

**ALASKA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING, LAND AND WATER**

**Memo of Decision to Grant Easement under AS 38.05.850
Port Protection Community Association
ADL 105837**

Proposed Action: The Division of Mining, Land and Water, Southeast Region (DMLW), proposes to grant a public easement on unoccupied State tidelands to the Port Protection Community Association for an existing sewer line outfall pipe. The sewer line traverses State tidelands seaward of Lot 8 of USS 3558 and, according to DEC, was completed "on or before 1994".

The proposed public easement is approximately 472 feet long by 30 feet wide, comprising about 0.3 acres, more or less.

Legal Description: The project is within Section 18 of Township 64 South, Range 76 East Copper River Meridian according to the development plan submitted by a State engineer for the Alaska Department of Environmental Conservation on October 7, 1992, shown on Attachment A.

Legal Authority: AS 38.05.850, AS 38.05.035, 11 AAC 05.010

Revocability Determination: As per AS 38.05.850, DMLW is directed, for purposes of public notice, to determine by evaluation of the nature and duration of the intended use of the easement whether or not it is functionally revocable. To determine if the easement is functionally revocable, DMLW uses two tests as directed by the *Alaska Supreme Court in Northern Alaska Environmental Center v. State of Alaska, Department of Natural Resources*. The first test focuses on the likelihood of revocation. In this case, due to the financial investment of the State of Alaska, Department of Environmental Conservation, Village Safe Water and the importance of a community septic system to the health and safety of the residents of Port Protection, the likelihood of revocation is so low that it fails the first test.

The second test that must be considered when determining if an easement is functionally irrevocable is the impact removal would have on the environment. Being that the sewer line is either buried in a trench or exposed to the seabottom, removal would not have a long term negative impact on the environment. The impact of removing the concrete anchors is also unlikely to have a long term negative effect. This being the case, the project passes the second test.

Typically, a functionally irrevocable determination is the product of a finding that revocation is unlikely and removal would have a significant long term impact on the environment. In this particular case, DMLW has determined that the overall impact the revocation would have on the health and safety of the community as well as the investment of the State in itself warrants a determination of functionally irrevocable. This being the case, the proposed action will be subject to the public notice requirement set forth in AS 38.05.850(c).

Administrative Record: ADL 105837 and the Prince of Wales Area Plan, Revised October 1998.

Scope of Decision: The scope of administrative review, under AS 38.05.035(e)(1)-(2), for this proposed easement is limited to: 1) reasonably foreseeable, significant effects of the uses proposed to be authorized, 2) the applicable statutes and regulations, 3) the facts pertaining to the land or resources, and 4) the issues that are material to the determination that the proposed easement will best serve the interests of the State.

Title: The State received title to the affected tide and submerged lands under the 1958 Alaska Statehood Act (Public Law 85-508), the 2002 Submerged Lands Act (Public Law 31) and under the U.S. Constitution, Article IV, Doctrine of the Equality of States and the equal footing doctrine under entry of the state into the Union. Management is subject to the public trust doctrine.

Planning and Classification: The Prince of Wales Area Plan has identified the project area as Subunit 2a Port Protection Subdivision Insert Map and has designated the tidelands for Floathomes – Secondary Use, Shoreline Development – Personal, Public Recreation – Anchorage, Recreation – Commercial, and Public Recreation – Developed. These designations convert to Settlement Land and Public Recreation Land.

The Plan has designated the uplands as Settlement (S), Public Recreation – Undeveloped (Ru), and Water Resources (W), which converts to a classification of Settlement land, Public recreation land, and Water resources land.

The Prince of Wales Area Plan directs DMLW to manage the land to support community expansion, recreation, and firewood and fish and wildlife harvest. Issuance of this easement is compatible with the designation, classification, and management intent for the land.

Municipality: Unorganized Borough

Native Corporation: Sealaska

Water Bodies: The sewer outfall line lies within Wooden Wheel Cove adjacent to the waters of Port Protection.

Agency Review, and Public Notice: This is an old application for a sewer outfall line that has been in place since 1994 if not before. DMLW is not aware of any issues relating to the outfall line. This being the case, DMLW is deferring Agency Review and proposing the issuance of the public easement. The proposed issuance of the easement, as well as the Revocability Determination under AS 38.05.850 noted above, is appealable and will be public noticed on the Alaska Online Public Notice System, available at www.state.ak.us.

Environmental Risk: No significant environmental risk is associated with this project. The applicant has not proposed fuel storage or other uses that may pose such a risk to the environment.

