



May 1, 2019

Dear Alaska House Resources Committee,

Thank you for the recent opportunity to testify on HB 138. There were a number of important questions raised during the testimony, including the four questions below that are key to making a decision on this bill. We're writing today with additional information from ADEC and EPA to fill the gaps that were exposed. Please also find attached the referenced documents for your records.

1. Is there currently a Tier 3 designation process in place?

- Yes. Alaska has three pathways to designate a Tier 3 Water, but has not used them.
- In the absence or defeat of HB 138, they remain "present and available".
- They are defined in ADEC's 2010 Interim Antidegradation Implementation Guidance as follows:
 - i. Waterways in national parks, state parks, or wildlife refuges or waterways considered to have exceptional recreational or ecological significance can be designated as Tier 3 waters, during the consideration of wastewater discharge permit
 - ii. DEC has the authority to review nominations and designate Tier 3 waters through the triennial review process
 - iii. The legislature has always had the authority to designate Tier 3 waters at any time, in addition to the above avenues designation
- From ADEC's Interim Antidegradation Implementation Guidance, p. 5):
 - "...in addition to considering possible tier 3 designation as part of a permit action, waters could also be designated as tier 3 through two other existing legal mechanisms, prior to any permitting action. A person could propose a tier 3 designation as part of the division's existing triennial review process, where the public is invited to suggest changes to the state's water quality standards."
 - "Of course, people seeking tier 3 designations during this interim period may also pursue that goal before the state legislature in the first instance, by advocating for a bill recognizing an ONRW water."
- On March 9, 2018, ADEC submitted new antidegradation guidance to the EPA to replace their interim antidegradation implementation guidance. The new guidance only address Tiers 1 and 2, failing to address Tier 3. In the absence of new guidance for Tier 3 designation methods, the methods in the 2010 interim guidance stand.
- The three designation methods outlined in the 2010 interim guidance have been acknowledged and approved by the EPA in a letter dated July 26, 2018: *"The implementation methods section at 18 AAC 70.016 is new, represents the*



majority of ADEC's submittal, and generally replaces Alaska's 2010 interim antidegradation implementation guidance. However, in its response to comments when addressing a concern that Alaska's rule making did not include a process for nominating and designating waters for Outstanding National Resource Water protection, ADEC referred to the interim antidegradation implementation guidance. ADEC stated that Tier 3 designation methods are still present and available, and that ADEC will continue to work with all stakeholders on a final nomination and designation process (see "Antidegradation Implementation Methods Regulations Responsiveness Summary," ADEC, November 2017, Comment Summary 51)." (p.1)

- The referenced Comment Summary 51 is also attached.

2. Does a Tier 3 designation impact everyday uses of the waterbody, such as running a boat and private septic tanks?

- No. Tier 3 designations only deny permits for long-term degradation, such as a large-scale industrial plants dumping waste into the waterway. Short-term uses, such as motor boats, cleaning fish, culture camps, and private septic systems, are not impacted by a Tier 3 designation.
- From ADEC's Tier 3 Fact Sheet: "In general, activities that do not require Alaska point source discharge permits (APDES permits) are not affected by a Tier 3 designation. A Tier 3 designation would not impact normal activities not currently regulated by the state . . . Individual septic systems discharging to a leach field are considered a land application that does not require an APDES permit. . . Outboard motors, road run-off and road plowing, salting, sanding are considered nonpoint source discharges." (p. 3)
- There is also an exception for any temporary point source impacts: " . . there is an exception to allow activities that result only in temporary, short-term, and limited change in the water quality of a Tier 3 water, for example, for construction activities." (ADEC's Tier 3 Fact Sheet, p. 1)

3. Is a Tier 3 process reversible?

- Yes. It would be easier, however, to do so through an administrative process via ADEC than through a legislative-only process.
- From ADEC's Tier 3 Fact Sheet: "Currently, there is no precedent for removing an ONRW once in place; neither is there federal regulation or policy prohibiting such an action." (p. 2)
- From an email to ADEC from EPA, dated 1/26/16: " . . a state has discretion to remove ONRW protection from a water, if it chooses to do so consistent with state law, and the action is done consistent with the federal WQS rules for revising water quality standards (including public participation of course)." (p.1)

4. Is a Tier 3 designation a land-use issue?

- No. A Tier 3 designation is nothing like establishing a park and does not impact how the adjacent land is used. Owners of land adjacent to a waterbody have no inherent right to degrade waters of the state. If this were true, then an



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upstream landowner authorized to discharge and degrade a waterbody would be taking something of value from downstream landowners. This 'taking' of the ability of a downstream landowner to further degrade the water is not recognized under state law or guidance.

- From ADEC's Tier 3 Fact Sheet: "Land uses, such as logging or mining, would not be impacted as long as the ONRW water quality was maintained and protected." (p. 4)

Please don't hesitate to contact us for further information.

Thank you,

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