THE STATE
of ALASKA
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SENT VIA EMAIL
Senator Chris Birch
Senate Resources Committee
State Capitol Room 125
Juneau, AK 99801
Senator.Chris.Birch@akleg.gov

Re: *SB 51*

Dear Chairman Birch and members of the Senate Resources Committee:

This letter sets out information regarding Tier 3 waters and the regulatory effect of a Tier 3 designation. It also sets out current Alaska Supreme Court law regarding how to evaluate whether a citizen's initiative constitutes an appropriation of state assets.

Background on Tier 3 waters

A Tier 3 water is a high quality water that constitutes an outstanding national resource water. "[I[f a high quality water constitutes an outstanding national resource, such as a water of a national or state park or wildlife refuge or a water of exceptional recreational or ecological significance, the quality of that water must be maintained and protected...."[1]

Once a water is designated a Tier 3, it is subject to DEC regulatory restrictions – for all discharges under the Alaska Pollutant Discharge Elimination System or Clean Water Act §401 certifications to a Tier 3 water or a tributary to a Tier 3 water that will degrade or have the potential to degrade the existing water quality, the department is required to conduct an antidegradation analysis for a

1) a proposed new or expanded discharge;

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[1] 18 AAC 70.015(a)(3).

2) an existing discharge that did not previously require authorization, if the applicant is proposing an expanded discharge;
3) an existing discharge where a license or permit was previously required but had not been issued;
4) a discharge with a previously expired license or permit that had not been administrative extended; or
5) a previously terminated discharge, if the applicant is seeking reauthorization.[2]

The department will not authorize a discharge to a tier 3 water or tributary unless the department finds that:

1) the lowering of water quality is temporary and limited;
2) no lowering of the water quality will occur and existing uses and Tier 3 water quality will be maintained and protected;
3) a discharge to a tributary meets all applicable requirements under Tier I and Tier II of this section;
4) existing state-regulated nonpoint sources to the Tier 3 water are using all state-required practicable best management practices (to ensure that no lowering of water quality will occur and existing uses will be maintained and protected; and
5) there is no proposal for a new zone of deposit or mixing zone in the Tier 3 water.[3]

Reversal of a Tier 3 designation

The EPA has not issued any guidance on the reversibility of a Tier 3 designation. That we know of, two states (Utah and Pennsylvania) have developed guidance or regulations that allow for the reversal (or "re-characterization") of a Tier 3 designation. EPA would have had to sign off on the guidance or regulations prior to their going into effect, so one would presume that EPA does not believe there is a bar to reversal of a designation. To our knowledge, no state has yet attempted to de-designate a Tier 3 designation.

What waters can be designated Tier 3

The legislature enacted a statutory definition of waters of the State. "Waters" under Alaska law "includes lakes, bays, sounds, ponds, impounding reservoirs, springs,

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2 18 AAC 70.016(d)(1).
3 18 AAC 70.016(d)(4).

wells, rivers, streams, creeks, estuaries, marshes, inlets, straits, passage canals, the Pacific Ocean, Gulf of Alaska, Bering Sea, and Arctic Ocean, in the territorial limits of the state, and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially in or bordering the state or under the jurisdiction of the state."[4] The State can designate any "waters of the state", regardless of the ownership of surrounding lands, as a Tier III water. Presumably, if SB 51 went into effect, the state agencies and the legislature would take into account the impact on surrounding lands, when determining if a water should be designated. Each water would have to be evaluated on a case by case basis to determine impacts and whether other legal issues could be raised if the waters were designated.

Alaska Supreme Court law on citizen's initiatives and appropriations

Generally, the people can propose and enact laws by initiative.[5] However, Article XI, §7 contains several express limitations on the power of the ballot initiative, including that "[t]he initiative shall not be used to … make or repeal appropriations."[6]
When reviewing an initiative, the Supreme Court has stated that it will "construe voter initiatives broadly so as to preserve them whenever possible. However initiatives touching upon the allocation of public revenues and assets require careful consideration because the constitutional right of direct legislation is limited by the Alaska Constitution."[7] "'The reason for prohibiting appropriations by initiative is to ensure that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs.'"[8]

The Supreme Court has identified "two core objectives of the constitutional prohibition on the use of initiatives to make appropriations": "First, the prohibition was meant to prevent an electoral majority from bestowing state assets on itself. Second, the prohibition was designed to preserve to the legislature the power to make decisions concerning the allocation of state assets."[9]

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4 AS 46.03.900(37).
5 Alaska Const. art. XI, §1.
6 Alaska Const. art. XI, §7.
7 *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 422 (Alaska 2006).
8 *Mallott v. Stand for Salmon*, 431 P.3d 159, 164 (Alaska 2018)(citing *McAlpine v. University of Alaska*, 762 P.2d 81, 88 (Alaska 1988)(emphasis in original)).
9 *Pullen v. Ulmer*, 923 P.2d 54, 63 (Alaska 1996).

The most recent case considering whether an initiative constitutes an appropriation was *Mallott v. Stand for Salmon.*[10] In that case, an initiative was introduced that would have established permitting requirements for activities that could harm anadromous fish habitat. In analyzing the initiative, the Supreme Court found that two phrases[11] used in the initiative would "explicitly restrict the commissioner's discretion to make allocation decisions."[12] The Supreme Court found that:

> [T]hey are problematic because – however they are interpreted – they bar the commissioner from granting a permit to a project that would "cause substantial damage" or have one of the listed effects, even if in the commissioner's – or the legislature's – considered judgement the public benefits of that particular project outweigh its effects on fish habitat. By doing so, the initiative "encroaches on the legislative branch's exclusive 'control over the allocation of state assets among competing needs'" by removing certain allocation decisions from the legislature's range of discretion.[13]

The Court found that the offending provisions could be severed from the rest of the initiative and that the rest of the initiative could go before the voters.[14]

Sincerely,
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JAC/cep

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10 431 P.3d 159 (Alaska 2018).

11 The two phrases were: "substantial damage" and "an anadromous fish habitat permit may not be granted" for activities that would affect fish habitants in various specific ways listed in six subsections. *Id.* at 166.

12 *Id.* at 166.

13 *Id.* at 167 (quoting *Alaska Action Ctr., Inc. v. Municipality of Anchorage*, 84 P.3d 989, 993 (Alaska 2004) (quoting *Pullen*, 923 P.2d at 63)).

14 *Id.* at 177.