

Niblack Project LLC
ADL 108261
FINAL DECISION UNDER AS 38.05.850

Summary of Public Comment:

- No public comments received.
- Public comments received; see Attachment 1.

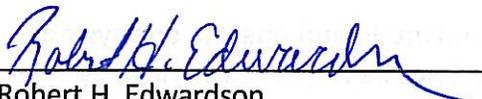
Modifications to Decision:

- Decision is not modified.
- Decision is modified as specified in Attachment 2.

Approval:

The finding presented above has been reviewed and considered. The casefile has been found to be complete and the requirements of all applicable statutes have been satisfied. It is the finding of the Regional Manager that it is in the best interest of the State to proceed with this authorization under the authority of AS 38.05.850.

- AFFIRMED AS PROPOSED.
- MODIFIED AND AFFIRMED.



Robert H. Edwardson
Southeast Regional Manager

5/6/2016

Date

A person affected by this decision who provided timely written comment or public hearing testimony on this decision may appeal it, in accordance with 11 AAC 02. Any appeal must be received by the 20th calendar day after the date of "issuance" of this decision as defined in 11 AAC 02.040(c) and (d) may be mailed or delivered to the 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 goes into effect as a final order and decision of the department on the 31st calendar day after issuance. 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 is enclosed.

- Attachment 1: Summary of public comments
Attachment 2: Modifications to decision
Attachment 3: Appeal regulations

Final Decision, ADL 108261
Attachment #1
Summary of Public Comments

Commenters:

Comments that were timely filed were received from the following parties:

1. Loretta Ford, Hunter Dickinson Inc. Mining/Niblack Project LLC (applicant)
2. Mark Minnillo, Alaska Department of Fish and Game

Summary of Comments and Responses:

Comment from applicant: The applicant would like to build, maintain and operate one system to manage surface runoff and adit drainage rather than two, as recommended in the Proposed Regional Manager's Decision.

The draft easement states that use of the LAD system in winter is not practical due to freezing temperatures. This is true, however, it is not practical to maintain and operate the LAD system due to freezing temperatures and worker safety. Risk to worker safety occurs year round when periodic, on-site staff inspects the LAD system by walking each active dispersion line through the uneven terrain of the natural forest. The terrain is extremely rough which is typical of coastal SE Alaska. The occasional bear encounter increases the risk to worker safety.

The impetus for implementing a marine discharge system is to eliminate the LAD system, which can be cumbersome and unsafe to maintain. The LAD system was originally designed when water quality from the adit was unknown. With 7 years of baseline data for discharge characteristics, the intention is to now operate a marine discharge on a full time basis. Using both systems seasonally does not completely eliminate maintenance and safety concerns.

DNR Response: We approve of the request to build, maintain and operate one system to manage surface runoff and adit drainage. Two systems will not be required as originally proposed.

Comment from the Alaska Department of Fish and Game (ADFG): ADFG stated "Under Section VIII Planning and Land Use Classification, I have some concern with the statement "ADFG did not indicate that a crucial habitat designation at this location is warranted." My exact comments were: "According to the attached map the pipe and outfall would be located completely outside of the crucial habitat area... I think the 40 acre guideline makes no sense and that the 40 foot depth guideline should be used for the outfall. The entire bay out to 40 feet is likely to have some eelgrass and be used for salmon schooling/rearing. The distance from the crucial habitat polygon to the outfall is not more than 100 feet, which is not very far."

ADFG also stated that even though the site is not considered "crucial habitat", the area of the proposed outfall has the same characteristics as the area designated as "crucial habitat" and should be treated the same way.

DNR Response: The proposed site is subject to the Prince of Wales Island Area Plan (POWIAP) and is located in Subunit 14b with the land use designation of Mining-access/exploration. The management intent for the unit specifies it is for mining access. The outfall has been determined to be compatible with the area plan.

The areawide land management policies in Chapter 2 of the POWIAP for Fish and Wildlife Habitat and Harvest Areas¹ guide that since the use is outside of a crucial habitat area, the use must be consistent with ACMP's 6 AAC 80.130(a-d), the management guidelines in the chapter, and the management guidelines in Chapter 3.² Because the ACMP no longer exists, those guidelines do not apply. The management guidelines for Fish and Wildlife Habitat and Harvest Areas in Chapter 2 require all land use activities be conducted with appropriate planning and implementation to avoid or minimize adverse effects on fish, wildlife or their habitats.³ To meet this mitigation requirement, the Niblack Project LLC shifted the proposed outfall pipe alignment to avoid anticipated effects on eelgrass within the Niblack Anchorage.

