



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of
Environmental Conservation

Randy Bates, Director
Division of Water

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February 24, 2020

The Honorable Geran Tarr
Co-Chair, House Resources Committee
State Capitol, Room 28
Juneau, AK 99801

The Honorable John Lincoln
Co-Chair, House Resources Committee
State Capitol, Room 102
Juneau, AK 99801

Dear Representatives Tarr and Lincoln:

The Department of Environmental Conservation (DEC) recorded and fielded several questions during and after the hearing of HB 138 Natural Resource Water Designation on Monday February 17. I have listed those questions and provided answers for each, as follows. We are pleased to provide the committee with the information necessary to make an informed decision on this bill.

1. How would a Tier 3 waterbody be designated? Would it be an entire waterbody or a section of a waterbody?

The designation of a Tier 3 waterbody must include boundaries upstream and downstream of the water. These boundaries may include the latitude and longitude of a point or boundary line or may include a description of the waters. The designation could include an entire waterbody or may include only a portion or section of the waterbody.

2. How would upstream waters and tributaries be impacted by a Tier 3 designation? Would degradation be allowed upstream or on a tributary if it did not affect the water quality of the Tier 3 waterbody?

Regulated point source discharge activities and regulated nonpoint source discharges which degrade or lower the water quality of a designated Tier 3 water are not allowable after designation, regardless of their location (18 AAC 70.016(d)(4)). Activities upstream of a Tier 3 designation would only be permitted if they did not degrade the water quality within the boundaries of the Tier 3 waterbody.

As discussed in the committee hearing, there is an exception that would allow activities that result only in a temporary and limited change in the water quality of a Tier 3 waterbody. "Temporary and limited" is defined at 18 AAC 70.016(f) as the shortest possible time, generally weeks or months, and is limited in impact. An activity with a temporary and limited effect may not degrade water quality permanently.

Since a Tier 3 designation requires maintenance of the water quality present at the time of designation, any previously permitted discharges to the waterbody, regardless of location, would be allowed to continue after designation. They would not, however, be allowed to increase the volume or concentration of their discharge in subsequent permit renewals or modifications if that change degraded the water quality within the boundary of the Tier 3 waterbody.

3. Is degradation of water quality and the use of mixing zones allowed in Tier 3 waters, and if so, what are the parameters?

DEC is responsible for ensuring that permitted activities discharging to water meet the established water quality standards at 18 AAC 70. Within the receiving waters, DEC will sometimes authorize a mixing zone for the discharge where the water quality standard can be exceeded in a small and defined area. Outside of that mixing zone, however, the water quality standards are met. This is a current and common practice in Tier 1 and Tier 2 waters and is authorized under 18 AAC 70.240.

The degradation of a water quality and the use of mixing zones would not be allowed in a designated Tier 3 water, in accordance with 18 AAC 70.016(d)(3) and 18 AAC 70.016(d)(4)(E).

4. Does DEC have statutory authority to designate Tier 3 waters?

In accordance with AS 46.03.080, DEC has the authority and obligation to establish standards of quality and purity or classify water as to minimum quality and purity. DEC accomplishes this and establishes the protection levels of the water during the permitting process for a wastewater discharge on a parameter-by-parameter basis according to 18 AAC 70 Water Quality Standards and 18 AAC 83 Alaska Pollutant Discharge Elimination System (APDES) regulations. The protection levels for water are either Tier 1, for which not all water quality criteria are met, or Tier 2, where all the water quality criteria are met (the vast majority of waters in Alaska are Tier 2 waters).

DEC believes that the designation of a Tier 3 waterbody would exceed our statutory authority at AS 46.03.080, which grants DEC authority to regulate the quality and purity of the water. In contrast, the designation of a Tier 3 waterbody requires an evaluation of recreational or ecological value that makes the water exceptional (40 CFR 131.12(a)(3) and 18 AAC 70.015(a)(3)). Given that designation of a Tier 3 waterbody is likely an appropriation and the legislature has not clearly delegated that authority to make such an appropriation to DEC (in light of the criteria of exceptional recreational or ecological significance), DEC believes the legislature is the appropriate body to make a Tier 3 designation.

5. Does the November 21, 2018 DEC Policy and Procedure Guidance Relating to the Nomination and Designation of Tier 3 Water require formal EPA approval? Is it subject to the Administrative Procedures Act?

40 CFR 131.12(b) requires states to develop methods for implementing their antidegradation policies and such methods are to be consistent with the state's antidegradation policy and the federal antidegradation policy. Binding methods (like regulations) require EPA approval; guidance policies do not require formal EPA approval. Thus, EPA may review DEC's guidance policy on Tier 3 designations and indicate whether it is consistent with the federal antidegradation policy, but DEC's guidance policy is not subject to EPA's formal review and action. DEC received an email from EPA indicating that this guidance was consistent with the Clean Water Act.

If you have additional questions, please do not hesitate to contact our Legislative Liaison Laura Achee at laura.achee@alaska.gov or 907-465-5009.

Regards,

A handwritten signature in blue ink, appearing to read 'Randy Bates', is written over the word 'Regards,'.

Randy Bates
Director
Division of Water