

# STATE OF ALASKA

**DEPARTMENT OF NATURAL RESOURCES**

**OFFICE OF THE COMMISSIONER**

**SEAN PARNELL, GOVERNOR**

P.O. BOX 111000  
JUNEAU, ALASKA 99811-1000  
PHONE: (907) 465-2400  
FAX: (907) 465-3886

550 WEST 7<sup>TH</sup> AVENUE, SUITE 1400  
ANCHORAGE, ALASKA 99501-3650  
PHONE: (907) 269-8431  
FAX: (907) 269-8918

June 10, 2010

Brook M. Brisson  
Clean Water and Mining Program Director  
Northern Alaska Environmental Center  
830 College Road  
Fairbanks, AK 99701-1535

**SUBJECT: COMMISSIONER'S DECISION on Request for Reconsideration of the  
October 31, 2008 Decision to Adopt the Revised Northwest Area Plan**

Dear Ms. Brisson:

By letter dated November 26, 2008 that was received in this office by email on that date, the Northern Alaska Environmental Center (NAEC) requested reconsideration of my October 31, 2008 decision to adopt the revised Northwest Area Plan, with a November 7, 2008 date of issuance. In my December 3, 2008 letter to Zachary Richter at NAEC, I acknowledged the request for reconsideration was timely received and stayed my decision to adopt the revised Northwest Area Plan during my review of your reconsideration request. (11 AAC 02.040; 11 AAC 02.060) I also explained that the Land Classification Order (issued in conjunction with the plan adoption) was also stayed because one of the issues in your request for reconsideration concerned the classification of two upland units.

This letter is my decision on your request for reconsideration. The project file, applicable Alaska Statutes and department regulations make up the administrative record upon which I based my decision. After careful consideration, I am denying your request for reconsideration in part and granting your request for reconsideration in part. Allow me to explain.

**BACKGROUND:** The original Northwest Area Plan (NWAP) was adopted in 1989 and designated the land use and management guidelines for over 11 million acres of state land in the area from Point Lay to Saint Michael in northwest Alaska. Since then the state has selected and topfiled over 4 million additional acres of land throughout the area and, as a result, the NWAP needed to be revised to designate the land uses for these additional lands. These additional lands are scattered throughout the Lisburne and Seward Peninsulas but some of the larger blocks of land are in the Baird Mountains between the Noatak and Kobuk River drainages, in the Selawik Hills east of

*"Develop, Conserve, and Enhance Natural Resources for Present and Future Alaskans"*

Buckland, in the Darby Mountains east of Council, and in the Kigluaik Mountains north of Nome. Other parcels of state land are located along the lower Noatak River, in the upper Kobuk River drainage, and along the eastern shore of Norton Sound. Neither the original nor the revised NWAP affects federal, Native or other private lands, although it does provide recommendations on federal land that has been selected for conveyance to the state.

Prior to drafting the proposed revisions to the NWAP, the department held public “scoping meetings” in several communities affected by the NWAP as a way to include the public in the state’s planning process. The purpose of the scoping meetings was to explain the planning process, gather information, and solicit comments from the public about managing state land and the various possibilities for using state land and resources. Public scoping meetings were held in Teller and Nome on October 11, 2007 and again on January 9, 2008 in Nome. Public scoping meetings were held on November 5 - 7, 2007 in Noatak, Kotzebue, Kiana and Buckland. Persons could also submit their input in writing to the department.

After the scoping meetings, the department prepared a Public Review Draft of the revised NWAP in April 2008. The revised NWAP designated the land use for the additional lands and retained most of the designations in the original plan. Most of the additional land was designated for wildlife habitat and mineral values but several areas on the Seward Peninsula were designated as settlement for future sales of state land. The Public Review Draft was available for approximately two months, with comments due by June 9, 2008. Public meetings were held in May 2008 in Anchorage, Fairbanks, Teller, Nome, Kotzebue and Barrow to present the Public Review Draft and allow for public comment on the proposed revisions to the NWAP. The Public Review Draft of the revised NWAP was available on DNR’s website and copies were available at various locations, such as local libraries and city offices, the Alaska Department of Fish and Game office in Nome, and DNR’s Public Information Centers in Anchorage and Fairbanks.

