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March 4, 2016

Senator Cathy Giessel, Chair
Senate Resources Committee
State Capitol Room 502
Juneau, AK 99801

Re: SB163, National Resource Water Nomination/Designation

Dear Senator Giessel:

The Alaska Miners Association (AMA) writes to offer comments on SB163, a bill titled “An Act relating to the nomination and designation of state water as outstanding national resource water.”

AMA is a non-profit membership organization established in 1939 to represent the mining industry in Alaska. We are composed of more than 1,800 members that come from seven statewide branches: Anchorage, Denali, Fairbanks, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. Our members include individual prospectors, geologists, engineers, vendors, suction dredge miners, small family mines, junior mining companies, and major mining companies. We look for and produce gold, silver, platinum, molybdenum, lead, zinc, copper, coal, limestone, sand and gravel, crushed stone, armor rock, and other materials.

On February 10, members of the Alaska Department of Environmental Conservation (ADEC) met with representatives of AMA to discuss the Administration’s introduction of SB163. As we understand, the U.S. Environmental Protection Agency requires states to have a process in place in which individuals and/or organizations can nominate waters to be designated as a Tier 3 Outstanding Natural Resource Water (ONRW). To meet this requirement, ADEC has proposed this bill to mandate that state waters cannot be designated as an ONRW except by an Act of the Legislature.

By way of background, waters designated as an ONRW are provided the highest level of protection under the State’s antidegradation policy. From ADEC: “The federal and state antidegradation policies require water quality to be maintained and protected in a Tier 3 water. The interpretation of this provision typically is that new or increased discharges to a Tier 3 water or its tributaries are not permitted if the discharges would result in a lowering of water quality (i.e., cause degradation). The only exception to this prohibition is to allow activities that result only in a temporary, short-term and limited change in the water quality of a Tier 3 water; for example, construction activities that only impact water quality during construction. Such activities must not permanently degrade water quality.”

Designation of an ONRW and subsequent Tier 3 water protection would, without doubt, be a barrier to resource development, economic development, and some crucial municipal projects. Conceptually, the AMA would prefer that the State of Alaska request that Alaska be exempted from the provision within the Clean Water Act (CWA) that requires the State to have a designation process in place. However, it may not

be possible to secure this exemption. While there may be cases in which nomination of an ONRW is warranted, AMA believes the process and any designation could be used by some anti-development individuals or organizations to stop responsible development projects. Therefore, we believe it is necessary and appropriate for the Legislature to be tasked with this important rule. The AMA also believes the nomination process should include an opportunity for stakeholder appeal of the nomination prior to Legislative review. In that case, AMA would support SB163, on the condition that recommendations are incorporated into an updated version of the bill, as outlined below.

1. Section 1, item a, Line 6: "Water of the state may not be designated **or managed** as outstanding national resource water except by an Act of the Legislature."

It is imperative that when a state water is nominated for designation as an ONRW, it should not be managed or treated as such until an Act of the Legislature confirms the designation. Actions that manage the water with Tier 3 protections prior to designation are inappropriate.

2. Section 1, new item b, line 7: AMA suggests including the following language: "The department's management of a water body, or particular stretch of a water body, as an outstanding national resource water, shall be limited solely to that portion of a waterbody designated by the legislature and shall not extend to tributaries, adjacent waters, or any other waters of the state unless such waters have been expressly designated by the legislature as outstanding natural resource waters."

Designating a water as an ONRW shall apply to the area or portion that merits Tier 3 protections only. ONRW and management actions resulting from its designation should not apply to upstream activity, tributaries, and any other adjacent waters. Parties that nominate waters for ONRW designation must be required to be specific as to the portion of the waterbody that is being nominated, and designations cannot go further or be applied to any waters outside the intended designation area.

3. Section 1, line 11: add sentence that reads "The department will reject nominations that fail to satisfy any information requirements established by the department in regulation."

ADEC should have a mechanism in place in which it can dismiss illegitimate nominations, so that they do not have to forward baseless information to the Legislature.

4. Section 1, Page 2, line 1, item e: "Within 10 days after the convening of each Legislature, the commissioner shall transmit to the Legislature for consideration a list of nominations and related material that were received ***by the department within the 24 month period preceding*** September 1 of the previous year.

Nominations of ONRW waters should be done constructively; therefore, AMA believes the agency should start each nomination period with a clean slate, ensuring that previously nominated waters that the Legislature declined to act on aren't forwarded to the Legislature ad infinitum. Requiring new nominations every two years will help to mitigate the duplicative and outdated nominations of waters already addressed as being inappropriate for an ONRW designation. A list of nominations should only be forward to the Legislature once per session. Nominations received by the agency after the September 1 deadline should be considered in the nomination period for the following Legislature.

5. Add a new Section 2 which is attached to this letter as Exhibit A.



Criteria should be added by which the relevant State agencies prepare a record of a nomination for the Legislature's consideration of an ONRW. Whether or not those criteria have been met should be subject to appeal. Finally, if a waterbody is important and unique enough to warrant Tier 3 consideration, DEC should submit a report to the Legislature explaining how it plans to manage existing point source dischargers to ensure compliance with permit stipulations and manage non-point dischargers to ensure they comply with all regulatory requirements.

