



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Environmental
Conservation

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March 17, 2016

The Honorable Louise Stutes
Chair, House Fisheries Committee
State Capitol Room 416
Juneau, AK 99801

Dear Representative Stutes,

Thank you for hearing House Bill 283: National Resource Water Nomination/Designation on March 15th. Below, I have provided supplemental responses to some of the questions that came up during that hearing.

When were the EPA regulations put forth requiring states to have a process to designate Tier 3 water? (Rep. Kreiss-Tomkins)

The Clean Water Act was first passed in 1972 (was amended and actually renamed the Clean Water Act in 1977). The Federal Register citation for 40 CFR 131.12 is 48 FR 51405 published on Nov. 8, 1983. The federal Clean Water Act requires states to adopt water quality standards that include an antidegradation policy and implementation methods.¹ Alaska adopted its antidegradation policy, which mirrors requirements in federal regulations, in 1997.² The policy establishes requirements that must be met to authorize a reduction in existing water quality. The process outlined in the policy was used for years, but in response to case law in other jurisdictions – and on a general APDES permit for Cook Inlet – the Department of Environmental Conservation (DEC) developed interim antidegradation implementation methods that were adopted in 2010.³ At that time, EPA recommended that the state establish a stand-alone Tier 3 designation process, outside the permit process.⁴ Alaska has so far not promulgated a standard that has been submitted to EPA for approval.

Do you have a legal opinion describing the ambiguity in authority over who designates a water as an Outstanding National Resource Water (ONRW)? (Rep. Kreiss-Tomkins)

DEC obtained the following response from the Department of Law:

¹ 40 C.F.R. 131.12.

² 18 AAC 70.015.

³ Interim Antidegradation Implementations Methods, State of Alaska, Dept. of Env'tl Cons., Policy and Procedure Number 05.03.103, July 14, 2010.

⁴ *Id.*, at 5.

EPA's regulations directing each state to develop and adopt a statewide antidegradation policy and implementation methods includes a requirement (40 C.F.R. § 131.12(a)(3)) that:

“Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.”

These “Outstanding National Resources Waters” are also referred to as “ONRWs” and “Tier 3” waters. There are three levels of water quality protection described in EPA's regulations with Tier 3 being the water getting the highest level of protection. No new pollution may be discharged into a Tier 3 water with very limited and temporary exceptions. Tier 3 waters are essentially preserved in their existing state much like land that is being managed as a park or refuge.

The argument that DEC does have statutory authority to designate Tier 3 waters stems from DEC's water quality and purity standards authority, AS 46.03.080, and its general authority under AS 46.03.020(9) to act as the official agency to deal with federal environmental laws. Under that authority, DEC is arguably the agency that complies with the EPA regulatory requirement for the state to have the equivalent of a Tier 3 protected waters category (40 C.F.R. § 131.12(a)(3)), and therefore to develop an implementation process for designating Tier 3 waters. This is the position the state's Legislative Affairs Agency took in 2014.⁵

The argument that DEC does not have statutory authority stems from two sections of Article VIII of the Alaska Constitution. First, Article VIII, § 7, holds that, “the legislature may provide for the acquisition of sites, objects, and areas of natural beauty or of historic, cultural, recreational, or scientific value. It may reserve them from the public domain and provide for their administration and preservation for the use, enjoyment, and welfare of the people.”⁶ Second, Article VIII, §2, holds that “the Legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of the people.”⁷ As the highest level of protection afforded a water of the state and in conjunction with the language of 40 CFR 131.12(a)(3), the Department of Law has advised DEC that a Tier 3 water could be a “state natural resource.” As such, Article VIII § 7 would seem to apply to the designation of a Tier 3 water. Similarly, since development and utilization of a water is significantly restrained once a Tier 3 designation is applied, Article VIII §2 would seem to apply as well. Supporting this interpretation is the fact the Legislature, not any state agency, has designated parks, refuges and other protected areas in the state in other instances.

