

**The Nature Conservancy - Alaska**

517 L Street, Suite 100  
Anchorage, AK 99501



October 27, 2024

Department of Natural Resources  
Division of Mining, Land & Water  
550 W. 7<sup>th</sup> Avenue, Suite 1070  
Anchorage, AK 99501

Via: [dnr.water.regulation@alaska.gov](mailto:dnr.water.regulation@alaska.gov)

Re: Comments on Notice of Public Scoping for Possible Updates and Revisions to Water Management Regulations

Dear Mr. Barrett,

The Nature Conservancy in Alaska (TNC AK) thanks you for the opportunity to provide initial suggestions as the Alaska Department of Natural Resources (the Department) considers revising certain regulations implementing AS 46.15.145, 11 AAC 93.141 through 11 AAC 93.147. We appreciate the Department's interest in scoping in order to solicit public feedback around potential changes in regulations that could fundamentally shift water management across Alaska.

The Nature Conservancy is a global conservation organization working around the world to protect lands and water for people and nature. Our approach is unique in that we seek to ensure land, water, and resources are protected *for* people – not *from* them. Guided by science and partnerships, we have worked in Alaska for over two decades and employ staff with strong roots in the state. Throughout this time, our work in Alaska has always been committed to solutions that incorporate community needs and well-being. This commitment ensures Alaskans see their needs reflected in the solutions we work on – and that these solutions respect their livelihoods, ways of life, and the places that sustain them.

The seafood industry is a cornerstone of Alaska's economy and salmon are a valuable part of the multi-billion dollar economic impact of this industry across the state. However, this industry is facing numerous challenges, as acknowledged by the creation of the Joint Legislative Task Force Evaluating Alaska's Seafood Industry by the Alaska Legislature this year. While Alaska's ability to influence consumer demand and global markets is limited, we know that salmon need sufficient water in rivers and streams around the state to thrive. The instream flow water reservation system translates this basic scientific knowledge into regulation. By continuing to protect water in streams, the State plays a key role in ensuring the ongoing ability of Alaskans to enjoy the livelihoods, ways of life, and recreation value that are tied to salmon.

It is with this in mind that we express our strong support for the continuation of the existing instream flow program at the Department and recommend against any changes to this program that would weaken the Department's current ability to maintain water in rivers and streams. Below, we provide specific comments pertaining to the regulations we see as most relevant and important to a functioning instream flow reservation system. Our feedback is organized into four sections, with specific recommendations underlined.

### **Application for a Reservation of Water - 11 AAC 93.141**

While the public scoping announcement noticed on August 1, 2024 does not contain specific prompts regarding 11 AAC 93.141, it is included in the public notice as being considered for changes. As such, TNC-AK strongly recommends language that provides opportunity for applicants other than state entities and federal agencies to apply for a certificate of a reservation of water continue to be included. Specifically, we request that the agency keep language in 11 AAC 93.141 that states “...or a person may apply for a reservation of water...”

Additionally, we recommend that the Department consider adding language that expands the definition of possible applicants to include federally-recognized Tribes and Tribal entities. Precedent exists for this inclusion; in the regulations (adopted June 18, 2024) for the recently enacted carbon offset program, the Department included tribal entities and federally recognized tribes as actors from whom the Department may solicit recommendations to identify potential carbon offset projects (see 11 AAC 78.020).

### **Content of Application - 11 AC 93.142**

In the public scoping announcement noticed on August 1, 2024, the Department provided the following prompts to guide public response to 11 AAC 93.142:

- *Should additional information be required to justify the need for a reservation of water?*
- *What types of data and methodology?*

TNC-AK strongly recommends that additional information not be required to justify the need for a reservation of water. 11 AAC 93.142(b)(8) states that applications will “identify physical, biological, water chemistry, and socio-economic data substantiating the need for and the quantity of water requested for the proposed reservation.” As written, the regulation already provides a high barrier for applicants to overcome, thus limiting the ability of interested parties to apply for and be granted instream flow reservations. Specifically, requiring the applicant to substantiate the need for the reservation with studies and data creates a burden that is often too onerous and resource-intensive for entities with fewer resources. This often means that only certain entities with appropriate resources are able to pursue the benefits this existing statute aims to make possible, which often disproportionately preventing applications from parties most reliant upon these resources. This is evidenced by analysis from the Institute of Social and Economic Research (ISER; see attached) using data from the Alaska Department of Natural Resource, Water Resources Section, showing that as of November 2016, 98% of the rights to reserve water in Alaska are held by the Alaska Department of Fish and Game. This work also shows that as of November 2016, of the 580 pending applications 53% are from the federal government, 38% are from the state government, and 9% are private entities – an analysis that clearly demonstrates the high barrier to entry for any entity that does not have resources to match those of government in order to meet the application requirements laid out in 11 AAC 93.142.

### **Adjudication of Applications - 11 AAC 93.145**

While the public scoping announcement noticed on August 1, 2024, does not contain specific prompts regarding 11 AAC 93.145, it is included in the public notice as being considered for changes. If changed, TNC AK strongly recommends that any amendments to these regulations

clearly and specifically establish a timeline under which applicants can expect to be notified of adjudication or non-adjudication for applications for water reservations. Research from ISER (see attached) has shown that getting approvals for water reservations can take a decade or longer. Establishing a clear timeline for the process would benefit both applicants and the Department by providing clear and transparent process, timeline, and expectations, resulting in a more efficient, consistent, and cost-effective water reservation process, which is clearly stated in the August 1 public notice as an interest of the Department.

#### **Issuance of a Certificate of Reservation of Water - 11 AAC 93.146**


In the public scoping announcement noticed on August 1, 2024, the Department provided the following prompts to guide public response to 11 AAC 93.146:

- *Should only State resource agencies, such as DNR or Alaska Department of Fish and Game, hold the certificate of a reservation of water?*
- *Who should hold a certificate of a reservation of water?*

TNC AK strongly recommends that entities beyond State resource agencies be able to hold the certificate of a reservation of water. Foremost, there currently exist rightsholders as well as pending applications from entities that are not State resource agencies, so a change of this nature would be notable and have impact. Under Alaska law, a reservation of water is a substantive property right. Additionally, with the application process for holding these reservations being costly and time consuming, DNR must consider not only the implications and impacts of a substantial change in direction of this policy, but also how the state treats the applicants and rightsholders in this change. Specifically, would the state compensate the applicant, take the certificate, or grandfather it in? If so, what are the associated legal requirements, and does this align with the original intent of the policy? Lastly, this prompt raises questions when taken in tandem with the question raised by the Department under 11 AAC 93.147. If changes are made to the holder of the certificate, the effect of these modifications will be to significantly change how the provisions of review under 11 AAC 93.147 are applied and implemented.

We appreciate the Department's interest in soliciting public feedback. As well, particularly given the substance of comments submitted in January 2021 when the Department publicly noticed proposed changes to 11 AAC 93, it is critical that the Department not just solicit public feedback but integrate the content of comments received as it undergoes this process. With this in mind, we look forward to a robust and responsive public engagement processes, should the Department choose to proceed with changes in the State's water reservation policy.

Sincerely,



Ivy Spohnholz  
Alaska State Director  
The Nature Conservancy