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

CITY OF VALDEZ, Requester, v. DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF SPILL PREVENTION & RESPONSE, and ALYESKA PIPELINE SERVICE COMPANY, Respondents	OAH No. 25-0950-DEC

RECOMMENDED RULING ON PHASE ONE (REQUEST FOR ADJUDICATORY HEARING) UNDER 18 AAC 15.220

I. Introduction

In general, parties who received an adverse decision by a division of the Alaska Department of Environmental Conservation (ADEC) may seek commissioner-level review of the underlying decision. This is accomplished by filing a request for hearing under 18 AAC 15.200. The City of Valdez ("City") used this mechanism to challenge the approval, by ADEC's Division of Spill Prevention and Response (SPAR), of the Valdez Marine Terminal Oil Discharge Prevention and Contingency Plan, Plan No. 3-CP-4057("VMT C-Plan") which is "the property of the Owners of the Trans Alaska Pipeline System" and for the "sole use" of Alyeska Pipeline Service Company ("Alyeska").[1] The City identified six contested issues for a hearing. The Commissioner of ADEC remanded three of the issues to SPAR and preliminarily referred three of the requests to the Office of Administrative Hearings for a determination of whether they met the requirements for a hearing. SPAR opposed most of those referrals, but did not oppose the referral of part of contested Issue 5.[2] Additionally, the permit holding party, Alyeska, participated in this appeal and opposed all of the referrals.

This decision concludes that some of this opposition rests upon a misplaced belief in the strength of the Respondent's arguments on the merits, and that—for some of the proposed issues—the requesters have met the threshold for demonstrating a hearing is appropriate. However, for parts of Issue 5 the City either lacks standing to bring suit against SPAR for supposed violations of agreements with third parties, or raises issues outside the

[1] ADEC000051.
[2] SPAR's Opp. To Req. for Adj. Hearing at 13.

scope of a hearing available under 18 AAC 15.200. Accordingly, while a hearing is granted on Issue 5, that hearing is limited to contested issues for which a hearing is available under 18 AAC 15.200 and the City has standing to pursue.

Regarding Issue 4, this proposed decision is not definitively finding that a best available technology analysis for a sensitive gauging system was required in approving the VMT C-Plan. However—in the interest of avoiding disputes among the parties about record supplementation and the potential need for an evidentiary hearing or discovery—Issue 4 is being remanded to SPAR to require them to amend their basis of decision to demonstrate that such an analysis was made at some point.

II. Factual and Procedural History

A. Relevant C-Plan Requirements

State law requires an oil terminal facility to develop and comply with a SPAR approved oil discharge prevention and contingency plan, known as an ODPCP or C-Plan.[3] General C-Plan requirements are laid out at 18 AAC 75.448 as follows:

> An oil discharge prevention and contingency plan submitted for approval under 18 AAC 75.400 - 18 AAC 75.495 must be usable as a working plan for oil discharge control, containment, cleanup, and disposal. The plan must contain enough information, analyses, supporting data, and documentation to demonstrate the plan holder's ability to meet the requirements of AS 46.04.030, AS 46.04.055(c)(2), and 18 AAC 75.400 - 18 AAC 75.495. The plan must demonstrate that the personnel, equipment, and other resources identified in the plan are sufficient for meeting each response planning standard applicable for each facility in the plan. The plan must take into account realistic maximum response operating limitations and their effects on response capability and the deployment of resources. The department will review and evaluate a plan by verifying that it meets the applicable requirements under 18 AAC 75.448 - 18 AAC 75.453.[4]

There are four primary categories of C-Plan or related requirements specifically at issue in this matter: those governing: Oil Spill Primary Response Action Contractors ("PRACs"), aboveground oil storage tanks, the procedures to respond to the greatest possible discharge, and the degree of coordination with other entities.

[3] AS 46.04.030.
[4] 18 AAC 75.448(a).

a. Oil Spill Primary Response Action Contractors

"If a contingency plan submitted to the department for approval relies on the services of an oil spill primary response action contractor, the department may not approve the contingency plan unless the primary response action contractor is registered and approved under AS 46.04.035."[5] The term "Primary Response Action Contractor" is defined at AS 46.04.035 as "a person who enters into a response action contract with respect to a release or threatened release of oil and who is carrying out the contract, including a cooperative organization formed to maintain and supply response equipment and materials that enters into a response action contract relating to a release or threatened release of oil."

SPAR regulations provide a further definition at 18 AAC 75.500(a) stating a PRAC is:

> a person who is or intends to be obligated under contract to the holder of an approved oil discharge prevention and contingency plan issued under AS 46.04.030 to provide resources or equipment to contain, control, or clean up an oil discharge. "Oil spill primary response action contractor" does not include
>
> > (1) a person who provides only ancillary services or equipment not for the specific purpose of containing, controlling, or cleaning up an oil discharge; or
> >
> > (2) an approved oil discharge prevention and contingency plan holder who provides to another plan holder resources or equipment to contain, control, or clean up an oil discharge.

