

**STATE OF ALASKA
ALASKA OIL AND GAS CONSERVATION COMMISSION
333 W. 7th Ave., Suite 100
Anchorage, Alaska 99501-3539**

Re: THE PETITION OF GREENPEACE,)
INC., for Rehearing of Approval of)
Permit to Drill No. 200-211 (API No.)
50-029-22996-00).) **May 9, 2001**

ORDER DENYING REHEARING

In its Order Granting Rehearing for Limited Purpose and Denying Request for Stay, the Commission afforded Greenpeace, Inc. ("Greenpeace") and BP Exploration (Alaska) Inc. ("BP") the opportunity to brief the question of whether Greenpeace has the right to apply for rehearing of the Commission's approval of an application for a permit to drill. The Commission noted that after consideration of the arguments presented by Greenpeace and BP on that issue, "the Commission will determine whether it may hear Greenpeace's petition on the merits and will proceed accordingly." Having now considered the briefs filed by Greenpeace and BP in this matter, the Commission declines to rule on what might be called this "standing" issue but instead denies rehearing on the merits.

I. Is Greenpeace a "Person Affected" under AS 31.05.080(a)?

AS 31.05.080(a) provides, in relevant part:

Within 20 days after written notice of the entry of an order or decision of the commission . . . a *person affected by it* may file with the commission an application for the rehearing in respect of the matter determined by the order or decision, setting forth the respect in which the order or decision is believed to be erroneous.

(Emphasis supplied.) Greenpeace asserts that it is affected by the challenged permit approval because of its interest in use of public resources such as fish, wildlife, marine mammals, and water that may be harmed from a well blowout, aquifer contamination, drilling mud spills, or other failures. In addition, a Greenpeace member asserts that his "navigational, scientific, recreational and aesthetic use of the area [in the vicinity of the Northstar project] is currently, and was, adversely affected by Northstar oil and gas activities that blocked [his] access to navigable waters, and impaired [his] ability to engage in the activities, or to use public resources."

As a preliminary observation, Greenpeace appears to have an exaggerated notion of the legal criteria that guide the approval or disapproval of an application for a permit to drill. Under AS 31.05.090, the issuance of a permit to drill is mandatory unless "the drilling of the well is contrary to law or a regulation or order of the commission, or unless the person is in violation of a commission regulation, order or stipulation pertaining to drilling, plugging or abandonment of a well." So long as the proposed drilling complies with applicable legal requirements, the Commission has no authority to deny a permit on the ground that the drilling activities may impair access to navigable waters, adversely affect

someone's recreational use of the area, or even pose a residual risk to "remarkable and unique" public interest resources.¹ Those concerns, while certainly legitimate, are addressed in other forums, such as the decisions of the Department of Natural Resources regarding oil and gas lease sales and plans of operation and the decisions of local government regarding land use.

Nonetheless, it cannot be denied that in a practical sense, the asserted interests of Greenpeace and its members could potentially be affected by an erroneous permit decision on the part of the Commission. The question is whether Greenpeace is "affected" *in a legal sense*: i.e., whether AS 31.05.080(a) is intended to allow persons besides the permit applicant (and perhaps others owning interests in the affected property) to re-open Commission decisions on permits to drill.²

Perhaps because of a paucity of pertinent authority, the briefing provided to the Commission is less informative on this question than had been hoped. The Commission remains dubious that AS 31.05.080(a) is intended to apply to members of the public or entities such as Greenpeace that do not claim an ownership interest in directly affected property. Nevertheless, the Commission is hesitant on this record to rule as a matter of law that such persons may never qualify to obtain rehearing of a permit decision. For purposes of this order, the Commission assumes without deciding that Greenpeace has the right under AS 31.05.080 to request rehearing.

II. Was the Commission Required to Undertake a Second Consistency Review under the Alaska Coastal Management Program?

One ground on which Greenpeace seeks rehearing of the Commission's permit decision is the assertion that the Commission has failed to comply with the requirements of the Alaska Coastal Management Program ("ACMP"). The Commission disagrees.

Because multiple authorizations from state "resource agencies" as well as federal agencies were required before BP could begin drilling (or conducting other activities under the Northstar Project), an ACMP consistency review process was coordinated by the Office of Management and Budget, Division of Governmental Coordination. See AS 44.19.145(a)(11); 6 AAC 50.030. Pursuant to this consistency review, in which the Commission participated (see Appendix 1 to this order), the Division of Governmental Coordination made a final determination, on February 4, 1999, that the Northstar Development Project is consistent with the ACMP. See Exhibit 4 to Briefing on Greenpeace's Right to Petition for Rehearing.

It is clear from the Project Description and other portions of the consistency determination documents that this consistency determination covers the drilling of wells such as that whose permit Greenpeace seeks to challenge on rehearing here. The project description stated, in relevant part:

Twenty-three wells will be drilled initially. One well will be a Class I disposal well for non-hazardous and Resource Conservation and Recovery Act

¹ To the extent that the Alaska Coastal Management Program has supplemented the Commission's authority, such considerations might be addressed under that additional authority. This question is considered below.

