

## ***Implications of a Tier 3 Designation on Watershed Users***

This paper addresses the potential implications of a Tier 3 Outstanding National Resource Water (ONRW) designation on waterbodies in Alaska.

The Tier 3 designation arises out of federal antidegradation rules. These rules were promulgated by the U.S. Environmental Protection Agency (EPA) under the Clean Water Act and are designed to ensure that the nation's waters are not degraded. The most stringent of these rules is called "Tier 3." Any waterbody that is designated an ONRW cannot, under the Tier 3 rules, be degraded beyond the baseline conditions. However, Tier 3 goes beyond enforcing current water quality regulations. Instead, the Tier 3 rules prohibit any new activities and expansion of existing activities that change water quality in any way. *This prohibition would apply even in situations where a new discharger could show that its discharge meets applicable water quality rules, and fully protects fish, aquatic life and other water uses.*

This paper explores some of the implications of a Tier 3 designation on the types of activities commonly seen on Alaska waterbodies.

- **Water Quality Standards Apply to All Operations in Alaska.**

The Alaska water quality standards play a key role in understanding how a Tier 3 designation would impact uses in a designated ONRW watershed. The Alaska water quality standards provide:

A person may not *conduct an operation* that causes or contributes to a violation of the water quality standards set by this chapter.<sup>1</sup>

The water quality standards set by this chapter specify the degree of degradation that may not be exceeded in a waterbody as a result of human actions. The water quality standards *are set by the antidegradation policy* [and] the water quality criteria ...<sup>2</sup>

There are two key points:

- First, Tier 3 is part of the Alaska water quality standards. These standards apply to "operations" rather than simply to activities that discharge pollution into a waterbody.
- Second, the water quality standards are self-executing and apply to "operations". Nothing in the regulations limits the application of water quality standards to activities that *require a permit* from the Alaska Department of Environmental Conservation (ADEC), Alaska Department of Natural Resources (DNR), or other agencies.

Together, the existing regulations would prohibit any person from conducting an operation that degrades a designated Tier 3 waterbody, regardless of whether that activity requires a permit or other authorization from ADEC, or another state or federal agency. This regulatory mandate is *self-executing*, in the same way that a speed limit posted on a road applies to activities on that

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<sup>1</sup> 18 AAC 75.010(a).

<sup>2</sup> 18 AAC 70.010(b).

road even though cars do not have permits requiring them to abide by the speed limit. This is a key point.

The conclusion that Tier 3 should be interpreted broadly is supported by the EPA. In the preamble supporting its antidegradation rulemaking, EPA stated:

*It is the position of EPA that, at a minimum, States and authorized Tribes must apply antidegradation requirements to activities that are “regulated” under State, Tribal, or federal law (i.e., any activity that requires a permit or a water quality certification pursuant to State, Tribal or federal law, such as CWA 402 NPDES permits or CWA 404 dredge and fill permits, any activity requiring a CWA 401 certification, any activity subject to State or Tribal nonpoint source control requirements or regulations, and any activity which is otherwise subject to State or Tribal regulations that specify that water quality standards are applicable).*<sup>3</sup>

Degradation is commonly associated with point and nonpoint sources of pollution. Common nonpoint sources include urban runoff, domestic animals, road construction, timber harvests, off-road vehicles, boats, septic systems, agriculture, and damage to shorelines from activities, such as fishing, piers, and buildings. Common point source discharges include treated sewage, solid waste, chemical wastes, biological materials, seafood processing wastes, dredged soil, mining wastes, rock, sand, dirt, munitions, heat, garbage, discarded equipment, and runoff from construction or agricultural sites. The Tier 3 program would apply to all of these potential sources even in situation where the activity may not be regulated under state and federal permits.

- **ADEC’s Proposed Antidegradation Regulations Do Not Impact How Tier 3 Would Be Applied Outside of the Clean Water Act Context.**

ADEC’s proposed 2014 antidegradation regulations would only apply to activities regulated under the federal Clean Water Act,<sup>4</sup> such as ADEC point source discharge permits and Corps 404 permits. *However, the designation of a waterbody as Tier 3 would apply to a broader category of activities than those regulated under the Clean Water Act permitting programs.* Specifically, any activity that has the potential to degrade a designated ONRW and its tributaries could be prohibited.

- Restrictions Could Arise in Three Ways

1. Regulators could choose to impose restrictions on their own initiative.

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<sup>3</sup> 63 Fed. Reg. 36742, 36780 (July 7, 1998) (EPA preamble to proposed Water Quality Standards Regulations).

<sup>4</sup> ADEC proposed antidegradation implementation methods during January 2014. See [http://dec.alaska.gov/water/wqsar/Antidegradation/docs/Antidegradation\\_2014\\_Amendments\\_Public\\_Notice\\_Version.pdf](http://dec.alaska.gov/water/wqsar/Antidegradation/docs/Antidegradation_2014_Amendments_Public_Notice_Version.pdf). The regulations acknowledge that the antidegradation policy applies to *all* waters of the state, not just to activities regulated under the Clean Water Act. The proposed regulation only addresses how Tier 3 would apply to waters regulated under the federal Clean Water Act. See proposed 18 AAC 70.016 (a).

