



KENAI PENINSULA BOROUGH

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**MIKE NAVARRE
BOROUGH MAYOR**

TO: Dale Bagley, Assembly President
Members, Kenai Peninsula Borough Assembly
Mike Navarre, Mayor

THRU: Colette Thompson, Borough Attorney *CT*

FROM: Elizabeth Leduc, Assistant Borough Attorney *EL*

DATE: June 2, 2015

SUBJECT: Borough roads and drainage – legal opinion

This legal memorandum is offered in response to the letter distributed on June 1, 2015 by assembly member Stan Welles, specifically concerning his statements and belief that the borough is violating state law and borough code governing road-related drainage in the K-Beach area.

DNR Regulations and the Alaska Water Use Act

In his letter distributed on June 1, 2015, Mr. Welles states that he believes that the roads in the K-Beach area violate Alaska regulation 11 AAC 93.035, though it is not exactly clear what type of violation he is alleging. These regulations are intended to effectuate Alaska statute chapter 46.15, also known as the Water Use Act. It is the opinion of the legal department that the borough is not in violation of either state water use laws or regulations, as the Act is inapplicable to roadside ditching.

AS chapter 46.15 specifically addresses the right to appropriate water from a water source. Under the Act, *appropriate* means to “divert, impound, or withdraw a quantity of water from a source of water, for a beneficial use or to reserve water under AS 46.15.145.” A *beneficial use* is

a use of water for the benefit of the appropriator, other persons or the public, that is reasonable and consistent with the public interest, including, but not limited to, domestic, agricultural, irrigation, industrial, manufacturing, fish and shellfish processing, navigation and transportation, mining, power, public, sanitary, fish and wildlife, recreational uses, and maintenance of water quality.¹

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¹ Definitions can be found at AS 46.15.260.

A user who is permitted to appropriate water under the Act is said to have “water rights,” meaning the legal right to divert, impound or withdraw a specific quality of water from a specific source. When a water right is granted, it runs appurtenant to the land where the water is being used for as long as the water is being used.

The Act also allows DNR to authorize the temporary use of water, either when the applicant intends to use a significant amount of water (defined by regulation) that has not already been appropriated, or intends to use a less than significant amount of water that the commissioner determines may have an adverse effect on other water uses. A temporary water use authorization (TWUA) does not establish a right to appropriate water, but rather to use water for a period not to exceed five years. It appears that the types of uses allowed under a TWUA are the same type of activities that are addressed under the appropriation sections of the statute, as there is no separate definition or discussion of temporary “use” other than the time-period and the lack of legal appropriation rights to the water in question.

11 AAC 93.035, the regulation cited by Mr. Welles, specifies the requirements to apply for the use of a significant amount of water. Subsection (b) of this regulation lays out the four scenarios under which an appropriation permit or a temporary water use permit is required:

- (1) the *consumptive use* of more than 5,000 gallons of water from a *single source* in a single day;
- (2) the regular daily or recurring *consumptive use* of more than 500 gpd from a *single source* for more than 10 days per calendar year;
- (3) the *non-consumptive use* of more than 30,000 gpd (0.05 cubic feet per second) from a *single source*; or
- (4) any water *use* that may adversely affect the water rights of other appropriators or the public interest.

Consumptive use is not defined in the regulations. According to Black’s Law Dictionary, “consumption” means “the act of destroying a thing by using it; the use of a thing in a way that thereby exhausts it.” Common examples of consumptive use are water used for drinking and other household applications, or water used to irrigate crops.

Non-consumptive use is defined by the regulations as “the instream use of water, or the diversion of water where the quantity of water diverted is not diminished except by evaporation or transpiration and the water is returned to its original source at the original point of diversion immediately after its use.” 11 AAC 93.970(33).

Development of rights-of-way, including roadside ditching, is not a water “use” that falls within the purview of AS 46.15 or 11 AAC 93. Such ditches are intended to remove water that falls on the roadway in the form of precipitation so that the road is safe for travel. The ditches do not collect water from a single source, nor does the drainage of water off the roadbed qualify as use of water under any definition within the statute or regulation. The ditches are also not intended to “drain the wetland,” as Mr. Welles alleged in a letter he submitted to the assembly in January 2015, but rather to simply protect the infrastructure and allow for safe passage. The ditches do not divert water from a specific source, nor do the ditches consume water or use it and then return it to an original source. Because the statute and regulation at issue are inapplicable, the borough cannot be found to be in violation of these laws.

