ALASKA MINERS ASSOCIATION

121 W. Fireweed Suite 120 | Anchorage, Alaska | 99503 | 907.563.9229 | alaskaminers.org

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Brandon McCutcheon
Division of Mining, Land and Water
550 W. 7th Avenue, Suite 1070
Anchorage, AK 99501-3579
Submitted via e-mail: dnr.water.regulation@alaska.gov

Dear Mr. McCutcheon:

Thank you for the opportunity to comment on proposed changes to DNR's water management regulations, 11 AAC 93.

AMA is a professional membership trade organization established in 1939 to represent the mining industry in Alaska. We are composed of more than 1,400 members that come from eight statewide branches: Anchorage, Denali, Fairbanks, Haines, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. Our members include individual prospectors, geologists, engineers, suction dredge miners, small family mines, junior mining companies, major mining companies, Alaska Native Corporations, and the contracting sector that supports Alaska's mining industry.

The Alaska Miners Association has been closely following issues involving DNR's water management program: specifically, issues involving the reservation of water 11 AAC 93.141 - 147. We enthusiastically support the proposed changes to §146(b). The Association strongly believes that the right to manage water for Alaska's fish habitat belongs to state agencies, particularly the Alaska Department of Fish and Game. Unfortunately, the proposed new subsection §146(g) creates procedural rights that give special advantages to private parties with regard to water and fish habitat. Taken together, the changes proposed in the two paragraphs do not accomplish what we hope was the intended policy. Therefore, we cannot support these regulations. Unless DNR is able to eliminate the proposed new subsection §146(g), we believe the regulations that were noticed should not be adopted.

General Comments

The two most important comments that AMA has consistently made to DNR about the agency's instream flow program are that private parties should not hold a certificate of water, and that DNR misinterprets the statutory requirement concerning the need for a reservation of water.

The problem of private party certificate holders. With respect to the holder of a reservation of water, the statute may allow anyone to apply for a reservation (or IFR as they are commonly known). However, the statute is silent as to what person or organization should hold it. The statute allows DNR to determine the owner through analysis of the public interest. As a matter of policy, Alaska's fish belong to all Alaskans: not to an individual, an interest group, or even to a city, community, group or a specific Native Tribe. Decisions about fish habitat should be made by the Department of Fish and

Game, not by any of those other individuals or groups. We have reiterated this policy position to DNR many times and in many different ways. The potential for Alaskans to have to ask single-interest groups or people outside the state, about the level of protection our fish deserve is inappropriate.

DNR appears to implement this philosophy with the proposed change to §146(b). We enthusiastically support the change. Thank you.

However, the change is undercut by the new subsection §146(g). That subsection gives special rights to a private applicant which resemble those of certificate holder. What proposed subsection (b) improves, proposed subsection (g) degrades. As a pair, they are not an improvement over the present situation. The right for a private party to initiate an administrative or court proceeding beyond that of the general public is inappropriate and not an improvement over the current situation.

The need for a reservation. With respect to need, the Alaska Miners Association has long maintained that DNR practice with respect to evaluating instream flow applications has misinterpreted the statute.

The instream flow statute requires an application to identify a "purpose" for a reservation and, separately, to demonstrate the "need" for the proposed reservation. Statute and regulation clearly differentiate between these two requirements. "Need" and "purpose" exist in different parts of the statute. AS 46.15.145(a) lists four allowable purposes. For the applicant, it is literally a matter of checking a box. For all recent applications adjudicated by DNR – including those submitted by 3rd-party applicants or DF&G – the applicants checked the box and noted the purpose as "Protection of fish and wildlife habitat, migration, and propagation."

AS 46.15.145(c) requires DNR to issue a reservation if four conditions are satisfied.[1] The "need" requirement is one of these conditions. The requirement to demonstrate a "need" for a reservation is a significant, substantive obligation. It is in a different part of the statute than "purpose" and has a different meaning. DNR's regulations expand on this difference. One part of the regulation requires the applicant to simplify "identify the purpose" from a potential list of four purposes [11 AAC 93.142(b)(1)]. A different part of the regulation requires the applicant to "explain what need exists for the proposed reservation, including reasons why the reservation is being requested [§142(b)(3)]."[2] Another regulation requires an applicant to "identify physical, biological, water chemistry, and socio-economic data substantiating the need for and the quantity of water requested for the proposed reservation [§142(b)(8)]."

All recent DNR decisions include a sole sentence which discusses need. A typical sentence reads: "Sufficient flows are needed to support riverine habitats used by fish and to provide fluvial processes that maintain these habitats." This need statement only restates one of the four potential purposes. This or a similar statement is the only explanation in any recent application that purports to address the "need" for a reservation. There is nothing in any recent application to distinguish the particular reach of stream that is the subject of the application from any other waterbody in Alaska that contains salmon. The applicants' sole evidence of a need is this single statement that fish and fish habitat need

[1] The four requirements are: (i) the rights of appropriators will not be affected, (ii) the applicant has demonstrated that a need exists for the reservation, (iii) there is sufficient unappropriated water in the stream for the reservation, and (iv) the proposed reservation is in the public interest. AS 46.15.145(c).
[2] 11 AAC 93.142(b)(3).

sufficient water. This is, of course, true for every stream with fish. If this superficial, broad statement of need is legally sufficient, then an IFR is presumptively appropriate for every fish-bearing stream in Alaska.