AMA also intends to provide these suggestions directly to ADEC staff, and we are hopeful that inclusion of our suggestions, as well as the Committee feedback the agency received at the February 15 hearing, will be incorporated into this bill. AMA greatly appreciated the opportunity to discuss this bill with ADEC and greatly appreciates the opportunity to submit our comments for the record before your Committee.

Please don't hesitate to contact me if you have any questions on our comments.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Deantha Crockett', with a long, sweeping flourish extending to the right.

Deantha Crockett
Executive Director

Attached: AMA Comments SB163 Exhibit A; Criteria for Tier 3 designation



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EXHIBIT A - SB 163 CRITERIA

Section 2:

- A. DEC shall make the following evaluations, determinations, and findings before submitting a waterbody to the Legislature for Tier 3 consideration. The submission of a waterbody to the Legislature for Tier 3 consideration is not, and shall not be considered, a recommendation for Tier 3 designation by DEC.
1. A nomination for Tier 3 designation may be submitted to DEC by any resident of Alaska with respect to any waterbody or segment thereof. DEC shall determine whether the waterbody has exceptional water quality characteristics relative to other State of Alaska water, including one or more of the following:
 - a. the water is in a relatively pristine condition, largely absent of human sources of degradation, and of exceptional value to the state in this condition;
 - b. the water is of exceptional ecological, economic, or recreational significance. If the Tier 3 nomination is based on this subsection the nominating application shall be accompanied by a detailed report explaining how the ecological, economic, or recreational values make the waterbody exceptional; or
 - c. the water is an exceptional and rare example of its type regardless of whether the water is considered high quality. If the Tier 3 nomination is based on this subsection the nominating application shall be accompanied by a detailed report explaining the factors that make the water exceptional and rare and why its water quality condition should be disregarded.
 2. The application for Tier 3 nomination shall include the following information:
 - a. The nomination described in Paragraph 1 must include the current contact information for the nominator and the following required information about the waterbody proposed for Tier 3 designation:
 1. the name, description, and geographic location;
 2. the boundaries or extent, including maps, sufficient to define the waterbody in statute;
 3. identification of land ownership adjacent and proximal to the proposed waterbody, including information on whether those lands have designated or protection status;
 4. rationale and information to support a Tier 3 designation that meets conditions in Paragraph 1 including the required comparison to other State of Alaska waterbodies to demonstrate exceptional characteristics and an explanation of how the existing water quality supports the rationale;

5. an explanation of why the existing management and protection levels are insufficient, including an identification and description of immediate, short term, or potential significant risks to the exceptional characteristics of the water;
 6. any supporting available evidence, including information on existing uses, sufficient and credible water quality data, and other technical data or records; and
 7. other available evidence which the nominator considers supportive of the nomination, such as:
 - a. any additional information on land owners, stakeholders, or communities that may be affected by the proposed designation and the respective interests in the proposed designation;
 - b. any economic or social information relative to the proposed designation, including available natural resources, special land area designations, transportation corridors, and subsistence uses and users;
 - c. documentation of any public outreach and the public's level and degree of support for the proposed designation;
 - d. documentation of the level and degree of support for the proposed designation from any affected local government; and
 - e. any additional information related to the proposed water or evidence to the proposed waterbody or evidence to support the proposed designation.
- b. DEC shall conduct a completeness review of the application, and request additional information as necessary to process the application; and
 - c. DEC shall be reimbursed by the applicant for DEC's costs of processing an application, including the required evaluations and reports. DEC shall begin processing the application and the required evaluations and reports after a satisfactory reimbursable services agreement has been received from the applicant.
3. DNR shall prepare a report evaluating the land use implications of any waterbody proposed for Tier 3 nomination that DEC intends to submit to the Legislature. The report shall include the social and economic impacts arising out of any change in land use that would result from a Tier 3 designation. The report shall be submitted to the Legislature along with a DEC submission of a waterbody to the Legislature for Tier 3 consideration. Before preparing the report DNR shall enter a satisfactory reimbursable services agreement with the applicant for the costs of preparing the report.
4. DEC shall evaluate:
 - a. all point source dischargers on the nominated waterbody to determine whether they are following best management practices and meeting their permit requirements, and
 - b. all non-point dischargers to determine whether they are using best management practices and at least achieving water quality standards;
 5. DEC shall prepare a report describing enforcement actions being undertaken by DEC to bring point source dischargers into compliance with their permits and non-point sources into compliance with water quality standards that shall accompany a Tier 3 submission to the Legislature. The report shall describe the water quality anticipated if all point and non-point dischargers come into compliance.



6. DEC's final evaluations, determinations and findings regarding a waterbody or segment thereof shall constitute a final department decision that may be administratively appealed under 18 AAC 15.200. The Department shall not forward any waterbody to the Legislature until all administrative and judicial appeals have been resolved. Should there be an administrative and/or judicial appeal the decisions and records thereof shall be forwarded to the Legislature. Should there be an administrative and/or judicial appeal the Department of Law shall prepare a report summarizing the contentions of the parties and the decision of the administrative hearing officer or the judge as the case may be.