



**Patrick M. Flood**  
Sr. Lead Negotiator

ATO-2058  
P. O. Box 100360  
Anchorage, AK 99510-0360  
Phone 907.263.4368  
Fax 918.662.8278

patrick.m.flood@conocophillips.com

October 21, 2015

Leah Levinton  
External Affairs Coordinator  
Alaska Gasline Development Corporation  
3201 C Street, Suite 200  
Anchorage, Alaska 99503

**Re: Comments on Proposed Confidentiality of Information Regulations**

Dear Ms. Levinton:

By this letter, ConocoPhillips Alaska, Inc. (CPAI) provides further comments on the proposed regulations regarding confidentiality of information issued by the Alaska Gasline Development Authority (AGDC) on September 18, 2015. CPAI is a participant in the ongoing Alaska LNG Project (AKLNG) and AGDC is a state-owned entity participating on behalf of the State of Alaska in AKLNG. CPAI supports AGDC's participation in AKLNG; hence, CPAI has a significant interest in how AGDC proposes to handle confidential information related to both AKLNG and the in-state natural gas pipeline that AGDC is also tasked with pursuing. Presuming that AGDC is the state entity assigned to represent the State of Alaska's interests in future work on the LNG project, AGDC's actions with regard to confidentiality and disclosure of information significantly impact all other participants in the project, and, if contrary to LNG industry standard practices regarding competition and confidentiality, would reduce AGDC's effective and efficient participation in the project.

While AGDC is a state corporation, its participation in a project such as AKLNG is not in a sovereign capacity but as a proprietary equity participant, like the other participants. Participation in a competitive LNG project is a unique opportunity for the State of Alaska and not an endeavor that is a standard state function in the United States. The legislature recognized this situation and to facilitate that unique role, the legislature provided AGDC with broad powers that allow AGDC to participate in and implement natural gas and LNG projects in a coordinated manner with private entity co-venturers. The proposed regulations, as detailed below, would not allow AGDC to function effectively and efficiently within the industry standards necessary for a competitive LNG project or other natural gas project.

In industry projects, when a participant or contractor wants to have its information held confidential, it does not have to prove to the receiving party if or how sensitive or confidential the information is. The parties either come to agreement on the terms for how the disclosing party's information will be held confidential, or the disclosing party does not disclose its information and the receiving party does not have the benefit of that information. The proposed regulations attempt to have AGDC, as a receiving party, mandate and control what information owned or disclosed by other parties is held confidential and under what terms. If AGDC were to decline to hold information owned or co-owned by third parties confidential, it would not have the same information available for making decisions that the other participants have and AGDC would not be able to effectively represent the State's interests in any natural gas project or LNG project that involves private parties.

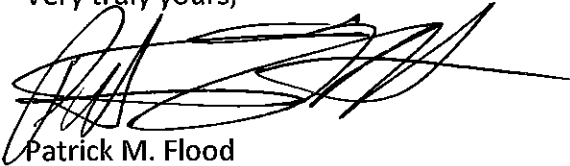
The legislature recognized that a state corporation operating in a proprietary role cannot effectively do so under the same requirements as a state agency engaged in public works projects or standard public functions does. Hence, the legislature exempted AGDC from the state procurement code and the state personnel code. AS 31.25.065; .140. The legislature has also granted AGDC the advantage of statutorily mandated expedited review and action by state agencies or entities [AS 31.25.007] and cooperation from other state agencies [AS 31.25.090(a)]. The legislature clearly wanted to put AGDC in an advantageous position to engage in activities usually conducted only by private entities. Further to that intent, the legislature authorized AGDC to "enter into confidentiality agreements necessary to acquire or provide information to carry out its functions" [AS 31.25.090 (f)] and to protect information under such agreements by providing that "[t]he portions of records containing information acquired or provided by the corporation under a confidentiality agreement are not subject to AS 40.25." [AS 31.25.090(g)] AGDC needs that broad authority in order to obtain information needed to effectively function as the State's representative in an Alaska liquefied natural gas project and should not restrict the scope it has successfully used historically by promulgating the proposed regulations.

