

BEFORE THE COMMISSIONER OF THE  
ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the matter of: )  
Request for Expedited Review of )  
Vitus Marine LLC's Oil Discharge )  
Prevention and Contingency Plan Amendment )  
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**DECISION OF COMMISSIONER**

The only issue before me is whether to modify the standard review process in 18 AAC 75.455 for the review of Vitus Marine LLC's proposed amendment to their existing Oil Discharge Prevention and Contingency Plan. Based on the facts and analysis below, I have decided to modify the review process pursuant to 18 AAC 75.457 by shortening the public comment period to one week (ending January 3, 2012 at 5:00 p.m. AST).

**Background:**

A scheduled fall delivery of fuel by Delta Western, Inc. to Bonanza Fuel, Inc. ("Bonanza Fuel") in the community of Nome was missed. The delivery was planned to be by a fuel barge operating in open water pursuant to an oil discharge prevention and contingency plan ("C-plan") approved by this department

(“DEC”).<sup>1</sup> Conditions made delivery more difficult going into late fall. A severe storm on November 8-11, 2011 followed soon by sea and shore ice conditions prevented further use of fuel barges in the area until next open water season.<sup>2</sup>

Rather than wait until the next season, Bonanza Fuel initiated efforts for a winter delivery of fuel by contracting with Vitus Marine LLC (“Vitus Marine”) to secure a spot charter for delivery of diesel and gasoline in the late December – early January timeframe. Vitus Marine contracted for the *Renda*, a Russian ice-strengthened tanker, to make a delivery through ice of approximately 1,000,000 gallons of diesel fuel and 400,000 gallons of gasoline. The U.S. Coast Guard was asked to make the cutter *Healy* available to break ice for the *Renda*. The *Healy* is the only operating Coast Guard ice breaker. The Coast Guard has advised they can only keep the *Healy* in the Nome area until about January 14-15, 2012 when it will need to depart for a port in Washington State for scheduled work.<sup>3</sup>

Current reports from NOAA show approximately 305 to 411 miles of ice, depending on the route chosen, must be broken to reach Nome with the ice being up to three feet thick with potentially thicker ridges. With forecast temperatures

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<sup>1</sup> Bonanza Fuel owns and operates a tank farm in Nome for storage of gas and diesel fuel. It contracts with other companies, such as Delta Western, Inc. and Vitus Marine LLC, to bring fuel by vessel to Nome. As explained later in this Decision, the marine shippers are required to have a C-plan approved by DEC for the fuel deliveries to Bonanza Fuel.

<sup>2</sup> The Mayor and the City Council of Nome also declared the storms to be a ‘disaster emergency’ under AS 26.23.140. On December 5, 2011, Governor Parnell declared a “disaster emergency” for the series of storms that had impacted Western Alaska between November 7 and November 13, 2011, including the Nome area. The declarations do not reference the pending fuel shortage.

<sup>3</sup> In addition to providing ice breaking capability to the *Renda*, the *Healy* provides important back-up capacity in the event of an emergency in ice conditions. The *Healy* is considered by DEC to be a critical element of Vitus Marine’s proposed amended C-plan.

below normal, NOAA anticipates the ice could thicken over the next several weeks.

In summary, if the *Renda* cannot make the contemplated fuel delivery to Nome by approximately January 14, 2012, it appears likely the *Healy* will leave the area and ice conditions will preclude marine delivery of fuel to Nome until next open water season. Based on past experience, fuel barges would start arriving in the area again in the June time period.

Tankers transporting fuels in state waters must first have a C-plan approved by the department. *See* AS 46.04.030(c). Vitus Marine already has an approved C-plan, but the tanker *Renda* is not covered under it. An amendment to add a vessel to an existing C-plan is to be reviewed under 18 AAC 75.455 if the department determines that the proposed amendment “will diminish the plan holder’s ability to respond to an oil discharge.” *See* 18 AAC 75.415(f). The existing C-plan does not contemplate transfer of fuel, or responding to a potential spill, in ice conditions. Again, based on current ice conditions and forecasts, it appears there will be shore-fast ice in the Nome harbor when the *Renda* would arrive in Nome around January 9, 2012. This will likely require the fuel to be transferred from the tanker to the fuel header on shore via a hose, the process the *Renda* uses in Russia for winter fuel deliveries there. Based on these assumptions the department has determined Vitus Marine’s proposed amendment must be reviewed under 18 AAC 75.455.

