

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION**

JAMES AND NANCY OLIVER dba)	
SAFETY WASTE INCINERATION,)	
)	
Requester,)	
)	
v.)	
)	
ALASKA DEPARTMENT OF)	
ENVIRONMENTAL CONSERVATION,)	
DIVISION OF ENVIRONMENTAL HEALTH,)	
)	
Respondent.)	OAH No. 24-0354-DEC
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DECISION ON REQUEST FOR ADJUDICATORY HEARING

I. Introduction

James and Nancy Oliver, doing business as Safety Waste Incineration, Inc. (SWI), requested an adjudicatory hearing to contest the May 8, 2024 decision of the Alaska Department of Environmental Conservation, Division of Environmental Health (Division) to deny SWI’s application for renewal of its solid waste treatment permit, identifying four contested issues for resolution. As discussed below, the request satisfies the requirements for a hearing request under 18 AAC 15.200 with regard to two of four issues identified by SWI, and a hearing should be granted as to those issues. A final determination as to whether an evidentiary hearing, or a hearing on the record and briefs, is appropriate will be made after the agency decision record is filed.

II. Factual and Procedural History

A. The Permit

The Division issued solid waste permit number SWZA102-24 to SWI on January 17, 2019, pursuant to Title 46 of the Alaska Statutes and Title 18, Chapter 60 of the Alaska Administrative Code (AAC).¹ The permit authorized SWI to maintain and operate an autoclave,

¹ ADEC 000043-000047.

incinerator, and medical waste storage facility in Wasilla for the treatment of medical waste.² The permit was effective for a five-year period.³

B. Notice of Violation.

On October 24, 2022, following an announced routine inspection of the facility on September 7, 2022, the Division issued SWI a Notice of Violation (NOV), alleging multiple permit and regulatory violations identified during the inspection.⁴ The alleged violations included issues concerning signage, access control, waste tracking, bloodborne pathogen training, waste storage locations and duration, secondary containment, and record-keeping, among other things.⁵

On November 7, 2022, SWI provided a response to the NOV disputing the allegations.⁶ The Division responded on November 29, 2022, outlining why the violations were still being pursued and providing evidence for the violations.⁷ Subsequently, the Division and SWI met several times in January 2023 to discuss to discuss a path forward for SWI to achieve compliance.⁸

C. Compliance Order by Consent

To “resolve [the] ongoing enforcement matter and to avoid the expense of formal enforcement proceedings,” the Division and SWI entered into a Compliance Order by Consent (COBC), signed by SWI and the Division in April 2023.⁹ By its express terms, the COBC made clear that it “shall be binding” on the Division and SWI.¹⁰

² ADEC 000044.

³ ADEC 000044.

⁴ ADEC 000049-000057. The alleged violations included violations regarding signage, access control, waste tracking, bloodborne pathogen training, waste storage locations and duration, secondary containment, and record-keeping, among other things.

⁵ ADEC 000051-000056.

⁶ ADEC 000063.

⁷ ADEC 000063.

⁸ ADEC 0068.

⁹ ADEC 000059-000090.

¹⁰ ADEC 000083.

The COBC required SWI to take various corrective actions, including displaying appropriate signage at the facility and the submittal of multiple plans and forms for the Division's approval.¹¹ Additionally, SWI was required to develop a new system for tracking waste for the Division's approval, and to submit tracking information to the Division monthly. ADEC agreed to suspend civil penalties and assessments accrued per AS 46.03.760 in the amount of \$19,897.29, conditioned on SWI's compliance with its obligations under the agreement.¹²

On April 28, 2023, SWI submitted its first deliverable to the Division under the COBC.¹³ The submission was supposed to include a facility map, visual monitoring form, waste manifest form, and plans for signage and access control.¹⁴ On May 3, 2023, the Division informed SWI that it found the proposed plans and forms to lack sufficient detail, specifying the reasons for its finding.¹⁵

On May 5, 2023, SWI provided its first monthly submission under the COBC.¹⁶ The submission was supposed to include handwritten waste manifests, visual monitoring forms, and biological testing results with accompanying date-stamped photos.¹⁷ On May 8, 2023, the Division notified SWI that the submission was insufficient. The Division followed up with a May 17, 2023 letter detailing alleged deficiencies with SWI's compliance, specifying changes needed to achieve compliance, and establishing a new deadline (May 25, 2023) for submittal of corrected plans and forms.¹⁸

On May 22, 24, and 25, 2023, SWI submitted several responses to the Division's May 8 and May 17 letters, objecting to the Division's position regarding the adequacy of SWI's

¹¹ ADEC 000070-000077.

