

OFFICE OF THE COMMISSIONER OF THE ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

DECISION ADDRESSING ISSUES REMAINING AFTER REMAND FOR FLINT IDLLS RESOURCES ALASKA, LLC'S 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 (ADEC) Division of Spill Prevention and Response (SPAR Division). The July 27, 2015 letter responded to Flint Hills' June 29, 2015 request to modify a portion of the North Pole Refinery site on-site cleanup plan (OCP).¹ Specifically, Flint Hills requested modification of the OCP's sulfolane "interim performance standard" for the groundwater extraction and treatment system.² In its July 27, 2015 letter, the SPAR Division responded that the OCP "conditions a change in the performance standard on the Alaska Department of Environmental Conservation's institution of a cleanup

1 Exhibit L to Flint Hill's Memorandum in Support of Request for Adjudicatory Hearing (Hearing Request).
2 Exhibit K to Hearing Request. The OCP was approved on October 16, 2014. Exhibit H to Hearing Request.

level for sulfolane that is different from 15 µg/L [the current, "interim" standard]," and that as such, the request to modify the standard was "premature."³ A public notice of the request for adjudicatory hearing was issued. The SPAR Division responded to the request⁴ and Flint Hills filed a reply.⁵

On November 9, 2015, I remanded the matter to the SPAR Division for development of a substantive decision on two questions relating to whether the SPAR Division approved or disapproved Flint Hills' request to modify the interim OCP performance standard pursuant to 18 AAC 75.360.⁶ On remand, the SPAR Division found that Flint Hills' petition did not "request a change to the OCP performance standard under DEC's regulations but rather requested a modification to the performance standard based on the provisions contained in the OCP itself."⁷ Further, the SPAR Division noted that as a result, the Division did not approve or disapprove the request pursuant to 18 AAC 75.360.⁸ The Division found that if it were to treat Flint Hills' June 29, 2015 Petition (Petition) as a request under 18 AAC 75.360, that the Petition "lack[ed] sufficient information for SPAR to evaluate whether the system modification would meet the Cleanup Plan requirements specified in 18 AAC 75.360(4)(A) and (C)."⁹ The Division also described the additional information it anticipated would be required for SPAR to evaluate whether a modification met requirements of 18 AAC 75.360(4)(A) and (C).¹⁰

In its February 8, 2016 Request to Address Issues Following the November 9 Remand, or in the Alternative, Renewed Request for Adjudicatory Hearing, Flint Hills noted that it disagreed

³ Exhibit L to Hearing Request

⁴ SPAR Response, dated September 16, 2015.

⁵ Flint Hills Reply, dated September 28, 2015.

⁶ Decision Regarding Flint Hills Resources Alaska, LLC August 14, 2015 Request for Adjudicatory Hearing, dated November 9, 2015 (November 9 Decision).

⁷ SPAR Remand Decision, dated January 7, 2016, at 4.

⁸ *Id.* at 2.

⁹ *Id.* at 4.

¹⁰ *Id.* at 3-4.

with the SPAR Division's description of requirements for modification under 18 AAC 75.360, but that it was "not pursuing a challenge to the Division's rejection of its Petition based on 18 AAC 75.360." ¹¹ Flint Hills stated that it reserved its right to request a future modification pursuant to 18 AAC 75.360. ¹²

Flint Hills also noted in its February 8, 2016 Request that after the decision on remand, there still remained an undecided issue- if an adjudicatory hearing should be granted on "whether the Division should have modified the OCP under the terms of the OCP." ¹³ In my order dated February 22, 2016, I stated that I would finalize a decision on issues remaining after remand.

I. Discussion

Flint Hills is correct that the remand and the decision on remand do not address all issues raised in its Request for Adjudicatory Hearing. In its Request to Address Issues after Remand, Flint Hills "respectfully request[ed]" that I "address and decide Flint Hills' request for Hearing insofar as it requests an adjudicatory hearing on the Division's denial of Flint Hills' request to modify the OCP pursuant to the terms of the OCP." ¹⁴ I agree with Flint Hills that this issue remains and address it in this decision. Flint Hills has stated that it is "not pursuing a challenge to the Division's rejection of its Petition based on 18 AAC 75.360 at this time." ¹⁵ Therefore, this decision addresses the arguments and issues raised by Flint Hills only as they apply to the denial

¹¹ Flint Hills Resources Alaska, LLC's Request to Address Issues after Remand, or the alternative, Renewed Request for Adjudicatory Hearing (Request to Address Issues after Remand), dated February 8, 2016 at 2, n. 3.

