

Questions and Answers Regarding Proposed Water Regulations
Division of Mining, Land and Water
Department of Natural Resources
April 1, 2021

Question: What is the intent for the insertion of “the point discharge or return flow, if any” in 11 AAC 93.220(b)(2)?

Answer: The additional information is currently requested on an application for a temporary water use authorization and helps make the distinction whether the water use is consumptive or non-consumptive. The additional language also gives the Department of Environmental Conservation additional information that may be helpful in determining if a discharge permit is necessary.

Question: For context, our applicants who apply for TWUAs usually do not have a point discharge because they are using water for general uses such as dust depression on roads. Is DMLW planning to change the TWUA permit application after regulation changes have been adopted?

Answer: The location of water discharge or return flow (if any) is already requested on Table 3 of the current Application for Temporary Use of Water.

Question: In general, what group of applicants gain from the proposed changes?

Answer: The proposed regulation changes are intended to improve the implementation of the Water Use Act in a manner that is consistent with the Alaska Constitution. The changes are not intended to confer a “gain” to any particular group of applicants.

Question: What impact does each of the sections have on water use to the applicant?

Answer: DNR cannot judge how each section impacts every applicant. Each applicant should consider potential impacts.

Question: The Alaska Constitution states, “[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.” Are DNR’s changes consistent with AS 46.15.145(a)(1)?

Answer: Yes. The proposed regulation changes more clearly ensure that reservations of water will be managed for common use.

Question: Under current law, a state or federal agency and a person may also apply to reserve water in a stream for, among other things, the ‘protection of fish and wildlife habitat.’ Further, the Alaska Constitution establishes a system to appropriate water for various beneficial uses and for the “general reservation of fish and wildlife.” Id. Section 13. How do the proposed changes work in concert with this current constitutional provision?

Answer: The proposed regulations changes are intended to further distinguish reservation of water appropriations from traditional water right appropriations. Traditional water right certificates are issued to persons for a specific beneficial use. Reservations of water are a reserved level or flow that is reserved for a specific public purpose, not for the sole use or benefit of the applicant.

Question: “Appropriations out of a waterbody are made by applying for a water right or temporary water use permit.” 11 AAC 93.040, 11 AAC 93.220. Why are you changing this?

Answer: There are no proposed changes to 11 AAC 93.040. 11 AAC 93.220 has additional verbiage added to better identify a temporary water use as consumptive or non-consumptive, consistent with the application for a temporary use of water.

Question: Why try to curtail public comment?

Answer: The proposed changes do not curtail public comment. To the extent this question pertains to proposed changes to 11 AAC 93.510 for public notice of a critical water management area, the purpose of changes is to make the public comment process less formal. DNR expects to continue the practice of holding meetings concerning critical water management areas but reserves discretionary authority in the event there is no public interest in attending a meeting.

Question: The DNR response to questions that an "eligible person affected by a decision" may appeal in accordance with 11 AAC 02. What criteria will DNR use to determine who is an individual or entity:

- (i) affected by a decision on an instream flow reservation application?
- (ii) affected by a decision to withdraw, impound or divert water?

Answer: There is no formal definition of “eligible person affected by a decision” in 11 AAC 02. A potential appellant would need to describe how they were affected.

Question: (i) If DNR is holding a certificate of reservation, and additional flow data or other information is required because there is a subsequent application for an out-of-stream withdrawal, impoundment or diversion, will DNR be financially responsible to provide the additional data?

(ii) Who else will be financially responsible to supply the necessary data?

(iii) How will DNR determine the amount that DNR as certificate holder pays, and how much the applicant pays?

(iv) If DNR has any financial responsibility in this instance, will there be a fiscal note for this these regulations?

Answer: (i) If an application for a subsequent withdrawal, impoundment or diversion is received it would be the responsibility of the subsequent applicant to demonstrate there is sufficient unappropriated water. (ii) – (iv) Because the subsequent applicant will bear the cost to demonstrate there is sufficient unappropriated water regardless of who holds the certificate of reservation, DNR does not foresee an increase in its costs in adjudication the subsequent application. Persons challenging the subsequent application would bear their own costs.

Question: The Alaska Constitution, Article VIII, Section 3 states "Wherever occurring in their natural state, fish and wildlife and waters are reserved to the people for common use."

Article VIII, Section 13 also references the waters "reserved to the people for common use."

(i) Why is this Constitutional provision not enforced by DNR as an "automatic" instream flow reservation?

(ii) Has DNR calculated the savings to the State if there is an automatic instream flow reservation?

(iii) What percentage of Alaska streams have hydrologic data to support DNR's issuance of permits for withdrawal, impoundment or diversion?