In summary, the uncertainty stems from whether a Tier 3 designation is more appropriately classified as a reservation of a public area for preservation purposes, or is simply a water quality and purity standard. The Legislature has delegated a general authority to DEC under AS 46.03.080 and AS 46.03.020(9) to establish water quality and purity standards. However, it is arguable that this

⁵ Proposed Regulations Relating to State Water Quality Antidegradation Policy (18 AAC 70.015), State of Alaska Legislative Affairs Agency, Div. of Legal and Research Services, March 3, 2014.

⁶ Alaska Const. art. VIII, §7.

⁷ Alaska Const. art. VIII, §2.

designation would extend to the irrevocable reservation of a water body from essentially all development.

This uncertainty is partly related to public policy as well as legal authority. Since a Tier 3 designation has far reaching consequences, and is possibly irreversible, it may make for better public policy to put such a decision in the hands of the elected representatives rather than appointed officials. Doing this would also provide the opportunity for the Legislature to craft specific measures to protect special waters of the state without having to necessarily limit other activity or uses that would be precluded under a Tier 3 designation by DEC.

How many states don't have a defined process outside the default legislative process (Rep. Kreiss-Tomkins)

See the enclosed '50 States ONRW Policies and Implementation Methods Table' that was published by the Idaho Department of Environmental Quality in 2010. It would take DEC staff some time to update this information, but because it gives the citations to other state antidegradation provisions, we felt it would be helpful in more quickly researching options.

How do water bodies get classified or move between Tiers 1 and 2?

See the enclosed 'Tier Descriptions and Movement between Tiers.'

How is Lake Tahoe managed across state boundaries when it's designated Tier 3 in California but not in Nevada? (Rep. Johnson)

Lake Tahoe was designated as an ONRW by California in 1980 and a "water of extraordinary ecological or aesthetic value" in Nevada (Nevada doesn't have a Tier 3 process). On both sides of the boundary, the lake is managed under a Total Maximum Daily Load (TMDL) program – a method to reduce pollution over time – to restore the lake's water clarity.

Could you provide clarification on whether department's intentions are that the appropriation envisioned gives the department the authority to designate a water body, or is an appropriation plus another action (i.e., a bill) necessary? (Rep. Johnson)

Given the current budget situation, DEC would not have sufficient funds in its operating budget to analyze and vet nominations it receives. One funding option (as is described in the bill), would have the public bring nominations to DEC, who would gather them and periodically (at the start of a new Legislature, e.g.), transmit a list to the Legislature along with information received from the nominator or other member of the public. At this point, the department would not have started analyzing the material or have had public hearings. If the Legislature wanted DEC to dig deeper, look at science, economics, policies, talk with other agencies, adjoining land owners, the public, etc., the Legislature would provide an appropriation and direction for DEC (working with the other resource agencies) to do that. The department could come back to the Legislature by a given deadline (the start of the next session e.g.) with a report or recommendation.

An appropriation to DEC to do an analysis of a Tier 3 nomination would not be a de facto designation of that waterbody.

An alternative funding option would be to have the DEC process Tier 3 nominations similar to how it processes a permit request, where the cost of the processing is largely borne by the applicant and the applicant is responsible for contributing reliable data and supporting analyses, maps, etc. For example, DEC would receive the nomination and initial supporting material; DEC (with DNR and DF&G) would estimate the cost of performing the necessary agency analyses and preparing the required reports and enters into a funding agreement with the applicant to pay for that work; DEC submits a capital budget request to the Legislature for sufficient program receipts to cover the estimated cost of the work. The bill would also need provisions that allow DEC not to proceed with work on a nomination unless and until it had the needed funding to do this work.

We hope these responses prove useful to the Committee. If there are further questions or follow up on these issues, please feel free to contact us.

Sincerely,



Larry Hartig
Commissioner

Enclosures: '50 States ONRW Policies and Implementation Methods Table'
'Tier Descriptions and Movement between Tiers'

The following table has been compiled as a reference guide for finding antidegradation policy and implementation methods for other states and territories in the nation. The date of rule and date of implementation method refer to the date that individual states identify as the most current version of either rule or implementation method. The submittal date is when the state submitted the rule for approval to EPA. The effective data for Clean Water Act purposes refers to the date that EPA sent the letter approving the rule or in some cases implementation methods. Every effort was made to find the most current version available online, however due to the dynamic nature of the internet, some links may have changed. This document will be updated as more information becomes available regarding EPA approval status.