The legal department's interpretation of the Water Rights Act is supported by contact the administration has had with DNR throughout the 2013 flood and its aftermath.² For example, the administration was in close contact with DNR at the time the Buoy Street ditch was constructed. Dave Schade, DNR Natural Resource Manager, informed the borough that typical roadside ditch construction, improvement and maintenance do not require a TWUA. However, if the borough were to actively divert water, for example, by constructing a permanent pipeline under K-Beach Road to direct water from the water catchment at the end of Karluk Avenue to the inlet, then a TWUA would be required because it would be an intentional diversion of water from a particular source.³ In fact, the borough obtained a TWUA for this purpose, which is valid through January 27, 2020, as a precautionary measure in case such action is needed to deal with acute flooding in the future.⁴

Borough Code

As an initial matter, the borough has three types of powers related to roads: maintenance powers (adopted 1981), improvement powers (adopted 1985), and construction powers (adopted 2001). However, the borough has actually constructed very few roads. In most areas, including the K-Beach neighborhoods impacted by the 2013 flood, the roads were designed and constructed by private developers. The borough has, however, accepted more than 600 miles of roads throughout the borough into the borough maintenance system. Many roads were accepted into the maintenance system prior to the adoption of road construction standards (see KPB chapter 14.06) and have been "grandfathered" into the maintenance system in their existing state. The road service area (RSA) engages in a capital improvement program to bring roads up to construction standards; this program is based on a tier system and the availability of state and borough funds.

Mr. Welles proposes that the roadside ditches in the K-Beach area, and perhaps throughout the borough, violate code, specifically KPB 14.06.170. That provision states, in relevant part,

Roads shall be constructed to prevent ponding of runoff waters in roadside ditches. Drainage ditches shall be constructed such that runoff waters will be conveyed to natural drainage courses, ditches or waterways, or other man-made drainage courses. Outfalls shall be constructed to prevent excessive siltation of riparian habitats, channel erosion, or other damage to public or private property.

The intent of this construction standard is to ensure that borough roads are kept clear of water for the purpose of protecting the infrastructure and promoting safe travel, consistent with the purpose of the RSA.

² The borough also remained in close contact with other state agencies, including the Department of Transportation (DOT) and Department of Environmental Conservation (ADEC), during the entire flood response, to ensure compliance with state law with regards to any efforts made to protect the borough's road infrastructure.

³ Note that the diversion of water in this manner during the 2013 flood was allowed without a permit but by permission of DNR because of the emergency circumstances.

⁴ This infrastructure is not intended to "drain the wetland" as Mr. Welles alleged in a letter submitted to the assembly in January 2015. It is intended only for intermittent use as necessary to deal with acute flooding or periods of high water. Unless such circumstances arise, this pipeline is blocked off and does not drain water into the inlet.

Many of the roads in the K-Beach area, as well as in other areas of the peninsula, traverse terrain that is nearly flat, with very little gradient to move water laterally. Many of the ditches along roads in the K-Beach area do hold some water on a temporary basis until the water can percolate into the ground, which, in nearly flat areas such as K-Beach, is the natural drainage course. In such situations, where there is little natural grade, drainage galleries or “stormwater detention basins” are often constructed to aid the downward flow of water and avoid ponding. The RSA considers drainage galleries to be a reasonable practice for handling water that falls on the roadway in areas that do not promote significant lateral flow. According to the Environmental Protection Agency (EPA) and the Alaska Department of Environmental Conservation (ADEC), infiltration or percolation of water is a preferred method of dealing with stormwater. This is a standard engineering practice employed not just by the borough, but also by other entities that construct or improve rights-of-ways including, for example, the Alaska Department of Transportation (DOT) and the City of Kenai. Furthermore, all capital improvement projects constructed by the borough within rights-of-way are designed and approved by a qualified civil engineer.

The legal department interprets the term “ponding” to mean a more permanent holding of water and does not believe that the practice of using drainage galleries violates KPB 14.06.170. The roadside ditches that traverse flat or nearly flat terrain allow water to follow the natural drainage course downwards where it either recharges the groundwater or follows a natural outflow path. Some ditches in the K-Beach area do have sufficient slope to move water laterally, especially during times of high water. However, in this area, much of the water drains into the ground and then follows an underground course to the inlet. Evidence of this can be seen in the seepage along the bluffs in the K-Beach area.

Conclusion

In sum, the borough administration has worked closely with state and federal agencies throughout the flood of 2013 and its aftermath to ensure that its actions to protect and improve the road infrastructure comply with all relevant laws. It is the opinion of the legal department that the borough has not violated AS 46.15, 11 AAC 93, or KPB 14.06.170 with regards to road construction, improvement or maintenance in the K-Beach area or in other areas of the borough impacted by the flooding in 2013.