A total of 20 individuals and organizations submitted comments on the Public Review Draft of the revised NWAP. The NAEC submitted comments on June 9, 2008. The department reviewed all comments and prepared the September 2008 “Issue-Response Summary” to list the principal issues raised in the comments, provide the department’s responses, and identify plan changes based on these comments. Changes to the plan were compiled in the September 2008 “Approved Revisions” document. These changes included designating another one million acres of tide and submerged land as Habitat, changing the designation on some of the land around Salmon Lake from Settlement to Habitat/Public Recreation, adding fishery and wildlife resource information to management units, and clarifying how multiple use and sustained yield principles guide state land use. The April 2008 Public Review Draft and the September 2008 Approved Revisions constitute the final adopted plan.

On October 31, 2008, the Commissioner of the Department of Natural Resources adopted the revised NWAP, with a November 7, 2008 date of issuance. The 2008 revised NWAP supersedes the 1989 NWAP. In adopting the plan, the Commissioner also approved Land Classification Order NC-08-001 on October 31, 2008, with a November 7, 2008 date of issuance, that classifies land according to the revised NWAP’s land use designations. This is the decision the NAEC timely requested I reconsider.

**ISSUES RAISED IN REQUEST FOR RECONSIDERATION AND THE DEPARTMENT'S RESPONSES:**

**A. General Review Request.** We believe that effective public participation in developing management intent for state land requires that the public have the opportunity to review the actual written content of a document and changes to that document. Since the final draft of the Northwest Area Plan (NWAP) will not be released until *after* the appeal period is over, public review and comment on the management intent for resources and uses in specific units is *impossible*, and in no way can this be considered a "meaningful opportunity to participate." It is also very difficult to understand and follow the changes to the NWAP when it is necessary to reference and correlate the information in the Public Review Draft, the Issue Response Summary, and the Approved Revisions. We request that a final draft of the NWAP, which includes the proposed management intent statements for all tideland and upland resources allocation tables, be issued for public review with a new appeal period.

**Department's Response:** I disagree. The public has had "a meaningful opportunity to participate" in the revisions to the NWAP because the "actual written content of the document" is the Public Review Draft that was made available to the public in April 2008, and the "changes to that document" are the September 2008 Approved Revisions. The April 2008 Public Review Draft and the September 2008 Approved Revisions constitute the final adopted plan. The Approved Revisions list provides an effective way for the public to know what changes have been made to the Public Review Draft of the plan in an easy to read format that cites the subject and/or page number in the plan and states the changes/revisions. Therefore, there is no need to prepare a final draft that would incorporate the changes because the existing process is functionally equivalent to a final draft. There would be little public benefit to preparing and releasing a final draft for additional public review, issuing another adoption decision, followed by a new appeal period.

The approach the department used in this plan is similar to that used in other area plans prepared since 2000. That is, the department makes the Public Review Draft of the plan available to the public both online at DNR's website and at various locations throughout the state, including distribution of electronic and paper versions of the plan to specific interested parties. There is opportunity for public comment on the Public Review Draft, and when the public comment period ends, an Issue-Response Summary and a list of Approved Revisions to the Public Review Draft are prepared. The issue-response method is a typical method used to collect and respond to public comments at the local, state, and federal levels on plans and issues that are complex. It has proven to be an effective method to take public comments, synthesize them, and present recommended changes. The list of Approved Revisions is the list of changes that are recommended by staff and approved by the Commissioner and documents the changes to the Public Review Draft that were described in more detail in the Issue-Response Summary. This process has worked for many years and was developed in response to the public wanting to see how DNR responded to public comments and to know if public suggestions were reflected in changes to the plan. These documents allow that ease of review. In the past (during the 1990's), when the department prepared a final draft of the plan, the public had difficulty determining what changes had been made.

## **B. Specific Review Request.**

**Item 1.** Various animal populations and habitats have been omitted from the resource allocation for tideland unit LT-04. Please add the following animal populations and habitats to the table. (i) King eiders were not mentioned nor that (ii) the southern portion of the tideland area is a migratory near shore pinch point for beluga and other whale species migration. Therefore, impacts to migration are more significant in this region for the survival of the impacted species (i.e., beluga whales). Also not mentioned was the increasing importance of the (iii) benthic zone as a feeding area for pinniped species, and the importance of (iv) boulder patches in tidal areas as a significant habitat feature. (v) Please add the following management intent language...to maintain and enhance the natural environment...

