Alyeska pipeline SERVICE COMPANY

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October 5, 2004

Letter No. 1888
Via e-mail

Mr. Don Bodron
Division of Air Quality
Department of Environmental Conservation
410 Willoughby Avenue, Suite 303
Juneau, AK 99801-1795

Re: Comments on Proposed Permit Administration Fee Regulations

Dear Mr. Bodron:

Attached are Alyeska Pipeline Service Company's (Alyeska's) comments on the proposed permit administration fee regulations. We appreciate the opportunity to supply these comments and look forward to your review and handling of them.

In sum, it was difficult for us to understand how the estimates for time and costs were determined, particularly for those five facilities singled out as ones with "complex permits." It is thus our hope and request to speak with ADEC prior to the finalization of these regulations regarding the mechanisms used to place the VMT is in what is possibly the highest permitting cost category.

Thank you again for the opportunity to comment and please don't hesitate to call me at (907) 787-8806 if you have any questions.

Sincerely,

Bradley C. Thomas
Sr. Environmental Engineer

attachment: *Comments on ADEC Air Fee Regulation Package Proposed August 24, 2004*

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1. ***18 AAC 50.400(f)***: the proposed language in this paragraph references the operator of a stationary source described by 18 AAC 50.326 "who wishes to obtain a minor permit described in Table 11 of this subsection..."

   Table 11 of the subsection does not describe minor permits. It conveys the fees for certain types of permit revisions as well as for various permit-related activities. Perhaps a more thorough and accurate description of Table 11 and its purpose could be included within the body of the regulation.

2. ***Table 11***: This table appears to indicate that Title I permits can be amended via the Administrative Revision process. Is this, in fact, the case? If so, perhaps other sections of the regulations could be amended to make this section consistent. As a side note, the appearance of the undefined word "complex" in this table is troubling. This issue will be addressed in a separate comment.

3. ***Table 11***: This table lists a fee of $26.50 for each excess emission or permit deviation report submitted. Alyeska strongly urges the Department to roll this fee into the annual flat or fixed compliance costs. Leaving it as proposed will:
   - cost both ADEC and the regulated entity much more than $26.50 to process the fee payments; and
   - have the potential effect of draining one of the desire to conservatively report deviations or excess emissions. When evaluating whether an event qualifies as an excess emission or permit deviation – particularly those events that may reside in "gray areas" of the regulations - a regulated entity may unfortunately learn to factor cost into their consideration. The effect of this would be, of course, fewer reports submitted to the Department. We are not certain that this is the intended effect of this fee.

4. ***Table 11***: This table lists fees for reviewing source test plans and results. Alyeska strongly urges the Department to include these costs in the fixed annual compliance costs. There are several reasons for this but a major one is that the types of plan and result reviews are unspecified. What if the test is voluntary and performed for defensive or permit application reasons? Should a permittee have to pay the Department to look at these results?

   Further, it is not clear whether, after a test is reviewed, the results of that review become official. In other words, does payment of an invoice for test review constitute official acceptance of the test by the Department? Either an affirmative or negative answer to this question introduces issues requiring resolution.

If affirmative, then the regulated community will have a void finally filled where test reports have been submitted and nothing ever heard about the test again. The Department, on the other hand, will be hindered in making any subsequent contrary declarations regarding the test results.

If negative, an altogether different Department employee may later review the test and declare it invalid (for, perhaps, a real technical flaw). The permittee, then, might well have submitted a payment for a defective test report review. In this case, the permittee can expect to pay for, at a minimum, another test – and those fees associated with the test. Additionally, the permittee might even have to pay for the review of test results where the original test was declared invalid. Nothing in the proposed regulation package precludes this.

It has been the experience of many in the regulated community that source test results are reviewed multiple times and used for purposes other than simple permit compliance demonstrations at a specific point in time. This gap, and its attendant issues are best addressed by rolling the source test costs (including the time spent on site observing the test as referenced in draft 18 AAC 50.400(i)(6)) into the fixed annual compliance costs.

As a final thought on the matter, how might one learn to view the future unilateral imposition of source test requirements (and, hence, test plan and result submittals) in a permit? Such requirements could take on the appearance of "revenue generators" and it is best to avoid this by including testing costs with the annual compliance costs.

5. ***Table 11***: According to Table 11, entities requesting fee reviews under 18 AAC 15.190 will be billed $110.00. 18 AAC 15.190 reads:

18 AAC 15.190. Fee Review
(a) An applicant for a permit or approval who is authorized by a provision of this title to seek a review of a fee decision of the department under this section may, within 30 days of receipt of the fee invoice, make a written request that the director of the division issuing the invoice review the matter. The applicant need not pay the disputed fee until the director issues a final decision under (b) of this section, and the department will not charge interest while the director considers the request for fee review.

