

IN THE ALASKA PUBLIC OFFICES COMMISSION

PEBBLE LIMITED PARTNERSHIP,	)	
PEBBLE MINES CORP., and RESOURCES	)	
DEVELOPMENT COUNCIL,	)	
Complainants,	)	
	)	
vs.	)	OAH No.: 09-0231-APO
	)	
RENEWABLE RESOURCES COALITION,	)	APOC Case Nos.: 09-01-CD
INC., AMERICANS FOR JOB SECURITY.	)	09-04-CD
ALASKANS FOR CLEAN WATER, INC	)	09-05-CD
and ROBERT B. GILLAM,	)	09-06-CD
Respondents.	)	

**BRIEF OF AFCW AND ROBERT B. GILLAM REGARDING  
PAYMENT AMOUNT FOR CONSENT DECREE**

For the reasons stated herein, AFCW and Robert B. Gillam (“Respondents”) believe that an amount no greater than \$60,000 is appropriate to resolve this matter.

**I. DISCUSSION**

**A. The Amount Is Appropriate When Compared With Maximum Penalties  
Applicable To The Remaining Allegations.**

The APOC Staff and Respondents have calculated the maximum penalties permitted by statute, based on the premise that the remaining allegations can be proven and upheld on appeal.<sup>1</sup> The Staff calculated that number to be \$170,750 and, due to a slightly different methodology, Respondents calculated the maximum to be \$146,400.<sup>2</sup> Accordingly, the proposed \$60,000 settlement amount is either 35% or 41% of the *maximum* possible penalties. Such a ratio is appropriate, for the reasons discussed later in this brief.

The current APOC regulations authorize only much smaller maximum amounts.<sup>3</sup> Applying the regulations, the Staff’s approach would yield a maximum amount of \$34,150, while Respondents’ method yields a maximum of \$29,280.<sup>4</sup>

<sup>1</sup> Respondents strongly dispute that the allegations will be proven.

<sup>2</sup> See January 28, 2010 Brief’s filed by Staff and Respondents, as well as February 1, 2010 Brief filed by co-respondent, RRC The differences in these amounts are primarily attributable to the Staff’s position that Mr. Gillam faces *four* separate allegations, and Respondents’ position that the Staff’s allegations actually only encompass *two* alleged reporting violations.

<sup>3</sup> As discussed in Respondents’ prior brief, 2 AAC 50.399 provides for a maximum penalty of only \$10 per day for the remaining allegations.

Thus, based on the maximum penalties, payment of no more than \$60,000 is appropriate.

**B. The Amount Is Appropriate In Light Of The Applicable Civil Mitigation Criteria.**

As discussed in Respondents' prior brief, application of APOC's civil penalty Mitigation Criteria requires a reduction from the maximum in this proceeding.<sup>5</sup> Where, as here, regulated parties have cooperated fully with the investigation there is particular reason to apply the mitigation factors.

First, the "inexperienced filers" criterion qualifies all three respondents for a 50% reduction.<sup>6</sup> Second, Mr. Gillam is eligible for up to a 100% reduction of the penalties applicable to his remaining allegations. The evidence demonstrates, and the Staff does not dispute, that Mr. Gillam suffered a "personal emergency or incapacitating illness" in the summer of 2008 which prevented filings. This would justify a total or partial reduction of the potential payment of up to \$29,800.

APOC's Mitigation Criteria specifically require that these reductions be used in conjunction with one another. Therefore, applying both of these mitigating factors would reduce the total maximum amount to \$58,300.<sup>7</sup> If the regulations are followed, the payment would be reduced to only \$11,660. Considering the Mitigation Criteria, the proposed \$60,000 amount is appropriate.

**C. The Amount Is Appropriate Because It Correlates Directly With The AJS Settlement Already Approved By APOC.**

Former respondent, Americans for Job Security ("AJS"), settled its involvement in this matter on terms very similar to those in the proposed consent decree, with a payment of \$20,000.<sup>8</sup> AJS is alleged to have participated in many of the same transactions which form the basis of the allegations against Respondents. Therefore, the AJS settlement is the most

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<sup>4</sup> The law requires that an agency must apply applicable law including properly adopted regulations and the failure to do so is an abuse of discretion. *See* AS 44.62.570(b) and *Manthey v. Collier*, 367 P2d 884 (Alaska 1962).

<sup>5</sup> *See* Mitigation Criteria at 1 "...staff will consider the mitigation criteria described below." (emphasis added).

<sup>6</sup> All three remaining respondents qualify as "inexperienced filers" under the Criteria's definition in that it is beyond dispute that all were "in their first year of filing disclosures."

<sup>7</sup> \$146,400 – 29,800 (excused due to medical emergency) = \$116,600 (reduced by 50% due to first time filer status) = \$58,300.