Under 18 AAC 75.451(i), if a plan holder proposes to use the services of a PRAC to meet C-Plan requirements they must be registered and described in the C-Plan in specific detail.

b. Aboveground Oil Storage Tank Requirements

Under 18 AAC 75.450(a), a C-Plan's "prevention plan" "must demonstrate" that the plan holder "meets all applicable requirements of 18 AAC 75.005 – 18 AAC 75.085." This includes requirements for field-constructed aboveground oil storage tanks at oil terminal facilities such as those at 18 AAC 75.065(h)(1)(A). That regulation requires an "owner or operator of an installation placed in service before May 14, 1992 to . . . equip each field-constructed aboveground oil storage tank" with one of various options, including a leak detection system such as a "sensitive gauging system." A sensitive gauging system is a defined term that "means the

[5] AS 46.05.035.

best demonstrated available gauging technology at the time of tank construction or substantial reconstruction, or initial gauging system installation."[6]

c. Greatest Possible Discharge

A C-Plan must "identify the greatest possible discharge that could occur at the facility or operation, and the general procedures to respond to a discharge of that magnitude."[7] "Greatest possible discharge" is not a defined term at 18 AAC 75.990. The C-Plan must also include a list of resources, in addition to those used to meet the response planning standard, that may be used in responding to the greatest possible discharge.[8] SPAR's briefing claims that, in drafting these regulations, they intended "greatest possible discharge" to be interpreted by its plain language.[9] No information has been presented yet directly tying the level of a "greatest possible discharge" to the level of a federal "worst case discharge," which appears to be a discharge level calculated by a formula and not necessarily one based on the plain meaning of "worst."[10]

d. Coordination with Other Entities

Among other things, under AS 46.04.020(e) SPAR:
shall enter into negotiations for memoranda of understanding or cooperative agreements with the United States Coast Guard, the United States Environmental Protection Agency, and other persons in order to

> (1) facilitate coordinated and effective oil discharge prevention and response in the state . . . and . . .
> (2) provide for cooperative review of oil discharge prevention and contingency plans submitted to the department under AS 46.04.030;

Relatedly, AS 46.04.020(f) states that, "[i]n fulfilling its responsibilities under (e) of this section, the department shall consult with the governing bodies of municipalities and villages."

B. <u>Procedural History</u>

On October 20, 2023, Alyeska applied for renewal of the VMT C-Plan.[11] The City provided comments on that application and requested additional information on December 15, 2023, and October 11, 2024.

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[6] 18 AAC 75.990(112).
[7] 18 AAC 75.448(b).
[8] 18 AAC 75.451(l).
[9] SPAR Opp. to Req. for Adj. Hearing at 5.
[10] Appendix D of 40 C.F.R. Part 112.
[11] ADEC000001.

On November 6, 2024, DEC approved the VMT C-Plan subject to a number of terms and conditions, one of which was a suggestion the City provided in its comments.[12] On November 26, 2024, the City requested an informal review of that decision. On February 24, 2025, the Division responded with a final decision that changed a few of the conditions of approval of the VMT C-Plan,[13] but did not take all of the actions the City requested. On March 26, 2025, the City then submitted a request for a formal hearing under 18 AAC 15.195 – 15.340 as permitted by 18 AAC 75.460.

The City identified six contested issues. Pursuant to 18 AAC 15.220(a)(2), the City's request for an adjudicatory hearing on three of those issues was conditionally referred to the Office of Administrative Hearings ("OAH") for a recommended decision on whether the request meets the requirements of 18 AAC 15.200, and, if it does, on the scope of any hearing on the request. OAH may also recommend that the matter should be vacated and remanded to the division director for further action. Simultaneously with that appeal request, the City submitted a request for alternative dispute resolution under 18 AAC 15.205, and request for a stay under 18 AAC 15.210.[14] The request for a stay has not been referred to OAH.

Combined, the City's required concise statement of the three contested issues referred to this office take up more than four pages of their voluminous request.[15] While somewhat sympathetic to the City's objection to SPAR's attempt to clarify the issues for hearing, SPAR is not wrong that, particularly in regard to contested Issue 5, the issues presented by the City can be somewhat sprawling. As 18 AAC 15.220(a)(2) permits OAH to make a decision on the scope of a hearing OAH has attempted to encapsulate the City's issues for analysis. "Contested issue No. 5" has been split into Issues 5a, 5b, 5c, and 5d for the purpose of identifying appropriate issues for a hearing. The issues referred to OAH for a recommended ruling are understood to be as follows:

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[12] *Id.*
[13] ADEC000049.
[14] City's Req. for Adj. Hearing, Mar. 26, 2025, 102 – 103.
[15] A party may have good cause to believe that more space than provided on the required forms is necessary to explain their dispute and capture all the necessary detail. However, when it comes to providing the required the concise statement of the issue itself, the City is encouraged in future filings to attempt to provide a thesis statement encapsulating each issue. If it cannot be compressed in such a manner it may mean that it is an amalgam more than one issue, and a requester is always welcome to raise those separately.

