THE STATE of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

Department of Environmental Conservation

Commissioner's Office

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MEMO

TO: Representative Chuck Kopp
FROM: Jason Brune, Commissioner, Department of Environmental Conservation
DATE: April 17, 2019
RE: Tier 3 Water Designation Process

Below please find the answers to the questions you have raised regarding Tier 3 water designation:

1. **What is the current process for designating Tier 3 waters in Alaska? Is there any formal or informal agreement between EPA and the state for how to process applications/nominations for Tier 3 waters? Are there any regulations (draft or promulgated) relating to a Tier 3 designation process?**

   There is no administrative process for nominating or designating Tier 3 waters in Alaska. The Department has guidance (dated 11/21/2018) advising the public that a Tier 3 designation could be made by legislation that is enacted into law. EPA has informally concurred that a legislative designation process satisfies the Clean Water Act and federal regulatory requirements (Dan Opalski email 11/23/2018).

   There is not a formal or informal agreement between the EPA and the Department in regards to the method(s) for processing Tier 3 nominations and applications.

   There are no draft or promulgated regulations specifying the Tier 3 designation process. Regulations were drafted in the past, but were not promulgated in response to the public comment the Department received.

2. **What specific requests, mandates, or requirements has EPA imposed on the State of Alaska relating to designation of Tier 3 waters? What, if any, are the timeframes associated with those requirements?**

   EPA has not requested, mandated or imposed specific requirements or deadlines on the State of Alaska pertaining to the designation of Tier 3 water. EPA has cited the requirements of 40 C.F.R. 131.12(a)(3) for Tier 3 water protection and a state's obligation to develop implementation procedures. While states are required to have a **process** for designating Tier 3 waters, they are not obligated to actually establish any Tier 3 waters. In the 1997 approval of Alaska's water quality standards (WQS) and Alaska's original antidegradation policy in 18 AAC 70.015, EPA stated the following:

   > "Alaska needs to identify implementation procedures for its antidegradation and mixing zone policies. This is particularly important for State issued permits and NPDES permits issued by EPA. In order for EPA to successfully implement the intent of Alaska's WQS, and to avoid confusion during the §401 certification process, EPA needs additional clarification as to how

Alaska intends to implement these State policies. Implementation procedures do not have to be adopted in regulation, they can be adequately addressed in State policy or guidance."

In a 2016 memo to then Commissioner Hartig, EPA stated the following:

"As you know, it is EPA's preference that states develop their own water quality standards, and the identification of a Tier 3 water in rule or statute is viewed as a water quality standard action. While we look forward to and support Alaska's development of a process for identifying Tier 3 waters, we are not eager to identify Tier 3 waters in lieu of the state, would not anticipate doing so, and in any event would communicate with ADEC as an initial step should such a matter come to us for consideration. **In the meantime, we support Alaska's efforts at thorough and thoughtful deliberation as appropriate investment in a Tier 3 identification process that can fare better in implementation by having addressed the concerns of the myriad stakeholders [emphasis added]."**

3. **What are the potential consequences of not codifying a process for Tier 3 designation? The Clean Water Act was passed in 1972, why are we now concerned about a formal designation process?**

   The potential consequences of not having a formal designation process could include direct litigation and permit challenges/appeals of Clean Water Act (CWA) §402 wastewater discharge permits or §401 water quality certifications issued by the Department. Lawsuits could be brought by EPA or third parties and have the potential to unnecessarily delay permits (projects) for 3-4 years.

   The EPA has the authority to impose its own Tier 3 designation process on Alaska if we do not produce an approvable process. Informal conversations with EPA suggest that the guidance DEC has in place mitigates this risk.

   Antidegradation was included in EPA's first Water Quality Standards Regulation (40 CFR 130.17, 40 FR 55340-41, November 28, 1975) and was refined and re-promulgated on November 8, 1983 (48 F.R. 51400, 40 CFR 131.12). The State of Alaska originally adopted an antidegradation policy in 1997. There has been increased attention and litigation over years, creating a corresponding increase in the need for a formal Tier 3 nomination process.

4. **Do any other states not have a codified process for Tier 3 designation? If so, have any of them faced legal challenges for non-compliance of CFR 131.12? If so, what, if any, have been the outcomes?**

   See attachments from circa 2010 summarizing other state's processes. There has been litigation. It would take considerable time to research and provide a comprehensive summary.

5. **Has DEC received any requests for Tier 3 designation? If so, what waterbodies and by what entities?**

   Yes, the Department has received five nominations.

   a. Koktuli River (2012) - Petitioners: Trout Unlimited, Inc., Alaska Program Nushagak-Mulchatna Wood-Tikchik Land Trust, Alaska Alpine Adventures, LLC (Dan Oberlatz), SnoPac Products, Inc., Alaska Independent Fishermen's Marketing Association Renewable Resources Coalition, Nunamta Aulukestai

b. Chilkat River (2015) – Petitioner: Chilkat Indian Village
c. Yakutat Forelands (2016) – Petitioner: Yakutat Tlingit Tribe
d. Chandlar River (2016) – Petitioner: Venetie Village Council
e. Draanjiik River (2017) – Petitioners: Gwichyaa Zhee Gwich'in Tribal Government and the Chalkyitsik Village Council

6. **A 1989 National Parks Service publication entitled *Outstanding National Resource Waters: A Resource Management Tool* notes that "almost all waters of the State are designated for drinking water uses, the highest use classification permitted under the State's water quality standards, which seems to provide the equivalent of tier 3 protection or designation as ONRW" (8). If existing state water quality standards are equivalent to Tier 3 standards, is it necessary to codify a designation process?**

The referenced publication pre-dates the adoption of Alaska's antidegradation policy. Tier 3 water quality protection is separate from, and more restrictive than, water quality criteria that protect designated uses, like drinking water supply (e.g., 18 AAC 70.020). A water quality criterion protective for drinking water is not necessarily the most stringent criterion for a given parameter. For example, the water quality criterion to protect aquatic life from dissolved copper is more stringent than for drinking water, as aquatic life are more sensitive to copper than humans. Consistent with CWA requirements, existing water quality in a designated Tier 3 water must be maintained and protected, even if levels for a given parameter are of higher quality than the state water quality standards (18 AAC 70.015(a)(3) and 40 C.F.R. 131.12(a)(3). Wastewater discharges requiring a permitted mixing zone or zone of deposit are not allowable (18 AAC 70.016(d)(3)). Designation sets such a stringent protection level that only temporary and limited degradation of water quality is allowable in a Tier 3 water (18 AAC 70.016(f)). It is necessary to codify a designation process since a Tier 3 water designation has significant implications for use of the water and surrounding land.

7. **What user groups and/or activities would most likely be affected by a Tier 3 water designation in Alaska?**

A Tier 3 designation provides a very high level of protection. A designation would impact any user group and/or activity proposing a discharge to the designated water. Based on current nominations, the mining industry and tribes would be most affected by a Tier 3 designation since any upland activity requiring a wastewater discharge permit (such as a mine, community wastewater treatment plant, lodge, seafood processing plant etc.) would likely need a wastewater discharge. As such, Tier 3 designation may impact or preclude land use activities, if it is technologically or economically infeasible for the proposed discharges to achieve the required Tier 3 water quality protections.