Attention: DEC Commissioner Jason Brune (jason.Brune@alaska.gov)
Attention: DEC Water Division Director Randy Bates (randy.Bates@alaska.gov)
Attention: DEC Environmental Program Specialist Gary Mendivil (gary.mendivil@alaska.gov)

Introduction to Appeal

This appeal is being submitted by the directly adjoining property owners to the property being granted a waiver of wastewater Disposal Regulations 18 AAC 72. We believe this waiver should not have been granted. It not only affects us negatively as adjacent property owners, but it will result in diminished water quality for the Kenai River fish, wildlife and recreational users as well as property owners along the river.

Like most people on the Peninsula and elsewhere around the State, we believe the Kenai River is a very special place. The Alaska Legislature recognized this by establishing a special park in 1984 to help preserve this very unique natural resource.

The Parks brochure describes this as follows:

*The Kenai River Special Management Area (KRSMA) was established in 1984 in response to the increasing public use and strain on the river system’s health. The KRSMA contains more than 105 miles of rivers and lakes and is adjacent to 16 publicly managed parks that offer prime opportunities for boating, camping, wildlife viewing and, of course, fishing. re is a special Park for the Kenai River Drainage. Fisheries management on the Kenai River is a very large focus for both ADF&G managers and the Alaska Board of Fisheries. Groups such as the Alaska Watershed Forum spend a great deal of time and effort trying to help preserve the water quality and productivity of the Kenai River, in the face of stream runoff, increasing use levels, stream bank development and many other factors.*

_source: http://lidnr.alaska.gov/parksasounits/kenailkrスマ.htm_

In this context, we believe the Kenai River deserves special treatment and protections by DEC, not ill-advised relaxation of DEC regulations which are intended to protect both people and the river.

We believe that this property owner has demonstrated little concern or consideration for DEC regulations and protecting the Kenai River in the past and should not be awarded special treatment via this exemption. We also believe that DEC, particularly for the Kenai River, should be more concerned with protecting water quality and river productivity than with processing permits.

**Responses for DEC Adjudicatory Hearing Form**

(The following responses follow the headings for Adjudicatory Hearing form)
Requester Contact Information

Ron Rogalsky and MJ Loveland
945 Ames Road and 1003 Angler Drive
P.O. Box 35
Kenai AK 99611
phone: 907-398-9238
e-mail: mjron@acsalaska.net

Jim Richardson and Barbara Baker
1015 Angler Drive, Kenai AK 99611 and
1543 E 26th Avenue
Anchorage, AK 99508
phone: 907-441-8027
e-mail: resecon.alaska@gmail.com

Identification of Represented Parties

This appeal is filed by the individual adjacent property owners listed above. But, we believe that all of us have a stake in the water quality and future water quality of the Kenai River.

Both signers have had/currently have a relationship with the Alaska State Parks Kenai River Special Management Area Advisory Board and have been involved with other organizations that work to preserve and protect the future productivity of the Kenai River. But as stated, they are not representing these organizations with this appeal.

Decision and Issues to Be Reviewed

Foster's Alaska Cabins, Angler Acres Subdivision, Part 4, Lot 1
DEC Plan Tracking No. 28869

DEC Decision letter dated 11/19/21
Decision letter signed by David Wilfong, Engineering Associated I, DEC

There was no public hearing to allow testimony on this issue. However, both signers had numerous communications with DEC staff during their review of this application.