State	Rule	Date of Rule	Submittal Date	Approved (Y/N)	Effective Date for CWA	Implementation Method	Date of Method	Submittal Date	Approved (Y/N)	Effective Date for CWA
Alabama	335-6-10-.04 Antidegradation Policy	Jan. 19, 2010				335-6-10-.12 Implementation of the Antidegradation Policy				
Alaska	18 AAC 700.015 Antidegradation Policy	Nov. 1, 1997				Implementation	In development			
Arizona	A.A.C. R18-11-107 Antidegradation Policy	Apr. 24, 1996				Implementation	Draft Apr 2008		Y	Jan. 21, 2009
Arkansas	Regulation No. 2	Oct. 26, 2007								
California	Policy	1968		Y	1990	Memo	1987			
Colorado	5 CCR 1002-31.8 Antidegradation Policy	Nov. 30, 2009				Implementation	Dec. 2001			
Connecticut	Policy	2002				Implementation (Appendix E)	Dec. 17 2002			
Delaware	DAC Title 7.7401 Antidegradation Policy Section 5	July 11, 2004		Y		Implementation (Section 5)	July 11, 2004			

State	Rule	Date of Rule	Submittal Date	Approved (Y/N)	Effective Date for CWA	Implementation Method	Date of Method	Submittal Date	Approved (Y/N)	Effective Date for CWA
Florida	FAC 62-302.300 Antidegradation Policy	May 11, 2006				Not Found				
Georgia	Chapter 391-3-6-.03 (2)	July 2000				Not Found				
Hawaii	HAR 11-54-01.1	April 17, 2000		Y	April 2000	Not Found				
Illinois	35-C-1.302.105	Aug. 9, 2006	9/17/02	Y	8/2/05	35-C-1.302.105 & 35-C-1.302.521	Aug. 9, 2006	9/17/02	Y	8/2/05
Indiana	327 IAC 2-1-2 Maintenance of Surface Water Quality Standards	Jan. 14, 1997	1/14/97	Y	8/4/00	Draft Rule More info	Jun. 19, 2009	NA	NA	NA
Iowa	567 Chapter 61, Section 61.2(2) Antidegradation Policy	Jan 13, 2010	Not yet submitted			Implementation	Feb. 17, 2010	Not yet submitted		
Kansas	KAR 28-16-28c General Provisions (a) Antidegradation	Apr. 27, 2005				Implementation	Aug. 6, 2001			
Kentucky	Title 401 Chapter 5:029 General Provisions Section 1. Antidegradation Policy	Dec. 17, 2004				401 KAR 10:030. Antidegradation policy implementation methodology	June 16, 2008	Nov. 13, 2009	N	

State	Rule	Date of Rule	Submittal Date	Approved (Y/N)	Effective Date for CWA	Implementation Method	Date of Method	Submittal Date	Approved (Y/N)	Effective Date for CWA
Louisiana	LAC33.IX.1109 A. Antidegradation Policy	May 12, 2000				Draft Implementation Procedures	Aug. 2009			
Maine	38 MRSA 464(4)(F)	June 13, 2001				Memo	June 13, 2001			
Maryland	COMAR 26.08.02.04: Antidegradation Policy	May 24, 2005		Y		COMAR 26.08.02.04-1 Antidegradation Policy Implementation Procedures & COMAR 26.08.02.04-2 Outstanding National Resource Water	May 24, 2005			
Massachusetts	314 CMR 4.00 Section 4.04 Antidegradation Provisions	Feb 23, 1996				314 CMR 4.00 Implementation Procedures for the Antidegradation Provisions	Oct. 21, 2009			
Michigan	MAC: Water Resources Protection Part 4. Water Quality Standards, R 323.1098	Apr. 2, 1999		Y	8/4/00	Implementation	Apr 12, 2005	NA	NA	NA