Survey: This is a public easement for a sewer outfall existing for approximately 20 years; the easement drawing, tied to a surveyed property boundary, has been prepared by a State Engineer.

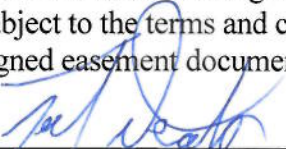
Therefore DMLW has decided to accept the Site Plan and Profile (Attachment A) submitted with the application in lieu of an as-built survey.

Bonding and Insurance: The performance guaranty and insurance requirements are waived due to the nature and scope of the project and benefit to the public.

Fee: In accordance with 11 AAC 05.010(c), as the Port Protection Community Association is essentially acting as a pseudo-governmental entity, the annual fee is waived.

Discussion: The Port Protection Community Association applied for a public easement for the sewer outfall line 21 years ago. DMLW was waiting for an acceptable as-built survey before issuing the public easement. As noted above, DMLW will accept the development diagram in lieu of an as-built survey and will grant the public easement.

Adjudicator Recommendation: Based upon the information provided by the applicant as well as review of relevant planning documents, statutes, and regulations related to this application, it is my recommendation to grant a public easement for the sewer line outfall for a term of 25 years or until the easement is no longer used for the intended purpose, whichever occurs first. The easement, subject to the terms and conditions set forth therein, will be issued upon the return of the applicant signed easement document and any required deliverables.




Ted Deats
Natural Resource Specialist

October 3, 2013

Date

Regional Manager's Decision

I have completed my review of the administrative record for the public easement application ADL 105837. I concur with the conclusions and recommendations set forth in the Memorandum of Decision. It is my decision to issue the public easement described and recommended herein.



David L. Kelley
Regional Manager

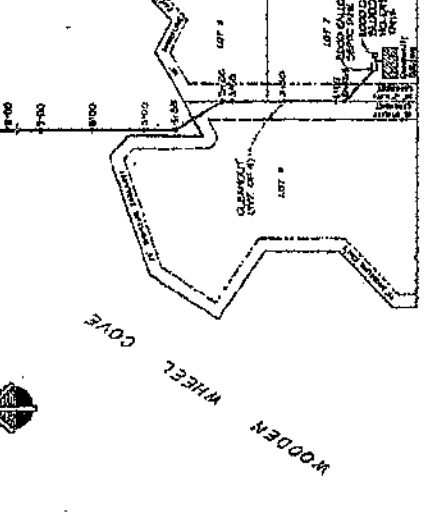
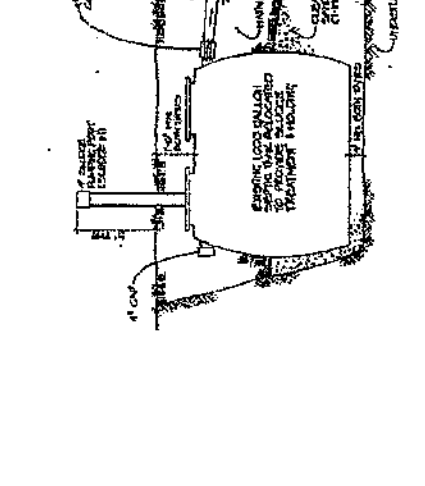
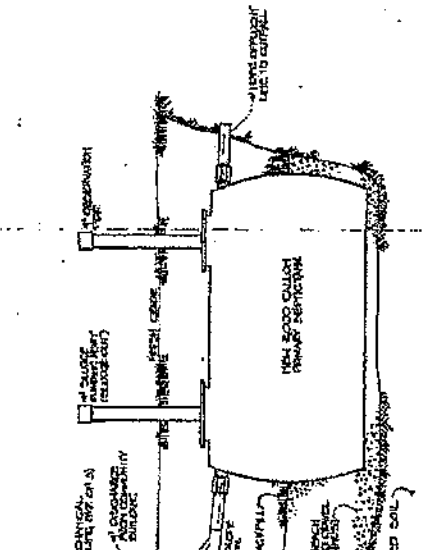
October 3, 2013

Date

Attachments: Attachment A – Development Plan
Attachment B – Easement

A public notice decision will appear in the Alaska Online Public Notice System, available at www.state.ak.us.

