

From: [Deantha Skibinski](#)
To: [Program Support, DMLW \(DNR sponsored\)](#)
Subject: AMA comments on DNR Water Regulations
Date: Thursday, November 30, 2023 4:30:51 PM
Attachments: [AMA comments on DNR Water Regulations 2023.pdf](#)

You don't often get email from deantha@alaskaminers.org. [Learn why this is important](#)

CAUTION: This email originated from outside the State of Alaska mail system. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Our comments are attached. Thank you very much!

Deantha Skibinski
Executive Director
Alaska Miners Association
deantha@alaskaminers.org
cell/text: 907-317-6323



121 W. FIREWEED SUITE 120 | ANCHORAGE, ALASKA | 99503 | 907.563.9229 | ALASKAMINERS.ORG

November 30, 2023

Ms. Molly Benson
Alaska Department of Natural Resources
Division of Mining, Land, and Water
550 W 7th Ave Suite 1070
Anchorage, AK 99501
Submitted via email

Re: Notice and Supplemental Notice of proposed changes relating to water management in the regulations of the Department of Natural Resources (DNR)

Dear Ms. Benson:

The Alaska Miners Association (AMA) appreciates the opportunity to provide comments on DNR's proposed changes to water management regulations.

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, and major mining companies, Alaska Native Corporations, and the contracting sector that supports Alaska's mining industry.

We have reviewed the proposed changes for the following sections of the January 2021 regulations package:

11 AAC 93.115 Closure of an application for a water right
11 AAC 93.210 Temporary water use
11 AAC 93.220 Procedure for temporary water use
11 AAC 93.510 Public notice and meeting (for Critical Water Management Areas)
11 AAC 93.530 Effect of the order
11 AAC 93.970 Definitions

The proposed changes consist largely of cleanup and clarifying language that we believe are positive and beneficial, and we have no suggested edits or further comments on the changes.

In the Notice, DNR indicates it has opted to postpone proposed changes relating to applications and certificates for instream flow reservations. In the Questions and Answers materials, the Department indicates it plans to hold scoping meetings in 2024, which will involve an interactive process with multiple stakeholders. AMA has long engaged with the Department on this important issue, and we look forward to continuing to do so.



AMA's comments on the 2021 regulations package, in which we extensively detail our comments on the existing instream flow reservations regime, can be seen [here](#) for your reference.

Thank you for the opportunity to provide these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "DSK", is positioned above the typed name.

Deantha Skibinski
Executive Director

Bristol Bay Heritage Land Trust

Re: Comments on Proposed Changes to DNR Water Management Regulations

Dear Ms. Benson,

On behalf of the Bristol Bay Heritage Land Trust (BBHLT) please accept these comments on the proposed changes to the Alaska Department of Natural Resources (DNR) water management regulations, 11 AAC 93. Over the last fifteen years BBHLT has been engaged in a variety of efforts to assess and protect the waters that provide the spawning and rearing habit so important for the salmon that return to Bristol Bay. In that time BBHLT and others with support raised by BBHLT have added over 1300 stream miles to Alaska's Anadromous Waters Catalog, developed a regional stream temperature monitoring network, and collected the extensive hydrologic data necessary to support pending instream flow reservations on several major tributaries in the Nushagak and Kvichak River watersheds. We undertook these efforts often with the encouragement and cooperation of our State's natural resource agencies as we were able to bring resources to bear to supplement their limited resources. Now, ironically, we find ourselves pushing back against those very same agencies that now wish to undo or limit the results of our efforts. We fear such is the case again here.

We concur with and join the comments provided to you by Trout Unlimited and The Katmai Service Providers and particularly emphasize the point raised by them that the proposed changes to the water management regulations, in combination with the DNR's failure to adjudicate applications for reservations and other instream uses elevates out-of-stream beneficial uses above instream beneficial uses when no such distinction exists in state law.

We also concur that any amendment to 11 AAC 93.210(a) should make clear that the procedures to authorize the temporary use of water apply only where there is no prior unadjudicated application for appropriation, including a prior unadjudicated application to reserve water. Because it is impossible for ADNR to evaluate whether a temporary use of water may adversely affect a prior unadjudicated application for that same water, and the Alaska Constitution gives priority to prior rights, the DNR cannot lawfully authorize the temporary use of water where a prior unadjudicated application, including for instream uses, exists.

Since BBHLT helped underwrite the still unadjudicated instream flow reservation applications in the Nushagak and Kvichak River watersheds the once healthy return of Chinook salmon to the Nushagak River Watershed has declined to a level where ADF&G recommended to the Alaska Board of Fish that this population be managed as a "Stock of Concern." Memorandum, Bristol Bay Area Stock of Concern Recommendations, Alaska

Department of Fish and Game, Divisions of Sport Fish & Commercial Fisheries,
October 7, 2022.

While these pending instream flow applications did not factor in the Chinook stock assessment, we can see how reservations can be valuable for future management of the fishery. Often declines in fish production are blamed on poor fisheries management, but in fact, the "root cause" is human interference with fish habitat. The result is uncertainty and finger-pointing among commercial fishers, sport fishers and subsistence users who are then subjected to more management restrictions

to the point where a fish stock is lost because the root cause, habitat degradation, is not addressed.

Alaska's reservation of water process addresses this "root cause" problem up front by authorizing a process in which the amounts of water needed by fish can be determined and provided a measure of protection. A water reservation that protects fish enables ADF&G to set aside human caused habitat degradation in a watershed as the likely cause of fish stock declines and focus with a greater measure of confidence on other factors. It would be most unfortunate if the failure of ADNR to consider unadjudicated instream flow reservation applications in the context of a temporary water use permit application results in making it necessary for ADF&G to consider habit loss as a factor in a fish stock decline.

November 30, 2023

Molly Benson
Division of Mining, Land and Water
550 W. 7th Avenue, Suite 1070
Anchorage, AK 99501

Via: <https://alaskadnr.commentinput.com/?id=FiCphsA95>



Re: Comments on Proposed Changes to DNR Water Management Regulations

Dear Ms. Benson,

On behalf of the Bristol Bay Heritage Land Trust (BBHLT) please accept these comments on the proposed changes to the Alaska Department of Natural Resources (DNR) water management regulations, 11 AAC 93. Over the last fifteen years BBHLT has been engaged in a variety of efforts to assess and protect the waters that provide the spawning and rearing habit so important for the salmon that return to Bristol Bay. In that time BBHLT and others with support raised by BBHLT have added over 1300 stream miles to Alaska's Anadromous Waters Catalog, developed a regional stream temperature monitoring network, and collected the extensive hydrologic data necessary to support pending instream flow reservations on several major tributaries in the Nushagak and Kvichak River watersheds. We undertook these efforts often with the encouragement and cooperation of our State's natural resource agencies as we were able to bring resources to bear to supplement their limited resources. Now, ironically, we find ourselves pushing back against those very same agencies that now wish to undo or limit the results of our efforts. We fear such is the case again here.

We concur with and join the comments provided to you by Trout Unlimited and The Katmai Service Providers and particularly emphasize the point raised by them that the proposed changes to the water management regulations, in combination with the DNR's failure to adjudicate applications for reservations and other instream uses elevates out-of-stream beneficial uses above instream beneficial uses when no such distinction exists in state law.

We also concur that any amendment to 11 AAC 93.210(a) should make clear that the procedures to authorize the temporary use of water apply only where there is no prior unadjudicated application for appropriation, including a prior unadjudicated application to reserve water. Because it is impossible for ADNR to evaluate whether a temporary use of water may adversely affect a prior unadjudicated application for that same water, and the Alaska Constitution gives priority to prior rights, the DNR cannot lawfully authorize the temporary use of water where a prior unadjudicated application, including for instream uses, exists.

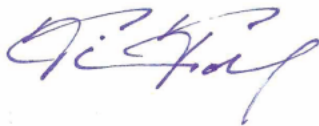
P.O BOX 1388, DILLINGHAM, AK 99576; (907) 843-2832
Email: bbaylandtrust@gmail.com Website: bristolbaylandtrust.org

Since BBHLT helped underwrite the still unadjudicated instream flow reservation applications in the Nushagak and Kvichak River watersheds the once healthy return of Chinook salmon to the Nushagak River Watershed has declined to a level where ADF&G recommended to the Alaska Board of Fish that this population be managed as a “Stock of Concern.” *Memorandum, Bristol Bay Area Stock of Concern Recommendations, Alaska Department of Fish and Game, Divisions of Sport Fish & Commercial Fisheries, October 7, 2022.*

While these pending instream flow applications did not factor in the Chinook stock assessment, we can see how reservations can be valuable for future management of the fishery. Often declines in fish production are blamed on poor fisheries management, but in fact, the “root cause” is human interference with fish habitat. The result is uncertainty and finger-pointing among commercial fishers, sport fishers and subsistence users who are then subjected to more management restrictions to the point where a fish stock is lost because the root cause, habitat degradation, is not addressed.

Alaska’s reservation of water process addresses this “root cause” problem up front by authorizing a process in which the amounts of water needed by fish can be determined and provided a measure of protection. A water reservation that protects fish enables ADF&G to set aside human caused habitat degradation in a watershed as the likely cause of fish stock declines and focus with a greater measure of confidence on other factors. It would be most unfortunate if the failure of ADNR to consider unadjudicated instream flow reservation applications in the context of a temporary water use permit application results in making it necessary for ADF&G to consider habit loss as a factor in a fish stock decline.

Respectfully,
BRISTOL BAY HERITAGE LAND TRUST



Tim Troll, Executive Director

From: [Hayes, Miriam \(Nicole\)](#)
To: [Program Support, DMLW \(DNR sponsored\)](#)
Cc: [Stratton, Benjamin T](#)
Subject: BLM Comments on Proposed Changes Relating to Water Management Regulations
Date: Wednesday, November 22, 2023 11:52:13 AM
Attachments: [20231123_BLMCommentsDNRproposedWaterRegChanges.pdf](#)

You don't often get email from mnhayes@blm.gov. [Learn why this is important](#)

CAUTION: This email originated from outside the State of Alaska mail system. Do not click links or open attachments unless you recognize the sender and know the content is safe.