State	Rule	Date of Rule	Submittal Date	Approved (Y/N)	Effective Date for CWA	Implementation Method	Date of Method	Submittal Date	Approved (Y/N)	Effective Date for CWA
Minnesota	MAR 7050:0185 Nondegradation for all waters	Oct. 11, 2000		Y	1984 OSRW 1988 all other waters	Implementation More Info	Jan 2007	NA	Y	1984, 1988
Mississippi	Water Quality Criteria for Intrastate, Interstate, and Coastal Waters Section I.1	Aug. 23, 2007				Implementation	Jan. 28, 2010			
Missouri	10 CSR 20-7.031(2) Antidegradation	Oct. 31, 1999				Implementation	May 7, 2008			
Montana	Montana Code Annotated 2009 75-5-303 Nondegradation Policy	June 30, 2008		Y	Feb. 13, 2001 2003 and 2008 approvals vacated by court decision	17.60.706 through 17.30.716	June 30, 2008		Y	Feb. 13, 2001 2003 and 2008 approvals vacated by court decision
Nebraska	Title 117, Chapter 3: Antidegradation Clause	March 22, 2009				Antidegradation Implementation Procedures for Title 117	May 23, 2001			
Nevada	NRS 445A.565	1995				Not Found				
New Hampshire	PART Env-Wq 1708	Dec. 10, 1999				Vol 1. Stormwater and Antidegradation	Dec. 2008			

State	Rule	Date of Rule	Submittal Date	Approved (Y/N)	Effective Date for CWA	Implementation Method	Date of Method	Submittal Date	Approved (Y/N)	Effective Date for CWA
New Jersey	NJAC 7:9B-1.5(d) Antidegradation	Jan. 4, 2010	March 30, 2010	Y	originally approved in 1985	More Info Category 1 Implementation				
New Mexico	NMAC 20.6.4.8	Aug. 1, 2007				Implementation in CPP	Dec. 14, 2004			
New York	Policy Memo	Sept. 9, 1985	Sept. 11, 1985	Y	Sept. 26, 1985	Implementation	Sept. 9, 1985	Sept. 11, 1985 Feb 26, 1998	Y Y	Sept. 26, 1985 Oct. 6, 2000
North Carolina	NCAC 15A.02B.0201	Oct. 1, 1996				Not Found				
North Dakota	NDAC Chapter 33-16-02.1 Purpose	June 1, 2001				Not Found				
Ohio	OAC 3745-1-05	Dec. 15, 2009	4/13/03	Y	6/27/03	Guide to Ohio EPAs Antideg	July 1, 2003			
Oklahoma	OAC 785:45-3-1 and -2 Antidegradation	Nov 14, 2006				Implementation Plan	Nov 14, 2006			
Oregon	OAR 340-041-0004	March 2, 2004				Internal Management Directive	March 2001			

State	Rule	Date of Rule	Submittal Date	Approved (Y/N)	Effective Date for CWA	Implementation Method	Date of Method	Submittal Date	Approved (Y/N)	Effective Date for CWA
Pennsylvania	PC 25.93.4a Antidegradation	July 17, 1999		Y	March 17, 2000 except Section 93.4b. Full approval Mar. 7, 2007	Implementation Plan	Nov. 29, 2003		Y	Mar. 7, 2007
Puerto Rico	40CFR131.42 (Impl. Proc.)	Dec. 12, 2007	N/A	N/A	Jan. 11, 2008	40CFR131.42	July 1, 2009			
	PRWQSR (Policy)	March 28, 2003	March 28, 2003	Yes	June 26, 2003					
Rhode Island	EVM 112-88.97-1 Rule 18	Jan. 4, 2007				EVM 112-88.97-1 Rule 18 (Appendix C)	Dec. 2009			
South Carolina	R.61-68 Section D. Antidegradation Rules	April 25, 2008				Implementation	July 1998			
South Dakota	ARSD 74:51:01:34 through 74:51:01:39	July 20, 1997				Implementation	Oct. 1998			
Tennessee	TCA 1200-4-3.06	Oct. 24, 3006	July 20, 2007	Y	March 27,2008	Implementation in rule	Oct 24, 2006	July 20, 2007	Y	March 27,2008
Texas	30 TAC 307.5	Aug. 17, 2000				Implementation	Jan 2003			
Utah	R317-2-3	March 1, 2010				Implementation in rule More info	March 1, 2010	March 22, 2010	Y/N	April 26, 2010

