

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

AHTNA INFRASTRUCTURE &)	
TECHNOLOGIES, LLC)	
)	
Requestor,)	
)	
v.)	
)	
ALASKA DEPARTMENT OF)	
ENVIRONMENTAL CONSERVATION,)	
DIVISION OF WATER,)	
)	
Respondent.)	OAH No. 22-0942-DEC
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RULING ON REQUEST FOR ADJUDICATORY HEARING

I. Introduction

In general, parties who received an adverse decision by a division of this Department may seek commissioner-level review of the underlying decision. This is accomplished by filing a request for hearing under 18 AAC 15.200. Ahtna Infrastructure & Technologies, LLC (“Ahtna”) has used that mechanism to request a hearing to challenge the issuance of a Notice of Violation (“NOV”) by the Division of Water.

This decision finds that neither 18 AAC 15.200 nor any other provision of law entitles Ahtna to a formal hearing on the issuance of an NOV. However, Ahtna raises important issues that the Commissioner may, as a matter of discretion, review. The Commissioner exercises that discretion to afford Ahtna an opportunity to challenge the issuance of the NOV, using a different procedure.

II. Background

Ahtna operates the NOAA Fairweather Homeport Recapitalization Project under an APDES¹ general permit. Following an inspection of the project on August 16, 2022, the Division sent Ahtna an NOV listing three alleged permit violations.² The NOV asked for certain corrective actions, as well as an explanatory report.³ Although it mentioned a range of potential

¹ Alaska Pollution Discharge Elimination System.
² A.R. 222-224.
³ A.R. 223.

enforcement actions that could be taken, it did not formally initiate any of them; specifically, it did not contain a “notice of intent to issue a compliance order” under 18 AAC 95.010(a).

Ahtna does not contest the factual basis for the NOV, and it promptly complied with the items requested in the NOV. It contends, however, that an NOV in this context has significant practical and economic consequences for the company, perhaps rendering it ineligible for federal contracts. It alleges that the use of an NOV was inappropriate for noncompliance items that it alleges were not significant and were immediately corrected.

Following its compliance, Ahtna requested that the NOV be rescinded and replaced with a compliance letter.⁴ The Division denied this request on October 28, 2022.⁵

On November 28, 2022, Ahtna filed a Request for Adjudicatory Hearing on the Department form for hearings under 18 AAC 15.200, seeking commissioner review of the October 28 decision. Pursuant to 18 AAC 15.220(a)(2), the request was conditionally referred to the Office of Administrative 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,” as well as to evaluate the related question of whether OAH has jurisdiction to hear this matter.

III. OAH Jurisdiction

OAH has jurisdiction to hear the preliminary phase of this proceeding (regarding whether there is a right to a hearing) on two bases. First, Ahtna presented this request for hearing as a request under 18 AAC 15, the regulatory chapter that governs all or virtually all proceedings that fall under OAH’s mandatory jurisdiction for certain environmental matters, AS 44.64.030(a)(42). Under 18 AAC 15.220(a), the first step of such a proceeding is an evaluation of whether the hearing request falls within the scope of the hearing right created by that chapter, and the Commissioner may task OAH with conducting that evaluation and recommending a decision to him. This is consistent with the general principle that a tribunal has jurisdiction to evaluate whether it has jurisdiction.⁶ Second, the Commissioner has referred the preliminary phase to OAH. Under AS 44.64.030(b), an agency may refer any adjudicatory proceeding to OAH, even if it does not fall under OAH’s mandatory jurisdiction. A voluntary referral under AS

⁴ A.R. 226-228.

⁵ A.R. 237-238.

⁶ *See, e.g., United States v. United Mine Workers*, 330 U.S. 258, 290-9 (1947).

44.64.030(b) confers jurisdiction.

Let us next turn to jurisdiction over the merits of the dispute between Ahtna and the Division. As will be seen, an evaluation of Ahtna’s hearing shows that it does not fall within existing entitlements to an adjudicatory hearing. Nonetheless, insofar as the Commissioner exercises discretion to authorize an adjudicatory proceeding, he has the option to refer it to OAH under the broad authority contained in AS 44.64.030(b).

IV. Right to Hearing Under 18 AAC 15

The hearing opportunity and procedures under 18 AAC 15 apply to two classes of proceedings. An NOV issued by the Division of Water does not fall within either of them.

