

SB

163

<TARGET><BILL>SB 163</BILL><SUBJECT>SB
163</SUBJECT><COMM>SRES29</COMM></TARGET>

SENATE COMMITTEE REPORT First Committee of Referral

DATE: 1/29/16

FURTHER: Finance

Date of 5-Day Notice: 02/19/16
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: 02/04/16

Resources Committee considered SENATE BILL NO. 163

SB 163-NATL. RES. WATER NOMINATION/DESIGNATION

"An Act relating to the nomination and designation of state water as outstanding national resource water; and providing for an effective date."

and recommends:

- be replaced with CS SB 163 (RES) [] Same Title New Title
- [] adopt previous CS _____ (_____) [] Same Title [] New Title
- [] attached amendment(s)
- [] adopt _____ Letter of Intent
- [] further referral to _____ Committee

Dept Abbr.	
ADM	LWF
CED	LAW
COR	LEG
EED	MVA
DEC	DNR
DFG	DPS
GOV	REV
DHS	DOT
AJS	UA

NEW FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
DEC	✓			1
DNIZ			✓	2
DFG			✓	3

PREVIOUS FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #

[] APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	Do PASS	Do NOT PASS	NO REC	AMEND
	Costello			✓	
	Coshill	✓			
	Micicich				✓
	Steudman			✓	
CHAIR:	Gressy	✓			

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Governor Bill Walker
STATE OF ALASKA

January 28, 2016

The Honorable Kevin Meyer
President of the Senate
Alaska State Legislature
State Capitol, Room 111
Juneau, AK 99801-1182

Dear President Meyer:

Under the authority of Article III, Section 18 of the Alaska Constitution, I am transmitting a bill relating to the nomination of state water as "outstanding national resource water," also known as "Tier 3" water. Once a water body is designated as a Tier 3 water, the only additional pollutants from wastewater discharges that can be added to that water are temporary and limited. There is currently no Tier 3 water in Alaska.

The bill would add a new section, AS 46.03.085, authorizing the Department of Environmental Conservation (DEC) to collect nominations of state water for Tier 3 status and compile a list of nominated water for transmittal to the Legislature. The bill also would clarify that legislative action would be required to formally designate a body of water as a Tier 3 water.

The Clean Water Act requires states to implement a procedure for Tier 3 designation. DEC does have the authority to set quality and purity standards under AS 46.03.080 and has the technical expertise to analyze whether or not a water body meets the criteria for extra protection under Tier 3 status. However, currently there is no provision in the Clean Water Act for reversing a Tier 3 designation. Thus, such a designation has the potential to permanently limit development. Given the far-reaching consequences, the final authority for designation should rest with the Legislature and not with DEC.

I urge your prompt and favorable action on this measure.

Sincerely,

A handwritten signature in black ink that reads "Bill Walker".

Bill Walker
Governor

Enclosure



SB163 – Natl. Res. Water Nomination/Designation Sponsor Statement

SB163 “An act relating to the nomination and designation of state water as outstanding national resource water; and providing for an effective date.”

Senate Bill 163 (SB163) creates a process for water in Alaska to be designated as an Outstanding National Resource Water (ONRW). The purpose of an ONRW – or Tier 3 – designation is to offer special protection for waters of "exceptional recreational or ecological significance." Once a water is designated as an ONRW, the only additional pollutants from wastewater discharges that can be added to that water are temporary and limited.

The state is required to establish a process for ONRW designation under the federal Clean Water Act. Current statute and the Constitution are not clear regarding the Department of Environmental Conservation (DEC)'s authority to designate ONRWs. ONRWs are afforded special protection: because only temporary and limited pollutants are allowed to be added to ONRWs, an ONRW designation effectively becomes a land use decision with the possibility of impacting or barring further development on lands near ONRWs. Given the far-reaching consequences of designation, ONRW designation is more appropriately the Legislature's decision.

This bill clarifies that the final designation decision is made by the Legislature. It also establishes a process by which nominations can be submitted to and compiled by DEC for submittal to the Legislature for consideration.

There is no anticipated increased cost to implement this bill. DEC will be able to establish regulations and collect nominations with current staffing levels.

There are currently no ONRWs in the State of Alaska; however, DEC has received three requests for ONRW designations, which DEC is holding until a final process for designation is established.

It is important to the protection of Alaska's human and environmental health to have a clear process for designation of Outstanding National Resource Waters or Tier 3 waters in the state.

Classification of Water: A Description of Tiers 1-3

Per the Clean Water Act, Alaska's water quality antidegradation policy¹ creates three classifications, or "tiers," of waters.²

Tier 1 waters are waters for which not all water quality criteria are met. This can be due to naturally occurring constituents in the water, or can be due to pollutants introduced by humans.

Example of a naturally-occurring Tier 1 water: Red Dog Creek runs through an area that contains natural ore bodies, resulting in naturally (pre-mining) high concentrations of cadmium, lead, zinc, aluminum, and other metals in the creek.

Example of a human-caused Tier 1 water: The Chester Creek watershed in the urban area of Anchorage is impaired by fecal coliform bacteria. Human activities in the area, such as dog walking and bird feeding, contribute to this pollution.

Permitting in a Tier 1 water: The Tier 1 permitting process is largely the same process as for Tier 2 (below) because water quality criteria are normally met for *some* constituents.

Tier 2 waters are "high-quality waters," which include the vast majority of waters in Alaska. In these waters, all water quality criteria are met.

Example of a Tier 2 water: Gastineau Channel near Juneau is an example of a high quality water into which discharge from the Juneau-Douglas Wastewater Treatment Plant is permitted.

Permitting in a Tier 2 water: For a Tier 2 water, the water quality must be maintained or protected unless DEC authorizes a reduction in water quality following prescribed and rigorous permitting methods. In the permit, DEC must conclude and demonstrate that:

- Allowing the lowering of water quality is necessary to accommodate important economic or social development,
- Water quality criteria will not be violated, except in an authorized mixing zone,
- Existing uses of the water will be fully protected,
- Effective and reasonable treatment methods will be used, and
- Statutory and regulatory requirements are met.

Tier 3 waters are waters found by a State process to be of exceptional significance or unique.

Example of a Tier 3 water: There are no Tier 3 waters in the State of Alaska. In California, one of two Tier 3 waters is Mono Lake. Mono Lake is 2-3 times saltier than the ocean and is an alkaline lake with a pH of 10 (designated for its uniqueness rather than water purity).

Permitting in a Tier 3 water: The quality of water in a Tier 3 water must be maintained and protected. Discharges that add any additional pollutants to a water can only be temporary or limited; for example, runoff from a construction project.

¹ For more on Alaska's Antidegradation Policy, visit:
<http://dec.alaska.gov/water/wqsar/Antidegradation/index.html>.

² 18 AAC 70.015

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3/15/16

CS FOR SENATE BILL NO. 163()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-NINTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL
FOR AN ACT ENTITLED

1 **"An Act relating to the nomination and designation of state water as outstanding**
2 **national resource water; and providing for an effective date."**

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 *** Section 1.** AS 46.03 is amended by adding a new section to read:

5 **Sec. 46.03.085. Outstanding national resource water.** (a) Water of the state
6 may not be designated as outstanding national resource water as specified in 40 C.F.R.
7 Part 131.12 except by an act of the legislature. The department may not manage water
8 of the state as specified in 40 C.F.R. Part 131.12 unless the water has been designated
9 as outstanding national resource water under this section.

10 (b) The department shall accept nominations of water for designation as
11 outstanding national resource water if the nominations meet the requirements of this
12 subsection. A nomination must specifically and geographically identify a water body
13 or portion of a water body for designation.

14 (c) Any resident of the state may provide a nomination.

(d) The department shall

(1) adopt regulations that establish the process for submitting the nomination and additional information;

(2) provide public notice of all nominations;

(3) provide individual notice to each known property owner whose interest is affected by a designation; and

(4) establish a mechanism to allow any resident of the state to provide additional information.

(e) The department may transmit an outstanding national resource water nomination to the legislature under (f) of this section only if the department, in writing attached to the nomination,

(1) determines that the water is important, unique, or ecologically sensitive;

(2) determines that the designation is necessary to protect the water because current state or federal protections are not sufficient;

(3) determines that there is no other available or effective method of protecting the water;

(4) identifies

(A) if the water is a river, whether the river has been designated a wild and scenic river under 16 U.S.C. 1271 - 1287 (Wild and Scenic Rivers Act);

(B) whether the water is an ecosystem for or the habitat of an endangered or threatened species listed under 16 U.S.C. 1531 - 1544 (Endangered Species Act of 1973) or determined under AS 16.20;

(C) whether the water is an ecosystem for, the habitat of, or the location of an outstanding recreational fishery; and

(D) whether the water serves as the sole source of water for the use of people; and

(5) describes the potential effects of the designation on

(A) endangered or threatened species listed under the 16 U.S.C. 1531 - 1544 (Endangered Species Act of 1973) or determined under AS 16.20;

1 (B) recreational fisheries; and

2 (C) water supplies for the use of people.

3 (f) Within 10 days after the convening of each regular legislative session, the
4 commissioner shall transmit to the legislature for consideration a list of nominations
5 meeting the criteria in (e) of this section and related material received by September 1
6 of the preceding year. The department may not transmit a nomination substantially
7 similar to a nomination transmitted within the two years immediately preceding the
8 nomination.

9 (g) Every 10 years, beginning in 2017, the Department of Environmental
10 Conservation and the Department of Natural Resources shall each deliver a report to
11 the senate secretary and the chief clerk of the house of representatives and notify the
12 legislature that the report is available. The reports must describe each body of water
13 designated as outstanding national resource water and provide a recommendation
14 regarding the continuation of the designation.

15 * **Sec. 2.** AS 46.03.900 is amended by adding a new paragraph to read:

16 (38) "outstanding national resource water" means a water body that has
17 been determined by the legislature to be important, unique, or ecologically sensitive.

18 * **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to
19 read:

20 **TRANSITION: REGULATIONS.** The Department of Environmental Conservation
21 shall adopt regulations necessary to implement this Act. The regulations take effect under
22 AS 44.62 (Administrative Procedure Act), but not before the effective date the law
23 implemented by the regulation.

24 * **Sec. 4.** Section 3 of this Act takes effect immediately under AS 01.10.070(c).

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3/31/16

CS FOR SENATE BILL NO. 163()

IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-NINTH LEGISLATURE - SECOND SESSION

BY

**Offered:
Referred:**

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the nomination and designation of state water as outstanding state**
2 **resource water; defining outstanding state resource water; providing for the**
3 **management of outstanding state resource water; and providing for an effective date."**

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 * **Section 1.** AS 46.03 is amended by adding new sections to read:

6 **Article 3A. Outstanding State Resource Water**

7 **Sec. 46.03.135. Outstanding state resource water; nominations.** (a) A water
8 of the state may not be designated as an outstanding state resource water except by an
9 act of the legislature. An outstanding state resource water designation may not be
10 removed except by an act of the legislature.

11 (b) The department shall accept from a resident of the state a nomination of
12 water for designation as outstanding state resource water. A nomination must include

13 (1) the name, the geographic identification, and specific distinguishing
14 features of a water body or portion of the water body nominated for designation;

- 1 (2) a detailed map identifying
- 2 (A) the location of the nominated water;
- 3 (B) the boundaries of the nominated water, including any
- 4 upstream or downstream boundaries;
- 5 (C) adjacent, proximate, or overlapping boundaries of the
- 6 nominated water, and a national or state park, a river designated a wild and
- 7 scenic river under 16 U.S.C. 1271 - 1287 (Wild and Scenic Rivers Act), critical
- 8 habitat designated under 16 U.S.C. 1531 - 1544 (Endangered Species Act of
- 9 1973), and other similar protected areas;
- 10 (3) evidence demonstrating that the nominated water is
- 11 (A) in relatively pristine condition, largely absent of human
- 12 sources of degradation, and of exceptional value to the state in its current
- 13 condition;
- 14 (B) of exceptional ecological, economic, or recreational
- 15 significance; or
- 16 (C) an exceptional and rare example of its type, regardless of
- 17 its water quality;
- 18 (4) a statement concluding that the designation is necessary to protect
- 19 the nominated water; the statement must, at a minimum, reference supporting
- 20 scientific data and principles;
- 21 (5) a discussion of alternative means that could be used to protect the
- 22 nominated water under state or federal law;
- 23 (6) available water quality data for the water, including chemical,
- 24 physical, or biological water quality information relevant to establishing a baseline
- 25 water quality of the nominated water;
- 26 (7) a description of current or future activities that result or could result
- 27 in a discharge in waters adjacent to or a tributary of the nominated water, or in the
- 28 nominated water itself that may need to be limited or managed to comply with the
- 29 standards under AS 46.03.185, if the nominated water is designated as outstanding
- 30 state resource water;
- 31 (8) a discussion of the economic effect the designation would have on

1 the local and regional economies of the state;

2 (9) evidence that the nominated water constitutes waters of the United
3 States;

4 (10) any additional information that the person submitting the
5 nomination believes may be necessary to aid the department in conducting the analysis
6 necessary to forward the nomination to the legislature; and

7 (11) a fee of \$1,000.

8 **Sec. 46.03.145. Department determinations on nomination; agreement.** (a)

9 Within six months after receiving a nomination, the department shall determine
10 whether the nomination meets the requirements of AS 46.03.135. If the department
11 determines that a nomination meets the requirements of AS 46.03.135, the department
12 may enter into an agreement with the resident of the state that nominated the water.
13 The agreement under this section may provide that the resident shall reimburse the
14 department for the costs or a portion of the costs incurred by the department or another
15 state agency related to the nomination process. The agreement may specify that costs
16 incurred by the department include costs for

17 (1) necessary public notice and public hearings; and

18 (2) preparation of the findings, analyses, or determinations related to
19 the nomination.

20 (b) For a nomination meeting the requirements of AS 46.03.135 for which a
21 cost agreement has not been established or for which a partial cost agreement has been
22 established, the department shall prepare an estimate of the cost to the department and
23 other state agencies to prepare and process the nomination. The cost estimate under
24 this subsection may be transmitted to the legislature for consideration as a capital
25 appropriation.

26 **Sec. 46.03.155. Regulations.** (a) The department shall adopt regulations that
27 establish a process for

28 (1) submitting a nomination and additional information related to a
29 nomination;

30 (2) prioritizing nominations;

31 (3) providing public notice and a public hearing for all nominations;

1 (4) providing individual notice to known owners of land adjacent to
2 the nominated water;

3 (5) providing, upon the request of an individual, a copy of the
4 nomination and additional material related to the nomination, including public
5 comments related to the nomination; and

6 (6) an individual to request an additional public hearing on a
7 nomination.

8 (b) The department may adopt regulations that establish additional nomination
9 or information requirements not provided in this section.

10 **Sec. 46.03.165. Requirements for submission to the legislature; nomination**
11 **attachments.** (a) The department may forward a nomination for outstanding state
12 resource water to the legislature only if the

13 (1) entirety of the water nominated is a water of the United States;

14 (2) department has determined that the nomination meets the
15 requirements of AS 46.03.135;

16 (3) department, in consultation with the Department of Fish and Game
17 and the Department of Natural Resources, determines that the nominated water has
18 exceptional characteristics when compared to other state water and the water

19 (A) is in relatively pristine condition, largely absent of human
20 sources of degradation, and of exceptional value to the state in its current
21 condition;

22 (B) is of exceptional ecological, economic, or recreational
23 significance; or

24 (C) is an exceptional and rare example of its type, regardless of
25 its water quality;

26 (4) resident of the state who nominated the water has paid in full the
27 fee due under AS 46.03.135(b)(11) and amounts owed under an agreement under
28 AS 46.03.145.

29 (b) The department shall, in consultation with the Department of Fish and
30 Game and the Department of Natural Resources, create a report analyzing the
31 nomination using the factors described in this subsection. At a minimum, the report

1 must analyze

2 (1) whether there is a risk that the quality of the nominated water will,
3 without the designation, be degraded, causing permanent and substantial adverse
4 effects to the exceptional characteristics of the water;

5 (2) the advantages and disadvantages of other means the state may
6 have to protect the nominated water to preserve its exceptional characteristics.

7 (c) The department may, to assist with the requirements of this section, request
8 that the resident of the state that nominated the water provide additional information.

9 (d) Upon completion of the requirements in this section and AS 46.03.135 -
10 46.03.155, and the regulations adopted thereunder, and after attaching to the
11 nomination the report required under (b) of this section, a summary of the public
12 comments related to the nomination, and any other required or pertinent material
13 compiled under this section or AS 46.03.135 - 46.03.155, or regulations adopted
14 thereunder, the department shall certify the nomination complete. The department
15 shall note on the nomination the date the department certifies the nomination
16 complete.

17 **Sec. 46.03.175. Submissions to the legislature.** (a) Within 10 days after the
18 convening of each first regular legislative session, the commissioner shall transmit to
19 the legislature for consideration a list of nominations certified complete under
20 AS 46.03.165(d) in the preceding four calendar years. For a nomination certified
21 complete under AS 46.03.165(d) in the preceding two calendar years, the
22 commissioner shall submit to the legislature the entire nomination, as certified
23 complete under AS 46.03.165(d).

24 (b) Every 10 years, beginning in 2020, the Department of Environmental
25 Conservation and the Department of Natural Resources shall each deliver a report to
26 the senate secretary and the chief clerk of the house of representatives and notify the
27 legislature that the report is available. The reports must describe each body of water
28 designated as outstanding state resource water and provide a recommendation
29 regarding the continuation of the designation.

30 **Sec. 46.03.185. Regulation of outstanding state resource water.** (a) The
31 department shall regulate water designated as outstanding state resource water under

1 AS 46.03.135 to maintain and protect the water so that no new or increased discharge
2 and no new or increased discharge to a tributary to the water would result in lower
3 water quality in the water, unless the discharge is temporary and does not result in
4 long-term lower quality of water.

5 (b) The department may not manage water of the state as specified in (a) of
6 this section unless the water has been designated an outstanding state resource water
7 under AS 46.03.135.

8 (c) A nomination under AS 46.03.135 - 46.03.195 does not create rights or
9 considerations under state law.

10 **Sec. 46.03.195. Definitions.** In AS 46.03.135 - 46.03.195,

11 (1) "resident of the state" means an individual who establishes
12 residency under AS 01.10.055;

13 (2) "waters of the United States" has the meaning given in 40 C.F.R.
14 230.3, as that section read on the effective date of this Act.

15 * **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to
16 read:

17 APPLICABILITY. The submission required under AS 46.03.175(a), enacted by sec. 1
18 of this Act, applies to the first regular session of the legislature beginning after January 1,
19 2018.

20 * **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to
21 read:

22 TRANSITION: REGULATIONS. Within one year after the effective date of this Act,
23 the Department of Environmental Conservation shall adopt regulations necessary to
24 implement this Act. The regulations take effect under AS 44.62 (Administrative Procedure
25 Act), but not before the effective date the law implemented by the regulation.

26 * **Sec. 4.** Section 3 of this Act takes effect immediately under AS 01.10.070(c).



ALASKA STATE LEGISLATURE

SENATE RESOURCES COMMITTEE

SEN. CATHY GIESSEL

Chair

State Capitol, Room 427

Juneau, AK 99801-1182

(907) 465-4843 Fax 465-3871

Sen. Mia Costello, Vice-Chair

Sen. Peter Micciche

Sen. Bert Stedman

Sen. John Coghill

Sen. Bill Stoltze

Sen. Bill Wielechowski

Senate Bill 163 Version I

Explanation of Changes

Authored by staff at the Department of Environmental Conservation

In response to public testimony on the bill, the Committee Substitute (CS) adds more definition on the nomination criteria and process for designation of Tier 3 waters. The changes include:

- Changes the name of Tier 3 waters to outstanding state resource waters
- Adds that the Legislature may remove a designation
- Rather than have the process for submittal of nomination information and public notice established in regulation (AS46.03.085(c) in the original bill), the CS establishes an eleven point criteria a nomination must include, and adds a fee (Section 46.03.135(b)(1) through (11))
- Adds a six month timeline for the department to determine that a nomination is complete
- Allows for the department to enter into an agreement with a nominator for the nominator to reimburse the department for the costs related to the nomination process including public notice, preparation of the findings, analyses and determinations related to the nomination. Alternatively, the department can prepare a cost estimate for processing a nomination and forward that to the legislature for consideration as a capital appropriation

- Outlines that the department shall establish a process for providing public notice, including individual notice to land owners, and for prioritizing nominations
- Before transmitting nominations to the legislature, adds that the department must certify a nomination complete; in consultation with DNR and DF&G, determine that the water has exceptional characteristics; in consultation with DNR and DF&G create a report analyzing certain factors related to the nomination including analysis of risk that the water will be degraded, and the pros and cons of alternative available to preserve the water
- Clarifies that a list of nominations from the preceding four calendar years is submitted to the legislature, while entire nomination packets for nominations certified complete in the preceding two calendar years are submitted
- Requires the state resource agencies to submit a report to the legislature every ten years on the status of designated waters and recommendations on continuation of the designations
- Provides language describing how the department shall manage a designated water to maintain its existing water quality and only allow discharges that result in temporary lowering of water quality
- Clarifies that a water cannot be managed as an outstanding state resource water until it has been designated as such
- Provides a definition of “resident” and “waters of the United States”
- Adds uncodified law that the department’s first submittal of nominations to the legislature be after 2018

Fiscal Note

State of Alaska
2016 Legislative Session

Bill Version:	CSSB 163(RES)
Fiscal Note Number:	4
(S) Publish Date:	4/4/2016

Identifier: SB163-DFG-HAB-4-2-16
 Title: NATL. RES. WATER
 NOMINATION/DESIGNATION
 Sponsor: RLS BY REQUEST OF THE GOVERNOR
 Requester: Governor

Department: Department of Fish and Game
 Appropriation: Statewide Support Services
 Allocation: Habitat
 OMB Component Number: 486

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2017	Included in	Out-Year Cost Estimates				
	Appropriation Requested	Governor's FY2017 Request	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
OPERATING EXPENDITURES	FY 2017	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2016) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2017) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
 If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Initial version.

Prepared By:	David E. Rogers, Director	Phone:	(907)465-6436
Division:	Habitat	Date:	04/02/2016 11:00 AM
Approved By:	Kevin Brooks, Deputy Commissioner	Date:	04/02/16
Agency:	Fish and Game		

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2016 LEGISLATIVE SESSION

Analysis

This Bill clarifies that the final state natural resource water designation decision is made by the Legislature. It also establishes a process by which nominations can be submitted to and compiled by the Department of Environmental Conservation (DEC) for submittal to the Legislature for consideration.

DEC will provide a Reimbursable Services Agreement (RSA) to the Habitat division to help answer questions about water quality, fish, and wildlife related to the nomination and designation of state water as outstanding state resource water; provide appropriate water related fish and wildlife data when requested; provide input and comments on regulation development; and provide site specific input on nominated waters.

Funding for the RSA is included in the DEC fiscal note. The Division of Habitat has sufficient interagency receipt authority for the agreement which is estimated to be \$40,000.

