

## Alaska Oil and Gas Association

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*Marilyn Crockett, Executive Director*

November 30, 2007

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Alaska Oil and Gas Association Comments to  
ADEC Proposed Revisions to the Oil and Other  
Hazardous Substances Pollution Control  
Regulations in 18 AAC 75

Dear Mr. Janes:

The 17 members of the Alaska Oil & Gas Association (AOGA) account for the majority of oil and gas exploration, development, production, transportation, refining and marketing activities in the state. We appreciate the opportunity to comment on the proposed regulation changes to Title 18 of the Alaska Administrative Code, Chapter 75, Article 3, (18AAC75 Article 3), Discharge Reporting, Cleanup and Disposal of Oil and Other Hazardous Substances with updates the Cleanup Levels Guidance and Cumulative Risk Guidance. We would like to thank ADEC for granting a 30-day extension to review these regulations.

We would also like to commend ADEC in its efforts to present in a very open and informal forum a comprehensive review of these proposed regulations and comments received to date at the Alaska Association of Environmental Professionals held on November, 2007. It's open and transparent meetings like these that industry would appreciate seeing more of within Alaska's environmental and regulatory community.

AOGA has the following concerns and recommendations:

**Cost versus Risk:** The concept of “maximum allowable concentration regardless of risk” being applied to all sites in Alaska regardless of site specific conditions is introduced. This concept fails to take into account such factors as remoteness and logistics of a site, potential receptors and exposure pathways, future land use, depth to groundwater, depth to permafrost, cost to remediate versus risk mitigation, etc. We suggest that ADEC perform a cost versus risk analysis on a site-specific basis to determine the need to “protect, preserve, for the health and welfare...” on a site by site basis. We have also heard through various members that some ADEC staff apparently believes that the current regulations already require that and that this change only clarifies existing regulations. AOGA and its member companies have participated in the rewrite of these regulations since that project was begun in the 1994 and disagree with the statement that this significant change merely clarifies existing regulation. This new concept has never been in regulation. It is also contrary to: (1) past ADEC approvals; (2) the whole concept of risk based regulations; and (3) the underlying statutory requirements that mandate consideration of risk. This is discussed in more detail below.

**Petroleum in Soil as Pollution:** The proposed revision would designate a maximum concentration of petroleum hydrocarbon contamination in soil remaining onsite for site closure determination. Additionally, it would consider petroleum in soil above these maximum allowable concentrations as “pollution” under AS 46.03.900 regardless of risk. This would replace the existing section which allows for petroleum hydrocarbon in soil above the maximum allowable concentration to remain if the responsible party can demonstrate “that the petroleum hydrocarbon will not migrate and will not pose significant risk to human health, safety, or welfare, or to the environment.”

This proposed revision is inconsistent with DEC’s existing regulations and the Department’s statutory mandate. It is also inconsistent with US EPA risk based methodology which formed the underpinning of the 18 AAC 75 rewrite. The proposed definition of “pollution” is much broader than the statutory mandate discussed above. First, Alaska Statute 46.03.024, requires consideration of public comment on cost when considering how pollution should be defined. Second, AS 46.03.070 and the definition of pollution itself in AS 46.03.900(20), requires consideration of risk to public health, safety, or welfare, to human health or the environment when developing “pollution” standards. The Alaska Supreme court also agreed with this concept 33 years ago in *Strock v. State*, 526 P2d 3 (Alaska 1974). Simply put, Alaska Statute requires consideration of risk when defining pollution. The ADEC rulemaking on these regulations that occurred from 1995 – 1998 made that point very clear. The proposed regulation is not just inconsistent with this mandate, but violates it. Third, the proposed regulatory rewrite completely ignores the requirements of AS 46.03.826; 46.03.865; 46.03.900(9); AS 46.08.900(6); and AS 46.09.900(4) all of which define hazardous substance based on the concept of risk.

Next, the existing regulation under 18 AAC Section 75.340 requires that a responsible party propose soil cleanup levels based upon “an estimate of the *reasonable maximum exposure expected to occur* under current and future *site conditions*, and shall develop those cleanup levels using one of four cleanup methods. 18 AAC 75.340(a)(3) and (4) allows Methods 3 and 4 for the development of site-specific alternative cleanup levels which considers risk at the specific site, after evaluating contaminant concentrations and the reasonable exposure that is expected to occur at that site. This proposed revision, however, is inconsistent with the provisions of 18 AAC 75.340 in that it categorically dismisses risk and specific site conditions in designating maximum allowable levels of petroleum hydrocarbon which cannot be exceeded, if site closure is needed. There are many sites in Alaska which may exceed these maximum allowable levels for petroleum hydrocarbon in soil, but which do not pose any risk because a *reasonable maximum exposure* to human health and the environment *at that site* is not expected to occur. It should be noted that even US EPA has no published toxicity values for petroleum hydrocarbons and does not assess them as such. AOGA recommends that site-specific, risk-based cleanup levels for petroleum hydrocarbon in soil (and other hazardous substances) are the most rational basis for site closure determination.