¹² *Id.* On the issue of consideration of future modification pursuant to 18 AAC 75.360, the SPAR Division noted in its remand decision that if "Flint Hills submits information supporting modification, SPAR will review it at that time." SPAR Remand Decision at 4. Thus, both parties appear to agree that regardless of this proceeding, Flint Hills may request future modification of the performance standard under 18 AAC 75.360 at any time, although Flint Hills has noted disagreement about what information would be sufficient for SPAR to evaluate whether to approve or deny such a request for modification.

¹³ Request to Address Issues after Remand at 2.

¹⁴ *Id.* at 3-4.

¹⁵ *Id.* at 2, n. 3.

of the request to modify the performance standard for sulfolane based on the provisions contained in the OCP.

More specifically, this decision addresses the denial of the Flint Hills' request to modify the *interim* performance standard. As noted in my November 9, 2015 Decision:

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.¹⁶

As I described in my November 9, 2015 Decision, Flint Hills interprets the OCP (particularly Section 5.4.2) as providing an ability for Flint Hills to "request a modification to the current OCP performance standard (15µg/L) at any time."¹⁷ Further, Flint Hills indicated in its June 29, 2015 petition that the language of Section 5.4.2 of the OCP provided that SPAR Division would act on a request within 30 days.¹⁸ Conversely, the SPAR Division argues that a request to change the performance standard is not "ripe for consideration" until a cleanup level is instituted.¹⁹ The SPAR Division therefore did not consider the merits of Flint Hills' June 29, 2015 request to modify the interim performance standard, based on its determination that the OCP "conditions a change in the performance standard on the Alaska Department of Environmental Conservation's institution of a cleanup level for sulfolane that is different from 15 µg/L."²⁰ In other words, the SPAR Division argues the OCP does not provide for a change to the *interim* performance standard that is in place until a cleanup level is instituted.

¹⁶ November 9 Decision at 8 (quoting Exhibit K to Hearing Request at 1, 7).

¹⁷ *Id.* at 5

¹⁸ Exhibit K to Hearing Request at 1.

¹⁹ SPAR Response at 22.

²⁰ Exhibit L to Hearing Request.

The SPAR Division argues that the July 27, 2015 letter is not a final decision for which an adjudicatory hearing may be requested under 18 AAC 75.385. This argument is based on SPAR's interpretation that the OCP does not provide for a modification of the performance standard until a final cleanup level is set.²¹ Both parties cite to case law that discusses the test of finality of an agency decision for purposes of appeal to superior court as being "whether the agency has completed its decision making process, and whether the result of the process is one that will directly affect the parties."²² Here, regarding Flint Hills' request to modify the interim performance standard pursuant to the OCP, the SPAR's July 27 letter is a final decision. The July 27 letter meets the finality standard agreed upon by both parties-the Division had "completed its decision-making process" denying the request to change the *interim* performance standard, finding that the *interim* standard could not be changed, based on the Division's interpretation that the OCP does not provide for a change to the performance standard (interim or otherwise) unless a cleanup level different from 15 µg/L is instituted. Further, the decision "directly" affected Flint Hills' ability to request a change to the interim performance standard pursuant to the language of the OCP.

The interpretation of the language of the OCP remains a key question in this matter-whether the language of the OCP provides for Flint Hills to request modification of the interim performance standard at any time before a cleanup level is set, or whether it is required to wait until a cleanup level is instituted to request modification. This key question could also impact SPAR's consideration of a request to modify the interim performance standard, as the OCP

²¹ SPAR Response at 20-22; *see also* 18 AAC 75.385 (providing ability to request adjudicatory hearing for a person aggrieved by a "final department decision" under the site cleanup rules).

²² *State, Dept. of Fish & Game v Meyer*, 906 P.2d 1365, 130 (Alaska 1995) (internal quotations omitted) (cited in SPAR Response at 18-19, Flint Hills Reply at 5).

provides that the ADEC will act upon a request within 30 days if the submittal is complete.²³

This differs from the language of 18 AAC 75.360, the regulation that provides for modification of a cleanup plan, which does not specify a time period for the Division to consider a request to modify an OCP performance standard.

This key question also impacts the issues of disputed fact alleged by Flint Hills. The five issues of disputed fact that Flint Hills alleged are:

1. Was the Division justified in refusing to modify the OCP to reflect the sulfolane cleanup standard requested by Flint Hills under 18 AAC 75.345(b)(2), and supported by the reference dose identified by the Division's Expert Panel?
2. Is the Division authorized to require Flint Hills to achieve a 15 ug/L performance standard for sulfolane at the North Pole site, even though a) the Division has not set a groundwater cleanup level for sulfolane in Table C, and b) the Division refuses to approve or reject the sulfolane groundwater cleanup level proposed by Flint Hills pursuant to 18 AAC 75.345(b)(2)?
3. Does the Division's refusal to modify the OCP violate the mandate in the Commissioner's Order dated April 4, 2014, which required the Division to determine a cleanup level for sulfolane?
4. Did the Division provide an appropriate rationale and reasoning, within the meaning of the Commissioner's Order dated April 4, 2014, when refusing [Flint Hills'] request to modify the OCP pursuant to the OCP and 18 AAC 75.360(4)?²⁴

²³ Exhibit G to Hearing Request at 36.