Answer: These questions are not related to the proposed changes in the regulations. Rather, they appear to question the need for Alaska's Reservation of Water statute, AS 46.15.145. DNR is not in a position to comment on whether the statute is necessary based upon that the constitutional reservation. DNR's proposed revisions to the water use regulations are designed to improve DNR's implementation of the Alaska Water Use Act.

Question: Can DNR participate in collaborative stakeholder meetings regarding the proposed DNR water regulation changes?

Answer: Prior questions requesting that DNR hold meetings or hearings were aggregated and answered on page 19 of the first Questions and Answers document posted on March 16, 2021. As explained there, the changes to the regulations are intended to provide clarity to applicants, resulting in more complete applications and a public notice process under 11 AAC 93.510 that is consistent with the public notice process elsewhere in DNR's regulations. Given the extension of the public comments period and the acceptance of supplemental questions, the Department believes it has addressed all concerns. All reasonable comments submitted by the April 2 deadline will be tabularized and made available to concerned parties for their review.

Questions Regarding Proposed Changes to 11 AAC 93.142

In the "Questions and Answers Regarding Proposed Water Regulations Division of Mining, Land and Water Department of Natural Resources date March 16, 2021 (March 16 Q&As), it was pointed out that although the law already defines "four purposes," under 11 AAC 93.142(b)(3), the DMLW changed the wording to "purported" (March 16 Q&As p. 2). As rational for this change, the agency provides that the "proposed revision is intended to have the applicant state why a reservation of water is being requested and list the need because *There may not be unilateral agreement that a reservation of water is needed*" (March 16 Q&As p. 2). Does this mean that the Proposed Regulations are intended to give development interests who want to divert the same or portions of the water identified in the instream flow reservation application, the ability to have input regarding the "purported need" for the reservation or otherwise prevent the instream flow application from processed or granted?

Answer: The proposed wording change to "purported need" was intended to prompt the applicant to consider if a reservation of water is needed, versus other existing controls, such as a fish habitat permit. Notice of an application for a reservation of water are provided in accordance with AS 46.15.133 and 11 AAC 93.080.

Question: DMLW's answered "[n]o, the other appropriations require a statement of beneficial use," (March 16 Q&As p. 2) to the question will "the proposed addition of 'purported need' also be applied to

other types of appropriated water rights such as withdrawals, diversions, and impoundments?” (March 16 Q&As p. 2) Does a request for a Temporary Water Use Authorization (TWUA) to appropriate water require a “statement of beneficial use or any information as to why consumption of the water in question is needed?”

Answer: A TWUA application must include information including the nature of the use and the justification for the request. 11 AAC 93.220(b). A TWUA application does not create a water use right, rather an authorization to use available, unappropriated water for a specific purpose that is temporary.

Questions Regarding Proposed Changes to 11 AAC 93.146

Question: What are the differences between the legal rights of a certificate holder of a water reservation as compared to those of non-governmental applicant for such reservation? I understand that one of the differences is “that the certificate holder is responsible for compliance with the conditions of the certificate of reservation,” (11 AAC 93.146(b)) however, I would also like to know, under the Proposed Regulations, what rights to enforce and manage the reservation would the Alaska Department of Natural Resources as certificate holder have that the “non-governmental” applicant would not have?

Answer: The proposed regulations do not address or alter the “right to enforce” water reservations. By statute, only DNR has enforcement authority. See AS 46.15. Regarding management, under the proposed regulations DNR as certificate holder would be responsible for compliance with the conditions of the certificate where the applicant is a “non-government” person or entity. However, under the proposed 11 AAC 93.146(g), non-government applicants will “have standing to initiate or participate in any administrative or judicial proceeding regarding the department’s adjudication of the application or the management of the certificate.”

Question: DMLW provides that “[a] review of existing authorizations reveals that only four reservations of water are currently held by a non-governmental organization, with many complete applications accepted and awaiting adjudication.” (March 16 Q&As p. 3) Please clarify this statement. Specifically, is the low number of non-governmental agency holders because of a lack of interest by such organizations desiring instream flow certificates or because of back-log in processing instream flow reservations by DMLW? Is there an emphasis by DMLW for putting the processing of instream flow reservations applications submitted by citizens or tribal organizations on the back burner including refusing to process any such applications if the reservation would potentially, conflict with a mining company or other development interest’s requests or application for consumptive use of water? How many instream flow applications that have been submitted to DMLW are still being processed and how many of these non-governmental or tribal organizations?

Answer: These questions are not related to the proposed regulation changes.