To Whom it May Concern:

Please find the attached comments from the US Department of the Interior, Bureau of Land Management - Alaska, regarding the proposed changes to the water management regulations.

Best,

Nicole Hayes

Branch Chief, Renewable Resources
US DOI, Bureau of Land Management - Alaska
907.271.4354 - office
907.290.0179 - cell



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
Alaska State Office
222 West Seventh Avenue, #13
Anchorage, Alaska 99513-7504
www.blm.gov/alaska

In Reply Refer To:
7250 (AK-931)

Molly Benson
Department of Natural Resources
Division of Mining, Land, & Water
550 West 7th Avenue, Suite 1070
Anchorage, Alaska 99501-3579

Dear Ms. Benson:

Thank you for the opportunity to provide comments on the Supplemental Notice of Proposed Changes Relating to Water Management in the Regulations of the Department of Natural Resources, dated October 6, 2023. Several proposed changes to the Alaska Administrative Code (11 AAC 93) have the potential to significantly affect procedures the Alaska Department of Natural Resources (DNR) and the Bureau of Land Management (BLM) cooperatively developed to protect the outstandingly remarkable values of BLM-administered wild and scenic rivers in Alaska.

It is the policy of the BLM to acquire and perfect federal reserved water rights necessary to carry out public land management purposes in full compliance with applicable state laws. If a federal reserved water right is not available, then the BLM acquires and perfects state water rights through state law.

Since 1988, the BLM has been filing for instream flow reservations of water through state law (AS 46.15.145 and 11 AAC 93) to maintain specified instream flows for designated wild and scenic rivers. The BLM collaborated with DNR to provide training and instruction on securing state-based water rights through state law (AS 46.15) and participated on the federal/state Federal Reserved Water Rights Work Group, which was established in response to previous Water Use Act Amendments to develop processes to secure instream flow water rights through the state administrative system.

Over the past 30 years, BLM has filed 25 applications for reservations of water for hundreds of miles of rivers and has received state priority dates for these reservations. At this time, all but one of the BLM's applications are awaiting adjudication by DNR. The BLM has acted in good faith with the state, invested substantial resources to acquire its reservations of water and other

water rights needs under AS 46.15, and is concerned that several of the proposed regulatory changes will adversely impact the BLM's pending applications for state-based reservations of water.

Specific comments regarding the proposed regulatory changes are provided below.

1. Page 1. **11 AAC 93.115. Closure of an application for a water right.** Condition 1, DNR proposes the addition of the bold text and removal of the text in brackets to the current regulation:

(1) the applicant informs the commissioner, in writing, or by filing a notice of relinquishment, that the applicant has abandoned plans to develop the water source or use, in which case **the commissioner may** close the application [WILL, IN HIS OR HER DISCRETION, BE CLOSED BY THE COMMISSIONER] without further correspondence with the applicant;

BLM Comment: BLM suggests changing the current regulation language above by requiring DNR to formally notify the applicant in writing and/or electronic communication to confirm that the application has been closed.

2. Page 2. **11 AAC 93.210(a) Temporary water use.** DNR proposes the addition of the bold text to amend the existing regulation:

(a) Procedures to authorize the temporary use of water, as provided in 11 AAC 93.220, will apply if the use continues for less than five consecutive years and the water applied for is not otherwise appropriated **under a permit to appropriate water, certificate of appropriation, certificate of reservation, or change permit.**

BLM Comment: The proposed change will create uncertainty about the priority date of applications to reserve water that have been accepted by DNR but have not yet been fully adjudicated, if junior temporary water uses are authorized before the certificate of reservation is issued. Existing regulations require DNR to protect flows requested in applications to reserve water that have been accepted and assigned a priority date by DNR. The proposed change appears to not consider requested flows that have not yet been certificated when processing junior temporary water use authorizations.

More specifically, proposed changes to 11 AAC 93.210 explicitly strengthen temporary water use authorizations above unadjudicated reservations of water applications. The BLM does not support this proposed change.

3. Page 3. **11 AAC 93.220(b)(2) Procedure for temporary water use.** DNR proposes the addition of the bold text and removal of the text in brackets to the current regulation:

(2) a map identifying the section, township, range, and meridian, and indicating the location of the property, the point of withdrawal, diversion, or impoundment, [AND] the point of use, **and the point of discharge or return flow, if any;**

BLM Comment: The proposed change to 11 AAC 93.220. Procedure for temporary water use, part b, section 2 provides additional clarity. The BLM supports this proposed change.

4. Page 6. **11 AAC 93.970(25). Definitions.** DNR proposes the addition of the bold text and removal of the text in brackets to the current regulation:

(25) "appropriators of record" means [APPLICANTS FOR, AND PERMITTEES AND CERTIFICATE] holders of a **permit to appropriate water, certificate of appropriation, certificate of reservation, or change permit**[, WATER RIGHTS];"

BLM Comment: The proposed regulatory change removes "applicants" from the definition of "appropriator of record". This proposed change creates uncertainty for applicants awaiting permits to appropriate water and certificates of reservation. The new definition removes a senior priority standing for unadjudicated applications when other types of water use are requested.

For over 30 years, the BLM has filed applications for reservations of water and is waiting for certificates reserving water to be issued for all but one of these applications. The BLM's water rights policy and land use planning documents direct the BLM to protect instream flow needs by asserting claims to water rights under Federal law where applicable and filing for instream flow water rights under state law where allowed and encourage the BLM to work with appropriate state agencies to acquire, perfect, and protect the needed water rights. This policy direction applies to Wild and Scenic Rivers set aside pursuant to the Wild and Scenic Rivers Act, which creates Federal reserved water rights on BLM-administered lands for each Wild and Scenic River at the time of designation. The proposed change to the definition of "appropriator of record" may significantly and negatively impact BLM's uncertificated reservations of water. The BLM recommends the original definition be retained.

The BLM appreciates the opportunity to provide comments on the proposed changes to the DNR's water management regulations. If you have any questions or would like further clarification of our questions or comments, please contact Ben Stratton, Water Resources Lead for the Alaska BLM Aquatic Resources Program, at (907) 271-4411 or btstratton@blm.gov.

Sincerely,

Kevin J. Pendergast PE, CPG
Deputy State Director, Resources
BLM Alaska

From: [topher0722](#)
To: [Program Support, DMLW \(DNR sponsored\)](#)
Subject: Proposed DNR Water Regulations - Second Supplemental Notice Extending Public Comment Period
Date: Thursday, November 30, 2023 5:00:17 PM
Attachments: [DNR Proposed Water Regulations \(text-redline\).docx nov 2023 proposal ESTES COMMENTS 30 NOV 2023.docx](#)
Importance: High

You don't often get email from **Private Information**. [Learn why this is important](#)

CAUTION: This email originated from outside the State of Alaska mail system. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Attention: Molly Benson

(Re: the original October 6, 2023 Public Comments Notice for Revisions to 11 AAC 93)

General Comments

Thank you for the opportunity to comment on the proposed October 6, 2023 revisions to 11 AAC 93 regulations. Please see general comments and the attached specific comments).

I strongly recommend the Alaska Department of Natural Resources reinstate the Alaska Water Resources Board to execute future revisions.

Please keep me informed in writing of all next steps and actions related to this and other future 11 AAC 93 revision proposals and actions.

Specific Comments

My specific recommendations are included in the accompanying attachment for only excerpts of the proposed regulation changes I thought merited further revisions.

Thank you. Christopher

----- Original message -----

From: Private Information
Date: 11/7/23 3:15 PM (GMT-09:00)
To: Private Information
Subject: FW: Proposed DNR Water Regulations - Second Supplemental Notice Extending Public Comment Period

----- Original message -----

From: "Program Support, DMLW (DNR sponsored)" <dmlwprogramsupport@alaska.gov>
Date: 11/6/23 2:45 PM (GMT-09:00)
To:
Subject: Proposed DNR Water Regulations - Second Supplemental Notice Extending Public Comment Period

You are receiving this email because you submitted a comment in response to a prior public notice relating to Alaska Department of Natural Resources water regulations.

SECOND SUPPLEMENTAL NOTICE EXTENDING THE PUBLIC COMMENT PERIOD FOR PROPOSED CHANGES RELATING TO WATER MANAGEMENT IN THE REGULATIONS OF THE DEPARTMENT OF NATURAL RESOURCES

BRIEF DESCRIPTION

The Department of Natural Resources is extending the public comment period on its proposal to amend water management regulations.

On October 6, 2023, the Department of Natural Resources published public notice of its proposed changes to water management regulations in 11 AAC 93. The purpose of this supplemental notice is to extend the public comment period for an additional two weeks. The new deadline for public comments is now **5:00 p.m. on Thursday, November 30, 2023**.

On January 15, 2021, the Department of Natural Resources publicly noticed its proposed changes to water management regulations in 11 AAC 93. The department extended the comment period twice, on February 26, and on March 16, 2021, with a final deadline for comments on April 2, 2021. The department reviewed public comments and is opting to postpone proposed changes relating to applications and certificates for instream flow reservations. The department will move forward with the remaining regulation changes proposed in the January 2021 regulations package:

11 AAC 93.115 Closure of an application for a water right

11 AAC 93.210 Temporary water use

11 AAC 93.220 Procedure for temporary water use

11 AAC 93.510 Public notice and meeting (for Critical Water Management Areas)

11 AAC 93.530 Effect of the order

11 AAC 93.970 Definitions

Some modifications have been made to the January 2021 proposed changes after a thorough review of public comments. A copy of the proposed regulations is available for review on the Alaska Online Public Notice System; on the Division of Mining, Land and Water website at

<https://dnr.alaska.gov/mlw/news/>; or by contacting the division by email at dmlwprogramsupport@alaska.gov.