Fiscal Note

State of Alaska
2016 Legislative Session

Bill Version:	CSSB 163(RES)
Fiscal Note Number:	3
(S) Publish Date:	4/4/2016

Identifier: SB163CS(RES)-DNR-MLW-4-1-16
 Title: NATL. RES. WATER
 NOMINATION/DESIGNATION
 Sponsor: RLS BY REQUEST OF THE GOVERNOR
 Requester: Senate Resources

Department: Department of Natural Resources
 Appropriation: Fire Suppression, Land & Water Resources
 Allocation: Mining, Land & Water
 OMB Component Number: 3002

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2017 Appropriation Requested	Included in Governor's FY2017 Request	Out-Year Cost Estimates				
			FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
OPERATING EXPENDITURES							
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2016) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2017) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
 If yes, by what date are the regulations to be adopted, amended or repealed? N/A

Why this fiscal note differs from previous version:

Revised with additional analysis in response to Committee Substitute

Prepared By:	Brent Goodrum, Director	Phone:	(907)269-8625
Division:	Mining, Land and Water	Date:	04/01/2016 12:00 AM
Approved By:	Marty Rutherford, Acting Commissioner	Date:	04/01/16
Agency:	Department of Natural Resources		

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2016 LEGISLATIVE SESSION

Analysis

The direct fiscal impact to the Department of Natural Resources (DNR) as a result of this legislation is expected to be covered through Reimbursable Services Agreements (RSAs) from the Department of Environmental Conservation (DEC). The exact amount of these RSAs going forward is unknown, as expenditures will be based on the number and scope, if any, of future nominations under the bill.

Funding for these RSAs will come from DEC general fund program receipts (GFPR) included in the DEC fiscal note, which contains more detailed information and should be referred to.

Section 1 of the bill amends Chapter 3 of Title 46 (AS 46.03) by adding seven new sections that provide a process to implement the Federal Clean Water Act provision (40 C.F.R. Part 131.12(a)(3)) related to nomination and designation of outstanding state resource water.

Section 2 of the bill clarifies the first session of the Legislature the reporting provision of the bill is applicable to, Section 3 provides authority for DEC to promulgate regulations to implement the bill, and Section 4 provides for an effective date.

Additional potential indirect fiscal impacts to DNR could occur in the process of reviewing applications for land and water use authorizations that are within or proximal to a designated waterbody. Under the bill, the land or water use application and adjudication processes may need to evaluate and explain authorization decisions in the context of potential impact on water bodies designated as outstanding state resource water. These authorizations include water rights, temporary water uses, mining or oil and gas development permits, land use permits, leases or sales, access easements, and material sales.

Fiscal Note

State of Alaska
2016 Legislative Session

Bill Version:	CSSB 163(RES)
Fiscal Note Number:	2
(S) Publish Date:	4/4/2016

Identifier: SB163CS(RES)-DEC-WQ-03-31-16
 Title: NATL. RES. WATER
 NOMINATION/DESIGNATION
 Sponsor: RLS BY REQUEST OF THE GOVERNOR
 Requester: Senate Resources Committee

Department: Department of Environmental Conservation
 Appropriation: Water
 Allocation: Water Quality
 OMB Component Number: 2062

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2017 Appropriation Requested	Included in Governor's FY2017 Request	Out-Year Cost Estimates				
			FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
OPERATING EXPENDITURES	FY 2017	FY 2017					
Personal Services							
Travel	10.0						
Services	350.0						
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	360.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

1005 GF/Prgm	360.0						
Total	360.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2016) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2017) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? Yes
 If yes, by what date are the regulations to be adopted, amended or repealed? 04/29/17

Why this fiscal note differs from previous version:

Reflects changes of Committee Substitute
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Prepared By:	Michelle Hale, Director	Phone:	(907)465-5135
Division:	Water	Date:	03/31/2016 03:15 PM
Approved By:	Alice Edwards, Deputy Commissioner	Date:	03/31/16
Agency:	Department of Environmental Conservation		

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2016 LEGISLATIVE SESSION

Analysis

Analysis/Assumptions:

This CS for SB163 spells out the criteria that a nomination must address, and requires payment of a \$1,000 application fee. Under this version, the Department may enter into an agreement whereby the nominator will pay costs incurred by the Department and other State agencies related to the nomination process, including preparation of findings, analyses, and determinations related to the nomination, as well as public notice and public hearings. The department may also request a capital appropriation based on a cost estimate for processing a nomination.

The bill requires that the Department of Environmental Conservation make its completeness determination within six months of receiving the nomination. In addition, it requires the Department to adopt regulations within one year that establish a process for public notice, individual notice to landowners, and prioritization, and it establishes a process the Department must complete before transmitting any nomination to the Legislature, including coordination with the Departments of Natural Resources and Fish and Game.

The bill requires the Departments of Environmental Conservation and Natural Resources to submit a report to the Legislature every ten years describing each Tier 3 water, and providing a recommendation regarding the continuation of the designation.

The Department does not currently have the staff capacity to take on the amount of additional work required under the current version of the bill, beyond the regulation development and completeness determination. The Department cannot anticipate the number of nominations that may be received in any given year, or at this point anticipate what the related annual workload might be. This Fiscal Note assumes a multi-year operating appropriation for the first three years of the program. At that time the Department would have a better grasp on what the annual costs will be. It would also not make sense for the Department to add staff for an unknown workload, so most of the work would be contracted out as needed.

Operating Expenditures

Costs will be funded by agreements between the nominator and the Department as General Fund Program Receipts.

Travel:

Travel costs include 8 two-day trips over three years for one staff member to attend local public meetings in the areas where proposed designations are located.

Services:

Services include in-house services or contractual outsourcing funded by the nominator via statutory designated program receipts. Services include but are not limited to: public notice costs; analyzing the nomination and preparing analysis and reports to submit to the Legislature with the nominations; and coordinating with other State agencies via reimburseable service agreements.

Fiscal Note

State of Alaska
2016 Legislative Session

Bill Version:	SB 163
Fiscal Note Number:	1
(S) Publish Date:	1/29/2016

Identifier: DEC-WQ-12-30-15
 Title: NATL. RES. WATER
 NOMINATION/DESIGNATION
 Sponsor: RLS BY REQUEST OF THE GOVERNOR
 Requester: Governor

Department: Department of Environmental Conservation
 Appropriation: Water
 Allocation: Water Quality
 OMB Component Number: 2062

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2017 Appropriation Requested	Included in Governor's FY2017 Request	Out-Year Cost Estimates				
			FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
OPERATING EXPENDITURES	FY 2017	FY 2017					
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2016) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2017) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? Yes
 If yes, by what date are the regulations to be adopted, amended or repealed? 06/30/17

Why this fiscal note differs from previous version:

Not applicable, initial version.

Prepared By:	Michelle Hale, Division Director	Phone:	(907)465-5135
Division:	Water	Date:	12/30/2015 02:00 PM
Approved By:	Alice Edwards, Deputy Commissioner	Date:	01/08/16
Agency:	Department of Environmental Conservation		

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2016 LEGISLATIVE SESSION

Analysis

Analysis/Assumptions:

The purpose of the legislation is to provide a process by which waters can be designated Outstanding National Resource Waters, or Tier 3 waters, by the Legislature. A process is required by the Clean Water Act, but has not yet been defined in Alaska. There are currently no Tier 3 waters in the state.

Work will be done by existing staff in the Division of Water. These staff already work extensively with the water quality standards that provide the framework for the required Tier 3 designation process. In addition, nominations for Tier 3 waters have already been received by the Division and are being tracked by water quality standards staff. The additional workload associated with forwarding the nominations to the Legislature will be incorporated by prioritizing the existing work.

Regulations may be promulgated to describe the process for nomination and the process for the interested or affected public to submit additional information. The Division has already done extensive work on draft regulations. After additional outreach and public notice, it is expected that regulations would be adopted by June 30, 2017.

UNITED FISHERMEN OF ALASKA



Mailing Address: PO Box 20229, Juneau AK 99802-0229
Physical Address: 410 Calhoun Ave Ste 101, Juneau AK 99801
Phone: (907)586-2820 **Fax:** (907) 463-2545
Email: ufa@ufa-fish.org **Website:** www.ufa-fish.org

March 4, 2016

Senator Cathy Giessel, Chair
Senate Resources Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: Opposition for SB 163 as written regarding Outstanding Natural Resource Waters

Dear Senator Giessel and Committee Members,

United Fishermen of Alaska (UFA) is the statewide commercial fishing trade association, representing 34 commercial fishing organizations participating in fisheries throughout the state and its offshore federal waters. Fifteen of our 36 member organizations represent salmon fisheries that are dependent on Alaska's outstanding water quality and habitat for continued production, and another eight are salmon aquaculture associations that are subject to APDES permitting for discharges.

In 2014 UFA submitted comments to DEC regarding proposed implementation methods for Alaska's water quality antidegradation policy regulations (attached). In our 2014 comments we expressed concern about the legislature's ability to approve or deny applications for Tier 3 Outstanding Natural Resource Waters (ONRW) within the very short time frame of a legislative session. We also suggested a process within DEC or a multi-agency effort to adjudicate ONRW applications.

On that note, we are opposed to SB 163 as it is currently written. We believe that Tier Three water quality designation decisions should be made by the professional water quality managers at DEC and other state agencies. This process should not be forced into the political arena. UFA believes a multi-agency process that includes DEC, DNR and ADF&G should be implemented to determine which Alaska waters should be designated for tier 3 protection with a public hearing as part of the process.

We thank you for the opportunity to provide testimony.

Sincerely,

Jerry McCune
President

Mark Vinsel
Executive Administrator

MEMBER ORGANIZATIONS

Alaska Bering Sea Crabbers • Alaska Independent Fishermen's Marketing Association
Alaska Independent Tendermen's Association • Alaska Longline Fishermen's Association • Alaska Scallop Association • Alaska Trollers Association
Alaska Whitefish Trawlers Association • Armstrong Keta • At-sea Processors Association • Bristol Bay Reserve • Cape Barnabas Inc.
Concerned Area "M" Fishermen • Cook Inlet Aquaculture Association • Cordova District Fishermen United • Douglas Island Pink and Chum
Freezer Longline Coalition • Golden King Crab Coalition • Groundfish Forum • Kenai Peninsula Fishermen's Association
Kodiak Regional Aquaculture Association • North Pacific Fisheries Association • Northern Southeast Regional Aquaculture Association
Petersburg Vessel Owners Association • Prince William Sound Aquaculture Corporation • Purse Seine Vessel Owner Association
Seafood Producers Cooperative • Southeast Alaska Herring Conservation Alliance • Southeast Alaska Fisherman's Alliance
Southeast Alaska Regional Dive Fisheries Association • Southeast Alaska Seiners • Southern Southeast Regional Aquaculture Association
United Cook Inlet Drift Association • United Southeast Alaska Gillnetters • Valdez Fisheries Development Association



UNITED FISHERMEN OF ALASKA

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April 16, 2014

Earl Crapps
ADEC Division of Water
555 Cordova St
Anchorage, AK 99501
By Email: earl.crapps@alaska.gov

RE: Proposed implementation methods for water quality antidegradation policy

Dear Mr. Crapps,

United Fishermen of Alaska is the statewide commercial fishing trade association, representing 36 commercial fishing organizations participating in fisheries throughout the state and its offshore federal waters. Fifteen of our 36 member organizations represent salmon fisheries that are dependent on Alaska’s outstanding water quality and habitat for continued production, and another eight are salmon aquaculture associations that are subject to APDES permitting for discharges. Commercial fishing vessels currently do not require NPDES permits for discharges incidental to normal operation. However, unless Congress takes additional action, the moratorium from the requirement to obtain permit coverage for incidental discharges from these vessels under a vessel general permit expires December 18, 2014.

We appreciate the opportunity to comment on the proposed regulation changes 18 AAC 70.016 and 70.017 establishing implementation methods for water quality antidegradation policy, and we thank the department for extension of the public comment period. The State’s salmon bearing waters are protected by ADF&G Habitat Division permitting on activities including discharges if they are listed in the State’s Catalog of Anadromous Waters, but the catalog is far from complete, so we see antidegradation regulations as another essential tool in protecting salmon and the habitat they require.

We commend the department on the implementation approach of a public workgroup process including stakeholders and representatives of affected state agencies and concerned organizations.

Below are our comments on the proposed regulations, first with general comments and then by section, in the order in which they appear:

In general, we support regulations that are clear and unambiguous. We note recurring usage of the phrase “in its discretion” and ask that these be eliminated where necessary to clarify the role of the department as required steps or considerations, not subject to discretion as to whether these steps or requirements are carried out. The final selection of the permitted alternative at the

end of the process may involve the discretion of the department, but tasks in the process should not be bypassed discretionarily.

We do not support that in implementing these regulations it is necessary to repeal **18 AAC 70.016(a)(2)(D)**, which reads:

“(D) the methods of pollution prevention, control, and treatment found by the department to be the most effective and reasonable will be applied to all wastes and other substances to be discharged; and”

We believe that this section is consistent with the federal antidegradation statutes and is appropriate to retain in the overriding policy, as it is important in conveying that alternatives shall be included for consideration by DEC in an antidegradation analysis, and is clear that DEC select the most effective and reasonable option. The removal of this implies that DEC might permit an option that is less effective and reasonable than alternatives, which seems contrary to common sense and prudent policy.

18 AAC 70.016 (a) (4) We support that an antidegradation analysis is subject to the public participation and intergovernmental review procedures under 18 AAC 70.015(c).

18 AAC 70.016 (a) (5) (A through H) We ask that information be included on any salmon species known to use the waterbody, including the noting of any waterbodies included in the Catalog of Anadromous Waters, within or downstream of the proposed activity. In **(G)**, we are unclear on why the determination of the highest applicable antidegradation tier level for each pollutant or parameter of concern would be submitted by the applicant, and suggest that the determination of applicable tier for a given pollutant is the department’s responsibility, not the applicants, as conveyed in 18 AAC 70.016 (c) (1).

18 AAC 70.016 (a) (6) We have concern with:

“the applicant may submit sufficient credible baseline water quality information, measured or modeled, for the receiving water in order for the department to determine the applicable tier level.”

We are concerned that this language is vague and that modeling is not necessarily sufficient, considering that each waterbody is unique and an application for discharge is site specific. We understand that some applicants may not have the ability to obtain thorough measurement of water quality and volume through different seasons over a period that would provide the necessary information for a tier 2 determination. The regulations are not clear as to what the department will do if the applicant chooses not to submit baseline water quality information. We suggest that “may” be changed to “shall” in this passage, or further clarification given to the process the department would use to conduct the tier 2 analysis if not provided with necessary information. We recommend not permitting discharges without adequate site specific water quality and quantity information.

18 AAC 70.016 (b) and (c) Tier 1 & 2

We support the pollutant by pollutant, parameter by parameter approach, as salmon are particularly sensitive to specific pollutants. This best protects water quality and allows the appropriate classification in cases where a specific pollutant might pose a risk. In supporting this approach we also note, however, that little is known about the synergistic or biomagnifying

effects on salmon or aquatic life from a combination of different toxins at levels that individually may not pose harm (see comment below on 18 AAC 70.016 (c) (3)).

18 AAC 70.016 (c) (2)

We have general concern with de-minimis exemptions, and feel they would only be appropriate in cases where the degradation activity is of very short duration in waters of high flushing, such as incidental discharge in the normal operation of commercial fishing vessels, and temporary net pens that hatchery operations use temporarily to imprint salmon to return to approved locations. Alaska's salmon hatcheries are subject to NPDES permitting for raceways but "*net pens rearing native species released after a growing period of no longer than 4 months to supplement commercial and sport fisheries*" are exempted from permitting in the EPA Effluent Limitations Guidelines and New Source Performance Standards for the Concentrated Aquatic Animal Production Point Source Category (Federal Register August 23, 2004, online at <http://www.epa.gov/fedrgstr/EPA-WATER/2004/August/Day-23/w15530.htm>).

We ask that de minimis exemptions in Tier 2 applications be very limited and closely defined, and not be allowed for pollutants that are known or become known to "biomagnify" in their effects on salmon and aquatic life (see comment below on 18 AAC 70.016 (c) (3)).

We have concerns with the arbitrary 5% threshold over the existing, permitted or allowable discharge level, because it would become problematic in situations with successive "de minimis" applications for discharge in the same waterbody.

18 AAC 70.016 (c) (2) (B) & (C)

In this section it appears that the word "and" is incorrectly placed in the line below where it belongs, as the passage does not seem to make grammatical sense. We suggest placing it as it appears in brackets and removing it from where we show it in strikethrough below:

*"The proposed discharge will not cumulatively decrease the available assimilative capacity of the receiving water by more than five percent from the conditions as of the initial date of this section; the cumulative lowering of water quality must take into account all sources in the receiving water, [and]
(C) the following conditions are met; ~~and~~
(i through iv)"*

18 AAC 70.016 (c) (3)

In general we have concerns with this section because it allows for categorical exemptions. Discharges allowed without antidegradation analysis under general permits and de minimis exceptions may benefit from being reviewed at some time to be analyzed based on new information – especially the synergistic effects of different contaminants that are currently not well understood. A 2008 Pacific Northwest study noted:

"Although the effects of individual anticholin-esterase insecticides on aquatic species have been studied for decades, the neurotoxicity of mixtures is still poorly understood...

"We observed addition and synergism, with a greater degree of synergism at higher exposure concentrations. Several combinations of organophosphates were lethal at concentrations that were sublethal in single-chemical trials..."

The Synergistic Toxicity of Pesticide Mixtures: Implications for Risk Assessment and the Conservation of Endangered Pacific Salmon
Cathy A. Laetz,¹ David H. Baldwin,¹ Tracy K. Collier,¹ Vincent Hebert,² John D. Stark,³ and Nathaniel L. Scholz¹
<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2661902/>

In addition, new technologies may be developed or new market opportunities for discharged matter may become cost-effective to provide a practicable “no discharge” alternative to an ongoing discharge. The antidegradation review would provide a mechanism to promote adoption of new technologies or practices that could reduce degradation, which otherwise might not become apparent to the permittee.

We are especially concerned with (C) in this section which seems to mean that a rogue operation that “required but did not apply or receive a permit”, would be categorically exempted from antidegradation analysis.

All in all, we feel that the only appropriate categorical exemption, if any, would be renewal of discharges that had previously undergone antidegradation analysis in some reasonable time frame such as ten years, and are not proposing an increase in discharge.

18AAC 70.015 (c) (5) (B) Requirements of a Tier 2 application:

We are concerned with the use of “*such as*” preceding the list of practicable alternatives for the proposed discharge, as ask that (i), the non-discharge alternative analysis, be required rather than suggested as inferred by the phrase, “*such as*”. In this passage we also recommend that analysis of (iv) *seasonal discharges to avoid critical ecological time periods* be required in any waters included in the Catalog of Anadromous Waters, so that consideration of the various life stages of salmon in a system is assured.

18AAC 70.015 (c) (5) (E) We have concern that the applicant would identify the least degrading practicable alternative in their application. While they may have a preferred alternative, the determination of the least degrading practicable alternative is the responsibility of the department in its analysis, and this alternative should be required in the permit.

18AAC 70.015 (c) (6) (A & B) We have concerns that the requirement for either a social or economic importance analysis seems to only require description of the positive benefits of a degradation proposal. These analyses should also include consideration of negative effects. In (B), the economic importance analysis should also consider if there are economic effects outside the area where the receiving water is located – which is often the case with salmon bearing waters that provide resource for commercial, subsistence, personal use and sport activity far beyond the local area.

18 AAC 70.016 (e) - General permit antidegradation analysis

We have concerns that this section is very loosely defined and is not clear on the potential range of waterbodies and activities that might be included or allowed in a general permit, as the effects of discharges are cumulative and site specific. We also have concerns with the interplay of de minimis exemptions in applications under a general permit, and would support clear language that defines parameters for general permits, limits on the geographical extent, and analysis of combined effects of proposed activities. Similarly to de minimis exemptions, we suggest that general permits be very limited and closely defined.

18 AAC 70.017 Tier 3 Outstanding National Resource Water

In (a) of this section, “Tier 3 water shall be designated in statute.” We interpret that this would require approval from the legislature, but we are not confident in the practical ability of a legislature to accomplish this in one or two 90 day regular sessions. We suggest that language

should clarify a process within DEC and/or a multi-agency board that would allow the legislature the practicable opportunity to approve a designation in a single 90-day session.

18 AAC 70.017 (a)(3) We have concerns with the requirement for Tier 3, Outstanding National Resource Waters: *“the water must have exceptional characteristics relative to other state of Alaska water”* and (3) *“the water is an exceptional and rare example of its type regardless of whether the water is considered high quality.”* We note the wording “National” rather than “State” resource waters . We feel that waters of exceptional characteristics may well be situated near others that may also be exceptional, and the fact that Alaska has more waters of outstanding quality than the other states does not diminish their value or the justification for protection at the highest tier. Waterbodies should not be precluded from Tier 3 classification based on presence of other nearby exceptional quality waterbodies, if they would otherwise qualify.

18 AAC 70.017 (b) We support the proposed regulations allowing that nomination for Tier 3 classification may be submitted by any resident of Alaska, but nominations should also be allowed to be made by organizations, corporations, tribes, or State agencies.

In summary, we thank you for the opportunity to provide these comments under the extended deadline, and for your consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Julianne Curry', written in a cursive style.

Julianne Curry
Executive Director



Yakutat Tlingit Tribe

606 Forest Hwy 10 * P.O. Box 418 * Yakutat, Alaska 99689
Phone (907) 784-3238 * Fax (907) 784-3595 * www.yttribe.org



February 22, 2016

Michelle Hale, Division Director
Department of Water
Alaska Department of Environmental Conservation
410 Willoughby Ave., Ste. 303
Juneau, AK 99811-1800
Michelle.hale@alaska.gov

Re: Nomination for Tier 3 Outstanding Natural Resource Water (ONRW) Designation

Ms. Hale:

On August 26 the Yakutat Tlingit Tribal Council unanimously voted to seek Tier 3 Natural Resource Water Designation. The Yakutat Tlingit Tribal Council represents the Yakutat Tlingit Tribe (Petitioners) in nominating the Yakutat Forelands for ONRW status and protection under 18 AAC 70.015(a)(3). To qualify as a Tier 3, or ONRW water, one of two criteria must be met. The water must either be in a national or state park or wildlife refuge or be a water with exceptional recreational or ecological significance (Emphasis added). Under these criteria, the Yakutat Forelands qualify as both an exceptional recreational area and as having special ecological significance. Additionally, these lands contain many historic, traditional, sacred and cultural sites vital to the Yakutat Tlingit Tribe. The area is currently under congressionally designated protection and within an inventoried Roadless Area.

Even though the State of Alaska has no nomination procedures yet in place, the federal antidegradation policy provides guidance for Petitioners. ONRW designation offers special protection for waters of "exceptional ecological significance." These are water bodies that are important, unique, or sensitive ecologically, but whose water quality, as measured by the traditional parameters such as dissolved oxygen or pH, may not be particularly high or whose characteristics cannot be adequately described by these parameters (such as wetlands).¹ See also 40 CFR 131.12(a)(3).