¹² ADEC 000077.

¹³ ADEC 000092-000100.

¹⁴ ADEC 000070-000072, 000076-000077.

¹⁵ ADEC 000102-000106.

¹⁶ ADEC 000108-000111.

¹⁷ ADEC 000072, 000074-000076.

¹⁸ ADEC 000113-000115; ADEC 000116-000121.

submissions.¹⁹ On May 31, SWI submitted another plan required by the COBC,²⁰ which the Division also deemed insufficient.

On June 6, 2023, the Division conducted an inspection of the facility and identified multiple instances of alleged noncompliance with the COBC. The Division outlined these deficiencies in a June 27, 2023 letter, and advised that it was imposing half (\$9,948.65) of the suspended civil penalty under the COBC, based on SWI's continued noncompliance with the agreement.²¹ On July 17, 2023, the Division consolidated its prior comments and plan reviews into a single document "to aid [SWI] in revising [its] forms and plans."²²

On July 31, 2023, SWI requested dispute resolution from the ADEC Commissioner's Office, primarily concerning the monthly waste manifest forms it was required to submit to the Division under the COBC. The Commissioner delegated the matter to the Division Director, who issued a letter on September 15, 2023, upholding the Division's imposition of the civil penalty and costs incurred and its requirements for items that must be included on the waste manifest forms, excluding signature blocks.²³

The Division conducted another inspection on September 13, 2024, and purportedly found many of the same noncompliance issues it had observed at the facility previously. In an October 13, 2023 letter, the Department of Law notified SWI that it was imposing the remainder (\$9,948.65) of the suspended penalty under the COBC, and specified multiple deficiencies in SWI's compliance with the COBC.²⁴

D. Permit Renewal Application

¹⁹ ADEC 000123-000135.

²⁰ ADEC 000137-000142.

²¹ ADEC 000143-000147.

²² ADEC 000149-000154.

²³ ADEC 000156-000159.

²⁴ ADEC 000082-000089. The alleged deficiencies included the absence of various approved plans (such plans for storage, access control, secondary leakproof containment, biological indicator testing, and visual monitoring), the absence of an approved waste manifest form, failing to modify storage trucks to be leakproof, and problems with various monthly and other submissions. ADEC 000161-000168.

On December 15, 2023, SWI submitted an application for the renewal of its waste disposal permit, which was set to expire on January 17, 2024.²⁵ The application was missing the relevant attachments, which SWI identified as either “pending” or “not applicable,” with no further explanation. On January 2, 2024, the Division denied the permit application, deeming it to be incomplete and citing SWI’s history of noncompliance.²⁶

On March 26, 2024, the ADEC Commissioner issued a decision vacating the Division’s denial of the permit renewal and remanding the matter to the division to process completeness issues with the permit renewal application consistent with 18 AAC 60.210(d). On March 27, 2024, in accordance with the Commissioner’s order, the Division sent SWI a list of deficiencies with the permit renewal application and gave SWI until April 29, 2024 to submit the outstanding materials and complete its application.²⁷ On April 22 and April 26, 2024, SWI submitted a permit renewal application that included the materials missing from its December 2023 application.²⁸

On May 8, 2024, the Division deemed SWI’s permit renewal application to be administratively complete, but it denied the application “based on SWI’s history of noncompliance with the permit, applicable regulations, and the COBC.”²⁹ The Division added:

SWI’s history of noncompliance demonstrates that the applicant is unwilling or unable to achieve and maintain compliance with the COBC, their previous permit (SWZA102-24), and the regulations. **Based on a review of the compliance history at the facility, the Division is denying the requested permit renewal under 18 AAC 60.215.**³⁰

The Division also informed SWI that because its permit had expired, it “may no longer accept, store, or treat medical waste at its facility.” Accordingly, it directed SWI to provide proof

²⁵ ADEC 000090-000102.

²⁶ ADEC 000039.