**Site Closure:** As stated above, AS 46.03.900(20) defines pollution as “the contamination or altering of waters, land, or subsurface land of the state in a manner which creates a nuisance or makes waters, land, or subsurface land unclean, or noxious, or impure, or unfit so that they are *actually or potentially harmful or detrimental or injurious* to public health, safety, or welfare, to domestic, commercial, industrial, or recreational use, or to livestock, wild animals, bird, fish, or other aquatic life.” The same risk concept exists in the statutory definitions of hazardous substance. The proposed revision, which disregards risk, ignores the statutory mandate to include a risk determination of at least potentially harmful or detrimental or injurious to public health, safety, welfare, or to the environment before a finding of pollution can even be made.

This proposed revision is also problematic for AOGA in that we anticipate it would delay official site closure of sites in the current closure process or potentially reopen past risk based closures. The proposed revision implies (and ADEC staff have stated that it is the intent) that sites with petroleum hydrocarbon above the maximum allowable levels will not receive a site closure determination from DEC. Thus, it is likely that because of this proposed revision, a number of industry sites which have been remediated to applicable cleanup levels and which pose no risk to human health and the environment will be reconsidered.

AOGA recommends deletion of this proposed revision and to maintain instead the present version of the regulations which allows for the maximum allowable concentration to remain if a responsible person can demonstrate “that the petroleum hydrocarbon will not migrate and will not pose a significant risk to human health, safety, or welfare, or to the environment.” The provision was discussed for nearly five years in the mid 1990’s and was carefully crafted to comply with Alaska Statute.

**Migration to Groundwater:** In its effort to “clarify” the applicability of migration to groundwater levels, DEC is proposing to use a single statewide migration groundwater cleanup level for each contaminant. In this approach, DEC includes supra-permafrost groundwater as a potential contaminant migration pathway to nearby surface waters and adopts the most stringent groundwater levels (the over 40-inch zone) to Arctic sites. This change in methodology was “to provide more consistency in site management,” but eliminates one of the key technical benefits of the program – the ability to have different targets based on the wide range of climates existing across the state. The effect on the cleanup levels for sites is most dramatic in the Arctic.

While the ability to consider any site within Alaska under a single set of cleanup levels may appear to be simpler, particularly to the risk assessor, it is AOGA’s concern that eliminating the specificity of the cleanup levels based on biomes may in fact create more administrative oversight. By defaulting to the lowest value across the state, it is likely that the level of cleanup will intensify and the number of sites will increase. It also defaults from the sound technical basis that the Department argued so strongly for in its prior rulemakings on this subject. These increases will require more resources in staff time and funding to ensure closure of the sites for both ADEC and responsible parties. It is AOGA’s concern that the cost-benefit of this revision for the sake of simplicity with minimum added protection was not adequately considered. We suggest maintaining the migration to groundwater levels for two precipitation zones and leaving exempt the Arctic from these levels.

**Elimination of the ten-times rule:** This rule allowed the use of 10 times the concentrations in the cleanup levels for sites where the groundwater was non-potable. Elimination of this rule will have a similar effect to that discussed above for soil leading to site-specific risk evaluations, additional cleanup, or deed restrictions or notifications placed on groundwater beneath sites which in turn could impact property value. Although the ten-times rule is arbitrary, it allows for flexibility. AOGA recommends maintaining this rule.

**Elimination of Institutional Controls:** The proposed revision replaces the phrase “applicable cleanup levels” with “most stringent cleanup level protective of unrestricted use” to describe the levels that hazardous substances remaining at the site must be below in order for DEC to approve elimination of institutional controls. However, no definition of “most stringent cleanup level protective of unrestricted use” is provided, nor is it clear from the proposed revision how this cleanup level will be determined. This proposed replacement of terms effectively removes all cleanup levels that are not the most stringent from usability for site closure. Additionally, under the proposed revision, site closure can only be achieved if the most stringent cleanup levels protective of unrestricted uses are met, even if DEC concurs that higher levels do not pose a risk to human health or the environment. In other words, eliminating risk through Institutional Controls may not allow for site closure.

AOGA recommends deletion of this proposed revision and to maintain instead the present version of the regulations which allows for the elimination of institutional controls when residual hazardous substances at the site are determined to be below the applicable cleanup levels.

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Alaska Department of Environmental Conservation  
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**Site Closure:** No regulation or guidance document currently available appears to separately acknowledge the “closure/conditional closure” concepts. With site closure as the driving force behind all remediation in light of reducing health risks and minimizing costs, we believe that closure should be treated separately in regulation to further characterize this process and address concerns mentioned above such as the inclusion of remediation costs versus risk benefits and site-specific risk reduction considerations.

AOGA appreciates your consideration of our comments.

Sincerely,

A handwritten signature in cursive script that reads "Marilyn Crockett".

MARILYN CROCKETT  
Executive Director