3. Was SPAR's approval of the VMT C-Plan flawed because the C-Plan lacks a PRAC certificate?

4. Is the VMT gauging system a "sensitive gauging system" and does that system provide a basis for SPAR to grant a credit reducing the Response Planning Standard Volume in Scenario 5?

5a. Did the VMT C-Plan fail to include an adequate list of resources that could be used in responding to the greatest possible discharge?

5b. In approving the VMT C-Plan did SPAR fail to comply with AS 46.04.020?

5c. Was SPAR required to examine the C-Plan's compliance with 40 C.F.R. 112.20, and other requirements imposed and governed by agencies other than the Division?

5d. In approving the VMT C-Plan did SPAR fail to comply with the TAPS Grant and Lease or cooperative agreements with the federal government?

III. Discussion

For a hearing request under 18 AAC 15 to be appropriate, the request must comply with the requirements governing such requests set out in 18 AAC 15.200. The Division and Alyeska identified four ways in which they believe the request failed to comply with those requirements. They argue that:

1. the City lacks standing;
2. there is no right to a hearing under 18 AAC 15.200 on some of these issues;
3. some of the issues were not raised previously as required; and
4. the requesters failed to identify disputed issues of material fact and law.

These alleged issues will each be addressed in turn.

A. Standing

Under 18 AAC 15.200(d), a requester must show in their request:

(1) that the requester or, if the requester is an organization, the representative members of the organization, are directly and adversely affected by the contested issues in the department's decision so as to justify relief;
(2) the nature of the interest asserted by the requester;

(3) whether that interest is one that the applicable statutes and regulations were intended to protect; and
(4) the extent to which the contested issues in the department's decision directly and substantively impairs that interest.

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."[16] As recognized in a prior administrative decision, courts "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."[17]

For all the issues here the City provides largely similar statements of standing. The City describes its interests in the environment, in the protection offered by a fully compliant C-Plan, and its interest in not being unreasonably exposed to the risk of oil spills. They argue that any failure by SPAR to ensure a compliant C-Plan adversely impacts the City and its citizens.

SPAR does not challenge the City's standing, however Alyeska does, arguing that the "city relies on cut and paste statements of standing that are too general, too speculative, and wholly disconnected from the issues the City disputes."[18] Alyeska concedes that the City has a general interest in the C-Plan, environment, and economy, but contends that the City failed to demonstrate how each of the contested issues directly impacts protected specific interests.

Alyeska challenges the City's standing based on claims that there will be no direct adverse impacts to the City from the lack of PRAC certificate, the supposed insufficiency of a greatest possible discharge level, and the lack of harm caused by improving VMT leak detection. However, these claims often rely on Alyeska's assumption that their interpretation of the facts and law is the only possible interpretation, or they undervalue the interest of parties protected by a C-Plan in ensuring C-Plan compliance.[19] Alyeska also makes arguments that focus on what they claim are the positive impacts of changes in the C-Plan—such as contending that their current

[16] *Copeland v. Ballard*, 210 P.3d 1197, 1203 (Alaska 2009).
[17] Ruling on Req. for Adj. Hearing, *Prince William Sound Regional Citizen's Advisory Council v. DEC, Spill Prevention and Response,* OAH 22-0111-DEC, at 6.
[18] Alyeska's Opp. To Req. for Adj. Hearing at 8.
[19] *See, e.g., id.* at 10, 14 – 15 (arguing that the City's interpretation of the requirements of PRAC certificates and the implications of section 6 are incorrect and that is why the City lacks standing.)

monitoring system is better than the previous one[20]—but no argument has been presented that the default here is the old C-Plan instead of nonoperation or a better plan.

There is little question here that the City of Valdez would be significantly impacted by a serious oil spill from VMT—after all VMT is within the City limits and the City's economy and property could both be seriously impacted by significant incidents. SPAR and the legislature have determined that statutory and regulatory C-Plan requirements are necessary to protect the public and the environment. Any weakness in the C-Plan that undermines those requirements or might lessen SPAR's ability to ensure a comprehensive clean up represents an increased risk of adverse consequences on the City and its citizens. That increased risk is a direct and adverse impact, and it is present throughout most of the City's contested issues.