The management intent in Chapter 3, Subunit 14b – Moira Sound, states the tidelands and submerged lands will be managed for multiple use, with tidelands and submerged lands managed to protect the most important recreation and fish and wildlife habitat and harvest areas. As stated, the Niblack Project LLC shifted the outfall pipe alignment so that it would fall outside of the area designated crucial habitat to avoid anticipated effects on eelgrass within the Niblack Anchorage.

Finally, the Fish and Wildlife Guidelines in Chapter 3 states crucial habitat for salmon rearing and schooling extends to a depth of 40 feet at mean lower low water at the mouths of anadromous fish streams unless otherwise indicated.⁴ Though eelgrass beds and salmon habitat may occupy other portions of the bay, the most important areas were identified at the mouths of three anadromous streams with crucial habitat designations. This project avoided areas with that designation. Though ADFG stated it is likely that the entire bay has eelgrass and is used for salmon schooling and rearing, current data does not suggest that a crucial habitat designation is warranted.

¹ POWIAP, ch. 2, p. 5-6

² POWIAP, ch 2., p. 6

³ POWIAP, ch.2, p. 5

⁴ POWIAP, ch. 3, p. 250

**Attachment #2
Modifications to Decision**

The proposed decision under AS 38.05.850 for the Niblack Project LLC marine outfall easement is modified as follows:

Project Description:

The proposed easement will be approximately 30 feet wide by approximately 480 feet long, comprising approximately 0.33 acres on State owned land, for the purpose of installation, use and maintenance of a marine outfall pipe across state land. The land use authorization for the marine outfall pipe will be subject to maintaining proper authorization for the discharge into marine waters. Currently, authorization for wastewater discharge from the Niblack Exploration Project Wastewater Treatment Facility is authorized by the Alaska Department of Conservation (ADEC) under Permit No. AK0053708. Seasonal use of the existing LAD system will not be required.

All other conditions of the proposed decision ADL 108261 are unchanged.

Final Decision, ADL 108261
Attachment # 3
Appeal Regulations

11 AAC 02. Appeals

11 AAC 02.010. APPLICABILITY AND ELIGIBILITY. (a) This chapter sets out the administrative review procedure available to a person affected by a decision of the department. If a statute or a provision of this title prescribes a different procedure with respect to a particular decision, that procedure must be followed when it conflicts with this chapter.

(b) Unless a statute does not permit an appeal, an applicant is eligible to appeal or request reconsideration of the department's decision on the application. An applicant is eligible to participate in any appeal or request for reconsideration filed by any other eligible party.

(c) If a statute restricts eligibility to appeal or request reconsideration of a decision to those who have provided timely written comment or public hearing testimony on the decision, the department will give notice of that eligibility restriction as part of its public notice announcing the opportunity to comment.

(d) If the department gives public notice and allows a public comment period of at least 30 days on a proposed action, and if no statute requires opportunity for public comment, the department may restrict eligibility to appeal or request reconsideration to those who have provided timely written comment or public hearing testimony on the proposed action by including notice of the restriction as part of its public notice announcing the opportunity to comment.

(e) An eligible person affected by a decision of the department that the commissioner did not sign or cosign may appeal the decision to the commissioner within the period set by 11 AAC 02.040.

(f) An eligible person affected by a decision of the department that the commissioner signed or cosigned may request the commissioner's reconsideration within the period set by 11 AAC 02.040.

(g) A person may not both appeal and request reconsideration of a decision. (Eff. 11/7/90, Register 116; am 9/19/2001, Register 159)

Authority:	AS 03.05.010	AS 38.04.900	AS 38.08.110	AS 41.15.020	AS 44.37.011
	AS 29.65.050	AS 38.05.020	AS 38.09.110	AS 41.17.055	AS 46.15.020
	AS 29.65.120	AS 38.05.035	AS 38.50.160	AS 41.21.020	AS 46.17.030

11 AAC 02.015. COMBINED DECISIONS. (a) When the department issues a combined decision that is both a final disposal decision under AS 38.05.035(e) and any other decision, including a disposal decision combined with a land use plan decision, or a disposal decision to grant certain applications combined with a decision to deny others, the appeal process set out for a disposal decision in AS 38.05.035(i) - (m) and this chapter applies to the combined decision.