Vitus Marine, in consultation with U.S. Coast Guard, DEC and others, developed a schedule and action plan for using the *Renda*, assisted by the *Healy*, to make the winter fuel delivery. By letter dated December 29, 2011, Vitus Marine submitted for DEC's review a proposed amendment to their existing C-plan to allow the *Renda* to enter state waters and make the fuel delivery. That request for amendment is now under review by DEC. Vitus Marine, by letter dated December 27, 2011, has asked me to expedite the department's review of the proposed amendment to assure that the amendment, assuming it meets DEC's approval, will be in place when the *Renda* reaches state waters.

This decision documents my analysis and findings on that request to shorten the review period. It does not address the proposed amendment itself. No decision on whether to approve the proposed amendment will be made until after the abbreviated public comment period described in this decision.

**Regulatory Requirements:**

The standard schedule for departmental review of amendments to C-plans includes a thirty-day public comment period. *See* 18 AAC 75.455(b). Another regulation, 18 AAC 75.457, gives me the authority to modify the standard review process in certain circumstances. Those circumstances include emergencies "as described in AS 26.23 or AS 46.04.080 or other applicable law", as well as situations where I find that an expedited plan review "is necessary for the

preservation of the public peace, health, safety, or general welfare.” I will discuss in the analysis section of this decision how either or both of these prongs of the regulation apply to the proposed winter fuel delivery to Nome. Any decision to invoke the regulation and expedite plan review must be made on “clear and convincing evidence.”

**Analysis:**

**1. Fuel Shortages.**

Department staff, in coordination with the Department of Commerce, Community and Economic Development (DCCED), have researched the extent to which there is a fuel shortage in Nome due to the missed fall delivery. That research reveals there are not sufficient supplies of home heating oil, gasoline, or ultra-low sulfur diesel fuel to get the community through the winter and spring. We have discussed the current situation with the two major fuel suppliers in Nome, Crowley Marine Services and Bonanza Fuel. Crowley primarily supplies the fuel needs at the airport. Bonanza Fuel is the primary fuel provider for the city of Nome and the Alaska Air Guard. They are also the primary supplier of fuel for federal, state and City of Nome governmental buildings and operations, the local Indian Health Service hospital, home heating oil, and fuel for private and public vehicles.

Without some form of winter fuel delivery, Bonanza Fuel anticipates running out of all three kinds of fuel before they can reasonably expect to be re-supplied next summer. That summer fuel delivery, like the fall, requires open water conditions, which arrive anytime from late-May until mid-July. Based on current fuel inventories, and projected demand assuming average weather conditions, Bonanza Fuel expects to run out of diesel fuel in February or March, gasoline in March or April, and home heating oil in April. These projections for both diesel and gasoline include the reserves that Crowley has already agreed to make available to Bonanza Fuel, in the volume of 150,000 gallons for each of those two fuel types. In fact, Bonanza Fuel's own supply of diesel is essentially gone, so it will begin drawing on the Crowley reserve in January 2012.

These projections do not take into account possible fuel conservation measures that could be implemented by the supplier Bonanza Fuel or by the community. One of Bonanza Fuel's major customers for diesel fuel is the Alaska Gold Company, operator of the currently inactive Rock Creek Mine. The company uses diesel to support its on-going reclamation and water management activities at the mine. If there were no way to replenish Bonanza Fuel's diesel inventory, it would likely have to stop supplying the company's needs in order to keep supplying the community's needs. The department has not attempted to identify other fuel conservation method that the community itself could implement. Given the high cost of fuel in Nome, it seems unlikely that there are

many examples of wasteful or inefficient use of fuel that might offer the potential for substantial voluntary reductions in usage.

