



THE STATE
of **ALASKA**
GOVERNOR SEAN PARNELL

Department of Natural Resources

Division of Mining, Land and Water

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February 8, 2013

The Honorable Cathy Giessel, Chair
Senate Resources Committee
State Capitol
Juneau, AK 99801

Dear Senator Giessel and members of the Senate Resources Committee:

During the February 2, 2013, Senate Resources hearings on SB 26, the following questions were raised. Please find below the responses from the Division of Mining, Land and Water (DMLW) along with the original questions were asked in bold. All references to the bill are based upon version 28-GS1524\A.

Q: Are Shorefish Leases included in this renewal provision or was it covered last year in HB 361?

Shorefish leases are governed by AS 38.05.082, and the renewal of shorefish leases is governed by (d) of that section. These provisions are not changed in SB 26, nor were they changed in last year's bill HB 361. With regard to the concern whether a shorefish lease holder will have some sort of preferential right, they would only have a competitive right. However, when the state has more than one qualified applicant, DNR must determine who is most qualified as defined under subsection AS 38.05.082(b).

Q: Is the location or physical proximity to a proposed activity considered in order to meet "physically affected" criteria?

It should be noted that there was some mixing of definitions during the hearing. There are two definitions.

First in section 33, the section that governs general appeals, to be adversely affected is defined such that the decision made by the department must create or impose an adverse and direct effect or detriment to the person or person's interest.

Second in section 39, the section that governs sales of water or applications for appropriation or removal, adversely affected is defined such that the decision made by the department must directly affect a person either by physical or financial detriment to the person's interests. Therefore the question about the definition of "physical" that was discussed in Committee is only applicable for water appropriation decisions.

Living in close proximity does not obviate the need for the appellant to explain how they are adversely affected. As a general rule, water removed from a water source tends to be replaced

(equalized over time and distance) by surrounding groundwater. Therefore, the more geographically distant one is from a water withdrawal site, the less likely that they will be physically affected by the water withdrawal.

Q: More clarity on the “substantially and adversely affected” definition/application.

“Adversely affected” is defined in bill Sections 33 (DNR appeals generally) and 39 (water appropriations). Additionally, the Black’s Law Revised Fourth Edition (1968 Edition) definition of “substantial” is: *of real worth and importance; belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable.* Webster’s New World Dictionary Second College Edition (c) 1984 defines “substantial” as: *of having substance; real; actual; true; not imaginary; strong; solid.* “Adverse” is defined in Webster’s Dictionary (1979) as: *acting against or opposed to one’s interests.*

Q: Would nonprofits/NGOs be able to appeal under the new standard?

Yes, as long as the organization met the requirements of the relevant statutory standard (e.g., either Section 33 or 39 of the bill).

It could be noted that in the Alaska Court system, generally organizations have standing to bring suit on behalf of its members where: “(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Friends of Willow Lake, Inc. v. State, Dept. of Transp. & Pub. Facilities, Div. of Aviation & Airports*, 280 P.3d 542, 546 (Alaska 2012) (internal quotations and citations omitted).

Q: Requested a list of non-governmental agencies with submitted water reservation applications and the potential projects impacted.


This is supplied in the attached spreadsheet.

Q: At what point does either private interference or federal interference/delay on a development project constitute a “takings”?

Senator Dyson was referencing property takings (under either the Alaska State Constitution, or the Fifth Amendment of the federal Constitution). In order for there to be a taking of property, there needs to be governmental, not private, action. Generally speaking, the Fifth Amendment is violated when “land-use regulation does not substantially advance legitimate state interests or **denies an owner economically viable use of his land.**” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) (internal quotations and citations omitted, emphasis added).

- Article I, section 18 of the Alaska Constitution provides broader protection than the Fifth Amendment.
- A case by case analysis by the Department of Law would be necessary to answer this question in more detail.

Sincerely,


Wyn Menefee
Chief Operations Officer, Division of Mining, Land and Water