

OFFICE OF THE COMMISSIONER OF THE ALASKA DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

FLINT HILLS RESOURCES ALASKA, LLC)	
)	
Requestor,)	
v.)	
)	
ALASKA DEPARTMENT OF)	
CONSERVATION, DIVISION OF SPILL)	
PREVENTION & RESPONSE,)	
)	
Respondent.)	
_____)	

**DECISION REGARDING FLINT HILLS RESOURCES ALASKA, LLC AUGUST 14,
2015 REQUEST FOR ADJUDICATORY HEARING**

I. Background

On August 14, 2015, Flint Hills Resources Alaska, LLC (Flint Hills) requested an adjudicatory hearing, pursuant to 18 AAC 75.385 and 18 AAC 15.200, regarding a July 27, 2015 letter from the Alaska Department of Environmental Conservation’s Division of Spill Prevention and Response (SPAR Division) about the performance standard for the on-site cleanup plan for the Flint Hills North Pole Refinery site.¹ Flint Hills argues that the letter (July 27 Letter) was a final decision from the SPAR Division denying a June 29, 2015 petition from Flint Hills to modify the groundwater extraction system performance standard under the approved Onsite Cleanup Plan for the North Pole refinery site (June 29 Petition).² Flint Hills argues there are five

¹ The July 27, 2015 SPAR Division letter is attached as Exhibit L to Flint Hill’s Memorandum in Support of Request for Adjudicatory Hearing (Hearing Request Memorandum).

² Exhibit K to Hearing Request Memorandum.

“Disputed Issues of Law and Fact” regarding the July 27 Letter and that therefore an adjudicatory hearing should be granted.³

In the June 29 Petition, Flint Hills requested that the Alaska Department of Environmental Conservation (ADEC) “modify the interim performance standard for the FHRA [Flint Hills] North Pole groundwater extraction and treatment system from 15 µg/L to 362 µg/L.”⁴ The petition stated that pursuant to Section 5.4.2 of the Final Onsite Cleanup Plan for the Flint Hills North Pole site, ADEC “agreed to act upon such a petition within thirty (30) days.”⁵

The petition also discussed the administrative process to date for determining a groundwater cleanup level for sulfolane pursuant to 18 AAC 75.345(b). Groundwater cleanup levels are set out for a number of substances in Table C of 18 AAC 75.345(b)(1). There is not a level for sulfolane in Table C, but 18 AAC 75.340(b)(2) provides for DEC to approve a cleanup level derived from an approved site-specific risk assessment conducted under the *Risk Assessment Procedures Manual*, adopted by reference at 18 AAC 75.340(f)(1). As noted by Flint Hills in the June 29 Petition, a decision from the SPAR Division set the site-specific cleanup level for the North Pole Refinery Site at 14µg/L in November 2013.⁶ Flint Hills requested an adjudicatory hearing regarding the November 2013 decision, and as a result, in April 2014, the Commissioner issued a decision vacating the approval of a 14µg/L cleanup level

³ Hearing Request Memorandum at 16.

⁴ Exhibit K to Hearing Request Memorandum at 1.

⁵ *Id.*

⁶ *Id.* at 2.

and remanding the determination to the SPAR Division with instructions to develop the record further and provide a decision on an approved cleanup level under 18 AAC 75.345(b)(2).⁷

An on-site cleanup plan was submitted by Flint Hills and approved by the SPAR Division in October 2014.⁸ This plan addresses “remedial strategy for the onsite area” of the Flint Hills North Pole Refinery.⁹ Flint Hills asserts that at the time of finalization of the Onsite Cleanup Plan (OCP), it understood that ADEC expected to make a cleanup level determination imminently, and that it agreed to the current OCP performance standard of 15 µg/L only because “the Division actively represented that this standard would be in place only *during the short period*” until the Division came to a cleanup level determination.¹⁰ The SPAR Division has recently noted in a letter to Flint Hills dated June 9, 2015, that the Division is “deferring a final decision on a cleanup level at the Refinery Site until the results from the NTP [National Toxicology Program] studies are available.”¹¹ Flint Hills argues that in addition to two years of lab testing, it could take an additional three years to analyze the NTP results, and in the meantime, Flint Hills will continue to incur cleanup costs.¹²

The July 27 Letter from the SPAR Division noted that SPAR disagreed with “a large number of statements” made in the June 29 Petition, but that it would respond only “specifically to [Flint Hills] request to change the sulfolane combined groundwater extraction and treatment performance standard from 15 µg/L to 362 µg/L.”¹³ The SPAR Division stated that as ADEC

⁷ Exhibit B to Hearing Request Memorandum at 8.