You may comment on the proposed regulation changes, including the potential costs to private persons of complying with the proposed changes, by submitting written comments on the division's online comment portal at <https://alaskadnr.commentinput.com/?id=FjCphsA95>; by mail to Molly Benson at the Division of Mining, Land and Water, 550 W. 7th Ave., Suite 1070, Anchorage, AK 99501-3579; or by email at dmlwprogramsupport@alaska.gov. The comments must be received no later than 5:00 p.m. on Thursday, November 30, 2023. Please note that all comments become public records subject to public inspection.

You may submit written questions relevant to the proposed action to the contact information provided above. The questions must be received at least 10 days before the end of the public comment period (by 5:00 p.m. on Monday, November 20, 2023). The division will aggregate its responses to substantially similar questions and make the questions and responses available on the Alaska Online Public Notice System and on the division's website at <https://dnr.alaska.gov/mlw/news/>.

If you are a person with a disability who needs a special accommodation in order to participate in this process, please contact Molly Benson by email at dmlwprogramsupport@alaska.gov or by phone at 269-8601 no later than Monday, November 20, 2023, to ensure that any necessary accommodation can be provided.

After the public comment period ends, the department will either adopt the proposed regulation changes or other provisions dealing with the same subject, without further notice, or decide to take no action. The language of the final regulations may be different from that of the proposed regulations. You should comment during the time allowed if their interests could be affected.

Statutory Authority: AS 46.15.010; AS 46.15.020; AS 46.15.040; AS 46.15.050; AS 46.15.080; AS 46.15.100; AS 46.15.133; AS 46.15.145; AS 46.15.155; AS 46.15.180; AS 46.15.250; AS 46.15.255; AS 46.15.256.

Statutes Being Implemented, Interpreted, or Made Specific: AS 46.15.010; AS 46.15.020; AS 46.15.040; AS 46.15.050; AS 46.15.080; AS 46.15.100; AS 46.15.133; AS 46.15.145; AS 46.15.155; AS 46.15.180; AS 46.15.250; AS 46.15.255; AS 46.15.256.

Fiscal information: The proposed regulation changes are not expected to require an increased

appropriation.

The Department of Natural Resources keeps a list of individuals and organizations interested in its regulations. Those on the list will automatically be sent a copy of all of the department's notices of proposed regulation changes. To be added or removed from the list, send a request to Molly Benson at the contact information provided above, providing your name and either your email or mailing address, as you prefer for receiving notices. Individuals can also sign up to receive automated notifications of all State of Alaska notices, including public notice for regulation changes, by subscribing to the Alaska Online Public Notices System:

<https://aws.state.ak.us/OnlinePublicNotices/Default.aspx>.

CEstes Nov. 30, 2023 Specific Language Comments (highlighted in yellow) and calibri font.

11 AAC 93.115 is amended to read:

11 AAC 93.115. Closure of an application for a water right. The commissioner may close a [A] pending water right application and the department's application file [WILL, IN THE COMMISSIONER'S DISCRETION, BE CLOSED] if

(1) the applicant informs the commissioner orally that the applicant has abandoned plans to develop the water source **or** [AND] use, in which case the **commissioner will notify the** applicant [WILL BE NOTIFIED] in writing that the application is closed as a consequence of the oral notice;

(2) (2) the commissioner is unable to locate the applicant by certified mail at the address on file in order to adjudicate the application, in which case **the commissioner may close** the application [WILL, IN THE COMMISSIONER'S DISCRETION, BE CLOSED] without further correspondence [BY THE COMMISSIONER] with the applicant;

ADD NEW SECTION TO 11 AAC 93.115: All AS 46.15.080 public notice commenters for a specific appropriation of water (withdrawals, diversions, impoundments, and reservations) will be notified for closures for all categories of appropriations that have undergone or are in the process of public notice reviews.

Register 116; am ___/___/___, Register _____)

Register ____, _____ 2023 NATURAL RESOURCES

Authority: AS 46.15.020 AS 46.15.13

11 AAC 93.510 is repealed and readopted to read:

(a) At the same time that the department posts a notice under (a) of this section on the Alaska Online Public Notice System, the department will provide the notice by mail, electronic mail, or other means to

ADD: (7) any person on record that has requested notification requesting notifications of actions pertaining to waterbodies in the critical water management area.

(1) (Eff. 11/7/90, Register 116; am
___/___/___, Register ___)

Authority: AS 46.15.010 AS 46.15.020

11 AAC 93.530(a) is amended to read:

(a) **Not later than** [WITHIN] 30 days after signing a department order to designate a geographic or hydrologic area as a critical water management area [,] or revoke or amend a designation [,] the commissioner will announce the decision by **posting** [PUBLISHING] the

order **on the Alaska Online Public Notice System (AS 44.62.175) and mailing the order** [IN A NEWSPAPER OF GENERAL CIRCULATION IN THE AFFECTED AREA ONCE A WEEK FOR FOUR CONSECUTIVE WEEKS. THE ORDER WILL ALSO BE MAILED] to **appropriators** [PERMITTEES OR CERTIFICATE HOLDERS] of record and property owners [OF RECORD] in the **affected** area, affected federal, state, and local agencies, **including the Department of Fish and Game and the Department of Environmental Conservation, [and]** **any** affected regional and village corporations **organized under 43 U.S.C 1601 - 1629h (Alaska Native Claims Settlement Act), ADD and all persons on record requesting notifications of actions pertaining to waterbodies in the critical water management area.**

(Eff. 11/7/90, Register 116; am 8/20/2004, Register 171; am ___/___/___, Register ____)

Authority: AS 46.15.010 AS 46.15.180 AS 46.15.255
AS 46.15.020 AS 46.15.250 AS 46.15.256

11 AAC 93.970(4) is amended to read:

(4) "commissioner" means the commissioner of **natural resources, or the commissioner's** [OF THE DEPARTMENT OF NATURAL RESOURCES OR HIS OR HER] delegate;

11 AAC 93.970(9) is amended to read:

(9) "division" means the division of **mining,** land and water [MANAGEMENT] within the Department of Natural Resources;

11 AAC 93.970(25) is amended to read:

(25) "appropriators of record" means [APPLICANTS FOR, AND PERMITTEES AND CERTIFICATE] holders of permits to appropriate water, certificates of appropriation, certificates of reservation, or change permits[, WATER RIGHTS];

DO NOT DELETE "WATER RIGHTS" IN (25) ABOVE AS PROPOSED: INSTEAD RETAIN "WATER RIGHTS" IN ITS EXISTING LOCATION BUT WITHIN PARENTHESIS IN (25) EXISTING LANGUAGE

(Eff. 2/8/67, Register 23; am 12/29/79, Register 72; am 9/11/83, Register 87; am 11/7/90, Register 116; am 9/16/92, Register 123; am 8/20/2004, Register 171; am ___/___/___, Register ___)

Authority:	AS 46.15.020	AS 46.15.050	AS 46.15.133
	AS 46.15.040	AS 46.15.080	AS 46.15.145

From: [Siobhan McIntyre](#)
To: [Program Support, DMLW \(DNR sponsored\)](#)
Cc: [Colles, Christianna D \(DNR\)](#); [Benson, Molly M \(DNR\)](#)
Subject: Project/Reg. No. 2020200431, public comments relating to water management in DNR regulations
Date: Thursday, November 30, 2023 1:44:47 PM
Attachments: [image001.png](#)
[2023 11 30 - FINAL DNR Proposed TWUP Regs Comment Ltr.pdf](#)

Some people who received this message don't often get email from smcintyre@trustees.org. [Learn why this is important](#)

CAUTION: This email originated from outside the State of Alaska mail system. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Director Colles and Ms. Benson:

Attached please find comments submitted by Trustees for Alaska on behalf of the Alaska Wilderness League, Alaska Longline Fishermen's Association, Southeast Alaska Conservation Council, Northern Alaska Environmental Center, and Norton Bay Watershed Council regarding the State of Alaska, Department of Natural Resources' proposed amendments to its water management regulations, including its temporary water use permit regulations (Supplemental Notice of Proposed Changes Relating to Water Management in the Regulations of the Department of Natural Resources, Project/Reg. No. 2020200431).

Thank you for the opportunity to comment on these proposed amendments. Please contact Siobhan McIntyre, Staff Attorney, Trustees for Alaska at (907) 433-2008 with any questions or concerns. We request that the State respond to these comments, and inform us of their rulemaking decision via e-mail (smcintyre@trustees.org).

Sincerely,

Siobhan McIntyre (she/her)
Staff Attorney
Trustees for Alaska
121 W Fireweed Lane, Ste. 105
Anchorage, Alaska 99503
(907) 433-2008 (direct)
smcintyre@trustees.org / www.trustees.org



We use the law to protect and defend Alaska's lands, waters, wildlife, and people.

We recognize that we live and work within the traditional lands of the Indigenous Peoples of Alaska, and that our offices are located on the traditional territories of the Dena'ina Peoples. We acknowledge the place-based knowledge of these peoples, and are grateful for their ancestral and current stewardship of these lands.

The information contained in this email message may be privileged, confidential and protected from disclosure. If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited. If you think that you have received this email message in error, please email the sender at smcintyre@trustees.org.

*please consider the environment before printing



TRUSTEES FOR ALASKA

PROTECT | DEFEND | REPRESENT

November 30, 2023

Via E-mail

Christy Colles, Director
Molly Benson, Natural Resource Specialist
ALASKA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING, LAND, AND WATER
550 W. 7th Ave., Suite 1070
Anchorage, AK 99501
christianna.colles@alaska.gov
molly.benson@alaska.gov
dmlwprogramsupport@alaska.gov

RE: Public Comments on Supplemental Notice of Proposed Changes Relating to Water Management in the Regulations of the Department of Natural Resources, Project/Reg. No. 2020200431

Dear Director Colles and Ms. Benson:

Trustees for Alaska submits these comments on behalf of the Alaska Wilderness League, Alaska Longline Fishermen's Association, Southeast Alaska Conservation Council, Northern Alaska Environmental Center, and Norton Bay Watershed Council regarding the State of Alaska, Department of Natural Resources' (DNR) proposed changes to its water management regulations, including its temporary water use permit (TWUP) regulations.