Guidance for developing implementation methods for antidegradation policies is provided through EPA's Regional Offices. While there is no published antidegradation guidance in Region X, Region VIII provides the following guidance on factors to consider when designating ONRW's. The factors to be considered in granting ONRW status include:

¹ Water Quality Standards Handbook: Second Edition EPA-823-B-94-005; August 1994 updated June 2007. At: <http://water.epa.gov/scitech/swguidance/standards/handbook/index.cfm>



- (1) Location (e.g., on federal lands such as national parks, national wilderness areas, or national wildlife refuges),
- (2) Previous special designations (e.g., congressionally protected areas),
- (3) Existing water quality (e.g., pristine or naturally-occurring),
- (4) Ecological value (e.g., habitat critical to the propagation of anadromous fish),
- (5) Recreational or aesthetic value (e.g., presence of an outstanding recreational fishery), and,
- (6) Other factors that indicate outstanding ecological or recreational resource value (e.g., rare or valuable wildlife habitat).²

Overview

We find that the entire area described below is comprised of an interconnected wetland that functionally serves as one watershed. The entirety of this low-lying wetland is productive anadromous fish habitat and functions as a single unit forming a unique ecological and recreational area that contributes to both the state and local economies. The many streams and rivers are surrounded by riparian habitat that plays a crucial role in water quality, fish habitat and channel stability: shade, cover, food, stream energy dissipation, and habitat complexity, are critical to the maintaining the functions of this anadromous wetland area. As this entire area serves as a single interconnected water resource, it is imperative that water quality be protected by granting Tier 3 ONRW protections.

Specifically, the wetland functions need to be maintained to enhance or protect water quality for drinking water, spawning, and other uses as is described by the State of Alaska.³ The Yakutat Forelands area described below supports over a dozen species of fish, including all five Pacific salmon species, and serves as prime spawning, rearing, and migration habitat. The State of Alaska Dept. of Fish and Game in 1983 classified the Yakutat Forelands as "Class I", a designation meaning that "the area merits permanent protection."⁴

The United States Environmental Agency (USEPA) identifies wetlands specifically as being eligible for ONRW protections.

"ONRW designation also offers special protection for waters of "exceptional ecological significance." These are water bodies that are important, unique, or sensitive ecologically, but whose water quality, as measured by the traditional parameters such as dissolved oxygen or pH, may not be particularly high or whose characteristics cannot be adequately described by these parameters (such as wetlands)."⁵

² U.S. Environmental Protection Agency, Region VIII, EPA Region VIII Guidance: Antidegradation Implementation 9 (1993).
http://www2.rivernetwork.org/cleanwater/Region8_ch2_pg5-20.pdf

³ Alaska's Final Integrated Report F. Alaska Water Quality Management Program: P. 110

⁴ 101st Congress 1st Session AMENDING ANILCA TO DESIGNATE CERTAIN LANDS IN THE TONGASS NATIONAL FOREST AS WILDERNESS, AND FOR OTHER PURPOSES, H.R. REP. NO. 101-84, Part 1 at 35 (1989).

⁵ 40 CFR 131.12(a)(3)



The Forelands remote nature and pristine water quality are crucial factors that sustain millions of salmon that are born, grow, migrate and return to spawn its gravels. This fish habitat supports a varied community of bear, moose and thousands of migratory birds as well as the economy and the practice of cultural activities of the nearby community of Yakutat.

All of these resources depend on the protection of the high quality water that not only physically connects the wetlands and numerous streams and rivers, but also connects the fish and wildlife resources.

Location of the ONRW

The area nominated is comprised of the congressionally-designated Yakutat Forelands Land Use Development II ("LUD II") Management Area⁶ and a Semi-remote Recreation LUD designated in the 2008 Amendment to the Tongass Land and Resource Management Plan (TLMP), 2008. A map is available in the published Forest Plan.⁷

This area is within the Yakutat Forelands Inventoried Roadless Area (#339). This Roadless Area's specific boundaries can be described as encompassing the land southeast from the town of Yakutat, between the Forest Highway 10 on the northeast, Glacier Bay National Park on the southeast, and the southwest boundary is the Gulf of Alaska, from Dry Bay to the South to Johnson Slough on the North. (*339-Yakutat Forelands C2-234 Final SEIS*)

Previous Special Designations

All of the nominated area is within an inventoried Roadless Area and currently under Congressional protections as either a LUD II area or Semi Remote Recreation area.

Congress passed the Tongass Timber Reform Act in 1990. In this landmark legislation, Congress designated the southern part of the nominated area as the Yakutat Forelands LUD II Management Area. The northern part of the nominated area is designated as Semi-remote Recreation LUD. Congress chose the Yakutat Forelands LUD II Area "for special management because of [its] critical importance for fish and wildlife habitat and [its] high value to tourism and recreation."⁸

The protections afforded under a Tier 3 designation are consistent with these management goals.

The Tongass Forest Plan (2008) describes the desired future condition for lands designated under Semi-Remote Recreation LUD as "characterized by generally unmodified natural environments. Ecological processes and natural conditions are only minimally affected by past or current human uses or activities." See 2008 TLMP at 3-63.

⁶ Tongass Timber Reform Act, Pub. L. 101-626, § 201, 104 Stat. 4426, 4428 (1990)
⁷ http://tongass-fpadjust.net/Maps/FPA_Map_ROD.htm

⁸ H.R. CONF. REP. NO. 101-931, at 16 (1990).



Exceptional Existing Water Quality and Ecological Value

There is very little chemical water quality data available for this area. The fact that the area supports a vibrant and diverse aquatic community and wildlife in an exceptional environmental setting is evidence of a high quality water resource.

The Yakutat Forelands comprise a diverse array of rivers and wetlands that possess a variety of functions and values that contribute substantially to the State of Alaska's and the Nation's economy and well-being. The 1979 Forest Plan recognized the area as the single most diverse and productive fish, wildlife and waterfowl area in the Tongass.⁹ It includes productive rivers and streams, moist and wet marshes, kettle ponds, palustrine emergent marshes, Sitka spruce/hemlock forested wetlands, riparian shrub communities, littoral wetlands, and temperate rainforest wetlands.

All of the activities, either natural or by man on the Forelands are dependent on the natural high quality and abundance of water. The interconnectedness between hydrology, fisheries, wildlife and people in this area demands the highest level of protection by the State of Alaska.

The Alaska Department of Fish and Game has identified over 90 anadromous fish streams in the area. This unique and productive coastal environment is exceedingly rare and in need of protection to water quality to ensure its continued vitality.

Fisheries

This coastal and riverine wetlands are important to commercial, sport and subsistence fishing economies. The Yakutat Forelands are an interconnected wetland/estuarine complex that serve as critical spawning and rearing areas for all five salmon species, cutthroat, dolly varden trout and significant runs of eulachon. Included in this area are the Italito, Akwe and Asek Rivers. According to the West Foreland Hydrologic Condition Assessment (2005):

“These streams collectively have the highest values for both spawning and rearing habitats. They are also among the most sensitive to both natural and human-caused disturbances. Some have developed complex life cycles uniquely adapted to their watersheds. The Situk River alone is considered one of the most productive rivers in Southeast Alaska due to its high fish species diversity and population density (Thedinga et al 1993).”

The valuable fisheries resources of the area are recognized by the State of Alaska Department of Fish and Game (ADF&G). Among the numerous fish bearing streams in the area, the Anadromous Waters Catalogue (ADF&G, 2000) identifies Williams Creek, Akwe River, Italio River, Ahrnklin River, and Situk River as primary fish-bearing streams (Class I). Additional Class I streams in the nominated area include: Cabin Slough, Emile Creek, Gines Creek, Clear

⁹ 101st Congress 1st Session AMENDING ANILCA TO DESIGNATE CERTAIN LANDS IN THE TONGASS NATIONAL FOREST AS WILDERNESS, AND FOR OTHER PURPOSES, H.R. REP. NO. 101-84, Part 1 at 35 (1989).



Creek, Tanis River and Lake, Muddy Creek Cannery Creek, Square Creek and Outflow, Ustay River and Triangle Lake, Dangerous River, Miller Creek, Antlen River, Seal Creek, Middle Slough, and Kunayosh Creek. These waters provide habitat for sockeye, chinook, coho, pink, and chum salmon; steelhead and cutthroat trout; and Dolly Varden char. Eulachon run in the Situk, Lost, Dangerous, Italio, Akwe, and Alsek Rivers.

In 1998, the ADF&G assessed wildlife and resource data to specific Southeast watersheds and ranked them for comparison into Value Comparison Units (VCU) in order to guide management decisions.¹⁰ Within the nomination area are several river systems that earned the maximum VCU ranking of 1 for salmon production values. These systems are the Situk River, East Fork of the Italio, the Akwe River and Alsek River. ADF&G underwent this assessment because it believes it is the state's interest to minimize conflicts between resource developments that result in the loss of habitat productivity and other forest uses that depend on habitat integrity. ONRW protection would serve to further the State's interest in maintaining these incredible public trust resources supported on the Yakutat Forelands.

Wildlife Habitat

The Yakutat Forelands comprise valuable habitat that supports a rich wildlife population, both in numbers and species diversity. Large mammal species include both brown and black bears (including the glacier bear, a bluish color phase of the black bear), moose, wolverines, wolves, and mountain goats. There is a Sitka black-tailed deer population, as a result of transplant efforts in the 1940's. Small animals include mink, marten, beaver, snowshoe hare and pika, as well as several amphibian species.

There are few resident bird species; however, the area is heavily used by migratory species, both for nesting and resting and includes waterfowl and raptors. (Appendix C339-Yakutat Forelands C2-236 Final SEIS at (e)). These include Trumpeter swans, sandhill cranes and a wide variety of other shorebirds. Various other neotropical migrants utilize the area for reproduction, winter habitat and migration resting areas. Over 500,000 shorebirds utilize the foreland estuaries during migration. See Alaska's Key Coastal Wetlands, U.S. Forest Service.

Exceptional Recreational and Aesthetic Values

This area supports an exceptional wild and natural fishery that attracts fishermen, hunters and birders from all over the world. These world-class recreational fishing rivers attract thousands of sport fishermen per year. The revenue generated by sport fishing is vital to the economy of Yakutat and Southeast Alaska. Alaska State law (18 AAC 70.015.(3)) dictates that "if a high quality water constitutes an outstanding national resource, such as a water of a national or state park or wildlife refuge or a water of exceptional recreational or ecological significance, the quality of that water must be maintained and protected (Emphasis added)"¹¹

¹⁰ See ADF&G Technical Bulletin No.98-4 Tongass Fish and Wildlife Assessment. Tab le 6 Appendix A (1998).

¹¹ 18 AAC 70.015



The 1979 forest plan recognized the Area (Yakutat Forelands) as the single most diverse and productive fish, wildlife, and waterfowl area in the Tongass. The numerous rivers, including the Italo, Akwe, and Ustay-Tanis Rivers are highly productive commercial fisheries for coho and sockeye salmon. The Forest Service describes the recreational fisheries for steelhead and salmon as "world class." See AMENDING ANILCA TO DESIGNATE CERTAIN LANDS IN THE TONGASS NATIONAL FOREST AS WILDERNESS, AND FOR OTHER PURPOSES, H.R. REP. NO. 101-84, Part 1 at 35 (1989).

The Yakutat Forelands have been vital for local food security for millennia. These wetlands support community food gathering for Native and rural non-Native Alaskans, as well as big game hunting. Resident households in Yakutat consume over 1000 pounds of wild foods, annually, from the forelands alleviating the high cost of grocery bills. See Alaska Dept. of Fish and Game Subsistence Division Report, 1999.

Importance to Tlingit Culture

The Tlingit people have occupied this area for thousands of years. The use of these land supports and is entwined with traditional and cultural practices and or the continuation of culture for future generations. These areas contains numerous archeologically sensitive areas sacred to us, one such example is, "where the Raven came to shore." Much of our culture and identity are dependent on the continued health of the Forelands and the fishery and wildlife it supports.

Local Economy

The majority of the monetary economy of Yakutat is derived from the Forelands in the form of commercial fishing, guided hunting and fishing, tourism, and remote recreation. Much of Yakutat's economy is almost entirely based on sport, commercial and subsistence fishing on the Situk River alone.¹² All of these activities depend on the pristine quality of the wetland resource.

Trigger for a Tier 3 Review

The Department of Environmental Conservation's past practice has been to consider the potential for ONRW designation as part of the public notice and comment process on a draft wastewater discharge permit. However there is nothing in the interim guidelines that precludes consideration and granting of an ONRW nomination request outside of an application for a discharge permit or other trigger for an antidegradation review.¹³

Although the nominated area is not the subject of an application for a discharge permit, the area faces multiple threats for development. Oil and gas exploration has occurred in the area and the potential for development appears relatively high. The U.S. Geological Survey (USGS) has identified the Yakutat Forelands as a "Most Favorable Petroleum Reserve Area." As yet, development activities have not been initiated. Furthermore, the USGS Mineral Resource Data website (2001) indicates that there are eight prospects in the area for iron, titanium, gold, platinum, and chromium.¹⁴

¹² Hubbard Glacier, Russell Fiord and Situk River -A Landscape in Motion, by Robert Gubernick Steven Paustian: *USDA Forest Service, Tongass National Forest, 2007*

¹³ (http://www.dec.state.ak.us/water/wqsar/Antidegradation/docs/P&P-Interim_Antidegradation_Implementation_Methods.pdf)

¹⁴ Tongass Forest Plan Final SEIS, C2-242 at: www.tongass-seis.net/yrd/pdf/339.pdf



Exploration activities may well be permitted outside of the need for a discharge permit application, or a discharge may be granted a temporary exclusion. Once an area is targeted for mineral or oil and gas development there will be little political will to do anything that may delay that development. It is imperative that ONRW protections be in place prior to any move to actively develop oil and gas leases in this area.

Therefore we ask the Alaska State Department of Environmental Conservation to acknowledge the Cultural significance, exceptional ecological values and outstanding recreational opportunities of the Yakutat Forelands and protect the dependent relationship between the surface and subsurface water quality, soils, fish and wildlife, economy and culture and designate this area a Tier 3 Outstanding Natural Resource Water afforded the highest level of protection from degradation.

Thank you for your assistance in helping us to attain this.

Yakutat Tlingit Tribe Council

Name: _____ Title: Tribal President _____
Victoria L. Demmert

Signature: _____ Date: _____

CC: Barbara Blake at: Barbara.Blake@alaska.gov
Lt. Governor Byron Mallott



NATIONAL PARK SERVICE

Wrangell-St. Elias National Park & Preserve / Glacier Bay National Park & Preserve

Yakutat Ranger Station P.O. Box 137

Yakutat, AK 99689

907 784 3295 Fax 907 784 3535

Date: February 22, 2016

Byron Mallott
Lt. Governor
Alaska State Capital Building
P.O. Box 110001
Juneau, AK 99811-1800

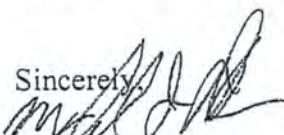
Dear Mr. Mallott:

The National Park Service Yakutat District Field Office of Wrangell-St. Elias & Glacier Bay National Parks and Preserves shares/supports the Yakutat Tlingit Tribe's desire to recognize and protect the pristine water resources found on the Yakutat Forelands. We support the nomination for Tier 3 Outstanding Resource Water Designation.

The Yakutat Forelands comprise a 400,000 acre mosaic of wetlands, shrublands, and forests. Over 200 bird species have been recorded on the forelands; approximately 60% of those species are known to breed or are suspected to breed in the area. Shorebirds, seabirds, songbirds, raptors, and Sandhill cranes use the Forelands rivers, wetlands and estuaries as stop over sites during their migration. The Black Sand Spit Aleutian Tern colony, the largest breeding colony in Alaska, hosts a significant proportion of the species' global population. Other important wildlife resources found on the Forelands include moose, black and brown bears, wolves, numerous fur bearers, Sitka black tail deer, Stellar sea lions, Harbor porpoise, and Harbor seals.

The Yakutat Forelands include some of the most pristine and productive salmon habitat in the state. A dense network of streams channels provides spawning and rearing habitat for all five species of Pacific salmon, Dolly Varden Char, cutthroat trout and steelhead trout. The salmon runs on the Forelands are all wild, produced annually by the high quality habitat without the need for hatcheries. This productivity is exemplified by the Situk River which supports runs of all five species of Pacific salmon and Alaska's largest run of steelhead trout. Commercial, sport, and subsistence fisheries—which make up much of the region's economy, are dependent on healthy functioning aquatic habitats and clean water.

The National Park Service, Yakutat District agrees with fully and supports the Yakutat Tlingit Tribes nomination to permanently protect these unique and exceptionally pristine resources. Please contact me if you should have any questions about the Yakutat Forelands.

Sincerely,


Michael Thompson, Yakutat District Ranger



Forest
Service

Alaska Region
Tongass National
Forest
Yakutat Ranger
District

P.O. Box 327
Yakutat, AK 99689-0327
Phone: (907) 784-3359
Fax: (907) 784-3457

Date: September 17, 2015

Byron Mallott
Lt. Governor
Alaska State Capitol Building
P.O. Box 110001
Juneau, AK 99811

Dear Mr. Mallott:

The Yakutat Ranger District shares the Yakutat Tlingit Tribe's desire to recognize and protect the water resources of the Yakutat Forelands. We support the nomination for Tier 3 Outstanding Resource Water Designation.

The Yakutat Forelands is a 400,000 acre mosaic of wetlands, shrublands, and forests. Over 200 bird species have been recorded on the Forelands; approximately 60% of those species are known to breed or are suspected to breed in the area. Shorebirds, seabirds, songbirds, raptors, and sandhill cranes use the Forelands rivers, wetlands and estuaries as stop over sites during migration. The Black Sand Spit Aleutian tern colony, the largest breeding colony in the Alaska, hosts a significant proportion of the species' global population. Other important wildlife resources found on the Forelands include moose, black and brown bears, wolves, fur bearers, Sitka black tailed deer, Steller sea lions, and harbor seals.

The Yakutat Forelands include some of the most productive salmon habitat in the State. A dense network of stream channels provides spawning and rearing habitat for all five species of pacific salmon, Dolly Varden Char, cutthroat and steelhead trout. The salmon runs on the Forelands are all wild, produced annually by the high quality habitat without the need for hatcheries. This productivity is exemplified by the Situk River which supports runs of all five species of pacific salmon and Alaska's largest run of steelhead trout. Commercial, sport, and subsistence fisheries --which make up much of the region's economy, are dependent on healthy functioning aquatic habitats and clean water.

The Yakutat Ranger District agrees with the Yakutat Tlingit Tribe that these resources are exceptional and should be protected. Please feel free to contact me if you should have any questions about the Yakutat Forelands.

Sincerely,

LEE A. BENSON
District Ranger



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Environmental
Conservation

OFFICE OF THE COMMISSIONER

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March 2, 2016

The Honorable Cathy Giessel
Chair, Senate Resources Committee
State Capitol Room 427
Juneau, AK 99801

Dear Senator Giessel,

Thank you for hearing Senate Bill 163: National Resource Water Nomination/Designation on February 15th. Below, I have provided supplemental responses to some of the questions that came up during that hearing.

Do you have a formal opinion from an attorney describing the ambiguity in authority over who designates a water as an Outstanding National Resource Water (ONRW)? (Sen. Wielechowski)

DEC obtained the following response from the Department of Law:

EPA's regulations directing each state to develop and adopt a statewide antidegradation policy and implementation methods includes a requirement (40 C.F.R. § 131.12(a)(3)) that:

"Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected."

These "Outstanding National Resources Waters" are also referred to as "ONRWs" and "Tier 3" waters. There are three levels of water quality protection described in EPA's regulations with Tier 3 being the water getting the highest level of protection. No new pollution may be discharged into a Tier 3 water with very limited and temporary exceptions. Tier 3 waters are essentially preserved in their existing state much like land that is being managed as a park or refuge.

The argument that DEC does have statutory authority to designate Tier 3 waters stems from DEC's water quality and purity standards authority, AS 46.03.080, and its general authority under AS 46.03.020(9) to act as the official agency to deal with federal environmental laws. Under that authority, DEC is arguably the agency that complies with the EPA regulatory requirement for the state to have the equivalent of a Tier 3 protected waters category (40 C.F.R. § 131.12(a)(3)), and

therefore to develop an implementation process for designating Tier 3 waters. This is the position the state's Legislative Affairs Agency took in 2014.¹

The argument that DEC does not have statutory authority stems from two sections of Article VIII of the Alaska Constitution. First, Article VIII, § 7, holds that, "the legislature may provide for the acquisition of sites, objects, and areas of natural beauty or of historic, cultural, recreational, or scientific value. It may reserve them from the public domain and provide for their administration and preservation for the use, enjoyment, and welfare of the people."² Second, Article VIII, §2, holds that "the Legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of the people."³ As the highest level of protection afforded a water of the state and in conjunction with the language of 40 CFR 131.12(a)(3), the Department of Law has advised DEC that a Tier 3 water could be a "state natural resource." As such, Article VIII § 7 would seem to apply to the designation of a Tier 3 water. Similarly, since development and utilization of a water is significantly restrained once a Tier 3 designation is applied, Article VIII §2 would seem to apply as well. Supporting this interpretation is the fact the Legislature, not any state agency, has designated parks, refuges and other protected areas in the state in other instances.

In summary, the uncertainty stems from whether a Tier 3 designation is more appropriately classified as a reservation of a public area for preservation purposes, or is simply a water quality and purity standard. The Legislature has delegated a general authority to DEC under AS 46.03.080 and AS 46.03.020(9) to establish water quality and purity standards. However, it is arguable that this designation would extend to the irrevocable reservation of a water body from essentially all development.

This uncertainty is partly related to public policy as well as legal authority. Since a Tier 3 designation has far reaching consequences, and is possibly irreversible, it may make for better public policy to put such a decision in the hands of the elected representatives rather than appointed officials. Doing this would also provide the opportunity for the Legislature to craft specific measures to protect special waters of the state without having to necessarily limit other activity or uses that would be precluded under a Tier 3 designation by DEC.

Can an entire watershed be designated? If so, the consequences of that concern me. (Sen. Stedman)

There are no provisions in the federal antidegradation requirements that preclude a state from designating an entire watershed as a Tier 3 water. If a state did this, it could significantly limit uses of that watershed in the future that could result in any pollution being released, at least from point sources, into the waters within the watershed. This is why the department believes a decision of this magnitude would more appropriately reside with the Legislature. Under the current version of SB 163, while a watershed may be nominated, the Legislature would have the sole authority to designate

¹ Proposed Regulations Relating to State Water Quality Antidegradation Policy (18 AAC 70.015), State of Alaska Legislative Affairs Agency, Div. of Legal and Research Services, March 3, 2014.

² Alaska Const. art. VIII, §7.

³ Alaska Const. art. VIII, §2.

and therefore assign Tier 3 (ONRW) protection. The public, local governmental agencies and interested agencies would, of course, have the opportunity to weigh in during the legislative process on any nomination the Legislature took up in the form of a bill.

