

**From:** [Jessica Kayser Forster](#)  
**To:** [Abel Hopson-Suvlu](#); [Thatcher Brouwer](#)  
**Cc:** [Jones Hotch Jr](#); [Kimberley Strong](#); [Kimberley Strong \(External Contact\)](#); [Brian Willard](#)  
**Subject:** HB 138 materials  
**Date:** Friday, April 26, 2019 1:55:50 PM  
**Attachments:** [ak-wqs-antideq-im-rule-action-ltr \(1\).pdf](#)  
[final-tier-3-guidance-11-21-2018.pdf](#)  
[HB138 Chilkat Indian Village 26April2018.pdf](#)

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Hi Abel and Thatcher,

Thanks for your time and for hearing the Chilkat Indian Village's ideas and concerns related to HB 138.

I have attached some materials- two reference documents and one document outlining HB 138 considerations.

Please send them along to the members of the House Resource Committee for their consideration prior to the hearing on Monday the 26th at 1pm.

If you have any additional questions please feel free to call or email.

Thanks again.

Happy Friday,  
Jess

Jess Kayser Forster  
Chilkat Indian Village





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10

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OFFICE OF  
WATER AND  
WATERSHEDS

JUL 26 2018

Mr. Andrew Sayers-Fay  
Director, Division of Water  
Alaska Department of Environmental Conservation  
555 Cordova Street  
Anchorage, Alaska 99501

Re: Revisions to Alaska's Water Quality Standards Addressing Antidegradation Policy and Antidegradation Implementation Methods, March 9, 2018 Submittal

Dear Mr. Sayers-Fay:

Pursuant to section 303(c)(3) of the Clean Water Act and 40 CFR Part 131, the U.S. Environmental Protection Agency approves the new and revised water quality standards addressing antidegradation policy and antidegradation implementation methods submitted by the Alaska Department of Environmental Conservation on March 9, 2018. Details of the submitted water quality standards and the EPA's action are outlined below and in the enclosed support document.

### Background

By letter dated March 9, 2018, the ADEC submitted new and revised water quality standards at 18 AAC 70.015, 18 AAC 70.016, and 18 AAC 70.990 of Alaska's water quality regulations. These new and revised water quality standards were adopted by ADEC on February 28, 2018; were certified by the Alaska Attorney General on March 7, 2018 as being duly adopted pursuant to state law; and became effective under Alaska state law on April 6, 2018. Prior to adoption, ADEC provided an opportunity for public comment, including a public hearing, as described in ADEC's public notice and ADEC's response to public comment ("Antidegradation Implementation Methods: Notice of Proposed Changes to the Water Quality Standards Regulations of the Department of Environmental Conservation," ADEC, May 31, 2017; and "Antidegradation Implementation Methods Regulations Responsiveness Summary," ADEC, November 2017; respectively).

The water quality standards changes submitted to the EPA for review and action are identified in an enclosure to ADEC's March 9, 2018 submittal letter, and include limited clarifying revisions to Alaska's antidegradation policy at 18 AAC 70.015, antidegradation implementation methods in rule at 18 AAC 70.016, and associated new definitions at 18 AAC 70.990 (Attachment to Memorandum, Scott Meriwether, Office of Lieutenant Governor, to Gary Mendivil, Department of Environmental Conservation, RE: Filed Permanent Regulations, March 9, 2018).

The implementation methods section at 18 AAC 70.016 is new, represents the majority of ADEC's submittal, and generally replaces Alaska's 2010 interim antidegradation implementation guidance. However, in its response to comments when addressing a concern that Alaska's rule making did not include a process for nominating and designating waters for Outstanding National Resource Water protection, ADEC referred to the interim antidegradation implementation guidance. ADEC stated that

Tier 3 designation methods are still present and available, and that ADEC will continue to work with all stakeholders on a final nomination and designation process (see "Antidegradation Implementation Methods Regulations Responsiveness Summary," ADEC, November 2017, Comment Summary 51).

