

[12] 18 AAC 75.910(f) expressly gives a "person receiving a cost recovery invoice" the right to seek "informal review." This appears to be the same "informal review" whose procedures are set out in 18 AAC 15.185. 18 AAC

nor the Phillipses question whether these billing decisions—provided they are ripe—confer a right to an adjudicatory hearing. The Commissioner could reach this issue independently, but in light of the history of this matter he exercises discretion not to interpose a new barrier to review that SPAR has not raised.

DEC's regulations contemplate that administrative hearings may occur in the form of either full evidentiary hearings or as simply hearings on briefs.[13] The first basis for appeal appears to present a legal question as to whether and under what circumstances liability for costs extends to successor landowners, and it will be referred for a hearing on the briefs. Prior to briefing, the parties may seek to supplement the record consistent with 18 AAC 15.220(e) and 15.237(b).

IV. There Is No Ripe Issue with Respect to Waiver

Mr. and Mrs. Phillips explain their second issue for appeal as follows:

> Whether the Phillipses are entitled to relief from fees for 2021, and any fees from 2018 or 2019 for which they might otherwise be responsible, being imposed under AS 46.08.070 as owners of residential property who have taken all steps to clean up a spill which was not caused by their negligence.[14]

Here, the Phillipses directly ask the tribunal and the Commissioner to apply a waiver under AS 46.08.070. 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.

V. There Is a Ripe Issue Regarding the Denial of Site Closure

On or about May 7, 2021, the Phillipses submitted what SPAR has formally characterized as "a request for closure of the Last Frontier LLC contaminated site."[15] SPAR initially rejected the closure request on May 24, 2021, stating that "there is not adequate information to close this site."[16] 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

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75.910 does not say whether there is a right to an adjudicatory hearing after, or instead of, informal review.

13 18 AAC 15.220(b)(1) and (c)(1).

14 A.R. 179.

15 The quoted language is from a SPAR communication at A.R. 90. The date is from A.R. 145. The actual request for site closure, which may have been quite informal, does not seem to be in the record. The April 15, 2021 engineering report at A.R. 113-115 may have been part of the site closure request.

16 A.R. 90-93.

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."[17] SPAR requested "a workplan to address the contamination remaining onsite,"[18] a request that the Phillipses plausibly contend would embark them on substantial additional expense. This is what Mr. and Mrs. Phillips seek to appeal. In essence, they wish to stand on the information they have already submitted and the actions they have already taken, arguing that they are sufficient for site closure.

The decision on whether to accept or reject a site closure request is made under 18 AAC 75.380. SPAR's decision to reject site closure *unless additional work is done* appears to be fully considered and final. The Phillipses are aggrieved by it, because without site closure they face an ongoing impediment to marketing the property and/or ongoing expense. 18 AAC 75.385 provides that a "person aggrieved by a final department decision under 18 AAC 75.380 . . . may request an adjudicatory hearing under 18 AAC 15.195 – 18 AAC 15.340."

SPAR opposes this aspect of the hearing request on the basis that, as a matter of law, it "cannot" approve site closure on the present record. As with SPAR's argument regarding cost recovery discussed in Part III above, this argument is plausible—but it is an argument on the merits. The Phillipses are entitled to adjudication of their legal position, be it right or wrong. As with the first basis for appeal, the dispute regarding the availability of site closure at this juncture appears to present an essentially legal question. It will be referred for a hearing on the briefs. Prior to briefing, the parties may seek to supplement the record consistent with 18 AAC 15.220(e) and 15.237(b).

VI. Conclusion

An adjudicatory hearing on the briefs and record is granted with respect to issues one and three of the October 4, 2021 Request for Adjudicatory Hearing.

RECOMMENDED: December 27, 2021; amended after deliberations January 4, 2022.

By: *Signed*
Name: Christopher Kennedy
Title: Administrative Law Judge

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17 A.R. 120.
18 *Id.*

Adoption

A. The undersigned, in accordance with 18 AAC 15.220(c)(1), GRANTS the request for an adjudicatory hearing and returns the matter to the Office of Administrative Hearings to schedule and hold appropriate proceedings.

DATED this 6th day of January, 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.]