What kind of stakeholder input are you getting? I've heard some are reticent to be involved because DEC hasn't listened. (Sen. Stoltze)

The Division of Water has been conducting public outreach for some time on the development of Clean Water Act antidegradation implementation methods including the designation process for ONRWs in Alaska; this is a complex subject with many facets to consider. Feedback from DEC's 2013 public Antidegradation Workgroup process recommended that state legislative action was needed to clarify who has the authority to designate an ONRW. That workgroup also recommended a more robust, up-front evaluation process for nominations by state agencies than is currently included in the proposed legislation (The workgroup's report can be found on the DEC website at: http://dec.alaska.gov/water/wqsar/Antidegradation/docs/WorkgroupRpt_01_24_13_Final.pdf). The State considered the workgroup's recommendation, but ultimately proposed a simpler approach to collecting nominations and forwarding them to the Legislature. The current proposal would avoid the risk that agencies and the public could spend a lot of limited resources studying nominations and compiling reports on nominated waters that the Legislature might never choose to take up in a bill. Instead, under the current proposal, the Legislature, if it wanted a particular water analyzed by the agencies for possible consideration as an ONRW, could direct the agencies to do that while providing the fiscal resources needed to do this work.

DEC is continuing to reach out to stakeholders on the proposed legislation, including members of the Antidegradation Workgroup, industry, tribes, communities, government agencies, and NGOs. We continue to respond to questions and are listening to suggestions that are being raised with respect to the process for nominating and designating ONRWs. Division of Water Director Michelle Hale recently held an informational town hall meeting in Haines where the Chilkat River has been nominated, attended by over 100 people. In general, DEC is hearing support for establishing a clear process to designate an ONRW in Alaska; individual stakeholders may have specific thoughts on the process and what might be useful to include in a final bill. DEC is listening to these suggestions and understands that amendments to the bill may be needed to provide for more clarity on the ONRW designation authority and process.

What have been your discussions with DNR's Division of Mining, Land and Water? (Sen. Coghill)

DNR initially had concerns regarding whether a court might stay DEC's or DNR's issuance of a permit or other authorization for activity on land (with drainage to a water) or in a water where that activity would add pollutants to that water, when there is a nomination to designate that water as an ONRW and pending a final action on that nomination. That concern has been raised to the Department of Law who responded as follows:

In general, a person with standing may always petition a court for a temporary restraining order or an injunction staying the issuance of a permit upon showing that there would be irreparable harm if

such relief were not granted.⁴ Plausibly, a person could argue that a discharge of pollution into a water body would irreparably harm that water to the extent that a Tier 3 designation would become meaningless. However, a petition for a Tier 3 designation would not create any new rights or avenues for an injunction beyond that which already exist. For example, a person could just as easily request an injunction until an Environmental Impact Statement is completed, or a census of local endangered species is completed for purposes of the Endangered Species Act.

In comments DEC has seen from stakeholders, there has been a suggestion the proposed bill should be modified to explicitly provide that no water may be treated as an ONRW until designated as an ONRW by the Legislature.

DNR's fiscal note says that the bill will be "signed into law," but if the executive branch is ceding authority to the legislative branch, would the governor sign a bill? Or would it be a resolution? (Sen. Wielechowski)

There is a constitutional requirement that the Legislature make the determination, based on Article 8, secs. 2 and 7 of the Alaska Constitution. Those provisions are read to mean that the Legislature must pass a bill that would need to go through the normal process of obtaining the governor's signature to become law.

Why does the bill include a nomination process in addition to the legislative process? What's the rationale for the bill beyond line 7? (Sen. Costello)

DEC does not believe section 1 (b) through (e) of the current bill is likely required to meet EPA's requirement in 40 C.F.R. § 131.12(a)(3). However, the department believes these subsections would provide both a clear and helpful means to take in nominations from the public and a place interested members of the public could go to start getting information about any nominations.

What is the nature of the 22 bodies of water designated in Arizona? And what is the process and criteria in WA, OR, and ID? (Sen. Micciche)

See the enclosed 'Outstanding Arizona Waters' and 'Process and Criteria for ONRW in WA, OR, and ID.'

How does EPA view the CFR for ONRW; does a nomination put restrictions on a water body? Could we clarify on line 7 that we're talking about 131.12 paragraph 3? (Sen. Coghill)

A nomination should not put restrictions on a water body as the protection level would only be in effect upon actual designation. The CFR only requires states have a method for designation of ONRWs. It does not require states to designate any ONRWs. Again, DEC has received comments from stakeholders suggesting the proposed bill be modified to explicitly provide that no water may

⁴ See, e.g., *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011) (holding that Environmental group was likely to suffer irreparable harm in absence of preliminary injunction against proposed logging and timber sale by United States Forest Service in area damaged by fire; members of group would be denied use and enjoyment of the area.); Cf. *Friends of the Wild Swan v. Weber*, 767 F.3d 936 (9th Cir. 2014) (holding that Environmental organizations seeking preliminary injunction to halt logging projects approved by United States Forest Service (USFS) on both sides of Flathead River in Montana's Flathead National Forest did not establish a likelihood of irreparable harm to bull trout and westslope cutthroat trout fisheries in the absence of an injunction.)

be treated as an ONRW until designated as an ONRW by the Legislature. It would also be possible to modify the bill to clarify the regulatory citation in line 7.

There's been no consideration of tying hands of future legislatures. (Sen. Costello)

If SB 163 is amended to include criteria for designation of a Tier 3 water while leaving decision-making authority to the Legislature, future legislatures would not be bound by those criteria. "It is a well-established principle that one legislature cannot abridge the power of a succeeding legislature," or "bind a future legislature to act in a particular manner."⁵ It is DEC's understanding, based on advice we have received from the Department of Law, the legislature can use its inherent powers under Article VIII of the Alaska Constitution to designate a Tier 3 water for any reason it so chooses or create a new category of protected water than Tier 3. Future legislatures can also choose to amend the statutory criteria in the same bill they use to designate a water body.

We should have a process for reversing a designation. (Sen. Coghill)

There is no federal regulation or guidance specifically addressing whether or how a state's designation of an ONRW can be reversed or modified. DEC knows of no ONRWs in the United States that have had their designation reversed. It is assumed that the justification necessary would be extensive; however, the proposed removal of an ONRW designation would presumably be similar to the process used to originally designate the ONRW, here, the legislative process.

Does the EPA penalize us if we don't establish a process? Please brief us on ramifications of not establishing a process. (Sen. Wielechowski)

The federal Clean Water Act requires states to adopt water quality standards that include an antidegradation policy and implementation methods.⁶ Alaska adopted its antidegradation policy, which mirrors requirements in federal regulations, in 1997.⁷ The policy establishes requirements that must be met to authorize a reduction in existing water quality. To facilitate its decision-making process, DEC relies on interim antidegradation implementation methods that were adopted in 2010.⁸ At that time, EPA recommended that the state establish a stand-alone Tier 3 designation process, outside the permit process.⁹ Alaska has so far not promulgated a standard that has been submitted to EPA for approval.

Alaska is required to establish an antidegradation implementation policy that includes Tier 3 waters.¹⁰ This implementation policy is subject to review and approval by EPA.¹¹ If EPA disapproves of a state's implementation policy, they will first notify the state of what changes are required to attain approval, and if the state does not adopt the specified changes, the Regional EPA Administrator

⁵ *Weiss v. State*, 939 P.2d 380, 397 (Alaska 1997) (citing 73 Am.Jur.2d Statutes § 34 (1974); *State v. Lewis*, 559 P.2d 630, 643 (Alaska 1977); *Applications of Herrick & Irish*, 82 Hawai'i 329, 922 P.2d 942, 951 (1996).) See also Re: SCS CSHB 268(FIN) am S (reengrossed) -- Making and amending appropriations, 1995 Alaska Op. Atty. Gen. (Inf.) 225 (Alaska A.G.), 1995 WL 790770.

⁶ 40 C.F.R. 131.12.

⁷ 18 AAC 70.015.

⁸ Interim Antidegradation Implementations Methods, State of Alaska, Dept. of Env't'l Cons., Policy and Procedure Number 05.03.103, July 14, 2010.

⁹ *Id.*, at 5.

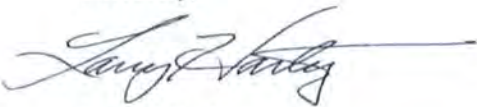
¹⁰ 40 C.F.R. 131.10, 40 C.F.R. 131.12(a).

¹¹ 40 C.F.R. 131.21.

may propose and promulgate a water quality standard that complies with federal law.¹² Alaska would then be required to incorporate EPA's promulgated water quality standard in issuing permits, and EPA could formally object to a permit if Alaska does not incorporate EPA's promulgated standard. If the objection is not resolved, EPA may issue the permit.¹³ In other words, if EPA does not approve of Alaska's implementation policy with regard to the designation of Tier 3 waters, they can overrule the state and create a federal policy that complies with their interpretation of the Clean Water Act.

We hope these responses prove useful to the Committee. If there are further questions or follow up on these issues, please feel free to contact us.

Sincerely,



Larry Hartig
Commissioner

Enclosures: Outstanding Arizona Waters
Process and Criteria for ONRW in WA, OR, and ID

¹² 40 C.F.R. 131.22(a).

¹³ 40 C.F.R. 123.44

OUTSTANDING ARIZONA WATERS (OAWs)

A.A.C. R18-11-112(G)

1. West Fork of the Little Colorado River, from its headwaters at 33°55'02"/109°33'30" to Government Springs at 33°59'33"/109°27'54" (approximately 9.1 river miles);
2. Oak Creek, from its headwaters at 35°01'30"/111°44'12" to its confluence with the Verde River at 34°40'41"/111°56'30" (approximately 50.3 river miles);
3. West Fork of Oak Creek, from its headwaters at 35°02'44"/111°54'48" to its confluence with Oak Creek at 34°59'14"/111°44'46" (approximately 15.8 river miles);
4. Peeples Canyon Creek, from its headwaters at 34°23'57"/113°19'45" to its confluence with the Santa Maria River at 34°20'36"/113°15'12" (approximately 8.1 river miles);
5. Burro Creek, from its headwaters at 34°52'46.5"/113°05'13.5" to its confluence with Boulder Creek at 34°37'4.5"/113°18'36" (approximately 29.5 miles);
6. Francis Creek, from its headwaters at 34°54'38"/113°20'30" to its confluence with Burro Creek at 34°44'29"/113°14'37" (approximately 22.9 river miles);
7. Bonita Creek, from its boundary of the San Carlos Indian Reservation at 33°03'08"/109°33'41" to its confluence with the Gila River at 32°53'36"/109°28'43" (approximately 14.7 river miles);
8. Cienega Creek, from its confluence with Gardner Canyon and Spring Water Canyon at 31°47'38.5"/110°35'21.5" to the USGS gaging station at 32°02'09"/110°40'34" (approximately 28.3 river miles);
9. Aravaipa Creek, from its confluence with Stowe Gulch at 32°52'10"/110°22'03" to the downstream boundary of the Aravaipa Canyon Wilderness Area at 32°54'23"/110°33'42" (approximately 15.5 river miles);
10. Cave Creek, from its headwaters at 31°50'30"/109°17'04.5" to the Coronado National Forest boundary at 31°54'38"/109°08'40" (approximately 10.4 river miles);
11. South Fork of Cave Creek, from its headwaters at 31°50'20"/109°16'33" to its confluence with Cave Creek at 31°53'04"/109°10'30" (approximately 8.6 river miles);
12. Buehman Canyon Creek, from its headwaters at 32°52'0.5"/110°39'54.5" to its confluence with unnamed tributary at 32°24'31.5"/110°32'08" (approximately 9.8 river miles);
13. Lee Valley Creek, from its headwaters at 33°55'49"/109°31'34" to its confluence with Lee Valley Reservoir at 33°56'28"/109°30'15.5" (approximately 1.6 river miles);
14. Bear Wallow Creek, from its headwaters at 33°35'54"/109°26'54.5" to the boundary of the San Carlos Indian Reservation at 33°37'52"/109°29'44" (approximately 4.25 river miles);
15. North Fork of Bear Wallow Creek, from its headwaters at 33°34'47.5"/109°21'59.5" to its confluence with Bear Wallow Creek at 33°35'54"/109°26'54.5" (approximately 3.8 river miles);
16. South Fork of Bear Wallow Creek, from its headwaters at 33°34'38.5"/109°23'58" to its confluence with Bear Wallow Creek at 33°35'54"/109°26'54.5" (approximately 3.8 river miles);
17. Snake Creek, from its headwaters at 33°37'21.5"/109°26'11" to its confluence with the Black River at 33°40'31.5"/109°28'58.5" (approximately 6.2 river miles);
18. Hay Creek, from its headwaters at 33°51'00"/109°28'48" to its confluence with the West Fork of the Black River at 33°48'30"/109°25'19" (approximately 5.5 river miles);
19. Stinky Creek, from the White Mountain Apache Indian Reservation boundary at 33°52'36.5"/109°29'45" to its confluence with the West Fork of the Black River at 33°51'21.5"/109°27'09.5" (approximately 3.0 river miles);
20. KP Creek, from its headwaters at 33°34'03"/109°21'19" to its confluence with the Blue River at 33°31'44"/109°12'04.5" (approximately 12.7 river miles);
21. Davidson Canyon, from the unnamed spring at 31°59'00"/110°38'46" to its confluence with Cienega Creek; and
22. Fossil Creek, from its headwaters at the confluence of Sandrock and Calf Pen Canyons above Fossil Springs at 34°26'48.7"/111°32'25" to its confluence with the Verde River at 34°18'21.8"/111°40'31.6" (approximately 17.2 river miles).

Process and Criteria for ONRW in WA, OR, and ID¹

I. Washington

1. Status: Process and criteria in regulations; no designations to date
2. Criteria:
 - (1) To be eligible for designation as an outstanding resource water in Washington, one or more of the following must apply:
 - (a) The water is in a relatively pristine condition (largely absent human sources of degradation) or possesses exceptional water quality, and also occurs in federal and state parks, monuments, preserves, wildlife refuges, wilderness areas, marine sanctuaries, estuarine research reserves, or wild and scenic rivers;
 - (b) The water has unique aquatic habitat types (for example, peat bogs) that by conventional water quality parameters (such as dissolved oxygen, temperature, or sediment) are not considered high quality, but that are unique and regionally rare examples of their kind;
 - (c) The water has both high water quality and regionally unique recreational value;
 - (d) The water is of exceptional statewide ecological significance; or
 - (e) The water has cold water thermal refuges critical to the long-term protection of aquatic species. For this type of outstanding resource water, the nondegradation protection would apply only to temperature and dissolved oxygen.
3. Process:
 - (2) Any water or portion thereof that meets one or more of the conditions described in subsection (1) of this section may be designated for protection as an outstanding resource water. A request for designation may be made by the department or through public nominations that are submitted to the department in writing and that include sufficient information to show how the water body meets the appropriate conditions identified in this section.
 - (3) After receiving a request for outstanding resource water designation, the department will:
 - (a) Respond within sixty days of receipt with a decision on whether the submitted information demonstrates that the water body meets the eligibility requirements for an outstanding resource water. If the submitted information demonstrates that the water body meets the eligibility requirements, the department will schedule a review of the nominated water for designation as an outstanding resource water. The review will include a public process and consultation with recognized tribes in the geographic vicinity of the water.
 - (b) In determining whether or not to designate an outstanding resource water, the department will consider factors relating to the difficulty of maintaining the current quality of the water body. Outstanding resource waters should not be designated where substantial and imminent social or economic impact to the local community will occur, unless local public support is overwhelmingly in favor of the designation. The department will carefully weigh the level of support from the public and affected governments in assessing whether or not to designate the water as an outstanding resource water.
 - (c) After considering public comments and weighing public support for the proposal, the department will make a final determination on whether a nominated water body should be adopted into this chapter as an outstanding resource water.

¹ This summary by DEC staff is an interpretation of other states' criteria and processes.

II. Idaho

1. Status: Process and criteria (section c) in regulations; no designations to date
2. Process/Criteria:

Tier III - Outstanding Resource Waters (ORWs). ORWs are designated by the legislature. Subsection 052.09 describes the nomination, public notice and comment, public hearing, and board review process for directing the Department to develop legislation designating ORWs. Only the legislature may designate ORWs. Once designated by the legislature, the ORWs are listed in these rules.

a. Nominations. Any person may request, in writing to the board, that a stream segment be considered for designation as an Outstanding Resource Water. To be considered for ORW designation, nominations must be received by the board by April 1 or ten (10) days after the adjournment sine die of that year's regular session of the legislature, whichever is later, for consideration during the next regular session of the legislature. All nominations shall be addressed to: Idaho Board of Environmental Quality...

The nomination shall include the following information:

- i. The name, description and location of the stream segment;
 - ii. The boundaries upstream and downstream of the stream segment;
 - iii. An explanation of what makes the segment a candidate for the designation;
 - iv. A description of the existing water quality and any technical data upon which the description is based as can be found in the most current basin status reports;
 - v. A discussion of the types of nonpoint source activities currently being conducted that may lower water quality, together with those activities that are anticipated during the next two (2) years, as described in the most current basin status reports; and
 - vi. Any additional evidence to substantiate such a designation.
- b. Public Notice and Public Comment. The board will give public notice that one (1) or more stream segments are being considered for recommendation to the legislature as outstanding resource waters. Public notice will also be given if a public hearing is being held. Public comments regarding possible designation will be accepted by the board for a period of at least forty-five (45) days. Public comments may include, but are not limited to, discussion of socioeconomic considerations; fish, wildlife or recreational values; and other beneficial uses.
- c. Public Hearing. A public hearing(s) may be held at the board's discretion on any stream segment nominated for ORW designation. Public notice will be given if a hearing is held. The decision to hold a hearing may be based on the following criteria:
- i. One (1) or more requests contain supporting documentation and valid reasons for designation;
 - ii. A stream segment is generally recognized as constituting an outstanding national resource, such as waters of national and state parks, and wildlife refuges;
 - iii. A stream segment is generally recognized as waters of exceptional recreational or ecological significance;
 - iv. The board shall give special consideration to holding a hearing and to recommending for designation by the legislature, waters which meet criteria found in Subsections 052.09.c.ii. and 052.09.c.iii.;
 - v. Requests for a hearing will be given due consideration by the board. Public hearings may be held at the board's discretion.

d. Board Review. The board shall review the stream segments nominated for ORW designation and based on the hearing or other written record, determine the segments to recommend as ORWs to the legislature. The board shall submit a report for each stream segment it recommends for ORW designation. The report shall contain the information specified in Subsection 052.09.a. and information from the hearing record or other written record concerning the impacts the designation would have on socioeconomic conditions; fish, wildlife and recreational values; and other beneficial uses. The Department shall then prepare legislation for each segment that will be recommended to the legislature as an ORW. The legislation shall provide for the listing of designated segments in these rules without the need for formal rulemaking procedures, pursuant to Sections 67-5201, et seq., Idaho Code.

III. Oregon

1. Status: Policy, process and criteria combined in antidegradation policy regulations; no designations to date, however, the state does have current nominations
2. Regulations:
 - (8) Outstanding Resource Waters Policy. Where existing high quality waters constitute an outstanding State or national resource such as those waters designated as extraordinary resource waters, or as critical habitat areas, the existing water quality and water quality values must be maintained and protected, and classified as "Outstanding Resource Waters of Oregon."
 - (a) The Commission may specially designate high quality water bodies to be classified as Outstanding Resource Waters in order to protect the water quality parameters that affect ecological integrity of critical habitat or special water quality values that are vital to the unique character of those water bodies. The Department will develop a screening process and establish a list of nominated water bodies for Outstanding Resource Waters designation in the Biennial Water Quality Status Assessment Report (305(b) Report). The priority water bodies for nomination include:
 - (A) Those in State and National Parks;
 - (B) National Wild and Scenic Rivers;
 - (C) State Scenic Waterways;
 - (D) Those in State and National Wildlife Refuges; and
 - (E) Those in federally designated wilderness areas.
 - (b) The Department will bring to the Commission a list of water bodies that are proposed for designation as Outstanding Resource Waters at the time of each triennial Water Quality Standards Review; and
 - (c) When designating Outstanding Resource Waters, the Commission may establish the water quality values to be protected and provide a process for determining what activities are allowed that would not affect the outstanding resource values. After the designation, the Commission may not allow activities that may lower water quality below the level established except on a short term basis to respond to public health and welfare emergencies, or to obtain long-term water quality improvements.
 - (11) "Commission" or "EQC" means the Oregon Environmental Quality Commission.



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March 4, 2016

Senator Cathy Giessel, Chair
Senate Resources Committee
State Capitol Room 502
Juneau, AK 99801

Re: SB163, National Resource Water Nomination/Designation

Dear Senator Giessel:

The Alaska Miners Association (AMA) writes to offer comments on SB163, a bill titled "An Act relating to the nomination and designation of state water as outstanding national resource water."

AMA is a non-profit membership organization established in 1939 to represent the mining industry in Alaska. We are composed of more than 1,800 members that come from seven statewide branches: Anchorage, Denali, Fairbanks, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. Our members include individual prospectors, geologists, engineers, vendors, suction dredge miners, small family mines, junior mining companies, and major mining companies. We look for and produce gold, silver, platinum, molybdenum, lead, zinc, copper, coal, limestone, sand and gravel, crushed stone, armor rock, and other materials.

On February 10, members of the Alaska Department of Environmental Conservation (ADEC) met with representatives of AMA to discuss the Administration's introduction of SB163. As we understand, the U.S. Environmental Protection Agency requires states to have a process in place in which individuals and/or organizations can nominate waters to be designated as a Tier 3 Outstanding Natural Resource Water (ONRW). To meet this requirement, ADEC has proposed this bill to mandate that state waters cannot be designated as an ONRW except by an Act of the Legislature.

By way of background, waters designated as an ONRW are provided the highest level of protection under the State's antidegradation policy. From ADEC: "The federal and state antidegradation policies require water quality to be maintained and protected in a Tier 3 water. The interpretation of this provision typically is that new or increased discharges to a Tier 3 water or its tributaries are not permitted if the discharges would result in a lowering of water quality (i.e., cause degradation). The only exception to this prohibition is to allow activities that result only in a temporary, short-term and limited change in the water quality of a Tier 3 water; for example, construction activities that only impact water quality during construction. Such activities must not permanently degrade water quality."

Designation of an ONRW and subsequent Tier 3 water protection would, without doubt, be a barrier to resource development, economic development, and some crucial municipal projects. Conceptually, the AMA would prefer that the State of Alaska request that Alaska be exempted from the provision within the Clean Water Act (CWA) that requires the State to have a designation process in place. However, it may not



be possible to secure this exemption. While there may be cases in which nomination of an ONRW is warranted, AMA believes the process and any designation could be used by some anti-development individuals or organizations to stop responsible development projects. Therefore, we believe it is necessary and appropriate for the Legislature to be tasked with this important rule. The AMA also believes the nomination process should include an opportunity for stakeholder appeal of the nomination prior to Legislative review. In that case, AMA would support SB163, on the condition that recommendations are incorporated into an updated version of the bill, as outlined below.

