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

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| ALYESKA PIPELINE SERVICES CORPORATION,<br>Requester,<br><br>v.<br><br>DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF SPILL PREVENTION & RESPONSE,<br>Respondent. | ) | OAH No. 22-0110-DEC |

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

## I. Introduction

Alyeska Pipeline Service Company requested an adjudicatory hearing to contest the Division of Spill Prevention and Response's decision regarding the Valdez Marine Terminal contingency plan. Because the Division's decision requires additional explanation, the hearing request is denied, and the matter is remanded to the informal review process.

## 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] The Initial Approval included several numbered "conditions of approval" or COAs.

Of particular importance to this proceeding is the second condition of approval, called "COA 2: Secondary Containment Commitment Required Verifications." It 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

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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 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.

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, have been key issues in contention in connection with the VMT C-Plan.

After SPAR issued the Initial Approval of the VMT C-Plan, both Alyeska and the Prince William Sound Regional Citizens' Advisory Council 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. The regulatory deadline for completion of this informal review was February 6, 2020.[4] Here, regrettably, the Division did not issue its informal review decision until December 22, 2021.[5]

In the informal review decision, the Division amended its Initial Approval of the VMT C-Plan. With regard to COA 2B, the Division modified the requirements for Alyeska to evaluate the integrity of the liner, including the timing for identifying an evaluation method, and the scope of the evaluation itself.

- While the 2019 Initial Approval provided Alyeska four years to identify a non-destructive test method to verify liner integrity, conduct proof-of-concept testing and provide a report for SPAR to review, the December 2021 informal review decision removed the requirement for proof-of-concept testing and extended to December 2022 the deadline for proposing a method to evaluate the liner integrity. Because two years had passed between the Initial Approval and the informal review decision, this deadline change effectively reduced Alyeska's time to identify a method for evaluating liner integrity from four years to roughly one year.

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[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] *See* 18 AAC 15.185(c). The review was due 20 days after Alyeska complied with an information request from SPAR under the same regulation. Alyeska did so on January 17, 2020.

[5] Two earlier versions of the informal review decision seem to have been issued about 20 days prior to the final version, but these were superseded by the final version. The limited record available at this time does not provided a full indication of what changes were made or why the earlier versions were deemed erroneous.

- The informal review decision also changed the scope of the evaluation required. Alyeska's December 2019 informal review request concerned, in part, the initial COA 2 requirement that Alyeska test "1% (approximately 2,420 $ft^2$) of the buried (or ballasted) membrane (CBA and other materials) of the East Tank Farm's Secondary Containment Area." The Division's December 2021 Informal Review decision increased that requirement to "no less than 10% (approximately 24,200 $ft^2$) of the buried, or ballasted membrane 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] Alyeska filed such a request. Very broadly, Alyeska seeks the removal of COA 2B, or at least to have it rolled back to the one percent level on the basis of procedural and substantive errors. Alyeska also seeks to remove COA 2C, a requirement for a tabletop exercise that Alyeska believes to have become redundant.

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 does not immediately take one of these actions, he may conditionally refer the matter to the Office of Administrative Hearings for fuller recommended decision of whether the request meets the requirements of 18 AAC 15.200 (including the requirement for standing), whether the matter should be summarily remanded, and if not, what the scope of any review proceedings should be. Such a conditional referral was made here, and both parties have filed briefs with the Office of Administrative Hearings.

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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).

## III. Discussion

*A. Has the Requester Met the Requirements of 18 AAC 15.200?*

With respect to all aspects of 18 AAC 15.200 other than the requirement for standing, SPAR concedes that Alyeska has met the regulatory threshold and is entitled to a hearing. SPAR contends that the hearing should be limited to briefing on the existing record.

As to standing, SPAR takes the startling position that Alyeska may lack standing to contest changes to the terms of its own C-Plan, but it articulates no reason why this would be so. It then says it "does not specifically object *at this time*" (italics added) and that it "defers to the discretion of OAH and the Commissioner's Office" to determine whether Alyeska has standing. In these circumstances, standing will be deemed to be conceded – as it should be where a permit-holder contests changes to the terms of *its own* plan.

*B. Should the Matter be Remanded for Further Action Prior to Any Hearing?*

The central issue in this case is the change to COA 2B. In the 2019 C-Plan approval, Alyeska was required to test one percent of the liner, a requirement Alyeska contested as excessive. In the December 22, 2021 informal review decision, SPAR increased this requirement to ten percent and required it all to be performed within the boundaries of the largest cell. In making this change, SPAR made a number of implicit determinations.

One such determination is that this ten-fold change was "minor" and not "substantive." This is because, if the change were not "minor," the director would have been required to order the staff "to re-notice the contested decision" and follow the process leading to a final "revised decision."[9] The director did not do that. There is, however, no explanation of any kind in the director's decision of why this change was deemed to be minor. Alyeska, for its part, has lodged plausible evidence with its appeal indicating that the change would impose direct costs and potential operational disruptions that could have a multi-million dollar impact. Alyeska's evidence suggests that the difference between one-percent and ten-percent sampling may be fundamental: the former can be done opportunistically and can be a part a program integrated with normal tank farm maintenance, whereas the latter would require deliberately taking portions of the tank farm out of service, with the potential to disrupt the shipping sequence for crude oil.