However, Issue 5d involves the City attempting to enforce the supposed terms of various agreements between the state and federal government. The City is not a party to those agreements, and the City has failed to demonstrate their interests are those that were intended to be protected by those agreements. If federal agencies believe that SPAR has failed to meet its obligations, those agencies can bring suit, but that is not what is happening here today. Accordingly, the City is found to have standing[21] to bring Issues 3 through 5c, but not Issue 5d. Accordingly, while a hearing is granted on the City's contested Issue 5, that hearing is not for the arguments discussed here under Issue 5d and Issue 5d is not addressed in the rest of this analysis.

B. Right to a Hearing

A hearing can be requested regarding a limited array of matters under 18 AAC 15.200.[22] A detailed discussion of the types of matters is unnecessary here, but one of them is the appeal of a C-Plan. Under 18 AAC 75.460(b)(2)(B), a party aggrieved by SPAR's decision to approve a C-Plan may request a hearing under 18 AAC 15.200.

No authority has been identified or is known that permits an appeal under 18 AAC 15.200 of issues of federal compliance outside of SPAR's jurisdiction.

[20] *Id.* at 13.
[21] As the parties may be aware, this is not the first time the VMT C-Plan has been appealed to this office by the City and the City has also previously been found to have standing as well. *See, e.g.,* Ruling on Request for Adjudicatory Hearing, *Prince William Sound Regional Citizens Advisory Council, et. Al, v. ADEC Div. of Spill Prevention and Response,* OAH No. 17-1219-DEC, at 12.
[22] *See, e.g.,* 18 AAC 15.195.

In Issue 5c, the City is alleging that the C-Plan approved by SPAR is non-compliant with federal requirements for Facility Response Plans. Facility Response Plans are federally required documents submitted to the EPA regional administrator for approval.[23] Whether or not the VMT C-Plan complies with federal Facility Response Plans requirements is not up to SPAR and is not in one of the categories of matters for which a hearing can be granted under 18 AAC 15.200. Accordingly, while a hearing is granted on the City's contested Issue 5, that hearing is not for the arguments discussed here under Issue 5c and Issue 5c is not addressed in the rest of this analysis.

C. Failure to Raise Issues Below

Under 18 AAC 15.200(a), "a person who requests an adjudicatory hearing . . . must have actively raised the issue to the department through participation in the public review process on the draft decision, if the department offered one, either by submitting written comments or by testifying at a public hearing on the draft decision, unless the challenge is to a provision of a final permit that was not in the draft permit that was the subject of the public notice or comment process."

A "draft decision" here, is defined by 18 AAC 15.920 to include "the permit or approval application, along with supporting materials submitted by the permit applicant or permittee and put out for public comment, that formed the basis for the contested decision." Additionally, "permit" is also defined to include C-Plans.[24]

As discussed previously,[25] the City participated in at least two rounds of comments on this edition of the VMT C-Plan. It appears that the status of certain parts of the C-Plan such as the PRAC certificate were in flux during the public comment period, with the City alleging that the PRAC was to be part of the C-Plan in the original renewal application and was later removed.[26]

Two allegations were made that the City failed to raise issues below, one by each of the Respondents on separate issues. Alyeska alleges that the City failed to raise the issue that the sensitive gauging system fails to meet its definition in its comments.[27] And SPAR contends that

[23] 40 CFR 112.20.
[24] 18 AAC 15.920(13).
[25] Supra at 4.
[26] City's Req. for Hearing at 63.
[27] Alyeska's Opp. To Req. for Adj. Hearing at 19.

the City failed to argue below that SPAR errored in approving the renewed VMT C-Plan because of the lack of Alyeska's PRAC certificate.

a. Sensitive Gauging System

Alyeska very briefly claims the City failed to raise their dispute about the necessity for a Best Available Technology review of the sensitive gauging system below.[28] It is not clear if this was meant to be a full claim that the City had failed to raise the issue below, but SPAR's basis of decision directly addresses the City of Valdez in responding to that claim.[29] Accordingly it appears the issue was properly raised below.

b. PRAC Certificate

Similarly, instead of plainly showing that the City failed to raise the issue about the PRAC certificate below, SPAR argues instead that the City has changed its argument regarding why the PRAC certificate must be included. SPAR alleges it has shifted from focusing on Alyeska serving as its own PRAC to Alyeska serving as a PRAC for the owners of the Trans-Alaska Pipeline System (TAPS).

In response, the City alleges their comment on October 11, 2024, argued that the PRAC certificate was required to be included by, among other things, the requirements of 18 AAC 75.451.[30]

The full record is not yet available; however, a review of the City's comments at pages 46 to 47 of attachment G to their hearing request demonstrate the City did claim that deletion of the PRAC certificate would make the C-Plan non-compliant with 18 AAC 75.451. While SPAR may be correct that some of the related argumentation regarding corporate and ownership structures has developed since then, that does not invalidate the fact that the primary legal argument—that the removal of the PRAC made the C-Plan noncompliant—was raised.