1. Section 1, item a, Line 6: "Water of the state may not be designated ***or managed*** as outstanding national resource water except by an Act of the Legislature."

It is imperative that when a state water is nominated for designation as an ONRW, it should not be managed or treated as such until an Act of the Legislature confirms the designation. Actions that manage the water with Tier 3 protections prior to designation are inappropriate.

2. Section 1, new item b, line 7: AMA suggests including the following language: "The department's management of a water body, or particular stretch of a water body, as an outstanding national resource water, shall be limited solely to that portion of a waterbody designated by the legislature and shall not extend to tributaries, adjacent waters, or any other waters of the state unless such waters have been expressly designated by the legislature as outstanding natural resource waters."

Designating a water as an ONRW shall apply to the area or portion that merits Tier 3 protections only. ONRW and management actions resulting from its designation should not apply to upstream activity, tributaries, and any other adjacent waters. Parties that nominate waters for ONRW designation must be required to be specific as to the portion of the waterbody that is being nominated, and designations cannot go further or be applied to any waters outside the intended designation area.

3. Section 1, line 11: add sentence that reads "The department will reject nominations that fail to satisfy any information requirements established by the department in regulation."

ADEC should have a mechanism in place in which it can dismiss illegitimate nominations, so that they do not have to forward baseless information to the Legislature.

4. Section 1, Page 2, line 1, item e: "Within 10 days after the convening of each Legislature, the commissioner shall transmit to the Legislature for consideration a list of nominations and related material that were received ***by the department within the 24 month period preceding*** September 1 of the previous year.

Nominations of ONRW waters should be done constructively; therefore, AMA believes the agency should start each nomination period with a clean slate, ensuring that previously nominated waters that the Legislature declined to act on aren't forwarded to the Legislature ad infinitum. Requiring new nominations every two years will help to mitigate the duplicative and outdated nominations of waters already addressed as being inappropriate for an ONRW designation. A list of nominations should only be forward to the Legislature once per session. Nominations received by the agency after the September 1 deadline should be considered in the nomination period for the following Legislature.

5. Add a new Section 2 which is attached to this letter as Exhibit A.



Criteria should be added by which the relevant State agencies prepare a record of a nomination for the Legislature's consideration of an ONRW. Whether or not those criteria have been met should be subject to appeal. Finally, if a waterbody is important and unique enough to warrant Tier 3 consideration, DEC should submit a report to the Legislature explaining how it plans to manage existing point source dischargers to ensure compliance with permit stipulations and manage non-point dischargers to ensure they comply with all regulatory requirements.

AMA also intends to provide these suggestions directly to ADEC staff, and we are hopeful that inclusion of our suggestions, as well as the Committee feedback the agency received at the February 15 hearing, will be incorporated into this bill. AMA greatly appreciated the opportunity to discuss this bill with ADEC and greatly appreciates the opportunity to submit our comments for the record before your Committee.

Please don't hesitate to contact me if you have any questions on our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Deantha Crockett", written in a cursive style.

Deantha Crockett
Executive Director

Attached: AMA Comments SB163 Exhibit A; Criteria for Tier 3 designation



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EXHIBIT A - SB 163 CRITERIA

Section 2:

- A. DEC shall make the following evaluations, determinations, and findings before submitting a waterbody to the Legislature for Tier 3 consideration. The submission of a waterbody to the Legislature for Tier 3 consideration is not, and shall not be considered, a recommendation for Tier 3 designation by DEC.
1. A nomination for Tier 3 designation may be submitted to DEC by any resident of Alaska with respect to any waterbody or segment thereof. DEC shall determine whether the waterbody has exceptional water quality characteristics relative to other State of Alaska water, including one or more of the following:
 - a. the water is in a relatively pristine condition, largely absent of human sources of degradation, and of exceptional value to the state in this condition;
 - b. the water is of exceptional ecological, economic, or recreational significance. If the Tier 3 nomination is based on this subsection the nominating application shall be accompanied by a detailed report explaining how the ecological, economic, or recreational values make the waterbody exceptional; or
 - c. the water is an exceptional and rare example of its type regardless of whether the water is considered high quality. If the Tier 3 nomination is based on this subsection the nominating application shall be accompanied by a detailed report explaining the factors that make the water exceptional and rare and why its water quality condition should be disregarded.
 2. The application for Tier 3 nomination shall include the following information:
 - a. The nomination described in Paragraph 1 must include the current contact information for the nominator and the following required information about the waterbody proposed for Tier 3 designation:
 1. the name, description, and geographic location;
 2. the boundaries or extent, including maps, sufficient to define the waterbody in statute;
 3. identification of land ownership adjacent and proximal to the proposed waterbody, including information on whether those lands have designated or protection status;
 4. rationale and information to support a Tier 3 designation that meets conditions in Paragraph 1 including the required comparison to other State of Alaska waterbodies to demonstrate exceptional characteristics and an explanation of how the existing water quality supports the rationale;



5. an explanation of why the existing management and protection levels are insufficient, including an identification and description of immediate, short term, or potential significant risks to the exceptional characteristics of the water;
 6. any supporting available evidence, including information on existing uses, sufficient and credible water quality data, and other technical data or records; and
 7. other available evidence which the nominator considers supportive of the nomination, such as:
 - a. any additional information on land owners, stakeholders, or communities that may be affected by the proposed designation and the respective interests in the proposed designation;
 - b. any economic or social information relative to the proposed designation, including available natural resources, special land area designations, transportation corridors, and subsistence uses and users;
 - c. documentation of any public outreach and the public's level and degree of support for the proposed designation;
 - d. documentation of the level and degree of support for the proposed designation from any affected local government; and
 - e. any additional information related to the proposed water or evidence to the proposed waterbody or evidence to support the proposed designation.
- b. DEC shall conduct a completeness review of the application, and request additional information as necessary to process the application; and
- c. DEC shall be reimbursed by the applicant for DEC's costs of processing an application, including the required evaluations and reports. DEC shall begin processing the application and the required evaluations and reports after a satisfactory reimbursable services agreement has been received from the applicant.
3. DNR shall prepare a report evaluating the land use implications of any waterbody proposed for Tier 3 nomination that DEC intends to submit to the Legislature. The report shall include the social and economic impacts arising out of any change in land use that would result from a Tier 3 designation. The report shall be submitted to the Legislature along with a DEC submission of a waterbody to the Legislature for Tier 3 consideration. Before preparing the report DNR shall enter a satisfactory reimbursable services agreement with the applicant for the costs of preparing the report.
4. DEC shall evaluate:
- a. all point source dischargers on the nominated waterbody to determine whether they are following best management practices and meeting their permit requirements, and
 - b. all non-point dischargers to determine whether they are using best management practices and at least achieving water quality standards;
5. DEC shall prepare a report describing enforcement actions being undertaken by DEC to bring point source dischargers into compliance with their permits and non-point sources into compliance with water quality standards that shall accompany a Tier 3 submission to the Legislature. The report shall describe the water quality anticipated if all point and non-point dischargers come into compliance.



6. DEC's final evaluations, determinations and findings regarding a waterbody or segment thereof shall constitute a final department decision that may be administratively appealed under 18 AAC 15.200. The Department shall not forward any waterbody to the Legislature until all administrative and judicial appeals have been resolved. Should there be an administrative and/or judicial appeal the decisions and records thereof shall be forwarded to the Legislature. Should there be an administrative and/or judicial appeal the Department of Law shall prepare a report summarizing the contentions of the parties and the decision of the administrative hearing officer or the judge as the case may be.

Thank you for the opportunity to participate in this discussion on SB 163. I appreciate the time that you are taking to understand and discuss this bill. I appreciate also the hard work that you are putting in this session on our fiscal dilemma.

The Alaska Center for the Environment and Alaska Conservation Voters (ACE/ACV) opposes SB 163.

We support a clear and transparent process to designate Outstanding National Resource Water (ONRW also known as tier 3 waters) under the Clean Water Act. We support an inclusive process that highlights local input, and that creates compromise and a working relationship between stakeholders. We are disappointed that Governor Walker would see fit, out of all the options, to punt this tier 3 determination responsibility to the legislature.

It is an important decision; designating a section of a waterbody as an ONRW protects the water from new sources of water pollution. Establishing the legislature as the final arbiter of this big decision puts a lot of pressure on committee chairs and individual legislators. It also places the designation in a kind of chutes and ladders game which some people and groups are better equipped to play than others.

We recognize that the legislature could make tier 3 designations. The primary problem that we see with having the legislature call the final shot on tier 3 designation is that it creates a white hot political debate, instead of a stakeholder discussion. Additionally, a 90-day session is dominated by generally one or two or three major issues and may not provide enough time to fully and fairly vet and decide on a tier 3 nomination.

We believe that DEC, with input from ADFG, and DNR, would yield better results for Alaska in the long run, and would foster better public dialogue. We also believe that the office of the Governor is powerful enough to absorb the shock of opposition from whomever is opposed to the final outcome.

In the western lower 48, it is our understanding that all states have adopted some method of designating tier 3 waters as required by the clean water act. Only a small handful of states put the onus of approving a tier 3 designation on the state legislature.

Some western states like Montana that require legislative approval of tier 3 also automatically designate all waters in national parks and protected areas as tier 3 waters. Idaho requires legislative approval and has no tier 3 waters. Other western states like Wyoming and Washington and Oregon leave the designation process up to their equivalent of a DEC. Per capita, there is a larger constituency for salmon and clean water in Alaska than any other state in the lower 48. So comparisons to any of these states are tough.

ACE/ACV recognizes that tier 3 designation might seem awkward in Alaska where we do have a superabundance of high value rivers, wetlands, lakes and streams. However, there are numerous reasons why it's important to have a science based, transparent and inclusive ONRW process that allows Alaskans to seek tier 3 protections for important waterbodies.

For one thing, we keep breaking records. In Alaska and the US and the World. 2015 was the hottest year in recorded history. January 2016 was the warmest January in human record. Climate change is likely going to change a lot of things for water in Alaska. Perhaps the stress of

low snow pack and increasing water temperature on our fish habitat will engender more and more pressure to protect fish habitat from additional stressors. At some point likely soon a whole lot of people might be looking for a whole lot of answers on how to protect our fish. A science based determination process may be more appropriate than a legislative process as we begin to examine and judge the impacts of climate change on all of our waters and the need to protect or not protect them.

I do not speak for any of the entities that have submitted tier 3 applications to date. It is conceivable though that Alaskans will submit applications to protect waterbodies as a response to perceived policy and decision making shortcomings. Of course we all have our own view of whether the balance is tilted too far one way or the other. ACE/ACV believes that many current permitting processes have structural deficiencies that prevent compromise or that adequately protect our fish and water, such that ONRW designation may be sought.

For example: We have lost the Coastal Zone Management Program which brought Alaskans to the table in major permit reviews, we have no ability to comment on temporary water use permits which are used as a proxy for major industrial water rights, we have stripped public interest litigation to bare bones, we have consolidated public comment on oil and gas leasing, we have halted reasonable water quality measures to prohibit wastewater mixing zones in salmon spawning habitat, we have rolled back an citizens initiative to make cruise ships not dump sewage into state waters. We have no requirement for interagency consultation on major water withdrawal permits, we have no law on the books to prevent dewatering of a salmon stream.

Under the Clean Water Act, the state is not required to designate tier 3 waters, it is only required to have a process in place for citizens to make nominations. There are various options for what that process could look like. ACE/ACV does not think that a legislative process is the right one for Alaska. SB 163 is merely a path to more shrill debate. Alaska is uniquely dependent on fish and clean water so there is going to be a lot of noise surrounding this issue.

There is obviously an interest in the legislature in mitigating against tier 3 nominations. Instead of creating a process where tier 3 nominations dominate the legislative conversation, the Walker Administration should use the tools at its disposal to build a public conversation around why Alaskans would seek tier 3 nomination in the first place.

To summarize in closing, Alaska is overdue for the adoption of a clear, inclusive, science-based ONRW process. While there is no requirement to designate waters, only to have a process, whatever process is adopted should be workable for the people of Alaska, and allow them to make nominations and have the nominations considered. The decision should be science-based, inclusive, and transparent. ACE/ACV believes that the process that makes the most sense is to have DEC, the agency with the water quality and permitting expertise, be in charge of the decision.

Thank you,

Louie Flora
Legislative Liaison,
ACE/ACV

Monday, March 14, 2016 3:30 pm Butrovich 205

REPORT TO THE ALASKA STATE SENATE RESOURCES COMMITTEE, Cathy Giessel, Chair

by GREATER HAINES CHAMBER OF COMMERCE, Debra Schnabel, Executive Director

On Senate Bill 163: "An Act relating to the nomination and designation of state water as outstanding national resource water; and providing for an effective date."

The mission of the Greater Haines Chamber of Commerce is promotion of economic growth that contributes positively to quality of life in Haines.

A household survey undertaken in 2011 by the McDowell Group as a basis for developing our 2025 Comprehensive Plan concluded that 72% of Haines' residents rate quality of life as high.

66% named natural beauty and outdoor opportunities as what they liked most about Haines.

Haines is a community in transition. Our century-long economic history includes simultaneous operation of four salmon canneries; growth and demise of Porcupine, a mining town supporting over 5000 people and a post office; simultaneous operation of two sawmills manufacturing wood products for export; a cruise ship schedule that brought three to four vessels into port weekly, seasonally. Haines is the typical Alaskan community that has prospered or not, depending on resource extraction, technological overhauls, global market conditions and politics. Today's demographics describe a community of retirees, craftspeople who renovate or construct their homes, small business entrepreneurs, tour operators, fishermen and health care providers.

The best use of our natural resources has been a subject of debate in Haines since statehood. Indeed, much of Haines' economic history has been decided by the state because of land-granting by the state for funding the Mental Health Trust and the University of Alaska. The State owns and manages 32% of all land in the Haines Borough; the Haines State Forest and the Chilkat Bald Eagle Preserve fill out the inventory. The Haines State Forest, once an economic engine for a defining timber industry, is being defunded by the State. The Chilkat Bald Eagle Preserve is still an economic development opportunity, with 77% of respondents supporting increased commercial use. To the extent that our economy is still resource-dependent, the Chilkat River is the lifeblood of commerce.

The Chamber views the nomination of the Chilkat River as a Tier 3, outstanding national resource water as specified in 40 C.F.R. Part 131.12, as a strategy to direct energy away from mineral resource development in tributaries of the Chilkat River, and to focus energy on preservation of wild salmon stock for subsistence and commercial use, and development of recreational tourism. It is the politics of defining quality of life.

Some would say that a Tier 3 designation is necessary to preserve cultural values including subsistence lifestyles, necessary to preserve wild stock salmon fisheries, necessary to maintain a semblance of pristineness that attracts photographers, artists and tourists seeking wilderness recreation. Those would say it is necessary because it is impossible to otherwise guarantee that there will never be a mishap, an accident that could introduce toxins or pollutants in the river, that it is impossible for a mining operation to create a method of waste disposal that would not pollute ground water or a tributary or

the Chilkat River directly. Those who support a Tier 3 designation can envision a healthy economy that restricts large scale resource extraction to fisheries and an economy built on tourism.

Those who do not support Tier 3 designation believe that traditional resource development undertaken with modern methods and under the scrutiny of state agencies responsible for protecting the state's waters do not threaten water quality. They also think that a mining operation, specifically, the Palmer Deposit, is the sort of economic development that would improve quality of life because it would create jobs and open up more land. These people believe that there is adequate regulation in place to preserve water quality in the Chilkat River. Those who oppose a Tier 3 designation see it as an imposition on their lifestyle and a threat to potentially meaningful economic development.

In the 2011 survey, more than 50 % of households supported potential economic development opportunities utilizing agriculture (95%), value-added wood products (92%), winter tourism (83%), promotion of the Chilkat Bald Eagle Preserve (77%) and large scale timber harvesting (65%). 50% of households supported "large scale mining such as the Constantine Mineral deposit in the Chilkat Valley," the Palmer Project.

Being for or against Tier 3 for economic reasons is only one aspect of the issue. The issue is more broadly political. Some think it would take government regulation of local life too far. We have been told at a Q&A session held by the DEC in Haines on Feb. 22 that any activity currently undertaken in state waters would be allowed to continue. But there is nonetheless concern that a Tier 3 designation would prohibit infrastructure development that may be deemed important to the support of subsistence lifestyle and outdoor recreation: boat launches, docks, and possibly, the operation of machines that raise turbidity levels in the river.

The political aspects of the proposed process for designation of Tier 3 as outlined in SB163 is of concern to our membership. This was brought out in a recent membership survey conducted by the Chamber, with 58 respondents.

Are you familiar with SB163 Tier designation legislation?	Yes 98%	No 2%	
Did you attend the 2/22 DEC presentation on Tier 3?	Yes 43%	No 57%	
Do you favor Tier 3 designation decided by the Legislature or the Administration?	Legislature 29%	Admin 40%	Undecided 31%
Do you favor designating the Chilkat River as Tier 3?	Yes 43%	No 54%	Undecided 3%

Governor Bill Walker's assessment for "far-reaching consequences" for economic development supports his opinion that the basis for a Tier 3 designation ought to be political, not scientific. As written, SB 163 calls for a legislative action on designation. Our membership favors slightly a scientific basis because the citizenry is too aware that votes on issues affecting local economies can be easily "traded" among legislators with different constituent loyalties.

Another concern about SB163 as written is that provision that any single resident may nominate a Tier 3 designation. Generally, consideration of a designation of such "far-reaching consequence" ought to have a larger political buy-in at the time of application. *It needs scientific buy-in. Nominating applications must be vetted.*

In considering the process for designating state waters as an outstanding national water resource, the Chamber looks to the State Constitution, Article 8 – Natural Resources. The Legislature has constitutional authority for utilization, development and conservation of all natural resources, including water, which is subject to appropriation, with priority to prior rights and preference among beneficial uses and the general preservation of fish and wildlife. Constitutionally, the Legislature may provide for the administration and preservation of special use site for the use, enjoyment and welfare of the people as it did with the formation of the Chilkat Bald Eagle Preserve. The Constitution also provides that mineral rights hold a priority right for extraction.

Nature offers us phenomenal choices that require good judgment and a crystal ball. Decisions have consequences. Reflecting on the potential impact of a Tier 3 designation seems similar to the impact that consideration of habitat for various species of wildlife had in the management of our national forests. A Tier 3 designation would change the course of economic development for Haines, but in what direction and characterization remains the purview of those who remain to accept the challenge.



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AMA Testimony
Deantha Crockett, Executive Director
SB163: National Resource Water Nomination/Designation

Thank you. For the record, my name is Deantha Crockett and I am the Executive Director of the Alaska Miners Association. AMA appreciates the invitation to provide testimony today on SB163.

The Alaska Miners Association is a professional trade association established in 1939 to represent the mining industry in Alaska. We are composed of more than 1,800 members that come from seven statewide branches: Anchorage, Denali, Fairbanks, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. AMA is an umbrella association, representing the large mining operations in Alaska but also small family mines, coal, sand, quarry rock and gravel mining, and the vendor and contracting sector that supports the mining industry.

SB163 addresses the process in which an outstanding national resource water (ONRW) is designated. The Federal Clean Water Act includes antidegradation rules, the most stringent of which is called "Tier 3." Any waterbody that is designated as an ONRW would fall under Tier 3 rules and cannot be degraded beyond the baseline conditions. This means that any new activities or expansion of existing activities in the waterbody that would change the water quality in any way would be prohibited, even if the discharge could prove it meets applicable water quality standards and fully protects fish, aquatic life, and other water uses. To this end, I have a white paper that outlines the implications of a Tier 3 designation on watershed uses that I will submit with my testimony today.

Designation of an ONRW and subsequent Tier 3 water protection would, without doubt, be a barrier to resource development, economic development, and some crucial municipal projects. Conceptually, the AMA would prefer that the State of Alaska request that Alaska be exempted from the provision within the Clean Water Act (CWA) that requires the State to have a designation process in place. However, it may not be possible to secure this exemption, and in that case, AMA believes the best avenue in which the State of Alaska can establish a process in which waterbodies can be nominated for ONRW designation is through an Act of the Legislature. Therefore, we support the passage of SB163 this session, provided amendments are made to ensure the process is credible and done in a way that truly evaluates waterbodies with science and data prior to the pursuit of a designation.

While there may be cases in which nomination of an ONRW is warranted, AMA believes the process and any designation could be used by some anti-development individuals or organizations to stop responsible development projects. To prevent this process from being used as a tool to stop the next mine, timber sale, fish processing plant, or oil and gas development, we propose the following amendments. Please note that these amendments are cited in section in our letter to this Committee dated March 4.



One, language should be included in this bill to ensure that water of the state that is nominated for ONRW designation should absolutely NOT be managed as such until an Act of the Legislature confirms the designation. Actions and requirements to dischargers that manage the water prior to an official designation would be inappropriate.

Two, the bill should be specific in that nomination of a waterbody should be a specific segment of the waterbody and not extend to tributaries and other adjacent waters. Parties that nominate waters for ONRW designation must be required to be specific as to the portion of the waterbody that is being nominated, and designations cannot go further or be applied to any waters outside the intended designation area. Therefore, should the nomination be confirmed and designated by the Legislature, DEC's management of the water body as an outstanding national resource water shall be limited solely to that portion of a waterbody designated by the legislature.

Three, AMA believes the bill should include language to provide the ability for DEC to reject nominations that fail to satisfy specific criteria and requirements for information that the department would establish in regulation. In our March 4 letter, we provided an appendix that outlines suggested criteria for any submission of an ONRW nomination. In an attempt to be brief, this summarized criteria and suggested requirements includes:

1. Information that proves the waterbody has exceptional unique characteristics relative to other State of Alaska waters including being in a pristine condition; largely absent of sources of human degradation; being of exceptional ecological, economical, or recreational significance; being an exceptional or rare example of its type; and accompanied by data that demonstrates these criteria.
2. DEC shall conduct a completeness review of all applications and be able to request additional information as necessary to process the application, even if it necessitates the nomination being held over to the next nomination period as outlined in the bill.
3. DEC should have the authority to require reimbursement from the applicant for DEC's costs of processing an application, including the required evaluations and reports. DEC shall begin processing the application and the required evaluations and reports after a satisfactory reimbursable services agreement has been received from the applicant.
4. DNR shall prepare a report evaluating the land use implications of any waterbody proposed for Tier 3 nomination that DEC submits to the Legislature. The report shall include the social and economic impacts arising out of any change in land use that would result from a Tier 3 designation. Before preparing the report DNR shall also enter a satisfactory reimbursable services agreement with the applicant for the costs of preparing the report.
5. DEC's final evaluations and determinations and findings regarding a waterbody or segment thereof shall constitute a final department decision that may be administratively appealed. The Department shall not forward any waterbody to the Legislature until all administrative and judicial appeals have been resolved. Should there be an administrative and/or judicial appeal the decisions and records thereof shall be forwarded to the Legislature. Should there be an administrative and/or judicial appeal the Department of Law shall prepare a report summarizing the contentions of the parties and the decision of the administrative hearing officer or the judge as the case may be.

