Comments by Entities other than General Public

11 AAC 05.010, FEE CHANGES.

The fee should remain in the regulations to discourage frivolous nominations (Kenai Peninsula Borough Trails Commission); no other adverse comments; Alaska Outdoor Council and Matanuska-Susitna Borough support the repeal. **Response:** DNR will proceed to repeal the fee for nominating RS 2477 rights-of-way.

11 AAC 51.010, PURPOSE AND APPLICABILITY.

General questions on or challenges to the concept of a public easement, particularly if the commenter owned private land subject to a public easement (Division of Agriculture; see data base of comments from the general public as well). **Response:** DNR will proceed with this section. DNR's regulations can't alter the nature of a public easement. (As expected, many private landowners opposed RS 2477 rights-of-way, which they view as an unjust after-the-fact "taking" of their land. But some owners—particularly Delta agricultural purchasers—objected equally to public access on easements DNR reserved before sale, portrayed on their survey plats, and listed in their deeds.)

We applaud the effort to group all of DNR's regulations into one chapter to make them easier to find and follow. (Alaska Miners Association) But certain portions, particularly those dealing with RS 2477 rights-of-way, are disturbing. They may mesh with existing state law, but are questionable public policy. Reserving public access is important but should not jeopardize private property rights, reduce municipal property taxes, or keep access rights that no longer serve a public purpose because alternate access exists (Matanuska-Susitna Borough). **Response:** Comment noted. Some of these conflicts can be reduced by administrative actions, careful vacations, or legislation, but there is an inherent tension between public access rights and private property rights. Given their choice, many state land purchasers would probably prefer that there be no public easements on the parcel they are buying—but they want access to that parcel, including utility access, as well as access from that parcel to nearby lakes, streams, and public lands.

Forceful objections to the concept of reserving public easements: "paper management," "major mistake," "no field-truthing or local consultation," "these regulations, if finalized…, will create a management nightmare" (Mentasta Traditional Council). **Response:** DNR does not agree. DNR believes it is essential to protect public access when it carries out state land disposals, and has been doing so under similar or identical regulations for many years. As for RS 2477 rights-of-way, DNR understands that many landowners wish they did not exist. However, that will not help to resolve management problems.

It is a fatal flaw to use the terms "easement" and "right-of-way" interchangeably. DNR apparently does not recognize a term for full ownership of the strip of land. The regulations refer to "ownership" of an easement, but by their very definition, easements are a right to use land, not ownership of it. **Response:** DNR knows that people sometimes use the term "right-of-way" (as in Alaska Railroad ROW) to mean ownership in fee, not a mere access easement. However, the legislature appears to have used "easement" and "right-of-way" interchangeably in every reference to access reserved under AS 38 (DNR checked each use to verify this); court decisions have consistently treated section-line "rights-of-way" under AS 19.10.010 as easements; similarly, court decisions agree that RS 2477 rights-of-way are easements. The proposed regulations deal only with access rights reserved under AS 38 and AS 19.10.010, or acquired by the state under RS 2477, all of which are indeed easements rather than fee ownership. Thus it would not make sense to use the ambiguous term "right-of-way" when an unambiguous one—equally correct or superior—is available.

The definitions are confusing. "Right-of-way" implies an individual right (Alaska Outdoor Council).

Response: A "right-of-way" can be an individual right (private right-of-way) but is not used that way in this chapter.

Not all easements are access easements, e.g. utility easements, which do not allow public access (Pat Kalen, American Congress on Surveying & Mapping). **Response:** DNR agrees. This regulation begins, "Unless otherwise specified…." Whenever the chapter refers to a utility easement, it so specifies. DNR also expanded the definition of "utility easement" to state, "…unless identified as an 'access and utility easement,' a utility easement is not available for public access without the permission of the landowner."

Expand the title of the chapter to include "section lines and RS 2477 rights-of-way" (Alaska Miners Association). **Response:** To clarify, this section explains early on that the term "easement" is used interchangeably with "right-of-way." DNR expanded it to state explicitly that an RS 2477 right-of-way is a public access easement.

KPB requires dedication of rights-of-way over section-line easements because the law does not allow it to manage them or control activities on them or whether they are vacated. When there is an existing section-line easement on which a road could be constructed in a proposed easement, it makes no sense for the borough to impose an additional 60-foot right-of-way adjacent to it just so it can control it. KPB's laws do not exempt citizens from also obtaining any state permit required. The state generally does not manage or maintain internal subdivision roads (Kenai Peninsula Borough). **Response:** DNR agrees it would be duplicative for the borough to require a 60-foot right-of-way adjacent to a section-line easement so as to have sole control. Shared jurisdiction works. Phase 2 will consider the proposed 11 AAC 51.200, which would allow management authority to be transferred to local government. The borough is correct that it would be rare for either DNR or DOTPF to build or maintain an interior subdivision road.

Applicability should include trailheads, too—particularly where the easement intersects with roadways managed by DOTPF or municipalities. Does "access easement" refer to public or private easements? Define "easement" and "right-of-way" (Kenai Peninsula Borough Trails Commission). **Response:** DNR agrees that providing public spaces for trailheads is important. However, DNR would typically retain the land in fee (keep the land in state ownership) for such a purpose, rather than reserving an easement and selling the underlying land. The chapter applies to public rather than private easements (see (d) of this section), but the word "public" has been added to (b) for clarity. "Right-of-way" and "easement" are used interchangeably, and are defined in (b).

In (c) you say construction on state land doesn't create an easement, yet 11 AAC 51.055 claims that RS 2477 rights-of-way are created by public use or construction. That includes land currently in state and private ownership (Kenai Peninsula Borough Trails Commission). **Response:** There are many RS 2477 rights-of-way on what is now state or private land—but the construction or use had to occur while the land was subject to RS 2477 (i.e. it was unappropriated, unreserved federal land and before RS 2477 was repealed). This is why the construction reference in 11 AAC 51.055 uses the past tense.

Add that the chapter does not apply to mental health trust land unless the easement was validly reserved or established when the land was so designated (Mental Health Trust Land Office). **Response:** DNR did not add this statement because it is equally true of municipal land, private land, Alaska Railroad land, University land, and federal land. 11 AAC 51 does not give DNR authority to create easements on land it does not manage. (RS 2477 rights-of-way are not exceptions to this rule. DNR cannot create them now. If they were not accepted by official act or public user while the land was still subject to RS 2477, they do not exist.) Instead, at the Mental Health Trust Land Office's request, DNR revised the definitions of "state land" and "department" to exclude mental health trust land.

It should be stated that 11 AAC 51 does not apply to section-line easements. There is no

statutory reason for DNR to manage section-line easements (repeated at least seven times in Matanuska Electric Association's comments by Quintavell). **Response:** AS 19.30.400 applies to section-line easements acquired under RS 2477. Other section-line easements are reserved by DNR before it conveys state land, or exist across state land DNR manages. See further discussion under 11 AAC 51.200, but resolving this issue will be postponed to Phase 2.

During the drafting of AS 19.30.400, we pointed out that its management language would apply to section-line easements too, not just to historic trails, and were told not to worry. But the bill never got modified and now DNR is interpreting the language as applicable to section-line easements. We think there is a contradiction in state law. DOTPF's permits for utility use are far faster and cheaper than DNR's. (Robert Ylvisaker for Matanuska Electric Association). **Response:** The committee minutes on the 1998 legislation (SB 180) dealt almost exclusively with historic trails. But at least once (March 31, 1998, House State Affairs) the sponsor's legislative assistant noted that section-line easements are a type of RS 2477 right-of-way. In the minutes of the 1999 legislation (SB 45), the legislative assistant specifically explained that the bill dealt with vacations of section-line easements. DNR thinks legislators understood the law applied to section-line easements. However, DNR agrees that AS 19.30.400 and AS 19.25.010 apparently conflict, and that as part of Phase 2 the two agencies should come up with an interpretation that eliminates those conflicts. See discussion under 11 AAC 51.200.

Saying an easement does not represent full ownership conflicts with the statement that public easements remain in public ownership (ADF&G). **Response:** Although there is no legal conflict—"ownership" can refer to any part of the bundle of rights that make up land title—DNR revised this regulation to say "…continues to be owned by the public."

ADF&G believes that RS 2477 rights-of-way do vest the state with title to the land (ADF&G). **Response:** DNR disagrees, based on clear case law in Alaska (Dillingham Commercial Co. v. City of Dillingham). An RS 2477 right-of-way, including a section-line right-of-way, is an easement rather than ownership in fee of a corridor of land.

"Easement" and "right-of-way" are used inconsistently throughout the regulations; the definitions are confusing (ADF&G). **Response:** DNR checked every use of both terms to ensure absolute consistency. "Easement" is used everyplace but in the phrase "RS 2477 right-of-way." The latter is indeed an easement, but after 134 years of using the term, it is too late to change.

In (b), saying DNR can authorize informal trails or temporary roads on state land where there is no easement, specify that this would require a permit (Mentasta Traditional Council). **Response:** DNR can't make the suggested addition because under current rules, constructing trails up to five feet wide on state land using hand tools would not require a permit. However, if there's no easement and the underlying land is not state-owned, DNR can't authorize road construction, period! To clarify the limits of this subsection, the phrase "on state-owned land" has been added.

Subsection (c) says constructing a trail on state land doesn't create an easement. Does this statement preclude prescriptive easements? What about RS 2477's? (ADF&G) Many trails should be grandfathered (Alaska Trail Association). **Response:** AS 38.95.010 bars prescriptive easements on state land. RS 2477 applied only to unreserved, unappropriated federal land. It never applied to private land or to state land. DNR attempts to reserve easements for existing informal trails before conveying the land out of state ownership, although it undoubtedly misses some it doesn't know about. Public access is protected so long as the land remains public.

In (d), the regs should clarify that an easement is a valid existing right (ADF&G). **Response:** Done.

Define "temporary" and "casual use trail" (Kenai Peninsula Borough Trails Commission, Matanuska-Susitna Borough). **Response:** DNR considers it desirable to keep these concepts flexible. Such access is typically for mineral exploration and development (e.g. winter cross-

country access to bring equipment to a mining site), or for temporary access roads developed in a timber sale area.

11 AAC 51.015, STANDARDS FOR EASEMENTS.

Give examples of "special circumstances [that] dictate otherwise" (Kenai Peninsula Borough Trails Commission) or drop the phrase from (a). Private property owners need to know the precise location of easements affecting their property (Bering Straits Native Corp.). **Response:** DNR agrees, as a general rule, and revised the regulation to specify the exceptions it had in mind. In some land disposals (municipal land grants, stake-it-yourself programs, etc.), the transfer takes place before considerable time before the survey. In other cases survey is not needed because the easement is tied to a specified boundary or line, e.g. ordinary high water mark.

In (b), the term "dedication" is generally understood to mean a transfer to the borough of title to the land estate. Maybe "grant" should be used instead. Define "dedication" and/or "grant" (Kenai Peninsula Borough Trails Commission). **Response:** "Dedication" is unfortunately a misunderstood term. It does not inherently mean "conveyed to the borough," nor does it automatically mean fee title. For example, AS 19.10.010 speaks of access rights "dedicated for use as public highways" along section lines. Alaska's courts interpret this law as reserving a section-line easement across state land (and accepting the grant of an easement across federal land under RS 2477), not fee title. And DNR does not know of any court decision that views AS 19.10.010 as having conveyed section-line easements to Alaska's boroughs. "Grant" might be even more confusing because legally it means "bestow/confer/convey." In many cases DNR does convey public access easements to a borough (or to a homeowner's association if there is no borough or if the borough doesn't want them), but in other cases it keeps them in state ownership.

Many second class cities in rural Alaska can't carry out platting resposibilities as required by new state law (Mentasta Traditional Council). **Response:** To DNR's knowledge, there is no new law imposing platting responsibilities on second class cities. Platting is still a discretionary function for such cities within the unorganized borough. (There is a new law on platting, AS 40.15.300-.380, but it requires action by DNR rather than by municipalities.)

The regulations should have separate sections for survey standards and design standards for each type of easement, including standards for trailheads. The survey standards should provide for use of differential GPS (Kenai Peninsula Borough Trails Commission). **Response:** DNR's survey regulations are in a different chapter of regulations, 11 AAC 53. DNR's Division of Forestry sets design standards for roads that are needed to reach timber sale areas, but otherwise DNR does not typically build or maintain roads and does not set design standards. 11 AAC 51.100(f) is worded to allow for the use of differential GPS, without necessarily meeting DNR's standards for survey.

Surveying should not be required if there is no dispute as to the location of the easement (DNR) or improvements will cost less than $50,000 or the cost of survey (Alaska Trail Association). How will "improvements" and "constructed" be construed? Temporary bridges or detours are commonly necessary. Yet how would a landowner's interests be addressed if the state chose to permit construction on an unsurveyed easement on private land? (Alaska Outdoor Council) Requiring survey and platting before development is too expensive and is usually not necessary (Quintavell for Matanuska Electric Association). **Response:** DNR moved this language to 11 AAC 51.100(e) and did provide for some exceptions. However, DNR does not agree that it is "usually" unnecessary to survey an existing easement across someone else's land before improvements or utilities are placed on that easement. A developer who strays off the easement is trespassing.

Specify that the person proposing construction must do the survey; specify that if there's a boundary uncertainty, the property owner must do the survey (ADF&G). **Response:** DNR does

not consider it desirable to limit options in this way, and it might be inequitable to require the property owner to do the survey. The idea presents practical problems, too: In many cases of uncertainty, there is no way to tell whose land the easement crosses until a survey has been done.