Thank you for this opportunity to comment and assist DNR in its review of its amendments to Alaska's water management regulations. We appreciate DNR's initiative to amend its regulations to curtail TWUP extensions to a maximum period of five years. We support DNR in making this proposal, and it is certainly a step in the right direction. However, the proposed language does not go far enough to correct and guard against the practice of authorizing successive, decades-long TWUP extensions without public input.

As discussed in further detail in these comments, we urge DNR to incorporate the following three changes to the regulations. First, DNR should limit the duration for any

single TWUP to a maximum of one year—a period that is truly representative of the “temporary” nature of the permitted water use—subject to, at most, a single one-year extension. Second, we request that DNR establish, in connection with all TWUP applications—including initial permits, extensions, and amendments—a minimum public comment period of 30 days. Third, DNR should provide for concurrent government-to-government consultation with potentially affected Alaska Tribes. Regulatory language that would implement these proposed changes is set forth in Attachment A.

I. Water withdrawals are harmful to aquatic life.

Water withdrawals pose a substantial threat to aquatic life, including fish, juvenile fish, fish eggs, and prey organisms, even if these withdrawals are “temporary.” Water withdrawals can impact essential fish habitat by altering natural flow, stream velocity, water channel depth and width, as well as changing sediment and nutrient transport.¹ In addition, water withdrawals create fluctuating water levels, which can decrease streambank stability and vegetation.² Water returns can increase water temperature, salinity, and introduce pathogens and contaminants.³ In a recent study conducted on the Arctic Coastal Plain, researchers found that lake water withdrawals—and, in particular, decadal-long consecutive lake water withdrawals—were not offset by same-year snowmelt.⁴ Thus, increased “seasonal climate extremes and lake water-withdrawal have an immediate impact on streamflow and lake water levels ... limit[ing] fish migration into the lakes in early summer for foraging and prevent[ing] a return of fish to downstream overwintering habitat.”⁵ For lake water withdrawals for ice roads in the Northwest Territories, a twenty-percent water withdrawal from one interior lake was found to reduce volume-weighted oxygen by twenty-six percent and overwintering habitat by twenty-three percent; the same study showed no change for a withdrawal of ten percent.⁶ Thus, TWUPs for withdrawals and return activities can have significant impacts on water quality, fish, cultural resources, and subsistence activities.

In particular, anadromous fish, including the five species of salmon, whitefish, sheefish, eulachon, smelt, and others, are critically important for Alaska’s subsistence communities, Indigenous culture, and ecosystem health. It is well-known that baseline ecological data for most water bodies throughout Alaska is severely lacking, including insufficient hydrological data to document water availability and incomplete fish

¹ Douglas Limpinsel et al., Nat’l Marine Fisheries Serv., Alaska Region, Impacts to Essential Fish Habitat from Non-Fishing Activities in Alaska: EFH 5-Year Review from 2018-2023, at 51, 97 (2023), <https://repository.library.noaa.gov/view/noaa/50445>.

² *Id.*

³ *Id.*

⁴ Anne Gadeke et al., *Modeled Streamflow Response to Scenarios of Tundra Lake Water Withdrawal and Seasonal Climate Extremes, Arctic Coastal Plain, Alaska*, Water Res. Rsch., July 14, 2022, at 15-16, <https://agupubs.onlinelibrary.wiley.com/doi/10.1029/2022WR032119>.

⁵ *Id.*

⁶ Peter A. Cott et al., *Effects of Water Withdrawal from Ice-Covered Lakes on Oxygen, Temperature, and Fish*, J. of the Am. Water Res. Ass’n, April 2008, at 340, <https://onlinelibrary.wiley.com/doi/10.1111/j.1752-1688.2007.00165.x>.

distribution information.⁷ The severe inadequacies of the Anadromous Waters Catalog are also well-understood.⁸ Under these circumstances, the minimal protections offered by the TWUP process are insufficient to conserve Alaska’s important aquatic resources.

II. DNR should amend its water management regulations to further constrain the use of TWUPs.

Water is a key natural resource, and the Alaska Constitution safeguards “the conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people” and “the general reservation [of water] for fish and wildlife.”⁹ The State also has a well-established policy favoring transparency and public participation in government decision making.¹⁰ DNR’s practice of issuing successive, decades-long TWUP extensions has resulted in the disposal of important, constitutionally-protected interests in public waters without public notice and comment.¹¹

To rectify this failing, DNR should take this opportunity to limit the use of TWUPs to situations where the harmful impacts are truly temporary and de minimis. To that end, DNR should limit the duration of any single TWUP to a maximum of one year, with the potential for, at most, a single one-year extension. Under this proposal, the maximum overall timeframe for a temporary water use would be two years, rather than the five years being proposed by DNR. Even a two-year timespan is pushing the limit for what might be considered temporary. A five-year authorization cannot reasonably be understood as temporary. Any proposed water withdrawal extending beyond two years should be required to undergo the regular water rights application process set forth in 11 AAC 93.035 et seq.

⁷ Christopher Estes, ADF&G Instream Flow and Lake Level (Reservation of Water) Protection Report 2 (May 2009), <https://www.nature.org/content/dam/tnc/nature/en/documents/tnc-instream-flow-and-lake-level-protection-report.pdf>; see also Yereth Rosen, *Dry Summers Could Mean Trouble for Use of Lake Water for North Slope Ice Roads, Study Says*, Alaska Beacon (Aug. 22, 2022), <https://alaskabeacon.com/2022/08/26/dry-summer-could-mean-trouble-for-use-of-lake-water-for-north-slope-ice-roads-study-says/>.

⁸ See, e.g., ADF&G, Anadromous Waters Catalog Overview, <https://www.adfg.alaska.gov/sf/SARR/AWC/index.cfm?ADFG=main.home> (acknowledging that the Catalog and associated Atlas “represent a fraction of the streams, rivers, and lakes actually used by anadromous species”).

⁹ Alaska Const. art. VIII, §§ 2, 13; see also *State, Dep’t of Nat. Res. v. Greenpeace, Inc.*, 96 P.3d 1056, 1062 (Alaska 2004).

¹⁰ See, e.g., *Fuller v. City of Homer*, 75 P.3d 1059, 1062 (Alaska 2003) (describing public access to records as a “fundamental right” and emphasizing that the “cornerstone of a democracy is the ability of its people to question, investigate and monitor the government” (internal quotation omitted)).

¹¹ One example of a TWUP renewed repeatedly for a 15-year period is the Put 27 Mine Site. First issued in 2001 for a period of seven months, it was reissued at the end of 2001 for five years, renewed again in 2005 for five years, and renewed again in 2011. See TWUP A2001-23; TWUP A2001-93; TWUP A2006-64; TWUP A201 I-99.

III. DNR should amend its water management regulations to include meaningful public notice and comment opportunities in connection with TWUPs.

It is also imperative that DNR provide meaningful public notice and comment opportunities, allowing the public to review and provide input on “temporary” water uses. Community members and the public possess a critical interest in Alaska’s unique and irreplaceable water and fish resources and must be allowed to weigh-in at the outset on withdrawal and return-related issues, such as: adequacy of applications (e.g., tributaries named, withdrawal and return points identified, chemicals used), adequacy of baseline information about fish populations, whether authorized quantities are reasonable, whether best practices for withdrawal and return would be followed, and whether—and to what degree—harm to aquatic life and habitat would be avoided or mitigated. Moreover, as discussed above, enormous data gaps exist for most Alaskan water bodies—especially with respect to proposed water uses that could adversely impact critical anadromous fish species. Local communities and the public possess essential information on these resources and should be provided notice and the opportunity to comment on all TWUPs to help fill in these gaps.

For these reasons, DNR should further amend its water management regulations to include public notice and a minimum 30-day comment period for all TWUP applications, including initial permits, extensions, and amendments.

Furthermore, even if the State declines to amend its regulations as proposed here, DNR should exercise its discretion to provide public notice and a minimum 30-day comment period in connection with all TWUPs “to protect the public interest.”¹² Public notice and comment for all permitted water withdrawals—no matter how “temporary”—are necessary to ensure a full and complete analysis of impacts from the proposed water use.

IV. DNR should amend its water management regulations to require meaningful and respectful government-to-government consultation for potentially affected Alaska Tribes.

Water is essential to Alaska Native communities throughout the state, and Alaska’s Tribes have a strong interest in protecting fish, aquatic life and habitat, and spawning areas to ensure the continued health of subsistence resources and related cultural practices. Alaska’s Indigenous peoples have inhabited this land since time immemorial and have unparalleled, traditional ecological knowledge of its waters; this knowledge is invaluable and should be considered by State decisionmakers in reviewing and issuing TWUPs and water rights.

¹² See generally 11 AAC 93.035(b)(4), (c), 93.070(a), (b)(4), 93.100, 93.110(b), 93.120(b), (e)(2)(D), (e)(3)(F), (g), 93.130(c), 93.144(a), 93.145(d), 93.146(d), 93.147(b)(4), 93.210(b), 93.220(f).

The Alaska Supreme Court has consistently recognized the sovereignty of Alaska's Tribes.¹³ The Alaska legislature also recently enacted HB 123 in express recognition of Alaska's 229 federally recognized tribes and their "unique role in the state's past, present, and future."¹⁴ DNR should take this opportunity to build on this recognition and amend its water management regulations at 11 AAC 93.080 and 11 AAC 93.220, as set out in Attachment A, to provide for meaningful and respectful government-to-government consultation on TWUPs and water rights with Alaska's Tribes.

