

Final Report - Ombudsman Investigation

Department of Natural Resources, Division of Mining, Land, and Water

J2018-0547

July 17, 2019

The Alaska State Ombudsman provides this final public report of the investigation of complaint J2018-0547 pursuant to AS 24.55.200.

Introduction

In December 2018, the Alaska State Ombudsman received a complaint about the Department of Natural Resources, Division of Mining, Land, and Water (DMLW). The complainants explained that they had submitted comments in August 2018 on two proposed actions: a material sale (ADL 233180) and a related staging area (LAS 32497). Both of these actions related to a joint Department of Transportation and Public Facilities (DOTPF) and Federal Highway Administration project to rehabilitate 15 miles of the Seward Highway south of Girdwood.¹

After the complainants submitted their comments on these projects, DMLW provided the complainants with the final finding on LAS 32497 approving the staging area. However, after inquiring about the status of the material sale (ADL 233180), the complainants were told that DMLW did not intend to consider their comments or release a written decision on the material sale. The complainants subsequently complained to the Ombudsman. They alleged that DMLW had failed to comply with administrative notice and comment requirements, and they asked for the following remedies:

- For DMLW to consider their comments regarding ADL 233180;
- For any actions or permissions granted by DMLW related to ADL 233180 to be suspended or voided because of the lack of consideration of their comments; and

¹ More information about this project can be found at: <http://www.sewardhighway75to90.com/>.

- For a determination whether DMLW’s lack of consideration of their comments, lack of a written decision, and failure to provide the complainants with information about how to appeal DMLW’s decision is allowable under the law or not.

Allegations

The Ombudsman investigated two allegations:

Allegation 1: Contrary to law: The Division of Mining, Land, and Water failed to comply with notice and comment procedures regarding a proposed material sale.

Allegation 2: Contrary to law: The Division of Mining, Land, and Water failed to comply with AS 38.05.550(b)’s notice and comment requirements in designating material sites.

Assistant Ombudsman Kate Higgins investigated this complaint. She provided notice of the investigation to Division Director Marty Parsons on February 19, 2019. Based on a preponderance of the evidence,² the Ombudsman finds the first allegation **NOT SUPPORTED** and the second allegation **JUSTIFIED**.³

Statutory Authority

Prior to 2012, the Department of Natural Resources (DNR) was required to follow the notice and comment process prior to authorizing a material sale. In 2012, the Alaska Legislature passed legislation intended to streamline the material sale process.⁴ The new law authorized DNR to designate a material site through the notice and comment process, instead of requiring the department to notice each individual material sale. Once a material site is designated, DNR can

² The standard used to evaluate all ombudsman complaints is “preponderance of the evidence:” if the evidence indicates that, more likely than not, the administrative act took place and the criticism of it is valid, the allegation should be found justified.

³ A complaint is “justified” if the investigation establishes that the administrative action complained of occurred and the Ombudsman determines that criticism of the administrative action is valid. *See* Ombudsman Policy 4060.03 Findings.

⁴ *See* HB 361, “An Act relating to the Alaska Land Act, including certain leases, sales, and other disposals of state land and materials . . .” enacted September 25, 2012 (available online in BASIS at <http://www.akleg.gov/basis/Bill/Detail/27?Root=HB 361#tab6 4>).

enter into contracts to sell materials from those sites without any further public notice or comment, thus eliminating the need for multiple notice and comment periods.

AS 38.05.550. Disposal of materials provides:

- (a) All materials owned by the state may be sold or conveyed as provided in AS 38.05.550 – 38.05.565.
- (b) Materials may only be sold or removed from sources or sites designated by the department. The department shall issue a decision under AS 38.05.035(e) that the sale and extraction of materials from that location is in the best interests of the state at the time each source or site is designated. The department shall give notice, in accordance with AS 38.05.945, of the department’s decision to designate a source or site for the sale and extraction of materials. After decision and notice, the department may sell materials continuously, without further finding or notice, from that designated source or site under this section until the source or site is closed by the department.

AS 38.05.945 provides, in relevant part:

- (b) When notice is required to be given under this section,
 - (1) the notice must contain sufficient information in commonly understood terms to inform the public of the nature of the action and the opportunity of the public to comment on it.

Background

Pursuant to the newly enacted AS 35.05.550, DMLW issued a final finding and decision on November 29, 2012, designating just over 500 specific sites as materials sites.⁵ According to the agency, the new legislation did not provide much lead-time to implement the new designation process. As such, the decision was made to issue an omnibus decision designating as many sites as possible.

