



### **Tier 3 Outstanding National Resource Waters**

**Cost of Designation:** Alaska Statute 37.10.052 directs ADEC to collect fees for the permitting, compliance, and conducting plan reviews in order to degrade waters. Equal protection under the law mandates that a Tier 3 analysis not differ from a Tier 2 analysis. The fees must reflect the average actual and direct costs of providing the regulatory services for which the fees are collected. A table of these fees can be found at: <http://dec.alaska.gov/water/wastewater/fees/>. Furthermore, 18 AAC 72.957 (individual permit fees) stipulates that “[t]he fee is \$0 for facilities that are not in operation and that were authorized before January 17, 2002.” See note 2 to Table F. Since implementing a Tier 3 involves NOT authorizing an operating discharge, the fee should be \$0. ADEC has stated that it will not be monitoring water quality for Tier 3 waterbodies, so the agency will not be incurring costs to monitor.

**Tributaries:** ADEC has also not committed to applying Tier 3 criteria to tributaries of a Tier 3 waterbody stating that they are willing to authorize a discharge into a tributary as long as the degradation is not detectable at the upper boundary of the Tier 3 waterbody.

**Tier 3 Does Not Limit Other Uses:** Tier 3 is part of the antidegradation statute. It is the position of EPA that states must apply antidegradation requirements to activities that are “regulated” under State, Tribal, or Federal law (i.e., any activity that requires a permit or a water quality certification pursuant to State, Tribal or Federal law). This means that any activity or operation that does not require a discharge permit is allowed on Tier 3’s. See: 63 Fed. Reg. 36742, 36780 (July 7, 1998) (EPA preamble to proposed Water Quality Standards Regulations).

**No Relation to Land Use:** A Tier 3 designation is nothing like establishing a park. This is a misreading of the EPA language. “The ‘candidate’ water body types (e.g., wild and scenic rivers, waters in national and state parks) **are merely suggestions** that EPA has provided regarding the kinds of water bodies that states, tribes, and territories might choose to designate for Tier 3 level protection.” See: Watershed Academy Web, Introduction to the Clean Water Act available at [https://cfpub.epa.gov/watertrain/moduleFrame.cfm?parent\\_object\\_id=2650](https://cfpub.epa.gov/watertrain/moduleFrame.cfm?parent_object_id=2650).

Owners of land adjacent to a waterbody have no inherent right to degrade waters of the state. If this were true then, conversely, an upstream land owner authorized to discharge and degrade a waterbody down to the water quality criteria, as the current Tier 2 guidance allows, would be taking something of value from downstream land owners. This ‘taking’ of the ability of a downstream land owner to further degrade the water is not recognized under state law or guidance.

**Same Process as Degradation:** Equal protection under the law mandates that residents and communities have the same rights as corporations when it comes to the use of the public’s waters. The processes for designating a Tier 3 waterbody and permitting degradation should be the same. If ADEC has the authority and technical expertise to permit degradation, then it must also be the body that designates Tier 3, as many states already recognize. The legislature always



retains the right to act independently to either designate or delist a Tier 3. Actions to degrade or protect go hand-in-hand and cannot be separated. Doing so is unjust and an inaccurate read of the purpose of Tier 3 designations.

**Permanence of Designation:** Even if the designating body is ADEC, the legislature can always overturn or reverse a Tier 3 designation.

**Department of Law's Decision Must be Made Public:** Prior to March, 2016 the Alaska Dept. of Law (DOL) wrote an opinion on who retains the authority to designate a Tier 3. This opinion has never been made public. DOL has hid behind "attorney-client privilege" to withhold this opinion.

**Removing the Right of Initiative from "by law" Definition:** This only serves to remove public participation and make the process for protecting our shared waters more difficult. Government actions, especially those that directly affect our communities, must be transparent. The government is supposed to work for the people, not deny residents a voice.

**Tier 3 Designation Benefits All Alaskans:** The ONRW designation benefits all users of the water, including any downstream users, by protecting against water quality degradation. ONRWs are often headwater streams that ultimately feed municipal drinking water systems and fisheries. Additionally, wildlife, aquatic species and tourism all benefit from ONRW designation because streams provide irreplaceable habitat. If watershed conditions along the ONRW need improvement, designation can help in the prioritization of restoration efforts and associated funding requests.