<sup>8</sup> This settlement was approved by APOC on September 24, 2009.

germane comparison to make when considering the appropriateness of the settlement amount for the remaining respondents.

The Staff claimed that AJS made three prohibited pass-through donations to AFCW in 2008. AJS faced a maximum penalty of \$46,450.<sup>9</sup> The \$20,000 payment by AJS represented 43% of the total maximum that could have been imposed. This ratio correlates very strongly with the amount proposed by Respondents. As discussed above, \$60,000 represents 41% of the potential maximum for the remaining allegations. Because the APOC determined that such a ratio was appropriate to settle with AJS, it is appropriate to settle the remaining allegations.

Additionally, since \$20,000 was adequate payment as to one party, then \$60,000 is proportionally adequate to settle with the remaining three. AJS participated in the same conduct alleged against the remaining respondents. It is fair and equitable to allow AFCW, Mr. Gillam, and RRC to settle the remaining allegations for a payment that amounts to \$20,000 each. There is no basis for, nor goal to be served by, subjecting the remaining respondents to such significantly disparate treatment.

**D. The Amount Is Appropriate When Compared With The Staff Costs Actually Attributable To Investigating The Remaining Allegations.**

The APOC has requested information about the costs incurred in this proceeding. Respondents believe that such costs are not an appropriate way to calculate a proposed settlement, and the Staff has taken this same position in other proceedings.<sup>10</sup> However, assuming that the APOC may consider cost data, Respondents have prepared the attached spreadsheet showing appropriate reductions in the asserted costs. *First*, while the Staff's spreadsheet shows costs of \$198,000, this amount is not directly attributable to this proceeding, nor to Respondents.<sup>11</sup> Most of the time incurred by staff was by salaried employees, who would have been paid regardless of this matter. *Second*, the Staff spent considerable time on the "Gillam Group" allegations but those were dismissed by the APOC in mid November.<sup>12</sup>

<sup>9</sup> These three transactions subjected AJS to potential maximum penalties as follows: 1) June 20 transaction: \$50 per day x 332 days = \$16,600; 2) July 15 transaction: \$50 per day x 307 days = \$15,350; and 3) August 1 transaction: \$50 per day x 290 days = \$14,500.

<sup>10</sup> In the AAMS/CAP matter, counsel for the staff stated at the hearing on January 29, 2010, that costs incurred was "not an appropriate metric" to determine a settlement amount. It is also worth noting that the authority to recover costs arises only after a disputed hearing at which a determination of a violation has been made. See AS 15.13.390(b).

<sup>11</sup> See Exhibit 1, spreadsheet excluding costs not attributable to respondents.

<sup>12</sup> This allegation involved the contentions that the actions of four individuals meeting to discuss, draft and promote getting a ballot measure on the ballot and to work to oppose the proposed Pebble Mine made them a

This theory took up at least one-half of the June 4, 2008, Staff Report and *all* of the August Staff Report. It was the subject of motions to dismiss. All costs incurred prior to the dismissal of the “group” allegations should therefore be discounted by at least 50%. *Third* despite the agreement of the parties to settle this matter, they were ordered on October 15, 2009 to litigate pending dispositive motions. Costs incurred after this date at the direction of the APOC should not be imputed against Respondents. Applying these three adjustments shows actual costs related to this matter were, at most, \$52,325.00.

Staff has agreed that Respondents litigated their positions in good faith. They also have prevailed in part by having some allegations and parties dismissed. This litigation has also advanced a body of law which will provide additional clarity to future filers.

Finally, as discussed above, AJS has already paid \$20,000 – meaning only \$32,325.00 in attributable costs remain. Respondents’ proposed payment of no more than \$60,000 is appropriate because it is 186% of the remaining costs.

**E. The Amount Is Appropriate In Light Of Past APOC Sanctions And Is Sufficient To Deter Future Conduct.**

Respondents incorporate by reference the portion of RRC brief’s demonstrating the proposed payment is appropriate in light of past APOC sanctions and provides sufficient deterrence.

**F. The Commission, Like The Courts, Should Encourage Reasonable Settlements.**

As discussed in RRC’s brief, the Commission should encourage respondents to cooperate with its investigations and encourage reasonable settlements of disputed matters. Respondents incorporate by reference these arguments from RRC’s brief.

**II. CONCLUSION**

A payment of no more than \$60,000 is appropriate given the cooperation and good faith conduct of the respondents, the applicable mitigation criteria, the close correlation to the amount of the AJS settlement and the costs attributable to this investigation. Such an amount would be among the largest amounts ever assessed by APOC and therefore would significantly deter similar conduct by others. The amount asserted by the Staff is not appropriate based on the cooperation by the Respondents, the amount assessed against AJS and other factors as described above. Respondents therefore respectfully request that the APOC require a payment

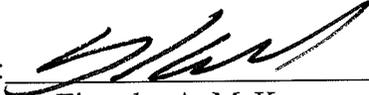
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“group” under Alaska law. The Commission properly rejected the staff interpretation of “group” and dismissed this allegation.

of no more than \$60,000 to resolve this proceeding under the terms of the parties' agreed-upon consent decree.

