



130 Seward Street, Suite 501, Juneau, Alaska 99801
1500 W. Benson Blvd, Anchorage AK, 99503
907.269.5290 907.465.4970 800.478.2624
ombudsman@akleg.gov • www.ombud.alaska.gov

FOR IMMEDIATE RELEASE

Contact: Kate Burkhart, 907-465-4970, kate.burkhart@akleg.gov

OMBUDSMAN INVESTIGATES DIVISION OF MINING, LAND, AND WATER; RECOMMENDS CHANGES TO AGENCY REGULATIONS AND PUBLIC NOTICE PROCESS

August 5, 2019 Juneau – Alaska State Ombudsman Kate Burkhart recently concluded two investigations of complaints about the Department of Natural Resources (DNR), Division of Mining, Land and Water (DMLW). One complaint involved the Aquatic Farming Program, while the other involved the designation of sites and sale of materials from public lands.

In A2017-0619, the Ombudsman investigated a complaint about how DNR has implemented its policy requiring that aquatic farm leaseholders have liability insurance. While the complainant, a new applicant for an aquatic farm lease, was required to carry this insurance, existing leaseholders were not. The complainant felt that this policy unfairly disadvantages new aquatic farming leaseholders entering the market.

The Ombudsman investigated whether DNR unfairly requires new aquatic farming leaseholders to obtain commercial liability insurance policies as a condition of their lease agreement, but does not require existing leaseholders to carry commercial liability insurance until their lease term expires. The Ombudsman also investigated whether DNR's reliance on 11 AAC 96.065 as legal authority for requiring aquatic farmers to purchase liability insurance was contrary to law.

Based on the information and evidence collected during the investigation, the Ombudsman found that DNR's administrative actions create a financial disadvantage for new aquatic farm lessees as compared to long-term leaseholders, without showing that it is in the best interests of the State of Alaska. The Ombudsman also found that DNR had expressly based its policy of requiring commercial insurance on regulatory authority that is not applicable to aquatic farm leases.

The Ombudsman recommended that DNR update its regulations to require all aquatic farm leaseholders to carry commercial liability insurance. The agency's policy — requiring commercial liability insurance — helps ensure that there are resources available to mitigate and remediate any harms caused by leaseholders to Alaska's waters. It should apply equally to all leaseholders, and not just those entering the industry. The Ombudsman also recommended that DNR revise aquatic farm decisional documents and lease forms to remove reference to 11 AAC 96.065, which does not apply.

DNR did not dispute the Ombudsman's findings or reject the recommendations. DMLW Director Marty Parsons informed the Ombudsman that the division is in the process of drafting updated leasing regulations which will require commercial liability insurance for all leaseholders, including

aquatic farming. Director Parsons also reported that the division has begun reviewing documents for inappropriate citations or references to 11 AAC 96.065. Instead, the agency will refer to its broad statutory authority under AS 38.05.035 for all future decisional documents.

The second complaint (J2018-0547) involved DNR's materials site designation process. That complaint arose after DMLW issued public notice of a proposed materials sale and solicited comments on the proposed sale. The complainants submitted comments on the proposal but were subsequently advised by DMLW staff that the division would not be formally responding to their comments. They contacted the Alaska State Ombudsman for assistance, and the Ombudsman opened an investigation.

The Ombudsman investigated whether DNR had failed to comply with the public notice and comment requirements related to the proposed material sale and in designating a materials site. The Ombudsman found that the Legislature had streamlined the process for issuing materials sales in 2012. Since then, the division is not required to notice a proposed materials sale as long as the materials site has already been designated by DNR. Even though DMLW did notice the proposed sale, and created expectations of a public process, DMLW was not required by statute to publicly notice or accept comments for the proposed material sale at issue in this complaint. Therefore, that allegation was found unsupported by the evidence.

The Ombudsman also investigated a separate issue of DMLW's practice of designating certain materials sites without public notice or opportunity for comment. After the Legislature's 2012 changes, DMLW issued an omnibus decision after public notice and comment, designating over 5,00 materials sites. The decision also included a catch-all provision that purported to designate any other sites that had not been specifically included in the omnibus decision, provided that the site met certain criteria.

The site at issue was not included in the omnibus decision. It was designated, without public notice or opportunity for comment, using the catch-all criteria for designating additional sites under the 2012 decision. The Ombudsman found that this designation of the site was contrary to AS 38.05.550(b), which requires DNR to provide "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." The Ombudsman recommended that DMLW provide the public with notice and opportunity to comment on proposed site designations, 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.

The agency declined to adopt the recommendation, stating that its current reliance on the omnibus decision "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 omnibus decision criteria as the basis for designating sites.

Public reports for both investigations, with findings and recommendations are available online at <http://ombud.alaska.gov/case-summaries/>.

###