



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

**Department of
Environmental Conservation**

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March 13, 2020

The Honorable Geran Tarr
Co-Chair, House Resources Committee
State Capitol, Room 28
Juneau, AK 99801

The Honorable John Lincoln
Co-Chair, House Resources Committee
State Capitol, Room 102
Juneau, AK 99801

Dear Representatives Tarr and Lincoln:

The Department of Environmental Conservation (DEC) fielded questions during and after the hearings of HB 138 Natural Resource Water Designation on Monday March 9 and Wednesday March 11. I have listed those questions and provided answers for each, as follows. We are pleased to provide the committee with the information necessary to make an informed decision on this bill.

1. A copy of 18 AAC 70.017 (Tier 3 Outstanding National Resource Water) was shared with the committee? Where did this come from?

18 AAC 70.017 was a section in the January 2014 public notice draft antidegradation regulations. DEC revised the draft antidegradation regulations, removed 18 AAC 70.017 based on public comments, additional stakeholder input, and the belief that the legislature is the appropriate body to make a Tier 3 designation, and put them back out for public review in 2017. The February 2017 final antidegradation regulations did not include 18 AAC 70.017.

2. There were questions posed about Tier 3 designations and whether a project(s) would be allowed to trade or expand its discharge affecting a Tier 3 water.

The EPA interprets the 'water quality to be maintained and protected' provision as requiring no new or increased discharges to Tier 3 water and no new or increased discharges to tributaries of Tier 3 waterbodies that would result in lower water quality in the Tier 3 water. The only exception is for short-term and temporary changes.

This provision has been viewed differently by States, Tribes, and EPA Regions. Some of these groups have interpreted this provision to allow new discharges as long as the water quality is either maintained or improved. Alternatively, some have interpreted water quality in terms of characteristics for which the water body was selected as Tier 3 and have strictly maintained those characteristics while allowing other characteristics to become degraded.

The Alaska Water Quality Standards at 18 AAC 70.016(d)(4) address this provision and state, in part, that "...the department will not authorize a discharge to a Tier 3 water or tributary to a Tier 3 water unless the department finds that

- (A) the lowering of water quality is temporary and limited, including any lowering of water quality due to dredging or fill placement authorized under 33 U.S.C. 1344 (Clean Water Act, sec. 404 permit) permit;
- (B) no lowering of the Tier 3 water quality will occur and existing uses and Tier 3 water quality will be maintained or protected;..."

A strict interpretation of the Alaska Water Quality Standards indicates that new or increased discharges to a Tier 3 water that would result in a lower water quality would not be allowed.

3. How is the baseline water quality of a Tier 3 water determined, and how is that baseline utilized in the review and permitting of a project?

There are a variety of reasons for which a Tier 3 water might be nominated, including ecological reasons (a water with an upwelling source creating an ice free environment that then supports a late run of salmon), recreational reasons (a meandering highly productive river system that is utilized by a recreating population), and water quality reasons (the clarity of a particular water body or the absence/excess of a particular parameter like copper or salinity). Amendment 14 (31-LS0811\K.24 and dated 3/5/20) of HB 138 (CSHB 138 31-LS0811\K and dated 2/4/20) addresses, in part, the nomination requirements for a Tier 3 water. These include, in part, a general description of what makes the water an outstanding national resource water, the recreational or ecological value, and the existing water quality of the nominated water.

An applicant that proposes a discharge listed in 18 AAC 70.016(a)(1) to a Tier 3 water or tributary to a Tier 3 water is required to submit the information specified under 18 AAC 70.016(a)(5), baseline water quality information under (a)(6) of that section, and information on the quality of the discharge and the effect of that discharge on the water quality of the Tier 3 water (18 AAC 70.016(d)). DEC would conduct a Tier 3 antidegradation analysis and find whether the proposed discharge would degrade the Tier 3 water quality or uses of the Tier 3 water. DEC would consider the water quality parameters and/or the uses described as the reason for the Tier 3 designation. As stated above, under 18 AAC 70.016(d)(4), DEC may only authorize a discharge to a Tier 3 water or tributary to a Tier 3 water if the lowering of water quality is temporary and limited, no longer-term lowering of the Tier 3 water quality will occur, and existing uses and Tier 3 water quality will be maintained and protected.

Based on the current regulations, it is unlikely that DEC could authorize any proposed activity with a discharge into or affecting a designated Tier 3 water.

If you have additional questions, please do not hesitate to contact our Legislative Liaison Laura Achee at laura.achee@alaska.gov or 907-465-5009.

Regards,

A handwritten signature in blue ink, appearing to read "Randy Bates".

Randy Bates
Director
Division of Water