What happens if the survey isn't done? Who ensures it's valid? What if alternate access already exists—who pays for platting to remove the existing easement? How soon would it happen? Whose rules would be used if the easement was transferred to DOTPF? What if the landowner and an agency agreed to take action to protect habitat, such as revegetation or repairing a water crossing, and the survey wasn't done? There should be an interagency task force to work on refining this regulation. This could be misinterpreted to mean that easements that aren't surveyed aren't available for public use. What about existing roads? It's rigid to survey in all cases; we have been pushing land managers to accept GPS readings. (ADF&G) **Response:** The regulations do not require survey "in all cases." When DNR moved this language to 11 AAC 51.100(e), it provided for some exceptions. Most of the questions ADF&G posed have answers. Whenever DNR requires an applicant to obtain a survey, the survey must be performed to DNR's standards. If applicants don't comply, they don't get the authorization. If the easement is managed by DOTPF, DNR's regulations would not apply to it. A landowner has inherent authority to protect his land from erosion, repair a water crossing, etc., regardless of whether the land is subject to a public easement (so long as the easement isn't blocked by the action), and regardless of whether DNR has issued a permit.

There will be an unbelievable delay if DNR requires survey and platting of an easement before authorizing improvements on that easement. Right now, if one of our projects needs to cross DNR land, we file an application; receive an early-entry permit; complete the installation; do an as-built survey; and only then is the final easement document issued, taking anywhere from two to four years to finalize (Matanuska Telephone Association). The current process is that an application is filed for an easement; DNR decides whether an easement should be granted and whether to authorize early entry; the road or utility is installed; then the centerline/pole line is surveyed and finally the easement is created. The regulation should not change this process (Matanuska-Susitna Borough). **Response:** Like the original 11 AAC 53.300, which has been in effect since 1980, this regulation does not deal with **proposed** easements that a utility company would apply for across DNR land. Subsection (c) sets widths for standard easements DNR reserves before it surveys and sells a parcel of land; subsection (a) refers to surveying those reserved easements before the land disposal takes place. See also 11 AAC 51.100(e); it, too, deals with existing easements. DNR reworded both clauses in hopes of making them more clear. Neither regulation deals with state-owned land where is not yet any easement. The latter case is what Matanuska Telephone Association and the Matanuska-Susitna Borough are worrying about. On state land where there is not yet any easement, it makes good sense for DNR to permit a utility company to install its improvements first, and survey later. That flexibility allows for in-the-field variations from the planned route to allow for topography, soil conditions, or other contingencies. After the company provides an as-built survey of the pole line, that becomes the centerline of the new easement. But this procedure obviously cannot be used if the easement has already been reserved and DNR no longer owns the underlying land. When a utility company wishes to use an already-reserved but unsurveyed easement, it must find the easement first—by means of a survey—and take care to stay within its bounds.

Under subsection (b), since when does DNR convey an interest in land just by a plat note? (DMLW) **Response:** DNR changed this wording to "…expresses its intent…typically in a disposal decision documented by a plat note." The important thing is to be sure each disposal decision on a new subdivision or other new land disposal covers not only easements being reserved but whether those easements will be conveyed to the municipality. Otherwise misunderstandings between the state and platting authorities are likely. This was not done in the past. As part of Phase 2, DNR hopes to clarify the status of internal subdivision easements it reserved in previous land disposals.

What specific language in the plat note would express intent to transfer ownership? (Kenai Peninsula Borough Trails Commission) **Response:** See above; DNR employees rightly pointed out that "conveyance by plat note" doesn't work when state lands are involved. "Disposals of an interest in state land" require a formal process with notice to the general public.

MSB ordinances require dedication and ownership to the borough. AS 29.40.010 gives the municipality platting authority if there is a conflict. The borough has a platting ordinance saying that "…offers to dedicate rights-of-way, roadways, easements or public areas to the public on a final plat are accepted **automatically** by the borough upon approval…." We request that the regulation be reworded, as the borough must have full control, including issuance of permits to develop the rights-of-way (Matanuska-Susitna Borough). **Response:** A platting authority can require that easements (or road corridors in fee) be conveyed to it as a condition to approving the plat. DNR is subject to the same rules as a private subdivider—but cannot comply if they conflict with state law. For ordinary utility and access easements reserved in a DNR subdivision, no conflict arises: no state interest would be served by retaining those easements in state ownership. As part of the proposed land disposal decision for the subdivision, DNR can express its intent to reserve access easements and to grant them to the borough. The public will be able to comment on this aspect of the disposal as on any other. But if the access happens to be the Parks Highway, a section-line easement, an easement to the Susitna River under AS 38.05.127, or an RS 2477 right-of-way, DNR believes state law says, "This easement must remain state property." If the municipality insisted that such easements be conveyed to it regardless, and would not even be satisfied by receiving management authority while the state retains ownership, DNR could not proceed with the subdivision, and the courts would ultimately have to resolve the dispute. Note that the Mat-Su Borough platting ordinance's use of the word "automatically" seems to refer to the acceptance end of the process, not the "offer" (responding to some case law that an offer to dedicate is not complete without explicit acceptance). DNR does not interpret Mat-Su Borough's ordinance to mean, "DNR automatically conveys all reserved easements to the borough when a state plat is filed, and this conveyance is exempt from the land disposal procedures required by AS 38."

The proposed regulations do not clearly establish management authority for all easements that have been previously dedicated to the borough in state subdivisions (Kenai Peninsula Borough). **Response:** Past practices left their status somewhat ambiguous, which is why DNR plans to make its intent clear in future subdivisions. When the platting authority requires private landowners to dedicate road easements or corridors through land they are subdividing, those interests in land pass from private to public ownership. In this situation, "dedication to public use" necessarily means "conveyance into public ownership" and thus "conveyance to the municipality" (as the only public agency at hand). But on public land that is being subdivided, "dedication to public use" does not necessarily mean "conveyance from state ownership to municipal ownership." Dedicated easements, road corridors, school sites, and other public areas required by the platting ordinances can be kept available for public use without necessarily conveying these interests in land to the municipality: they are already public in character. If DNR does intend to convey them into municipal ownership, it will first satisfy the requirements of AS 38 applicable to a "disposal of an interest in state lands." Phase 2 will seek to "clean up the back trail," as easement ownership was left unclear in many previous state land disposals.

In (c)(3), drop "trail" from the phrase "pedestrian or trail easement" because people often refer to RS 2477's as trails, and this would lead to confusion. Add RS 2477's to (c)(7) dealing with 60-foot easements for existing roads that don't yet have a right-of-way (Alaska Miners Association). Are "pedestrian" and "trail" synonymous? What about dog teams, snow machines, etc.? **Response:** It is not a good idea to assume the word "trail" is a shortcut for "RS 2477 right-of-way." Subsection (c) deals solely with easements DNR reserves before a lease or land disposal, a category that cannot include and shouldn't be confused with RS 2477 rights-of-way. DNR does not reserve RS 2477 rights-of-way and does not set their width. Instead, it finds RS 2477 rights-of-way that already exist, and researches their legally applicable width. The phrase has been clarified to "pedestrian easement or trail easement," showing they are two different types of

easement. A trail easement is for general-purpose use. (DNR rarely reserves easements restricted to pedestrian use, unless a platting authority requires it.)

Define utility easements, pedestrian easements, and trail easements. Specify what uses are allowed. What special conditions might call for a variance, and what is the minimum width? (Kenai Peninsula Borough Trails Commission) **Response:** DNR added a definition of "pedestrian easement" to 11 AAC 51.990; "utility easement" was already in that section. DNR did not define "trail," but does not use this term in any unusual or special sense, so people can rely on the dictionary definition. DNR does not think it is prudent to list specifically allowed uses for easements, instead allowing the terms to stay current with common usage. For instance, if DNR had listed which uses were allowed on a "utility easement" when it originally adopted this regulation in 1980, it would not have included fiber-optic lines, cable television/cable modem lines, cell phone towers, etc., because they did not yet exist. And BLM's existing regulation defining "trail" uses is now somewhat obsolete: it refers to "three-wheel vehicles" but not "four-wheelers" (which people use now instead of three-wheelers). Special conditions justifying a variance might include terrain problems or an unusually small building site on a particular lot, requiring the easement to be narrower than usual. When special measures must be taken, DNR will have to decide on the width based on the particular circumstances.

Change "neighborhood service roads" back to "residential road" to match DOTPF's terminology (Matanuska-Susitna Borough). **Response:** DNR asked DOTPF which term it uses. DOTPF reported that it had no definition or preference for either term.

The reference to AS 19.10.010 should be deleted. There is no reason for DNR to take on management of section-line easements (Quintavell for Matanuska Electric Association). **Response:** The regulation says "the state" (not DNR) retains ownership of section-line easements and certain other "state interest" easements. DNR's interpretation is that section-line easements clearly belong to the state. They do not belong to municipalities, nor to utility companies. However, the regulation does not address which state agency will manage particular uses on section-line easements. That will be tackled in Phase 2.

Do the proposed widths apply only to newly reserved easements, or to alter the width of an existing easement prior to sale? (Kenai Peninsula Borough Trails Commission) **Response:** The regulations did not originally propose any change in widths (these same widths have been used for 20 years). Because of the comments below, the standard widths of utility easements will be 30'. However, changing this regulation will not change the width of utility easements DNR has already reserved at 20'.

Utility easements in (c) should normally be 30', not 20', because poles usually have crossarms with the conductors set outboard, and a minimum of 5' is needed beyond the conductor in case of blowouts. This is the industry standard (GVEA). **Response:** DNR changed this to 30', but still allows for a variance where appropriate. For instance, if a subdivision will have rows of back-to-back lots with utility easements down the back lot line, there would usually be no need for the easement on each lot to be 30' wide. A total width of 30' (15' on each lot) would be adequate.

Utility easement requirements vary depending on the type of facility. This paragraph should be deleted and widths determined on a case-by-case basis (Quintavell for Matanuska Electric Association). **Response:** The commenter misunderstands. Subsection (c) deals with standard easements DNR will reserve before conveying land out of state ownership. The regulation does allow for variance if special conditions exist, but a "default setting" is needed before DNR issues the deed. DNR cannot predict what type of facilities will be installed post-conveyance. If the easement eventually proves too narrow, the utility will have to seek an additional easement from the property owner.

Easements on Native corporation lands must follow the standards set by 17(b) of ANCSA. See Alaska Public Easement Defense Fund v. Andrus (Alaska Federation of Natives). **Response:**

The proposed regulations do not change or deal with easements reserved by the federal government under sec. 17(b) of the Alaska Native Claims Settlement Act before it conveys land to Native corporations. They deal only with easements the state reserves before conveying state-owned land, and RS 2477 rights-of-way established on unreserved, unappropriated federal land in the past. (ANCSA did not extinguish valid existing rights held by the state.)

Pedestrian or trail easements should be 25' to be consistent with ANCSA 17(b) trail easements (ADF&G). **Response:** DNR agrees that a consistent width will help users of trails that cross Native corporation land and then go into state land disposal areas. Users should note, however, that DNR's land management rules won't match the ANCSA 17(b) regulations. The ANCSA regulations limit trail easements to "no more than" 25 feet "if the uses to be accommodated are for travel by foot, dogsleds, animals, snowmobiles, two and three-wheel vehicles, and small all-terrain vehicles (less than 3,000 lbs. [gross vehicle weight])." DNR does not typically restrict trail uses in this way.

What about the existing language saying the easement could become wider at the time of survey and platting? (ADF&G) **Response:** Normally the final land conveyance decision has already been made before the survey is done. It is legally questionable to impose additional or wider easements after that decision is final.

It's an escalation to change "vested in the public" to "the state retains ownership of the easement." You cite AS 38.05.035 as authority to manage easements, but that only applies to state land. The real estate may be privately owned. DNR doesn't have authority over public easements. Change it back (Div. of Agriculture). **Response:** The term "state land" legally includes "state-owned interests in land." The director's authorities under AS 38.05.035 apply not only to land the state owns in fee, but to reserved interests in land it has sold (including situations where only the mineral rights have been reserved). Unlike other forms of property, land title is divisible into many separate interests that may be held by different parties. By definition, public easements do not belong to the private owners whose land they cross. Instead, they are held by public agencies (federal, state, or local) in the name of the public. If DNR reserved the easement and did not transfer it to another agency, DNR manages it (see AS 38.04.058 for legislative policy on how the easement should be managed). If it is an RS 2477 right-of-way and has not been transferred to DOTPF, DNR manages it (see AS 19.30.400).

This seems generally appropriate, but we agree with Bill Ward's concerns about the relation of the proposed rules to the rights of private landowners. We don't presume to redraft the regulations to clear up the ambiguities (Alaska Outdoor Council). **Response:** Whenever private land is subject to public easements, there may be tensions between the two sets of rights. Each of the parties is entitled to the benefit of its respective estate in land. Legally, however, the underlying land is the "servient estate." The landowner does not have the right to preclude public access on the public easement.

11 AAC 51.020, NOMINATION APPLICATION (to be repealed).

We agree with repealing this. RS 2477 rights-of-way should be established as valid only by a court of law (or by the Legislature if on state land), not simply certified as valid by an administrative agency (Matanuska-Susitna Borough). **Response:** DNR agrees that administrative certification did not legally accomplish anything.

Dropping certifications removes a costly burden (Resource Development Council). **Response:** DNR agrees.

Repealing the nomination process deletes the public's and other agencies' right or opportunity to assert RS 2477 trails. (ADF&G, Alaska Outdoor Council) The certification process should go, but there should still be a way to nominate trails, something beyond DNR's merely soliciting information. The public has provided much information that DNR couldn't have gathered on its

own because of underfunding. Information should be solicited from groups or individuals if data standards are met. We want the original language restored (ADF&G). **Response:** DNR reworded the regulation to more clearly show it solicits public input. Note that the public can and does assert RS 2477 rights-of-way in court, and other agencies are free to do so as well. They never needed to wait for a "nomination" under DNR's regulations. If they don't want to go to court but have valuable historic information to contribute, DNR is confident they will still bring it forward in response to DNR's solicitation. Unlike a "nomination" under DNR's original process, public comment under this section contributes to the annual legislative report required by AS 19.30.400. DNR plans to propose legislation clarifying that once a route has been reported to the legislature, it has the same status as if it had been listed directly in AS 19.30.400.