A person affected by this decision may appeal it, in accordance with 11 AAC 02. Any appeal must be received by **October 23, 2013** and may be mailed to Joseph R. Balash, Acting Commissioner, Department of Natural Resources, 550 W. 7th Avenue, Suite 1400, Anchorage, Alaska 99501; faxed to 1-907-269-8918, or sent by electronic mail to dnr.appeals@alaska.gov . If no appeal is filed by the appeal deadline, this decision becomes a final administrative order and decision of the department on **November 4, 2013**. An eligible person must first appeal this decision in accordance with 11 AAC 02 before appealing this decision to Superior Court. A copy of 11 AAC 02 may be obtained from any DNR public information office.



GENERAL NOTES

1. Refer to the site plan for the location of the septic system components.
2. The septic tank shall be constructed of concrete and shall be 10' x 10' x 6' deep.
3. The effluent line shall be 4" diameter and shall be installed at a minimum slope of 1/8" per foot.
4. The pump-out station shall be installed at the end of the effluent line.

Mean High Water at 11.5 ft
According to ASLS 2004-44
472 feet long below MHW
From Sta 3+28 to Sta 8+00

**STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING, LAND & WATER, SOUTHEAST REGION
400 Willoughby Ave., P.O. Box 111020
Juneau, Alaska 99811-1020**

PUBLIC EASEMENT

ADL 105837

THIS AGREEMENT made and entered into this 31st day of October 2013 by and between the **STATE OF ALASKA, acting by and through the Department of Natural Resources, Division of Mining, Land & Water**, hereinafter referred to as Grantor, and **the Port Protection Community Association**, hereinafter referred to as Grantee.

WITNESSETH, that in accordance with the provisions of Sec. 38.05.850, A.S. and the rules and regulations promulgated thereunder, Grantee having filed an application for an easement for **an existing sewer line outfall (472' by 30')** on **State tidelands with the** Division together with a map showing the definite location thereon which Grantee has adopted and agrees to be the specific and definite location of the aforesaid easement, and

WHEREAS, it is understood and agreed by Grantee herein that, as a condition to the granting of the easement applied for, the land covered by said easement shall be used for no purpose other than the location, construction, operation and maintenance of the said easement over and across the following described State lands, to wit:

The easement area depicted on the easement diagrams for ADL 105837 is attached hereto as Attachment A. The easement is located within Section 18, Township 64 South, Range 76 East, Copper River Meridian.

The said combined easement area contains less than 0.3 acres more or less.

TO HAVE AND TO HOLD the same until the above described land shall no longer be used for the above-mentioned purpose and subject to conditions and reservations elsewhere set forth herein and any "Special Conditions".

In the event that the easement herein granted shall in any manner conflict with or overlap a previously granted right-of-way or easement, Grantee herein shall use this easement in such a manner as not to interfere with the peaceful use and enjoyment of the previously issued right-of-way or easement and no improvements shall be constructed by Grantee herein upon the overlapping area unless the consent therefore has first been obtained from Grantee under the pre-existing right-of-way or easement.

Grantee in the exercise of the rights and privileges granted by this indenture shall comply with all regulations now in effect or as hereafter established by the Division of Mining, Land & Water and all other Federal, State or Municipal laws, regulations or ordinances applicable to the area herein granted.

TERMS and CONDITIONS

1. This Easement is issued for a period of 25 years and is subject to revocation with cause. This easement shall expire on **October 31, 2038**.
2. Grantor reserves the right to allow other like or compatible uses of the easement and the right to require such users to enter into an equitable maintenance agreement with the holder of this easement. The equitableness of any such agreement shall be determined by Grantor.
3. Grantor assumes neither responsibility for maintenance of improvements constructed within public easements on state land, nor liability for injuries or damages attributable to that construction. Grantor also makes no warranty that dedicated lands are suitable for the existing use.
4. Public access shall not be precluded by activities or structures allowed by this right-of-way/easement. All operations must be conducted in a manner that will ensure minimum conflict with other users of the area. Grantee shall not close landing areas or trails or otherwise prevent overland access commonly used by the public. The interests served by the public trust doctrine, specifically the right of the public to use navigable waterways and the land beneath them for navigation, commerce, fishing, hunting, protection of the areas for ecological study, and other purposes, will be protected. Interference with the rights of the public to use a public easement is an actionable cause at law.
5. Grantee assumes all responsibility, risk and liability for all activities of Grantee, its employees, agents, invitees, contractors, subcontractors, or licensees directly or indirectly conducted in connection with this easement, including environmental and hazardous substance risks and liabilities, whether accruing during or after the term of this easement. Grantee shall defend, indemnify, and hold harmless the State of Alaska, its employees, and agents from and against any and all suits, claims, actions, losses, costs, penalties, and damages of whatever kind or nature, including all attorney's fees and litigation costs, arising out of, in connection with, or incident to any act or omission by Grantee, its employees, agents, invitees, contractors, subcontractors, or licensees, unless the sole proximate cause of the injury or damage is the negligence or willful misconduct of the State or anyone acting on the State's behalf. Within 15 days Grantee shall accept any such cause or action or proceeding upon tender by the State. This indemnification shall survive the termination of the easement.
6. Grantee shall immediately notify the Department of Environmental Conservation (DEC) by telephone, and immediately afterwards send DEC a written notice by facsimile, hand delivery, or first class mail, informing DEC of: any unauthorized discharges of oil to water, any discharge of hazardous substances other than oil; and any discharge or cumulative discharge of oil greater than 55 gallons solely to land and outside an impermeable containment area. If a discharge, including a cumulative discharge, of oil is greater than 10 gallons but less than 55 gallons, or a discharge of oil greater than 55 gallons is made to an impermeable secondary containment area, Grantee shall report the discharge within 48 hours, and immediately afterwards send DEC a written notice by facsimile, hand delivery, or first class mail. Any discharge of oil, including a cumulative discharge, solely to land greater than one gallon up to 10 gallons must be reported in writing on a monthly basis. The posting of information requirements of 18 AAC75.305 shall be met. Scope and Duration of Initial Response Actions (18 AAC 75.310) and reporting requirements of 18 AAC 75, Article 3 also apply.