Decision and Issues to Be Reviewed

Relevant Background Information:

We believe the previous actions of the permit applicant at 1005 Angler Drive are relevant to DEC's review, and should have triggered a more stringent investigation of claims made in their application, particularly those claims that were directly contradicted by information easily available to the DEC staff. Specifically:

- In 1991, the owner of the property (1005 Angler Drive) installed a camper RV on the edge of the small creek with DEC a toilet outfall draining directly into the creek. A complaint was called in to DEC in Soldotna. A staff member, Bob Krogxing came out for a site visit and observed the sewer outfall into the creek. He interacted with the owner and required removal of the outfall pipe. When contacted later to inquire of a citation for violating water
quality of the creek/Kenai River had been issued. Mr. Krogxing replied that DEC had been
told by the legislature to do nothing on enforcement of any violation. The relevance of this
point is two fold: In 1991, DEC staff recognized the importance of stopping a sewer outfall
into this creek and required an immediate stop to that pollution. If this creek was this
important in 1991, it is not logical that it is an unimportant 'dry creek' in 2021/2022.
Secondly, it shows a history of ignoring water quality and DEC regulations by the owner of
the property.

- The affected water body is the Kenai River. In our initial discussions with DEC staff on this
permit application, we encounter resistance in their belief that this section of Beaver Creek
(known officially as the Beaver Creek/Kenai River Meander) was legally part of the Kenai
River. If you need proof that this is the case, we recommend contacting the State Parks
regional office at Morgan's Landing. If you go to the mouth of the Beaver Creek/Kenai
River Meander, you will see a State Parks 'No Wake' sign. This sign is only legal and
enforceable because this stretch is legally part of the Kenai River, upstream to the
confluence of Beaver Creek and the Kenai River Meander. This is relevant because
contamination from this small creek goes directly into the Kenai River. As noted below, the
DEC recognized this fact in resolving a discharge violation in 1991.

- Several years ago, Jim Richardson walked the small creek from its confluence into the
Kenai River upstream to the outfall from the 'Lake at Kenai'. Along the way, he found
several pink salmon smolt and several were collected to pass along to the Alaska
Department of Fish & Game. We asked if this small creek could be added to the State's
anadromous fish catalog of streams. The answer was no, that they do not have the
research staff to make additions to the catalog these days, and also that pink salmon were
found everywhere. The relevant point is that the stream contained pink salmon smolt, quite
a trick for a "dry creek".

- The signing parties tried to provide accurate information to the DEC staff and invited them
to do a site visit from our respective properties. Some of the information that was not
utilized and inaccurate information that was utilized is discussed below. We believe that it
was extremely unfortunate that the DEC did such a cursory observation of the stream at
issue (i.e. one drone overflight in October). The straight portion of this stream (that drains
the wetlands along Angler Drive) are entirely on a public use easement that extends for 33
feet on each side of the north property boundary for 1005 Angler Drive. And the entirety of
the outlet stream from the 35 acre lake is entirely within property owned by Ron Rogalsky,
how provided DEC with blanket permission to utilize his property to verify the status of the
stream.

- Importantly to this appeal is the DEC authority for separation distance of septic systems.
The regulation for this issue is 18 AAC 72.020 shown below.

18 AAC 72.020. Separation distances. (a) A person who builds or installs a sewer,
private sewer line, onsite system, or domestic wastewater treatment works shall comply with the
applicable minimum separation distances set out

(1) in 18 AAC 80.020 for a public water system, unless the department has approved a lesser
separation distance under that section; or

(2) in (c) of this section for a private water system.
(b) The minimum separation distance between the mean annual high water level of a lake, river, stream, spring, or slough, or the mean higher high water level of coastal waters, and a lift station, holding tank, septic tank, soil absorption system, seepage pit, pit privy, or other wastewater collection, treatment, or disposal system is 100 feet, measured horizontally. (emphasis added).

Note that this description in AAC 72.020 refers to the mean annual high water level of (in this case) a stream. The Code does not say that the water level has to be visible at one moment in time from an overflight of a drone. And also noticeably, the stream in question has been significantly modified along the portion of its flow through the original course across a portion of 1005 Angler Drive. Fill has been added and possibly a portion of this flow has been routed through a pipe, explaining why the stream has water above and below those points.

**Contested Issue #1:**

The applicants are contesting the (inaccurate) characterization of the two small creeks directly adjacent to 1005 Angler Drive as

On page 1 of the DEC letter of 11/19/21, five reasons are given why the waiver approval was made by DEC. We believe that item (5) is grossly incorrect and that item (4) is also incorrect.