²⁷ ADEC 000039.

²⁸ ADEC 000039.

²⁹ ADEC 000036-000041.

³⁰ ADEC 000039.

within 30 days that “all untreated medical waste (including pharmaceutical waste) collected or stored by SWI has been transferred to a permitted medical waste treatment facility or given back to the generator of the waste” and that “all treated medical waste in the possession of SWI has been properly disposed of at a permitted landfill.”

SWI requested informal review of the Division’s denial of the permit renewal application pursuant to 18 AAC 15.185. On May 22, 2024, the Division granted informal review but reaffirmed the decision to deny the permit renewal.

D. Adjudicatory Hearing Request

On May 30, 2024, SWI sought an adjudicatory hearing, which the Commissioner conditionally referred to the Alaska Office of Administrative Hearings to determine whether the request satisfies the requirements of 18 AAC 15.200, and if so, the scope of the hearing. In its hearing request, SWI identified what appear to be the following contested issues: (1) because the Division’s reason for denying the permit renewal application is an alleged history of noncompliance by SWI, whether each violation alleged by the Division actually occurred; (2) whether the COBC is illegal³¹ (SWI contests this issue because the Division’s finding of a history of noncompliance by SWI appears to be based in part on SWI’s noncompliance with the COBC); (3) whether the “order for payment of a civil assessment, accrued under AS 46.03.760, along with other oversight costs” pursuant to the COBC was illegal, because the COBC was illegal; and (4) whether SWI’s pharmaceuticals constitute medical waste, which SWI claims is relevant to the legality of the Division’s directive to SWI regarding the treatment and disposal of its remaining pharmaceuticals. The Division took no position on whether the hearing request meets the requirements of 18 AAC 15.200, but asserted that any hearing granted be held on the existing record and written briefs.

³¹ SWI asserts in its hearing request that “numerous terms [of the COBC] were written indeterminately and later made unreasonable and it was planned, designed and implemented at odds with State law and administrative code.”

III. Discussion

At the hearing request stage, it is not necessary for a requester to prove its case by a preponderance of the evidence. Rather, the requester must meet the requirements set forth in 18 AAC 15.200 to be entitled to an adjudicatory hearing: the request must be timely, the request must include specific information, and the requester must have standing.³²

A. The requirements of 18 AAC 15.200(a) (timeliness)

18 AAC 15.200(a) requires that a requester submit its request *either* within 30 days after a final decision is issued after informal review *or* within 30 days of a decision that is reviewable under the department’s regulations — *whichever is later*. Here, SWI submitted its request for a hearing on May 30, 2024, which was well within the 30-day period after the Division’s May 22, 2024 decision following informal review. Therefore, the hearing request was timely.

B. The requirements of 18 AAC 15.200(c) (required content)

To meet the requirements of 18 AAC 15.200(c) regarding the contents of a hearing request, the request must contain the following information: (1) a description of the decision to be reviewed; (2) contact information for the requester; (3) a clear and concise statement of the contested issues, including disputed issues of fact and law and their relevance to the decisions at issue, and an explanation of how the decision was in error with respect to the contested issues; and (4) information on the interests and issues at stake and why the hearing request should be granted.

Here, it is clear that the decision under review is the Division’s May 8, 2024 denial of SWI’s application for the renewal of its permit. SWI also provided the necessary contact information (the address and phone number of its owners, Jim and Nancy Oliver), and identified

³² 18 AAC 15.220(a), (c), and (d). An additional requirement in 18 AAC 15.220(a)— that a person who requests a hearing must have participated in the public review process on a draft decision, if the department offered one – does not apply in this case, where there was no draft decision of the Division on the permit renewal application.

the interests at stake due to the denial of the permit renewal application – namely, the Olivers’ livelihood and ability to pay their bills.

SWI also provided a sufficient description of two of the four contested issues identified in its hearing request. The first issue - whether each of the alleged violations occurred - challenges the basis for the Division’s denial of the permit renewal on the grounds that SWI “engaged in a history of noncompliance with the permit, applicable regulations, and the COBC.” This is an appropriate issue for an adjudicatory hearing.