D. <u>Disputed issues of Material Fact and Law</u>

Under 18 AAC 15.200(c)(4)(C), a request for a hearing is required to contain supporting information including, among other things, "a clear and concise statement of the contested issues proposed for hearing, identifying for each contested issue . . . the disputed issues of material fact

[28] *Id.*
[29] ADEC000032.
[30] City's Reply to Alyeska's and SPAR's Opp. to Req. for Adj. Hearing at 5 – 6.

and law proposed for review." "A material fact is one upon which resolution of an issue turns."[31] This means that if it's irrelevant to the outcome which side's interpretation of the fact or law is correct the fact is not material.[32]

This is not a high burden and the question of whether or not material issues have been identified does not turn on whether, ultimately, those arguments will be successful. "[T]he question for consideration here is not whether the . . . requesters are entitled to prevail at hearing, but whether they have articulated a basis for a hearing—specifically, by setting forth what issues should be adjudicated and the basis for their allegation that the Division erred as to those issues."[33]

SPAR argues that City failed to identify a disputed issue of material fact or law for contested Issues 3 and 4.[34] Alyeska takes the position that the City has failed to identify an issue of material fact or law for any of the contested issues.[35] In taking these positions, the Respondents spend significant time attempting to show the City's arguments on these issues will be unsuccessful, but the question here is merely whether the standards for sufficiency of pleading have been met. In advancing arguments that dispute the Requester's interpretation of the facts and law, the Respondents demonstrate that there are matters in dispute that should be appropriately resolved through a hearing. A party's belief that it has ironclad arguments in its favor does not mean there is not a dispute.[36] An assessment of the relative strength of the parties' arguments is the precise point of that adjudicatory hearing.

To some extent, the parties may be conflating the standard here for raising material issues with the summary judgement standard which examines whether there is any "genuine" issue of material fact.[37] However, while the standard for granting an administrative hearing under 18 AAC 15 used to require identifying a disputed "genuine" issue of fact or a "significant" issue of law,[38]

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[31] *Fischer v. Kenai Peninsula Borough Sch. Dist.*, 548 P.3d 1086, 1091 (Alaska 2024) (citing *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 519 (Alaska 2014)).
[32] *See, e.g., Sonneman v. State*, 969 P.2d 632, 635 (Alaska 1998) ("A factual issue will not be considered material if, even assuming the factual situation to be as the non-moving party contends, he or she would still not have a factual basis for a claim for relief against the moving party.")
[33] Ruling on Request for Adjudicatory Hearing, *Prince William Sound Regional Citizens Advisory Council, et. Al, v. ADEC Div. of Spill Prevention and Response,* OAH No. 17-1219-DEC, at 18.
[34] SPAR's Opp. To Req. for Adj. Hearing at 10 – 13.
[35] Alyeska Opp. To Req. for Adj. Hearing at 16 – 21.
[36] *See, e.g., OAH No 17-1218/1219-DEC* Recommended Ruling on Request for Adjudicatory hearing, at 16.
[37] *See, e.g.,* ARCP 56(c); *Scott v. Harris,* 550 U.S. 372, 380, (2007)
[38] 18 AAC 15.220, as amended July 11, 2002.

it was amended in 2017 and removed those stronger requirements.[39] Accordingly, the analysis here does not need to consider whether a dispute is genuine or significant to quite the same degree as the parties might expect in a motion for summary judgement or in a hearing prior to that change. This does not mean facially ridiculous arguments will be humored, but the standard is not high. Moreover, contrary to Respondents' assertions that success on these disputed issues would not change the outcome, these disputed issues involve questions of compliance and process that would—if the City is correct—result in, at the very least, what the City contends to be a more protective C-Plan that decreases the risk to the City and its environment and economy.

c. Issue 3: Was SPAR's approval of the VMT C-Plan flawed because the C-Plan lacks a PRAC certificate?

In its briefing the City identifies numerous disputed issues it believes are material to determining if APSC's PRAC certificate is required to be part of the VMT C-Plan. These include purely legal arguments, such as that the VMT C-Plan fails to meet the requirements of AS 46 and 18 AAC 75 because of its failure to include the PRAC certificate and information therein, as well as various factual assertions supporting that claim regarding past SPAR practices, VMT's ownership structure, and more.[40] These are disputed material issues. For example, if that statement of law is correct, the VMT C-Plan will be required to change—meaning it is material—and it is plainly a legal conclusion that the Division and Alyeska disagree with—making it disputed. It thus satisfies the requirement that the City identify a material issue of disputed law or fact for contested Issue 3. If true, the Division and Alyeska's rebuttal—that the City's legal arguments hinge a flawed interpretation of who the responsible parties are for C-Plans, or that the previously included PRAC certificate has no bearing on the VMT C-Plan—may hold merit, but they do not utterly invalidate the potential reasonability of the claim. This is particularly true given that the City is arguing not just that the PRAC certificate needs to be included, but that without it the C-Plan fails to meet the requirement of demonstrating sufficient resources are available. More importantly, the PRAC certificate was included in the 2019 VMT C-Plan. While it is not yet clear if SPAR required that inclusion or not, there has obviously been a change in practice. If the City is correct and the requirements for the inclusion of the PRAC certificate changed between 2019 and 2024 without any apparent regulatory or statutory change, it is