This omnibus decision itself is quite short, only four pages, however “it is intended to complement and update the Preliminary Decision, which is longer and provides more context. The two documents together constitute the final agency decision.”⁶ The omnibus decision states in part:

⁵ See Final Finding and Decision Regarding Material Sites Designations (omnibus decision), November 29, 2012.

⁶ DMLW Response to Preliminary Ombudsman Report, June 10, 2019.

Scope of Review and Finding:

The scope of this finding and decision is to designate existing material extraction locations identified in Attachment “A” as Designated Material Sites under AS 38.05.550(b) for the use and operation as material sites for the long-term sale and extraction of materials until closed by the Division. This decision does not designate any new material sites beyond those that meet the criteria stated above not does it authorize the expansion of the legal boundary of any existing material sites. New material sites, or legal boundary expansions to existing material sites require a separate finding and decision under AS 38.05.550 and AS 38.05.035.⁷

Attachment A identifies and lists the specific sites designated as material sites under the decision.

The list is prefaced by the following paragraph:

In addition to the 518 sites listed below DNR designates material extraction locations on state-owned lands for which, DMLW has, 1) since January 1, 2000, issued material sale decision(s) on, or sale contracts for, the extraction of various amounts, quantities and types of materials under previous statutory authorities, 2) in place a valid existing authorization allowing another state agency to use or manage a site as a material extraction source, or 3) in place a valid existing authorization allowing a local government entity or another public or charitable entity to use the site as a material extraction source under AS 38.05.810(a).⁸

On August 8, 2018, DMLW posted two notices to the State of Alaska’s Online Public Notice website. One was titled “Material Sale Information Bulletin” and stated that DMLW “is considering issuance of a Material Sale Contract (ADL 233180) to Granite Construction Company to extract material (rock) from a designated yet undeveloped material site (ADL 233107).”⁹ It continued:

This Bulletin is to inform the public of the proposed ADL 233180 material sale, and provide an opportunity to submit information in the form of written comments that may assist in developing specific extraction operations and/or reclamation requirements, or identify any land use issues, prior to issuance of the material sale contract.

⁷ *Supra* n. 5 at 1-2.

⁸ Attachment A Material Site Decision List, November 29, 2012 at 1.

⁹ “Material Sale Information Bulletin ADL 233180 Milepost 88, Seward Highway,” Department of Natural Resources, August 8, 2018.

DEADLINE TO SUBMIT WRITTEN COMMENTS ABOUT THE PROPOSED MATERIAL SALE IS ON OR BEFORE 5:00 P.M. AUGUST 22, 2018.¹⁰

On August 21, 2018, the complainants submitted comments on the proposed material sale and the related staging area (LAS 32497). Their comments included their opposition to the proposed projects and raised concerns about noise, the viewshed, tribal consultation, traffic, and use of felled trees. The complainants expressly requested that DMLW notify them of any further actions related to these proposals, in enough time to make any necessary comment. In early November 2018, DMLW provided the complainants with the final finding for LAS 32497 and information about how to appeal that decision.

After receiving the final finding on the staging area, the complainants inquired about the status of the material sale (ADL 233180). After several email exchanges with agency staff, they learned that DMLW did not intend to issue a written decision on the material sale and that “DNR will not be responding to the comments received regarding ADL 233180. The only comment received regarding ADL 233180 was yours.”

Designation of ADL 233107

In reviewing DMLW’s land use records, we learned that the site at issue in this complaint was not specifically included in the 2012 omnibus decision. Instead, it was designated as a material site in March 2018, more than five years after the omnibus decision was issued. No specific notice or comment period was provided prior to its designation. Instead, notes in DMLW’s land use records database state: “Rock site designated through 2012 material omnibus [final finding and decision] additional site language, based on ADL 23921 (1964 Free use permit at site).”¹¹

Land records for ADL 23921 indicate that in 1964, DNR granted a “free use permit for 100,000 cubic yards to construct and/or maintain a federal aid primary highway. Indefinite term.”¹² DOTPF

¹⁰ *Id.* (archived notice available at <https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=190991>).

¹¹ “Case, Land, and Water Information,” File ADL 233107 (status date March 13, 2018) (online record at <http://dnr.alaska.gov/projects/las/#filenumber/233107/landflag/y/reporttype/abstract/filetype/ADL/searchtype/casefile>).