The most important misinformation is item (5) which states that "The drainage with the surface water only flows intermittently." To make this assertion, DEC had to ignore:

(a) The expert/local knowledge of both Mr. Richardson and Mr. Rogalsky provided to David Wilfong.
(b) The language in the DEC letter of May 25, 2005 letter (tracking #3395) which states, "The system was constructed without prior plan approval from ADEC and the soil absorption system was constructed within 100 feet of a drainage ditch that flows directly to the Kenai River.
(c) The 1991 enforcement by Bob Krogxing, DEC, to cause removal of a sewage discharge pipe from an RV parked at 1005 Angler Drive and emptying into the Kenai River about 50 feet downstream in the small stream. If this stream were dry, there would have been no need for Mr. Krogxing's action.
(d) This description of the stream system in question.

"Most of the subdivision was formerly used as a gravel pit with the 'lake' being formed by dredging soil from below the groundwater table. Several lots were landscaped using fill material either dredged from the lake or imported from offsite. The lake level reportedly remains constant, which would be expected based on its water source. A small drainage runs year-long from the lake, along the east border of Lot 7, along the border of Beaver Creek Estates Lot 2 and Anglers Acres Subdivision Part 4 Lot 1, and into Beaver Creek. A second drainage originates from surfacing groundwater from the cut face of the roadside ditching along the southwest boundary of Lot 1 and flows down the road-side ditch on the north side of Angler Drive before joining the lake drainage in the southeast corner of Lot 7. This water appears to be primarily surfacing groundwater due to its continued flow in the ditch as late as November when we were onsite. We did not observe any water flowing from the western corner of Lot 1
during our site observation but Mr. Foster informed us that in the summer water also seeps out of the ditch farther up Angler Dr as the road climbs a hill (heading west from the subdivision). The water then flows east in the Angler Drive ditch. A low-lying area in the southern portion of Lot 2 occasionally holds water and also drains into the Angler Drive ditch. Surface water setbacks for these bodies of water are shown on our Working Map."

(e) boundary of Lot 1 and flows down the roadside ditch on the north side of Angler Drive before joining the lake drainage in the southeast corner of Lot 7. This water appears to be primarily surfacing groundwater due to its continued flow in the ditch as late as November when we were onsite. We did not observe any water flowing from the western corner of Lot 1 during our site observation but Mr. Foster informed us that in the summer water also seeps out of the ditch farther up Angler Dr as the road climbs a hill (heading west from the subdivision). The water then flows east in the Angler Drive ditch. A low-lying area in the southern portion of Lot 2 occasionally holds water and also drains into the Angler Drive ditch. Surface water setbacks for these bodies of water are shown on our Working Map."

Source for above quotes - The Lake at Kenai report, page 1; completed by Tauriainen Engineering dated April 26, 2017 for Steve Foster (emphasis added).

(f) In addition, DEC had to ignore the overall water hydraulics of the area, which are obvious. Artesian groundwater in this area is moving from northwest to the southwest along both sides of Angler Drive and both sides of Beaver Loop Road. There are permanent wetlands along Angler Drive just upstream of where the ditch crosses into the section line easement adjoining the Foster Property. There is a 35 acre lake that is drained by a branch of this small creek that is also referenced in the above quote from Steve Foster. The confluence of the two branches of this small stream is shown in the schematic drawing appended to the DEC decision report.

(g) Ron Rogalsky and MJ Loveland purchased Lot 7 of the adjacent property - The Lake at Kenai in 2021. This lot contains the outfall stream that joins the other branch of the stream that drains the wetlands along Angler Drive. The Statutory Warranty Deed required for sale of this lot by Steve Foster (long-term co-owner of the subject property at 1005 Angler Drive) contained the following requirement shown below. It was explained to Mr. Rogalsky that this was required, since if he blocked the outlet of the lake, it would result in the lake level rising.

