



THE STATE
of **ALASKA**
GOVERNOR SEAN PARNELL

Department of Natural Resources

Office of the Commissioner

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March 3, 2013

Representative Bryce Edgmon
State Capitol Building
120 East 4th Street
Juneau, AK 99801

Dear Representative Edgmon,

Thank you for your letter regarding HB 77. Deputy Commissioner Ed Fogels and Chief of Operations Wyn Menefee have appreciated the opportunity to brief you and your staff on this bill, and I hope that this letter provides context to those discussions and answers your questions.

The Department of Natural Resources (DNR) has been making good progress across many fronts of the Governor's Permitting Initiative and has been focused on implementing the strategy and the work plan it provided to the Legislature in 2011. The goal of this comprehensive initiative is to modernize our permitting system to make it more timely, efficient, and certain. This will benefit all Alaskans, from Tribal members to municipalities and businesses of all sizes. HB 77 is part of this broader effort and will help accomplish these goals in many areas of permitting, by, among other things, reducing costs and time delays for applicants.

As you point out, one component of HB 77, the proposed change to the water reservation statutes, is causing some concern among your constituents as well as other Alaskans. I believe that the core of this concern is rooted in a misunderstanding that a water reservation is the only tool to protect fish habitat from too much water being withdrawn, and that somehow the proposed changes would lessen the protections for fish habitat. This is not the case.

As you know, a water reservation sets a specific amount of water to be retained in a water body. A key reason for a water reservation is to ensure that a water body has enough water to maintain healthy fish populations and habitats. Water reservations can also be used for other public purposes such as navigability, recreation, and water quality. The State frequently uses and seeks water reservations to protect fish habitat. For example, the Alaska Department of Fish and Game (ADF&G) has submitted 33 water reservation applications in the last two years and has 116

water reservations pending. In just the past three years, DNR has issued 32 water reservations to ADF&G.

The other two water management tools in Alaska statutes and regulations are water rights and temporary water use permits (TWUPs). These are commonly used throughout Alaska for almost all activities that require water.¹ Each authorizes the removal of a specific amount of water from a water body, and each requires DNR to work with ADF&G to ensure adequate water remains to protect fish habitat.

With regard to water reservations, HB 77 only affects the statutory responsibilities of DNR to manage the State's land, water and resources. This bill does not change any provisions relating to ADF&G, which has the statutory responsibility for protecting freshwater anadromous fish habitat. Moreover, DNR must evaluate impacts to fish and their habitat in consultation with ADF&G when issuing any water authorizations (AS 46.15.080 and AS 46.15.155). The State's commitment to maintaining healthy fish habitat does not change under HB 77.²

Under current law, any entity – a person; business; non-governmental organization; or local, state, or federal government agency – wishing to obtain water reservations, water rights, or TWUPs must apply to DNR for such authorizations. The goal of the proposed change to the water reservation statute is certainly not to stop the placement of water reservations on Alaskan water bodies, or to diminish the protection of fish habitat. Rather, the goal of this change is to ensure that water reservations are issued to and held in perpetuity by public agencies for the protection of public resources, rather than to enable private organizations and individuals to manage the State's public resources. HB 77 does not prevent private organizations, individuals, or tribes from pursuing water reservations, but, if passed, would require them to work with a

¹ Examples of the types of projects that utilize TWUPs that have been granted by the State include: village landfills; village sewer expansions; airport expansions; river crossings for ice bridge construction; Department of Transportation road and bridge construction and maintenance; pipeline and railroad projects; placer mining operations; mining, oil and gas exploration activities; Alaska Native Heritage Tribal Consortium construction; the Koniag quarry; the AK Railroad storm damage restoration; Alyeska Resort's snowmaking; the UAA's sports arena's aquifer analysis; the Igiagik village hydro project; the Kenai tank farm expansion; the White Alice military site cleanup; the Bradley Lake hydro project; the Kincaid Chalet; the Hatcher Pass ski resort; and the Eva Creek Wind farm. This list is by no means exhaustive.