¹² “Case, Land, and Water Information,” File ADL 23921 (status date August 10, 1964) (online record at <http://dnr.alaska.gov/projects/las/#landflag/y/searchtype/casefile/filenumber/23921/filetype/ADL/reporttype/abstract>).

completed a material site inspection report about the site in 2015, stating that “DOT&PF currently has an indefinite [free use permit] (ADL 23921) from DNR issued in 1964.”¹³ The site inspection also provides:

The site will be difficult to work due to its steepness and being restricted between the railroad and powerline. The site appears to contain significant quantities of rock and should be retained by DOT&PF for future use, if necessary.¹⁴

This report pre-dates DMLW’s designation of the site by about three years and appears to underscore DOTPF’s intent to retain the permit and enforce it if necessary.

The “In Addition To” Provision

DMLW staff explained that they believed that it was likely that some previously-used materials sites would be inadvertently missed during the agency’s internal review and subsequent omnibus decision. There was concern that they might have to shut down an active material sale during the busy summer construction months if it was missed during DMLW’s internal review leading up to the final decision. Therefore, DNR decided to include the “in addition to” language to allow DNR to subsequently treat a site as designated under the 2012 omnibus decision if it met the three criteria, even though it was not specifically included in the decision.

In order to designate a site under the “in addition to” language, the site must meet one of three criteria:

1. DMLW must have issued a material sale at that site at some point after January 1, 2000;
2. There must be a valid authorization allowing another state agency to extract materials from the site; or
3. There must be a valid authorization allowing a local governmental entity, or another public or charitable entity, to extract materials from the site.¹⁵

¹³ “Statewide Material Site Inventory, Material Site Inspection Report, Seward Highway MS 31-2-017-1” Alaska Department of Transportation and Public Facilities, June 25, 2015 at 1A (available online at http://www.dot.state.ak.us/edocs_code/edocs_document_relay_nativefile_bydocname.cfm?ddocname=DOT-ANC_107512&inline=1, last visited March 20, 2019).

¹⁴ *Id.* at 1B.

¹⁵ These are the criteria that DNR used to decide which sites to designate under the omnibus decision, but there is no statutory authority requiring or mandating the use of those specific criteria.

Since DMLW issued the 2012 omnibus decision, 20 designations have been made without public notice or comment, based on the “in addition to” language found in Attachment A. In contrast, in the same time frame, DNR has designated 35 new sites after engaging in the notice and comment process outlined in AS 38.05.550.

Analysis

The Ombudsman evaluates complaints objectively and bases her findings upon the preponderance of the evidence. This means the evidence must show that it is more likely than not the agency made a mistake before we can make a critical finding or recommendation to the agency.

Allegation 1: The Division of Mining, Land, and Water failed to comply with notice and comment procedures regarding a proposed material sale.

The post-2012 statutory structure requires DMLW to provide public notice and opportunity to comment before designating a site. Once a site is designated, DMLW is authorized to enter into sales contracts without additional notice or comment. Thus, if the site was already designated, DMLW was not required to provide the August 2018 notice of the material sale, nor was it required to accept or consider comments upon it.

It does not appear that DMLW violated the law when it failed to consider the complainants’ comments on the proposed material sale. Based on the preponderance of the evidence, the Ombudsman found Allegation 1 **NOT SUPPORTED** by the evidence.

However, the Ombudsman notes that DMLW created expectations that it would consider public comment when it provided public notice of the intent to enter into a material sale contract from the site ADL 233107. Further, DMLW provided the complainants with its decision on the staging area (LAS 32497) and provided information about how to appeal the decision. This reinforced the complainants’ (erroneous) understanding that the decisions at issue in this complaint were subject to the usual administrative notice and comment procedures.