Keep the nomination process—otherwise DNR loses its link with the public (Alaska Trails Association). **Response:** See above. With the annual comment period required by 11 AAC 51.055, DNR believes it will still have a strong link with the public.

The requirement to meet minimum information standards for nominations should remain in the regulations to discourage frivolous nominations (Kenai Peninsula Borough Trails Commission). **Response:** These requirements proved unrealistic. Many nominators failed to meet them. In at least one court case, the court rejected what is almost surely a valid RS 2477 right-of-way—its main opponent identified it as an RS 2477 many years ago!—in part because the nominator did not supply the information required by the regulation. DNR does not consider that this created good policy.

11 AAC 51.025, SECTION-LINE EASEMENTS.

Why is the chart necessary? It appears to come from information published by BLM. Why is DNR getting involved with widths on land not owned by the State of Alaska? (Kalen, American Congress on Surveying & Mapping). The chart is confusing. Maybe there should be two charts, the first covering whether an easement exists and the second covering widths. What has to have occurred and when? Does the filing of a protraction diagram count? (Kenai Peninsula Borough Trails Commission) **Response:** The chart does not come from BLM but from Attorney General's opinions interpreting state law. A 1969 Attorney General's opinion notes that federal land must be surveyed before there can be a "complete" acceptance and dedication of a section-line easement under RS 2477. (This type of section-line easement is an RS 2477 right-of-way. This is why DNR is "getting involved" in section-line easements on land never owned by DNR: AS 19.30.400 requires it to do so.) A footnote in that opinion says that "where protracted surveys have been approved and the effective date thereof published…then a section line right of way attaches…subject to subsequent conformation with the official public land surveys." However, the opinion did not close the loop: does the filing of the protraction diagram change the status of the land to "surveyed" and make the dedication "complete" under RS 2477? If not, and if the dedication was still incomplete when RS 2477 ceased to apply (withdrawal, appropriation, repeal), what happened? Ultimately the courts will have to decide whether protraction diagrams sufficed to create "surveyed" land. Regardless of which way that answer goes, the existence of a section-line easement and the width of that easement are inextricably linked, because section-line easements were created by a statute rather than by public user. Thus there is only one chart.

The chart is hard to digest but helpful. Our understanding was that RS 2477's could be asserted anywhere on unreserved federal land, yet this refers to surveyed land—please explain (Alaska Outdoor Council). **Response:** This language does not deal with RS 2477's accepted by actual construction or use (historic trails), but only with those accepted by enactment of AS 19.10.010. DNR's position (which the federal government does not necessarily agree with) is that the latter do not require any actual construction or use. However, in that case, the land must be surveyed.

A section-line easement continues to exist unless vacated—but what if the vacation wasn't legal? (ADF&G) **Response:** DNR changed the term to "lawfully vacated" to prevent misinterpretation.

The regulation is silent as to section-line easement vacations. The borough routinely vacates section-line easements through the subdivision and platting process. Clarify this so as to mesh with AS 29 and AS 40 (Matanuska-Susitna Borough). **Response:** AS 29.35.090 says that boroughs no longer have authority to vacate RS 2477 rights-of-way (which include "federal-width" section-line easements and the core of some "state-width" section-line easements), but proposed 11 AAC 51.065 will ensure that the platting authority still has a voice in the decision. The state's position is that platting authorities must obtain DOTPF's and DNR's consent in order to vacate non-RS 2477 section-line easements.

The regulation refers to "federal-width" section-line easements created on surveyed federal land up to Dec. 14, 1968, and says that is the date of PLO 4582. But an article by John Bennett of DOTPF says PLO 4582 was dated Jan. 17, 1969; that ANCSA repealed it and replaced it with vast withdrawals, followed by a series of additional withdrawals ending with PLO 5418; thus PLO 5418's date of March 25, 1974, is the true end date for establishing section-line easements on surveyed federal land. Two state agencies should not have different policies (Matanuska-Susitna Borough). **Response:** The notice of withdrawal that led to PLO 4582 (commonly called "the Land Freeze") was published Dec. 14, 1968, and went into effect upon publication. Because PLO 4582 was so sweeping, DNR has always used it as the practical end point for establishing RS 2477's in Alaska (whether along section lines or by actual construction and use). Exceptions conceivably exist, but they are "not the way to bet." It is worth noting that DOTPF's John Bennett commented on the regulations and did not find fault with the chart—except for warning that the federal government does not accept the existence of section-line easements, period.

We believe the 12/14/68 withdrawal date cited in the footnote is wrong. PLO 5418 (3/25/74) withdrew all remaining federal land and ended the period when new section-line easements could apply to surveyed federal lands (Matanuska Telephone Association). **Response:** PLO 4582 in December, 1968, withdrew federal land statewide. This comprehensive withdrawal was also known as "the Land Freeze." This 1968 withdrawal generally ended the period in which RS 2477 grants could be accepted, although brief windows of opportunity may have opened later if all of the withdrawals affecting a particular surveyed tract were temporarily lifted. PLO 5418 amended various existing withdrawals.

We object to the language purporting to limit "each section of land" and "all other sections" to surveyed land. There was very little surveyed land in territorial days. This would arbitrarily prevent the validation of many legitimate public-use trails and section-line easements (ADF&G). **Response:** This regulation does not deal with RS 2477 rights-of-way created by actual construction and use, but only with section-line easements under AS 19.10.010 and its predecessors. The regulation asserts section-line easements under RS 2477 if the land was surveyed, unreserved and unappropriated. For RS 2477's created by actual construction, DNR's position is that no survey was necessary.

We oppose section-line easements being placed under DNR's jurisdiction. The issue should be more clearly delineated (Matanuska Telephone Association). **Response:** AS 19.30.400 applies to "federal-width" section-line easements and the inner portion of many 100' section-line easements, so DNR has no choice in this matter. However, an older statute, AS 19.25.010, says that DOTPF is in charge of all utility use on state rights-of-way. This term surely includes section-line easements. DNR and DOTPF will need to interpret the two laws in a way that honors the intent of both statutes and does not create duplicative permitting systems. This subject will be postponed until Phase 2.

"Who" manages "what" on section-line easements is very loose: DNR or DOTPF? And some municipalities also believe they have control over them through their platting authorities. This needs to be cleaned up. Meantime, utility companies get their permits from DOTPF or from nobody, believing no permit is necessary. In some cases utilities have installed pipelines or powerlines without a permit, then denied general public access! And neither DOTPF nor the municipalities has any interest in general public use (recreational or subsistence access to reach

a hunting area, fishing stream, viewpoint, etc.); only in roads and utilities. Clarify. (ADF&G) **Response:** DNR agrees the situation needs to be clarified—but is confident that utility companies do not have any right to block public access on a section-line easement. This will be tackled in Phase 2.

If DNR is asserting control of section-line easements, must utilities apply to both the state and municipality before they can use them? (Matanuska Telephone Association) **Response:** DNR's and DOTPF's attorneys did not find any statute to support the assumption by some municipalities that they control section-line easements. More likely municipalities that began requiring permits for such use were seeking to impose order in an apparently uncontrolled situation. In Phase 2, DNR will again propose the idea of transferring management (but not vacation powers) to local government. DOTPF's statutes (AS 19.20 and "local service road" provisions in AS 19.30) already provide for such transfers. If management of an easement is transferred to a municipality, utility companies could presumably apply to the municipality to use it, if AS 19.25.010 allows this. In that case, no dual permit would be necessary.

This section should be deleted as it pertains only to section lines, which DNR shouldn't manage (Quintavell for Matanuska Electric Association). **Response:** This section deals with effective periods of various laws, not management. The intent is to make this information accessible to the public and not only to "insiders." It could equally well have been set out in DOTPF's regulations, rather than DNR's, but DOTPF has not done this. DNR's regulations have dealt with the topic (albeit previously limited to "state-width" section-line easements) since 1960.

Fifty feet on either side of the line is too wide an easement. The standard 33-foot width is adequate, familiar, and consistent with long-standing practice. Otherwise too much land is encumbered. Also, the regulations should clearly say they do not apply to protracted (unsurveyed) section lines (Mentasta Traditional Council). **Response:** DNR can't change these two standards, which are set by AS 19.10.010. However, the 50-foot width applies only on land acquired from the state, so it does not affect ANCSA lands. DNR's intent from July 1, 1960 onward was to reserve 50-foot section-line easements in all state land conveyances. DNR's regulations expressed this intent. It was reflected in DNR's "best interest findings" on proposed land sales, and DNR's land sale brochures told purchasers that section-line easements would be available for their access (although purchasers were typically warned that the easement would have to be surveyed before it could be developed).

Section-line easements should be documented on title plats to inform the public and property owners of their location (Bering Straits Native Corporation). **Response:** This would have been useful on BLM's master title plats to make "federal-width" section-line easements easier to research. However, BLM was probably unwilling to show them, even while RS 2477 was in effect. On state status plats, section-line easements are normally reserved before the land is conveyed, and section lines are shown, whether surveyed or protracted. And state survey plats make note of section-line easements unless they have been vacated.

The borough also maintains local roads that in some cases meander in and out of section-line easements and are in poor condition. It seems unlikely the state wants to manage or maintain them, but apparently remains the "owner." Ownership should be consistent with management and maintenance authority (Kenai Peninsula Borough). **Response:** Phase 2 will consider this issue. DNR will propose regulations that would let it transfer management authority to local government while retaining state ownership, similar to the existing 11 AAC 51.100(d). State retention of ownership would ensure that the easement could not be vacated without DNR's and DOTPF's concurrence.

11 AAC 51.030, CERTIFICATION (repealed).

We concur with repeal (Matanuska-Susitna Borough). **Response:** DNR agrees.

Nomination and certification are essential. It's an essential part of the public process. The burden of proof should lie with the entity nominating the route or with DNR (Kenai Peninsula Borough Trails Commission) **Response:** Although not required by AS 19.30.400, a public process will be required by 11 AAC 51.055 before DNR reports newly identified routes to the legislature each year. Unfortunately, the certification process was so slow and costly that DNR completed it on only 12 routes. The other 590 routes subsequently listed in AS 19.30.400 did not go through any public process other than the legislation itself.

11 AAC 51.035, DETERMINING NAVIGABLE OR PUBLIC WATER.

It is only fair and equitable to apply the ground rules from our out-of-court settlement to all state land conveyances (Matanuska-Susitna Borough). **Response:** DNR agrees.

These standards for navigable and public waters are very different from those imposed in the survey and platting of state lands before a disposal. Is DNR attempting to absolve conflict over state waters being disposed of by BLM to Alaska Native corporations? (Kalen, American Congress on Surveying & Mapping) **Response:** This regulation **is** the standard required when surveying state lands before a disposal. There will not be two different standards. However, DNR's regulation interprets AS 38.05.127 and does not affect or control "navigability for title purposes" (the focus of the state's dispute with BLM over land being conveyed to Alaska Native corporations).

This process will be simpler, but how will the area or width be determined? Also, "list or map" isn't clear enough—the easement needs to be locatable on the ground by survey, legal description, etc. Shouldn't the easement be surveyed? (Kenai Peninsula Borough Trails Commission) **Response:** The context should be considered: "list or map" is sufficient for public review of a **proposed** disposal decision. Ultimately (assuming DNR makes a final decision to convey the land) a survey will be done. Surveyors are familiar with methods of measuring or estimating water acreage.

ADF&G can assist DNR in identifying public waters and necessary public easements before a land conveyance, if contacted early enough (ADF&G). **Response:** DNR appreciates the assistance. ADF&G could begin researching water bodies within municipal land selections as soon as the municipality prioritizes its selections (or even as soon as they are filed); this would provide the longest possible review period. Waiting until DNR's proposed conveyance decision is published may leave very little time to gather field information.

Legal experts should address whether to use the term "ordinary high water mark" or "ordinary high water" (ADF&G). **Response:** Because ADF&G elsewhere requested that the 11 AAC 53 definition for "ordinary high water mark" be repeated in 11 AAC 51, the full term has been restored in 11 AAC 51.035-045.

We object to the new (b) because it eliminates the role of ADF&G and other agencies in providing comments on water bodies that qualify for easements. DNR should openly solicit input, and seek legislative assistance to support research (ADF&G). **Response:** This is a misunderstanding. Because DNR's proposed determination on public waters and associated easements is part of a preliminary written decision under AS 38.05.035(e), it automatically requires public notice under AS 38.05.945. Comments from other agencies are requested either before public notice, or concurrent with the public comment period. That process will not change.

Make clear that this section, and 11 AAC 51.045 dealing with reserving easements, do not apply to oil and gas lease sales, ever. Change all the "lease" references to "surface leases" (Division of Oil and Gas). **Response:** AS 38.05.127 does allow postponement of easement reservations for "oil and gas and mineral leases until the leases are ready to be developed." But the law does not waive the requirement altogether, so DNR's regulations cannot go as far as the commenter recommended. The legislature's intent was presumably to be sure the lease development does

not preclude public access. New language has been added to (a) allowing easement determinations to be postponed unless and until lease development activities are proposed within 100' from the water. Also, "lease" references in 11 AAC 51.045 have been changed to "lease of the land estate" (technically preferable to "surface" lease because state land is divided into land estate/mineral estate rather than surface/subsurface).

Subsection (b) should deal with navigability only for access purposes, not navigability for title. Eliminate any reference to the latter (ADF&G). **Response:** The "navigable for title" criterion (part of the standards in the out-of-court settlement mentioned above) has been dropped from the regulation, replaced by wording drafted by the Department of Law that a smaller waterway "will be considered navigable water if the department finds it is navigable in fact for a useful public purpose under AS 38.05.965(13); otherwise it will be considered public water." However, court decisions have gradually broadened title navigability, and the courts may someday expand it to be as broad as the definition in AS 38.05.965. The state is obligated to retain ownership of the beds of rivers determined navigable for title purposes. To meet this obligation, language has been added to 11 AAC 51.045 saying that DNR will retain the bed of inland navigable waters. This will provide a margin of safety.