DATED this 22<sup>nd</sup> day of February, 2010, at Anchorage, Alaska.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 22<sup>nd</sup> day of February, 2010, a true and correct copy of the foregoing document was served on the following via:

**Email and Hand-Delivery**

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**Appropriate Adjustments to Costs**  
**Adjustments to Claimed Costs Related to 09-01-CD**

These are the total claimed costs by month as provided by Counsel for APOC Staff:

	April	May	June	July	August	September	Apr-Sept	October	November	December	January	Oct-Jan	Total
Hearing Officer	\$634.50	\$2,754.00	\$2,511.00	\$1,232.50	\$507.50	\$9,657.00	\$17,296.50	\$5,655.00	\$12,629.50	\$594.50	\$1,363.00	\$20,242.00	\$37,538.50
Overtime Berliner	\$432.92	\$2,684.77	\$1,581.55	\$187.01	\$1,894.77	\$171.12	\$6,952.14	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$6,952.14
Regular Time Berliner	\$2,269.50	\$4,332.68	\$4,511.90	\$4,110.53	\$4,604.38	\$2,208.35	\$22,037.34	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$22,037.34
Overtime Wilson	\$1,108.49	\$6,169.12	\$861.16	\$0.00	\$127.76	\$0.00	\$8,266.53	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$8,266.53
Regular Time Wilson	\$2,354.50	\$4,473.55	\$4,680.46	\$3,879.25	\$4,290.40	\$0.00	\$19,678.16	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$19,678.16
Overtime Greva	\$550.24	\$3,313.60	\$1,115.68	\$0.00	\$0.00	\$0.00	\$4,979.52	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$4,979.52
Regular Time Greva	\$1,976.00	\$3,754.40	\$3,746.78	\$1,264.97	\$1,110.27	\$0.00	\$11,852.42	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$11,852.42
AG staff B Page	\$317.16	\$268.36	\$292.76	\$0.00	\$0.00	\$0.00	\$878.28	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$878.28
AG Tom Dosik	\$5,367.12	\$13,722.75	\$8,538.60	\$13,111.38	\$15,720.30	\$3,746.11	\$60,206.26	\$6,488.00	\$10,301.79	\$9,432.00		\$26,221.79	\$86,428.05
NA													
NA													
Total Costs	\$15,010.43	\$41,473.23	\$27,839.89	\$23,785.64	\$28,255.38	\$15,782.58	\$152,147.15	\$12,143.00	\$22,931.29	\$10,026.50	\$1,363.00	\$46,463.79	\$198,610.94

**Appropriate Adjustments**

1) Eliminate Regular Time for APOC Staff since they would have been paid regardless of this case:

Total Costs from above Spreadsheet

Total "Regular Time" for APOC Staff (Berliner, Wilson and Greva)

Total Costs less Regular Time which would have been paid regardless

2) Eliminate Costs related to "Gilliam Group" Allegations since those were dismissed by Commission on November 18, 2009

Total Costs (less "Regular Time" for staff) from above Spreadsheet from inception of case to end of November

Fifty Percent of above line (at least 50% of the work until dismissal related to "Gilliam Group" allegations.

Total Costs (less "Regular Time" for staff and less costs related to Gilliam Group allegations)

3) Eliminate Costs Incurred after rejection of prior settlement agreement since those costs were incurred at APOC direction

Costs Incurred after October 15 when APOC rejected prior consent decree (25% of October, 50% of November, 100% of rest)\*

Total Costs (less "Regular Time", "Gilliam Group" costs and costs after rejection of consent decree)

**Total costs after above adjustments**

Less Payment made by AJS pursuant to Consent Decree approved by APOC on 9/24/09

**Remaining Costs after AJS payment**

**Payments and Proposed Payments**

AJS Payment

Proposed Payment by RRC, AFCW and Gilliam

**Total of AJS and Proposed Payment**

**Proposed Payment as percentage of Remaining Costs after AJS Payment**

**186%**

\$198,610.94  
 -\$53,567.92  
 \$145,043.02  
 \$133,653.52  
 -\$66,826.76  
 \$78,216.26  
 -\$25,890.90  
 \$52,325.37  
 \$52,325.37  
 -\$20,000.00  
**\$32,325.37**

\$20,000.00  
 \$60,000.00  
**\$80,000.00**

\* For October and November 50% of the costs was deducted on line 27. The denial of the consent decrees was on Oct. 15 so this line includes half the remaining half (25%) of October's costs, the remaining 50% of Nov. costs and all of Dec. and Jan. costs