In sum, for the reasons stated above, DNR should (1) limit the duration for any single TWUP to a maximum of one year, with at most, a single one-year extension; (2) ensure public notice and a minimum 30-day public comment period in connection with all TWUP applications, including initial permits, extensions, and amendments; and (3) provide for concurrent government-to-government consultation for potentially affected Alaska Tribes. Regulatory language that would implement these proposed changes is set forth in Attachment A.

Thank you for the opportunity to comment on these proposed amendments to Alaska's water management regulations. Please contact Siobhan McIntyre, Staff Attorney, Trustees for Alaska at (907) 433-2008 with any questions or concerns. We request that the State respond to these comments, and inform us of their rulemaking decision via e-mail (smcintyre@trustees.org).

Sincerely,

s/ Siobhan McIntyre

Staff Attorney
Trustees for Alaska

s/ Maddie Halloran

Alaska State Director
Alaska Wilderness League

s/ Linda Behnken

Executive Director
Alaska Longline Fishermen's Association

s/ Meredith Trainor

Executive Director
Southeast Alaska Conservation Council

¹³ See Alaska Atty. Gen. Op. (Oct. 19, 2017) (citing cases), http://law.alaska.gov/pdf/opinions/opinions_2017/17-004_JU20172010.pdf.

¹⁴ An Act Providing for State Recognition of Federally Recognized Tribes, 42 SLA 2022.

s/ Katie McClellan

Mining Impacts and Energy Program Manager
Northern Alaska Environmental Center

s/ Emily Murray

Vice President
Norton Bay Watershed Council

ATTACHMENT A

11 AAC 93.080 is amended to read:

(6) the public comment period **shall be a minimum of 30 days, and this period** begins the first day the newspaper publication appears, or the first day of posting, or upon receipt of the notice as evidenced by the certified mail receipt, date stamp, or other evidence of actual service;

11 AAC 93.080 is amended to add a new subsection (8):

(8) The department shall engage in respectful and meaningful consultation with all potentially affected Tribes on a government-to-government basis concurrent with the public comment process.

11 AAC 93.210 is amended to read:

(a) Procedures to authorize the temporary use of water, as provided in 11 AAC 93.220, will apply if the use continues for **a total of** less than ~~five consecutive two~~ years, and the water applied for is not otherwise appropriated **under a permit to appropriate water, certificate of appropriation, certificate of reservation, or change permit.**

(b) A water right or priority is not established by a temporary water use authorization issued under 11 AAC 93.220. Authorized temporary water use is subject to amendment, modification, or revocation by the department if the department determines that amendment, modification, or revocation is necessary to supply water to lawful appropriators of record or to protect the public interest.

(c) Upon the commissioner's receipt of a written request from the permittee, **the commissioner may, for good cause, extend one time** an authorization for temporary use of water. ~~However, the temporary use shall not will, in the Commissioner's discretion, be extended one time for good cause for a period of time not to exceed five~~ **a total of two years, including the extension and the initial time period for which that authorization was issued.** The request for an extension of the authorization for temporary use of water must be accompanied by the fee prescribed in 11 AAC 05.260.

11 AAC 93.220 is amended to add subsections (h) and (i) as follows:

(h) Prior to the issuance of an initial temporary water use permit, and any amendment to or renewal of such a permit, the department shall provide public notice and a public comment period of at least 30 days. This period begins the first day the newspaper publication appears, or the first day of posting, or upon receipt of the notice as evidenced by the certified mail receipt, date stamp, or other evidence of actual service.

(i) The department shall engage in respectful and meaningful consultation with all potentially affected Tribes on a government-to-government basis concurrent with the public comment process.

From: [Nelli Williams](#)
To: [Program Support, DMLW \(DNR sponsored\)](#)
Cc: [Brian with Alaska Sportsman's Lodge](#)
Subject: Comments re: DNR Water Regulation Proposed Changes
Date: Thursday, November 30, 2023 7:01:02 AM
Attachments: [TU KSP Comments on Proposed Water Regs - 20231130 Final.pdf](#)

You don't often get email from nelli.williams@tu.org. [Learn why this is important](#)

CAUTION: This email originated from outside the State of Alaska mail system. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Ms. Benson,

Please see attached letter from Trout Unlimited Alaska and Katmai Service Providers with comments regarding the proposed changes related to water management regulations in the Department of Natural Resources.

Please let us know if you have any questions.

Sincerely,

Nelli Williams

Nelli Williams

Alaska Director, Trout Unlimited

Anchorage, Alaska | 907-230-7121

Dena'inaq elnen'aq' gheshtnu ch'q'u yeshdu

I live and work on the land of the Dena'ina.



**KATMAI SERVICE PROVIDERS,
INCORPORATED**

November 22, 2023

Molly Benson
Division of Mining, Land and Water
550 W. 7th Avenue, Suite 1070
Anchorage, AK 99501

Via: dmlwprogramsupport@alaska.gov

Re: Comments on Proposed Changes to DNR Water Management Regulations

Dear Ms. Benson,

On behalf of Trout Unlimited (TU) and Katmai Service Providers (KSP), please accept these comments on the proposed changes to the Alaska Department of Natural Resources (DNR) water management regulations, 11 AAC 93. Although the DNR has attempted to downplay the impact of the proposed changes by characterizing them as general updates and edits while postponing the most egregious of the previously-proposed changes, the current proposed changes nonetheless undermine Alaska's water management regulations. We have serious concerns about the proposed changes and what these changes would mean for Alaska's rivers, streams and lakes, our fisheries, and the many businesses and individuals that rely on our waters for their livelihood, for recreation, and for their cultural and subsistence values.

Trout Unlimited is the nation's largest sporting organization dedicated to coldwater conservation, with 20,000 Alaskan supporters that are passionate anglers, lodge and outfitting business owners, fishing and hunting guides, subsistence users, commercial fishermen, and Alaskans from a variety of walks of life. In addition to our members in more remote parts of the state, TU has active chapters in Fairbanks, Anchorage and the Mat-Su, on the Kenai Peninsula, and in Southeast Alaska. Our members rely on Alaska waters, and the fish and wildlife that inhabit them, for fishing, hunting, subsistence, outdoor recreation, and for employment in related industries. Our supporters join TU because TU works to care for the waters that so many Alaskan's rely on for fishing, recreation, or for supporting their businesses and ways of life. Trout Unlimited has submitted numerous applications to the DNR for instream flow reservations, participated in various adjudications, engaged in numerous 10-year reviews of instream flow reservations, and has incurred significant costs associated with those activities and applications.

Katmai Service Providers is an association of recreation and tourism businesses that operate in and around the Katmai National Park. The organization is dedicated to resource stewardship, promoting public access, and fostering cooperation and communication among users of the Katmai National Park and government agencies. Its members include fishing and hunting lodges, bear viewing outfitters, flying services, and tour operators. All of Katmai Service Providers' members have a deep and personal economic tie to the waters of Katmai National Park and the many rivers, streams and lakes in the broader Bristol Bay region. They are committed to conserving the region's unique fish, wildlife and water resources, which are essential to the region's long-term economic health. Katmai Service Providers' members regularly operate their businesses on and around waters subject to instream flow reservations, and rely on reservations to provide assurance that adequate instream flow will remain in those waters to support the fish and game, recreation, and navigation necessary for their businesses to prosper.

I. Background

Salmon fishing, and Alaska's iconic fish and wildlife populations, are essential to the Alaskan way of life and Alaskans' economic well-being. Many of TU's and KSP's members choose to live or operate in Alaska because of the many benefits afforded to them from healthy fish and wildlife populations that depend on natural stream flow and productive waters. Our members enjoy fishing and hunting on their time off, many earn their living from those same resources, and we work with our children and younger members to help ensure this lifestyle continues on into the future. This lifestyle, which is available to all Alaskans, depends on healthy and intact watersheds, unaltered streamflow, and natural water quality and quantity.

As increased population and development has taken place over the past decades, maintaining natural stream flow and water quality in our public waters has become increasingly important. Establishing and maintaining instream flow reservations for these important waterways helps serve the critical public interest by providing a guarantee for our important fish, wildlife and water resources, a foundation for our fish and water-based businesses, and helping to ensure the Alaskan way of life remains available into the future.

By observing the plight of salmon in the Pacific Northwest, with many salmon stocks already extinct and many more a mere fraction of their historic abundance, it is important to understand the risks to Alaska's salmon from a "death by a thousand cuts." This risk, regrettably, is already manifesting itself in Alaska where many Chinook and coho salmon stocks are well below historic abundance, and no longer support once thriving commercial or sport fishing opportunity. While any individual water body may seem inconsequential at first blush, a deeper inspection reveals the exceptional value of our salmon habitat and that *every* stream and river can have an impact on our important fisheries. Alaskans often tout, and rightly so, how our fisheries are sustainable and how they can continue to produce jobs, income and a healthy source of food indefinitely. However, this claim remains true only so long as we take care of our fisheries and fish habitat, and take measures to ensure adequate stream flow remains in our important rivers and streams.

Allowing and encouraging instream flow reservations has overwhelmingly positive benefits for Alaskans. Instream flow reservations help ensure natural stream flow, protect water quality and water quantity, and provide security for local sport and commercial fisheries, while also protecting the immeasurably important subsistence fisheries for local communities. Recreation, public health, our Alaskan way of life, and our economic wellbeing are all best served by encouraging instream flow reservations and allowing non-governmental entities like TU, KSP and others to pursue and obtain certificates. Maintaining the natural stream flow regime and water quality of Alaska's many rivers, streams and lakes often is their highest and most beneficial use.