Question: Federally Recognized tribal organizations are legally considered governments under federal law (AG Op. Legal Status of Tribal Governments in Alaska (October 19, 2017)). In addition, the state of Alaska officially recognizes tribes as sovereign governmental entities. Why, therefore, are tribal governments not included in Proposed Regulation 11 AAC 93.146(g) as “governmental” entities that can hold a water right certificate which right now states that only “state or federal agency, or a political subdivision of the state.”? How is the exclusion of Federally Recognized tribal governments from the

definition of who can be a water reservation certificate holder provided in 11 AAC 93.146(g), consistent with both federal law and state policy recognizing tribal sovereignty?

Answer: Without waiving sovereign immunity (where their constitutions allow), federally recognized tribes cannot be issued water reservation certificates. This applies equally under the existing and the proposed regulations, because certificate holders must be susceptible to enforcement and have the capacity to participate as parties in legal proceedings. 11 AAC 93.146(b) could be further amended in the future to include federally recognized tribal governments, but without uniformity as to waiver and capacity to waive immunity DNR is not currently prepared to issue certificates to entities beyond those identified in the proposed .146(b).

Question: Apparently, the substantial costs and resources that it takes to obtain an instream flow reservation, could be potentially off-set by becoming a co-applicant with a recognized government entity who would be the holder of the certificate under 11 AAC 93.146(b). However, even in such cases, “[u]nder the proposed regulations, in the event of a joint application by a non-government applicant and a government applicant, the certificate will be issued to the government applicant only.” (March 16 Q&As p. 6) Similarly, although DMLW encourages tribal or non-government applicants to partner with a government resource agency in applying for water reservations such partnership would be subject to agency consent.” (March 16 Q&As p. 7) Would such consent therefore, be withheld by the DMLW or other state agency in the event the proposed reservation of water potentially, conflicts with a mining company or other development interest’s requests or application for consumptive use of water?

Answer: The consent referred to in DNR’s response to the earlier question is the consent of the co-applicant government agency. A non-government applicant will not need DNR’s permission (consent) to partner with a government co-applicant.

Question: DMLW is the regulatory agency responsible for overseeing the water reservation application process including adjudicating the water right and certificate once issued including “preventing the certificate holder from abandoning, transferring, assigning, or converting” the certificate (AS 46.15.145 (f)). Would proposed regulation 11 AAC 93.146(b) in which “The Alaska Department of Natural Resources will be issued the certificate of reservation if the applicant is not a state or federal agency, or a political subdivision of the state,” therefore, improperly establish a potential conflict-of-interest issues by having the Commissioner regulate itself in those cases where it become the holder of a water reservation certificate? Please note that conflict of interest in having a regulatory agency oversee its own water right still exists in “the event a non-government applicant is concerned about the commissioner’s review of a corresponding certificate issued to DNR, the non-government applicant would qualify as an interested party in the commissioner’s review.” (March 16 Q&A p. 8).

Answer: Whether a non-government applicant appeals the Commissioner’s review of a water reservation (11 AAC 93.147) in the applicant’s capacity as holder of the certificate (existing regulations) or as applicant only (proposed 11 AAC 93.146(g)), the Commissioner remains responsible to adjudicate the appeal or request for reconsideration under the procedures in 11 AAC 02. In either event the Commissioner would re-evaluate a challenged DNR final decision. The outcome of the appeal would be subject to judicial review.

Questions Regarding Proposed Changes to 11 AAC 93.147

Questions: Does Proposed Regulation 11 AAC 93.147(a)(3), authorize the Commissioner to amend or revoke the original reservation in the event of “a subsequent applicant's protest of the justification for the reservation of water if water might be unavailable to both maintain the reservation of water and to grant the subsequent applicant's request” if such subsequent applicant is an application for a water right or request for a TWUA? If so, would the Commissioner be authorized to amend or revoke the reservation at any time of such “subsequent applicant's request.”

Answer: 11 AAC 93.147 (a) describes possible circumstances which might justify review of a reservation of water in less than 10 years. The term “subsequent applicant” at the end of proposed 11 AAC 93.147(a)(3) clarifies that this is the same person as the “subsequent applicant” protesting the reservation (see beginning of .147(a)(3)). Neither the existing or proposed regulation define “subsequent applicant.”

Questions Regarding Proposed Changes to 11 AAC 93.210

Question: In the March 16 Q&A DMLW responded to several questions by stating “This question does not relate to the proposed regulation changes.” (March 16 Q&A p. 13). Because the agency, however, is proposing changes to the regulations, does this mean it has opened up the entire Water Resource regulations for review and must address questions and recommendations for changing all the regulations?

Answer: DNR has endeavored to answer all questions that relate to the proposed changes or that suggest further changes.