(b) A request for fee review must be accompanied by a written discussion that sets out the reasons why the fee or computation is disputed and how it should be adjusted. The director of the department division issuing the invoice shall issue a written decision on the disputed invoice within 30 days after receiving the request for fee review. A decision made under this subsection is the final agency decision. A person aggrieved by that decision may appeal it to the superior court in accordance with the Alaska Rules of Appellate Procedure.

For the reasons cited in item 6 below, Alyeska strenuously objects to this proposed language. We acknowledge that $110 is not a huge amount of money but, on principle, it is fundamentally unfair to make an individual pay for a redress of grievance (in this case fees) without regard to the outcome of the review. Alyeska acknowledges the precedent that an entity should pay reasonable Department costs for grievances filed but not sustained. This, however, is not at issue here. Alyeska therefore respectfully requests that this line item be struck from Table 11.

6. ***18 AAC 50.400(i)(3)***: This proposed regulation language would require a permittee, at a rate of 149% of Department staff salary plus other direct costs, to pay for "appeals or adjudicatory hearings brought by the permit applicant." This item is presumably meant to cover the Department's time in preparing and carrying out its defense to an appeal since time spent in gathering and certifying the appeal record is covered by another regulation (18 AAC 15.237(c)).

   Given that this proposed regulation comes under the heading of "designated regulatory services" we remain baffled by the Department's view in this matter. The American Heritage dictionary defines service as "employment in duties or work for another" and "work done for others as an occupation or business." In this case, Department efforts are expended mainly in the service of the Department.

   Alyeska therefore strenuously objects to the inclusion of this language in the fee regulations. For other and more specific objections to this language, please see the Alyeska letters from Jordan Jacobsen to Tom Chapple dated April 30, 2004 and June 3, 2004. Further, please see the Alyeska letter from Jordan Jacobsen to Kurt Fredrikkson dated July 27, 2004 as well as the relevant filings made and to be made in the Superior Court of Alaska, 3rd Judicial District over the next several months.

7. ***18 AAC 50.400(i)(4), (5), and (7)***: The proposed language in these paragraphs would require a permittee to pay direct costs for minor and significant permit revisions as well as for pre-application assistance.

   Alyeska acknowledges the fact that the Department may not yet have years and years of experience in the minor and significant permit revision realm. We do, however, believe that a flat fee rate for these types of permit actions can be reasonably estimated and proposed as part of this regulation package on the basis of the year or so of experience thus far attained. If these estimates prove incorrect, the Department can always revisit the fee rates for these activities at a later date. Alternatively, the Department can leave the time and material cost approach for these permit activities in place and then commit, within the body of the regulation, to reopen the regulations12 or 18 months later to incorporate fixed fees for the minor and significant permit revisions.

The Department proposes to collect direct costs from applicants for pre-application assistance. Overall, pre-application assistance amounts to a small fraction of the overall permit work and, as such, these costs should be factored into the fixed permit costs. Collection of direct costs for pre-application assistance will have a chilling effect on people seeking help from the air quality authorities and we believe it is bad policy to build a program in this manner.

8. ***18 AAC 50.400(i)(8)***: This paragraph requires that the Department's direct costs be paid by permittees for "compliance activities, including preparing a notice of violation, compliance order by consent, settlement agreement, or consent decree."

First, the costs for preparing notices of violation should be considered part of the compliance review costs. Otherwise, it appears the compliance reviews would not include the final determination and notice of "in compliance" or "not in compliance." The latter of course, is the notice of violation.

Second, Department recovery of direct costs for compliance orders by consent (COBC), settlement agreements, or consent decrees should be, as has historically been the case, by negotiation. Some COBCs and settlement agreements are imposed on over the objections of permittees. Permittees take them as a matter of economy (i.e., it may be just too expensive to battle further over an issue when compared to the lower costs of acquiescence). It would thus be most fair for the Department to allow for negotiations to recover their direct costs (or a portion thereof) rather than to require a specified amount by regulation - which can have the appearance of a punitive fee. Alyeska believes this paragraph (minus the reference to notices of violation) should be moved to a renamed 18 AAC 50.401 ("Negotiated Agreements).

9. ***18 AAC 50.401***: In general, Alyeska believes that the fee program should be based on fixed costs to the maximum extent possible. As such, we encourage ADEC to convert those of these 18 AAC 50.401 negotiated fee categories possible to fixed fee categories as experience accrues.