From the Bristol Bay region to Southeast Alaska and beyond, Alaska's world-class fisheries are the foundation for our communities, cultures and economy. Commercial salmon fishing accounts for roughly 38,000 jobs and \$5 billion in annual economic contribution. When sport fishing is included, total employment tops 43,000. In the Bristol Bay region, where KSP's members operate and where most of the streams affected by TU's applications for reservations of instream flow are located, more than 50 million sockeye salmon can return annually, with recent years accounting for the largest runs in decades. *See Alaska Dept. of Fish & Game, 2023 Bristol Bay Salmon Season Summary, at 1 (Sept 2023).* Bristol Bay commercial harvests generate more than \$2.2 billion annually in economic output and provide more than 15,000 jobs, including half of all jobs in the Bristol Bay region. *See U.S. Env. Protection Agency, Final Determination Pursuant to Section 404(c) of the Clean Water Act: Pebble Deposit Area, Southwest Alaska, at 1 (Jan. 2023).* These huge annual salmon returns contribute to the entire state's economy, and are the result of the region's high-quality and diverse aquatic habitats, and the region's many naturally-flowing streams and rivers.

Anglers, hunters, and outdoor recreationists travel from across the globe to visit Alaska's free-flowing waters for their trophy fish and game, their remote scenery, and their wild character. Native Alaskans have relied on the bounty of Alaska's waters for many thousands of years to sustain their traditional and customary way of life. Generations of families have fished commercially in Alaska and numerous businesses, both large and small, have carved out niches capitalizing on Alaska's rivers and streams.

Maintaining instream flow is essential to Alaska, its people, and its economy. Our robust fish-based economy and unique fish-based cultures would not exist but for Alaska's many clean, naturally-flowing rivers and streams that provide some of the best spawning, rearing and migration habitat for wild salmon and resident fishes in the world. Decisions about how public waters are allocated, reserved, or otherwise appropriated are of utmost importance—and priority should be given to those beneficial uses that utilize instream flow.

II. Alaska's Constitution Guarantees the Right to the Common Use and Appropriation of Public Waters.

Multiple provisions of our Alaska Constitution and state law make clear that individuals and other non-government entities can apply for and receive certificates for reservations of instream flow. “Whenever occurring in their natural state, fish, wildlife and waters are reserved to the people for common use.” Art. VIII § 3.

All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.

Art. VIII § 13.

State law elaborates on these rights by defining “appropriate” to mean “to divert, impound, or withdraw a quantity of water from a source of water, for a beneficial use or to reserve water under AS 46.15.145.” AS 46.15.260(1). Similarly, “appropriation” is defined to mean “the diversion, impounding, or withdrawal of a quantity of water from a source of water for a beneficial use or the reservation of water under AS 46.15.145.” AS 46.15.260(2). Any person, which is broadly defined in law to include individuals and organizations like TU and KSP, “may apply to the commissioner to reserve sufficient water to maintain a specified instream flow or level of water” for “(1) protection of fish and wildlife habitat, migration, and propagation; (2) recreation and park purposes; (3) navigation and transportation purposes; and (4) sanitary and water quality purposes.” AS 46.15.145(a); see AS 46.15.260(7).

The only reasonable interpretation of these constitutional provisions and statutes is that, subject to prior rights and preferences among beneficial uses, individuals and non-governmental entities have the right to appropriate water, which includes the right to reserve water. Individuals and non-governmental entities don’t just have the right to apply for an appropriation; they have the constitutionally-guaranteed right to actually appropriate the water themselves.

State law provides that the commissioner shall issue a certificate if the commissioner finds the rights of any prior appropriators will not be affected, the applicant has demonstrated a need, there is unappropriated water sufficient for the reservation, and the reservation is in the public interest. AS 46.15.145(b). In evaluating the public interest, the Commissioner must consider:

- (1) the benefit to the applicant . . . ;
- (2) the effect of the economic activity . . . ;
- (3) the effect on fish and game resources and on public recreation opportunities;
- (4) the effect on public health;
- (5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;
- (6) harm to other persons resulting from the proposed

appropriation; (7) the intent and ability of the applicant to complete the appropriation; and (8) the effect upon access to navigable or public water.

AS 46.15.080(b); 11 AAC 93.970(13).

The proposed changes to the DNR's water management regulations would be a significant departure from the DNR's past practice, and directly conflict with the Alaska Constitution and Statutes. The proposed changes to the DNR's water management regulations, in combination with the DNR's failure to adjudicate applications for reservations and other instream uses, improperly elevates out-of-stream beneficial uses above instream beneficial uses when no such distinction exists in state law. While the constitution and statutes allow for preference among beneficial uses, that preference must be formed when there are competing uses, considering the priority of the competing uses, the comparative benefit from each competing use, impacts to affected waters, and the public interest:

When there are competing applications for water from the same source, and the source is insufficient to supply all applicants, the commissioner shall give preference first to the public water supply and then to the use that alone or in combination with other foreseeable uses will constitute the most beneficial use."

AS 46.15.090. Additionally, Alaska law defines "beneficial use" as:

a use of water for the benefit of the appropriator, other persons or the public, that is reasonable and consistent with the public interest, including, but not limited to, domestic, agricultural, irrigation, industrial, manufacturing, fish and shellfish processing, navigation and transportation, mining, power, public, sanitary, fish and wildlife, recreational uses, and maintenance of water quality.

AS 46.15.260(3). Instream and out-of-stream beneficial uses are scattered throughout this definition and in no particular order. Some of the specified beneficial uses—such as fish and shellfish processing, power, maintenance of water quality, and possibly others—can utilize instream flow *or* withdrawals out of the water body. Similarly, the definitions for the terms "appropriate" and "appropriation" include instream flow reservations along with diversions, impoundments, or withdrawals—without elevating any particular category of use above another. Yet, the DNR often takes many, many years to review and adjudicate applications for instream flow reservations. Trout Unlimited, for example, has numerous complete applications for instream flow reservations it submitted to the DNR more than 15 years ago that the DNR has yet to review or adjudicate. Relegating reservations of instream flow to be a second-class beneficial use—whether through overt regulatory changes or through unnecessary delays in adjudication—contravenes the Alaska Constitution and statutes, and has no basis in law. Just as any person can apply for and obtain a certificate for a beneficial use that relies on diverting, impounding, or withdrawing water, the DNR's regulations must allow a person to apply for and obtain a certificate for a reservation of instream flow.

III. Additional Specific Comments:

- 11 AAC 93.210(a): Any amendment to this regulation should make clear that the procedures to authorize the temporary use of water, as provided in 11 AAC 93.220, apply only where there also is no prior unadjudicated application for appropriation, including a prior unadjudicated application to reserve water. Because it is impossible for the DNR to evaluate whether a temporary use of water may adversely affect a prior unadjudicated application for that same water, and the Alaska Constitution give priority to prior right, the DNR cannot lawfully authorize the temporary use of water where a prior unadjudicated application, including for instream uses, exists.
- 11 AAC 93.220: The DNR should additionally change its regulations to require public notice and opportunity for comment before authorizing any temporary water use. If a proposed temporary water use may affect water subject to a prior application for appropriation, including for instream uses, and DNR should provide notice to that prior applicant, an opportunity for comment, and an opportunity for a hearing. The DNR should also consult with the ADFG to ensure sufficient water quality and quantity remains to support fish and wildlife spawning, rearing and migration. The Alaska Constitution guarantees the right to appropriate water for beneficial uses, including instream uses, and it would violate the Alaska Constitution for the DNR to authorize a temporary water use that uses water reserved for instream flow.
- 11 AAC 93.510: It is unclear how the proposed changes will change the public's, a certificate holder's, or an applicant's rights or responsibilities. The DNR should seek more transparent and open decision making, allow more public input, and avail itself of outside expertise that may allow the DNR to arrive at a more informed decision that better meets the public's need. Any holder of a certificate for an instream flow reservation and any applicant for an instream flow reservation should have the same rights and responsibilities as a certificate holder or applicant for a withdrawal, impoundment, or diversion.
- 11 AAC 93.530: Regulations should encourage broad public notice and participation by continuing to require the DNR to publish notice in a newspaper of general circulation. Additionally, notice should be mailed to applicants and not just appropriators. Because the DNR often takes many, many years to adjudicate applications, it should also provide notice to applicants and not just appropriators.
- 11 AAC 93.970(25): Because the DNR often takes many, many years to process applications and does not process applications according to the date they are received, the DNR must afford applicants of instream flow reservations the same priority and rights as certificate holders.

IV. Other Suggested Changes.

In order for the DNR to make informed decisions regarding the public interest and manage our state's waters in a way that protects our valuable fisheries, any changes to Alaska's water management regulations should require public notice and the opportunity for public input, along with consultation with the ADFG, even in instances where the proposed water use is temporary. Ensuring adequate water quality and quantity in our state's fish-producing waters to maintain our thriving fisheries is of utmost importance to Alaskans. We urge the DNR to end its opaque decision making and, if it adopts any changes to its water management regulations, to adopt changes that provide for public notice and participation, and that require the DNR to consult with the ADFG to ensure water-use decisions do not threaten the productivity and viability of our world-class fisheries:

- 11 AAC 93.040: Any application for an out-of-stream water right must require review by the ADFG to ensure minimum water quantity and quality remains in-stream to support fish and wildlife spawning, rearing and migration.
- 11 AAC 93.120: The DNR should adopt regulations that require it to review applications in the order they are received and to issue a decision rejecting or approving any application within three years in order to ensure the application is processed in a timely manner and not, in effect, stayed indefinitely.

V. Conclusion.

For all the above reasons, we strongly encourage the DNR to reject the proposed changes to its water management regulations. We urge the Commissioner to reconsider, to help secure our Alaskan way of life, protect our economic interests in fish and wildlife, and help safeguard the irreplaceable cultural values of our wild salmon by encouraging, rather than eroding, public participation in the pursuit of instream flow reservations. Fish and wildlife, and the habitat they rely on, are central to Alaskans' way of life and our economic, cultural and spiritual wellbeing. Non-governmental organizations, Tribes, individuals, and businesses all play a key role in ensuring adequate water and instream flow to keep these important resources thriving. It is critical that the DNR manage public waters in a way that ensures the continued productivity of important fish and wildlife habitat. Thank you for your careful consideration of these issues.