Should AGDC determine to proceed forward with regulations regarding its authority to maintain information owned or co-owned by third parties as confidential, the regulations need to provide certainty regarding confidentiality to those parties with whom AGDC will be contracting or otherwise receiving information from. In addition to being overly narrow and presenting significant risk to third party information, the proposed regulations contain ambiguities and inconsistencies. Attachment 1 to this comment letter contains more specific comments on each section of the proposed regulations.

Leah Levinton  
Alaska Gasline Development Corporation  
October 21, 2015  
Page 3

ConocoPhillips Alaska, Inc. supports AGDC's role as an effective participant in AKLNG and appreciates this opportunity to comment on AGDC's proposed regulations.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Patrick M. Flood', written over a horizontal line.

PMF:sb  
Encl.: Attachment 1

Attachment 1 to Comments Submitted by  
ConocoPhillips Alaska, Inc. Regarding Proposed Regulations  
By the Alaska Gasline Development Corporation

**I. Section By Section Comments.**

Confidentiality agreements 3 AAC . . . (a).

This proposed regulation contradicts AS 31.25.090(f) by not allowing confidentiality agreements for all types of information that AGDC may need to carry out its functions. This proposed regulation would allow AGDC to enter into confidentiality agreements with third parties but only for “specific information” in six categories. Under AGDC’s authority and current practices, AGDC may protect from public disclosure all information “necessary to acquire or provide information to carry out its functions” [AS 31.25.090(f)] The proposed regulations, however, do not clearly and with certainty cover all of the types of information that (a) are currently held confidential; (b) other participants and contractors in an LNG project would in the ordinary course of business expect and rely on to be held confidential; or (c) AGDC as a participant with other parties in a competitive LNG project would need to hold confidential. As discussed in the general comments, in non-government activities, the party providing the information determines whether it should be held confidential or not. In this case, where AGDC would anticipate being a co-owner or licensee of significant types and volumes of information, it is critical to recognize the rights of third party owners, third party co-owners and licensors in confidential information.

Large natural gas projects in general and large LNG projects in particular are complex and involve numerous agreements and contracts that are often unique to each project; there is no encyclopedic list of documents or types of information that would be held confidential to a project. A few examples of information not clearly and with certainty included in the proposed regulations but held confidential in the private sector are prices received and accepted from competitive bid processes, marketing intelligence/information, project negotiations and agreements related to construction or operations, LNG purchase and sales negotiations and agreements, and internal project investigations, analyses and reports.

Areas of ambiguity and uncertainty in this proposed regulation section include:

1. Many agreements involved in private operations or projects include a section on confidentiality of information that may be created or received regarding numerous different areas subject to the agreement (such as an operating agreement). As written, the regulations do not explain the difference between a “confidentiality agreement” (as the statute references), which may be a provision or article in a broader agreement that requires confidential treatment, and a “contract . . . to protect the confidentiality of information belonging to a third party” (as the proposed regulation references). Additionally, it is not clear how information co-owned by AGDC and a third party would be treated.
2. In subsection (3), it is not clear who would determine if “disclosure . . . would cause commercial or proprietary harm to the third party owning the information.” As discussed above in the general comments, the information owner decides how sensitive its information is and does not have to prove to the other parties before disclosure what harm may result from disclosure beyond the intended recipients. ADGC should not be the party to make that

determination. Even if there could be an acceptable process in place for AGDC to make the determination, a third party's risk and uncertainty with regard to confidential protection of its information would be greatly increased (that is, the third party would not necessarily know whether confidentiality would apply until after it entered into the agreement, for both information provided at the time the agreement was executed and information subsequently provided or created). AGDC should instead rely on a third party information owner or co-owner to assert confidentiality when it deems protection is necessary. Otherwise, the uncertainties could significantly limit the parties or contractors willing to enter into such agreements with the project participants and would undoubtedly be the source of chronic disputes over harm determinations.

Confidentiality agreements 3 AAC . . . (b).