In the meantime, it would be helpful if the Department included in the regulations a reference to the guidance document alluded to on page 13 of the Fixed Fee Support Paper. Further, this guidance document should be developed as soon as possible (quicker, we urge, than "when time permits"). This guidance should be developed in close consultation with industry groups and should detail how the negotiations will work in practice. For instance, what standards will the Department use in arriving at what they believe to be a reasonable cost to perform the work? What means or information may a permittee bring to bear that will positively support the amount they believe reasonable in the negotiation? What are the concerns or limitations around using contractors to carry out some of the work? What are the limitations around stipulated penalties for failure to meet certain deadlines?

The existing lack of definition or information around the negotiated agreement authority will make employing the provisions very difficult.

Finally, we noted the language on page 13 of the Fixed Fee Support Paper that reads, "If the department and the permit applicant fail to reach agreement on the costs for a complex permit after a reasonable amount of negotiation time has passed, the department will conclude that negotiations have failed and that the project, if it is to go forward, will proceed on a time and material basis."

We receive this statement as very negative. It appears to belie a pessimistic approach to negotiations on the part of the Department. Given that it is a statement of the obvious, we do not believe it should be contained in the Fixed Fee Support Paper or any other document in this package. Further, even in the absence of such statements, circumstances exist that may tend to steer the Department in the time and materials direction. By keeping statements such as this out of the relevant documents, we hope to ensure that the negotiated agreement approach to establishing work outlines, fees, and fee payment remains a mutually agreeable option.

In conclusion, Alyeska respectfully requests that the Department present within the regulations and the Fixed Fee Support Paper a more positive presentation of the negotiated agreement approach. Further, we urge the Department to draft quickly, in consultation with industry, a guidance document that places guardrails around the negotiation process - a document geared toward ensuring the success of the negotiations.

10. ***18 AAC 50.401(a)***: This paragraph requires the submittal of a retainer fee in the amount of $5,300 "before the Department will begin the process to reach a negotiated service agreement..."

The only purpose of this retainer fee seems to be that it guarantees the Department a minimum of $5,300 out of the gate in the negotiation process. This is inappropriate especially given that some of the activities listed may be reasonably expected, at times, to cost less than $5,300 (and this fee is non-refundable). Alyeska thus requests that the retainer fee be eliminated and that, instead, language be inserted in the regulation that permits the Department to include the costs incurred for permit receipt, completeness review, and negotiation time in the final amount agreed to with the permittee.

11. ***18 AAC 50.401(a)(9)***: This paragraph would require a negotiated fee agreement for the Department to "review terms and conditions of a Title I permit that is complex".

It is entirely unclear what this means and, as such, could be a paragraph abused. Alyeska requests this paragraph's removal or its explanation, within the body of the regulation.

12. ***General***: The word complex is contrasted with the word simple in Table 11 of the proposed regulations. This is confusing and unnecessary. "Simple" is not a word defined in the package (at least insofar as we could tell). Further, administrative revisions of Title V, Title I, or minor permits are equally difficult (or easy) independent of the permit type. Thus, all administrative revisions should cost the same ($110) and it would be unfair to charge some facilities more for equivalent actions.

Moreover, the general use of the word "complex" throughout the regulation package seems unnecessary and objectionable. Five facilities are singled out and just about any action on the part of the Department around these facilities will likely be billed at a rate likely equivalent to a time and material basis (see comment 9). Given the operational simplicity of the VMT as well as the fact that about the same number of regulations apply to it as, say, a large mining operation or a different marine terminal within the state, we do not believe the facility or its permits are comparatively complex. For this reason, and those cited below, Alyeska disagrees with the Department's labeling of any permit action for the VMT as "complex."

The Fixed Fee Support Paper is not very descriptive regarding how the Department arrived at the hour estimates in Appendix B so we cannot be certain how those hours were estimated. It is possible, then, that the hours were estimated on the basis of only some of the most recent permit activities. Recent permit activities in the case of the VMT have been, of course, highly unusual. First of all, the VMT just received its first Title V operating permit and, in advance of receiving that permit, much work was performed in cleaning up the former 18 AAC 50.400 permit and a construction permit. This is a one-time permitting activity and it is inappropriate to base future estimations on this.

Further, two of the permits issued have been appealed and it is possible that Department time spent on the appeals as well as resolving some of the permit disagreements brought out during the appeal might be included in the estimates. We hope this isn't the case because it would be a problem on two fronts. First, appeals are also non-routine events and any estimations of time expected in permitting the facility should not be based on this. Second, basing future permitting times - and hence, cost structure - on the basis of the ongoing appeals would appear as punitive treatment of the VMT. We are not inclined to believe that the Department would do this but it is necessary to establish that this is, in fact, not the case.

In concluding this point, Alyeska requests dialogue with the Department about the VMT classification prior to issuing these regulations as final. The information made available in the regulation package is insufficient for us to understand it and it does, in fact, cause us serious concern.