² No doubt every government decision has the potential to affect the public or members of the public (which probably explains why the government is involved in the first place). For example, an improvidently issued driver's license might lead to vehicle collisions on the part of an unqualified driver. As far as the Commission is aware, however, the Division of Motor Vehicles is not required to accept petitions from members of the public to rehear decisions to issue a driver's license.

(RCRA) exempt waste generated by drilling and camp activities. Fifteen wells will be for oil production, and 7 wells will be for gas injection into the reservoir to boost production.

Id. at 2-3. Moreover, Attachment C to the consistency determination, to which the Commission contributed, includes an extensive analysis of the risk of blowouts during the drilling of wells and a decision to impose seasonal restrictions on drilling. *See* Appendix 2 to this order.

The basis for Greenpeace's contention that a second consistency review must be performed for these same wells appears to be the fact that the Commission's permits to drill are not listed in the February 4, 1999, consistency determination as among the state and federal authorization to which "[t]his final consistency determination applies." Exhibit 4, *supra*, at 3. This omission is immaterial, however. A consistency determination covers *activities* or *projects*, not permits. The listing of federal and state authorizations is presumably provided as a convenience to the permitting agencies. In relevant part, 6 AAC 50.990(a)(6) defines "consistency determination" as

(A) a document that

(i) contains a brief description of the *project* under review and the scope of the project;

(ii) states whether the *project* is consistent, consistent with stipulations, or is not consistent, and provides a brief statement of the reasons for that determination;

(Emphasis supplied.) "Project" in turn is defined as "an *activity or use* that will be located in or may affect the coastal zone of the state and that is subject to consistency review under 16 U.S.C. 1456(c)" 6 AAC 59.990(a)(22) (emphasis supplied).

Thus, there is no doubt that the drilling of wells as part of the Northstar Development Project has been determined to be consistent with the ACMP. Assuming without deciding that the Commission is required under the ACMP to ensure that the activity proposed to be permitted under AS 31.05.090 is consistent with the ACMP before a permit to drill is issued, the Commission has satisfied that requirement here by not issuing Northstar Project permits to drill before the Division of Governmental Coordination made its final consistency determination for that project. Greenpeace, of course, had abundant opportunity to participate in the public process by which that final consistency determination was reached.

III. Was Greenpeace Entitled to Notice of the Permit Application?

In accordance with the Commission's long-standing practice under and interpretation of AS 31.05.090, the permit to drill in this case was issued without public notice or other notice to persons besides the permit applicant.³ Greenpeace asserts that this violated its due process rights as well as the provisions of AS 31.05.050(b).

The Commission believes the due process claim is without merit. Due process protections are not triggered by every government action, but only by those government actions that potentially impair a

³ Pursuant to 20 AAC 25.537(a), following issuance of the permit the Commission published the fact that the permit had been issued and certain information about the well in question.

person's property or liberty. Greenpeace has not claimed any property or liberty interest within the purview of the due process clause that might be at stake in the decision to approve the permit to drill in this case. *See State, Dept. of Natural Resources v. Universal Education Society, Inc.*, 583 P.2d 806 (Alaska 1978).

The statutory provisions cited by Greenpeace are inapposite. AS 31.05.050(b) does not address when notice must be given but rather specifies *how* notice is to be given when notice is "required by this chapter." AS 31.05 requires notice for well spacing exceptions, AS 31.05.100(b), and for compulsory unitization, AS 31.05.110(b), but not for permits to drill, AS 31.05.090.

Seemingly more pertinent to Greenpeace's concern is AS 31.05.060(b), which in relevant part provides:

Any action by the commission under this chapter that has application to a single well or single field need not comply with the provisions of AS 44.62.330 – 44.62.630 [the adjudication provisions of the APA], but shall be performed in accordance with regulations of the commission designed to afford persons affected by the action notice and an opportunity to be heard.

Contrary to Greenpeace's claim, the Commission has promulgated notice and petition regulations. *See* 20 AAC 25.540 (general provisions for hearings on petitions ("request[s] to issue an order affecting a single well or a single field")); 20 AAC 25.055(d) (specific notice provisions for spacing exceptions); 20 AAC 25.252(i) (notice for underground disposal or storage). These regulations do not, however, cover applications for permits to drill. Permits to drill are addressed in 20 AAC 25.005, which does not mandate notice. The question is whether the Commission is required to provide notice of those applications to others like Greenpeace. The Commission believes the answer is no.

Permits to drill are governed by a specific statutory provision that contemplates a limited and abbreviated administrative process. AS 31.05.090 *requires* the Commission to issue a permit to drill in the absence of a violation on the applicant's part. And it requires the Commission to act "promptly" "upon receipt of notification and fee" from the applicant. These provisions do not appear to be consistent with public notice or any other extended administrative process for deciding on applications for permits to drill. The Commission's practice has in fact been to act promptly on such applications, typically issuing a permit less than two weeks after receiving the application. Sometimes, as where an operator decides to substantially change the drilling objective (bottom-hole location) after beginning drilling operations, an even more rapid decision on an application is needed to avoid keeping a drilling rig in costly stand-by status. This would not be possible if public notice were required.

