

LEGAL SERVICES

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MEMORANDUM

May 2, 2019

SUBJECT: Statutory authority of the Department of Environmental Conservation to designate Outstanding National Resource Water (HB 138; Work Order No. 31-LS0811\A)

TO: Representative Geran Tarr
Attn: Thatcher Brouwer

FROM: Emily Nauman
Legislative Counsel 

You asked whether the Department of Environmental Conservation (department) has the statutory authority to designate waters as tier three or Outstanding National Resource Water (ONRW). It appears to be within the department's broad statutory authority to identify and manage waters of the state.

Background.

The Clean Water Act, at sec. 303,¹ requires each state to establish antidegradation policies. More specifically, federal regulations require the state to develop and adopt a policy to maintain and protect "waters of exceptional recreational or ecological significance" that "constitute an outstanding national resource."² Waters receiving the designation are afforded the highest level of environmental protection. Note that federal law does not require a state to designate an ONRW for protection, rather, the state must have a mechanism for nominating and designating an ONRW. In 2018, the department adopted regulations setting out the state's antidegradation policy.³ Currently, however, there is no nomination process for the designation of ONRWs. The department suggests an interested person submit an ONRW designation request to a legislator for introduction as a bill.⁴

Under AS 46.03.080, the department has the authority to "establish standards of quality and purity or group the designated waters of the state into classes as to minimum quality and purity, or both." AS 46.03.080 could be interpreted to include the authority to designate an ONRW, or at the very least could be interpreted to allow the department to

¹ 33 U.S.C. 1313.

² 40 C.F.R. 131.12(a)(3).

³ <https://dec.alaska.gov/water/water-quality/standards/antidegradation/>.

⁴ <https://dec.alaska.gov/media/14389/final-tier-3-guidance-11-21-2018.pdf>.

Representative Geran Tarr
May 2, 2019
Page 2

classify and protect waters in a way that replicates the ONRW designation. Citing the authority of AS 46.03.080, the department adopted regulations to protect certain waters as ONRW.⁵

Ultimately, I believe it is likely a court would find that the department has the statutory authority to designate or manage a water as an ONRW. Statutory interpretation, including the authority flowing from a statute, is considered to be within the special expertise of courts, not the administrative agencies.⁶ In 2010, the Alaska Supreme Court summarized the method it uses to examine an agency's statutory interpretation:

Our goal when interpreting a statute is to give effect to the intent of the law-making body with due regard for the meaning that the language in the provision conveys to others. We will adopt the rule of law that is most persuasive in light of precedent, reason, and policy after considering the plain meaning of the statute, the legislative purpose of the statute, and the intent of the statute. When reviewing an agency decision involving statutory interpretation and determination of legislative intent, we apply the substitution of judgment standard. But we may defer to an agency's interpretation of a statute if undefined or ambiguous terms appear in the statute.^[7]

In this instance, it does not appear to me that the department's authority is ambiguous.⁸ Under AS 46.03.050, the department "has jurisdiction to prevent and abate the pollution of the waters of the state." More specifically, AS 46.03.080 is constructed expansively to give the department the ability to "group the designated waters of the state into classes as to minimum quality and purity, or both." The ability to classify waters as those of exceptional significance seems to flow naturally from the broad authority provided to the department in statute. I find it unlikely a court would decide differently.

If I may be of further assistance, please advise.

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⁵ 18 AAC 70.015(a)(3) states, "if water constitutes an outstanding national resource, such as water of national or state park or wildlife refuge or water of exceptional recreational or ecological significance, the quality of that water must be maintained and protected."

⁶ *Hendricks-Pearce v. State, Dep't of Corr.*, 323 P.3d 30, 35 (Alaska 2014).

⁷ *Bradshaw v. State, Dep't of Admin., Div. of Motor Vehicles*, 224 P.3d 118, 122 (Alaska 2010). Internal citations and quotations omitted.

⁸ Relatedly, the Environmental Protection Agency has approved the adoption of state anidegradation policies in regulation.
<https://dec.alaska.gov/media/8285/ak-wqs-antideg-im-rule-action-sd-final.pdf>