**Department's Response:** In response to comments from NAEC and other organizations, the plan designation for Tideland Unit LT-04 was changed from General Use to Habitat/Harvest to reflect the importance of this tideland area. (Approved Revisions, page 4.) The management intent for this parcel was also changed to reflect the sensitive nature of this habitat and the need to coordinate with the Alaska Department of Fish and Game (ADF&G) and federal agencies on marine mammal haul out locations and walrus use areas, and the need to carefully evaluate any authorization within tideland and submerged areas. The resources and uses section of the resource allocation table was also modified to include information on walrus haul outs, the presence of Spectacled Eiders in the bay, and to stress the sensitivity of Ledyard Bay. These Approved Revisions were in addition to the already existing information on this unit in the Public Review Draft of the plan.

The items stated in the NAEC's reconsideration request are not appropriate for inclusion with one exception. The Spectacled Eiders (not King eiders) maintain a presence in Ledyard Bay and the Approved Revisions already added Spectacled Eiders to the plan's resource description. (Approved Revisions, page 4.) The two other concerns that relate to tideland management (beluga whale pinch points and tidal boulder patches) are more properly dealt with through the change in the unit's management intent and plan designation to Habitat/Harvest. By changing to the more protective designation of Habitat/Harvest, a higher level of review is intended to occur and these issues, as well as others, can be dealt with at the time of an adjudication of an authorization in this unit. Finally, the management intent language is standardized for units designated Habitat throughout the plan and it is sufficiently broad to ensure that the items you suggest to management intent are already incorporated in the plan and will be considered in the adjudication of a tideland application.

The Management Guidelines for Fish and Wildlife Habitat and Harvest Areas are described on pages 2-8 to 2-16 of the plan and the management intent for each unit is described in the resource allocation tables. The management intent for LT-04 states to consult with ADF&G, NMFS or USFWS, as appropriate, prior to issuing a state land use authorization in this unit, and language was added to consult with ADF&G and federal agencies on marine mammal haulout locations and walrus use areas. (Approved Revisions, page 4.) I believe this language is sufficient to address your concerns that animal populations and habitat will be considered before an authorization is issued in Unit LT-04. I would also like to point out that, in response to a comment from Trustees for Alaska, the plan was changed to add "Manage to Maintain and Enhance the Natural Environment" to the goals on page 2-7 for Fish and Wildlife Habitat and Harvest Areas, and a new

paragraph was added under Management Guidelines for Fish and Wildlife Habitat and Harvest Areas. (Approved Revisions, page 2.)

**I am granting your request for reconsideration in part and will add the first sentence in item 1. (ii) but not the second sentence in item 1. (ii) because it is speculative in nature and not appropriate to add to the plan. The plan will be changed to add: “The southern portion of this area is a migratory near shore pinch point for beluga and other whale species migration” in the resources and uses section for Tideland Unit LT-04.**

**Item 2. Please add the following animal populations and habitats to the resources and uses section and the appropriate management intent to the resource allocation table for Tideland Unit LT-02: “The northern portion of this area is a migratory nearshore pinch point for beluga and other whale species migration. Therefore, impacts to migration are more significant in this region for the survival of the impacted species (i.e. beluga whales).”**

**Department’s Response: I am granting your request for reconsideration in part and will add the first sentence in item 2 but not the second sentence, for the same reason given for item 1. (ii). The plan will be changed to add: “The northern portion of this area is a migratory nearshore pinch point for beluga and other whale species migration” in the resources and uses section for Tideland Unit LT-02.**

**Item 3. Please add the following animal populations and habitats in the resources and uses section and the appropriate management intent to the resource allocation table for upland units L-01, L-02, and L-05: “USFWS reports that, presumably because of the loss of ice in the region, walrus have begun hauling out in numerous places along the coast between Icy Cape and Cape Lisburne.” Include the need to consult with ADF&G and federal agencies on marine mammal haulout locations and walrus use areas.**