²⁴ Regarding the second portion of Question 4, as noted *supra*, this decision addresses the arguments made by Flint Hills only as they apply to the denial of the request to modify the interim performance standard for sulfolane based on the provisions contained in the OCP.

5. Was the Division's refusal to modify the OCP justified in light of the scientific information, including the information submitted by [Flint Hills] and by the Division's Expert Panel?²⁵

An adjudicatory hearing is warranted if there is a "genuine issue of disputed fact material to the decision."²⁶ Here, Flint Hills does not identify any disputed facts in Questions 1, 4, and 5. This is because the SPAR Division did not consider the substance of Flint Hills' request to modify the OCP, as it did not consider the request ripe for consideration under the terms of the OCP.

Instead, SPAR's July 27, 2015 response to Flint Hills' request to modify the OCP is based solely on the SPAR Division's interpretation of the "key issue," discussed above-whether the OCP provides a procedural mechanism for Flint Hills to request, and for SPAR to consider, modification of the interim performance standard before institution of a final cleanup level. This key issue is a threshold legal issue that requires resolution.

Question 2 poses a general legal question: whether the Division has authority to require a 15 µg/L performance standard even though the Division has not set a groundwater cleanup level for sulfolane in Table C and "refuses to approve or reject the sulfolane groundwater cleanup level proposed by Flint Hills pursuant to 18 AAC 75.345(b)(2)."²⁷ This general question must be read however in the context of the June 29, 2015 request and SPAR's July 27, 2015 response. As noted above, because Flint Hills has stated it is "not pursuing a challenge to the Division's rejection of its Petition based on 18 AAC 75.360 at this time,"²⁸ this question should be analyzed only in the context of modification of the performance standard under the terms of the OCP.

²⁵ Hearing Request at 16.

²⁶ 18 M C 15.220(b)(1)(B).

²⁷ Hearing Request at 16.

²⁸ Request to Address Issues after Remand at 3, n. 2. *See also* Request to Address Issues after remand at 3-4 (stating that "Flint Hills respectfully requests that the Deputy Commissioner address and decide Flint Hills' request for Hearing insofar as it requests an adjudicatory hearing on the Division's denial of Flint Hills' request to modify the OCP pursuant to the terms of the OCP").

Therefore, Question 2 is also impacted by the key preliminary legal question regarding whether the OCP even provides for modification of the interim performance standard before a final cleanup level is set.

Question 3 also poses a legal question, regarding interpretation of the Commissioner's April 4, 2014 order in a related Request for Adjudicatory Hearing. As with Question 2 however, it must be viewed in the context of the June 29, 2015 request and July 27, 2015 response. Thus, the question should be "did the Division's refusal to modify the OCP pursuant to the terms of the OCP violate the mandate in the Commissioner's Order dated April 4, 2014?" Therefore, Question 2 also is impacted by the preliminary legal question regarding whether the OCP even provides for modification of the interim performance standard before a final cleanup level is set.

Thus, Flint Hills' request raises "disputed and significant issues of law or policy,"²⁹ but not disputed issues of fact. **Therefore, I DENY Flint Hills request for adjudicatory hearing but GRANT a hearing on the existing agency record and written briefs pursuant to 18 AAC 15.220(b)(3), for a determination on the following disputed issues of law:**

1. Does the OCP, particularly Section 5.4.2, provide Flint Hills the ability to request a change to the groundwater extraction system performance standard at any time before a cleanup level for sulfolane is instituted (and also provide for SPAR to then act upon the request within 30 days if the submittal is complete) or does the OCP provide that Flint Hills may only request a change to the performance standard if a cleanup level is instituted at a level different than 15 µg/L?
2. If it is determined that a provision of the OCP provides the ability to request a change to the groundwater extraction system performance standard before a cleanup level for

²⁹ 18 AAC 15.220(b)(3).

sulfolane is instituted, and for SPAR to act upon the request within 30 days if the submittal is complete, is that OCP provision within the authority of DEC statutes and regulations, particularly 18 AAC 75.360?

I would note that given the fact that the SPAR Division has clearly and unambiguously indicated in its response to my remand that the request received from Flint Hills is not yet complete in order to assess whether it meets the requirements of 18 AAC 75.360, and the SPAR Division further identifies additional information required to process the request, it would appear that the matter can be addressed at any time through the process identified in 18 AAC 75.360. However, that would leave the questions of law pertaining to interpretation of the OCP unanswered. In this context we need to have the Office of Administrative Hearings address the two threshold legal questions listed above.



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

DATED: April 29, 2016

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