## **2. Alternative Delivery Methods.**

Given Nome's location off the road system, the only alternative to marine delivery of fuel is delivery by aircraft. Staff have researched the feasibility of this alternative to the proposed delivery by the *Renda*. It appears to be possible to meet the anticipated fuel shortages at Nome by air delivery, but there are significant costs with this option.

According to DCCED's calculations, air delivery would add at least \$5.65, and possibly as much as \$7, per gallon to the cost of the fuel to consumers in Nome. This would essentially double the price for home heating oil in Nome, which currently sells at \$6 per gallon. By contrast, fuel delivery by the *Renda* is projected to add only \$2 per gallon to the current fuel prices.

The fuel suppliers in Nome estimate that approximately 500,000 to 700,000 gallons of fuel would need to be flown in. The aircraft potentially available to make fuel deliveries at Nome are Douglas DC-6's operated by Everts Air. That plane can hold up to 4,400 gallons of diesel, or 5,000 gallons of gasoline, per trip. Thus, to meet Nome's projected fuel needs, it would take around 100 flights. Another air carrier, Lynden Air Cargo, has a slightly larger plane, a C-130 Hercules, which can haul up to 7,000 gallons of fuel, per trip. Actual availability

of these planes to deliver the amount of fuel needed by Nome within the required time frame has not been fully investigated by my staff. But the logistics of deliveries to Nome, and the limited number of aircraft, would presumably make it challenging, as well as expensive, to accomplish the task.

### **3. Consequences if Expedited Review is Denied.**

If I deny Vitus Marine's request for expedited review, several consequences will follow. First and foremost, as the facts above show that delaying the *Renda's* fuel delivery to allow for a thirty-day public comment period will almost certainly mean that the delivery cannot take place at all. The public notice initiating the start of the public comment period was posted on December 29, 2011. If we allow for the full 30-day review period, it would end on January 28, 2012. The department would then need time to review the comments received. This puts the earliest time the department could make a decision on the proposed amendment well after the date the *Healy* needs to leave Alaska. The ice will likely be too thick for the *Renda* to safely make the trip to Nome on its own.

If the winter fuel delivery does not take place, then the fuel suppliers for Nome will have no choice but to arrange for delivery of fuel by air. According to the local fuel suppliers, the Nome populace is very attuned to their dependence on seasonal fuel deliveries, and perceived or real disruptions to the expected deliveries can directly impact demand. Representatives for Bonanza Fuel have

already expressed the concern that their customers may well start to hoard fuel (i.e., buy more than they need now in anticipation of spring shortages) if for some reason the *Renda* is unable to deliver. This reaction could exacerbate the anticipated shortages and disrupt the supply to Bonanza Fuel's other customers, such as the public facilities and vehicle fleets.

If the community of Nome were for some reason unable to replenish their fuel supplies by air transport, and were to run out of any of the three types of fuel next spring, that would directly impact the well-being of the residents as well as the public services provided by the local, state and federal governments. If the shortage were to be of heating oil, then that would clearly jeopardize the residents' ability to heat their homes and survive late winter and spring conditions. It could also result in damage to infrastructure as homes, other buildings, and utilities froze up.

If the shortage were to be of gasoline and/or diesel, then a few examples of the many governmental services that could be impacted are: snow and snow drift removal on public roads and at the airport from frequent winter storms, city and state police services, ambulances, DOT equipment, and Alaska National Guard equipment. In short, predictable and serious threats to the community's safety and general welfare would follow from an acute shortage of any of the three fuel types, and if shortages of all three were to occur during the late winter and spring of 2012, the consequences to the community and its residents could be severe.

## **Findings and Conclusions:**

Based on the circumstances discussed above, I find that the current situation at Nome qualifies for expedited processing of a C-plan amendment under 18 AAC 75.457.

