



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Environmental
Conservation

DIVISION OF WATER

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March 21, 2023

The Honorable Cathy Giessel
The Honorable Click Bishop
Co-Chairs, House Resources Committee
State Capitol
Juneau AK, 99801

Dear Senators Giessel and Bishop:

Thank you for the opportunity to provide testimony on SB 72, Natl. Res. Water Nominations/Designation. Questions arose during the meeting on March 17, that required additional information, which are responded to below.

Cost to designate Tier III waters?

Attached is a letter from last session that addressed the question about the cost to develop a proposal for a Tier 3 water.

EPA's process for designating Tier III waters?

40 CFR 131.12 requires that the "*State shall develop methods for implementing the antidegradation policy that are, at a minimum, consistent with the State's policy and with paragraph (a) of this section...*" The State has an antidegradation policy for Tier 1 waters, Tier 2 waters, and Tier 3 waters. EPA requires that the State have a process to designate a Tier 3 water, but does not control or approve what that process is. In the absence of a DEC policy to establish a Tier 3 water, and likely even with the November 2018 DEC "policy" in place, the legislature has the legal authority to establish and designate a Tier 3 waterbody.

Antidegradation Authority?

The federal authority cited above (40 CFR 131.12) requires the state establish an antidegradation policy for waters, including those Tier 3 "*high quality waters [that] constitute an outstanding National resource.*" The state has established those

antidegradation rules generally in [18 AAC 70](#) and specifically at 18 AAC 70.015 and 70.016.

If you would like more information or have additional questions, I am happy to assist.

Sincerely,

A handwritten signature in blue ink, appearing to read "R. Bates".

Randy Bates

Director

Attachments: 20220419 Sen Res re Tier 3 response

Cc: Julia O'Conner, Staff to Senator Giessel
Anne Rittgers, Staff to Senator Bishop



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April 19, 2022

The Honorable Josh Revak
Chair, Senate Resources Committee
Room 125, State Capitol
Juneau AK, 99801

Dear Chair Revak:

At the April 8th Senate Resources Committee hearing on Senate Bill 228 regarding outstanding natural resource waters, I committed to following up and answering questions that members of the Committee asked. Those questions and responses are as follows.

Senator Miccichie asked (paraphrased) *"How does the Department's request for Section 404 dredge and fill permitting authority work with or against this bill regarding designation of a Tier 3 waterbody?"*

ANSWER – While I answered the question in committee, I want to make it clear in writing that these are very different programs in scope.

Section 404 authority is specific to dredge and fill permit applications for activities that are located in waters and wetlands of the United States. Under a State-run 404 program, Department staff would evaluate activities and work with applicants to avoid, minimize, or mitigate adverse impacts to the waters and wetlands from the proposed activities. This work is clearly within the Department's scope of authority and expertise related to water quality and purity.

Under the Clean Water Act, Tier 3 waters are defined as waters of exceptional recreational or ecological significance and may be nominated and designated accordingly. As discussed in committee, the unique characteristics of a Tier 3 water may not relate at all to the quality or purity of the water, but rather to the use, or lack thereof, of that water or surrounding areas. In short, a Tier 3 designation may not necessarily be about protecting the quality of a water body, which state and federal water quality standards already do. Rather, it may be about preserving the water body for one specific use to the exclusion of other uses of the water body or nearby areas which in no doubt has land use ramifications. The scope of considerations for a Tier 3 water designation extends well beyond water quality expertise of

Department staff and is essentially a de facto land use designation/appropriation. Therefore, we believe this power is appropriately vested with the legislative branch.

Senator Bishop asked “*What is the all-in cost for nominating a Tier 3 designated water?*”

ANSWER – The criteria for designating a Tier 3 water body are broad and varied. Therefore, the cost for developing information to support a Tier 3 nomination will also vary greatly depending on the level of rigor involved in the nomination. A nomination could be developed using multiple years of water sampling with laboratory analysis of the samples to compile a technically complex application which could cost hundreds of thousands of dollars. It would be expected that such nominations would have anecdotal, traditional, cultural, or other components as well.

Senator Kiehl asked “*Once designated, can a waterbody be de-designated? EPA doesn’t have any rules against it and didn’t have any notion against a delisting process. Is that a conflict or are both still accurate?*”

ANSWER – There is no conflict and both are still accurate. There is no language in the Clean Water Act addressing a de-listing or de-designation process for a Tier 3 waterbody, and as such, there appears to be no prohibition against removing a Tier 3 designation.

Sincerely,

A handwritten signature in blue ink, appearing to read "Randy Bates". The signature is stylized and cursive.

Randy Bates
Director