This high standard of "automatic navigability" will greatly increase areas legally open for public access without considering the real-world impacts on all landowners. Statewide maps should be developed and studied before such a regulation is passed; otherwise many problems, including more court cases and title conflicts, will be created (Mentasta Traditional Council). **Response:** DNR understands that the "navigable waters" standard defined in AS 38.05.965 is still somewhat broader than title navigability. But regardless of how broad it is, it only affects landowners who acquire their land from DNR. This definition, and the associated requirement to reserve access easements if the waters qualify as either navigable or public (AS 38.05.127), applies only to land DNR owns and plans to convey out of state ownership. The regulations are not new. AS 38.05.127 was passed in 1976 and required DNR to develop these regulations before any more land disposals took place. The regulations went into effect in 1977. The proposed changes would move them to a new location and fine-tune them, not start over from scratch.

Using an arbitrary distance, rather than documented evidence of use, to determine navigability is likely to increase litigation (Bering Straits Native Corporation). **Response:** The regulation deals with determining "navigable waters" under AS 38.05.127 (for purposes of reserving access before a state land disposal), not with navigability for title purposes. DNR does not see any possibility that litigation will result. Potential purchasers who object to DNR's reserved public easements for access to navigable and public waters can simply buy land from some other party for whom public access is not a priority.

Adopting the standards from the Mat-Su Borough out-of-court settlement will create difficulties unless it is very clear that the size limits in the regulation don't preclude individual assessments and the reservation of easements (ADF&G). **Response:** To provide for individual assessments of water bodies that don't meet the "standard" sizes, the regulation calls for a smaller waterway or water body to be "specifically addressed to determine whether it is navigable or public."

Why was this changed from a director duty to a department duty? Who will it be delegated to? (ADF&G, Kenai Peninsula Borough Trails Commission) Why was AS 38.05.127 inserted as authority for determination of navigable or public water? (ADF&G) **Response:** AS 38.05.127 is DNR's statutory authority for a determination of navigable or public water. The legislature is gradually changing "director" powers in AS 38 to "commissioner" powers, and has already done so in AS 38.05.127. The commissioner has delegated powers under AS 38.05.127 to whichever division is carrying out the disposal.

In (c)(1), easements should be listed and mapped. The mapped location should control in the event of a conflict (Mentasta Traditional Council). **Response:** This paragraph deals with the preliminary land disposal/easement decision, not the final easement decision. Public review is

aided if DNR is able to map the easements it proposes to reach the water body (sometimes called "to" easements), but DNR is not always ready to map the route at this point in the decision process. Mapping the "along" easements is usually not necessary: they will be reserved at a set width continuously along both sides of the water body and can simply be listed.

11 AAC 51.040, RS 2477 EVALUATION (repealed).

We concur with repeal (Matanuska-Susitna Borough). **Response:** DNR agrees.

Again, it is essential to retain this part of the public process. The state should not be able to claim a right-of-way without thoroughly evaluating a nomination and certifying it thinks it's valid (Kenai Peninsula Borough Trails Commission). **Response:** RS 2477 rights-of-way can't be gained by claiming them. They either exist or they don't exist as a matter of historic fact—regardless of when or even if DNR "asserts" or "identifies" or "certifies" them. DNR will continue thoroughly evaluating historic documentation and historic land status (assisted by information gained through public review) before it reports newly identified routes to the legislature. If it ceases to be thorough, it will lose RS 2477 court cases **on their merits.** DNR believes that when the courts consider an RS 2477 case, their time should be spent weighing those historic facts rather than scrutinizing whether DNR "certified" the route.

11 AAC 51.045, EASEMENTS TO NAVIGABLE OR PUBLIC WATER.

"Upland and seaward" should remain so it is clear whether the easement is to be 50 feet or 100 feet wide (Kenai Peninsula Borough Trails Commission). **Response:** That wording has caused questions in the past. The intent has always been, "Reserve an easement on the upland side if the parcel to be sold is uplands. If it's tidelands, reserve an easement on the tideland side." To clarify, language has been added saying to reserve an easement on both sides of the mean high water line if land on both sides is to be leased or conveyed.

Trailheads should be reserved too, not just easements, and other agencies—at minimum ADF&G, DPOR, the municipality, and the coastal district—should be consulted about easements (Kenai Peninsula Borough Trails Commission). **Response:** Keeping a site in public ownership for a trailhead is a good idea, although outside the purview of AS 38.05.127 and these regulations. DNR agrees that other parties should have a chance to review DNR's proposals for easements DNR plans to reserve to and along public waters. See 11 AAC 51.035: This regulation (in effect since 1977) requires DNR to list or map the easements in its preliminary disposal decision. DNR's public notice law, AS 38.05.945, requires public notice of and comment opportunities on such disposal decisions (the municipality is among those entitled to notice). Most disposal decisions within the coastal zone also require ACMP consistency reviews, with notice to the coastal district.

Continuous easements along waterways are a bad idea and 50 feet is too wide. Such easements were originally intended for ANCSA conveyances but were repealed. Control of access is one of the prime rights of land ownership. Lessees or purchasers may not want public access, and it is unwise to have "given away" this right, particularly where the main goal of the state Constitution is to maximize revenues from its land and resources (Mentasta Traditional Council). **Response:** Continuous easements along waterways have been the norm for all state land disposals since 1977, carrying out a constitutional mandate. Those who want to lease or buy oceanfront, lakefront, or riverfront property without public access should look to a source other than DNR. Alaska's Constitution does not mention revenue generation in its natural resources article, instead emphasizing "maximum use consistent with the public interest," and "maximum benefit of [Alaska's] people." It specifically provides that "Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State…."

"Department" is being inserted instead of "director". Shouldn't this say "commissioner"? The

commissioner can delegate the regulation duties to a department. "Access easement" and "section-line easement" aren't consistent with 11 AAC 51.015. (Pat Kalen, American Congress on Surveying & Mapping) **Response:** DNR does have a comprehensive system of delegating statutory authorities within the department. Duties to implement regulations go along with the statutory delegations. In this case, the duties are delegated to all of the DNR directors whose divisions undertake disposals. DNR does not see any inconsistency in this section's use of terms.

Is there a formal, well-defined public interest determination process to be followed in making decisions on easements? There should be a local public hearing before any easements are reserved. (Mentasta Traditional Council) **Response:** Decisions on reserving easements are part of the formal process for deciding whether it is in the state's best interests to proceed with a state land disposal. See the previous section, which refers to a "preliminary written decision required under AS 38.05.035(e)." AS 38.05.035(e) requires such decisions to consider the terms and conditions necessary to serve the state's interests, which includes public access needs. Another law, AS 38.05.945, requires DNR to give public notice that the proposed decision is available for public review and comment. AS 38.05.946 allows (but does not require) public hearings to be held in addition to the mandatory public comment period.

What does "when possible" mean? To what lengths will DNR go to accomplish continuous easements? What if there are private parcels: will DNR condemn them? (Mentasta Traditional Council) **Response:** The laws referred to above (including AS 38.05.127, the law requiring access to and along public water bodies) do not apply to land DNR does not own. If DNR does not own all of the parcels along the water body and there is no easement across the non-DNR land, a continuous easement is not possible. DNR does not have the authority to condemn private land.

Do these regulations apply only to state lands that are leased or conveyed out of state ownership? **Response:** Yes. They implement AS 38.05.127, a state land disposal statute.

Reserving an easement to public waters at one-mile intervals seems excessive. "Intervals up to about one mile" would provide some flexibility (Alaska Outdoor Council). **Response:** The language used in the regulations is "intervals of approximately one mile." That provides flexibility identical to what the Alaska Outdoor Council recommends. The intent was only to clarify the statutory requirement that easements be "established approximately once each mile."

In (c)(2), highway bridges and other crossings should be included. We are concerned about the status of (e) and (f). The federal government does not share DNR's obligation to reserve public easements, so DNR should reserve them prior to any conveyance back to federal ownership (ADF&G). **Response:** (c)(2) is for situations where "there is no existing trail, road, or other overland access route to the water" and therefore no highway crossings. (c)(1) covers situations where the trail or road reaches the water, which automatically includes crossings. DNR agrees with ADF&G that relying on the federal government to reserve the easements on reconveyed land is unwise; that is why DNR is repealing subsection (e). As for (f), access restrictions, this subject will be covered in Phase 2.

In (c)(2), the railroad reference should be deleted so that we don't mislead people into thinking it's okay to use the railroad right-of-way for access. The Alaska Railroad does not encourage or allow this due to safety concerns (DMLW). **Response:** With increased use of the track, DNR agreed this might indeed lead people into danger. The reference was scaled back to situations where an authorized railroad crossing comes within the two-mile distance.

The proposals in (c)(2) are unbelievably absurd, unimaginable ideas. These nonsensical reservations of access to public waters will later need to be vacated at considerable expense. They will be completely random, make no sense, cause conflicts, and will be paper platted (Mentasta Traditional Council). **Response:** The Constitution and AS 38.05.127 clearly intend that access to public waters be reserved and kept for public use, not reserved and then vacated.

DNR has been reserving easements under these standards since 1977 and does not consider the standards absurd or unimaginable. Although there is no point in surveying easements along water bodies—legally they are "tied" to the water body and move with it if the stream shifts course—easements to the water bodies are typically surveyed as part of the land disposal survey. Current state law requires DNR to survey and monument land disposal parcels.

Easements reserved on navigable waters on ANCSA lands must be at periodic points, not continuous as these regulations say (Alaska Federation of Natives). **Response:** This section deals with easements DNR must reserve before selling state-owned land adjacent to navigable or public waters. State law applicable to DNR land sales requires much more public access than is required by BLM's regulations for ANCSA conveyances. But that state law, and DNR's easement regulations, do not apply to ANCSA conveyances.

The proposed changes will preserve access while providing flexibility. However, notice to municipalities should be mandatory (Matanuska-Susitna Borough). Federal agencies should also be included (Alaska Outdoor Council). **Response:** The determination of navigable or public waters, and of the easements to be reserved, are both required to be set out in the proposed land disposal decision (see 11 AAC 51.035). AS 38.05.945 entitles a municipality to notice of this decision, but language has been added to the regulation referring to this fact. Except in unusual circumstances, federal agencies are unlikely to have any role in DNR's reservation of easements before a state land disposal.

11 AAC 51.055, IDENTIFYING RS 2477 RIGHTS-OF-WAY.

RS 2477 rights-of-way are granted under federal law. If the federal government recognizes an RS 2477, then the state must also do so. Why is this regulation necessary? The final decision is by the courts, which may not apply the same criteria (Pat Kalen, American Congress on Surveying & Mapping). **Response:** Unfortunately, the federal government has resisted recognizing RS 2477 rights-of-way. DNR understands that researching potential RS 2477 rights-of-way involves applying caselaw to historic land status and historic use. That is why the key concepts in this section, dealing with acceptance by "public use or construction" or "a positive act on the part of a public authority," are taken straight out of caselaw (e.g. Hamerly v. Denton).

RS 2477 rights-of-way should not uniformly be 100' wide. The width should meet the type of use, particularly if the route crosses small private parcels. We realize this may take a statute change and are willing to work with DNR and the legislature on possible legislative changes (Matanuska-Susitna Borough). **Response:** RS 2477 rights-of-way along historic trails are not necessarily 100' wide unless the route was still unreserved, unappropriated federal land in April of 1963, when AS 19.10.015 went into effect to set that width. That law could be amended so that it does not apply to RS 2477's, or so that it does not apply to RS 2477's where they cross small private parcels. However, only the legislature could undertake such a blanket change. Another solution is a case-by-case vacation of the outer part of the right-of-way if it is not needed.

The Kenai Peninsula Borough objects to removing nomination and certification requirements (Kenai Peninsula Borough Trails Commission). **Response:** Comment noted. DNR sees nothing in AS 19.30.400 to indicate the legislature wanted to continue with certifications. To the contrary, legislative history is clear that the sponsor considered certifications too slow and costly.

Typographical error in (a), "user" instead of "use." What constitutes public use? Does a single documented use meet this requirement? The state should have to show a pattern of use (Kenai Peninsula Borough Trails Commission). **Response:** The legal term "public user" means somewhat more than "public use." It refers to exercising a right, in this case the right offered under RS 2477 to construct a highway and thereby accept an easement for that highway. As early as 1938 in Alaska (Clark v. Taylor), and considerably earlier in other states, court decisions acknowledged that public user was a valid way to accept the grant of an RS 2477 right-of-way. It is very unlikely that a single use of a trail would pass muster. For instance, a 1961 court decision

in Alaska said that sporadic use of a dead-end trail out into wild country for hunting or recreation did not qualify (Hamerly v. Denton).

Why require a 1:63,360 map? Narrative with aerial photos may be sufficient to locate a historic trail even if the trail can't be found on the map (ADF&G). **Response:** If DNR has aerial photos of the trail, it does not anticipate any difficulty showing the potential right-of-way on a 1:63,360 map. In DNR's experience, depicting the route on a map is essential for public review. (The regulation does not require that the trail be printed on the published version of the map; the trail will simply be drawn in its approximate location.)

It's outrageous that you merely show the route on a map, when DNR will use these maps to record the right-of-way. Instead, DNR must determine the route's location in relation to property boundaries by a survey, GPS trail location diagram, or a legal description (Kenai Peninsula Borough Trails Commission). **Response:** DNR does not intend to use the maps to record the right-of-way. The maps are used to start the identification process, so that people supplying information or otherwise commenting on the route will know which trail DNR is asking about. (People sometimes use the same name for different trails, or different names for the same trail.) DNR houses the state's cadastral surveyors, who thoroughly understand the need for a survey to establish where the trail lies relative to property boundaries. GPS trail location diagrams usually won't suffice if the trail crosses smaller parcels.