[39] 18 AAC 15.220, as amended Nov. 5, 2017.
[40] City's Req. for Adj. Hearing at 56.

difficult to summarily dismiss the City's contention that the standards relied on in 2019 should apply the current C-Plan.

d. Issue 4: Is the VMT gauging system a "sensitive gauging system" and does that system provide a basis for SPAR to grant a credit reducing the Response Planning Standard Volume in Scenario 5?

As above, in its briefing the City identifies various factual and legal disputes that are part of its contested Issue 4. These issues surround what the City believes is the improper award of a two percent reduction in the VMT C-Plan's Response Planning Standard (RPS). These issues include whether the existing system is a sensitive gauging system fulfilling the requirements of 18 AAC 75.065(h)(1)(A), and whether the lack of basis for SPAR's determination to grant a 2% reduction for the identified system is problematic.

The City alleges there is no technical or regulatory justification or explanation given for the 2% credit in the C-Plan or SPAR's Basis of Decision. Moreover, the City argues that the system fails to meet the requirements for that credit or for a sensitive gauging system as no evidence is provided that the VMT's system meets the definition of sensitive gauging system which allegedly requires a best available technology determination.

In response, SPAR asserts that the sensitive gauging system is not subject to a best available technology determination as part of the VMT C-Plan renewal. They argue that—even though the definition of sensitive gauging system at 18 AAC 75.990(112) requires it to be the best available technology at some point—there is no plain requirement for that analysis to be duplicated or confirmed during a C-Plan renewal or 18 AAC 75.065(h)(1) analysis. Alyeska adds to this by asserting that no leak detection methodology was removed from the prior VMT C-Plan and this is merely an upgrade—presumably trying to suggest that if the sensitive gauging system standard and 18 AAC 75.065(h)(1) was met by the prior system there can be no dispute whether it was met by an improved system.

But again, the standard is not necessarily merely what has changed since the last plan. Under 18 AAC 75.450(a), the VMT C-Plan "must demonstrate that the applicant meets all applicable requirements" of 18 AAC 75.065(h)(1)(A). That regulation requires an "owner or operator of an installation placed in service before May 14, 1992 to . . . equip each field-constructed aboveground oil storage tank" with one of various options, including a leak detection system such as a "sensitive gauging system." A sensitive gauging system is a defined term that "means the best demonstrated available gauging technology at the time of tank construction or

substantial reconstruction, or initial gauging system installation."[41] Accordingly, an argument can be made that each C-Plan needs to demonstrate that standard is met.

SPAR's argument encounters similar difficulties. A sensitive gauging system is one way in which compliance with 18 AAC 75.065(h)(1)(A) can be achieved. As stated in the VMT C-Plan, "[Alyeska] complies with 18 AAC 75.065(h)(1)(A) by using a sensitive gauging system."[42] If the C-Plan is required to demonstrate compliance on this point, whether the system meets the definition of "sensitive gauging system" is a very important question. As the parties all acknowledge, "sensitive gauging system" has a specific definition that includes a requirement that it use what was—at least at some point—"the best demonstrated available gauging technology."[43] If the City is correct, for Alyeska to cite their sensitive gauging system as the reason they meet requirements, they must actually "demonstrate," under 18 AAC 75.450(a), that the system meets that definition. This appears to be a material issue and, without deciding that such a showing is required in each C-Plan, such a demonstration does need to have occurred at some point.

The administrative record is necessarily limited at this phase of the proceeding, so it is unsurprising that there are no readily identifiable materials definitively showing when the current gauging system was installed or modified. However, a viable argument exists that such information needs to have been cited or included in SPAR's basis for decision, and it was not. While it would be possible for the Commissioner to go forward with a hearing on this issue, it would be more efficient to remand this issue to provide SPAR with an opportunity to develop the record on this point. This would allow the parties to present arguments regarding this issue based on known facts and may eliminate the need for future discovery or an evidentiary hearing.