### The EPA's Action

Pursuant to section 303(c)(3) of the CWA and 40 CFR Part 131, the EPA approves the submitted changes at 18 AAC 70.015, 18 AAC 70.016, and 18 AAC 70.990, except as identified below and in the EPA's support document. Today's approval addresses only those submitted changes to 18 AAC 70 that are new or revised water quality standards for the purposes of CWA section 303(c). The EPA is not acting on unrevised language and previously existing provisions.

The EPA is also not acting on the following portion of the newly promulgated 18 AAC 70.016(a)(2)(B):

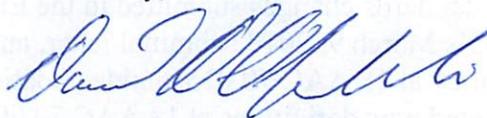
*...the responsible party whose actions or lack of action necessitated an emergency response action shall address any lowering of water quality that is not temporary and limited; existing law may be used to address restoration, rehabilitation, replacement, or acquisition of the equivalent for the affected natural resources, including long-term water quality impacts;*

Rather than stating a desired water quality condition, the provision addresses inconsistency with a desired condition. Such provisions are of an enforcement nature and therefore are not water quality standards subject to EPA action in accordance with CWA section 303(c) (see "What is a New or Revised Water Quality Standard under 303(c)(3), Frequently Asked Questions," October 2012, EPA Publication No. 820F12017).

The EPA's action applies only to water bodies in the State of Alaska, and does not apply to waters that are within Indian Country, as defined in 18 U.S.C. § 1151. In addition, nothing in this action shall constitute an approval or disapproval of a water quality standard that applies to waters within Indian Country. The EPA, or authorized Indian Tribes, as appropriate, will retain responsibilities for water quality standards for waters within Indian Country.

The EPA looks forward to future work with Alaska on water quality standards pursuant to our responsibilities under the CWA. If you have any questions regarding this letter, please contact me at (206) 553-1855 or Bill Beckwith of my staff at (206) 553-2495.

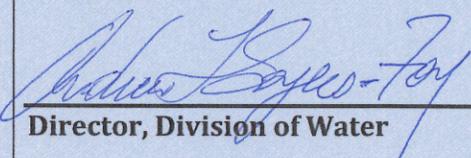
Sincerely,



Daniel D. Opalski, Director  
Office of Water and Watersheds

Enclosure

cc: Mr. Earl Crapps, ADEC (email only)  
Ms. Nancy Sonafrank, ADEC (email only)  
Mr. Brock Tabor, ADEC (email only)

State of Alaska Department of Environmental Conservation Division of Water  <b>Policy and Procedure</b>		Policy and Procedure Number <b>05.03.104</b>	PAGE <b>1 of 2</b>
		EFFECTIVE DATE  <b>November 21, 2018</b>	
SUBJECT  <b>Guidance Relating to the Nomination          and Designation of Tier 3 Waters</b>		SUPERSEDES  Interim Antidegradation Implementation Methods (05.03.103)	
Section  <b>Division of Water</b>	CHAPTER  <b>Water Quality          Standards, Assessment,          and Restoration          (WQSAR)</b>	APPROVED BY   <b>Director, Division of Water</b>	

## PURPOSE

The purpose of this *Guidance Relating to the Nomination and Designation of Tier 3 Waters* is to document the current process for the nomination and designation of Tier III waters in the State of Alaska. Currently there is no administrative process. The legislative process, however, is available to consider Tier 3 designation requests from the public or others. Tier 3 designations may be made by legislation that is enacted into law.

(Note: The Department engaged extensively with tribes and stakeholders over the last ten years in several efforts to develop an administrative process that would provide the opportunity for Alaska tribes and public to nominate waters for Tier 3 designation along with a public process involving state agencies to vet the nominations before a decision on a nomination is made. This effort included regulations proposed in 2013 and legislation proposed in 2016 (SB 163/HB 283). Because there wasn't sufficient consensus on the proposed regulations or legislation for them to move forward, the Department conducted additional outreach and discussion with the tribes and public in 2017. While there is still a lack of consensus on other potential Tier 3 nomination and designation processes Alaska might want to pursue, it is important for Alaskans to understand the legislative process described below remains present and available to them.)