Alyeska may be mistaken. If the COA-2B testing is not as disruptive as Alyeska suggests, or if Alyeska has simply misconstrued what the director is requiring, a more detailed explanation

[9] 18 AAC 15.185(d)(3).

might establish that the change is indeed "minor" and might even obviate the whole appeal. But the determination that this decision was minor was not even articulated, much less explained, in the informal review decision.

Another implicit determination is that the change is necessary. However, there is no explanation in the director's decision of why the change to COA-2B is necessary, nor of what benefits, if any, it would confer.

Another implicit determination is that ten percent is the appropriate amount of liner to sample, as opposed to one, five, eight, or 15 percent, to give a few examples. However, there is no explanation in the director's decision of why ten percent was chosen.[10]

Another implicit determination is that the "single largest cell" of the East Tank Farm's secondary containment area is the only appropriate place to conduct all of the testing. However, there is no explanation in the director's decision of why this choice was made.[11]

Likewise, the informal review decision implicitly concludes that halving the amount of time allowed to identify a method for evaluating liner integrity, and removing proof of concept testing, are both appropriate and feasible – as well as "minor," but no explanation of those changes or justification for those implicit assumptions is provided.

It would be possible, in spite of this lack of explanation, for the Commissioner to go forward with a hearing, but the hearing would likely have to take one of two undesirable directions. One alternative would be to open up discovery and cross-examination of SPAR's decisionmaking team about the reasoning behind these determinations, but this has the drawback of opening the door to *post hoc* justifications. Moreover, there is the risk of discovering, after more weeks or months of litigation, that there was in fact no reason for some of the choices made, or that any reasoning was unsupported in the record, which would necessitate a belated remand. The second alternative is even less desirable: to have an unrestricted evidentiary hearing so that the Commissioner can make all of the decisions regarding COA 2 in the first instance himself, supplying the missing reasoning that his staff did not articulate. While this might be a viable approach for some types of decisions, it is not ideal in the context of something as complex as a C-Plan approval.

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[10] The decision also seems to lack an explanation of the closely related issue of how the ten percent sample can be part of a statistically valid sampling approach. The Prince William Sound RCAC has focused on this aspect of the missing explanation in its parallel appeal.

[11] The absence of a rationale for this choice is also one of the appeal points raised by the Prince William Sound RCAC in its parallel challenge to the director's decision.

In most Alaska administrative appeals, including those in this department, a commissioner is not required to defer to judgments made by staff.[12] That said, commissioners can *choose* to defer, to an appropriate degree, to staff expertise.[13] This would be the normal course in a complex technical and regulatory appeal of this kind: a commissioner with no reason to doubt staff competence would likely choose to give a degree of deference to staff assessments of the best methodology to solve a particular problem. By giving no explanation for what it has done, however, the staff effectively deprives the commissioner of this option.

The second, less significant focus of the Alyeska appeal presents a similar problem. In informal review, Alyeska had sought removal of a tabletop exercise requirement in COA 2C on the basis that the work was already done in an exercise conducted on June 27, 2019. The completion of the 2019 exercise is something that allegedly may have been overlooked in the Initial Approval since the exercise was run during the interim between Alyeska's submission of its C-Plan for approval and the Division's issuance of the Initial Approval. The final informal review decision implicitly rejects Alyeska's request to delete the allegedly redundant exercise requirement, but does not explain why.

A standard remedy for decisions that are explained so inadequately that the reviewing tribunal is left with a nearly impossible task is simply to remand the matter for reconsideration and explanation.[14] That remedy will be applied here. The matter will be remanded to the informal review process for 30 days so that the director can prepare and issue an explanation of the determinations made in the informal review. If, in preparing the explanation, the director concludes that the change in COA 2B was not a minor change, the director will be at liberty to re-notice the decision in accordance with 18 AAC 15.185(d)(3)(B).

## IV. Conclusion

In accordance with 18 AAC 15.220(b)(3) and (c)(3), the director's informal review decision of December 22, 2021 is vacated. This matter is remanded to the director to issue a new informal review decision within 30 days of the date of this order. The new informal review decision shall provide the reasoning and explanation identified as missing in the discussion above. The director is not precluded from changing determinations made in the vacated decision. If the

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[12] *E.g., In re Ferrell*, OAH Case No. 06-0582-COL (Comm'r of Commerce, Community & Econ. Dev. 2007) at 7-8 n.26 (published at https://aws.state.ak.us/OAH/Decision/Display?rec=209).

[13] *See, e.g., Quality Sales Foodservice v. Dep't of Corrections*, OAH No. 06-0400-PRO, Decision and Order at 11-12 (Comm'r of Administration 2006).

[14] *See, e.g., Brown v. State,* 693 P.2d 324, 330 (Alaska 1984).

director determines that a determination in the revised decision is not "minor" within the meaning of 18 AAC 15.185(d)(3)(B), the director may act in accordance with 18 AAC 15.185(d)(3)(C).

The request for hearing is denied.

RECOMMENDED: March 11, 2022.

By: *Signed*
Name: Cheryl Mandala
Title: Administrative Law Judge

# Adoption

The undersigned, in accordance with 18 AAC 15.220(c)(3), VACATES the contested decision and remands the matter to the Director of Spill Prevention and Response for further proceedings as 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.]