Given that three related issues on the VMT C-Plan have already been remanded to the Division for consideration, contested Issue 4 is also being remanded to SPAR. This is not a decision that, as part of this C-Plan review, SPAR was necessarily required to complete a best available technology analysis for what Alyeska asserts is a sensitive gauging system. However, a viable argument exists that SPAR was required to make a determination that the system meets that definition at some point. Accordingly, SPAR is directed to either identify that analysis and cite it in their basis for decision here, or, if such an analysis is unavailable, conduct an analysis of

[41] 18 AAC 75.990(112).
[42] ADEC 000311.
[43] 18 AAC 75.990(112).

the system's ability to meet that definition. If such a determination has already been made in a prior C-Plan or elsewhere, this remand could be resolved as simply as incorporating that analysis and record into the basis for decision. However, the current lack of any discussion of whether the definition is met is insufficient given the apparent strength of the Requester's arguments and the desire to avoid the need for more complex litigation.

e. Issue 5a: Did the VMT C-Plan fail to include an adequate list of resources that could be used in responding to the greatest possible discharge?

The City next argues that scenario 6 does not comply with the requirements of 18 AAC 75.430(a), 75.448(b), and 75.451(l) because scenario 6 does not reflect the "greatest possible discharge" from the VMT and the VMT C-Plan failed to include an adequate list of resources that may be used in responding to that greatest possible discharge. Additionally, it ties its argument back to Issue 3 and asserts that—without the information found in the PRAC—the C-Plan fails to contain the required complete list of equipment available for the response or evidence of the necessary contractual commitments for Alyeska to use that equipment.

There are numerous disputed issues raised here, such as whether the VMT C-Plan complies with 18 AAC 75.448(b) in identifying the "greatest possible discharge." The City contends that it needs to be the absolute maximum amount of oil at the tank farm. SPAR does not argue that the City failed to raise material issues here, but Alyeska does. Alyeska contends that nothing requires the "greatest" spill to be the entire capacity of the tank farm and no evidence has shown that there could even be such a spill. This is clearly a legal and factual dispute over what the greatest possible discharge is defined as and whether a spill of the entire volume of the tanks is a possibility. Alyeska contends as an alternative argument that even if SPAR regulations require the equivalent of a federal worst-case discharge, that level is already met. That may also be true, but no information has been provided to demonstrate that the state's "greatest possible" discharge requirement is necessarily equivalent to the federal "worst case" discharge and, thus, there is insufficient evidence to demonstrate the claim is immaterial.

Other related legal issues are raised as well, such as whether the VMT C-Plan fulfills the requirements of 18 AAC 75.451(l) and 18 AAC 75.449(a)(10). These are not directly addressed by the Respondents' briefing and also seem to be material questions.

f. Issue 5b: In approving the VMT C-Plan Did SPAR fail to comply with AS 46.04.020?

Finally, the City alleges the C-Plan is impermissible because AS 46.04.020(e) requires SPAR to enter into agreements with federal agencies to provide for cooperative review and coordinate oil discharge prevention and response. They also allege that SPAR is required to consult with the City under AS 46.04.020(f), but that never happened.

Neither SPAR nor Alyeska address this argument in their briefs, but the City is apparently arguing here that 46.04.020(e) creates an ongoing obligation for SPAR to continually enter negotiations to provide for cooperative review of each C-Plan. Additionally, they are claiming that, because of that alleged ongoing obligation, SPAR is required to consult cities such as the City of Valdez during the cooperative review of each C-Plan. That is a reading of the statute that the Respondents made no attempt to rebut but seems to lie counter to SPAR's actions if the City's allegations are correct. Therefore, it is a material dispute and a hearing is appropriate.

IV. Future Proceedings

A. Type of Hearing

In their briefs the parties also dispute the appropriate form of the hearing. The City alleges that any failure to provide full discovery and an evidentiary hearing would be an abuse of discretion by the Office of Administrative Hearings (OAH),[44] while SPAR requests a hearing on the existing record and written briefs.[45]

Under 18 AAC 15.220(b), the Office of Administrative Hearings is to issue a recommended decision determining whether a hearing request meets hearing requirements and whether an adjudicatory hearing or hearing on the briefs should be held. Neither of these options compels a full evidentiary hearing with discovery. Instead, the scope of any hearing, and any related discovery, is a matter left to the Commissioner's discretion through a determination of good cause.

The case cited by the City to suggest denying discovery would be an abuse of discretion was an appeal of a Department of Revenue hearing decision, not an environmental permitting hearing such as this under 18 AAC 15. Moreover, that case held the denial of discovery to be an abuse of discretion in a highly specific circumstance and did not identify every failure to grant

[44] City's Reply to Alyeska's and SPAR's Opp. to Req. for Adj. Hearing at 33, 36.
[45] SPAR's Resp. and Opp. to Req. for Adj. Hearing at 14 – 15.

discovery was an abuse of discretion.[46] As explained by AS 46.03.880 and AS 46.04.890, adjudicatory hearing procedures reviewing permit decisions such as C-Plan approvals are not subject to quite the same standards the City may be familiar with in other types of matters. Accordingly, and as the City may already expect from the discussion of the remand of Issue 4, evidentiary hearings and discovery are rarer in the context of this type of permit appeal. Indeed, outside of specific demonstrations of good cause, 18 AAC 15.245 explicitly forbids a party from submitting many types of information that was not timely submitted to a Division prior to its decision.

