



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Natural Resources

DIVISION OF MINING, LAND & WATER
Director's Office

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March 6, 2020

Re: Department Regulations on Conveyance of Beds of Certain Navigable Waterbodies Determined to be Not Navigable in Fact

Opportunity to Comment on Proposed Regulation Changes

Dear Alaskan:

The Department of Natural Resources (DNR) proposes to adopt regulation changes in Title 11 of the Alaska Administrative Code to potentially allow for the conveyance of beds of certain navigable waterbodies to municipalities and others. Specifically, DNR is proposing to amend 11 AAC 51.045, the regulation concerning easements retained by the state for access to and along navigable and public waters, to convey the beds of waterbodies determined to be not navigable in fact, if the conveyance is determined to be in the state's best interest.

I am writing to explain the proposed regulation changes, why we are proposing this regulation package now, and how this action relates to the ongoing resource management planning process. I invite you to review and comment on these proposed regulations.

Brief Description

DNR is proposing to amend 11 AAC 51.045(d) in response to concerns raised by certain boroughs and municipalities that, in light of the 2016 revision to the definition of "navigable waters" at AS 38.05.965(14), the existing regulation unreasonably prevents the conveyance of lands that rightfully should be conveyed to them as part of their municipal entitlements under AS 29.65. Currently, 11 AAC 51.045(d) requires DNR to retain the beds of all navigable and public waters in state ownership. This regulation was adopted in 2001 and was intended to retain the beds of waters that are navigable in fact. While the original intent of this regulation was to ensure public ownership of the beds of navigable in fact waters, the 2016 statutory redefinition of "navigable waters" now prevents the conveyance of the beds of effectively all waters. DNR believes that revision of this regulation is appropriate and necessary to clarify the purpose of this regulation.

Why Do We Need This Regulation Change Now?

In 2016, Chapter 14, SLA 2016, revised the definition of "navigable waters" in AS 38.05.965(14). This revision broadly expanded the definition beyond waters that were navigable in fact, to include any water, in any state, for any useful purpose. This new definition included the beds of waters that are well beyond the limits of waters that are navigable in fact as defined under AS 38.04.062. Under the 2016 definition, 11 AAC 51.045(d) now effectively prevents DNR from conveying the beds of waters to municipalities under AS 29.65 and other land conveyances under Title 38 that are not

navigable in fact. The effect of the statutory definition change on this regulation also increases the costs to these municipalities, and DNR for other land disposals, to prohibitive levels for the survey of the boundaries of these countless waterbodies from selected uplands to be conveyed.

This regulation also prevents conveyance of certain beds that were once navigable in fact but no longer contain water. For instance, public works or flood control structures may have permanently altered the course or location of a navigable waterbody. In these cases, the segregated waterway may be dry or filled and no longer navigable in fact.

In these cases of dried or filled beds of waterbodies that were formerly navigable in fact, the segregated or filled lands may be of use to the borough or municipality in which the bed is located. While state statutes and case law allow the conveyance of beds of navigable waters, subject to the reservation of public access and the Public Trust Doctrine, 11 AAC 51.045 prevents DNR from conveying those beds of waterbodies that no longer contain navigable in fact waters.

DNR believes that the revision of the statutory definition of “navigable waters” under AS 38.05.965(14) has necessitated this revision to 11 AAC 51.045(d) to allow conveyance of beds of certain waters while “navigable” under the statutory definition, are not navigable in fact.

While DNR will continue to retain ownership of beds of waterbodies that have been determined to be navigable in fact, this proposed regulation change will allow the department to once again convey the beds of waters that are not navigable in fact. This proposed revision would allow for continued land conveyances to municipalities under the municipal land entitlement program and allow DNR to convey beds determined not to be navigable in fact, if: the conveyance is made subject to the Public Trust Doctrine; DNR makes a written determination that the conveyance is in the best interests of the state; and the conveyance includes a clause stating that ownership will revert back to the state if the public’s use and access of the waterbed is not preserved under the Public Trust Doctrine. DNR proposes to ensure through a deed covenant and reversionary condition that the public has full use of and access to these waters under the Public Trust Doctrine via the Equal Footing Doctrine and the Submerged Lands Act of 1953.

DNR is asking for public comments to assist the department in its efforts to consider revisions to this regulation.

Opportunity for Comment

Interested parties are encouraged to review the proposed regulation changes and submit any comments to the Division of Mining, Land and Water. Enclosed is the official “Notice of Proposed Changes in the Regulations of the Department of Natural Resources,” which provides the details regarding the submission of public comments. You can view the proposed regulations on our website at <http://www.dnr.state.ak.us/mlw/hottopics>.

For your comments to be considered, the department must receive them no later than **5:00 p.m. on Friday, April 10, 2020**. Comments must be in writing, and they may be mailed, faxed, or e-mailed to the following address:

Attention: Joe Joyner
Division of Mining, Land and Water
550 W 7th Ave., Suite 1070
Anchorage, Alaska 99501-3579
Fax: (907) 269-8904
E-Mail: dnr.easements.regulation@alaska.gov

You may also submit written questions relevant to the proposed regulations to:

Joe Joyner
Division of Mining, Land and Water
550 W. 7th Ave., Suite 1070
Anchorage, Alaska 99501-3579
Fax: (907) 269-8904
E-Mail at dnr.easements.regulation@alaska.gov.


Questions must be received at least 10 days before the end of the public comment period (**March 31, 2020**). The Department of Natural Resources will aggregate its response to substantially similar questions and make the questions and responses available at <http://www.dnr.state.ak.us/mlw/hottopics>.

For more information regarding DNR's proposed regulation changes or a copy of the proposed regulation change, go to <http://www.dnr.state.ak.us/mlw/hottopics>, or write to the Director's Office at: Joe Joyner, Division of Mining, Land and Water, 550 W. 7th Avenue, Suite 1070, Anchorage, Alaska 99501-3579; call 907-269-8511; or e-mail at joe.joyner@alaska.gov.

If you are a person with a disability who needs a special accommodation in order to participate in this process, please contact Joe Joyner at 269-8511 no later than March 31, 2020, to ensure that any necessary accommodations can be provided.

Thank you for your consideration of these proposed regulation changes. DNR looks forward to reading your comments and suggestions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Marty Parsons", with a long horizontal flourish extending to the right.

Marty Parsons
Director, Division of Mining, Land and Water
Department of Natural Resources