This cannot be right, however, and the applicant's need showing is deficient as a matter of law. The legislature intended for the need demonstration to be a high bar requiring an applicant to "demonstrate" in detail why the State of Alaska should take the extraordinary step of imposing a property restriction on a stream that makes public water legally unavailable for other uses. The granting of a reservation should be rare, and DNR is remiss in its efforts to take the rigor out of the process by noticing reservations based on minimal showings of need.

While the proposed regulation changes make only limited reference to the need requirement, they unfortunately reinforce DNR's existing policy of ignoring the statute. This is true of the proposed changes to §142, §147(b), and §147(e). While the changes to these sections are minor, the Association strongly urges that any revision should address DNR's practice of reading the "need" section of the statute as a minor, ministerial requirement. Changes which reinforce DNR's current practice are not helpful.

Specific Comments – Proposed Changes to IFR Regulations

Propose change to 11 AAC 93.142. As indicated above, DNR has ignored the statutory and regulatory requirement that an IFR demonstrate an actual need. We have suggested a 3-part need test to determine whether an IFR should be adjudicated:

- Is another, more robust permit process considering the issue and therefore the IFR is unnecessary?
- Is it in the middle of nowhere, perhaps in an area is off limits to development and where nothing is going on, therefore the IFR is unnecessary?
- Or is no other permit process addressing the issue, presumably an urban sprawl situation therefore IFRs may be appropriate (and should be appropriately managed)?

In this regulation DNR is proposing to change the requirement that an applicant explain "what need exists" to explain "the purported need." As far as we can tell, the meaning is the same. But changing the regulation on this issue without acknowledging the more accurate interpretation of the statute is not progress. We do not support this change for that reason.

Proposed change to 11 AAC 93.146(b). By itself, this regulation is significant improvement in policy. It recaptures Alaskans control over the management of our natural resources. We appreciate DNR's understanding of the issue and wholeheartedly support the change. Thank you. Unfortunately, as paired with the change to §146(g), the changes together do not significantly change the current situation.

Proposed change to 11 AAC 93.146(g). The policy change proposed for §146(b) is retracted by this section. Private special-interest groups have a history of using the instream flow statutes to try to pre-empt a robust, effective state permitting process with a history of being able to protect our fish resources. When the AMA last looked at this issue, fully 85% of the private IFR applications were made only after a major development had been proposed, and usually only by copying the developer's

data. Giving such private parties the right to initiate administrative or judicial proceedings, or even giving them the right to participate beyond the rights granted to other Alaskans is wrong. The act of copying private data should not create rights beyond those of ordinary Alaskans. This policy is wrong. When paired together, we find the two sections are no help, and possibly worse than the current situation. The Alaska Miners Association strongly opposes the changes proposed in this new subsection of the regs. If DNR proposes to enact the proposed changes to §146(b) and §146(g) together, the Association opposes them both.

Proposed change to 11 AAC 93.146(c). Generally, water rights are first in right, first in time: the first application has a priority above later applications, irrespective of the date when DNR adjudicates them. That is the system outlined in AS 46.15.050.

The IFR statute has language which excepts a certificate of reservation from the scheme outlined in §050. Specifically, AS 46.15.145(d) reads "A reservation under this section does not affect rights in existence on the date the certificate reserving water is issued." In other words, for an IFR, if someone holds a water right, and then DNR issues a certificate of reservation, that certificate is not superior to the water right, whatever their application dates.

DNR is attempting, by regulation, to change the meaning of the statute. This is not legal.

AS 46.15.145(d) exists for a reason. It has value. Companies developing a project should not be forced to apply for a water right until they fully understand the water budget for the project. Then they may apply for the correct amount of water and understand how to structure their water needs in a manner which protects fish. Unfortunately, DNR's proposed change, if legal, would penalize this environmentally responsible method of proceeding. It creates the situation where a project opponent can copy the publicly available data and apply for an IFR, thereby gaining legal priority over water for the project. The developer is forced to keep environmental information from the public – a poor solution – or apply for the maximum amount of water they can, as soon as they can, in order to protect their options for using water. This too misleads the public. It also allows opponents to use a water right application that the agencies and the project knows is not final against the applicant as a fear-raising tool.

In short, the priority scheme in AS 46.15.145(d) exists for a reason. DNR should respect that reason rather than undermine the statutory intent. The Alaska Miners Association opposes the proposed change.

Proposed change to 11 AAC 93.147(a)(3). We view the proposed change as clarifying the regulation's meaning and have no objection.

Proposed change to 11 AAC 93.147(b) and (e). As describe above, DNR has not been correctly evaluating the need for a certificate of water. DNR's evaluations have been ignoring statutory requirements on this issue. The changes to §147(b) and (e) emphasize that DNR's review of a certificate to focus on the *original* purpose of the certificate. That purpose is wrong and ignores the statue. The Association does not agree with DNR's emphasis on that original purpose. DNR should be able to review certificates with a more enlightened view of the statute. DNR should focus on whether

this is an actual need, as opposed to the need was that was stated (or more likely not stated) originally. For that reason, the Association urges DNR to not adopt these changes.

Specific Comments – Other Proposed Regulation Changes

Proposed Changes to 11 AAC 93.115. DNR proposes to eliminate the need to tell applicants whose file it is closing about their appeal rights. We see no reason why this change is in the public interest.

Proposed Changes to 11 AAC 93.570(25). There are many single-family residences who have applied but not received a water right. The definition change suggested in (25) would seem to eliminate them from being an "appropriator of record" who deserves public notice or other procedural requirements. This seems wrong. The current definition, including applicants seems appropriate.

Thank you for the opportunity to comment.

Sincerely,

Deantha Skibinski
Executive Director