Again, these criteria are much more thoroughly described in our March 4 letter and I would be happy to re-distribute these in more detail with my testimony.



Our fourth proposed change is to organize the timeline in which DEC collects nominations and forwards them to the Legislature. We suggest language stating that within 10 days after the convening of each Legislature, the commissioner shall transmit to the Legislature for consideration a list of nominations and related material that were received ***by the department within the 24 month period preceding*** September 1 of the previous year. Nominations of ONRW waters should be done constructively; therefore, AMA believes the agency should start each nomination period with a clean slate, ensuring that previously nominated waters that the Legislature declined to act on aren't forwarded to the Legislature repeatedly. Requiring new nominations every two years will help to mitigate the duplicative and outdated nominations of waters already having been addressed as being inappropriate for an ONRW designation. A list of nominations should only be forward to the Legislature once per session. Nominations received by the agency after the September 1 deadline should be considered in the nomination period for the following Legislature.

Our last recommendation for SB163 is that language be included that provides a mechanism in which the process can be reversed if the stream no longer needs tier 3 protection. An ONRW designation shouldn't be a final decision, it should be made only if absolutely necessary with a goal of restoring the waterbody to a condition in which multiple uses can return to it. DEC and perhaps the Legislature will need the authority and process to change the designation if and when applicable.

Even with our lengthy comments and suggestions I've outlined today, AMA believes SB163 is the start of a good bill with the potential to be good policy for Alaska. we are hopeful that inclusion of our suggestions will be incorporated into this bill. AMA greatly appreciates the opportunity to submit our comments for the record before your Committee, and stands ready to work on this bill with your committee and DEC to ensure the goals for water quality and economic development are not mutually exclusive. Thank you.

Implications of a Tier 3 Designation on Watershed Users

This paper addresses the potential implications of a Tier 3 Outstanding National Resource Water (ONRW) designation on waterbodies in Alaska.

The Tier 3 designation arises out of federal antidegradation rules. These rules were promulgated by the U.S. Environmental Protection Agency (EPA) under the Clean Water Act and are designed to ensure that the nation's waters are not degraded. The most stringent of these rules is called "Tier 3." Any waterbody that is designated an ONRW cannot, under the Tier 3 rules, be degraded beyond the baseline conditions. However, Tier 3 goes beyond enforcing current water quality regulations. Instead, the Tier 3 rules prohibit any new activities and expansion of existing activities that change water quality in any way. *This prohibition would apply even in situations where a new discharger could show that its discharge meets applicable water quality rules, and fully protects fish, aquatic life and other water uses.*

This paper explores some of the implications of a Tier 3 designation on the types of activities commonly seen on Alaska waterbodies.

- **Water Quality Standards Apply to All Operations in Alaska.**

The Alaska water quality standards play a key role in understanding how a Tier 3 designation would impact uses in a designated ONRW watershed. The Alaska water quality standards provide:

A person may not *conduct an operation* that causes or contributes to a violation of the water quality standards set by this chapter.¹

The water quality standards set by this chapter specify the degree of degradation that may not be exceeded in a waterbody as a result of human actions. The water quality standards *are set by the antidegradation policy* [and] the water quality criteria ...²

There are two key points:

- First, Tier 3 is part of the Alaska water quality standards. These standards apply to "operations" rather than simply to activities that discharge pollution into a waterbody.
- Second, the water quality standards are self-executing and apply to "operations". Nothing in the regulations limits the application of water quality standards to activities that *require a permit* from the Alaska Department of Environmental Conservation (ADEC), Alaska Department of Natural Resources (DNR), or other agencies.

Together, the existing regulations would prohibit any person from conducting an operation that degrades a designated Tier 3 waterbody, regardless of whether that activity requires a permit or other authorization from ADEC, or another state or federal agency. This regulatory mandate is *self-executing*, in the same way that a speed limit posted on a road applies to activities on that

¹ 18 AAC 75.010(a).

² 18 AAC 70.010(b).

road even though cars do not have permits requiring them to abide by the speed limit. This is a key point.

The conclusion that Tier 3 should be interpreted broadly is supported by the EPA. In the preamble supporting its antidegradation rulemaking, EPA stated:

*It is the position of EPA that, at a minimum, States and authorized Tribes must apply antidegradation requirements to activities that are "regulated" under State, Tribal, or federal law (i.e., any activity that requires a permit or a water quality certification pursuant to State, Tribal or federal law, such as CWA 402 NPDES permits or CWA 404 dredge and fill permits, any activity requiring a CWA 401 certification, any activity subject to State or Tribal nonpoint source control requirements or regulations, and any activity which is otherwise subject to State or Tribal regulations that specify that water quality standards are applicable).*³

Degradation is commonly associated with point and nonpoint sources of pollution. Common nonpoint sources include urban runoff, domestic animals, road construction, timber harvests, off-road vehicles, boats, septic systems, agriculture, and damage to shorelines from activities, such as fishing, piers, and buildings. Common point source discharges include treated sewage, solid waste, chemical wastes, biological materials, seafood processing wastes, dredged soil, mining wastes, rock, sand, dirt, munitions, heat, garbage, discarded equipment, and runoff from construction or agricultural sites. The Tier 3 program would apply to all of these potential sources even in situation where the activity may not be regulated under state and federal permits.

- **ADEC's Proposed Antidegradation Regulations Do Not Impact How Tier 3 Would Be Applied Outside of the Clean Water Act Context.**

ADEC's proposed 2014 antidegradation regulations would only apply to activities regulated under the federal Clean Water Act,⁴ such as ADEC point source discharge permits and Corps 404 permits. *However, the designation of a waterbody as Tier 3 would apply to a broader category of activities than those regulated under the Clean Water Act permitting programs.* Specifically, any activity that has the potential to degrade a designated ONRW and its tributaries could be prohibited.

- Restrictions Could Arise in Three Ways

1. Regulators could choose to impose restrictions on their own initiative.

³ 63 Fed. Reg. 36742, 36780 (July 7, 1998) (EPA preamble to proposed Water Quality Standards Regulations).

⁴ ADEC proposed antidegradation implementation methods during January 2014. *See* http://dec.alaska.gov/water/wqsar/Antidegradation/docs/Antidegradation_2014_Amendments_Public_Notice_Version.pdf. The regulations acknowledge that the antidegradation policy applies to *all* waters of the state, not just to activities regulated under the Clean Water Act. The proposed regulation only addresses how Tier 3 would apply to waters regulated under the federal Clean Water Act. *See* proposed 18 AAC 70.016 (a).

2. A third-party could protest a permit, authorization, or approval for an offending activity. It would argue that the activity violates State law if it has the potential to degrade water quality or uses of the water.
3. Any person could petition ADEC, DNR, or Alaska Department of Fish and Game (ADF&G) to promulgate a regulation to limit or manage a given activity.⁵

- **Existing Unpermitted Discharges Have Unclear Status.**

ADEC and EPA interpret the Tier 3 regimes as prohibiting so-called “new and expanded discharges.” It is unclear, however, whether this grandfathering concept would be limited to existing discharges that are *permitted prior* to the Tier 3 designation (*i.e.*, compliant with applicable requirements). This could be a very significant issue for ongoing activities which have existed for years but – for whatever reason – have never been fully permitted or which temporarily ceased operations.

- **Tributaries of Designated Tier 3 Waterbodies.**

ADEC and EPA take the position that discharges into tributaries of a Tier 3 waterbody must be regulated under a similar regime that would apply to the Tier 3 waterbody itself. This means that any new or expanded discharge into a tributary of an ONRW would be prohibited if the discharge has the potential to degrade the ONRW. This has the effect of extending the “no discharge” zone many miles upstream into the various tributaries of the designated ONRW.

- **Activities That Could Potentially Be Impacted by a Tier 3 Designation.**

- Motorboats

Motors release hydrocarbons into the water as part of the normal operation of the engine. It seems very likely that an argument will be made that the state must take steps to prevent an increase in degradation of water quality from motorboat traffic. This would almost certainly lead to a requirement for four-stroke motors in any ONRW and, perhaps, caps on motorboat traffic to ensure that there are no expanded discharges into the water. Boat traffic that causes excess turbidity could be prohibited. Speed limits to minimize wakes (turbidity/erosion) would likely be considered by agencies with relevant oversight.

- Residential and Commercial Septic Systems

A Tier 3 designation would categorically prohibit new direct discharges of treated sanitary flows into a designated waterbody. However, the use of leach fields and other facilities that do *not* involve direct discharge could also be prohibited. Some of these facilities impact groundwater. If groundwater is hydrologically connected to an ONRW, ADEC would have an obligation to ensure that its approval of the sewage system would not allow any flows to come into contact with the Tier 3 waterbody, even if the contact were to occur indirectly through groundwater.

⁵ Any person can petition an agency to promulgate a regulation. *See* AS 44.62.220.

- Point Source Discharges

Any new industrial discharge into an ONRW, other than temporary discharges, would be prohibited. This would include stormwater discharges, such as those typically seen at industrial, light industrial, road construction, and commercial yards. Any expansion of an industrial discharge source would be prohibited. ADEC has stated that existing discharges would be grandfathered; however, even ADEC acknowledges that these grandfathered operations cannot expand their discharges. Tier 3 is a rigid, growth-reducing scheme that will limit economic activities reliant on access to watersheds.

- Landfills

Most landfills discharge pollutants and a Tier 3 designation would likely make it very difficult to permit a landfill in an ONRW watershed because the discharge would lead to degradation (even if nominal) of the ONRW. Existing unpermitted landfills would likely be prohibited from obtaining discharge permits.

- Stormwater Permits for Construction Activities

ADEC's construction permit provides authorization for persons and companies to discharge stormwater and other flows from construction activities, such as road building, the construction of homes and buildings, and other activities that disturb an acre or more. ADEC would apparently allow temporary discharges, but this means discharges over "weeks and months" rather than years. The restriction could impair longer-term construction projects, such as road upgrades or building projects that extend over multiple months or over several years.

- Timber Harvest

Timber harvest activities lead to runoff into streams from harvesting activities and road-building. Even if a point source discharge permit is not required for these activities, DNR, the U.S. Forest Service, and other agencies would need to assess whether the authorization of activities could lead to degradation of a designated ONRW.

- Placer Mining

The discharge from placer mining is regulated under an Alaska Pollutant Discharge Elimination System (APDES) permit. The discharge from a placer mine is ongoing and would not be subject to the exception for temporary discharges. It would be regulated in the same way as any other industrial point source activity. Any new or expanded discharge would be prohibited. The Tier 3 regime would effectively preclude any new placer mining in an ONRW watershed. Existing placer mines would be locked into an inflexible permit that would preclude any expansion of operations and probably limit their ability to operate in a new location (a prohibited new discharge).

- Hard Rock Mines

A Tier 3 designation would make it very difficult to develop a new hard rock mine in any watershed with a designated ONRW. Although modern hard rock mines have stringent permit

requirements that require state-of-the art pollution control, a proposed mine would have to additionally show that it would cause no degradation to the Tier 3 waterbody. This goes above and beyond compliance with applicable laws and regulations, and would impose a standard that is probably impossible to meet for most new mines.

- Gravel Pits

Gravel pits need APDES permits for construction and operations. These are ongoing discharges and would not be permitted as an exception for temporary discharges. The Tier 3 designation would effectively preclude any new quarries in an ONRW watershed. It would also be very difficult to expand an existing quarry because doing so would increase the pollutants discharged into the Tier 3 waterbody.

- **Loss of Local Control**

In many places of the state, Alaska residents enjoys significant local input and control over management decisions affecting local waterbodies. This level of control would be ceded, in part, to the Tier 3 process because an ONRW designation imposes an inflexible rule on a watershed. This means that even if local citizens and advisory councils favor certain activities and view them as compatible with protection of a watershed, agencies may still be required to limit or prohibit those activities.

March 17, 2016

Governor Bill Walker
Alaska State Capital Building
Third Floor

Darwin Peterson
Legislative Director for the Office of the Governor
Alaska State Capital Building

Dear Governor Walker and Mr. Peterson,

The Alaskans in the following letter attempted to email testimony to the Governor's office regarding SB 163 and HB 283 and received an auto-response redirecting them to the Governor's website. Thank you for your attention to the important perspective of the nearly 500 Alaskans signed on to this letter.

Please do not hesitate to contact me with any questions or concerns that you may have.

Sincerely,

Melanie Brown
Bristol Bay Commercial Fisher and
Independent Contractor
(907) 244-1169

Cc: Senator Cathy Giessel, Chair, Senate Resources Committee
Cc: Representative Louise Stutes, Chair, House Fisheries Committee

3/17/16

Governor Bill Walker
Alaska State Capitol Building
Third Floor

Subject: Withdraw your support for SB 163 and HB 283

Dear Governor Walker,
CC: Sen. Cathy Giessel, Chairwoman, Senate Resources Committee
CC: Rep. Louise Stutes, Chairwoman, House Fisheries Committee

You were elected by Alaskans who wanted to have a greater voice in public process, resource permitting and habitat protection, please withdraw your support for SB 163 and HB 283. This legislation seeks to cut out the public from having a voice in fish protection and is a waste of time and energy. Majority legislative approval is virtually an impossible hurdle given the nature of the legislative process. The decision to designate a waterbody for specific protection should be science-based and informed by the resource protection agencies.

You can stop this bill in its tracks by simply withdrawing your support. It is time to show Alaskans what it means to be a leader who put our people and our fish first.

Sincerely,

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**NUNAMTA AULUKESTAI
CARETAKERS OF THE LAND**

March 16, 2016

Chair Cathy Giessel
Chair, Senate Resources Committee
Room 427, Alaska State Capitol
Juneau, Alaska 99801

Re: Comments CS Senate Bill 163

Dear Ms. Giessel,

Nunamta Aulukestai ("Nunamta") is submitting the following comments for your consideration regarding CS Senate Bill 163, "An Act relating to the nomination and designation of state water as outstanding national resource water."

Nunamta Aulukestai, which means Caretakers of our Land in Yupik, is a 501(c)(3) non-profit that includes ten ANSCA village corporations and ten tribal governments. The organization was incorporated as a non-profit in 2007. Nunamta's mission is to protect the land, water, and air that will sustain our way of life for all generations. Nunamta advocates on behalf of more than 6,000 tribal and village corporation members in the Bristol Bay region. For the members of Nunamta, subsistence has been and continues to be the means of survival in the region.

In 2010, Nunamta, along with six other organizations submitted an application to DEC for the nomination of the Kaktuli River as Outstanding National Resource Water. I want to thank Chair and members of the Committee for keeping the CS SB 163 in committee for further work.

The problems in CS SB163:

Page 2, Line 10 – we have a problem with ONLY IF in the section because the interpretation would mean that no application would ever go before the Legislature because it must meet the criteria of 1, 2, 3,4 and 5 in this section. We have a problem with (1) on line 12 of page 2, who determines what is "important, unique, or ecologically sensitive" and (2) that existing state or federal protections ARE NOT SUFFICIENT to protect the water – DEC would never be able to bring a nomination forward because they will always have the regulations and laws that are sufficient to

March 16, 2016

Nunamta Aulukestai Comments

protect the water, and (3) no other available or effective method of protecting the water – DEC, DNR and ADF&G will always determine they have the regulations or laws available to protect the water. I can't ever see a nomination coming forward to the Legislature that would be able to meet these criteria. If that is the intent, it is disingenuous to the Alaskans who have a right to use 40 CFR Part 131.12, paragraph A(3) for the Tier 3 designations to nominate Outstanding National Water Resources. Please remember that a Tier 3 designation is to "prohibit the lowering of water quality."

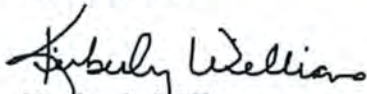
On page 3, recreational fishery should also include "subsistence fisheries" because of its importance as food security to the people of Alaska.

In Section F that the intent is for the Legislature to act – a vote up or down and the concern that if the Legislature doesn't act what happens to the ONRW application? I would ask that the Committee come up with language that if the Legislature doesn't act that it be approved.

Finally in Section F that the department "may not submit a nomination substantially similar to a nomination transmitted within two years immediately preceding a nomination" – the problem with the interpretation of what constitutes "substantially similar."

Thank you for your consideration of these comments.

Respectfully,

A handwritten signature in black ink that reads "Kimberly Williams". The signature is written in a cursive style with a large initial "K".

Kimberly Williams
Executive Director



Delivered by email to Sen.Cathy.Giessel@akleg.gov and
Representative.Louise.Stutes@akleg.gov

March 16, 2016

Senator Cathy Giessel
Chair, Senate Resources Committee
Room 427, Alaska State Capitol
Juneau, Alaska 99801

And

Rep. Louise Stutes
Chair, House Fisheries Committee
Room 416, Alaska State Capitol
Juneau, Alaska 99801

Re: Sealaska Corporation Comments on Proposed CSSB 163 and HB 283

Dear Chairpersons Giessel and Stutes:

Sealaska Corporation is the Alaska Native Regional Corporation for Southeast Alaska formed pursuant to the Alaska Native Claims Settlement Act. Sealaska has always been actively involved in Alaska water quality issues, both from the perspective of an active resource developer and as a strong supporter of the subsistence, commercial and recreational uses that our shareholders make of our region's waters.

Sealaska supports the proposed committee substitute for SB 163, and we recommend the substitute to the House Fisheries Committee in its consideration of HB 283. Our corporation was an active participant in the Alaska Department of Environmental Conservation's Antidegradation Workgroup. The Workgroup labored hard to achieve a consensus approach to Alaska's antidegradation program, and we support its recommendations. One of those recommendations was to involve the legislature, either directly or through delegation, in the process of designating Tier III waters. Because Tier III designation may significantly restrict development of large swaths of adjacent land, including private land, designation raises serious public policy issues of statewide significance that warrant legislative involvement.

Proposed CSSB 163 provide precisely that kind of needed oversight, and it provides needed legal certainty with respect to the authority to make Tier III designations.

We do urge one amendment to the proposed substitute: The Workgroup recommended that "antidegradation requirements and reviews should be restricted to Waters of the U.S. in Alaska, as defined under the [Clean Water Act]." *Final Workgroup Report* at 7.

The bill, on the other hand, envisions Tier III designations of any "[w]ater of the state." P. 1, ls. 5-6. As defined by ADEC's statutes, "waters" of the state covers more waters (including groundwater) than does the federal term "waters of the U.S."

AS 46.03.900(37). The antidegradation requirement is a federal requirement, and there seems no justification, in law or policy, for voluntarily expanding that requirement to waters not covered by the federal program.

Sealaska is pleased that the proposed substitute attempts to address several of the concerns raised by the Alaska Miners' Association in its March 4, 2016 comments on the original bill. Specifically, the substitute would:

- provide that waters of state may not be managed as Tier III waters until they have designated as such by the legislature;
- require nominations to identify the affected waters specifically; and
- outline both a process and criteria for ADEC's designation, aimed at building sideboards to what was, in the original bill, an open-ended delegation.

Thank you for the consideration that we know you will give to our comments.

Sincerely,

SEALASKA CORPORATION



Anthony Mallott
President and Chief Executive Officer

cc: Mr. Larry Hartig, Commissioner, Alaska Department of Environmental Conservation



March 15th, 2016

Dear House Fisheries Committee and Senate Resources Committee,

Clean water is a critical component of the health of our fisheries and subsequently our businesses. We are writing you today to express concerns regarding Governor Walker's proposal, (SB 163) to change the responsibility for rulemaking for Outstanding National Resource Waters (ONRW) from the Alaska Department of Environmental Conservation (ADEC) to the Alaska State Legislature.

Our businesses depend on southwest Alaska's clean water and productive rivers for fishing, hunting and recreating. Currently, this region is home to over 75 operating lodges and outfitters who are deeply dependent on healthy fisheries to survive.

The Kaktuli River, which sits at the headwaters of Alaska's largest commercial sockeye fishery, is one of Southwest Alaska's legendary sportfishing rivers, drawing anglers, hunters, and outdoor recreationists from around the world to enjoy its pristine water and bountiful wildlife. For this reason, several of us joined other stakeholders in 2010 and again in 2012, in submitting an application to ADEC to designate the Kaktuli as ONRW, or Tier 3 water, for its support of an Alaskan way of life.

SB 163/HB 283 raises three specific issues that concern us, particularly when thinking about putting our fisheries first for the good of Alaskan interests now and for future generations.

First, SB 163/HB 283 places ownership of resources that are to be managed in the best interest of all Alaskans into the hands of politicians. The bill creates a series of hurdles for securing an ONRW designation, disfavoring Alaskans and opening up the door to the influence of Outside development companies. Granting ONRW designation power to the Alaska Legislature creates a clear **imbalance** between managing Alaska's important resources for the benefit of all Alaskans and political gain. SB 163/HB 283 represent a regression from a clear and transparent process to a process clouded by the agendas of partisan politics.

Second, Alaska Department of Environmental Conservation's control over ONRW designation ensures that decisions are made based on measurable standards from fisheries science to economics. This, therefore, sets consistent standards of evaluation and **accountability** for all cases across the board.

Third, it SB 163/HB 283 creates a more cumbersome process, discouraging public involvement in the management of the resources that belong to them.

It is clear that management of Alaska's exceptional recreation and ecologically productive resources, like the Kaktuli River, deserve to be conducted predictably and without political influence.

We encourage you to oppose SB 163/HB 283 when it is heard in your committees to help ensure Outstanding National Resources Water designation is driven by sound science and Alaskans, not politics.

Sincerely,

Daren Erickson

Alaska's Enchanted Lake Lodge
Anchorage
info@enchantedlakelodge.com

Brian Kraft

Alaska Sportsman's Lodge
Kvichak River/Anchorage
bkraft@alaskasportsmanslodge.com

Nanci Morris Lyon

Alaska Sportsman's Bear Trail Lodge
King Salmon, AK
gofish@bristolbay.com

Marty Decker

Frontier River Guides, Anchorage
info@frontierriverguides.com

Martin Kviteng

Alaska Fishing Unlimited, Inc
Port Alsworth, AK
info@alaskalodge.com

Cecilia "Pudge" Kleinkauf

Women's Flyfishing®
Anchorage, AK
pudge@womensflyfishing.net

Dan Oberlatz

Alaska Alpine Adventures LLC
Anchorage, AK
dan@alaskaalpineadventures.com



ALASKA STATE LEGISLATURE

SENATE RESOURCES COMMITTEE

SEN. CATHY GIESSEL

Chair
State Capitol, Room 427
Juneau, AK 99801-1182
(907) 465-4843 Fax 465-3871

Sen. Mia Costello, Vice-Chair
Sen. Peter Micciche
Sen. Bert Stedman

Sen. John Coghill
Sen. Bill Stoltze
Sen. Bill Wielechowski

SENATE BILL 163

Sponsor: Senate Rules Committee by Request of the Governor

Explanation of Changes: Version H

1. Page 1, Lines 7-9: Amends Section 1(a) by prohibiting the Department of Environmental Conservation from managing a water of the state as an outstanding national resource water unless it has been designated as an outstanding national resource water by an act of the legislature.
2. Page 1, Lines 10-13: Amends Section 1(b) by requiring a nomination to specifically and geographically identify a water body, or portion of a waterbody, for designation as an outstanding national resource water.
3. Page 2, Lines 1-8: Amends Section 1(d) by requiring the Department of Environmental Conservation to adopt regulations establishing a process for submitting a nomination for an outstanding national resources water by providing public notice for all nominations, providing notice to all property affected by the designation, and creating a means for any resident of the state to provide additional information about the nomination.
4. Page 2, Lines 9-31/Page 3, Lines 1-2: Creates a new Section 1(e), requiring the Department of Environmental Conservation to transmit a nomination of an outstanding national resource water to the legislature if the department determined the nominated water to be unique, important, or ecologically sensitive; that the designation is necessary to protect the water due to insufficient federal and state protections; determined there is no other available/effective method of protection. The Department would need to determine whether the nominated water had either been designated a wild or scenic river; whether the water is either an ecosystem or habitat for an endangered or threatened species; whether the water is an ecosystem or habitat for an outstanding recreational fishery; or whether the water serves as the sole source of water for the use of people. The Department would describe the potential effects of a designation on endangered or threatened species; recreational fisheries; and the water supplies for the use of people.

