

Question and Answer Regarding Proposed Water Regulations
Division of Mining, Land and Water
Department of Natural Resources
October 19, 2023

Question: Can you explain why the department is opting to postpone proposed changes relating to applications and certificates for instream flow reservations.

Answer: The Department of Natural Resources obtained a large number of comments in 2021 on proposed regulation revisions to reservations of water in the following sections:

- 11 AAC 93.142 Content of application
- 11 AAC 93.146 Issuance of a certificate of reservation of water
- 11 AAC 93.147 Review of a reservation of water

Due to the large public engagement on this topic, the department has opted to defer this issue for another scoping notice and proposed regulation change in the near future.

Questions and Answers Regarding Proposed Water Regulations
Division of Mining, Land and Water
Department of Natural Resources
November 1, 2023

Question: Has the Instream Flow Water Reservation Program been suspended? Can you verify the current status of that program, and if it has been suspended, why hasn't it been published in the Alaska Online Public notices or otherwise?

Answer: The reservation of water program has not been suspended and continues to be staffed. The Department of Natural Resources is planning to hold scoping meetings in the future to evaluate possible changes to the reservation of water regulations. It is anticipated this will be an interactive process with multiple stakeholders.

Question: Does the department have a timeline for beginning the new scoping process?

Answer: The department is managing a number of other regulation packages and plans to take up reservation of water scoping in 2024, after the currently proposed changes to water regulations have been adopted. This timeline will provide adequate time to collect input on possible changes to the reservation of water program.

Question: Can the deadline for comments be extended?

Answer: The department will extend the November 13 comment deadline to allow the public more time to review the proposed changes and to submit questions and/or comments. The new comment deadline will be Thursday, November 30, 2023. A supplemental public notice of this extension will be issued as soon as possible.

Questions and Answers Regarding Proposed Water Regulations
Division of Mining, Land and Water
Department of Natural Resources
November 21, 2023

Question 1: Referring to the proposed changes for 11 AAC 93.115(4), page 1: “the applicant fails to provide information requested under 11 AAC 93.070... [AND ANY APPEAL PROCESS]. What is the intent of not notifying an applicant of the appeal process? Is there intent or has the appeal process been eliminated?

Response: Any decisions as defined in 11 AAC 02.900(4), including closure of an application under 11 AAC 93.115(4), are subject to appeal and will include the standard directions on the right to appeal and the process. 11 AAC 93.300 states that an eligible person may appeal a decision in accordance with the regulations in 11 AAC 02. Because the appeal process is described elsewhere in the regulations, there is no need to repeat the appeal information in 11 AAC 93.115(4).

Question 2: Referring to the proposed changes for 11 AAC 93.210(a), page 2:

- Will ADNR issue certificates of reservations or water rights prior to granting temporary water use permits on systems with pending reservation or water right applications? If not,
 - Will ADNR provide further clarity on the standing of applicants for a reservation of water or water right when considering a temporary water use authorization if the proposed regulations are adopted?
- Will ADNR account for the requested water in pending applications for reservations of water and water rights when considering a temporary water use authorization? If so,
 - How does ADNR intend to account for the requested water, and how will the applicants for a reservation of water or a water right be involved?
- Will ADNR please explain the implications to applications for water reservations and water rights?

Response to Items 1 and 2: The purpose of the amendment is to make it clear that temporary water use authorizations will not be issued if the water is otherwise appropriated under a water right or reservation. The regulation is not intended to address the timing of outstanding applications for water rights or reservations.

Response to Items 3 - 5: Per the regulation, the department will factor it in by accounting for the requested amount when adjudicating a temporary water use application. Depending on the nature of the TWUA applied for, the department will generally not issue TWUAs that impact applied-for rights or reservations.

Question 3: Referring to the proposed changes for 11 AAC 93.510, page 3-4: The new language ADNR proposes for 11 AAC 93.510 includes notification of existing applicants for a water right (b)(3) and temporary water use authorizations (b)(4). However, the proposed regulation does not specify contacting existing applicants for reservations of water.