**Department’s Response: I am granting your request for reconsideration on item 3 and a statement will be added to the resource allocation tables for Units L-01, L-02 and L-05 that indicates walrus have been reported to have been hauling out in numerous locations along the coast and the following language will be added to the management intent: “Consult with ADF&G and appropriate federal agencies on the siting of marine mammal haul-out locations and walrus use areas prior to issuing authorizations.”**

**Item 4. Upland unit K-03 is heavily used by the Western Arctic Caribou Herd (WACH), like the adjacent Upland unit K-04 [classified as Habitat], and should be classified Habitat or at the very least co-classified Habitat/Minerals. There are hundreds of caribou and countless caribou trails, and moose also depend on the habitats in this region and should be included in the resource allocation table. These wildlife resources are critical for subsistence in the region.**

**Department’s Response: I am granting your request for reconsideration on item 4 and will change the designation of Unit K-03 from Mineral to a co-designation of Mineral/Habitat and indicate the presence of moose in the resources and uses section. I would like to point out that the management intent for K-03 on page 3-41 of the plan states to consider impacts on the WACH**

and the importance of protecting caribou movement corridors when considering land use authorizations and to consult with ADF&G before issuing a long-term or permanent land use authorization.

**Item 5.** Mitigation Guideline A (page 2-8, lines 12 and 13) states, “The costs of mitigation relative to the benefits to be gained will be considered in the implementation of this policy.” Correlating the financial cost of mitigating adverse affects to fish, wildlife, and their habitats to the value of preserving “Life” without designating specific thresholds and criteria for evaluation is traditionally industry biased determination that results in the inappropriate degradation of habitat and wildlife resources. Please provide the specific criteria for making these cost benefit assessments for the mitigation of adverse effects to the natural environment and its ability to support “Life.”

**Department’s Response:** I disagree. Management Guideline A (Mitigation) is meant to be a general guideline, essentially requiring that DNR determine stipulations or measures needed to protect fish, wildlife, and their associated habitats when issuing authorizations for state land. The second part of the guideline recognizes the need to balance the costs of mitigation relative to the benefits to be gained from the use of state land. This guideline is used when DNR adjudicates an authorization and is meant to give general direction to the adjudicator, with the specific stipulations for the authorization detailed in the department’s best interest finding. That aspect of the guideline that gives direction to the adjudicator to compare costs and benefits is an appropriate aspect of the best interest finding. The application of this guideline during the adjudication process forces the adjudicator to deal with effectiveness and practicability of potential stipulations and whether a stipulation is warranted based on the costs to the user in terms of public benefits. It is inappropriate to identify specific thresholds in a plan that is meant to provide general guidance to the department for its management of the state’s land, water and resources. Rather, the specific thresholds are determined on a case-by-case basis during the department’s best interest finding process. Also, there is no available analytical model to identify and calculate such thresholds, even if DNR thought it appropriate to do so.

**Item 6.** Trustees for Alaska requested that DNR remove the word “preferably” from the phrase “[The extraction of coal is considered appropriate but must utilize management techniques that] preferably, avoid or minimize impacts [to the WACH, especially during the winter calving period/summer high use period]” in the management intent statement for Upland units L-03 and L-04 [on page 3-19 of the plan]. This comment was not addressed in the Issue Response Summary or in the Approved Revisions. It is stated on page 3-5, lines 32-37 of the NWAP that “When a co-designation of Minerals/Habitat or Coal/Habitat is applied, this implies that mining is or may be an appropriate use within a unit with this co-designation, but the habitat values within the unit must be taken into careful consideration when an authorization is under consideration. Stipulations shall be imposed in the authorization in order to ensure the continuation of the habitat value or resource within the unit.” Therefore, avoiding or minimizing impacts cannot be optional by including the word preferably in the statement of management intent for units L-03 and L-04.

**Department’s Response:** The Trustees for Alaska’s request you mention here is not in the Issue-Response Summary or Approved Revisions but I am addressing it here in your request for reconsideration. The management intent statement for L-03 and L-04 on page 3-19 to which you

refer is the *specific* management intent for those areas as described in the Resource Allocation Table. Page 3-5, lines 32-37 to which you refer is in the section titled “Explanation of Mineral and Coal Designations” in the Introduction of Chapter 3, and is a *general* explanation. As you correctly noted, page 3-5, line 35 of the plan was changed in response to a comment from Trustees for Alaska to read that stipulations “shall” be imposed in the authorization (Approved Revisions, page 3) to ensure that habitat impacts would always be considered.