(b) A decision of the department may include a statement that a final consistency determination under AS 46.40 (Alaska Coastal Management Program) has been rendered in conjunction with the decision. A person may not, under this chapter, appeal or request reconsideration of the final consistency determination, including a requirement necessary solely to ensure the activity is consistent with the Alaska coastal management program as approved under AS 46.40. (Eff. 9/19/2001, Register 159)

Authority:	AS 29.65.050	AS 38.04.900	AS 38.05.035	AS 38.09.110
	AS 29.65.120	AS 38.05.020	AS 38.08.110	AS 38.50.160

11 AAC 02.020. FINALITY OF A DECISION FOR PURPOSES OF APPEAL TO COURT. (a) Unless otherwise provided in a statute or a provision of this title, an eligible person must first either appeal or

request reconsideration of a decision in accordance with this chapter before appealing a decision to superior court.

(b) The commissioner's decision on appeal is the final administrative order and decision of the department for purposes of appeal to the superior court.

(c) The commissioner may order or deny a request for reconsideration within 30 calendar days after issuance of the decision, as determined under 11 AAC 02.040(c)—(e). If the commissioner takes no action during the 30-day period, the request for reconsideration is considered denied. Denial of a request for reconsideration is the final administrative order and decision of the department for purposes of appeal to the superior court.

(d) If the commissioner timely orders reconsideration of the decision, the commissioner may affirm the decision, issue a new or modified decision, or remand the matter to the director for further proceedings. The commissioner's decision, other than a remand decision, is the final administrative order and decision of the department for purposes of appeal to the superior court. (Eff. 11/7/90, Register 116; am 9/19/2001, Register 159)

Authority:

AS 03.05.010 AS 38.04.900 AS 38.08.110 AS 41.15.020 AS 44.37.011
AS 29.65.050 AS 38.05.020 AS 38.09.110 AS 41.17.055 AS 46.15.020
AS 29.65.120 AS 38.05.035 AS 38.50.160 AS 41.21.020 AS 46.17.030

11 AAC 02.030. FILING AN APPEAL OR REQUEST FOR RECONSIDERATION. (a) An appeal or request for reconsideration under this chapter must

(1) be in writing;

(2) be filed by personal service, mail, fax, or electronic mail;

(3) be signed by the appellant or the appellant's attorney, unless filed by electronic mail; an appeal or request for reconsideration filed by electronic mail must state the name of the person appealing or requesting reconsideration and a single point of contact to which any notice or decision concerning the appeal or request for reconsideration is to be sent;

(4) be correctly addressed;

(5) be timely filed in accordance with 11 AAC 02.040;

(6) specify the case reference number used by the department, if any;

(7) specify the decision being appealed or for which reconsideration is being requested;

(8) specify the basis upon which the decision is challenged;

(9) specify any material facts disputed by the appellant;

(10) specify the remedy requested by the appellant;

(11) state the address to which any notice or decision concerning the appeal or request for reconsideration is to be mailed; an appellant may also provide a telephone number where the appellant can be reached during the day or an electronic mail address; an appeal or request for reconsideration filed electronically must state a single address to which any notice or decision concerning the appeal or request for reconsideration is to be mailed;

(12) identify any other affected agreement, contract, lease, permit, or application by case reference number, if any; and

(13) include a request for an oral hearing, if desired; in the appeal or request for reconsideration, the appellant may include a request for any special procedures to be used at the hearing; the appeal or request for reconsideration must describe the factual issues to be considered at the hearing.

(b) At the time an appeal is filed, and up until the deadline set out in 11 AAC 02.040(a) to file the appeal, an appellant may submit additional written material in support of the appeal, including evidence or legal argument.

(c) If public notice announcing a comment period of at least 30 days was given before the decision, an appellant may not submit additional written material after the deadline for filing the appeal, unless the appeal meets the requirement of (a) of this section and includes a request for an extension of time, and the department determines that the appellant has shown good cause for an extension. In considering whether the appellant has shown good cause, the department will consider factors including one or more of the following:

- (1) comments already received from the appellant and others;
- (2) whether the additional material is likely to affect the outcome of the appeal;
- (3) whether the additional material could reasonably have been submitted without an extension;
- (4) the length of the extension requested;
- (5) the potential effect of delay if an extension is granted.