- Why does ADNR not specify contacting existing applicants for water reservations while explicitly including applicants for water rights and temporary water use authorizations?
- What is ADNR's intent with excluding applicants for water reservations from being notified, and how does ADNR intend to recognize the standing of Reservation applicants in critical water management area decisions?
- Regarding the language "geographic area" in (b)(1): How does ADNR define "geographic area"?
- Regarding the language "affected" in both (b)(1) and (b)(5): How does ADNR define "affected"?

Response to Items 1 and 2: The department will consider updating 11 AAC 93.510(b)(3) to include applicants for a water right or reservation.

Response to Items 3 and 4: The geographic area is different for each Critical Water Management Area (CWMA) and is generally defined as the limit of the pollution area or limited resource area. An affected area is generally equivalent to the geographic area defined in the order.

Question 4: Referring to 11 AAC 93.510, how will it be determined if federal agencies will be affected? Will this determination include consideration of federal applications for water reservations affected by the proposed actions?

Response:

Similar to the response above, applicants for permits to appropriate water and appropriators of record within or adjacent to a CWMA will be notified of the proposed department order. If federal lands or interests are within an area considered for designation as a critical water area, or for revocation of a critical water management area, DNR will include the appropriate federal agency in the notification process required under 11 AAC 93.510.

Question 5: Referring to the proposed changes for 11 AAC 93.970(25), page 6: The new language ADNR proposes removes "applicants for" from the definition of "appropriators of record." How does ADNR intend to recognize the standing of applicants for a water reservation or water right that has yet to be adjudicated?

Response: The purpose of the proposed change is to make it clear that a submitted application is not yet an appropriation. The intent of the proposed change is to eliminate from consideration any applications that are incomplete or are no longer active, the reason being that the Department has received over 300 incomplete water right applications that should not be considered as appropriations. The Department acknowledges that the proposed change suggests that applications awaiting adjudication will not fit the definition of appropriator of record. Parties who submit a complete application are issued a letter with their priority date and casefile number. AS 46.15.145(d) defines the date when a water reservation is appropriated. Any pending reservation must be considered during adjudication of any subsequent water right or temporary water use authorization.

Question 6: I have been using a well at my residence ... as have all the other homes located on ... for over 20 years. When I attempted to file for the water rights approximately 15 years ago; your department told me not to bother that my well was in use and had been for 5 years and it wasn't necessary. My question is are I or the other homeowners on ... being affected by these changes? Is there anything we need to do to preserve our water rights? Thank you for your consideration.

Response: Any person with questions about applying for water rights is encouraged to contact the Water Section for assistance at phone number (907) 269-8505, or by email at southcentral.waterrights@alaska.gov.

Question and Answer Regarding Proposed Water Regulations
Division of Mining, Land and Water
Department of Natural Resources
November 27, 2023

Question: Regarding proposed changes to 11 AAC 93.970(25) and the definition of "appropriators of record":

- Since the definition of "adjudication" (11 AAC 93.970(1)) incorporates the definition of "appropriators of record," the definition of "adjudication" is also being significantly changed. Is the intent of this rule change to remove consideration of applicants for water rights from all adjudications?
- If not all, in which adjudications would applicants for water rights not be considered, and what is the rationale for their exclusion?
- If consideration of applicants for water rights are removed from adjudications, how would this regulatory change comport with the statutory requirement in § 46.15.165 (Administrative Adjudications) to serve "each applicant, certificate holder, or permittee listed in the department's records within the adjudication area"?

Response: Although the change to the definition of "appropriators of record" in 11 AAC 93.970(25) would impact the definition of "adjudication" in 11 AAC 970(1) as it applies to "the settlement of conflicting claims among competing appropriators of record," the Department will continue to consider applicants for water rights where required to do so by specific water right adjudication statutes and regulations.