The City has plainly been a substantial participant in the public review process for this decision and has repeatedly been involved with SPAR's successive review of VMT C-Plans over the decades. It makes no allegations that it has factual information relevant to SPAR's decision that it failed to have an opportunity to provide to SPAR during the decision-making process. Instead, to support its argument that it should be permitted to present evidence it baldly alleges that SPAR's record is incomplete because it failed to consider certain information. This is not a sufficient demonstration that a full evidentiary hearing is necessary.

Moreover, while the City attempts to support its request by alleging that SPAR has failed to compile a complete and accurate record, this argument is premature. Under 18 AAC 15.237, the complete record is not yet required. Now that a hearing has been granted SPAR is required to compile a complete record on a set timeline.[47] If, upon reviewing that agency record the City believes it can demonstrate good cause to supplement that record, it can move to do so under 18 AAC 15.237, which points to 2 AAC 64.310. Similarly, if the City desires to submit a factual contention, expert opinion, issue of fact, or question of law that was not timely submitted to SPAR before their decision, it may move to do so by following the procedures at 18 AAC 15.245.

While it is apparent from the City's briefing that there is some kind of dispute regarding a public records request and its importance in completing the record here, the City's dispute with ADEC related to its public records request is not an issue that has been referred for a recommended decision on a hearing, and OAH is unaware of any denied public record request. Relatedly, OAH is unaware of any ruling by the Commissioner that this hearing may be amended

[46] *See* Decision on Appeal, *City of Valdez v. State Dep't of Revenue*, 3VA-00-22CI/3VA-10-84CI/3AN-11-7874CI (Nov. 18, 2013), at 45 – 46.
[47] 18 AAC 15.237.

to include additional evidence and treats any such assertions with significant skepticism until they are conclusively demonstrated given the above citations.

Accordingly, at this time the parties are granted a hearing on the briefs. The subject of the appropriateness of oral arguments can be addressed at the next conference after this decision is adopted. However, once SPAR has submitted the full record the parties will have thirty days to demonstrate the necessity of supplementation of that record or raise new issues, and further analysis of the appropriateness of a full evidentiary hearing and discovery may occur at that point.

B. Motions for Reconsideration

In acknowledgement of the potential complications caused by both the encapsulation of the requester's complex "concise statements" and a remand of a finding undergirding a C-Plan decision, the parties are given the opportunity to move for reconsideration. If the parties want to request reconsideration of this decision after its adoption, they have seven calendar days from the date of adoption to submit a motion of no more than five pages, and the opposing parties would have seven calendar days to respond in the same manner. Any reiteration of the arguments already contained in the briefing is disfavored, but, for example, if any of the parties believe the information to avoid a remand of Issue 4 is already available or that the encapsulation of the City's issues failed to capture important arguments the parties are welcome to inform the tribunal of that information.

C. Alternative Dispute Resolution

Alyeska has requested alternative dispute resolution and has suggested a discussion of next steps would be appropriate at a conference after the release of this decision. If this recommended decision is adopted, the ALJ is directed to set a conference for the parties soon afterwards to discuss the potential for mediation or other resolution, as well as scheduling and various other subjects. The parties are encouraged to discuss prior to that conference the potential for alternative dispute resolution here, as well as any foreseen motion practice, potential briefing timelines, and other areas of potential administrative cooperation.

V. Conclusion

The City's request for a hearing on Issues 3, 5a, and 5b is granted, but this hearing will be conducted through written briefs based on the agency record—subject to the City's right to

demonstrate good cause as detailed above. Issue 4 is being remanded to SPAR to identify or develop a record analyzing whether Alyeska's leak detection system meets the definition of a "sensitive gauging system." The ALJ is directed to set a scheduling conference.

RECOMMENDED: May 15, 2025

Garrison A. Todd
Administrative Law Judge

Adoption

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

DATED this 16 day of May, 20 25.

DocuSigned by:

By: _____
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Signature

Christina Carpenter
Name

Acting Commissioner

Non-Adoption Options

B. The undersigned, in accordance with 18 AAC 15.220(c)(2), DENIES the request(s) for adjudicatory hearing as not satisfying the requirements of 18 AAC 15.200, as follows:

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.

DATED this _____ day of _____, 20___.

By: _____
Signature

_____
Name
Commissioner_____
Title

C. The undersigned, in accordance with 18 AAC 15.220(c)(3), VACATES the underlying decision and remands this matter to the Division for further action, as follows:

DATED this _____ day of _____, 20___.

By: _____
Signature

_____
Name
Commissioner_____
Title