The fourth issue identified in the hearing request – whether pharmaceuticals constitute medical waste – is a legal question that could be relevant to whether SWI is required to comply with the Division’s directives regarding the treatment and disposal its remaining pharmaceuticals, based on the Division’s contention that SWI no longer has a valid permit to conduct those activities on-site.³³ Moreover, the Division did not object to including this issue within the scope of a hearing in this case. This issue is an appropriate issue to addressed in a hearing.

The second and third issues in SWI’s hearing request – whether the COBC is illegal, and thus, whether the civil penalties and assessments in the COBC are also illegal – are outside the scope of decisions subject to an administrative appeal under 18 AAC Chapter 15. The hearing procedures in that chapter apply to decisions to approve, deny, reissue or revoke specific types of permits, including waste management and disposal permits – not collateral attacks on long-past COBCs, such as the one in this case, which was negotiated and entered into by both parties, and applies to and is binding on the parties by its express terms. The appeal rights extended to SWI were rights to appeal the permit denial, not the COBC.

³³ It does not appear that SWI’s permit was administratively continued, or that SWI has sought a stay of the Division’s decision to deny its permit renewal application during the pendency of the adjudicatory hearing proceedings.

It should be noted, nonetheless, that in resisting a particular allegation that SWI violated a term of the COBC, SWI is not precluded from arguing that the term is being misconstrued or misapplied by the Division. This could encompass an argument that a particular provision would be illegal if construed the way the Division proposes to construe it. Any such argument would be incorporated in a defense to Hearing Issue 1.

C. The requirements of 18 AAC 15.200(d) (required content)

Finally, the hearing request needs to demonstrative a basis for standing under 18 AAC 15.200(d). Specifically, the request must show (1) the requesters are directly and adversely affected; (2) the nature of the requesters' interest; (3) whether that interest is protected by the applicable statutes and regulations; and (4) the extent to which the decision directly and substantially impairs those interests.

Here, the hearing request explains that the denial of SWI's permit renewal application has affected their ability to earn a living. As an entity subject to regulation under the solid waste management regulations in 18 AAC Chapter 60, there can be no doubt that SWI's interests are directly and substantially impacted by the decision to deny renewing its permit.

Because SWI submitted a timely hearing request containing the required information and made a sufficient showing of standing, the Commissioner should grant the request for a hearing.

IV. Hearing

A hearing may take the form of either briefs or an evidentiary hearing to gather additional evidence through testimony.³⁴ SWI did not clarify whether it was seeking a hearing on the record and briefs, as opposed to an evidentiary hearing. Based on the materials submitted to date, however, it appears that at least one of the contested issues (whether violations the Division alleges as a basis for its denial of the permit renewal actually occurred) could present factual questions for which an evidentiary hearing may be appropriate. A final determination as to whether an evidentiary hearing, or a hearing on the record and briefs, is appropriate in this case

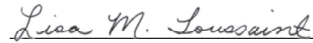
³⁴ 18 AAC 15.220(b)(1).

will be made after the agency decision record is filed. The hearing should cover the following issues presented by SWI in its hearing request, as rephrased here for clarity:

- (1) Because the Division's reason for denying the permit renewal application is an alleged history of noncompliance by SWI, the existence of those violations will be determined through the hearing process. Evidence may need to be taken independent of the COBC, since the COBC contains no admissions.
- (2) Argument will be heard on whether the SWI's pharmaceuticals constitute medical waste, and whether this issue is relevant to the legality of the Division's directive to SWI regarding the treatment and disposal of its remaining pharmaceuticals.

The Administrative Law Judge will set a schedule for the provision of the agency decision record to the parties and a briefing schedule after the time to intervene has expired.

Dated: July 12, 2024
(after deliberation and consideration
by the Commissioner)



Lisa Toussaint
Administrative Law Judge

Dated: July 15, 2024

 Digitally signed by Emma Pokon
Date: 2024.07.16 08:21:26 -08'00'

Emma Pokon
Commissioner

Certificate of Service: I certify that on July 16, 2024, this Notice of Assignment was distributed as follows: James and Nancy Oliver (by mail & email); Masha Kazakova, AAG (by email); Dept. of Law Central Email. A courtesy copy was provided to: Gary Mendivil (by email), Julia Schweminksi (by email), Christian Faatoafe (by email), and Emma Pokon (by email).

By: *Eric Bjelland*
Office of Administrative Hearings