⁸ Exhibit H to Hearing Request Memorandum.

⁹ Exhibit G to Hearing Request Memorandum at 1.

¹⁰ Hearing Request Memorandum at 13; Exhibit K to Hearing Request Memorandum at 4.

¹¹ Exhibit J to Hearing Request Memorandum at 2.

¹² Hearing Request Memorandum at 12; Flint Hills Reply Memorandum at 6.

¹³ Exhibit L to Hearing Request Memorandum.

“had not yet instituted a cleanup level for sulfolane,” the “request to change the system performance standard is premature at this time,” and that Flint Hills could resubmit its petition once a cleanup level had been established.¹⁴

Flint Hills requests this adjudicatory hearing regarding the SPAR Division’s July 27 Letter.¹⁵ Flint Hills lists five alleged “Disputed Issues of Law and Fact” in the Memorandum in Support of its Hearing Request.¹⁶

II. **Dispute regarding the threshold issue of finality.**

The parties dispute a key threshold issue in their briefs—whether or not the July 27 Letter is a “final” decision from which an adjudicatory hearing may be requested. This dispute rests on the question of whether the language of the OCP and/or ADEC regulations provide Flint Hills the ability to request modification of the OCP performance standards. The OCP approved in October 2014 sets the onsite sulfolane performance standard for the groundwater extraction and treatment system at 15 µg/L.¹⁷ However, the OCP contains the following language providing the ability to change the 15 µg/L standard:

Section 2.4.2.2 Sulfolane

“Note that in the event that the cleanup level for the site is instituted at a level different than the 15 µg/L, the system’s performance will be adjusted to meet the cleanup level. Prior to any adjustment, a pre-scoping meeting will be held if FHRA [Flint Hills] deems it necessary. Upon request by FHRA to adjust the system’s performance, ADEC will act upon the request within thirty days provided the submittal is complete.”¹⁸

¹⁴

Id.

¹⁵

Exhibit L to Hearing Request Memorandum.

¹⁶

Hearing Request Memorandum at 16.

¹⁷

Exhibit G to Hearing Request Memorandum at 19.

¹⁸

Exhibit G to Hearing Request Memorandum at 11.

Section 3.3 Groundwater

“When ADEC determines a final cleanup level for sulfolane at the site, the 15 µg/L will be replaced with the ADEC final cleanup level.”¹⁹

Section 5.4.2 Groundwater Extraction System Specifications

“In the event that a final determination of the sulfolane cleanup level is instituted at a level different than the 15 µg/L, the system’s performance will be adjusted to meet the cleanup level. Prior to any adjustment, a pre-scoping meeting will be held if FHRA deems it necessary. Upon request by FHRA to adjust the system’s performance, ADEC will act upon the request within 30 days provided the submittal is complete.”²⁰

In its June 29 Petition, Flint Hills stated that the OCP “provides” that Flint Hills may request adjustments to the system’s performance, and that under Section 5.4.2 of the OCP, the SPAR Division was required to act on such a request within thirty days.²¹ Similarly, Flint Hills argues in its brief that the language in the OCP “explicitly recognize[s] that Flint Hills has the right to request that DEC modify the performance standard for the groundwater extraction and treatment system,” and that ADEC’s regulations, specifically 18 AAC 75.360(4), also “provide[s] a similar right, making clear that a responsible person can request that DEC modify the terms of an approved site cleanup plan.”²² Thus, it is Flint Hills’ position that it may request a modification to the current OCP performance standard (15 µg/L) at any time pursuant to both the OCP and to ADEC regulation 18 AAC 75.360. Flint Hills argues it is not required to wait until a cleanup level is instituted to request an OCP performance standard change.