The Ombudsman suggested that DMLW consider whether soliciting public comment when it is not required, and when the agency does not intend to consider those comments, is the best use of agency resources and the public's time. DMLW responded that it is not the agency's policy or practice "to solicit comments and not consider those comments when deciding a land use action."¹⁶

DMLW Director Parsons continued:

I understand there was a misunderstanding during the communication that occurred between the complainant and staff. A written finding was not drafted but comments were considered and addressed in virtue of stipulations found in the material sale contract that was offered to the applicant. Soliciting comments for non-statutorily required authorizations provides additional information that allows for comprehensive site development planning and applicable stipulations. DMLW will review and evaluate practices of communication with commenters on projects which do not statutorily require notice and written decisions.¹⁷

The Ombudsman appreciates that DMLW recognizes that its communications inadvertently led to expectations by the complainants, and that the agency will review how it communicates with Alaskans who provide comments on projects such as these. The Ombudsman agrees with Director Parsons about the value of public input to the agency's planning and operations. The agency provided new information in its response that the complainants' comments were "considered and addressed" in stipulations in the eventual material sale contract.¹⁸ This new information leads the Ombudsman to question why DMLW did not reply to the complainants' inquiries and inform them that their comments resulted in agency action, choosing instead to reply: "DNR will not be responding to the comments received regarding ADL 233180."

Allegation 2: The Division of Mining, Land, and Water failed to comply with AS 38.05.550(b)'s notice and comment requirements in designating material sites.

DMLW designated ADL 233107 as a material site without notice or comment. AS 38.05.550(b) requires DMLW to provide "sufficient information in commonly understood terms to inform the

¹⁶ DMLW Response to Preliminary Ombudsman Report, June 10, 2019.

¹⁷ DMLW Response.

¹⁸ A review of the material sale contract shows that DMLW addressed several of the complainants' concerns, specifically their concerns about noise from blasting, conflict with the area management plan, and that any felled trees should be offered to residents for personal use. The contract required the applicant to notify residents within one mile of any blasting, that timber removal should be "minimized to the extent possible," and that the applicant should coordinate with the Division of Forestry regarding the disposition of any felled trees.

public of the nature of the action and the opportunity of the public to comment on it.” DMLW contends that the “in addition to” language is sufficient notice to the public that any site that fits one of the three criteria outlined, regardless of whether it was specifically identified in the decision or not, is automatically designated as a material site.

The Ombudsman finds Allegation 2 — that DMLW acted contrary to law by failing to provide notice and opportunity to comment on the ADL 233107 material site designation as required by AS 38.05.550(b) — **JUSTIFIED** by the preponderance of the evidence. It is improbable that the notice contained in the 2012 decision was “sufficient information” to put anyone on notice that DMLW might designate ADL 233107 as a material site six years later. Further, it would have been impossible for a member of the public to comment on whether ADL 233107 should be designated as a material site during the 2012 comment period because there was no notice that DMLW contemplated including it.

DMLW provided no response, and did not dispute, the finding related to Allegation 2.

Recommendations

Recommendation 1: DMLW should provide the public with notice and opportunity to comment, as required by AS 38.05.550(b), regardless of whether the site would fit the three criteria the division used to designate sites in the 2012 omnibus decision.

DMLW should cease its reliance on the “in addition to” language in its November 29, 2012 decision to designate materials sites, and instead provide the public notice and opportunity to comment required by law. The Ombudsman is not recommending that DMLW void the designation of ADL 233107 as a material site. Based on the 1964 free use permit associated with the site at issue, it is likely that the site would have been approved as a designated site, had DMLW followed the required notice and comment process.

The Ombudsman does not recommend that DMLW void any of the other site designations made in reliance on the 2012 “in addition to” language. However, the Ombudsman does recommend that DMLW immediately adopt business practices that comply with the notice and comment

requirements of AS 38.05.550(b). When DMLW seeks to designate a material site in future, it should issue public notice that provides “sufficient information in commonly understood terms to inform the public of the nature of the action and the opportunity of the public to comment on it.”

DMLW rejected this recommendation:

DMLW only utilizes the “in addition to” language when the site in question meets the criteria that was developed in the 2012 Omnibus Decision (OD). The ability to recognize designated sites that were omitted from the 2012 OD allows DMLW to more efficiently process material sales that will benefit important statewide projects. DMLW will consider a review and evaluation of the impact to future projects and whether to continue to utilize the “in addition to” language in the November 29, 2012.”¹⁹

Conclusion

The Ombudsman appreciates that executive agencies are under significant pressure to streamline operations and increase administrative efficiency. The Ombudsman notes, however, that Alaskans’ interest in knowing how public resources will be used, and having the opportunity to inform agency decisions, was specifically protected when AS 38.05 was enacted to give DMLW the opportunity to streamline its material site designation and sales processes. The Ombudsman’s recommendation seeks to balance the agency’s and the public’s interests.

¹⁹ DMLW Response at 2-3.