



2/12/2020

Re: CSHB 138

To: Alaska House Resource Committee Co-Chairs, Representatives Tarr and Lincoln,

I am writing today to urge you to not pass CSHB 138 out of the House Resources committee. I was on line to testify for over two hours last Monday but time ran out before I could speak. I hope to testify this Friday, but in case that is not possible, please consider the following written comments.

As nearly every commenter noted at your last hearing, this bill would effectively remove any possibility of a Tier 3 Outstanding National Resource Water (ONRW) from ever being designated in Alaska; a remarkable fact given the importance of Alaska waters and fisheries to the people of this State. If Tier 3 nominations are required to get Legislative approval, none will ever be approved. As you well know, a single committee Chair, the Rules Chairs, the Speaker of the House, the President of the Senate, or the Governor could table or veto every bill.

There were a number of statements/issues/questions made by the sponsor and his staff, or members of the public during last Monday's hearing that I would like to specifically address:

1. Does Alaska currently have a policy for designating Tier 3 waters?

Alaska adopted interim Antidegradation Policy (ADP) implementation guidance in 2010 in response to a court order by which it can evaluate and decide on Tier 3 nominations. ADEC has never acted through the policy with regards to a Tier 3 nomination to my knowledge. While I believe the policy should have more specificity with respect to process, and many of us have been trying to get ADEC to move this issue forward for literally a decade, to state that we have no mechanism in place for Tier 3 designation is inaccurate.

2. If we don't act soon, will EPA take over the process?

EPA has approved the State's interim ADP implementation policy, and given no indication of any intention to take over the Tier 3 designation process should Alaska not act further in the short term to adopt a more complete protocol.

3. Does ADEC have the authority to make Tier 3 designations?

Federal regulation at 40CFR 131.4 establishes Alaska's authority to review, establish, and revise its Water Quality Standards (WQS) under section 303(c) of the Clean Water Act (CWA.) The requirement

for every state to adopt an ADP, which is part of a state's WQS, is found at 40CFR 131.12, which requires not only the adoption of the policy itself, but of regulations necessary to implement the policy. Alaska Title 46.03.020 authorizes ADEC to adopt WQS, and ADEC has been administering Tier 1 and Tier 2 ADP designations for years. Regardless of the difference in terms of the level of protection for waters designated Tier 3 from other Tiers, there can be no question that ADEC has the authority to make such determinations.

Most states administer Tier 3 ADP and other WQS issues through their state environmental conservation agency. A few have established Water Quality Boards or Commissions for specific WQS-related actions such as Tier 3 designations. How it is done is up to each individual state; it is simply required that the policy exist, and be implementable. Again, we have had the capacity to make such decisions for a decade and there have been nominations before the department for eight years. The fact that no decisions have been made speaks to the unwillingness of the agency to do its job, not whether it has had the necessary authority. Finally, there is no need to clarify whether a state legislature has the power to designate a Tier 3 designation.

4. Can a Tier 3 designation be removed?

There is no law, regulation, or case law supporting the notion that once made, a Tier 3 designation remains in perpetuity. If the agency that made the designation wishes to remove it, it can do so, and certainly a state legislature would have the authority to remove a Tier 3 designation regardless of how it was adopted.

5. Will legislative Tier 3 determinations be less political?

It is hard to imagine a rule-making process that would be more political than bringing a Tier 3 bill before the State Legislature. Tier 3 decisions should be made on the merits of the situation in question, not the politics of one or more members of the Legislature. Note: Tier 3 ADP was never intended to be limited to waters of exceptional quality from a chemical or physical perspective. While pristine waters may be worth considering, Tier 3 protection could be assigned to a water that is legally "impaired". For example, Lake Tahoe in California is an impaired water body under section 303(d) of the CWA because it violates turbidity standards, yet it has been designated a Tier 3 water because of its overall importance to the local community.

6. What criteria should be applied when considering Tier 3 decisions?

You heard from many commenters that the decision should be based on "science." I would agree with that to a point: the evaluation needs to be objective. However, that shouldn't mean that the only consideration is water chemistry or some other physical parameter, as I mentioned above. A water that is of significant cultural importance should also be given serious Tier 3 consideration; there should be a subjective component to the decision that should lean heavily towards the wishes of the people in closest proximity or dependence on that water and therefore those most affected by the decision. Objective and subjective criteria should both apply to the decision. A designation shouldn't be denied for political or private financial reasons.

7. Should an applicant be required to submit a cost/benefit economic analysis?

As several commenters noted on Monday, a cost/benefit analysis is in fact a very complicated undertaking, and one that typically requires substantial funds. Even so, it is unlikely to be an accurate metric for a Tier 3 evaluation, since the benefits of a designation or its denial are often impossible to quantify. What monetary “benefit” could one assign to the Chilkat River, nominated for Tier 3 status five years ago by the Tlingit Village of Klukwan? How do you assign a numerical value to a river that has sustained a village for thousands of years?

8. Would this bill make the path to a Tier 3 decision more straightforward?

This bill would require a nominee to work through the Commission process, only to be followed by having to work the issue again through a full legislative process. ADEC or a Commission composed of qualified individuals should have the professional capacity and integrity to evaluate the importance or quality of a waterbody for such a discussion. I mean no disrespect, but the Legislature by comparison would have the least expertise in such matters, and only contribute to the politicization of the decision. Furthermore, the State Legislature has its hands full every session fulfilling the duties it has now, such as adopting a budget within a ninety-day term. Who would be undertaking this evaluation at the Legislative level? House and Senate offices would have to go out to the broader community for advice, people who would already be able to weigh in at the Commission or agency level. Nothing of value would be added to the process.

The current high quality of our waters and the health of our fisheries cannot be matched anywhere else in the country. I sincerely doubt the supporters of this bill are driven to see that Tier 3 nominations get a fair, comprehensive, apolitical evaluation. It would certainly be unfair for the State to facilitate the interests of would-be polluters, often international corporations, through an easier path via our state agencies towards an allowance to degrade a public water, while the road our own citizens must navigate to protect a water body critical to the needs and quality of life of our own communities becomes more and more difficult.

One final comment: missing from this discussion so far has been what a Tier 3 ONRW designation would or wouldn't do. The impact of designating a Tier 3 ONRW is often greatly exaggerated. A Tier 3 designation would not impact having a septic system near a waterbody, or the use of motorized boats on a river or lake, since in neither case is a point source discharge permit required. The fundamental change upon Tier 3 designation is that new or expanded discharge permits for point sources of pollution would not be allowed. The objective of a Tier 3 designation is to maintain the water at its present level of quality, whatever that may be.

This bill will not establish a procedure that matches the stated intent of the sponsor. Please do not pass this bill out of this committee.

Sincerely,



Gershon Cohen PhD
Project Director