2. A third-party could protest a permit, authorization, or approval for an offending activity. It would argue that the activity violates State law if it has the potential to degrade water quality or uses of the water.
3. Any person could petition ADEC, DNR, or Alaska Department of Fish and Game (ADF&G) to promulgate a regulation to limit or manage a given activity.<sup>5</sup>

- **Existing Unpermitted Discharges Have Unclear Status.**

ADEC and EPA interpret the Tier 3 regimes as prohibiting so-called “new and expanded discharges.” It is unclear, however, whether this grandfathering concept would be limited to existing discharges that are *permitted prior* to the Tier 3 designation (*i.e.*, compliant with applicable requirements). This could be a very significant issue for ongoing activities which have existed for years but – for whatever reason – have never been fully permitted or which temporarily ceased operations.

- **Tributaries of Designated Tier 3 Waterbodies.**

ADEC and EPA take the position that discharges into tributaries of a Tier 3 waterbody must be regulated under a similar regime that would apply to the Tier 3 waterbody itself. This means that any new or expanded discharge into a tributary of an ONRW would be prohibited if the discharge has the potential to degrade the ONRW. This has the effect of extending the “no discharge” zone many miles upstream into the various tributaries of the designated ONRW.

- **Activities That Could Potentially Be Impacted by a Tier 3 Designation.**

- Motorboats

Motors release hydrocarbons into the water as part of the normal operation of the engine. It seems very likely that an argument will be made that the state must take steps to prevent an increase in degradation of water quality from motorboat traffic. This would almost certainly lead to a requirement for four-stroke motors in any ONRW and, perhaps, caps on motorboat traffic to ensure that there are no expanded discharges into the water. Boat traffic that causes excess turbidity could be prohibited. Speed limits to minimize wakes (turbidity/erosion) would likely be considered by agencies with relevant oversight.

- Residential and Commercial Septic Systems

A Tier 3 designation would categorically prohibit new direct discharges of treated sanitary flows into a designated waterbody. However, the use of leach fields and other facilities that do *not* involve direct discharge could also be prohibited. Some of these facilities impact groundwater. If groundwater is hydrologically connected to an ONRW, ADEC would have an obligation to ensure that its approval of the sewage system would not allow any flows to come into contact with the Tier 3 waterbody, even if the contact were to occur indirectly through groundwater.

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<sup>5</sup> Any person can petition an agency to promulgate a regulation. See AS 44.62.220.

- Point Source Discharges

Any new industrial discharge into an ONRW, other than temporary discharges, would be prohibited. This would include stormwater discharges, such as those typically seen at industrial, light industrial, road construction, and commercial yards. Any expansion of an industrial discharge source would be prohibited. ADEC has stated that existing discharges would be grandfathered; however, even ADEC acknowledges that these grandfathered operations cannot expand their discharges. Tier 3 is a rigid, growth-reducing scheme that will limit economic activities reliant on access to watersheds.

- Landfills

Most landfills discharge pollutants and a Tier 3 designation would likely make it very difficult to permit a landfill in an ONRW watershed because the discharge would lead to degradation (even if nominal) of the ONRW. Existing unpermitted landfills would likely be prohibited from obtaining discharge permits.

- Stormwater Permits for Construction Activities

ADEC's construction permit provides authorization for persons and companies to discharge stormwater and other flows from construction activities, such as road building, the construction of homes and buildings, and other activities that disturb an acre or more. ADEC would apparently allow temporary discharges, but this means discharges over "weeks and months" rather than years. The restriction could impair longer-term construction projects, such as road upgrades or building projects that extend over multiple months or over several years.

- Timber Harvest

Timber harvest activities lead to runoff into streams from harvesting activities and road-building. Even if a point source discharge permit is not required for these activities, DNR, the U.S. Forest Service, and other agencies would need to assess whether the authorization of activities could lead to degradation of a designated ONRW.

- Placer Mining

The discharge from placer mining is regulated under an Alaska Pollutant Discharge Elimination System (APDES) permit. The discharge from a placer mine is ongoing and would not be subject to the exception for temporary discharges. It would be regulated in the same way as any other industrial point source activity. Any new or expanded discharge would be prohibited. The Tier 3 regime would effectively preclude any new placer mining in an ONRW watershed. Existing placer mines would be locked into an inflexible permit that would preclude any expansion of operations and probably limit their ability to operate in a new location (a prohibited new discharge).

- Hard Rock Mines

A Tier 3 designation would make it very difficult to develop a new hard rock mine in any watershed with a designated ONRW. Although modern hard rock mines have stringent permit

requirements that require state-of-the art pollution control, a proposed mine would have to additionally show that it would cause no degradation to the Tier 3 waterbody. This goes above and beyond compliance with applicable laws and regulations, and would impose a standard that is probably impossible to meet for most new mines.

- **Gravel Pits**

Gravel pits need APDES permits for construction and operations. These are ongoing discharges and would not be permitted as an exception for temporary discharges. The Tier 3 designation would effectively preclude any new quarries in an ONRW watershed. It would also be very difficult to expand an existing quarry because doing so would increase the pollutants discharged into the Tier 3 waterbody.

- **Loss of Local Control**

In many places of the state, Alaska residents enjoys significant local input and control over management decisions affecting local waterbodies. This level of control would be ceded, in part, to the Tier 3 process because an ONRW designation imposes an inflexible rule on a watershed. This means that even if local citizens and advisory councils favor certain activities and view them as compatible with protection of a watershed, agencies may still be required to limit or prohibit those activities.