**I am granting your request for reconsideration on item 6 and “preferably” will be deleted from the management intent for L-03 and L-04** because the meaning of what the department intended is not clear. This wording was not intended to enable a mining authorization to occur without avoiding and mitigating impacts upon wildlife and their habitats. Rather, it was phrased that way to ensure that avoidance is the preferable technique over mitigation. Avoiding impacts is less expensive and more effective than mitigating them after they are allowed to occur.

**Item 7.** Several commenters requested that “significant adverse impact”, “degradation of the resource”, and “consideration” be defined in the NWAP. These phrases are not self-evident and need definition. Very different conclusions can be made depending on the scope and perspective of stakeholders and adjudicators when interpreting the intent of language and evaluating impacts to and degradation of living natural resources. These definitions are critical to achieving the sustained yield and multiple use objectives of the NWAP while preserving, in Public Trust, the natural environment of Alaska for future generations.

**Department’s Response:** I disagree. In its review of recommended definitions, the department determined that some words or phrases could properly be described and others could not. Where a term is used in a statute or the administrative code or is a common term of art, they are defined in the Glossary. For the revisions to the NWAP, the definitions for “multiple use” and “sustained yield” were added to the Glossary. Both of these terms are defined in statute and are therefore appropriate for inclusion in the NWAP. The other words and phrases are meant to provide a general intent and the words that are used in each phrase would be the words as interpreted in common usage or as defined in a standard dictionary. Thus, no additional clarity can be provided or is appropriate.

**Item 8.** The issue of Climate Change must be addressed in NWAP. We request that the plan include a process that will allow DNR to respond to the impacts of climate change that may occur during the plan’s duration. Until more prescriptive language can be used, the management intent in the resource allocation tables should at the very least require “consideration” of Climate Change issues in project proposals and in the determination of cumulative impacts to the natural environment. Once the subcabinet group of state commissioners had completed the state climate change policy, a process, which includes meaningful public participation, should be initiated for the inclusion of language into all Area Plans so that Climate Change is adequately addressed.

**Department’s Response:** I disagree. The issue of climate change was addressed in the Issue-Response summary and the conclusions of that analysis remain valid. It is not practicable to include information on climate change in the area plan or to include a process for analyzing such changes over time. At this time, no definitive conclusions and no definite policies have been developed at

the state level to guide resource management. Until the effects of climate change have been determined at the state level and an approach developed at a statewide or areawide level, the inclusion of a climate change policy in an area plan is premature. It would also be inappropriate to include language in this area plan that would relate to changes that might affect all area plans as related to climate change. The NWAP is an inappropriate vehicle for stating such major policy change.

**Item 9.** The language added to Management Guideline, A. Preferred Material Sites (page 2-25, line 1) -- "unless it can be shown that the activity will not adversely affect fish spawning" -- after "permitted in fish spawning areas" should be removed. [Approved Revisions, page 3.] We request that it should remain a general policy that sales or permits for gravel extraction will not be permitted in known fish spawning areas.

**Department's Response:** I am granting your request for reconsideration on item 9. The plan will be changed to read: "As a general policy, sales or permits for gravel extraction will not be permitted in known fish spawning areas or within 150 feet of known spawning areas." This wording has been used in more recent area plans.

**DECISION:** For the reasons stated above, I have decided to deny your request for reconsideration in part and grant your request for reconsideration in part. The revised Northwest Area Plan, as adopted on October 31, 2008, will be modified in accordance with the items for which your request for reconsideration has been granted and as specifically detailed above.

**APPEAL:** This decision is the final administrative order and decision of the department for the purpose of an appeal to Superior Court. An appellant affected by this final administrative order and decision may appeal to Superior Court within 30 days in accordance with the Alaska Rules of Court and to the extent permitted by applicable law.

Sincerely,

  
Thomas E. Irwin  
Commissioner

cc: Dick Mylius, Director, Division of Mining, Land and Water, DNR  
Bruce Phelps, Chief, Resource Assessment and Development Section, MLW, DNR