Grantee shall supply DEC with all follow-up incident reports. Notification of a discharge must be made to the nearest DEC Area Response Team during working hours: Anchorage (907) 269-3063, fax (907) 269-7648; Fairbanks (907) 451-2121, fax (907) 451-2362; Juneau (907) 465-5340, fax (907) 465-2237. The DEC oil spill report number outside normal business hours is (800) 478-9300.

7. Site disturbance shall be kept to a minimum to protect local habitats. All activities at the site shall be conducted in a manner that will minimize the disturbance of soil and vegetation and changes in the character of natural drainage systems. Particular attention must be paid to preventing pollution and siltation of any waterways and to preventing disturbances to fish and wildlife populations and habitats.

8. All survey monuments, witness corners, reference monuments, mining claim posts, bearing trees, and unsurveyed corner posts shall be protected against damage, destruction, or obliteration. Grantee shall notify Grantor of any damaged, destroyed, or obliterated markers and shall reestablish the markers at Grantee's expense in accordance with accepted survey practices of the Division of Mining, Land & Water.

9. All solid waste and debris generated from activities conducted under this Easement shall be removed to a facility approved by the Alaska Department of Environmental Conservation (DEC).

10. Authorized representatives of the State of Alaska shall at all times have the right to enter on official business and inspect the easement area, including Grantee's improvements.

Prior to abandonment or termination by the Grantee, or within 90 days of termination, revocation or cancellation of this indenture by the Grantor, Grantee shall, within 90 days, remove all structures and improvements from the area herein granted, except those owned by Grantor, and shall restore the area to the same or similar condition as the same was upon the issuance of this easement. Should Grantee fail or refuse to remove the structures or improvements, within the time allotted, they shall revert to and become the property of Grantor. However, Grantee shall not be relieved of the cost of the removal of the structures, improvements and/or the cost of restoring the area.

Grantee shall utilize the lands herein granted consistent with the purposes of the proposed use, as revealed by the application therefore, and shall maintain the premises in a neat and orderly manner and shall adopt and apply such safety measures as shall be necessary, proper and prudent with respect to the use to which the land is subjected.

Any lands included in this easement which are sold under a contract to purchase shall be subject to this easement. Upon issuance of title to the purchaser, this easement shall remain in effect until its date of expiration.

In the event that the necessity for the easement shall no longer exist, or Grantee should abandon or fail to use the same, then this easement shall terminate.

The State of Alaska shall be forever wholly absolved from any liability for damages which might result to Grantee herein on account of this easement having been canceled, forfeited, or terminated prior to the expiration of the full term for which it was issued.

NOW THEREFORE, in accordance with the provisions of Sec. 38.05.850, A.S. and the rules and regulations promulgated thereunder and in accordance with the conditions heretofore set forth or attached hereto and made a part hereof, Grantee herein is hereby authorized to locate, construct, operate, and maintain said easement over and across the lands herein described.

IN WITNESS WHEREOF, the said grantor has caused these presents to be signed in duplicate and Grantee herein has hereunto affixed his signature on the day and year first above written.