Sincerely,



Nelli Williams
Alaska Director
Trout Unlimited
Anchorage, AK
Nelli.williams@tu.org



Brian Kraft
President
Katmai Service Providers
brian@fishasl.com

From: [Pittman, Loretta - FS, AK](#)
To: [FS-Mailroom R10](#); dnr.water.regulations@alaska.gov
Cc: [Program Support, DMLW \(DNR sponsored\)](#)
Subject: 2000;2530 : DNR Title 11 Water Rights Comments
Date: Thursday, November 30, 2023 3:37:06 PM
Attachments: [Formal Letter 1 Signature \(eSign\).pdf](#)

You don't often get email from loretta.j.pittman@usda.gov. [Learn why this is important](#)

CAUTION: This email originated from outside the State of Alaska mail system. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Link to Work Package FY 2024 - 639329: https://usdagcc.sharepoint.com/sites/FS-WO-CSA1/Mercury/_layouts/15/DocIdRedir.aspx?ID=YNURSQCXHYUA-1762000756-872639

This electronic message contains information generated by the USDA solely for the intended recipients. Any unauthorized interception of this message or the use or disclosure of the information it contains may violate the law and subject the violator to civil or criminal penalties. If you believe you have received this message in error, please notify the sender and delete the email immediately.

File Code: 2000; 2530
Date: November 30, 2023

Mr. Brandon McCutcheon
Department of Natural Resources
Alaska Department of Natural Resources
Division of Mining, Land and Water
550 West 7th Avenue, Suite 1070
Anchorage, Alaska 99501

Dear Mr. McCutcheon:

We appreciate the Department taking the time to respond to our questions regarding the proposed regulatory changes to Title 11 of the Alaska Administrative Code. Those answers provided useful context concerning the changes and helped inform the basis for the final US Forest Service comments, contained herein.

We offer the following comments to the proposed changes as they relate to the closure of water right applications, the procedures for temporary water use, public notices and hearings on critical water management areas, and definitions. Comments are issued in the order in which they are presented in the proposed regulatory amendments.

Comment 1: 11 AAC 93.115(4). “the applicant fails to provide information requested under 11 AAC 93.070 or fails to complete the newspaper notice of the proposed appropriation, in which case the **commissioner will notify the applicant [WILL BE NOTIFIED]** by certified mail that the application has been closed, noting the reason for **and effective date of the closure [THE EFFECTIVE DATE OF THE CLOSURE, AND ANY APPEAL PROCESS].**”

- DNR noted in their response to questions that the intent was not to eliminate the appeals process and that mention of it in 93.115(4) would be repetitive with other sections of the regulations. However, some applicants may not be immediately familiar with those other sections and therefore unaware of their appeal rights. We recommend keeping this notification language to increase clarity and transparency.

Comment 2: 11 AAC 93.210(a) “Procedures to authorize the temporary use of water, as provided in 11 AAC 93.220, will apply if the use continues for less than five consecutive years and the water applied for is not otherwise appropriated **under a permit to appropriate water, certificate of appropriation, certificate of reservation, or change permit.**”

- DNR notes that the proposed issuance of temporary uses of water will not be issued if they conflict with an adjudicated water right. However, this still does not address the



potential effects of water uses on unadjudicated or pending claims. Temporary water uses on any temporal or hydrologically relevant spatial scale may affect fish, wildlife, recreational or other resources. Complete unadjudicated applications for reservations of water are afforded priority standing and warrant consultation on any temporary water use application which may affect these reservations. We recommend standardizing consultation with affected parties for unadjudicated claims or, preferably, completing adjudications prior to the issuance of any temporary water use permit.

- DNR notes that “depending on the nature of the TWUA applied for, the department will generally not issue TWUAs that impact applied-for rights or reservations.” We appreciate this clarity and recommend that DNR include applied-for rights and reservations to the regulation to reflect this intention in order to avoid potential conflicts or adverse effects to natural resources.

Comment 3: 11 AAC 93.510(b)3.

- We recommend that DNR update the proposed language to include *applicants for a water right or reservation*. In response to questions concerning the differential treatment in the proposed regulatory change between applicants for water rights and temporary water use authorizations (originally included) and applicants for water reservations (originally excluded) ADNR responded that the Department would consider updating this section to include applications for a water right or reservation. We recommend this inclusion.

Comment 4: 11 AAC 93.970(25). "Appropriators of record" means [APPLICANTS FOR, AND PERMITTEES AND CERTIFICATE] holders of **permits to appropriate water, certificates of appropriation, certificates of reservation, or change permits** [, WATER RIGHTS]

- We recommend not changing the definition of “appropriators of record” for two reasons.
- First, the change unnecessarily limits the regulatory definition of “adjudication” by making it narrower than its applications. We note that since the regulatory definition of “adjudication” (11 AAC 93.970(1)) incorporates the definition of “appropriators of record,” that definition is also being substantially changed to remove applicants for water rights. Since both regulatory and statutory (see e.g., Alaska Statute § 46.15.165) provisions contemplate consideration of applicants for water rights in adjudications, the definition should not be narrowed so as to exclude them.
- Second, the definition of “appropriators of record” should not be changed in this way because the rationale for the change does not match the scope of the regulatory change. Specifically, the November 21 question and answer response stated that the intent of the proposed change was “to eliminate from consideration any applications that are incomplete or are no longer active.” But the proposed rule would eliminate consideration of all applications and not simply those that are “incomplete or are no

longer active.” Any regulatory change to the definition should more closely reflect this narrower intent.

The Forest Service greatly appreciates the opportunity to comment on ADNR’s proposed water regulation changes and the answers to questions which were provided. If you have any further questions or wish to engage in further discussion, please contact the Service’s Watershed Program Manager Robes Parrish (robert.parrish@usda.gov). Thank you for your consideration.

Sincerely,

X 

Signed by: BRIDGET DARR
BRIDGET DARR
Director of Natural Resources

U.S. Fish and Wildlife Service

Attached are U.S. Fish and Wildlife Service comments regarding the October 6, 2023, Supplemental Notice for Proposed Changes to DNR Water Regulations.



United States Department of the Interior

U.S. FISH AND WILDLIFE SERVICE
1011 East Tudor Road
Anchorage, Alaska 99503-6199



In Reply Refer To:
FWS/R7/NWRS/NR/WRB.MW

Ms. Molly Benson
Department of Natural Resources
Division of Mining, Land and Water
550 West 7th Avenue, Suite 1070
Anchorage, Alaska 99501-3579

Dear Ms. Benson:

This letter is in regard to the Alaska Department of Natural Resources (ADNR) October 6, 2023, supplemental notice of proposed changes to regulations in Title 11 of the Alaska Administrative Code, relating to the closure of water right applications, the procedures for temporary water use, the public notices and hearings on critical water management areas, and definitions.

Title III of the Alaska National Interest Lands Conservation Act mandates that the U.S. Fish and Wildlife Service (Service) ensures water of sufficient quality and quantity for populations and habitats of fish and wildlife as a purpose of every National Wildlife Refuge in Alaska (P.L. 96-487, 94 Stat. 2371 (1980)). The Service and the State of Alaska share a common interest in conserving and protecting fish and wildlife and their habitats. A reservation of water is one mechanism to achieve this shared interest.

It is the policy of the Service (403 FW1) to work within a State's administrative system to obtain water rights for the protection of fish and wildlife and their habitats so long as the water rights provide adequate protection of water quality and water quantity. As such, the Service has worked within the State of Alaska's water management regulations to apply for reservations of water for instream flow purposes. The Service currently maintains 202 applications for the reservation of water pending adjudication with priority standing ranging back to 1994.

Of the 203 reservation applications filed by the Service since 1994, one application has been granted a "certificate of reservation" through the adjudication process. The Service has expended significant resources on the collection, analysis, and maintenance of data that support State-based reservations of water for instream flows. The Service's significant investment in the State's water rights system warrants concern with ADNR's proposed regulation changes, specifically regarding the "standing" and "priority" of the Service's 202 reservation of water applications pending adjudication and future applications that may be submitted by the Service.

The Service notes that the October 6, 2023, supplemental notice of proposed regulation changes to Title 11 of Alaska Administrative Code are nearly identical to several regulation changes proposed by ADNR on January 15, 2021

(<https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=126212>). The Service expressed concerns with the proposed regulation changes through the 2021 public notice process. The Service's concerns were not resolved by ADNR's March 16, 2021, response to questions submitted by the public regarding the proposed changes to Title 11 (<http://dnr.alaska.gov/mlw/news/pdf/Questions-and-Answers-Regarding-Proposed-Water-Regulations.pdf>). The Service has also reviewed ADNR's November 21, 2023, response to questions submitted by the public regarding the proposed changes in the October 6, 2023, supplemental notice (<https://dnr.alaska.gov/mlw/news/pdf/2023-11-21-Questions-and-Answers-Water-Regulations.pdf>), and ADNR's answers have been considered in the Service's comments herein.

These concerns lead the Service to recommend that ADNR abandon the suggested changes to the definition of "appropriators of record" (in 11 AAC 93.970), add language such that the definition of "appropriators of record" includes complete applications for water reservations and water rights, or issue a "certificate of reservation" at the time an application for a reservation of water is received. Redefining "appropriators of record" removes "applicants" from the definition and strips the priority standing of "applicants" for water rights and water reservations as senior appropriators while adjudication is pending. The loss of the Service's priority date standing as the "applicant" for reservations of water is problematic to the Service's water right interests.

The Service's concern for the priority standing of our 202 pending applications for reservations of water also extends to changes in the authorization of temporary use of water permits under 11 AAC 93.210(a). The proposed change creates uncertainty about the priority of pending water reservation applications if junior temporary water uses are authorized prior to the adjudication of the water reservation. The Service recommends that the State maintain the original language of 11 AAC 93.210(a), and include "applicants for reservation of water" in the list of entities that water applied for is "not otherwise appropriated under," or issue a "certificate of reservation" at the time an application for a reservation of water is received. Failure to correct the exclusion of "applicant for reservation of water" strips the Service of its priority standing in the temporary water use process and inhibits the protection of adequate water quantity and quality for each Refuge.