² This also relates to water rights and TWUPs. State statutes specifically require DNR to evaluate impacts to fish and their habitat in consultation with ADF&G before issuing any water authorizations. AS 46.15.080 requires DNR to consider the effect on fish and game resources and on public recreational opportunities before issuing water rights. AS 46.15.155 requires DNR to request comment from the Department of Environmental Conservation and ADF&G before issuing TWUPs, including on issues of the protection of fish and their habitat. Restrictions and conditions are placed in water use authorizations to protect resources and other public interests. For example, restrictions are placed on the use of water collection devices, water volumes, and the timing of water use to prevent harm to fish and their habitat. This can include requirements for a Title 16 permit from ADF&G.

public entity, whether a state or federal agency, a borough, or municipality, to submit that application to DNR.³

An application for a water reservation takes significant agency time and resources to adjudicate, and also can add complications to public decision making for other uses of that water as the application is adjudicated. We believe that it is sound public policy to make sure that such significant decision-making processes for our public resources are led by public agencies – whether local, state, or federal. While the State strongly disagrees, some have asserted that an individual should be able to file for a reservation on an Alaskan water body and prevent others from obtaining a water right or TWUP from that water body until the application for the reservation is fully adjudicated (a process that can take three to five years due to data gathering). Under such a scenario, an individual or group could create significant delay for all manner of temporary water uses authorizations throughout the State and affect a wide range of activities related to such use simply by submitting an application for a water reservation.⁴ Such a result could have negative impacts across a broad spectrum of Alaska's citizens, communities and economic activities.

Answers to your specific questions are provided below:

- 1. Please provide us a description of the requirements included in a water flow reservation application and the typical costs associated with those amendments when the application is being made in a region of the state where little or no stream gauge data has been gathered.*

An application for a reservation of water must be made per stream segment or water body and for the purposes listed in AS 46.15.145(a) and 11 AAC 93.141. Per 11 AAC 93.142, a water reservation application submission requires the following:

- Completed application for each stream segment or water body with:
 - Location description
 - Map of those segments or water body
 - Location of permanent, temporary, or planned locations of water measurement devices

³ HB 77 focuses on water reservations. It does not change the ability of an entity to apply directly to DNR to obtain water rights or TWUPs authorizations. See footnote 1 for examples of activities utilizing TWUPs for their operations.

⁴ All of the examples of projects and activities listed in footnote 1 require TWUPs, and under the scenario described above these TWUPs could be put on hold for potentially years if an entity submitted an application for a water reservation for the water body associated with the TWUP and that water reservation had to be adjudicated prior to any other water use authorization moving forward.

- Description of purpose of reservation with specifics of the resource you are seeking to protect
- The quantity of water requested to be reserved
- Description of the methodology and monitoring that either was or will be completed over the next three years
- Times of the year and purposes for which the reservation is proposed
- Payment of \$1500 application fee (ADF&G does not pay this fee as a state agency but does contribute to staff costs for reviewing applications)
- Once under review, the applicant is responsible for payment of the public notice

The water gauging and species studies (if for habitat protection) or water quality review (if for water quality) must be completed over the course of three years if the data does not already exist. The cost of the studies and monitoring will vary depending on location and availability of access. DNR does not track the actual costs that applicants expend on data gathering. ADF&G often does its fish monitoring with in-house staff as part of their other work. In very rough figures, it might cost between \$14,000 and \$95,000 to install and monitor a water gauge for a year.

2. *Please provide us a list of the 61 water flow reservations that the state has granted, including a description of each reservation (in particular, its purpose) and the entity to which it was granted.*
- *Please provide us a similar list of the 37 pending applications that have been applied for by persons.*
 - *Please provide a similar list of the 401 pending applications that have been applied for by what we assume are government entities.*

In our initial briefing paper to the House Resources committee, we had incorrectly stated that there were 37 pending applications by persons and 401 total pending applications. In the materials submitted to House Rules, we corrected our material to state that there are 35 pending applications by “a person” and 371 total pending applications.

Attached to this letter are lists of the 61 water flow reservations that the State has granted, the 35 pending applications from “persons,” and a list of all pending applications. We have included the stated purpose for each of the 61 issued and 35 pending “person” applications in the spreadsheet. We have also included a summary list of the pending applications by applicant. Please note that the dates that appear on the lists are the “case status date” reflecting the last action taken by the Department and not the date the application was received.