5. Page 3, Lines 3- 8: Amends the previous bill version's Section 1(e) by reordering it to subsection 1(f), and adding a provision prohibiting the Department of Environmental Conservation from transmitting a substantially similar nomination to one already transmitted within two years of the existing nomination's original transmission.
6. Page 3, Lines 9-14: Adds a new Section 1(f), requiring the Departments of Environmental Conservation and Natural Resources to submit a report to each body of the legislature every ten years, beginning in 2017. The reports would describe each body of water designated as an outstanding national resource water and provide a recommendation regarding the continuation of that designation.
7. Page 3, Line 21: Amends Section 3 by replacing the word "may" with "shall," requiring the Department of Environmental Conservation to adopt regulations necessary for the implementation of the bill.

Commentary

Legislation protects Alaska's clean waters -- and Alaskans' right to keep them that way

Larry Hartig, Sam Cotten, Marty Rutherford
March 31, 2016

Text Size - A + A



OPINION: House, Senate bills confirm Legislature's authority to designate Alaska waters for protection, and citizens' rights to be part of the process. *Marc Lester / ADN*

As commissioners of the state's three resource agencies, we often see debates over how Alaska's natural resources -- including its wildlands, waters and fish, should be managed and used for public benefit. There are concerns pending legislation (Senate Bill 163/House Bill 283) might weaken protections for salmon and other aquatic life. We would not support SB 163 and HB 283 if that were the case.

Each of our departments has an important role in protecting salmon and other aquatic life. The state Department of Environmental Conservation sets and enforces water quality standards limiting when and how much pollution may be discharged into any water of the state. These standards are set through a rigorous public process. Alaska has some of the most stringent water-quality standards in the nation, and we are proud of our clean waters.

What you might not know is that all but a handful of waters in the state are classified as “Tier 2” waters. These high-quality waters must meet all water quality standards. This includes the “aquatic life” standards set by DEC specifically to protect the “propagation and development” of all aquatic species. These standards have been in place for decades and are the cornerstone for the protection of water quality for salmon and other species.

In response to EPA requirements, the state is now developing the process it will follow to designate “Tier 3” waters. Tier 3 waters are referred to in EPA regulations as “Outstanding National Resource Waters” found by the state to be “high quality waters ... such as waters of national and state parks and wildlife refuges and waters of exceptional recreational or ecological significance.” EPA regulations do not require a state to designate any Tier 3 waters, only to have a process to do so. Currently, there are no waters designated as Tier 3 waters (ONRWs) in Alaska, Washington, Oregon, Idaho or many other states. Some states have designated Tier 3 waters (ONRWs); for example, there are two in California, and New Mexico has many.

Once a state designates a body of water as Tier 3, the Environmental Protection Agency's regulations require the water quality in that water body to not only be protected but also “maintained,” meaning no new or additional discharges into the water may be authorized. This is the case even if there is no risk that the discharges could result in an aquatic life water-quality standard being compromised. The Tier 3 designation preserves the water quality in its present state without regard to other factors.

Gov. Bill Walker introduced SB 163 and HB 283 this session to confirm the Legislature holds the power to designate Tier 3 waters in the state. This is consistent with how lands and waters of the state have always been designated for preservation or conservation in the past. To date, the Legislature has designated approximately 12 million acres of state lands as refuges, sanctuaries, critical habitat areas, forests, parks, public-use areas and recreational rivers. No such designations have been made exclusively by an agency. According to the state Department of Law, Article VIII of the Alaska Constitution may well require Tier 3 designations be made by the Legislature.

Another key purpose of SB 163 and companion HB 283 is to provide the opportunity for any resident of Alaska to nominate a body of water for legislative designation as Tier 3. We believe Alaska residents expect and should have this right. We are also committed to seeing the final bill and any implementing regulations by our agencies provide for meaningful public involvement by all interested Alaskans in the review and consideration of all nominations.

Larry Hartig is commissioner of the Alaska Department of Environmental Conservation.

Sam Cotten is commissioner of the Alaska Department of Fish and Game.

Marty Rutherford is acting Commissioner of Alaska Department of Natural Resources.

The views expressed here are the writer's own and are not necessarily endorsed by Alaska Dispatch News, which welcomes a broad range of viewpoints. To submit a piece for consideration, emailcommentary@alaskadispatch.com. Send submissions shorter than 200 words to letters@alaskadispatch.com or [click here to submit via any web browser](#).

Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Walker,

I live in Sitka and I believe that clean water is one of our state's most valuable resources. I urge you to grant Alaskans the right to protect that water.

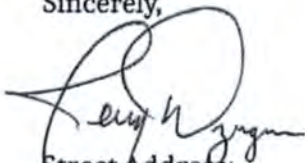
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I know that SB 163 and HB 283 were designed to change that, but instead of proposing a science-based process with clear criteria, this legislation turns the decision into a game of high-stakes political football.

Even worse, the changes to the legislation proposed by Senator Giessel would place ridiculously high barriers to granting waters the protective status of Outstanding National Resource Waters (also known as Tier 3).

Meanwhile, industry pays nothing for the right to pollute our water. I urge you to identify a reasonable process that will give Alaskans the same right to protect our water as industry has to pollute it.

Sincerely,

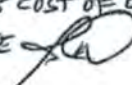


Street Address:

4319 VALHALLA DR.
SITKA, AK. 99835

Personal Comment:

I GREATLY APPRECIATE YOUR STARTING THE PROCESS TO PROTECT OUR WATER QUALITY - ALASKA DESERVES WATER'S HIGHEST PROTECTION. THE BEST COURSE WOULD BE TO LET ALASKAN'S PEOPLE DECIDE WATER QUALITY AND TAKE IT OUT OF THE BIASED INTERESTS ~~OF~~ OF THOSE WHO WOULD REDUCE WATER QUALITY, NOT BE AROUND TO CLEAN UP ITS INEVITABLE 'ACCIDENTS', AND LEAVE THE PEOPLE WHO LIVE HERE WITH THE COST OF CLEAN UPS AND LESSENING OF THE QUALITY OF OUR WATER - WHICH IS THE BASIS OF ALL LIFE



Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Walker,

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Sincerely,



Street Address:

Jennifer Whalen
440B Halibut Point Rd
Sitka, AK 99835

Personal Comment:

Thank you for realizing the importance of protecting the amazing/precious resource of clean water in Ak. You have a great opportunity to do this well, and it is our hope that you chose wisely in a way that demonstrates your care and love for our state and the people who live here.

Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

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Sincerely, *Kale Longacre*

Street Address: *PO Box 6041
Sitka, AK
99835*

Personal Comment: *clean water is wonderful. Millions of living things depend on it. Protecting our special places is crucial for keeping them clean for now and for future generations to enjoy. Please don't leave this duty to politicians. Thank you.*

Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

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Sincerely,

Mary Barrett
MARY BARRETT

Street Address:

207 Cedar Heights Rd.
Sitka, AK 99835

Personal Comment:

I am so tired of the attitude that the interests of industry are more important than the interests of Alaskans who live and play in Alaska waters and derive food from it. Mines run out and leave a mess, fish come back year after year. Don't leave these decisions to the politics of the legislature who are not scientists. Bad Idea

Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Walker,

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Sincerely,



Street Address:

Charles Wm. Bingham
405 Marine Street Apt No 6
Sitka, Alaska 99835

Personal Comment:

Clean water already is more valuable than oil. We need to protect it, so we don't lose it

Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

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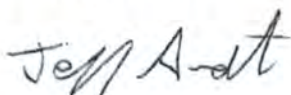
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Sincerely,



Street Address: 207 CEDAR HEIGHTS, SITKA

Personal Comment: THE FUTURE ECONOMIC DRIVERS IN S.E. ALASKA ARE GOING TO BE (ALREADY ARE) BASED ON PRISTINE HABITATS + LANDSCAPES. THE WORLD WILL CONTINUE TO COME (AND PAY) TO EXPERIENCE THIS FOR GENERATIONS TO COME IF THE HABITAT IS STILL HERE

Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Walker,

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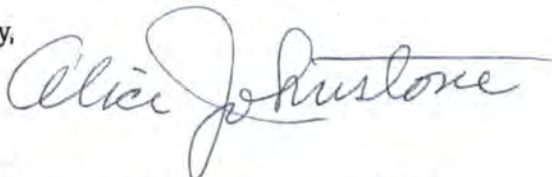
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Sincerely,



Street Address:

213 Shotgun Alley
Sitka Alaska 99835

Personal Comment:

Let's not make permitting a political process.

Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Walker,

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Sincerely,

Michelle Sanders

Street Address:

*105 Kramer Ave
Sitka AK 99835*

Personal Comment:

Please grant Alaskans the tools to make the right choicest for clean water

Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Walker,

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Sincerely,

Eugene Soloyan

Street Address:

419 Lincoln St.
Sitka, AK 99835

Personal Comment:

It would be great to protect the headwaters of the Chilkat Eagle Preserve near Husley.

Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Walker,

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Sincerely,



Robert C. Sanders

Street Address:

105 Kramer Ave.

Sitka, AK 99835

Personal Comment:

Please make this a priority for your tenure. Tier 3 is very important.

Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

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Sincerely,

Michael L. Whelan

Street Address:

*22589 Reynolds Drive
Tonawanda, Pa. 15055*

Personal Comment:

*I do not live in Alaska but truly believe
in preserving America's Natural Resources*

Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

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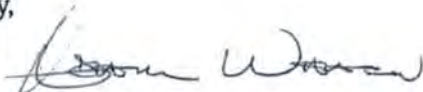
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Sincerely,



Street Address:

4408 HALIBUT POINT ROAD
SITKA, AK 99835

Personal Comment:

CLEAN WATER IS IMPORTANT TO ME TO HELP ENSURE
OUR WILD PLACES REMAIN WILD FOR FUTURE GENERATIONS
TO COME.

Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

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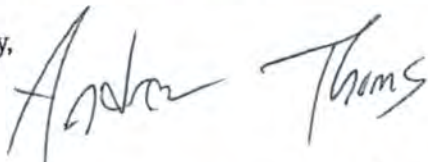
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Sincerely,



Street Address:

121 Jeff Davis
Sitka AK 99835

Personal Comment:

Please make the River above the
Haines Bald Eagle Reserve a
Tier III River.

Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

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Sincerely,

Kim J. Korlness

Street Address:

*1205 Georgeson Cp
Sitka AK 99835*

Personal Comment:

Please do this well. Our incredible state deserves important tier 3 waters. SAVE THE Eagle Preserve.

Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

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Right now under the Clean Water Act, anyone can seek a permit from the Alaska Department of Conservation to pollute Alaska's waters. But Alaskans don't currently have access to the same tools to protect the lakes and rivers that are most valuable to our communities, fisheries, and way of life.

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Even worse, the changes to the legislation proposed by Senator Giessel would place ridiculously high barriers to granting waters the protective status of Outstanding National Resource Waters (also known as Tier 3).

Meanwhile, industry pays nothing for the right to pollute our water. I urge you to identify a reasonable process that will give Alaskans the same right to protect our water as industry has to pollute it.

Sincerely,

Cara J Murray

Street Address:

609 Etown St. SITKA, AK 99835

Personal Comment:

*WE need ^{CLEAN} water to survive.
Please take this seriously.*

Governor Bill Walker
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Walker,

I live in Sitka and I believe that clean water is one of our state's most valuable resources. I urge you to grant Alaskans the right to protect that water.

Right now under the Clean Water Act, anyone can seek a permit from the Alaska Department of Conservation to pollute Alaska's waters. But Alaskans don't currently have access to the same tools to protect the lakes and rivers that are most valuable to our communities, fisheries, and way of life.

I know that SB 163 and HB 283 were designed to change that, but instead of proposing a science-based process with clear criteria, this legislation turns the decision into a game of high-stakes political football.

Even worse, the changes to the legislation proposed by Senator Giessel would place ridiculously high barriers to granting waters the protective status of Outstanding National Resource Waters (also known as Tier 3).

Meanwhile, industry pays nothing for the right to pollute our water. I urge you to identify a reasonable process that will give Alaskans the same right to protect our water as industry has to pollute it.

Sincerely,



Street Address:

708 Lake ST
Sitka AK 99833

Personal Comment:

Save our clean water!

Alaska Forest Association



111 Stedman Street
Ketchikan, AK 99901
Phone: 907-225-6114
Fax: 907-225-5920

March 17, 2016

Senator Cathy Giessel
State Capitol Room 427
Juneau AK, 99801

Senator Bert Stedman
State Capitol Room 30
Juneau AK, 99801

Alaska Forest Association comments in support of SB163

Dear Senators,

The Alaska Forest Association (AFA) is a non-profit business association that was formed in 1957 to represent the interests of the timber industry in Southeast Alaska. The AFA currently manages a pension program, a group health insurance program, a scholarship program for the timber industry and also sponsors the Sustainable Forestry Initiative program for Alaska.

At our Spring meeting in Juneau last week, Michelle Hale, Director for the Department of Environmental Conservation Division of Water (DEC) gave our group a good briefing of the potential impacts of a Clean Water Act – Outstanding National Resource Water designation (Tier 3 water designation).

The AFA supports the intent that only the State Legislature should have the authority to actually make a Tier 3 designation. The DEC already has effective regulatory tools for protecting water quality and the potential implications of adding a Tier 3 designation are so extreme that it should only be done in an extraordinary circumstance with a clear understanding of the impacts of such a designation.

The AFA also agrees with the recommendations of the Alaska Miners Association March 4, 2016 letter to your committee.

Sincerely,

Owen Graham
Executive Director
Alaska Forest Association

George R. Campbell

Haines AK 99827

Alaska State Legislature
State Capital
Juneau AK 99801

Senate Bill 163 Designation of Outstanding Resources
House Bill 283 Nat. Res. Water Nomination/Designation

March 16, 2016

Dear Legislators,

Designating a waterway for Tier 3 protection will cause a monumental change to the access and allowable uses of that waterway and surrounding lands; those changes cannot be overstated. To protect Alaskan's current freedoms in land use within our state, I suggest the following process be required prior to any waterway being designated for Tier 3 Protection:

1. All registered voters living in the affected area must approve a nomination by a super majority. Requiring a super majority ensures that the residents are in favor of such environmental protection, and a well organized minority group does not sway the vote in favor of such a dramatic change.
2. The Alaska Legislature approves the Nomination with a super majority. Again, this must be a unified agreement prior to lands becoming "park-like" under more federal control.
3. Alaska's voters confirm the Nomination through a super majority vote at the next regular election.

Please define and quantify all terms used in Section 2 SB 163, including: *important, unique, sensitive ecologically.*

Discussion

Your efforts to ensure Alaska continues land and water decision authority is applauded. Allowing federal regulators further control within Alaska, in my view, is a mistake.

Current proposed bills include words like “Unique” and “important” as criteria to be designated. These are great qualities, but I must ask: important comparing to what? Unique in what way? Without accompanying definitions listed in the bills, personal bias will become the spark of many public debates and court cases surrounding these terms in the future.

Testimony stating that the designation for Tier 3 should be ‘science based’ is flawed. What scientific facts determine ‘important’ or ‘Unique’? Each waterway in Alaska is unique in some way. Each has important properties. The Yukon and Kuskokwim Rivers are important to residents for not only the fish returning, but for travel and freight coming to the villages. Will forcing further restrictions on one of the uses be good for the residents?

Facts of science can determine current water qualities, which in Alaska are very high as stated by Commissioner Hartig. Scientific theory, conjecture, and historic data are used for developing risk assessments. These assessments, often called Environmental Impact Statements, are a prediction of the future, not concrete facts.

Risk decisions based on scientific assessments are rarely so simple and evident as one choice or the other is the clear direction. A case study of this is the plight of the Kenai River King Salmon. Numbers are down, runs have been weak, gillnets kill fish, sport fishing kills fish. The obvious solution might not be best for the salmon, or for the residents of the area. There is not a clear scientific solution acceptable to the residents of Alaska in this case; hence a decision has political elements.

Tier 3 decisions must be the will of the people. Residents of Alaska should determine what level of risk is acceptable along waterways. The decision to place a watershed under Tier 3 protection therefore should be in the hands of an overwhelming majority of the people.

Facts about waterways considered for Tier 3 nomination need to be available for people to make good decisions. A full Environmental Impact Study should be completed and made public prior to any debate about nominations. The study should include full disclosure of specific activities that will be curtailed, and what changes residents of the area will encounter once a waterway is designated Tier 3. Case law concerning restrictions on existing Tier 3 protected waters in the USA should be included.

Summary

Lands ANILCA and other planning processes designated open for resource extraction, including logging and mineral extraction, have been continually closed to industry through a myriad of regulations and lawsuits. Since ANILCA, there has been a continued battle to allow resource industries to operate due to constant legal battles designed specifically to disrupt.

The residents of our great state should have every opportunity to elevate protection of waterways, but it needs to require overwhelming support prior to such protection. By having a Super Majority decide if lands in watersheds should become “park-like, (DEC Commissioner Hartig to committees), objections and hard feelings in the future should be minimal.

Currently you must decide how a waterway could become designated as an “Outstanding National Resource Water”, making that waterway and it’s watershed upstream comparable to a National Park. The monumental effects to residents from designating a local waterway for Tier 3 protection cannot be overstated.

Thank you for your time,

George Campbell

Born and raised in Alaska, employment included: logging, guiding, commercial fishing, tourism, construction, aviation

To whom it may concern,

Thank you for the opportunity to comment on SB 163. My name is Sean Brownell and I have been an Alaskan resident for 30 years. I am a Yakutat commercial set net fisherman, as well as a business owner, and property owner in Haines Alaska who is trying to raise a family here in Southeast Alaska.

I will be directly impacted by two of these nominations, the Chilkat and Yakutat, and therefore have a special interest in this new mechanism you are considering. While it is important to keep the water and fish healthy for my livelihood (which DEC is saying they already do), I also want to have my rights and freedoms stay intact because we lose bits and pieces of them every day lately. I think a tier 3 nomination is not the right choice as it will take away future opportunities for me to conduct new, and/or existing business. There are other ways of regulating activity on the lands to maintain clean air and water that are already in place.

Commissioner Hartig, has characterized Tier 3 as 'park-like' – what does mean for commercial and subsistence use in the future? Tier 3 is a new thing in Alaska so there is a lot of confusion about it. For example, how are the existing users going to be grandfathered in? Will there be negative economic impacts? I would like to be notified and have the opportunity to fully understand the implications before it ever reaches the Legislature for a vote.

I support giving legislature the final decision authority, but I would also like to see some amendments that would ensure we all go into this with our eyes wide open. Most of us live in Alaska to enjoy certain freedoms that don't exist elsewhere and I ask you to stop and consider what we may all be losing as individuals with our own dreams that are not related to the direct intent of Tier 3 Nomination. I'm sure that if this goes through there will be a lot of hidden surprises that will shut the door on many things that no one is aware of.

Thank you for listening,

Sean Brownell

TYLER RENTAL

March 21, 2016

The Honorable Bert Stedman
Alaska State Senate
120 4th Street, State Capitol, Room 3
Juneau, Alaska 99801-1182

Dear Senator Stedman:

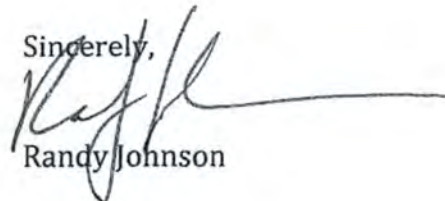
I am writing in support for Senate Bill No. 163, pertaining to the nomination and designation of state water as outstanding national resource water.

As a long-time business owner in Southeast Alaska, I share the concerns expressed by the Alaska Miners' Association (AMA), Sealaska Corporation, the Southeast Conference and many others that any designation of waterbodies in Alaska as Tier 3 should be made only by the Alaska State Legislature.

I am also in agreement with the so-called "Key Principles" submitted by the AMA to the Senate Resources Committee suggesting a number of changes to the bill as submitted by the governor.

I urge your support for this version of the bill. Thank you for your efforts to protect Alaska's ability to grow the economy and develop its natural resources. Please contact me if you have any questions.

Sincerely,



Randy Johnson

cc. Senator Cathy Giessel, Senate Resources Committee Chair

Ketchikan, AK

5216 Borch Street
PO Box 8158
Ketchikan, AK 99901
Office: 907-225-6069
Fax: 907-225-6118

Craig, AK

400 Port Bagial Blvd
PO Box 1172
Craig, AK 99921
Office: 907-826-2924
Fax: 907-826-2956

Juneau, AK

5295 Glacier Hwy
Juneau, AK 99801
Office: 907-780-2210
Fax: 907-780-2213

Chehalis, WA

153 Hamilton Rd North
Chehalis, WA 98532
Office: 360-748-8109
Fax: 360-748-8113



*Curyung Tribal Council
PO Box 216 • 531 D Street
Dillingham, Alaska 99576
Phone: (907) 842-2384
Fax: (907) 842-4510*

April 1, 2016

Good Afternoon,

Many stakeholders identified some of their concerns with SB 163 in a Press Conference held last week to which Lt. Governor Mallott provided a statement of response indicating that the Governor's office would take these concerns seriously in formulating policy to protect fish. However, today SB 163 is being pushed through the Senate Resources Committee for passage.

We feel that SB 163 would restrict public involvement and limit our ability to protect fish by:

Only allowing "Alaska Residents"-defined as registered voters-to nominate waters as Outstanding National Resource Waters, and disallowing Alaska Tribes this ability;

The three applications for nominating waters as Outstanding National Resource Waters on the table now were all submitted by Tribes of Alaska and/or Tribal Entities and under SB 163 will not be allowed to be adjudicated;

SB 163 adds more "hoops" that will need to be navigated before an application can be processed;

SB 163 will require that those navigating through these "hoops" and all expenses related to an application must be borne by the applicant, to include any state staff time.