The reference to determining the "approximate" location of RS 2477 rights-of-way is another major concern. If the state does not survey the actual location, it will cloud owners' title unnecessarily. The state is apparently unwilling to assume responsibility for locating these "floating" easements (Kenai Peninsula Borough). **Response:** Being able to show the approximate location on a map is only the first step in the process. DNR agrees that the final step should be surveying and recording the route and that interim uncertainties over its location will cause difficulties for landowners. However, AS 19.30.400 lists 602 routes and others have been identified. Surveying them all will be costly and time-consuming.

Instead of "approximate," determine the exact location. Otherwise there is a significant impact on property rights, property values, and tax revenues. A corridor approach such as DNR used in the summer of 1999 to assert unsurveyed routes is not proper (Matanuska-Susitna Borough). **Response:** The initial mapping only starts the process; see above. DNR's proposed recordation in the summer of 1999 was to comply with a legislative mandate. DNR had consistently stated its belief that it was unwise and inequitable to record unsurveyed routes across smaller parcels, and public response to the proposal was sufficient to put an end to the effort.

Not providing actual notice to affected landowners in the identification process makes their appeal rights meaningless and raises serious due process concerns (Kenai Peninsula Borough). **Response:** The original 11 AAC 51.030 assumed that notice could be given to the affected landowners early in the process, but that proved impossible. Unless the route crosses large tracts in single ownership, it will not be possible to specify which landowners are affected until the route has been surveyed. (Even then, because Alaska is not a "mandatory recordation" state and there was no statewide platting law until 1998, it won't be easy to find the current owners of parcels that may have been subdivided and sold.) This is why the regulations provide for a second appeal opportunity at the survey/construction stage (11 AAC 51.100(e)(4)).

The comment period should be 90 days, not 30; public notice is inadequate. Notice should include width, proposed use and season of use, that DNR asserts a title interest, etc., and should be sent by certified mail to all property owners along and within a quarter mile of the proposed right-of-way, village council, coastal district, etc. At least one public meeting should be held (Kenai Peninsula Borough Trails Commission). **Response:** There may be a misinterpretation here. The identification process does not deal with "proposed" rights-of-way, nor is "proposed" use relevant to the question of whether there is a valid right-of-way. This is an inquiry into historic use and historic land status, rather than a discretionary decision. The notice provisions are

modeled on those applicable to "state's best interest findings" before state land disposals—requirements that are not only statutory but mandated by the Alaska Constitution. Thus DNR believes they should be adequate for this fact-finding process as well. Unless the trail is already surveyed (unlikely), at this stage of the identification process DNR will not yet know whose property is encumbered by it and thus cannot give personal notice to the owners of those properties.

The proposed identification process affects municipal selections too. How can the borough develop and market its selections if they are subject to floating or unlocated easements? The borough does annual land sales. The state must assume full responsibility for claims filed by individuals who have bought borough land subject to later established RS 2477 rights-of-way. **Response:** As is true of other landowners, the borough acquires municipal land grants subject to valid existing rights. RS 2477 rights-of-way can't be established later (their establishment had to predate the original conveyance of the land by the federal government), but the sooner these valid existing rights are brought back to light, the better for all. AS 19.30.420 may protect local governments as well as the state against claims involving RS 2477 rights-of-way.

Clarify that management authority over an RS 2477 right-of-way can't be transferred to local government without its consent. **Response:** DNR agrees, but rules for management transfers will be addressed in Phase 2.

What is the purpose of (b)(3), which inquires whether there is evidence the right-of-way grant was accepted either by public use or by a positive act of a public authority? Legal advisors should carefully review this to see if this is appropriate and sufficient or unnecessary (ADF&G). **Response:** Legal advisors wrote this wording, which is in DNR's existing regulations. Under Alaska court decisions, this evidence is critical to an RS 2477 right-of-way assertion. Hamerly v. Denton.

Private parties, not just public authorities, established many if not most RS 2477's. In (b)(3)(B), refer to "a positive act on the part of a public authority or a private party that constitutes acceptance…." and define "public authority" (Alaska Miners Association, Alaska Outdoor Council). **Response:** DNR agrees that private parties established many RS 2477 rights-of-way, but private parties did not constitute a "public authority" and couldn't be included in such a definition. Instead, their actions constituted "public use." In Alaska, public use is an equally valid way to accept an RS 2477 right-of-way (Hamerly v. Denton). That is why the regulation lists it first, in (b)(3)(A).

DNR should solicit supporting evidence for routes it proposes to report to the legislature each year, not just contrary evidence (ADF&G, Alaska Miners Association). Make clear that all of the means of notice must be used (Alaska Miners Association). A 30-day public comment period is inadequate. Formal notice should be provided directly to the Department of Fish and Game (ADF&G). **Response:** "Supporting evidence" has been added; also, ADF&G has been added to the list of notice recipients, and "by each of the following" has been added in the lead-in. The comment period (a minimum of 30 days) is the same as required by AS 38.05.945 for a proposed land disposal decision. That statute carries out a constitutional mandate, so its standard should be adequate for this annual review.

Require notice to significant land owners including the Alaska Mental Health Trust Authority, the University of Alaska, and Alaska Native corporations (Mental Health Trust Land Office). **Response:** If DNR has reason to believe the trail passes through anyone else's land (regardless of how "significant" that person's landholdings are), of course it will include them in the notice. But it does not seem sensible to notify the listed parties if the route does not affect them.

DNR does not say how it will "determine" the location of the right-of-way, which could cause future problems and lawsuits. Say it will show it on a USGS map or if not available on a sketch map (Alaska Miners Association). We agree with the Alaska Miners Association (Alaska Outdoor Council). **Response:** Done, with a reference back to the map mentioned in (b).

Under (d), we suggest DNR make its final report decision available on its website (ADF&G). **Response:** DNR put last year's report decision on its website and plans to continue.

The final decision should be published in local and statewide newspapers, with findings of fact for each route, and should be sent to each affected property owner as an assertion of a property right against that parcel (Kenai Peninsula Borough Trails Commission). **Response:** The report will be sent to those who commented and then to the legislature, as required by AS 19.30.400. Until the route is surveyed, it is normally not possible to determine which properties are encumbered by that right-of-way. Until that is known with certainty, it would be premature to assert a property interest against specific parcels. (This is also why DNR has consistently opposed the idea of recording unsurveyed rights-of-way crossing smaller parcels of land.)

ADF&G and the public should be allowed to appeal the final decision regardless of prior comment. Drop the comment precondition (ADF&G, Bering Straits Native Corporation, Kenai Peninsula Borough Trails Commission, Alaska Outdoor Council). **Response:** The comment prerequisite has been dropped from the regulation. However, DNR does plan to add similar wording to its general appeal regulations.

We are opposed to and do not recognize the state's claim of easements under RS 2477. The public already has sufficient access through our land (AHTNA). **Response:** DNR understands that many landowners are surprised by and opposed to RS 2477 rights-of-way. However, once established in accordance with law, an RS 2477 right-of-way is a valid existing right belonging to the state.

The state should work with ANCSA corporations and federal agencies to consolidate RS 2477 rights-of-way on ANCSA land with nearby 17(b) easements (Chugach Alaska Corp.). In such cases, the 17(b) easement must take precedence over the RS 2477 right-of-way (Alaska Federation of Natives). **Response:** DNR agrees there may be good opportunities to consolidate RS 2477 rights-of-way with other easements, relocating them slightly if necessary to match current trail alignments. (If the route is not yet surveyed and platted and other landowners are not affected, 11 AAC 51.065(f) allows such realignments without requiring a formal vacation.) However, 17(b) easements should not automatically take precedence. From DNR's perspective, an RS 2477 right-of-way usually protects public access rights better than a 17(b) easement in terms of management, width, allowed uses, and safeguards against vacation.

The state should work closely with ANCSA corporations in identifying, surveying, and vacating RS 2477 rights-of-way. **Response:** DNR understands that ANCSA corporations, as major landowners, are deeply interested in RS 2477 rights-of-way. Although DNR's existing RS 2477 regulations did not require this, 11 AAC 51.055(b) will mandate notice to the ANCSA regional corporation and nearby village corporation of a proposed identification of an RS 2477 right-of-way.

Provided there is proper landowner participation and route consolidation, we urge DNR to continue identifying and surveying RS 2477 rights-of-way. As management of federal land becomes more restrictive, road access across federal lands becomes difficult to obtain, and utilization of RS 2477 easements will become more important. Most of our economically viable lands have no practical access except across federal land (Chugach Alaska Corporation). **Response:** DNR agrees that RS 2477 rights-of-way can provide essential access.

We do not necessarily accept the position that RS 2477's legally exist in Alaska. And we understand "RS 2477 politics," so we are concerned about how thorough and objective DNR's research will be, particularly compared to the previous certification process. You probably know DOTPF spends maintenance monies on potential RS 2477's for the sole purpose of demonstrating "a positive act on the part of a public authority." These special RS 2477 terms such as "construction" and "public user" should be defined (Mentasta Traditional Council). **Response:** DNR's intent is to keep its research as thorough and objective as under the

certification process; otherwise the courts will not uphold it. DNR and DOTPF both understand that no amount of public expenditures now will create an RS 2477 right-of-way. To be valid, the right-of-way had to be accepted while the land was still unreserved, unappropriated federal public domain and while RS 2477 was in effect. A statewide land withdrawal or reservation occurred with the 1968 "Land Freeze" in preparation for ANCSA, and RS 2477 itself was repealed in 1976. The special terms used with regard to RS 2477 are set by court decisions. In using and defining these terms, the courts will look to their own precedents rather than to DNR's regulations.

This section doesn't notify adjacent landowners. Require notice to them (Alaska Trail Association). **Response:** Until the route is surveyed, DNR has no way to know whose parcels are encumbered by it. It will be many years before the hundreds of RS 2477 rights-of-way listed in AS 19.30.400 are surveyed.

We are aware that RS 2477 is a repealed law. Anyone wanting to apply under RS 2477 would have had to apply to the governing body specifically stating that intention. That didn't happen when most of these trails were blazed. Also, RS 2477 was for highways, not trails. The assertions made by the state regarding trails do not apply. The proposed regulations are hostile and severely detrimental. DNR makes it worse by saying it can release the trail to DOTPF to manage. Also, by dropping certification, it is abandoning many of the checks and balances in the process (Chickaloon Village Traditional Council). **Response:** The commenter is correct that RS 2477 was repealed in 1976, and with few exceptions, ceased to allow new easements in Alaska after 1968 (PLO 4582). However, repealing a law does not extinguish valid existing rights gained prior to its repeal. DNR is not aware of any court decision saying that people had to apply to a governing body in order to accept an RS 2477 right-of-way. Nor does DNR know of any court decision requiring a "highway" in the modern sense. State law defines "highway" very broadly (including a footpath). AS 19.30.400 allows DNR to transfer RS 2477 rights-of-way to DOTPF. That same law sets out DNR's instructions for researching and identifying existing RS 2477 rights-of-way. When DNR's research is complete, it is required to report the route to the legislature, not administratively certify it. This is why certification is being repealed.

Repealing the nomination and certification process increases the state's ability to assert RS 2477 claims and reduces the ability of the public to contest them, amounting to compulsory measures to enforce access. This undermines local trail planning efforts. Our borough opposes the use of prescriptive rights or eminent domain powers to acquire recreational trail easements. Instead, we seek to plan and promote public trail access that meets trail users' needs and minimizes impacts on natural resources and adjacent land uses. This requires cooperation among all parties. Negotiation is preferable to the use of legal force and is ultimately more efficient as it will not be bogged down by costly litigation and public animosity. Please reevaluate and drop the proposed regulation changes (Kenai Peninsula Borough Trails Commission). **Response:** 1) The borough's trail planning efforts are commendable, but have no applicability to DNR's duties under AS 19.30.400. RS 2477 rights-of-way are valid existing rights gained by the public before the land passed into private ownership. They do not involve prescriptive easements or eminent domain. Yes, landowner cooperation makes it easier for the public to exercise its access rights—but the state's ability to assert RS 2477 rights-of-way is powerful motivation for such cooperation. A landowner who suspects that a trail across his land is a 100-foot-wide RS 2477 right-of-way may be very willing to "grant" a 20-foot conservation easement on that trail. He gains statutory protection against liability and a tax benefit to boot, and the specter of the RS 2477 right-of-way may never arise. 2) Deliberately handicapping DNR's ability to assert RS 2477 rights-of-way, by preserving a process that DNR has found to be flawed and costly, would not stop RS 2477 rights-of-way from being asserted. The courts may find their way to RS 2477 on their own, as in Eastham v. Price, or private individuals may lead them there, as in the Supreme Court's decision on Fitzgerald v. Puddicombe. (The state was not a party to either case.)

The department should not only "consider" adverse impacts, but seek alternatives to mitigate them. The lack of this commitment is a major flaw with DNR's approach to RS 2477's (Alaska Outdoor Council). **Response:** DNR is caught in the middle. Measures such as requiring a

survey before construction, so that the landowner can be identified and invited to comment, will help. The bottom line, however, is that many landowners are surprised and outraged to find that there is an RS 2477 right-of-way on their land. From their standpoint, the only solution is to vacate it, preferably without any cost to them. But unless other access is available, DNR cannot make that accommodation.

Expand (f) to say that DNR does not manage the route if it is within a state park, is an actively managed route within a national park or other federal conservation system unit, or is actively managed by the local municipality when identified (Kenai Peninsula Borough Trails Commission). **Response:** State parks are managed by DNR. For trails being managed by the National Park Service, US Forest Service, or a municipality at the time they are identified as RS 2477 rights-of-way, cooperative management agreements will protect public access and will undoubtedly be done. However, AS 19.30.400 would not let DNR automatically "cede" jurisdiction to a federal agency or municipality.

Add a requirement to (f) that the borough, or in the unorganized borough the department, will timely note the right-of-way to the plats (Alaska Miners Association). **Response:** Boroughs would probably refuse to show unsurveyed rights-of-way on their plats because (as with premature recording) there would be no way to be accurate. DNR has the same concern.

11 AAC 51.060, EVALUATION CRITERIA (repealed).

The Kenai Peninsula Borough is opposed to eliminating these criteria (Kenai Peninsula Borough Trails Commission). **Response:** They are moved, not eliminated. See the proposed 11 AAC 51.055(b).