¹⁹ Exhibit G to Hearing Request Memorandum at 19 (discussing the 15 µg/L extraction performance standard for groundwater as a cleanup objective).

²⁰ Exhibit G to Hearing Request Memorandum at 36.

²¹ Exhibit K to Hearing Request Memorandum at 1, 4, 7.

²² Hearing Request Memorandum at 14, n. 26 (citing to 18 AAC 75.360(4)).

Flint Hills' July 29 Petition also makes clear that the change requested is a change to the "interim performance standard."²³ In other words, Flint Hills requests a change to the temporary standard in place until a cleanup level is instituted.

In its response, the SPAR Division argues that its July 27, 2015 letter was not a final department decision appealable under department regulations, specifically 18 AAC 75.385, and that therefore the request for adjudicatory hearing should be denied.²⁴ The SPAR Division bases its arguments regarding finality on its position that a request to change the performance standard is not "ripe for consideration" until a cleanup level is instituted.²⁵ The SPAR Division thus takes the position that the language in the OCP only allows a change in the performance standard once a cleanup level is instituted. The SPAR Division does not address the argument made by Flint Hills in its briefing that 18 AAC 75.360(4) provides separate authority for Flint Hills to request a change to the OCP performance standard.

III. **Decision**

For the reasons below, I REMAND to the SPAR Division for further consideration of the June 29 Petition.

Flint Hills argues that the July 27 Letter is a final decision denying a request that was made pursuant to (1) language in the approved on-site cleanup plan (OCP) which provided for consideration of modification of the OCP upon request and (2) department regulations at 18 AAC 75.360(4). The SPAR Division argues that the OCP language provides for consideration of modification of the OCP upon request only once a cleanup level for sulfolane

²³ Exhibit K to Hearing Request Memorandum at 1.

²⁴ SPAR Response Brief at 18-22.

²⁵ SPAR Response Brief at 22.

has been instituted, which has not yet occurred. The SPAR Division is silent on the issue of whether Flint Hills also has the ability to request modification of the OCP under 18 AAC 75.360.

Upon review, I find that remand is appropriate in this matter because the SPAR Division does not appear to have considered the June 29 Petition as a request pursuant to 18 AAC 75.360. Based on the assumption that the request for modification of the OCP performance standard was premature (pursuant to the SPAR Divisions' understanding of the language of the OCP), the SPAR Division declined consideration of the request for modification, finding that it was not yet ripe for consideration of approval or disapproval.²⁶ Flint Hills argued in its briefing (although not the June 29 Petition) that it has the ability to make a request to modify the OCP performance standard pursuant to 18 AAC 75.360 as well as to the language of the OCP. Therefore, regardless of whether the OCP language provided a right to request modification of the OCP at any time, the SPAR Division appears to have failed to consider:

- (1) whether the request to modify the interim OCP performance standard was a request properly made pursuant to 18 AAC 75.360, and
- (2) whether the request was approved or disapproved pursuant to that regulation.

Remand is appropriate where the Division “failed to comply with a statutory or regulatory requirement.”²⁷ The decision is therefore remanded for further development of a substantive decision on issues (1) and (2) above. In making its determination, the SPAR Division should explain its reasoning on both points.

²⁶ Exhibit L to Hearing Request Memorandum.

²⁷ 18 AAC 15.220(b)(2).

It is worth reminding both parties that the June 29 Petition makes clear that the standard that Flint Hills requests to be modified is the “interim performance standard” for the OCP—the standard in place until a cleanup level is instituted.²⁸

The SPAR Division **will provide a decision on remand within 60 days of this order** unless it requests additional time for good cause shown.



Alice Edwards, Deputy Commissioner
Alaska Department of Environmental Conservation
(acting by delegation from the Commissioner)

DATED: November 9, 2015

cc: Eric Fjelstad and James Leik, Perkins Coie
Breck Tostevin, Alaska Department of Law
Jennifer Currie, Alaska Department of Law

²⁸ Exhibit K to Hearing Request Memorandum at 1, 7.