(d) If public notice announcing a comment period of at least 30 days was not given before the decision, an appellant may submit additional written material after the deadline for filing the appeal, if the appeal meets the requirements of (a) of this section and includes a notice of intent to file the additional written material. The department must receive the additional written material within 20 days after the deadline for filing the appeal, unless the appeal also includes a request for an extension of time, and the department determines that the appellant has shown good cause for an extension. In considering whether the appellant has shown good cause, the department will consider factors including one or more of the following:

- (1) comments already received from the appellant and others;
- (2) whether the additional material is likely to affect the outcome of the appeal;
- (3) whether the additional material could reasonably have been submitted without an extension;
- (4) the length of the extension requested;
- (5) the potential effect of delay if an extension is granted.

(e) At the time a request for reconsideration is filed, and up until the deadline to file a request for reconsideration, an appellant may submit additional written material in support of the request for reconsideration, including evidence or legal argument. No additional written material may be submitted after the deadline for filing the request for reconsideration.

(f) If the decision is one described in 11 AAC 02.060(c), an appellant who believes a stay of the decision is justified may ask for a stay as part of the appeal or request for reconsideration. The appellant must include an argument as to why the public interest requires a stay. (Eff. 11/7/90, Register 116; am 9/19/2001, Register 159)

Authority:

AS 03.05.010	AS 38.04.900	AS 38.08.110	AS 41.15.020	AS 44.37.011
AS 29.65.050	AS 38.05.020	AS 38.09.110	AS 41.17.055	AS 46.15.020
AS 29.65.120	AS 38.05.035	AS 38.50.160	AS 41.21.020	AS 46.17.030

Editor's note: The address for an appeal or request for reconsideration by personal service and by mail is: Department of Natural Resources, Commissioner's Office, 550 W. 7th Avenue, Suite 1400, Anchorage, Alaska 99501-3561. The number for an appeal or request for reconsideration by fax is: 1-907-269-8918. The electronic mailing address for an appeal or request for reconsideration by electronic mail is: dnr_appeals@dnr.state.ak.us

11 AAC 02.040. TIMELY FILING; ISSUANCE OF DECISION. (a) To be timely filed, an appeal or request for reconsideration must be received by the commissioner's office within 20 calendar days after issuance of the decision, as determined under (c) or (d) of this section, unless another period is set by

statute, regulation, or existing contract. If the 20th day falls on a day when the department is officially closed, the appeal or request for reconsideration must be filed by the next working day.

(b) An appeal or request for reconsideration will not be accepted if it is not timely filed.

(c) If the appellant is a person to whom the department delivers a decision by personal service or by certified mail, return receipt requested, issuance occurs when the addressee or the addressee's agent signs for the decision. If the addressee or the addressee's agent neglects or refuses to sign for the certified mail, or if the address that the addressee provided to the department is not correct, issuance by certified mail occurs when the decision is deposited

in a United States general or branch post office, enclosed in a postage-paid wrapper or envelope, addressed to the person's current address of record with the department, or to the address specified by the appellant under 11 AAC 02.030(a)(11).

(d) If the appellant is a person to whom the department did not deliver a decision by personal service or certified mail, issuance occurs

(1) when the department gives public notice of the decision; or

(2) if no public notice is given, when the decision is signed; however, the department may state in the decision a later date of issuance and the corresponding due date for any appeal or request for reconsideration.

(e) The date of issuance constitutes delivery or mailing for purposes of a reconsideration request under AS 44.37.011(d) or AS 44.62.540(a). (Eff. 11/7/90, Register 116; am 9/19/2001, Register 159)

Authority:

AS 03.05.010	AS 38.04.900	AS 38.08.110	AS 41.15.020	AS 44.37.011
AS 29.65.050	AS 38.05.020	AS 38.09.110	AS 41.17.055	AS 46.15.020
AS 29.65.120	AS 38.05.035	AS 38.50.160	AS 41.21.020	AS 46.17.030

11 AAC 02.050. HEARINGS. (a) The department will, in its discretion, hold a hearing when questions of fact must be resolved.