The adjudication process establishes a public record showing whether the state feels a right-of-way exists. It should **not** be repealed. Land owners, municipalities, and the state need this process to determine if a potential RS 2477 right-of-way should be taken to court or to the legislature to be determined valid or vacated (Matanuska-Susitna Borough). **Response:** DNR agrees that the adjudication process is essential. The standards DNR will use in its decision are moved to 11 AAC 51.055. The process is not identical, because the final step will be a report to the legislature instead of certification, but DNR intends that the quality of its research will remain equally high; the research will take place out in the open; and the public will have a chance to add to it or refute it before the final decision is made to include the route in the report.

11 AAC 51.065, EASEMENT VACATION.

Change the title and the text throughout to refer to RS 2477 rights-of-way, not just easements. **Response:** 11 AAC 51.010 specified that "easement" and "right-of-way" would be used interchangeably throughout the chapter.

As an example, the Herning Trail (RST 1467) was a winter trail from Knik to the Alaska Railroad for access to mining locations near Willow Creek. Clearly there is alternate access now from Knik to Willow and Houston via the Knik-Goose Bay Road and the Parks Highway. Use of RST 1467 has not been documented since the early 1900's. The burden of proof should not be on the private property owner or municipality to show that no RS 2477 right-of-way exists (Matanuska-Susitna Borough). **Response:** The borough's platting office believes that what DNR calls the Herning Trail is the same as what the borough knows as the Three-Mile Lake Trail, and that it is still used for recreation. But current use/lack of current use does not affect whether the right-of-way exists, which is strictly a matter of historic events and historic land status. DNR agrees that where alternate road access and utility access already exists, the only remaining question is whether alternate recreational access exists. In this case, DNR has been told that there is a more commonly used trail farther west, although it may currently lack a continuous easement.

Up front in (a), require that the other access be "equal or better" (Alaska Miners Association,

Resource Development Council, Alaska Outdoor Council). **Response:** Although that would be DNR's preference, our interpretation is that the legislature intended a lower standard for one type of RS 2477 vacation (see AS 19.30.410(2)).

Why is there a role for DOTPF in easement vacations, yet none for ADF&G? We object to allowing vacation of an RS 2477 right-of-way at the request of a municipality without "equal or better" alternative access. Also, we question the example in (d)(3) of "reasonably foreseeable" uses. An existing easement may only be suitable for wintertime use, but with maintenance, could be suitable for other uses (ADF&G). **Response:** DOTPF has a role in vacations because it has statutory authority over highway rights-of-way. ADF&G does not have such authority. The lesser RS 2477 vacation standard at the request of a municipality is statutory: compare AS 19.30.410(1) and (2). The example in (d)(3) was of a winter route through "poorly drained soils," a problem that could not be solved merely by maintenance. It is true that given sufficient money, materials, and a Corps permit, a causeway can be constructed across a swamp or even a lake. However, DNR would probably not interpret such construction "reasonably foreseeable."

Subsection (b) requires DOTPF's consent before any vacation, modification, or relocation of a section-line easement, but this should be repeated in (d) (DOTPF). DOTPF's approval should be required before vacation of an RS 2477 (Alaska Miners Association, Alaska Outdoor Council) **Response:** During DNR's meeting with DOTPF, DOTPF asked that this consent be extended to RS 2477 rights-of-way. That is the likely intent of the written comment, as there would be no need to repeat (b) in (d) . The reference to RS 2477's has been added.

Subsection (b) deals only with section-line easements (requiring DOTPF's consent before a vacation) and should be deleted (Quintavell for Matanuska Electric Association). **Response:** DNR has required DOTPF's consent before a section-line easement vacation since at least 1980 (see the Section Line Easement Vacation Certificate in 11 AAC 53.210). There is no disagreement between DNR and DOTPF that this precaution is appropriate. As it helps to ensure that a section-line easement will not unwisely be vacated, DNR does not understand why an electric utility company would object to it.

Delete (b). RS 2477's should be managed by DOTPF <u>when and if</u> they are determined valid. DNR should have no jurisdiction if they are valid, and until then, DOTPF should not be involved (Mentasta Traditional Council). **Response:** Although a reference to RS 2477 rights-of-way has now been added at DOTPF's request, (b) originally dealt only with section-line easements, some of which are not RS 2477's. Since 1980 DNR's regulations have required DOTPF's concurrence before a section-line easement is vacated. DNR continues to believe that this safeguard is appropriate.

We object to the idea that in all cases the petitioner must bear the burden and costs of providing for "equal or better access." In our view, a trail over a dangerous cliff should be moved; DNR should shoulder this responsibility (Alaska Outdoor Council). **Response:** The petitioner is not necessarily the landowner; it may be a state agency or municipality. But if a private landowner successfully petitions to remove a public access easement from his property, he gains a property right that was formerly state-owned. DNR has always expected the petitioner to bear the cost in this situation. In DNR's experience, landowners petition for vacations because they dislike public access across their property, not for public safety reasons.

In a decision on a vacation, DNR should not consider "both routes," but instead "alternate routes" (Mentasta Traditional Council). **Response:** The commenter makes a good point that the alternate access may involve more than one route. However, the original route needs to be considered too. This was changed to, "the existing easement and possible alternate access."

Allow a proposed easement, not just an easement of record, to substitute for an easement to be vacated (Mentasta Traditional Council). **Response:** DNR believes it would be risky to vacate the easement before replacement access is formally protected. Platting a new easement (if required)

can be done as part of the replat of the easement being vacated, with final approval delayed until the new easement is ready and any needed improvements have been completed.

Define "affected person;" if anyone can propose an easement, shouldn't anyone be allowed to petition to vacate it? (Kenai Peninsula Borough Trails Commission) Add tribal governments to those who can request a vacation. Define "petitioner"—be all-inclusive. Define "best interests of the state" (Mentasta Traditional Council). **Response:** DNR does not think the legislature intended for tribal governments to request vacations, unless they are affected landowners. State law (AS 40.15.305 and AS 29.40.120) defines who may petition for vacation of a recorded plat or easement. In addition, a municipal assembly or council can request that the special, easier standard of AS 19.30.410(2) be used to vacate an RS 2477 right-of-way, but any eligible party can petition for the vacation and ask the municipality to file the request. Although the law restricts petitioners' eligibility, it should be possible for an affected party to find someone eligible and willing to petition. (If not, the vacation would probably have been doomed to failure anyhow.) "Best interests of the state" is the standard set by AS 38.05.035(e) before any state land disposal may occur. Vacating a state-owned easement is a disposal of an interest in state land, unless the state owns the underlying land, which is likely why the legislature used the term in AS 19.30.410. The state's best interests may vary from case to case, so it would probably be impossible (and unwise) to define the term in a regulation.

Subsection (b): Approval of the local municipality is also required before a section-line easement can be vacated (Kenai Peninsula Borough Trails Commission). **Response:** RS 2477 rights-of-way have been added to this subsection at DOTPF's request. For the vacation of a section-line easement that is an RS 2477, there is no longer any statutory role for the municipal platting authority. However, (c) of that section restores a municipal role via DNR's regulations.

The scope is too narrow; more factors, e.g. natural resources and fish and wildlife habitat, should be considered before finding a vacation is in the state's best interests; what will the plat note say? which plats are affected? What if new information shows it was never an RS 2477 to begin with, destinations are open to interpretation, what are the intended or allowable uses, etc.; if an RS 2477 right-of-way isn't suitable for all uses, the right of way should be recorded only for those suitable uses (Kenai Peninsula Borough Trails Commission). **Response:** The process is already complex; considering even more factors should not be required. Most of the commenter's other concerns will depend on case-by-case circumstances. If new information shows the RS 2477 does not exist, it will not need to be vacated.

Add "equal or better" as a standard throughout, and drop the reference to the scope of the administrative finding. That will unduly limit the state, and "current public use patterns" are totally irrelevant (Alaska Miners Association, Alaska Outdoor Council). **Response:** See above for the discussion of "equal or better." Establishing the "scope" is important because it is required by AS 38.05.035(e) before a "disposal of an interest in state land." (An easement vacation is a disposal unless the state owns the underlying land.) Otherwise the question is wide open and a court could find it legally flawed. Knowing current public use patterns helps DNR assess whether replacement access is adequate.

AS 19.30.410 does not use the term "equal or better," so it should be dropped from the regulation. Redraft to comply with the law (Pat Kalen, American Congress on Surveying & Mapping) **Response:** Regulations interpret laws rather than repeating them. "Equal or better" has been DNR's traditional standard, albeit not previously in its regulations. AS 19.30.410 sets two different standards, one that DNR interprets as higher than "equal or better," and one that is lower. Most commenters found this comparison helpful in showing how DNR interprets the law.

Municipalities cannot vacate an RS 2477 right-of-way. Subsection (d) requires a borough to take action, via an ordinance, to recommend vacation. This is an unfunded state mandate, with no guarantee of a result that has been determined through a public process to be in the public's best interest (Matanuska-Susitna Borough). **Response:** DNR does not think AS 19.30.410(2)

requires such a request from a borough. If the borough assembly wishes to lend its official support to the petition, it is free to do so; if not, the more stringent standard of AS 19.30.410(1) will apply. Under either standard, the statutory bottom line is that the vacation must be "in the best interests of the state." DNR very strongly agrees a public process must be followed, with full public notice. That is why (c) says the petitioner must seek the platting authority's approval under AS 29.40.120-140. If the borough agrees to participate, this will ensure notice to nearby private landowners (difficult for DNR to accomplish on its own because it does not have plats of private land). In addition, DNR will give additional statewide notice along the lines of AS 38.05.945, the law applicable to land disposal decisions (vacating a state easement is a "disposal" unless the state owns the underlying land), and has added language to (c) to clarify this.

This section places the burden of proof on the affected property owners, perhaps leading to serious confrontations. If the easements are valid, they are state interests. Any request to vacate an RS 2477 right-of-way that has not been confirmed by a court (this does not include section-line easements, as the Supreme Court has found them valid) should remain the state's responsibility. DNR or DOTPF, not local municipalities, should conduct the hearings and gather evidence. This is consistent with current practice with DOTPF: when it recently realigned two roads, it originally requested the borough to hold the hearings and take assembly action. MSB refused to take any action, deferring to DOTPF (Matanuska-Susitna Borough). **Response:** Comment noted. If the borough declines to participate, DNR cannot force it to do so. Wording has been added to (c) to clarify this. However, DNR is hopeful local governments will stay involved in access decisions that affect their constituents.

(d)(2) would be a loophole for politicians and big money to vacate RS 2477's. Strike it (Alaska Trail Association). **Response:** As this lower vacation standard was set by the legislature, DNR can't strike it.

Although (d)(1) ("equal or better") is very well written and important, (d)(2) appears to establish a different standard. Change it back. Do the same with (d)(3). Instead of "improvements," require that the alternate access be "ready for its intended use" (Alaska Miners Association). **Response:** If it were up to DNR, DNR would have kept to the "equal or better" standard. However, when the legislature enacted AS 19.30.410, it set two different standards for RS 2477 vacations. One seems to be lower, and the other higher, than "equal or better." DNR agrees that "ready for its intended use" is clearer.

Delete (d)(3) altogether. An RS 2477 claim that has not been fully adjudicated is an assertion based on historic use. It does not justify establishing current-day rights-of-way for some hypothetical future access. New easements can be established later as needed (Mentasta Traditional Council). **Response:** AS 19.30.410(2), which this paragraph deals with, is already in effect and governs DNR's actions. Using its process to modify an asserted RS 2477 right-of-way, or vacate it in favor of other suitable access, may make much more sense and cost much less for all concerned than fully adjudicating the claim through a lengthy court battle. One landowner told DNR that he has spent $120,000 in legal fees unsuccessfully fighting an RS 2477 assertion across his five-acre parcel.

A Mat-Su Borough fact sheet says that an easement cannot be vacated if it does not legally exist. In many cases, RS 2477 rights-of-way do not appear on property deeds. In many cases the federal government manages established routes or trails. Why should the state reclaim an obsolete or abandoned corridor? (Chickaloon Village Tribal Council) **Response:** If an easement does not legally exist, there would be no need to vacate it. But the fact that an easement might not be listed on a deed does not mean it does not exist. All property transfers are subject to "valid existing rights." A valid RS 2477 right-of-way is a valid existing right, and cannot simply be abandoned (regardless of whether it has been used recently). If it is of no use to anyone, it can be vacated.

If the RS 2477 right-of-way is not established (surveyed), the alternative should not have to be

either (Kenai Peninsula Borough Trails Commission). We concur that DNR should not require a plat, unless necessary to locate the replacement easement (Matanuska-Susitna Borough). **Response:** See the revised (e). DNR agrees that RS 2477 rights-of-way should come under this same rule: a plat isn't necessarily required. (Note that survey and platting is not needed to "establish" an RS 2477 right-of-way along a historic trail. If it is valid, it was established long ago, either by public user or by a positive act of a public authority.)

11 AAC 51.070, APPEAL. We agree this is safe to repeal if the proposed replacement section (.910) is adopted (Matanuska-Susitna Borough). **Response:** Yes, the new section will replace it.

11 AAC 51.075, MARKING EASEMENTS.

We concur so long as it applies to mental health, school, and university land (Matanuska-Susitna Borough). **Response:** DNR proposes to update this section without substantive change. It has been used rarely, if at all.

Will this section apply to ADF&G on ADF&G-managed lands? It might not be appropriate. What about the requirement for written permission before removing a marking? Markings may need to be replaced with GPS readings because we have a problem with bears removing markings. Please identify the penalties, too. **Response:** The regulation says DNR can require easement marking or surveying "as a condition of any sale, lease, grant, or other disposal of state land." If ADF&G acquires a lease or Interagency Land Management Assignment from DNR, theoretically DNR could require ADF&G to mark or survey the easements. Relying on GPS readings does not meet the same need as a trail marker: with an accurate system and skilled operator, GPS can tell people where they are, but it can't distinguish legal access from trespass.