State	Rule	Date of Rule	Submittal Date	Approved (Y/N)	Effective Date for CWA	Implementation Method	Date of Method	Submittal Date	Approved (Y/N)	Effective Date for CWA
Vermont	Vt. Code R 12-004-052 Section 1-03	Jan. 1, 2008				Implementation in progress	Apr. 2010			
Virginia	9VAC25-260-30	Feb. 1, 2010		Y		Implementation in rule More info	Feb 1, 2010			
Virgin Islands	VIWQSR Sec.186-7	October 8, 2004	April 7, 2005	Y	May 26, 2005	none				
Washington	WAC 173-201A Part III Antidegradation	Nov. 20 2006		Y	May 2, 2007	Tier 2 Implementation More info	July 18, 2005	NA		
West Virginia	47-2-4 Antidegradation Policy	2008		Y		Title 60 Series 5	2008			
Wisconsin	NR 207.03	Apr. 2010	1988	Y	1988(?)	More info	2010	1988(?)	Y	1988
Wyoming	Chapter 1 Section 8	Apr. 25, 2007		Y	Jan. 25, 2002	Implementation	Feb. 2007			

Classification of Water: A Description of Tiers 1-3

Per the Clean Water Act, Alaska's water quality antidegradation policy¹ creates three classifications, or "tiers," of waters.²

Tier 1 waters are waters for which not all water quality criteria are met. This can be due to naturally occurring constituents in the water, or can be due to pollutants introduced by humans.

Example of a naturally-occurring Tier 1 water: Red Dog Creek runs through an area that contains natural ore bodies, resulting in naturally (pre-mining) high concentrations of cadmium, lead, zinc, aluminum, and other metals in the creek.

Example of a human-caused Tier 1 water: The Chester Creek watershed in the urban area of Anchorage is impaired by fecal coliform bacteria. Human activities in the area, such as dog walking and bird feeding, contribute to this pollution.

Permitting in a Tier 1 water: The Tier 1 permitting process is largely the same process as for Tier 2 (below) because water quality criteria are normally met for *some* constituents.

Tier 2 waters are "high-quality waters," which include the vast majority of waters in Alaska. In these waters, all water quality criteria are met.

Example of a Tier 2 water: Gastineau Channel near Juneau is an example of a high quality water into which discharge from the Juneau-Douglas Wastewater Treatment Plant is permitted.

Permitting in a Tier 2 water: For a Tier 2 water, the water quality must be maintained or protected unless DEC authorizes a reduction in water quality following prescribed and rigorous permitting methods. In the permit, DEC must conclude and demonstrate that:

- Allowing the lowering of water quality is necessary to accommodate important economic or social development,
- Water quality criteria will not be violated, except in an authorized mixing zone,
- Existing uses of the water will be fully protected (under the Clean Water Act, these uses include drinking water, swimming, and aquatic life, e.g.)
- Effective and reasonable treatment methods will be used, and
- Statutory and regulatory requirements are met.

Tier 3 waters are waters found by a State process to be of exceptional significance or unique.

Example of a Tier 3 water: There are no Tier 3 waters in the State of Alaska. In California, one of two Tier 3 waters is Mono Lake. Mono Lake is 2-3 times saltier than the ocean and is an alkaline lake with a pH of 10 (designated for its uniqueness rather than water purity).

Permitting in a Tier 3 water: The quality of water in a Tier 3 water must be maintained and protected. Discharges that add any additional pollutants to a water can only be temporary or limited; for example, runoff from a construction project.

¹ For more on Alaska's Antidegradation Policy, visit: <http://dec.alaska.gov/water/wqsar/Antidegradation/index.html>.