Proposed subsection (b) provides that no contract entered into after December 1, 2015 to protect the confidentiality of information shall itself be held confidential. The rationale and date for such a requirement are unexplained. The statute refers to "confidentiality agreements" so it is unclear whether this proposed regulation that refers to a "contract . . . to protect the confidentiality of information" would apply only to contracts specific to confidentiality or to confidentiality agreements (including those parts of broader agreements that include mutually agreed confidentiality provisions). If the proposed regulation would apply to broader agreements that include confidentiality provisions, then it would appear that no agreement could be held confidential. That type of restriction contradicts AGDC's broad authority to enter into confidentiality agreements in order to acquire or provide information and would significantly impede AGDC's ability to effectively participate in an LNG project.

Confidentiality agreements 3 AAC . . . (c).

Proposed subsection (c) would provide that AGDC would continue to honor its obligations under "contracts . . . to preserve the confidentiality of information" entered into before December 1, 2015. Compliance with existing contracts and agreements is obligatory; hence this regulation raises the questions of why AGDC is now proposing to restrict its own authority to hold information confidential, and what types of information it is currently authorized to hold confidential would not be held confidential if the proposed regulations were to be promulgated. Again, AGDC needs to use the broad authority it has exercised to date to obtain information on the same terms as other project participants in order to effectively and efficiently represent the State of Alaska in a natural gas or LNG project.

Disclosure of the corporation's information 3 AAC . . . .

This proposed regulation purports to protect "the corporation's trade secret" information from public disclosure. That protection is certainly necessary in a competitive LNG project, but it is not clear when trade secret information becomes trade secret information of the corporation (e.g., information created or acquired jointly with co-venturers). Presumably the corporation would treat trade secrets created or acquired jointly with its co-venturers in the same way but the regulation does not address that situation. The proposed regulation at subsection (b), if promulgated, should clarify that information created or acquired by the corporation jointly with other parties, including the LNG project participants, is protected as confidential information. Again, new restrictions imposed on the broad statutory authority already granted to AGDC would create uncertainty and confusion, and would impede AGDC's ability to obtain information necessary to efficiently and effectively represent the State's interests as a participant in a competitive LNG project.

Consideration of Confidential information 3 AAC . . . . .

This proposed regulation would allow confidential information to be provided to board members whether in executive session or not and for the board to authorize disclosure of confidential information. The AGDC board is already authorized to meet in executive session under the Open Meetings Act, but what the board members are intended to do when they “consider information that the corporation may or must keep confidential” is unclear and unexplained. The regulation does not indicate whether the board is to make decisions based on confidential information or to consider whether to hold information confidential or not. Furthermore, if this proposed regulation were to be promulgated, it must be clarified that the board cannot authorize a disclosure that is prohibited by an agreement with a third party, notwithstanding whether the confidentiality agreement was executed before or after the effective date of the regulations. This regulation would inject even more ambiguity and more uncertainty into AGDC’s ability to acquire information in order to effectively represent the State’s interests in a competitive project.

Limits on and review of confidential information 3 AAC . . . (a).

Subsection (a) of this proposed regulation asserts a policy of making as much information available to the public as possible but the boundaries and mechanisms are not specified. The process would rely on a presumption that information is available to the public absent “clear indication or demonstration to the contrary.” This is an ambiguous and subjective target. No process and standards are provided. The most effective and efficient method of providing the certainty necessary for information provided by or jointly owned with a third party is to provide that information be held confidential pursuant to an agreement with the third party (as provided in AS 31.25.090(f)) or as otherwise allowed by law. As written, even the existence of a confidentiality agreement is not recognized as sufficient to protect confidential information. The corporation is also directed to use the “least restrictive means possible” without any being identified. Conceivably, this could mean that all documents would be redacted to the minimum extent some unknown and undesignated official, employee or “professional and technical advisor”<sup>1</sup> of the corporation thought necessary without consideration of third party agreements or interests. Again, this approach to information management inserts great uncertainty in any communications or engagement by third parties with AGDC.

Missing in the entire set of proposed regulations is any required approval or even consultation with the party that owns or co-owns the confidential information. Hence, any third party that interacts with AGDC would be exposed to an increased risk of having information that it believed to be held confidential released to the public without notice.