Clarify. Most survey monuments are at ground level and not visible. Will DNR periodically inspect them? How will it pay for this? (Pat Kalen, American Congress on Surveying & Mapping) **Response:** The section deals with marking, not with survey monuments.

Matanuska Telephone Association does mark buried telecommunication lines, but we have no program to maintain those markers, and it would be cost-prohibitive if we were required to field-mark all easements (Matanuska Telephone Association). **Response:** The marking requirements are intended for public access easements, not for utility easements. The purpose is to help the general public find the access route. The word "access" has been added to make this clear.

DNR should not transfer its easement marking responsibilities to others (Mentasta Traditional Council, Kenai Peninsula Borough, Kenai Peninsula Borough Trails Commission). What criteria will be used? Maybe shorelines should be marked at intervals to show legal landing areas. DNR should provide the markers (Kenai Peninsula Borough Trails Commission). **Response:** Although DNR does not usually require easement marking as a condition of selling or leasing state land, in some situations this might make sense—even for the land purchaser. (The easier it is for the public to find and travel along the easement, the sooner they will leave the property!) In some types of land disposal, such as DNR's new remote recreational cabin site program, several years may pass before the access is formally platted, and meantime other stakers need to be able to reach their own sites. A uniform marking system is a good idea; perhaps DNR could use its authority under AS 41.21.852 to do this. Shorelines are not likely to require markers except at the access points to the shoreline (so that floaters can see where to take out).

11 AAC 51.080, COURT APPEALS. We agree with the repealer, but believe an RS 2477 right-of-way (except for a section-line easement) is not valid until surveyed, platted, and confirmed in court (Matanuska-Susitna Borough). **Response:** DNR believes that survey and a recorded plat, although desirable, are not a factor in establishing whether an RS 2477 right-of-way exists on a historic trail. Nor does DNR know of any caselaw suggesting that survey or recordation has any bearing on validity. See Fitzgerald v. Puddicombe, for instance, dealing with the unsurveyed Knik

Glacier Trail. A court decision is necessary if the landowner disputes the existence of the right-of-way, but that will not always be the case.

11 AAC 51.085, ACCESS AND UTILITY EASEMENTS TO MENTAL HEALTH LAND.

This section deals with access and utility easements to mental health trust land without cost to the mental health land trust. There should be no cost to the utilities, too. Our understanding is that platted utility easements are governed by local government. Will this change? What about access and utility easements to university trust lands? (Matanuska Telephone Association) **Response:** AS 38.05.801 requires special management of mental health trust land (but not university land). It mandates that DNR manage such land, among other principles, "for the benefit of the trust." AS 38 does not impose any similar trust duty on DNR regarding utilities. Instead, AS 38.05.850 requires DNR to establish a "reasonable rate or fee schedule" for telephone lines, power lines, and other uses. This fee schedule is found in 11 AAC 05.010(e). Regarding platting authorities: When land is subdivided, the platting authority typically requires that utility and access easements be dedicated for public use to serve each lot. After DNR subdivides and sells state land, DNR has no reason to be involved in managing utility easements within that subdivision. Thus DNR will likely convey such easements to the municipality. (If there is no municipality, it may convey them to a homeowner's association under AS 38.05.810.) Because AS 38 sets requirements to be met before any "disposal of an interest in state land," 11 AAC 51. 015 requires this conveyance to be formally documented.

11 AAC 51.100(e)-(f), EASEMENT MANAGEMENT.

General note: These subsections were originally proposed to be part of two larger sections, 11 AAC 51.200-210, dealing with easement management. The rest of those proposals will be postponed for consideration in Phase 2. However, these portion were moved into the existing 11 AAC 51.100 temporarily.

Set a dollar amount for improvements that will be allowed without a survey (Alaska Trail Association). **Response:** This language has been modified so that survey is not required if the easement can readily be located and there is no dispute whose land it crosses. That should solve much of the cost problem. If the location **is** disputed or can't be determined, survey is essential to avoid trespass and resultant legal liability.

"Notice and comment" opportunities for the landowner seem inadequate, considering the gravity of the situation (Alaska Outdoor Council). **Response:** DNR does not believe the law allows it to go farther than this. A landowner does not have veto rights over trail construction on an access easement. See Anderson v. Edwards, for instance (dealing with road construction on a section-line easement).

It should be clarified that a farmer can use his own farm equipment on an easement without a permit (Alaska Outdoor Council). **Response:** Wording was added to clarify that on his own land, the landowner can use equipment on the easement without needing a DNR land use permit.

Rename this; the current title is too broad for the content. Management includes signage, design, construction, maintenance, regulation of uses, enforcement, etc. (Kenai Peninsula Borough Trails Commission). **Response:** Now that this material has been moved to 11 AAC 51.100, the focus is even more basic. However, it still deals with "management" at that basic level: the requirement for a permit before bulldozers arrive to construct or expand the access; if the alignment is uncertain, the requirement for a survey before construction begins, and notification to the landowner. The rest of the proposal will be addressed in Phase 2.

Specify the notice measures, specify what uses are allowed on each type of easement, specify what activities constitute construction, it's not clear how what is now (e)(3) relates to (e), notice to the underlying landowner should not be discretionary, appeal rights are irrelevant if the person

does not know about it, does "appeal to the commissioner" limit the right to go to court? (Kenai Peninsula Borough Trails Commission) **Response:** Notice to the landowner before DNR issues a permit for construction is mandatory, not discretionary, as stated in (e)(3). The landowner has the right to appeal to the commissioner, as stated in (e)(4), and can go to court if still dissatisfied. 11 AAC 96 sets the threshold for when a permit is required. Under current standards, trails up to five feet wide can be hand-cleared without a permit; if heavy equipment will be used or the root system disturbed, a permit is needed. Vehicles up to pickup trucks can be used without a permit, too.

The borough prefers GPS trail location diagrams; the requirement for a Class III survey is offensive given DNR's ability to establish an RS 2477 right-of-way by recording a hand-drawn line on a map; does (f) say a GPS trail easement diagram won't have any bearing on anything? (Kenai Peninsula Borough Trails Commission) **Response:** DNR does not "establish" RS 2477 rights-of-way, with or without a hand-drawn map. They either exist or they don't. Knowing their location relative to property boundaries is desirable and at some point essential (unless they are on state land and/or the landowner does not dispute the boundaries). Usually a GPS diagram does not suffice for this purpose.

In what is now (f), change "trail" to "pedestrian," then move it to 11 AAC 51.055 (Alaska Miners Association). Defining "trail" would be better than deleting it, but we agree the subsection should be moved (Alaska Outdoor Council). **Response:** See above. DNR envisions that GPS trail easement diagrams might be useful to locate existing general-purpose trail easements, not just for pedestrian easements (DNR has reserved very few pedestrian easements). But this possibility isn't limited to RS 2477 rights-of-way, so the subsection does not belong in 11 AAC 51.055.

DNR must contact the landowner of record before surveying a proposed RS 2477 right-of-way. Make it mandatory (Alaska Federation of Natives, Chugach Alaska Corporation). **Response:** The regulation has been reworded to say, "The department will provide notice and a comment opportunity to the owner of the land determined to be subject to the easement." Where possible, this notification can take place before the survey. But the regulation can't make it mandatory to notify the landowner before survey: for routes crossing smaller parcels, there is no way to identify the landowners until the survey ties the route into property boundaries. (Note that there are no "proposed" RS 2477 rights-of-way. To be valid, an RS 2477 right-of-way had to be accepted before the federal land was withdrawn or appropriated, and in no case later than RS 2477's date of repeal in 1976.)

RS 2477 rights-of-way must be surveyed before recordation. Contrary to DNR's opinion, recordation of unsurveyed easements on large tracts is not inconsequential to the landowner. It constitutes an unacceptable risk and unnecessary cloud on the title (Alaska Federation of Natives, Chugach Alaska Corporation). **Response:** DNR would prefer to survey all RS 2477 rights-of-way before recordation, but survey will be very expensive and it will take many years to complete the job. DNR understands that recordation is not "inconsequential" to any landowner. However, where an RS 2477 right-of-way crosses a large tract owned by a single party, there is no risk of error: that landowner's title **is** burdened by the easement, and that fact should be reflected in the public record. See also 11 AAC 51.065(f), which allows realignment of an RS 2477 right-of-way elsewhere on a landowner's property to lessen the adverse effect on that landowner. So long as the route has not yet been platted, such a realignment would not require a formal vacation process.

On-the-ground identification of RS 2477 easements on our land requires a permit. It is our policy that any entry that is not within an existing easement requires a land use permit from us (Chugach Alaska Corporation). **Response:** DNR respects the landowner's right to have such a policy on land that is not subject to an existing easement. However, a valid RS 2477 right-of-way **is** an existing easement and represents the right of access. Survey of an RS 2477 right-of-way does not create the easement, but only measures its location.

There is a federal moratorium preventing any National Park Service employee from surveying trails on private property, yet a GPS survey was done on several asserted RS 2477 rights-of-way on Chickaloon Village Traditional Council lands without any notification to us. For the state to claim ownership of rights-of-way in this way is a gross perversion of the law (Chickaloon Village Traditional Council). **Response:** DNR is not familiar with the moratorium, but it did not ask the National Park Service to survey RS 2477 rights-of-way near the Chickaloon. (AS 19.30.400 lists at least four in this area—Chickaloon-Coal Creek Trail, Chickaloon-Knik-Nelchina Trail, Chickaloon River Trail, and Chickaloon-King River Road—with construction dates as early as 1898, long before any reservation or appropriation.) Regardless, DNR does not use surveys to claim RS 2477 rights-of-way along historic trails: a survey does not cause such an RS 2477 to come into existence, just as lack of a survey does not rule it out.

In what is now (f), say that DNR shall provide for a trail easement diagram, not "the department or a person may…." (Mentasta Traditional Council). **Response:** Especially if the unplatted easement crosses non-state land, a formal survey is far superior to a trail easement diagram. It would make no sense to require a trail easement diagram instead. Nor would it make sense to restrict this subsection to actions by DNR. Volunteer efforts to informally map existing trails, e.g. using GPS, can add to DNR's store of knowledge about public access routes.

11 AAC 51.910, APPEALS. We request that this section apply to all adversely affected governmental agencies and organizations (ADF&G). **Response:** This is the case. Nothing in the section bars appeals from governmental agencies and organizations.

11 AAC 51.920 and .930, LIABILITY. It should be clarified that the borough does not assume liability for damages, injury or death arising from use of an 11 AAC 51 easement. Municipalities should be specifically named as immune, since management and maintenance can be transferred to them (Kenai Peninsula Borough Trails Commission). **Response:** If management is transferred to a municipality, the easement would no longer qualify as being managed under 11 AAC 51, and DNR's regulations would not apply.

Add language protecting permittees in compliance with their permit, and any person who does good-faith maintenance or repairs, from liability (Alaska Miners Association). Protect those doing maintenance or repairs. Emphasize to the user that permanent or long-term damage to the easement may result in liability (Alaska Outdoor Council). **Response:** Language protecting those doing voluntary maintenance or repair of an access facility against liability to easement users has been added. However, such a person would still be responsible for any damage he did to the interests of the landowner, e.g. excessive clearing of trees. DNR does not see any obvious way to resolve this conflict.

We believe a recently passed state law relieves the landowner of liability for injury or death on an easement, unless the landowner irresponsibly creates a hazard. This does not seem to be reflected in this section, and should be (Alaska Outdoor Council). **Response:** The statute referred to is presumably AS 34.17.055. Unfortunately, this statute is extremely narrow. It applies only to "conservation easements" granted by the landowner to the state or to a municipality. No easement dealt with in 11 AAC 51 falls within those exceedingly narrow limits. However, the central concept in that statute—that a landowner is "not liable in tort, except for an act or omission that constitutes gross negligence or reckless or intentional misconduct"—better expresses what DNR believes should be state policy and has been added to the regulation. (A statute saying this would provide far better protection than a regulation.)

11 AAC 51.990, DEFINITIONS.

Change the definition of "Alaska highway system" to drop the reference to the list in 17 AAC 05.010, as it would be exceedingly difficult to use (DOTPF). **Response:** This regulation was reworded as DOTPF requested, although the definition is somewhat less informative than a

specific list of routes.

Add “recorded reservation” to the list of documents where an easement restriction may be noted (Mentasta Traditional Council). **Response:** Done.

The “arterial road” definition is new, but it needs definitions of “through traffic” and “access traffic” because the present language is not clear (ADF&G). **Response:** The term “arterial” is commonplace in platting regulations and has been used in DNR’s survey regulations for 20 years without causing confusion. In context (arterial roads vs. neighborhood service roads) the meaning should be apparent, even without a definition. The regulations do not use the term “access traffic.”

Instead of “ordinary high water,” define “ordinary high water mark” the same as in 11 AAC 53 (ADF&G). **Response:** Done.

Define “traditional means of access/traditional outdoor activity” (Alaska Trail Association) **Response:** These terms are set by law and DNR is not allowed to repeat them in its regulations.

Exclude the Mental Health Trust Land Office from the definition of “department” (Mental Health Trust Land Office). **Response:** Done.

Exclude Alaska mental health trust land (as defined in 11 AAC 99) from the definition of “state land” (Mental Health Trust Land Office). **Response:** Done.

Define “council” (Alaska Miners Association, Alaska Outdoor Council). **Response:** DNR interprets the term to mean “city council.” That modifier has been added directly to the regulation in which the word was used, 11 AAC 51.065(d)(2).

Define “trail” (Alaska Miners Association, Alaska Outdoor Council). **Response:** DNR uses this word in its ordinary sense.

Use the correct reference for the definitions of “navigable water” and “public water” (ADF&G). **Response:** The references were already correct: They referred to AS 38.05.965. It is not necessary or desirable to state the paragraph number of a statutory definition, as the Revisor of Statutes occasionally renumbers definitions in alphabetical order as new ones are added. That has happened twice recently to AS 38.05.965 (in 1984 and 1992).