First, I find that expedited review is necessary to make possible the winter delivery of fuel and address an “emergency” as described in AS 26.23. *See* 18 AAC 75.457.

Winter fuel shortages in rural Alaska communities are not uncommon. In the past, there have been instances where the Governor has made a disaster declaration and the state has provided financial assistance to support flying fuel in to address an immediate need in the community. Indeed, the state has in recent years been proactive in trying to avoid fuel shortages arising in the winter. Still, shortages can occur. There are mechanisms in place to address them, including a state “Fuel Emergency Fund”. *See* AS 26.23.400.

The current situation in Nome appears somewhat unique in at least two respects. The quantity of the fuel shortage is relatively large making flying the fuel in a less attractive option because of the costs and potential risks described above. Also, there is still a possibility of marine transfer of fuel over the next several weeks.

Regardless, the particular question before me is whether expedited review of the proposed amendment is “due to an emergency as described in AS 26.23 or

AS 46.04.080 or other applicable law.” See 18 AAC 75.457. The term “emergency” is not defined in either AS 26.23 or AS 46. There is a definition of “disaster emergency” in AS 26.23.900(3):

(3) “disaster emergency” means the condition declared by proclamation of the governor...to designate the imminence or occurrence of a disaster.

The term “disaster” is defined in AS 26.23.900(2):

(2) “disaster” means the occurrence or imminent threat of ...shortage of...fuel resulting from (A) an incident such as storm...[or] prolonged extreme cold...

Although no one is without fuel in Nome at this time due to the missed fall delivery, it is clear from the facts above that they will be without sufficient fuel in the spring unless additional fuel is brought into the community. The definition of “disaster” in AS 26.23.900(2) includes “imminent” threats of fuel shortages. What is apparent is that if action is not taken to timely address the fuel situation in Nome it will likely turn into a present emergency in the spring. In that sense, it could be viewed as “imminent.” The other important timing consideration here, and what again makes the present situation somewhat unique, is the narrow window of time available to act before the most affordable means of addressing the fuel shortage, use of the *Renda* and *Healy*, will be lost. The time period for making that decision and thus having the fuel emergency manifest itself in the spring is certainly “imminent.” One could argue that there is always the option of flying fuel in,

even if it will take months and add up to \$3,500,000 to \$4,900,000 the cost of the fuel, and this can be accomplished before anyone actually runs out of fuel. It may be true that for these reasons the current fuel situation wouldn't warrant a formal state disaster declaration under AS 26.23 but I don't believe that means the situation shouldn't still be considered a present emergency for the more narrow purposes of the decision to expedite under 18 AAC 75.457.

The second ground for my conclusion is that expedited review is necessary to preserve the 'general welfare' of the residents of the community of Nome. The term 'welfare' is not defined in our regulations, but should be understood and applied according to its common meaning. Black's Law Dictionary (7<sup>th</sup> Ed.) defines it as "well-being in any respect; prosperity," and other lay dictionaries are similar. The general well-being and prosperity of the residents of the Nome community will be preserved by expediting the C-plan review process in order to allow the winter delivery that is planned to take place in a very few days. I find the evidence to that effect, as summarized above, to be clear and convincing.

In addition, I find that the normal C-plan review process has been modified only to the extent necessary to accommodate the unique circumstances that we face at Nome. The department has not omitted public review altogether, but rather has truncated the review to fit the window of opportunity created by the fortuitous availability of an ice-breaker and the thickening ice conditions. Departmental staff, as well as Nome community leaders, have made an extra effort to allow for a

meaningful public notice and comment process within the narrow window of time available. This includes arranging for public service announcements being aired on both television and radio in the Nome area and a press release. Reducing the comment period itself from the normal thirty days to seven will hopefully allow the fuel delivery to occur, to the benefit of the general welfare of the entire Nome community.

Dated this third day of January, 2012.

A handwritten signature in blue ink, appearing to read "Larry Hartig", with a long horizontal flourish extending to the right.

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Larry Hartig, Commissioner  
Alaska Department of  
Environmental Conservation