## AUTHORITY

To prevent unnecessary lowering of water quality, 40 CFR § 131.12 requires states to develop and adopt an antidegradation policy, as well as to develop methods for implementing the policy. Alaska's antidegradation policy and implementation methods are established at 18 AAC 70.015 and 18 AAC 70.016, in 1997 and 2018, respectively.

## **BACKGROUND**

The Division of Water's Antidegradation policy under the 18 AAC 70 Water Quality Standards regulations provides for the protection of Tier 3 (or Outstanding National Resource Water) at 18 AAC 70.015(a)(3).

The Division of Water's Antidegradation Implementation Methods Regulations at 18 AAC 70.016 were filed on March 7, 2018 with an effective date of April 6, 2018 and approved by the EPA on July 26, 2018. The approved regulations are now in effect for actions regulated under the federal Clean Water Act (CWA) and specifically apply to CWA section 402 Alaska Pollutant Discharge Elimination System (APDES) wastewater permits and CWA section 401 water quality certifications.

In these regulations, the Division does not address nomination and designation procedures for Tier 3 (Outstanding National Resource Water). The regulations only include implementation methods for permitted discharges to Tier 3 waters once such waters have been designated.

## **POLICY**

The current process for nominating Tier 3 waters involves proposing the introduction of legislation to make the designation. Any such request may go to a legislative representative or committee for consideration for introduction as a legislative bill.

Typically, a request to an individual legislator would go to a legislator whose district contains the proposed Tier 3 water. Contact information for legislators is available online at <http://akleg.gov/senate.php> and <http://akleg.gov/house.php>.

Bills may also be introduced in the legislature through the House and/or Senate Rules committees at the request of the Governor. (AS 24.08.060(b)).

If a nomination is submitted to the Department with the expectation it will be processed administratively or otherwise acted on by the Department, the application will be returned to the nominator and the nominator will be informed of the legislative process described above.



"Yee gu.aa yax x'wan."

**An Indian Reorganization Act Village  
Under Act of Congress June 15<sup>th</sup> 1935**

**32 Chilkat Avenue Klukwan, Alaska**  
 HC60 Box 2207 Haines, Alaska 99827  
 Phone: (907) 767-5505  
 Fax: (907) 767-5518  
 Email: klukwan@chilkat-nsn.gov

**Re: House Bill 138: National Resource Water Designation**

The Chilkat Indian Village (CIV) is a Federally Recognized Indian Tribe representing the Village of Klukwan, 22 miles north of the community of Haines. The Tribal Council is the governing body and is mandated by our Tribal Constitution to protect and maintain the lands and waterways of the Jilkaat Kwaan (people of the Chilkat Valley) Territory, and for the Tribal Members of Klukwan. The Chilkat Indian Village would like to bring your attention to HB 138. Written below are some of our voiced concerns and ideas.

**Background:**

In 2008, the State of Alaska Department of Environmental Conservation began considering a process to designate Tier 3 water bodies under the Clean Water Act. 11 years later there is still not a process to determine if a nomination qualifies for a Tier 3 designation.

In 2016- the Chilkat Indian Village nominated the Chilkat River to be considered for Tier 3 designation under the Clean Water Act. This nomination was one of the original Tier 3 nominations in Alaska. These nominations insighted a considerable effort over the past few years by DEC and the legislature to develop a process for approving Tier 3 nominations.

During the 2016 legislative session, the Governor introduced legislation (SB163 and HB283) to establish a statutory process for nominating waters for Tier 3 status, vetting the nominations and making a decision. In the proposed legislation, the Legislature would have had the final authority for making all Tier 3 designations. The bills received considerable public interest. Ultimately, the Governor requested the bills be set aside and committed the administration to more dialog with Tribes and stakeholders before offering another proposal. SB 51 and HB 138 are ultimately the same bill that caused so much concern from the public in 2016.