Furthermore, as pointed out in the Commission's earlier order, under 20 AAC 25.537 almost all of the material submitted in support of an application for a permit to drill must be kept confidential. This would make participation in the permit decision by others besides the applicant awkward at best and next to meaningless at worst.

The Commission believes, then, that the legislature did not intend the issuance of permits to drill under AS 31.05.090 to be subject to advance notice to members of the public. If AS 31.05.060(b) applies at all to those permits, the permit applicant is the only person deemed to be "affected."

It is worth noting in this connection that when the legislature enacted AS 31.05.060(b) (Sec. 7, ch. 160, SLA 1978), it was with the purpose of *expediting* the decision-making process in matters concerning a single well or single field by exempting those matters from the adjudication provisions of the Administrative Procedure Act ("APA"). Speaker Malone, a co-sponsor of the legislation, explained in

committee meeting that it was "designed to be an 'anti-red-tape' provision for special consideration of a single field." H. Fin. Comm. Minutes, Apr. 27, 1978. See Appendix 3 to this order.

A lot of times, he advised, it isn't in the best interest of the State to go through the Administrative Procedure Act for a minor situation. He stated there ought to be simplified procedures in instances involving a single well or field.

Id.

By comparison, the APA itself requires notice only to "the parties," AS 44.62.420, who consist of "the agency, the respondent, and a person, other than an officer or an employee in an official capacity, who has been allowed to appear in the proceeding," AS 44.62.640(b)(4). Certainly by enacting an "anti-red tape" provision the legislature did not intend the concept of "persons affected by the action" under AS 31.05.060(b) to be *broader* than the very limited class of persons entitled to notice in APA adjudications. In the case of an application for a permit to drill, the equivalent of the "respondent" is the applicant. See 1978 Inf. Op. Att'y Gen. (Jan. 31; 663-78-0446), 1978 WL 18334, Appendix 4 to this order.

IV. Has Greenpeace Demonstrated Any Substantive Basis to Revisit the Commission's Decision to Issue the Permit to Drill?

Greenpeace asserts that the Commission failed in various respects to comply or to require BP to comply with substantive requirements of the Commission's regulations. However, Greenpeace has provided no basis for its conclusory assertions, and the Commission is aware of none. In addition, some of the regulations Greenpeace cites do not apply at all to an application for a permit to drill but instead apply to post-drilling operations, some of which have their own review and approval procedures. For example, Greenpeace complains that the Commission "failed to require abandonment plans in accordance with 20 AAC 25.105," but that regulation requires an operator to submit and obtain Commission approval of such a plan "before work is begun to abandon a well," not at the time an application for a permit to drill is made.

Greenpeace also asserts that the Commission failed to "conduct an analysis of coastal impacts from the well drilling, well operations, the underground injection well, or of the geophysical hazards associated with well-drilling and operation." As the Commission noted in its earlier order, coastal impacts were addressed as part of the ACMP consistency review and mitigation of coastal impacts are also implicitly addressed in the Commission's regulations. There is no further requirement for the Commission to analyze coastal impacts. Contrary to Greenpeace's assertion, geophysical hazards were considered by the Commission in reviewing the permit to drill. See 20 AAC 25.005(c)(4).

Accordingly, the Commission finds no basis for rehearing with respect to its permit decision in this matter.

V. The Commission Is Always Open to Receiving and Considering Information Bearing on Compliance or Non-compliance with Applicable Laws, Regulations, Orders, or Permit Conditions.

Finally, it is worth repeating what was said in the Commission's earlier order. Whether or not the AS 31.05.090(a) rehearing procedures apply or are invoked in a given situation,

the Commission itself has continuing authority to consider, investigate, and act on information received from whatever source, concerning compliance with the

statutory and regulatory provisions that the Commission administers. See, e.g., AS 31.05.030(b); 20 AAC 25.535. . . . Consequently, any material information that Greenpeace [or others] may choose to supply the Commission, whether through a rehearing proceeding if held or by informal means, will be given due consideration.

NOW THEREFORE IT IS ORDERED:

The petition for rehearing is **DENIED**.

DONE at Anchorage, Alaska, this 9th day of May 2001.



Cammy Oechsli Taylor

Cammy Oechsli Taylor, Chair
Alaska Oil and Gas Conservation Commission

[Signature]

Daniel T. Seamount, Jr., Commissioner
Alaska Oil and Gas Conservation Commission

Julie M. Heusser

Julie M. Heusser, Commissioner
Alaska Oil and Gas Conservation Commission

I certify that on May 9, 2001, a copy of the above was mailed to each of the following at their addresses of record:

Nancy S. Wainwright
BPXA Attorneys, Jeff Feldman/Susan Orlansky

Jody J. Colombe
Jody Colombe, Executive Secretary

This decision is the final order of the Alaska Oil and Gas Conservation Commission. Any Appeal to Superior Court must be brought within 30 days from the date that this decision is mailed or otherwise distributed.