"The drainage swale on Lots 7 and 8 maintain the level of the lake and are not to be blocked, dug out or altered in any way but may be maintained if necessary."


(h) It is obvious that a portion of the ravine where the creek runs has been modified with gravel filling and buried piping. But the water runs continuously. It is not a lot of water compared with Beaver Creek for example, but perfectly adequate to transport fecal coliform into the Kenai River. The DEC decision letter (plan tracking 28869) contains a letter from Tauriainen Engineering dated 10/21/21. Page two of that letter provides the following description of the flow on the two forks of the small stream.

"However, it is our understanding that a small drainage flows out of the lake year-round depending on precipitation, frost and groundwater conditions. Our previous submittal noted
that the soils at the bottom of the drainage ditch are believed to offer some infiltration which may partially explain why the ditch is intermittently dry"

All of the reasons listed above would lead a reasonable person to conclude that the small stream adjacent to this project flows constantly and should not be excluded from the DEC setback regulations.

**Explanation and Reasons the contested issue is relevant to the decision.**

If DEC had conducted a site visit (and not just overflown a drone over a portion of the small stream), they would have been able to see what other researchers, DEC staff and the property owner have reported. This small stream drains a 35 acre lake and a substantial wetlands, and also includes snow and rain runoff. The exemption to not enforce the 100 foot setback should not be granted.

**How are requesters directly and substantively affected?**

Both property owners and the public in general is subject to an incremental amount of contamination going directly into the Kenai River from the septic system that does not conform to the 100 foot stream setback on unconsolidated sand and gravel soils leading directly to the stream and the Kenai River.

Another relevant issue is impact not just to the streaming the Kenai River, but to the public easement (33 feet on each side of the north property line for 1005 Angler Drive), but also to the property on the north side of the creek, owned by Ron Rogalsky and MJ Loveland.

DEC did not account for the unsuitability of the soils between the septic system, the stream and the Kenai River.

The closest analysis of the soils on this site are from a well log directly next door to the south (1015 Angler Drive). A copy of that well log is attached below. As you can see, the first 28 feet are composed of unconsolidated sand and gravel. Any surface water, and keeping discharge from the drainfield allowed by this exemption will easily travel downslope, into the ditch and onto the Kenai River.
Any suggested terms or conditions?

Our suggestion is not to allow the setback exemption and follow 8 AAC 72.020. Follow the 100 foot setback.

Why should your request be granted?

The Kenai River is a special river to most of Alaskans and visitors from around the world. It is incrementally threatened by all sorts of development-related pollution. If we want to have our kids or their kids fish and enjoy the Kenai River as we have, everyone needs to do their part to help make this happen. In this case, DEC’s part is to enforce the 100 foot setback for the stream that runs by and into the Kenai River.
Request for Evidentiary Hearing

We believe we have submitted sufficient information for DEC to recognize that they were deficient in accepting the characterization of the stream as being 'dry' and should move to enforce 18 AAC 72.020.

If for some reason, this is not the case, we ask that DEC withhold approval of this system until such time as DEC staff could make a complete on-site assessment of the characteristics of this stream, extending all the way from the wetlands along Angler Drive, the 35 acre lake at the branch of the stream all the way to the confluence where goes into the Kenai River. Obviously the area is frozen now, but we suggest that this site visit, which we do not believe to be necessary given the information we have presented, could occur in the spring. This could be done at any time at your convenience. The straight portion of the stream, along Angler Drive passes through the Foster property on a public use easement that is 66 feet wide and incorporates the land under the stream through to its confluence with the Kenai River. You do not need anyone's permission to walk along and investigate this portion of the stream. The portion of the branch of the stream that comes out of the 35 acre lake to the confluence with the other portion of the stream is entirely on property owned by Ron Rogalsky and MJ Loveland. They will be pleased to allow access to this entire stretch of the stream to DEC staff.

Descriptions of Question of Facts to be Raised at Evidentiary Hearing

not applicable

Estimated Time for an Evidentiary Hearing

not applicable