

OFFICE OF THE COMMISSIONER OF THE ALASKA DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

Valdez Fisheries Development Association, Inc.)
)
Requester,)
v.)
)
ALASKA DEPARTMENT OF)
CONSERVATION, DIVISION OF SPILL)
PREVENTION & RESPONSE,)
)
Respondent.)
_____)

**DECISION REGARDING VALDEZ FISHERIES DEVELOPMENT ASSOCIATION
NOVEMBER 21, 2017 REQUEST FOR STAY**

I. Background

On November 21, 2017 the Alaska Department of Environmental Conservation (DEC or department) received a request for adjudicatory hearing and request for stay (Request) from the Valdez Fisheries Development Association, Inc. (VFDA or Requester) on the department’s approval of the Valdez Marine Terminal Oil Discharge Prevention and Contingency Plan. The requests were submitted through VFDA’s representative, Bruce Weyrauch, Attorney at Law. On November 30, 2017, the department referred the adjudicatory hearing request to the Office of Administrative Hearings and the case was assigned to Administrative Law Judge (ALJ) Cheryl Mandala. On December 18, 2017, ALJ Mandala granted an extension of time for DEC’s Division of Spill Prevention and Response (SPAR) to file its response to the request for adjudicatory hearing until January 12, 2018. As noted in the revised public notice issued on December 19, 2017, the decision regarding the request for stay remains with the Office of the Commissioner. Persons wishing to file a response to the request for stay were directed to serve

responses on the Office of the Commissioner by December 20, 2017. No responses were received by the deadline.

II. Regulations

The Administrative Procedures regulations at 18 AAC 15.210 provides a detailed process for requesting a stay and how a decision will be made on the request. In reviewing a request for a stay, the Commissioner will consider

(1) the relative harm to the person requesting the stay, the permit applicant, and public health, safety and the environment, if a stay were granted or denied.

(2) the resources that would be committed during the pendency of proceeding under this chapter if a stay were granted or denied; and

(3) the likelihood that the person requesting the stay will prevail in the proceedings on the merits.

Decision

I have considered VFDA's stay request applying these three factors. Although the information available to me in making a decision is limited, for the following reasons I find that the balance of interests lean in favor of granting a stay.

Looking at the first factor, relative harm, the risk of a spill during the pendency of this appeal is low. However, petitioners point out that the risk of harm from spilled oil to the Solomon Gulch Hatchery and Duck Flats, which continue to be designated "sensitive areas" by the department, could be very high, as would the corresponding economic harm to VFDA, if these areas aren't immediately boomed. Although it would be reasonable to assume that spill

responders would expeditiously boom those areas if threatened by a spill, it is also reasonable to assume that at the time the 1997 Matrix was developed and included in the Valdez Marine Terminal Oil Discharge Prevention and Contingency Plan, the department believed the risk of harm to the Hatchery and Flats from a spill warranted including the 1997 Matrix in the plan. No argument or facts against Requester's argument that the same risks that existed when the 1997 Matrix was first added to the plan still exist today have been provided. (According to VFDA's Request, at page 10, as recent as 2014 the department amended the Valdez Marine Terminal Plan but "maintained an immediate response to the VFDA Salmon Gulch Hatchery.") Requesters' arguments relating to relative harm, on their face, are plausible and for purposes of deciding this motion, I will accept them.

Going to the second factor, it appears that the resources that would be committed during the pendency of a stay would be minimal. The 1997 Matrix has been in effect for 20 years, and Petitioners are requesting that the status quo be maintained during the pendency of this appeal. It does not appear that there would be any additional commitment of resources if a limited and temporary stay is granted.

Finally, at this stage of the proceedings, there is not enough in the record to form an opinion on whether VFDA is likely to prevail on the merits. Therefore, this factor does not weigh either for or against a stay.

Based on this reasoning, the 2017 modifications to the provisions in the Valdez Marine Terminal Contingency Plan submitted by Alyeska regarding the Solomon Gulch Hatchery and the Duck Flats in the Sensitive Area Protection Mobilization Matrix, Volume 3 Table 9.0-1, are stayed. The previous version of the Matrix that was included in the 1997 Plan will remain in force during the pendency of these proceedings. If at any time during the proceeding a party

believes circumstances have changed such that applying these factors would lead to a significantly different result they may apply to me for a modification or lifting of the stay.



Larry Hartig, Commissioner

DATED: December 29, 2017

cc: Kristin Ryan, DEC
Graham Wood, DEC
Sarah Moore, DEC
Cameron Jimmo, LAW
Tom Stokes, APSC