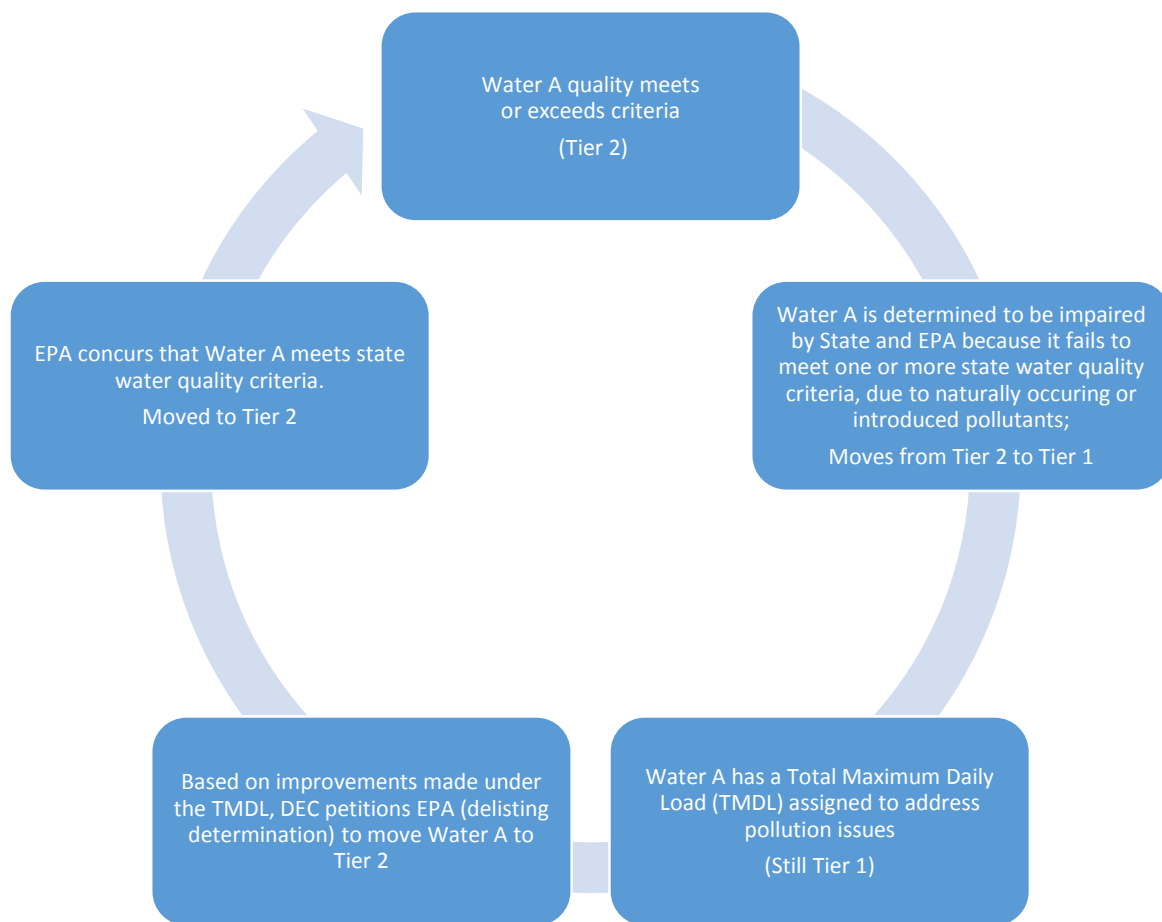
² 18 AAC 70.015

Movement between Tiers of Water

It is important to note that Tiers 1 and 2 are based strictly on science-driven water quality parameters, while Tier 3 is a designation independent of the process for Tier 1 and 2, and allows for consideration of social values, e.g. Thus, a Tier 1 (polluted or impaired) water could be designated as a Tier 3 water.

Under the Clean Water Act, each state is required to provide a comprehensive integrated report of water quality to the EPA. The report documents a comprehensive evaluation of the status and health of each water body in the State of Alaska and describes state programs for maintaining or improving the quality of Alaska's waters.

In addition, this report describes the process for evaluating whether waterbodies attain water quality standards (Tier 2) or are impaired (polluted or Tier 1). The reporting process includes classifying each waterbody depending on its health; determining which waterbodies need further action; scheduling when each impaired water body will be addressed; involving the public in determining how water quality will be addressed; and determining how waterbodies are removed from the impaired water body list, thus returning them to Tier 2. EPA is ultimately responsible for the approval/disapproval of the Integrated Report which includes impaired water determinations (Tier 1), Total Maximum Daily Load (TMDL) development to mitigate impairment, and delisting determinations for waters that meet all water quality criteria (Tier 2).



Note that this is a very simplified version of the process