First, the chapter applies to certain “permit, approval, or certification decisions . . . including decisions to amend, suspend, revoke, or re-issue permits, approvals, or certifications[.]”⁷ The NOV did not affect Ahtna’s permit.⁸

Second, the chapter applies to any other “decisions authorized to be reviewed in an adjudicatory hearing by a provision of [18 AAC]”.⁹ No other regulatory provision authorizing a hearing on an NOV has been suggested. Notably, 18 AAC 83.175 provides for appeals related to APDES permits, but in connection with general permits it provides a hearing opportunity that is expressly “limited to” review of “whether the authorization to discharge is the type of discharge intended to be covered under the general permit and the appropriateness of any site-specific terms or conditions.”¹⁰ NOVs fall outside this express limitation.

No other provision of 18 AAC “authorize[s]” hearings related to the APDES system. 18 AAC 95, discussed in another context below, does not authorize hearings, but rather prescribes procedures for hearings authorized by a statute, AS 46.03.850.

V. Right to Hearing Under AS 46.03.850

The NOV is a notice that in the opinion of the Division, the permit holder is in violation of a term of its permit. As such, it is most closely aligned in applicable law with the document described in AS 46.03.850(a), wherein the Department “may notify” a permitholder of such a

⁷ 18 AAC 15.010(e)(1).

⁸ While the NOV documented the Division’s belief that violations had occurred, Ahtna has not alleged any provision of the permit that would be affected thereby. This decision should not be construed to rule out a hearing right in the hypothetical context of a permit that contains consequences for NOVs, such as effects that flow from the number of prior NOVs that have been issued. This is apparently not such a permit.

⁹ 18 AAC 15.010(e)(2).

¹⁰ 18 AAC 83.175(b).

determination, triggering an obligation to respond regarding measures taken to correct the alleged problem. One should note, however, that the NOV is arguably one step short of a formal notice under AS 46.03.850(a), in that it was not served by personal service or certified mail¹¹ (the two methods of delivery contemplated by the statute). It also did not initiate a compliance order proceeding under the implementing regulations for AS 46.03.850, found in 18 AAC 95.

If the NOV was a notice under AS 46.03.850(a), it still does not trigger a right to a hearing. AS 46.03.850 is explicit in granting a hearing right only if the notice is followed by a “compliance order” under AS 46.03.850(c). The Division was wholly satisfied with the measures Ahtna took to bring itself into compliance, and no compliance order was issued.¹²

VI. Commissioner’s Supervisory Authority

The Commissioner is the chief executive of the Department.¹³ He may oversee and direct the decisions made by the divisions under his supervision. In some instances, this supervision has taken the form of granting—as a matter of discretion—an adjudicatory hearing in circumstances where the formal right to such a hearing is ambiguous but the need for policymaking oversight is nonetheless present.¹⁴ The Commissioner may also prescribe other, less formal review mechanisms for actions under his supervision.

In this case, Ahtna has raised a plausible claim that an NOV such as this one—while ostensibly nothing more than a notice of the regulator’s untested opinion that a violation has occurred—is a document that carries far-reaching practical consequences. Ahtna has also alleged that the Division’s use of this mechanism has been inconsistent and inappropriate.

The Commissioner wishes to understand this issue better, both to ensure that the appropriate course has been followed in response to these compliance issues and to consider whether the Department needs to consider a more formal regulatory structure for issuance and review of NOVs. Accordingly, the adoption order below denies an adjudicatory hearing under 18 AAC 15, but nonetheless grants Ahtna a proceeding to challenge the NOV in this instance.

¹¹ A.R. 224.

¹² Were a hearing granted under AS 46.03.850, it would fall outside the mandatory jurisdiction of OAH. See AS 44.64.030(a)(42). Any referral to OAH to consider the merits would have to be made under the voluntary referral provision in AS 44.64.030(b).

¹³ AS 44.46.010.

¹⁴ *E.g., In re Phillips v. Div. of Spill Prevention & Response*, OAH No. 21-2406-DEC (Commissioner of Environmental Conservation, Jan. 4, 2022).

VII. Conclusion

An adjudicatory hearing under 18 AAC 15 is denied. Further proceedings will be held in accordance with the Commissioner's adoption order to follow.

RECOMMENDED: January 24, 2023; slightly amended after deliberations January 24, 2023.

By: Signed
Christopher Kennedy
Administrative Law Judge

Adoption

A. The undersigned, in accordance with 18 AAC 15.220(c)(2), DENIES the request for an adjudicatory hearing as not meeting the requirements of 18 AAC 15.200. 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.

The undersigned will nonetheless, as a matter of supervisory discretion, conduct a one-day non-adjudicatory review of the Division's exercise of discretion in this matter. The review may result in a direction to modify the exercise of discretion. The review will be conducted at a mutually agreeable time within 30 days of the date of this order. The Division and Ahtna will each be allotted one-and-a-half hours for oral presentation and testimony. Immediately following the execution of this order, a representative of the Commissioner's office will contact the parties to make arrangements for the review.

DATED this 25th day of January, 2023.

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.]