**Considerations:**

- The current bills both in the House and Senate on the ONRW should **NOT** be passed. There are significant shortcomings:
  - o Designation should not be a statutory process.
    - Inviting the legislature to make such a determination politicizes a process that is best left to professionals with natural resource/science expertise. These people are best suited to assess merits of nominations for waters being, in the case of Tier 3 waters, "exceptional, important, unique, or sensitive ecologically..."
  - o There is no criteria for Tier 3 Waters, therefore there is no way for the legislature to know how to make this determination
    - If designation is a statutory process there needs to be a criteria developed so that the legislature understands how it is determining whether or not to designate. With no criteria HB 138 will waste time and money and continue to erode public trust in the legislative body as a whole.
  - o The bill lacks specifics- including an appeal process, length of time to process nomination, etc.
  - o By making this designation a legislative process the Govern maintains the right to veto. This will likely contribute to the nominations being caught up in a political debate while the determination should not be based on politics but on the ecological, recreational, and other criteria demonstrating an "outstanding" waterbody.



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- A new bill should be introduced. Below are a considerations for the new bill:
  - o Designation is an administrative action- authority for designation lies with DEC
  - o There is a public process
  - o There is a definition of "exceptional waters"
  - o There is a criteria for Tier 3 waters
  - o There is a process to appeal
  - o Nominations can be made by Alaskans only
  - o Any bill relating to ONRW should be heard by House Tribal Affairs and House Fisheries Committees
  
- The current nominated waterbodies should be dealt with as soon as possible:
  - o In lieu of a new bill being approved, the authority resides with DEC through the interim antidegradation implementation guidance and triennial review (EPA 2018, letter. See attached).
    - <https://dec.alaska.gov/water/water-quality/triennial-review/>
      - Scroll down and see PDF's under Fact Sheets
  - o DEC should be required to process the nominations and determine designation status.

Why has it been so difficult to come to agreement on the approval process for the State of Alaska: *"At both the 2017 and earlier workshops, there were two main groups with two distinct voices. One group is generally pro-regulation and pro-fishery and favored a science-based regulatory approach to Tier 3 nomination, with DEC or a Board as the designating authority. The other group is more pro-development and pro-resource extraction, preferring the ultimate designation authority to be in the hands of the legislature."* (DEC. 2017).<sup>1</sup>

Of course pro industrial development stakeholders and the construction industry are not going to like the idea of Tier 3 but this has to be okay. Similarly, the pro environment and pro public health people along with many Tribes working to protect subsistence resources do not like the idea of development special interests being able to degrade waterbodies. The Clean Water Act – like all regulation- in the United States works to find a balance. Right now in Alaska there is no balance to the current system. Why in Alaska do we provide entities a process to pollute our waters but we do not provide Alaskan's a process to protect our waters?

"In 1983, DEC was required by the Federal Clean Water Act to "develop, adopt, and retain a statewide antidegradation policy regarding water quality standards and establish procedures for its implementation through the water quality management process." (EPA WQS Handbook) Over the intervening 34 years, DEC has implemented a procedure allowing for the lowering of water quality through the issuance of discharge permits, but it has resisted the legal requirement to develop a process for the protection of high quality waters, known as Outstanding National Resource Waters (ONRW) or Tier 3 waters." (ULCAC.2017).<sup>2</sup>

The Chilkat Indian Village asks you to reject HB 138 and SB 51 and to support legislation that promotes the protection of exceptional water bodies in Alaska. CIV is reaching out to you and offering to work with you and other representatives to create a process to designate Tier 3.

<sup>1</sup> Developing a Tier 3 Water Nomination and Designation Process in Alaska. Outreach Report. DEC. September 2017.

<sup>2</sup> Upper Lynn Canal Fish and Game Advisory Committee. Tier 3 Designation. March 2017.

CHILKAT INDIAN VILLAGE



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Under Act of Congress June 15<sup>th</sup> 1935**

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Email: [klukwan@chilkat-nsn.gov](mailto:klukwan@chilkat-nsn.gov)

Thank you for listening to our concerns and for working to represent the Tribal Members of Klukwan.

Sincerely

Jones Hotch, Jr.

Chilkat Indian Village

Tribal Council Vice President

[jhotchjr@chilkat-nsn.gov](mailto:jhotchjr@chilkat-nsn.gov)

907-767- 5505