The Service's concern for the priority standing of our 202 pending applications for reservations of water also extends to changes in the public notice and meeting for critical water management area regulations 11 AAC 93.510. In the proposed language in 11 AAC 93.510(b), the Service recommends ADNR add language to notify existing applicants for reservations of water on a water source affected by the proposed designation, revocation, or amendment of a critical water management area, or issue a "certificate of reservation" at the time an application for a reservation of water is received. The Service also recommends adding language to the proposed language in 11 AAC 93.510(b) that ADNR will notify Alaska Native Tribes if affected by the proposed designation, revocation, or amendment of a critical water management area.

It is the Service's policy (403 FW1.3) to comply with State laws, regulations, and procedures in obtaining and protecting water rights, except where application of State statutes and regulations does not permit Refuge purposes to be achieved.

The Service values the opportunity to provide comments on ADNR's proposed water regulation changes. If you have any questions or desire further information, please contact the Service's Regional Water Rights Coordinator Michael Winfree by phone at 907-209-2664 or by electronic mail at Michael_Winfree@fws.gov.

Sincerely,

Acting Assistant Regional Director
National Wildlife Refuge System
Alaska Region

cc: Michael Winfree, Water Rights Coordinator,
Water Resources Branch, USFWS
John Trawicki, Chief of Water Resources
Branch, USFWS

From: [Nancy S. Wainwright](#)
To: [Colles, Christianna D \(DNR\); Program Support, DMLW \(DNR sponsored\)](#)
Subject: Comments on DNR Water regulations - Attached
Date: Thursday, November 30, 2023 4:56:11 PM
Attachments: [2023 11 30 Comments on DNR Proposed Changes to Water Regs.pdf](#)

Some people who received this message don't often get email from nswalaska@gmail.com. [Learn why this is important](#)

CAUTION: This email originated from outside the State of Alaska mail system. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Please see the attached comments and Public Records Request.

[Wainwright Legal Services, LLC](#)
2459 Sprucewood Street
Anchorage, Alaska 99508
907-205-1975
nswalaska@gmail.com

This communication (including attachments) constitutes an electronic communication within the meaning of the Electronic Communications Privacy Act, 18 U.S.C. Section 2510, and its disclosure is strictly limited to the recipient intended by the sender. It may contain information that is proprietary, privileged, and/or confidential. If you are not the intended recipient, any disclosure, copying, distribution, or use of any of the contents is STRICTLY PROHIBITED. If you have received this message in error, please notify the sender immediately and destroy the original transmission and all copies.

Wainwright Legal Services, LLC
2459 Sprucewood Street
Anchorage, Alaska 99508
907-205-1975
nswalaska@gmail.com

November 30, 2023

Christy Colles, Director
Alaska Department of Natural Resources
Division of Mining Land and Water
550 W. 7th Ave., Suite 1070
Anchorage, AK 99501

Sent via email to:
christiana.colles@alaska.gov
dmlwprogramsupport@alaska.gov

Re: Comments on Supplemental Notice of Proposed Changes Relating to Water Management in the Regulations of the Department of Natural Resources, Project/Reg. No. 2020200431

Dear Ms. Colles:

Thank you for the opportunity to comment on Proposed Changes on Water Management in the Regulations of the Department of Natural Resources and the Temporary Water Use Permit (TWUP) or Temporary Water Use Authorization (TWUA). I represent several Tribes in Northwest Alaska where there is considerable interest in any actions DNR takes to change its water regulations.

There is demonstrated public interest in these proposed regulation changes as well. DNR has been considering these changes since 2016 when it issued a public notice seeking information on regulatory changes. During the intervening time, DNR could have easily convened a public hearing and workshop about these regulations.

The collaborative resolution of Alaska's water issues was previously undertaken by the Alaska Water Resources Board comprised of members "having general knowledge of the use and requirements for the use of the water of the state and the conservation and protection of it." AS 46.15.190. The Board is authorized to hold public meetings "at any time or any place in the state in order to obtain public opinion on a water use problem or proposal." AS 46.15.230. It is charged with providing advice on the adequacy of State laws and regulations governing the establishment of water rights." AS 46.15.210. DNR is responsible to provide clerical staff for the Alaska Water Resources Board. AS 46.15.190.

However, DNR has not funded the Alaska Water Resources Board, and has and has failed to fulfill the collaborative function or the public outreach that the Water Resource

Board fulfilled. The Alaska Water Resources Board previously reported to the House and Senate Resources Committees when regulatory, policy, and statutory changes such as these were proposed.

These regulations warrant a collaborative meeting format to have a give-and-take among those who are affected by, and have specialized knowledge about, these important state water issues. In addition, they warrant an honest report to the Legislature about the changes that DNR is proposing to adopt. It is respectfully requested that DNR hold public workshops, involve those knowledgeable about water resource matters, and accurately report to the Legislature before making these regulatory changes.

DNR has a fiduciary responsibility to administer both instream and out-of-stream uses for the beneficiaries of the public trust – the people of Alaska –because water resources are "common use" resources and public access to those common use resources is "strongly protected."¹ The Alaska Supreme Court has discussed the addressed the type and extent of permissible regulation consistent with the "common use" of fish, wildlife and water resources protected in Article VIII, section 3. It examined the issuance of individual permits (such as those "sole use and benefit" type permits) and the "common use" of the State's resources by the general public (such as those advanced by instream flow reservations). In *Owsichek v. State*, 753 P.2d, 488 (Alaska 1988), the Court concluded that a careful reading of the constitutional minutes establishes that the provisions of Article VIII were intended to permit the broadest possible access to and use of state waters by the general public.² The common use clause contemplates that resources will remain in the public domain and will not be ceded to private ownership. Since the right of common use is guaranteed expressly by the constitution, it must be viewed as a highly important interest running to each person of the state.³ The Court found that the common use clause was a unique provision, not modeled under any other state constitution, and that it imposed on the state a public trust duty with regard to management of fish, wildlife and waters. The Court harkened to the framer's intention to prohibit exclusive grants or special privileges and concluded that the common use clause "imposes on the state a trust duty to manage fish, wildlife and water resources of the state for the benefit of all the people."⁴ The State argued that the common use clause did not

¹ "Whenever occurring in their natural state, fish, wildlife and waters are reserved to the people for common use." Art. VIII section 3. Public waters are "subject to appropriation," with priority given to prior right and preferences among beneficial uses as prescribed by law. Art. VIII section 13.

² *Owsichek* 753 P.2d at 92 (citing *Wernberg v. State* 516 P.2d 1191, 1198-99, (Alaska 1973)).

³ *Owsichek Id* fn. 10.

⁴ *Id.*

deprive the state of the discretion to manage its resources. But the Supreme Court disagreed, finding that the common use clause engrafted in the constitution certain trust principles guaranteeing access to fish, wildlife and water resources, and the State could not violate those trust principles in exercising its "discretion."

DNR's practice of issuing serial TWUPs has violated that trust responsibility in that there has been no analysis of the ongoing (cumulative) impacts to resources from decades of "temporary" water use or any DNR oversight or management of those "temporary uses."

DNR's effort to limit TWUPs to a single five-year timeframe appears to be a beneficial change but there is a question as to whether those who have already received multiple five-year permits for decades, will still be able to withdraw water for an additional five years under this regulation or whether their permit will cease upon its adoption. In any case, a five-year duration is no longer viable given the rapidly changing climate and the need for better water management. A one-year TWUP should be the maximum, with the possibility of extending an additional year provided there is public notice and government to government consultation with affected Tribes

The proposed changes to 11 AAC 93.210(a) appear to provide a preference for out-of-stream private use TWUPs over an unadjudicated reservation of water applications which does not fulfill DNR's responsibility to manage the waters for the "benefit of all the people." DNR should adopt a regulation to issue certificates of reservation prior to granting a TWUP on systems with pending instream flow reservation applications. Alternatively, DNR must evaluate whether a temporary use of water may adversely affect a prior unadjudicated applications for that same water.

The proposed changes to 11 AAC 93.115(1)and (2) are confusing. It appears under the proposed language that a relinquishment in writing "may" result in the closure of an application, but a verbal relinquishment "will" result in the closure of the application (after notification to the applicant.) A request to relinquish a pending water right application should be granted by DNR whether the request is in writing or oral.

Regarding 11 AAC 93.115(3)and (4), since DNR record-keeping is troubled, in order to ensure that DNR has accurate contact information for applicants, DNR should attempt to reach applicants through email, public notice or posted notice prior to closing an application, in addition to sending notice to the address "on file." It may be that an applicant has changed addresses, and notified DNR, but that address change was not properly processed by DNR. In addition any person that commented on the application should be notified before the application is extinguished.

A beneficial change is proposed in 11 AAC 93.220 to add the point of discharge and return flow. The map should be required to show Lat/Long and GIS coordinates of these locations.

DNR should provide notice under 11 AAC 93.510 to any person that has requested notification of actions pertaining to waterbodies in critical water management areas.

Thank you for your consideration of these comments.

PUBLIC RECORDS REQUEST:

I, respectfully request, under the Alaska Public Records Act (AS 40.25.120(a)) that a copy of all questions submitted, and comments received be provided electronically to me at nswalaska@gmail.com.

Please provide:

1. records of all questions received by DNR on or before November 30, 2023. I ask that those records/comments be provided as soon as practicable but no later than 10 business days after November 30, 2023 in accordance with 2 AAC 96.325(a).
2. all public comments received by DNR on the proposed regulations. I ask that the comments be provided within 10 business days of November 30, 2023 (or within 10 business days of the final day to public submit comments if the public comment deadline is extended) in accordance with 2 AAC 96.325(a).

In accordance with DNR Public Records request form, I hereby certify that I am not a party to litigation, nor am I acting on behalf of any party to litigation, against a public agency or official of the State of Alaska in any manner relevant to the records I request to review.

Respectfully,



Nancy S. Wainwright

nsw:mmwj