3. *If, for example, a water flow reservation is prudent in order to guarantee adequate flow volume for a mixing zone required for an industrial concern, will that industrial concern then have to approach the state to request that the state apply for a water reservation on their behalf? If so, who pays for gathering the data and other costs associated with the application?*

If the change as proposed in HB 77 passes, then yes, businesses that desire a water reservation would have to request that a state or federal agency, or a political subdivision of the state, apply for the reservation. The costs for that application would likely be borne by the business.

However, it is more likely that a business would apply for a water right rather than a water reservation to have a certain quantity of water available for a mixing zone. Mixing zones are established with quantities of water necessary to dilute the outfall. If a business needs a certain quantity to be used for their benefit, such as for the mixing and dilution, that fits within the water rights statutes and regulations. When DNR grants a water right, it must consider the impact on fish habitat along with seven other criteria spelled out in AS 46.15.080. A water right application does not require the same three years' worth of monitoring.

4. *It is reasonable to assume that if the state takes away the right of persons to pursue water flow reservations, a significant number of individuals and non-governmental entities who have been shouldering the costs of applications to protect fish and wildlife habitat will approach DNR, F&G, and other state agencies with requests that they file applications for in-stream flow.*

- *Has DNR consulted itself and these other agencies regarding the significant additional costs of taking up applications that under present law would not burden the state's treasury?*
- *Do DNR's and F&G's zero fiscal notes mean that those departments have already decided that they will not agree to any water flow reservation requests brought to them by Alaskan citizens or non-governmental organizations?*

As noted above, HB 77 does not take away the right of persons to pursue water flow reservations. The proposed change does not prevent private groups, individuals, or tribal entities from working with a public agency to apply for a reservation. In fact, this already occurs.

It is true that reservation requests to federal and state agencies and political subdivisions of the state may increase if the provision in statute that allows a person to apply directly to DNR for a water reservation is removed. However, the change in statute would in no way prevent private groups, individuals, or tribal entities from doing the same research they are conducting now. It would only mean that they would need to work with an agency to submit the applications.

Currently, ADF&G works with non-governmental groups on certain water reservation applications and that would be expected to continue.⁵ With its existing funding, ADF&G has filed 33 applications during the last two calendar years (2011 and 2012) and DNR currently has 116 applications from ADF&G pending adjudication. Most of the existing 61 water reservations that have been certificated since statehood were done so for ADF&G. With the Legislature's funding of DMLW to streamline our permitting process, and financial assistance from ADF&G, DNR has certificated 32 of those water reservations in the last 3 years.

The zero fiscal notes from DNR and ADF&G were submitted because there are not expected to be additional costs from the change. There is no predetermination that ADF&G will or will not submit applications on any given reaches of water bodies. ADF&G does a yearly plan and prioritizes its reservation applications to accomplish habitat protection goals.

I would like to say that the point in your letter about Alaska being unlike any other state in the Nation is a valid one, and I agree that we should not be striving to make all of our laws identical to those of the other states. The broader reason why DNR officials have referenced what other states have done is not to make the case that we should blindly follow other states, but that there is an important policy reason underlying the proposed water reservation changes of HB 77. Alaska is blessed with a huge abundance of clean water resources, and has far less pressure on those resources than most of the other states in the nation. Many of the other states have weathered decades of difficult battles over water appropriations, and have designed their laws accordingly. Given the importance and multiple uses of water, they have all found that the management of public water resources is more appropriately the province of public agencies.

In closing, I'd like to underscore that the proposed changes to state law regarding water reservations contained in HB 77 do not weaken Alaska's ability to protect fish habitat. HB 77 is intended to ensure that water reservation certificates are issued to public agencies for the protection of public resources. We have a steadfast commitment to working with all entities interested in water use authorizations. This will continue. Please let me know if you have any additional questions on HB 77 or any of our other bills before this legislature.

Sincerely,

A handwritten signature in dark ink, appearing to read "Dan Sullivan", with a long horizontal flourish extending to the right.

Dan Sullivan
Commissioner

⁵ More specifically, as the Commissioner of DNR, a priority of mine has been to deepen and strengthen cooperation with Alaska Native organizations, regional and village corporations, and Tribes. Such a commitment certainly extends to and includes work on water authorization issues.

Representative Bryce Edgmon
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Enclosures

cc: Cora Campbell, Commissioner, Alaska Department of Fish & Game
Heather Brakes, Legislative Director, Office of Governor Sean Parnell