It is not a fair and balanced process when we have to pay more, a \$1000 application fee, to apply to protect water quality than those who discharge pay to pollute it.

We implore Governor Walker to make good on his word to involve tribes in policy making and practice a fish first policy. Let's work together to improve or totally ditch SB 163.

Thank you.

A handwritten signature in black ink that reads 'Dorothy B. Larson'. The signature is written in a cursive, flowing style.

Dorothy B. Larson
Tribal Administrator

BRISTOL BAY NATIVE ASSOCIATION
P.O. BOX 310
DILLINGHAM, ALASKA 99576
Ph. (907) 842-5257 Fax (907) 842-5932

RESOLUTION 2016-05

**A RESOLUTION IN OPPOSITION TO SB 163 AND HB 283 IN THE ALASKA STATE
LEGISLATURE WHICH WOULD POLITICIZE ALASKA'S DESIGNATION OF
OUTSTANDING NATIONAL RESOURCE WATERS (ONRWs)**

- WHEREAS: The Bristol Bay Native Association (BBNA) is an Alaska Native regional non-profit corporation and a Tribal Consortium which provides a variety of educational, social, economic and related services to the Native people of the Bristol Bay Region; and
- WHEREAS: The membership of BBNA is the 31 federally recognized tribal governments in the Bristol Bay Region; and
- WHEREAS: The watershed of the Bristol Bay region supports the world's most prolific wild salmon runs, a revered renewable resource that has been harvested sustainably for millennia and are central to the cultural traditions of the diverse Alaska Native cultures of the region; and
- WHEREAS: The commercial salmon fishery of Bristol Bay is the world's most valuable wild salmon fishery, and typically supplies almost half of the world's wild sockeye salmon. In 2010, Bristol Bay's fishery represented nearly one-third of the total Alaska salmon harvest value, and supported 12,000 fishing jobs important for Alaskans from around the state; and
- WHEREAS: The Bristol Bay region has other important commercial, sports and subsistence fisheries, including many sports fisheries for numerous freshwater species in the Bristol Bay watershed; and
- WHEREAS: In 2012 the BBNA Board adopted Resolution 2012-04 supporting proactive EPA action using their authority under Section 404c of the Clean Water Act to impose proposed restrictions on the development of the Pebble Deposit, but litigation has stopped the EPA from finalizing necessary restrictions to protect fish and wildlife habitat; and
- WHEREAS: In 2010, a coalition of fishing, conservation and Alaska Native groups petitioned the Alaska Department of Environmental Conservation (ADEC) to designate the Kaktuli River, within the Bristol Bay watershed, as an Outstanding National Resource Water (ONRW) in order to protect fish and wildlife habitat; and

WHEREAS: ADEC is charged with overseeing Alaska's anti-degradation policies under the Clean Water Act, including identifying ONRWs, with help from the public; and

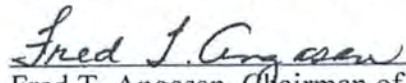
WHEREAS: By designating a river or stream as an ONRW, no new or increased pollution discharges can occur within that body of water, and no new or increased discharges can occur in a tributary if it results in lower water quality to the ONRW river or stream; and

WHEREAS: Legislation has been introduced by Governor William Walker in the 29th legislative session on the designation of ONRWs; SB 163 and HB 283 would create significant barriers, such as requiring final legislative approval that would result in the politicization of the ONRW designation process; and

WHEREAS: It is more proper that ADEC oversees and designates ONRWs through a scientific and public administrative review process that focuses on scientific information instead of through a highly politicized legislative process.

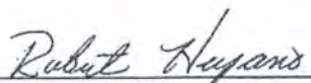
NOW THEREFORE BE IT RESOLVED by the Board of Directors of the Bristol Bay Native Association that we urge Alaska's legislators to oppose SB 163 and HB 283 in their present forms as they will politicize Alaska's designation of Outstanding National Resource Waters; and

BE IT FURTHER RESOLVED that BBNA urges the Alaska Department of Environmental Conservation to create a public, inclusive and scientifically sound administrative process for designating Outstanding National Resource Waters in Alaska without legislative approval.


Fred T. Angasan, Chairman of the Board

CERTIFICATION:

I, the undersigned Secretary of the Bristol Bay Native Association, do hereby certify that the Board of Directors of the Bristol Bay Native Association passed the foregoing resolution at a duly called and noticed meeting on this 24th day of March, 2016, and that a quorum was present.


Robert Heyano, Secretary

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter H. Ocean Dumping
Part 230. Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material
(Refs & Annos)
Subpart A. General

40 C.F.R. § 230.3

§ 230.3 Definitions.

Effective: August 28, 2015

Currentness

<In re E.P.A., 803 F.3d 804, 2015 WL 5893814 (C.A.6,2015) held: “The Clean Water Rule is hereby STAYED, nationwide, pending further order of the court.”>

For purposes of this part, the following terms shall have the meanings indicated:

- (a) The term Act means the Clean Water Act (also known as the Federal Water Pollution Control Act or FWPCA) Pub.L. 92–500, as amended by Pub.L. 95–217, 33 U.S.C. 1251, et seq.
- (b) The terms aquatic environment and aquatic ecosystem mean waters of the United States, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals.
- (c) The term carrier of contaminant means dredged or fill material that contains contaminants.
- (d) The term contaminant means a chemical or biological substance in a form that can be incorporated into, onto or be ingested by and that harms aquatic organisms, consumers of aquatic organisms, or users of the aquatic environment, and includes but is not limited to the substances on the 307(a)(1) list of toxic pollutants promulgated on January 31, 1978 (43 FR 4109).
- (e) The term discharge point means the point within the disposal site at which the dredged or fill material is released.
- (f) The term disposal site means that portion of the “waters of the United States” where specific disposal activities are permitted and consist of a bottom surface area and any overlying volume of water. In the case of wetlands on which surface water is not present, the disposal site consists of the wetland surface area.

(g) The term extraction site means the place from which the dredged or fill material proposed for discharge is to be removed.

(h) The term mixing zone means a limited volume of water serving as a zone of initial dilution in the immediate vicinity of a discharge point where receiving water quality may not meet quality standards or other requirements otherwise applicable to the receiving water. The mixing zone should be considered as a place where wastes and water mix and not as a place where effluents are treated.

(i) The term permitting authority means the District Engineer of the U.S. Army Corps of Engineers or such other individual as may be designated by the Secretary of the Army to issue or deny permits under section 404 of the Act; or the State Director of a permit program approved by EPA under section 404(g) and section 404(h) or his delegated representative.

(j) The term pollutant means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials not covered by the Atomic Energy Act, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. The legislative history of the Act reflects that "radioactive materials" as included within the definition of "pollutant" in section 502 of the Act means only radioactive materials which are not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated under the Atomic Energy Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term "pollutant", are radium and accelerator produced isotopes. See *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).

(k) The term pollution means the man-made or man-induced alteration of the chemical, physical, biological or radiological integrity of an aquatic ecosystem.

(l) The term practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

(m) Special aquatic sites means those sites identified in subpart E. They are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region. (See § 230.10(a)(3))

(n) The term territorial sea means the belt of the sea measured from the baseline as determined in accordance with the Convention on the Territorial Sea and the Contiguous Zone and extending seaward at a distance of three miles.

(o) The term waters of the United States means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (o)(2) of this section, the term "waters of the United States" means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (o)(3)(iii) of this section, of waters identified in paragraphs (o)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (o)(1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (o)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. The waters identified in each of paragraphs (o)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (o)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (o)(1)(iv) through (viii) of this section.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (o)(1)(i) through (iii) of this section.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph (o), the following definitions apply:

(i) **Adjacent.** The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (o)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (o)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (o)(1)(i) through (v) or are located at the head of a water identified in paragraphs (o)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) **Neighboring.** The term neighboring means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (o)(1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (o)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water

is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (o)(1)(iv) of this section), to a water identified in paragraphs (o)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (o)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (o)(1)(i) through (iii) of this section.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (o)(1)(i) through (iii) of this section. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (o)(1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (o)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (o)(1) through (3) of this section.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(p) to (s) [Redesignated as subsections (k) to (o) by 80 FR 37115]

(t) [Reserved by 80 FR 37115]

Credits

[58 FR 45037, Aug. 25, 1993; 80 FR 37116, June 29, 2015]

SOURCE: 45 FR 85344, Dec. 24, 1980; 80 FR 37115, June 29, 2015, unless otherwise noted.

AUTHORITY: 33 U.S.C. 1251 et seq.

Notes of Decisions (78)

Current through March 24, 2016; 81 FR 16051.

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter D. Water Programs
Part 122. EPA Administered Permit Programs: The National Pollutant Discharge Elimination System
(Refs & Annos)
Subpart A. Definitions and General Program Requirements

40 C.F.R. § 122.2

§ 122.2 Definitions.

Effective: August 28, 2015

Currentness

<In re E.P.A., 803 F.3d 804, 2015 WL 5893814 (C.A.6,2015) held: “The Clean Water Rule is hereby STAYED, nationwide, pending further order of the court.”>

The following definitions apply to parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative.

Animal feeding operation is defined at § 122.23.

Applicable standards and limitations means all State, interstate, and federal standards and limitations to which a “discharge,” a “sewage sludge use or disposal practice,” or a related activity is subject under the CWA, including “effluent limitations,” water quality standards, standards of performance, toxic effluent standards or prohibitions, “best management practices,” pretreatment standards, and “standards for sewage sludge use or disposal” under sections 301, 302, 303, 304, 306, 307, 308, 403 and 405 of CWA.

Application means the EPA standard national forms for applying for a permit, including any additions, revisions or modifications to the forms; or forms approved by EPA for use in “approved States,” including any approved modifications or revisions.

Approved program or approved State means a State or interstate program which has been approved or authorized by EPA under part 123.

Aquaculture project is defined at § 122.25.

Average monthly discharge limitation means the highest allowable average of “daily discharges” over a calendar month, calculated as the sum of all “daily discharges” measured during a calendar month divided by the number of “daily discharges” measured during that month.

Average weekly discharge limitation means the highest allowable average of “daily discharges” over a calendar week, calculated as the sum of all “daily discharges” measured during a calendar week divided by the number of “daily discharges” measured during that week.

Best management practices (“BMPs”) means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of “waters of the United States.” BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

BMPs means “best management practices.”

Bypass is defined at § 122.41(m).

Class I sludge management facility means any POTW identified under 40 CFR 403.8(a) as being required to have an approved pretreatment program (including such POTWs located in a State that has elected to assume local program responsibilities pursuant to 40 CFR 403.10(e)) and any other treatment works treating domestic sewage classified as a Class I sludge management facility by the Regional Administrator, or, in the case of approved State programs, the Regional Administrator in conjunction with the State Director, because of the potential for its sludge use or disposal practices to adversely affect public health and the environment.

Concentrated animal feeding operation is defined at § 122.23.

Concentrated aquatic animal feeding operation is defined at § 122.24.

Contiguous zone means the entire zone established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone.

Continuous discharge means a “discharge” which occurs without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities.

CWA means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92–500, as amended by Pub.L. 95–217, Pub.L. 95–576, Pub.L. 96–483 and Pub.L. 97–117, 33 U.S.C. 1251 et seq.

CWA and regulations means the Clean Water Act (CWA) and applicable regulations promulgated thereunder. In the case of an approved State program, it includes State program requirements.

Daily discharge means the “discharge of a pollutant” measured during a calendar day or any 24–hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the “daily discharge” is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the “daily discharge” is calculated as the average measurement of the pollutant over the day.

Direct discharge means the “discharge of a pollutant.”

Director means the Regional Administrator or the State Director, as the context requires, or an authorized representative. When there is no “approved State program,” and there is an EPA administered program, “Director” means the Regional Administrator. When there is an approved State program, “Director” normally means the State Director. In some circumstances, however, EPA retains the authority to take certain actions even when there is an approved State program. (For example, when EPA has issued an NPDES permit prior to the approval of a State program, EPA may retain jurisdiction over that permit after program approval, see § 123.1.) In such cases, the term “Director” means the Regional Administrator and not the State Director.

Discharge when used without qualification means the “discharge of a pollutant.”

Discharge of a pollutant means:

- (a) Any addition of any “pollutant” or combination of pollutants to “waters of the United States” from any “point source,” or
- (b) Any addition of any pollutant or combination of pollutants to the waters of the “contiguous zone” or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any “indirect discharger.”

Discharge Monitoring Report (“DMR”) means the EPA uniform national form, including any subsequent additions, revisions, or modifications for the reporting of self-monitoring results by permittees. DMRs must be used by “approved States” as well as by EPA. EPA will supply DMRs to any approved State upon request. The EPA national forms may be modified to substitute the State Agency name, address, logo, and other similar information, as appropriate, in place of EPA's.

DMR means “Discharge Monitoring Report.”

Draft permit means a document prepared under § 124.6 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a “permit.” A notice of intent to terminate a permit, and a notice of intent to deny a permit, as discussed in § 124.5, are types of “draft permits.” A denial of a request for modification, revocation and reissuance, or termination, as discussed in § 124.5, is not a “draft permit.” A “proposed permit” is not a “draft permit.”

Effluent limitation means any restriction imposed by the Director on quantities, discharge rates, and concentrations of “pollutants” which are “discharged” from “point sources” into “waters of the United States,” the waters of the “contiguous zone,” or the ocean.

Effluent limitations guidelines means a regulation published by the Administrator under section 304(b) of CWA to adopt or revise “effluent limitations.”

Environmental Protection Agency (“EPA”) means the United States Environmental Protection Agency.

EPA means the United States “Environmental Protection Agency.”

Facility or activity means any NPDES “point source” or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

Federal Indian reservation means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

General permit means an NPDES “permit” issued under § 122.28 authorizing a category of discharges under the CWA within a geographical area.

Hazardous substance means any substance designated under 40 CFR part 116 pursuant to section 311 of CWA.

Indian country means:

- (1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
- (2) All dependent Indian communities with the borders of the United States whether within the originally or subsequently acquired territory thereof, and whether within or without the limits of a state; and
- (3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Indian Tribe means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

Indirect discharger means a nondomestic discharger introducing “pollutants” to a “publicly owned treatment works.”

Individual control strategy is defined at 40 CFR 123.46(c).

Interstate agency means an agency of two or more States established by or under an agreement or compact approved by the Congress, or any other agency of two or more States having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator under the CWA and regulations.

Major facility means any NPDES “facility or activity” classified as such by the Regional Administrator, or, in the case of “approved State programs,” the Regional Administrator in conjunction with the State Director.

Maximum daily discharge limitation means the highest allowable “daily discharge.”

Municipal separate storm sewer system is defined at § 122.26 (b)(4) and (b)(7).

Municipality means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of CWA.

National Pollutant Discharge Elimination System (NPDES) means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under sections 307, 402, 318, and 405 of CWA. The term includes an “approved program.”

New discharger means any building, structure, facility, or installation:

- (a) From which there is or may be a “discharge of pollutants;”
- (b) That did not commence the “discharge of pollutants” at a particular “site” prior to August 13, 1979;
- (c) Which is not a “new source;” and
- (d) Which has never received a finally effective NPDES permit for discharges at that “site.”

This definition includes an “indirect discharger” which commences discharging into “waters of the United States” after August 13, 1979. It also includes any existing mobile point source (other than an offshore or coastal oil and gas exploratory drilling rig or a coastal oil and gas developmental drilling rig) such as a seafood processing rig, seafood processing vessel, or aggregate plant, that begins discharging at a “site” for which it does not have a permit; and any offshore or coastal mobile oil and gas

exploratory drilling rig or coastal mobile oil and gas developmental drilling rig that commences the discharge of pollutants after August 13, 1979, at a "site" under EPA's permitting jurisdiction for which it is not covered by an individual or general permit and which is located in an area determined by the Regional Administrator in the issuance of a final permit to be an area of biological concern. In determining whether an area is an area of biological concern, the Regional Administrator shall consider the factors specified in 40 CFR 125.112(a)(1) through (10).

An offshore or coastal mobile exploratory drilling rig or coastal mobile developmental drilling rig will be considered a "new discharger" only for the duration of its discharge in an area of biological concern.

New source means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants," the construction of which commenced:

- (a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source, or
- (b) After proposal of standards of performance in accordance with section 306 of CWA which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal.

NPDES means "National Pollutant Discharge Elimination System."

Owner or operator means the owner or operator of any "facility or activity" subject to regulation under the NPDES program.

Permit means an authorization, license, or equivalent control document issued by EPA or an "approved State" to implement the requirements of this part and parts 123 and 124. "Permit" includes an NPDES "general permit" (§ 122.28). Permit does not include any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit."

Person means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

Point source means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff. (See § 122.3).

Pollutant means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. It does not mean:

- (a) Sewage from vessels; or
- (b) Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that the injection or disposal will not result in the degradation of ground or surface water resources.

NOTE: Radioactive materials covered by the Atomic Energy Act are those encompassed in its definition of source, byproduct, or special nuclear materials. Examples of materials not covered include radium and accelerator-produced isotopes. See *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).

POTW is defined at § 403.3 of this chapter.

Primary industry category means any industry category listed in the NRDC settlement agreement (Natural Resources Defense Council et al. v. Train, 8 E.R.C. 2120 (D.D.C. 1976), modified 12 E.R.C. 1833 (D.D.C. 1979)); also listed in appendix A of part 122.

Privately owned treatment works means any device or system which is (a) used to treat wastes from any facility whose operator is not the operator of the treatment works and (b) not a "POTW."

Process wastewater means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.

Proposed permit means a State NPDES "permit" prepared after the close of the public comment period (and, when applicable, any public hearing and administrative appeals) which is sent to EPA for review before final issuance by the State. A "proposed permit" is not a "draft permit."

Publicly owned treatment works is defined at 40 CFR 403.3.

Recommencing discharger means a source which recommences discharge after terminating operations.

Regional Administrator means the Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or the authorized representative of the Regional Administrator.

Schedule of compliance means a schedule of remedial measures included in a "permit", including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations.

Secondary industry category means any industry category which is not a "primary industry category."

Secretary means the Secretary of the Army, acting through the Chief of Engineers.

Septage means the liquid and solid material pumped from a septic tank, cesspool, or similar domestic sewage treatment system, or a holding tank when the system is cleaned or maintained.

Sewage from vessels means human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes that are discharged from vessels and regulated under section 312 of CWA, except that with respect to commercial vessels on the Great Lakes this term includes graywater. For the purposes of this definition, "graywater" means galley, bath, and shower water.

Sewage Sludge means any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage. Sewage sludge includes, but is not limited to, solids removed during primary, secondary, or advanced waste water treatment, scum, septage, portable toilet pumpings, type III marine sanitation device pumpings (33 CFR part 159), and sewage sludge products. Sewage sludge does not include grit or screenings, or ash generated during the incineration of sewage sludge.

Sewage sludge use or disposal practice means the collection, storage, treatment, transportation, processing, monitoring, use, or disposal of sewage sludge.

Silvicultural point source is defined at § 122.27.

Site means the land or water area where any “facility or activity” is physically located or conducted, including adjacent land used in connection with the facility or activity.

Sludge-only facility means any “treatment works treating domestic sewage” whose methods of sewage sludge use or disposal are subject to regulations promulgated pursuant to section 405(d) of the CWA and is required to obtain a permit under § 122.1(b)(2).

Standards for sewage sludge use or disposal means the regulations promulgated pursuant to section 405(d) of the CWA which govern minimum requirements for sludge quality, management practices, and monitoring and reporting applicable to sewage sludge or the use or disposal of sewage sludge by any person.

State means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or an Indian Tribe as defined in these regulations which meets the requirements of § 123.31 of this chapter.

State Director means the chief administrative officer of any State or interstate agency operating an “approved program,” or the delegated representative of the State Director. If responsibility is divided among two or more State or interstate agencies, “State Director” means the chief administrative officer of the State or interstate agency authorized to perform the particular procedure or function to which reference is made.

State/EPA Agreement means an agreement between the Regional Administrator and the State which coordinates EPA and State activities, responsibilities and programs including those under the CWA programs.

Storm water is defined at § 122.26(b)(13).

Storm water discharge associated with industrial activity is defined at § 122.26(b)(14).

Total dissolved solids means the total dissolved (filterable) solids as determined by use of the method specified in 40 CFR part 136.

Toxic pollutant means any pollutant listed as toxic under section 307(a)(1) or, in the case of “sludge use or disposal practices,” any pollutant identified in regulations implementing section 405(d) of the CWA.

Treatment works treating domestic sewage means a POTW or any other sewage sludge or waste water treatment devices or systems, regardless of ownership (including federal facilities), used in the storage, treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated for the disposal of sewage sludge. This definition does not include septic tanks or similar devices. For purposes of this definition, “domestic sewage” includes waste and waste water from humans or household operations that are discharged to or otherwise enter a treatment works. In States where there is no approved State sludge management program under section 405(f) of the CWA, the Regional Administrator may designate any person subject to the standards for sewage sludge use and disposal in 40 CFR part 503 as a “treatment works treating domestic sewage,” where he or she finds that there is a potential for adverse effects on public health and the environment from poor sludge quality or poor sludge handling, use or disposal practices, or where he or she finds that such designation is necessary to ensure that such person is in compliance with 40 CFR part 503.

TWTDS means “treatment works treating domestic sewage.”

Upset is defined at § 122.41(n).

Variance means any mechanism or provision under section 301 or 316 of CWA or under 40 CFR part 125, or in the applicable “effluent limitations guidelines” which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), 301(h), 301(i), or 316(a) of CWA.

Waters of the United States or waters of the U.S. means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (v) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.]

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) **Adjacent.** The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) **Neighboring.** The term neighboring means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) **Tributary and tributaries.** The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its

status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum

along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act jurisdiction remains with EPA.

Whole effluent toxicity means the aggregate toxic effect of an effluent measured directly by a toxicity test.

Note: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning "This exclusion applies ___" in the definition of "Waters of the United States." This revision continues that suspension.¹

(Authority: Clean Water Act (33 U.S.C. 1251 et seq.), Safe Drinking Water Act (42 U.S.C. 300f et seq.), Clean Air Act (42 U.S.C. 7401 et seq.), Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.))

Credits

[48 FR 39619, Sept. 1, 1983; 50 FR 6940, 6941, Feb. 19, 1985; 54 FR 254, Jan. 4, 1989; 54 FR 18781, May 2, 1989; 54 FR 23895, June 2, 1989; 58 FR 45037, Aug. 25, 1993; 58 FR 67980, Dec. 22, 1993; 64 FR 42462, Aug. 4, 1999; 64 FR 43426, Aug. 10, 1999; 65 FR 30905, May 15, 2000; 80 FR 37114, June 29, 2015]

SOURCE: 45 FR 33418, May 19, 1980, as amended at 48 FR 14153, Apr. 1, 1983, unless otherwise noted.

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 et seq.

Notes of Decisions (97)

Current through March 24, 2016; 81 FR 16051.

Footnotes

¹ Editorial Note: The words "This revision" refer to the document published at 48 FR 14153, Apr. 1, 1983.