Limits on and review of confidential information 3 AAC . . . (b).

Subsection (b) of this proposed regulation would provide that in response to a public records request, and periodically as the corporation may establish, a committee of director(s) and staff member(s) would review information in the corporation’s possession to determine if it is confidential. It is unknown which set of regulations are referenced in the first sentence of this section so the implications of those references are unknown.

---

<sup>1</sup> See AS 31.25.060.

The committee would be considering applicable law and the “absent clear indication or demonstration to the contrary” standard (pursuant to subsection (a) above) for its determination of whether information “in the possession of the corporation” should be confidential or public. The proposed regulation appears to specifically include information owned by a third party and information co-owned by third parties, so long as the information is in the corporation’s possession. Again, there is no requirement, at any time in the decision process, for obtaining consent or consultation with a party providing, licensing, owning or co-owning the information, only a presumption of “no confidentiality” with a goal of not finding any “clear indication or demonstration to the contrary” of the information being confidential. A state agency engaged in sovereign activity or a public works project may attempt to operate under those conditions, but information cannot be managed under the proposed conditions in a competitive LNG project if the project is to have any chance of acquiring the information necessary to efficiently and effectively progress and operate.

Limits on and review of confidential information 3 AAC \_\_\_\_\_ (c).

Subsection (c) would continue the policy of presuming information is not confidential by directing the corporation’s president direct staff to review information already considered confidential and determine if the information is still confidential. Under this policy, no certainty exists that information provided to the corporation or jointly owned with the corporation will ever be held confidential for any length of time. As mentioned above, there is no provision in these proposed regulations about coordinating or consulting with any third party who owns or co-owns the information or otherwise relies on AGDC to continue the confidentiality of information. This lack of recognition of standard industry practices and the value of confidential information to a competitive project would chill and inhibit any third party interactions involving information a third party may wish to not put in the public domain. AGDC cannot engage as a participant in a competitive project of any kind with policies that put confidentiality at risk at all times, as the proposed regulations do.

Board action on contracts 3 AAC \_\_\_\_\_.

This proposed regulation mandates that any contract submitted to the board for approval be made public at least ten days prior to the board meeting when the contract will be considered. Unless AGDC can delineate how a “contract” differs from an “agreement”, this proposed regulation does not comply with AS 31.25.090; specifically, it contradicts the requirements of that section with regard to confidentiality agreements. AGDC has also not defined, or referenced any source that defines, which “contracts” must go to the board for approval and which do not require board approval.

**II. Areas Not Addressed by the AGDC Proposed Regulations.** Should AGDC promulgate regulations such as those currently proposed, it should consider addressing the following areas.

Information Owner Approval.

Nowhere in the entire set of proposed regulations is there any concept of a required consent, or even consultation with, a party that owns, or co-owns information that the party believes should be held confidential, prior to an AGDC act or failure to act that might disclose such information to the public. Hence, any third party interacting with AGDC who owns or co-owns information that it believes and relies upon to be held confidential would be subject to a release to the public without warning. AGDC would find it difficult to persuade third parties to business in that environment.

### Internal Information Control.

AGDC must assure its co-venturers and contractors, and parties licensing data or technology to AGDC, that the information in its custody or control is protected not just from external disclosure but from inappropriate internal disclosure. AS 31.25.040(b)(2) requires that AGDC “establish appropriate separation within the corporation by separating personnel and functions and by other means to the extent that the separation may be required by contract or applicable law for the purpose of screening and preventing the exchange of commercially sensitive information when developing an in-state natural gas pipeline, an Alaska liquefied natural gas project, and other transportation mechanisms to deliver natural gas in the state.” The proposed regulations do not address this issue but should.

### Claims for Damages.

The proposed regulations appear to impose AGDC as the decision maker regarding whether information submitted or licensed to it by third parties or created as joint property with third parties is confidential or not. If AGDC (an entity not subject to the Administrative Procedure Act (AS 31.25.130(a))) insists on imposing itself as a decision maker, AGDC needs to address how and where to serve claims for breaches of agreements and damages arising from incorrect classification and unauthorized disclosure of such information.