Use the correct definition for water body, as defined in 11 AAC 93 (ADF&G). **Response:** 11 AAC 93 deals with water rights, AS 46.15. In those regulations, it is reasonable to define “water body” very broadly: this definition even includes “intragravel water.” But DNR does not consider it reasonable or correct to apply such a broad definition in 11 AAC 51, which deals with water bodies for which public access easements must be reserved under AS 38.05.127. There is no need to provide a public access easement to an underground spring or aquifer.

Define all terms used, plus two others (Kenai Peninsula Borough Trails Commission). **Response:** The regulations use terms such as “grant” and “temporary” in their ordinary sense, without any intention to create special meanings.

“Pedestrian easement” should include a definition (exception?) for local platting authorities. Many pedestrian easements within the borough are legally used for ATV’s, skiing and snowmachines. And what about bike trails? (Matanuska-Susitna Borough) **Response:** The platting authority has the power to define “pedestrian easement” in a special way, of course, but in the rare circumstance that DNR reserves a pedestrian easement, it would not envision use by ATV’s and snowmachines without the landowner’s consent. (Skiing would definitely qualify and DNR believes bicycling should too, as bicycles are propelled by foot.)

11 AAC 51.200, EASEMENT MANAGEMENT (POSTPONED UNTIL PHASE 2).

The changes needed here are extremely important. "Construction" is not defined. Normal maintenance and repair must be differentiated from "new" construction, and allowed without a permit. (Alaska Miners Association, Resource Development Council, Alaska Outdoor Council) Make clear that this applies to RS 2477's, too. Add a new item specifying what does **not** require a permit, so that activities such as removing deadfall, cutting alders, throwing rocks into a washout, etc., won't be challenged as requiring a permit. Say that no permit is needed for repair and maintenance work such as brushing the trail or road and ditches; removing alders and other trees that may have grown or fallen in the trail; rebuilding culverts and ditches; filling ruts or washouts; applying gravel or other materials, etc. (Alaska Miners Association). **Response:** Some of these activities could be done without a permit under 11 AAC 96; others would seem to require the use of heavy equipment. As part of Phase 2, DNR will consider whether maintenance activities on existing roads and trails (those whose existence is undisputed) can be exempted from the permit requirement.

This section says DNR manages the easement unless it has been transferred. There are hundreds of miles of borough-maintained roads here on DNR easements or RS 2477's (including section lines) that have had no DNR administrative decision. This has occurred through platting or by actual construction, use, and maintenance. We maintain them; we should manage them. In some cases DNR has issued encroachment permits on DNR easements with borough-maintained roads, potentially creating financial hardships for the borough in its road maintenance and upgrades. The public needs to use DNR easements to get to their property; as the population grows, trails will become roads and the borough must be able to control them. We recommend giving municipalities that have road powers management authority over DNR easements within their boundaries (Matanuska-Susitna Borough). **Response:** DNR agrees that formal lines of authority need to be established; Phase 2 will address this. Split authorities, murky authorities, and conflicting authorities do not serve the public interest.

Do these regulations apply to easements for which the department has accepted responsibility, such as 17(b) easements? (Kenai Peninsula Borough Trails Commission). **Response:** DNR does not manage easements reserved under sec. 17(b) of the Alaska Native Claims Settlement Act.

Why make the public look up the conditions in AS 38.04.200? State them here (Kenai Peninsula Borough Trails Commission). **Response:** The Department of Law forbids administrative agencies to repeat, restate, or paraphrase statutes, for excellent reasons set out in its *Drafting Manual for Administrative Regulations*. Compliance with the manual is mandatory. A person who reads regulations without first reading the statutes they implement will see only part of the picture.

Expand this to say what activities aren't allowed, too: ATV's? snowmachines? Camping? Picnicking? (Matanuska-Susitna Borough) **Response:** The general rule is that the public only has the right of access on an access easement. DNR plans to specify that fishing is allowed for two reasons: first, access to the fish is a "public trust doctrine" right; secondly, DNR wants to clarify how DNR easements differ from ANCSA 17(b) easements (which forbid fishing). But unless it is only a pedestrian easement or some other restriction applies, ATV's and snowmachines are allowed (they provide a means of access); camping and picnicking are not (they are not necessary for access).

Our biggest concern is utility use on section-line easements, because DOTPF must pay to relocate the lines during highway construction. In 11 AAC 51. 200, cross-reference 17 AAC 15.031 to loop DOTPF into management (DOTPF). **Response:** In Phase 2, DNR and DOTPF must find a way to resolve the apparent conflict between AS 19.30.400 (which says public use of RS 2477 rights-of-way is subject to DNR's regulations unless the right-of-way is transferred to DOTPF) and AS 19.25.010. The latter statute says utilities can be installed on state rights-of-way only if authorized by a DOTPF permit. If DOTPF "occupies the field" with regard to utility

authorization, DNR has no role, nor any need to be involved. (Unfortunately, 17 AAC 15.031, the regulation cited by DOTPF, takes a different direction: "Utility permits are required only for section-line rights-of-way presently used or proposed for use by the department.") One solution may be to split easement management into separate parts, utility use and public use, with a different "default setting" for each.

11 AAC 51.200 (saying DNR manages RS 2477 rights-of-way) should include an exception for section-line easements because DNR management will be burdensome for electric utilities. We don't believe that AS 19.30.400 was intended to apply to section-line easements. Also, DNR and DOTPF have a cooperative management agreement saying that DOTPF has sole authority over management of highway rights-of-way (Ak. Rural Electric Cooperative Association/ARECA). We are adamantly opposed to any change that would expand the role of DNR with respect to section-line easements. We adopt the comments of the Alaska Rural Electric Cooperative Association (Homer Electric Association). **Response:** AS 19.30.400 applies to all 66-foot-wide section-line easements and the inner portion of many 100-foot-wide section-line easements, not just to historic trails, and says public use is under DNR's regulations. So instead of making an exception for all use of section-line easements as ARECA recommends, which would create a conflict with AS 19.30.400, any such exception—which will be dealt with in Phase 2—should apply only to utility use, tracking AS 19.25.010. See further discussion above. Note that the DNR/DOTPF cooperative management agreement was signed in 1994, so it cannot be interpreted as an attempt to transfer RS 2477 management authority to DOTPF under AS 19.30.400 (enacted in 1998). The cooperative agreement deals with Interagency Land Management Assignments from DNR to DOTPF, which are individual, numbered case files authorizing specific highway rights-of-way and airport lands. The agreement does not mention or deal with section-line easements as a class or RS 2477 rights-of-way as a class.

We don't think AS 19.30.400 was intended to let DNR grab DOTPF's authority over section-line easements. This is a power grab. AS 19.10.010 is clear that DOTPF has the authority to manage section-line easements. AS 19.30.400 is cloudy. The proposed changes represent tremendous and draconian changes in the operations of state government. DNR's procedures are expensive, cumbersome and intrusive (Keith Quintavell, Matanuska Electric Association). **Response:** AS 19.10.010 does not state who manages section-line easements, although AS 19.25.010 (in a different chapter) does clearly say DOTPF is in charge of utility use on "a state right-of-way." AS 19.30.400 is equally explicit regarding "public use." Separating "public use" from "utility use" on section-line easements and RS 2477 rights-of-way (see discussion above regarding DOTPF's and ARECA's comments) would resolve this statutory overlap.

We would appreciate recognition of ADF&G's role before DNR renders any decisions that would manage easements for "traditional means of access." These limits could dramatically affect our operations and users. A few years ago, agency representatives worked on a draft policy for the Governor. That should be revisited before any final decision. Or, we can provide our views in detail in the next few weeks before rendering final decisions on these regulations. There are numerous options here. Look at the legislative audit report, too (ADF&G). **Response:** ADF&G appears to misunderstand what this proposed regulation would do. It proposes to update two existing regulations on access restrictions, 11 AAC 53.330(f) (1977) and 11 AAC 51.100 (1992). Although accurate when originally written, these regulations were largely invalidated in 1997 when new legislation went into effect as AS 38.04.055, AS 38.04.058, and AS 38.04.200. These new statutes strictly limit DNR's authority to restrict access and give special protection to "traditional means of access." The existing regulations must be conformed with them lest someone mistakenly rely on those regulations as current state policy. DNR still plans to do this, although the effort will be postponed until Phase 2. The proposed 11 AAC 51.200 does not rely on any draft Governor's policy from earlier years, and DNR does not know what draft policy ADF&G refers to. Unless the draft policy was written after the 1997 legislation, it likely dealt with some other use of the term "traditional means of access."

AS 38.04.058 doesn't address private land encumbered by an easement, so you can't use that as

authority to manage easements. In fact, it requires the private landowner's concurrence and limits DNR's authority (DNR's Div. of Agriculture). **Response**: AS 38.04.058 unquestionably does address private land encumbered by a public easement DNR reserved before it sold the land. It deals explicitly with management of "an easement or right-of-way reserved under AS 38.04.050, 38.04.055, or other law." Those statutes require DNR to reserve public access easements to and through land DNR plans to sell. The commenter similarly appears to misunderstand the requirement in AS 38.04.058 for written concurrence by the landowner. That right of concurrence applies only to restrictions on access, not permission **for** access. (It makes sense to ask for the landowner's concurrence before DNR imposes access restrictions: that easement may provide the sole access to the landowner's property.) AS 38.04.058 does not give private landowners the right to veto, control, or restrict public use on public easements.

Is DNR serious about managing all easements not currently in use by DOTPF? Most easements need no management (Pat Kalen, American Congress on Surveying & Mapping). **Response:** DNR's proposal does not deal with all public easements in the state but only with specific "state interest" easements. See AS 19.30.400, for instance. Unfortunately, many easements **do** need management. To reduce the burden, DNR proposes to allow for transfers to municipalities as well.

11 AAC 51.210, GENERAL USE CONDITIONS (POSTPONED UNTIL PHASE 2).

(a)(4) is important and makes clear no permit is needed to use an easement, but this should include RS 2477's (Alaska Miners Association). **Response:** Throughout 11 AAC 51, "easement" is used to include RS 2477's.

By allowing fishing from public easements, DNR is inviting recreational use of the private property underlying them. What next? Camping? Hunting? Trapping? Fishnets and fish wheel anchors? Cabins? Parking motor homes? The allowed uses of section-line easements have been and will continue to be established by the courts. The validity, let alone uses, of RS 2477 rights-of-way have yet to be determined by the courts. It is presumptuous of DNR to say what can happen on these easements (Quintavell for Matanuska Electric Association). **Response:** The proposed regulation deals only with fishing, not with recreational use of private property. The fish do not belong to the private property owner. As for public use of RS 2477 rights-of-way in general, AS 19.30.400 clearly envisions that DNR and DOTPF will both have regulations on such use. DNR does not understand why a utility company would object to public use of such public easements. Utility use is only a secondary use of section-line easements and RS 2477 rights-of-way. General public access is the primary use, and utility use cannot interfere with it.

Limit fishing to easements on state land, then define state land to exclude Mental Health land (Mental Health Trust Land Office). **Response:** 1) The commenter's proposed wording would unintentionally forbid the public to fish on state land, unless an easement has been reserved. Easements are not usually reserved on land remaining in state ownership because they are not necessary: the public has an inherent right of access on state land. 2) Fishing is a key reason for reserving public easements along streams, lakes, and coasts before conveying the underlying land. If the public loses access to "public trust doctrine" resources, they effectively become private. DNR has a constitutional obligation to ensure "free access" to the navigable and public waters of the state.

In (a)(1) you say even the landowner can't block the easement without DNR's written authorization, and in (a)(4) you say what equipment can be used on the easement without a permit. But agricultural owners will need to use farm equipment on the easement, and they also need to block or obstruct unused easement corridors for cropland, pasturage, etc. (Div. of Agriculture). **Response:** (a)(4) deals with public use of the easement, not the landowner's use. The landowner has the inherent right to use farm equipment on his land—so long as he doesn't block the easement without authorization. See 11 AAC 51.100(e), which clarifies that DNR's permit regulations do not apply to the landowner's use of his own land. However, it is not within

the landowner's rights to declare a public easement "unused" and then proceed to make it unusable by the public. Both parties, public and private, have rights that must be respected.

Change all of this. Delete the language saying the landowner can't block the access, for instance. Make DNR responsible for constructing and maintaining access improvements, enforcing use restrictions, and repairing land damaged by use of the easement (Mentasta Traditional Council). **Response:** The commenter's proposal would not be consistent with applicable law.

The borough recommends a section outlining acceptable or allowable uses on each type of easement DNR manages: public access easements, trail easements, utility easements, RS 2477 rights-of-way [and seven other types including 17(b) easements] (Kenai Peninsula Borough Trails Commission) **Response:** DNR does not manage 17(b) easements. Although the commenter may envision an elaborate structure of use restrictions based on the term used in the property deed or on the plat, DNR does not see this as necessary or desirable. Utility easements are obviously for utility service. A utility easement is not a public access easement unless both purposes were stated in the reservation (e.g. "public access and utility easement"). The other labels all refer to public access easements of varying widths. Public access easements obviously allow public access. Alaska case law says that unused section-line easements and impliedly other "public highway" easements can also be used for utilities, not just people transportation.

Add exceptions—the same as for the item on vehicles—saying the public can fish from an easement unless use has been restricted, there's a special use lands designation, etc. (Kenai Peninsula Borough Trails Commission). **Response:** DNR can envision circumstances in which vehicle use must be restricted, e.g. at breakup. But DNR does not foresee any circumstance in which DNR would be called upon to prohibit fishing. (ADF&G, not DNR, regulates whether a fishery is open or not.)

DNR should reword the clause saying it's not responsible for constructing or maintaining improvements on an easement. They are part of management, and DNR may be responsible for them (Kenai Peninsula Borough Trails Commission). **Response:** DNR does not believe the legislature intended that DNR take responsibility for constructing or maintaining improvements on an easement.