(b) The hearing procedure will be determined by the department on a case-by-case basis. As provided in 11 AAC 02.030(a)(13), any request for special procedures must be included with the request for a hearing.

(c) In a hearing held under this section

(1) formal rules of evidence need not apply; and

(2) the hearing will be recorded, and may be transcribed at the request and expense of the party requesting the transcript. (Eff. 11/7/90, Register 116)

Authority:

AS 03.05.010	AS 38.04.900	AS 38.09.110	AS 41.17.055	AS 46.17.030
AS 29.65.050	AS 38.05.020	AS 38.50.160	AS 41.21.020	
AS 29.65.120	AS 38.08.110	AS 41.15.020	AS 46.15.020	

11 AAC 02.060. STAYS; EXCEPTIONS. (a) Except as provided in (c) and (d) of this section, timely appealing or requesting reconsideration of a decision in accordance with this chapter stays the decision during the commissioner's consideration of the appeal or request for reconsideration. If the commissioner determines that the public interest requires removal of the stay, the commissioner will remove the stay and allow all or part of the decision to take effect on the date set in the decision or a date set by the commissioner.

(b) Repealed 9/19/2001.

(c) Unless otherwise provided, in a statute or a provision of this title, a decision takes effect immediately if it is a decision to

(1) issue a permit, that is revocable at will;

(2) approve surface operations for a disposal that has already occurred or a property right that has already vested; or

(3) administer an issued oil and gas lease or license, or an oil and gas unit agreement.

(d) Timely appealing or requesting reconsideration of a decision described in (c) of this section does not automatically stay the decision. However, the commissioner will impose a stay, on the commissioner's own motion or at the request of an appellant, if the commissioner determines that the public interest requires it.

(e) A decision takes effect immediately if no party is eligible to appeal or request reconsideration and the commissioner waives the commissioner's right to review or reconsider the decision. (Eff. 11/7/90, Register 116; am 9/19/2001, Register 159)

Authority:

AS 03.05.010 AS 38.04.900 AS 38.08.110 AS 41.15.020 AS 46.15.020 AS 29.65.050 AS 38.05.020 AS 38.09.110 AS 41.17.055 AS 46.17.030 AS 29.65.120 AS 38.05.035 AS 38.50.160 AS 41.21.020

11 AAC 02.070. WAIVER OF PROCEDURAL VIOLATIONS. The commissioner may, to the extent allowed by applicable law, waive a requirement of this chapter if the public interest or the interests of justice so require. (Eff. 11/7/90, Register 116; am 9/19/2001, Register 159)

Authority:

AS 03.05.010 AS 29.65.120 AS 38.05.035 AS 38.50.160 AS 41.21.020
AS 03.10.020 AS 38.04.900 AS 38.08.110 AS 41.15.020 AS 46.15.020
AS 29.65.050 AS 38.05.020 AS 38.09.110 AS 41.17.055 AS 46.17.030

11 AAC 02.080. DEFINITIONS. Repealed. (Eff. 11/7/90, Register 116; repealed 9/19/2001, Register 159)

11 AAC 02.900. DEFINITIONS. In this chapter,

(1) "appeal" means a request to the commissioner to review a decision that the commissioner did not sign or cosign;

(2) "appellant" means a person who files an appeal or a request for reconsideration.

(3) "commissioner" means the commissioner of natural resources;

(4) "decision" means a written discretionary or factual determination by the department specifying the details of the action to be allowed or taken;

(5) "department" means, depending of the particular context in which the term is used, the Department of Natural Resources, the commissioner, the director of a division within the Department of Natural Resources, or an authorized employee of the Department of Natural Resources;

(6) "request for reconsideration" means a petition or request to the commissioner to review an original decision that the commissioner signed or cosigned. (Eff. 11/7/90, Register 116; am 9/19/2001, Register 159)

Authority:

AS 03.05.010 AS 38.05.020 AS 38.09.110 AS 41.17.055 AS 44.62.540
AS 29.65.050 AS 38.05.035 AS 38.50.160 AS 41.21.020 AS 46.15.020
AS 29.65.120 AS 38.08.110 AS 41.15.020 AS 44.37.011 AS 46.17.030
AS 38.04.900

