

# Developing a Tier 3 Water Nomination and Designation Process in Alaska

Outreach Report

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Prepared by the Alaska Department of Environmental Conservation



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## Executive Summary

The Alaska Department of Environmental Conservation's mission is to conserve, protect and improve Alaska's natural resources and environment to enhance the health, safety, and economic and social well-being of Alaskans. As part of its mission, DEC has been working toward establishing the state's antidegradation implementation procedures, which includes developing a process for the nomination and designation of Outstanding National Resource Waters, or Tier 3 waters.

As required by the Clean Water Act, Alaska's water quality antidegradation policy creates three classifications or tiers of water. The third tier, which is the subject of this outreach report, are waters found to be of exceptional significance. Once designated, such Tier 3 waters are required to be preserved in their current status, with no new discharges of pollutants allowed.

Over the past few years, DEC has drafted regulations and the Governor has proposed legislation related to Tier 3 and antidegradation, which resulted in considerable public interest. Many stakeholders have participated in the development of antidegradation implementation procedures over the years, including members of a workgroup from state resource agencies, industry, and non-governmental organizations. This workgroup was convened to evaluate the options and provide recommendations to DEC on essential elements of potential policy.

After hearing from constituents and stakeholders during the 2016 legislative session, Governor Walker asked that more time be taken for DEC to hear from the public, to increase awareness of the issue, and reach a better understanding of what a final process might look like. Whatever that final process might be, it will need to work well for all Alaskans and for all waters of the state, now and in the future.

DEC held a series of public workshops around the state in the spring of 2017 to invite discussion with the public and Tribes on this topic, particularly the process for nominating and designating Tier 3 waters.

In this report, we provide background information on Tier 3 federal requirements, give a snapshot of how other states are meeting federal Tier 3 requirements, discuss previous efforts by DEC to get public and Tribal input, and summarize the ideas and opinions we heard.

It is generally agreed that the issue of who should decide Tier 3 nominations needs to be decided and settled, so that the four nominations DEC has already received can be addressed. At the workshops and in the comments received, there was some agreement on the requirements for a nomination of a Tier 3 water, but there was no agreement on the type of process Alaska should use to designate a Tier 3 water. Opinions ranged from the final authority for making a designation resting with DEC to that authority resting with the Legislature, with other options such as a Board weighing in on or even making the final decision. The Administration is considering all of the comments we received as it makes its proposed decision on the Tier 3 process it believes will work best for Alaska. Whatever that decision, it will still need to go through a regulatory and/or legislative process, which will give the public and Tribes another opportunity to weigh in before it is finalized.

## Introduction

### Water Quality Standards, Antidegradation Policy, and Tier 3 Waters

In 1948, the Federal Water Pollution Control Act became the first major piece of national legislation to address the degradation of American waters. In 1972, scientific advances and public desire for better stewardship led to the amendment of that Act, which is better known as the Clean Water Act (CWA). Congress amended the CWA in 1987, making clear that section 303 of the act contains an antidegradation policy. The CWA and U.S. Environmental Protection Agency (EPA) regulations require every state to have water quality standards that include an antidegradation policy. Alaska adopted its antidegradation policy, which mirrors requirements in federal regulations, in 1997.

Degradation, in this context, refers to the addition of pollutants to surface waters. Antidegradation policy requires that pollutants will only be allowed to be discharged into water for good reason and within reasonable limits. Per the CWA and Alaska’s antidegradation policy, three classifications, or “tiers,” of protection are established. The three water “tiers” may be understood in the following general terms. Tier 1 waters are waters that are not currently meeting water quality standards for one or more parameters. This might be due to naturally occurring phenomena or human pollutants. Tier 2 waters are high quality waters where all water quality standards are being met or exceeded. Tier 3 waters are a special class of water that, due to multiple factors, are deserving of extra protection.<sup>1</sup>



According to Alaska’s Water Quality Standards, a Tier 3 water is defined as follows:

***18 AAC 70.015 (a)(3): “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.”<sup>2</sup>***

<sup>1</sup> Since the state proposes to classify tiers on a parameter-by-parameter (and not on a water body) basis, a specific water may include both Tier 1 and 2 parameters. For example, a particular water may be considered Tier 1 for a specific pollutant(s), while all other parameters are considered Tier 2, with the associated Tier 1 or 2 protection levels. Likewise, the associated protection levels differ. Tier 1 is the minimum protection level afforded all waters and requires “existing water uses and the level of water quality necessary to protect existing uses must be maintained and protected” [18 AAC 70.015(a)(1)]. Tier 2 protection level includes Tier 1 protection and allows for discharge of Tier 2 parameter(s) to the water once regulatory antidegradation requirements are met [18 AAC 70.015(a)(2)].

This does not apply to Tier 3, which is independent of parameter distinctions. Once designated, all parameters must be maintained and protected (no additional degradation allowed) [18 AAC 70.015(a)(3)].

<sup>2</sup> This language closely resembles language in federal regulation, which is as follows: 40 CFR 131.12(a)(3): “Where high quality waters constitute an outstanding National resource, such as waters of the National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.”

More recently, the CWA has been read by federal courts to not only require states to have an antidegradation policy, but also implementation methods<sup>3</sup>. These implementation methods are to include a process to both nominate and designate Tier 3 waters at the state level. States have significant flexibility in the design of the actual process; however, the Environmental Protection Agency must approve the process a state adopts, finding that it meets applicable federal CWA requirements. Once a Tier 3 water is designated, the water cannot be degraded further than it is at the time of designation. Existing permitted discharges could be maintained (but not allowed to expand); however, new ones could not be approved. There is an exception for short-term, limited discharges.

### Tier 3 Waters in the Lower 48

Several states in the Lower 48 now have nomination and designation processes in place. These processes vary by state in what waters are eligible to be nominated, what information must be submitted with a nomination, and who has the authority to designate a water. For example in Montana, the Water Pollution Control Advisory Council decides whether to accept a nomination based on set criteria, then directs the Department of Environmental Quality to prepare an environmental impact statement (EIS), the costs of which must be covered by the nominator. If, after the EIS has been completed and other relevant state agencies have been consulted, the Council decides to grant a nomination, it shall initiate a rulemaking to classify the water as Tier 3. According to Montana Code 75-5-316 (9), “A rule classifying state waters as outstanding resource waters under this section may be adopted but is not effective until approved by the legislature.” All waters located in Montana’s national parks and wilderness areas are designated as Tier 3.

Wyoming’s implementation policies for antidegradation call for Tier 3 waters (called Outstanding Aquatic Resources or Class 1) to be designated by the Environmental Quality Council in rulemaking hearings and do not require further legislative approval for a final decision. The criteria for nomination include: “water quality, aesthetic, scenic, recreational, ecological, agricultural, botanical, zoological, municipal, industrial, historical, geological, cultural, archaeological, fish and wildlife, the presence of significant quantities of developable water, and other values of present and future benefit to the people.” Like Montana, Wyoming designates all surface waters located in national parks or congressionally designated wilderness areas as outstanding waters.

Arizona’s designation process is also achieved by regulatory rather than legislative process. Twenty-one creeks and one canyon have been designated in Arizona. The State of Washington has created sub-tiers. Tier 3(a) is the highest level of protection, with no additional discharges allowed; while Tier 3(b), the second highest level of protection, conditionally allows minor degradation to occur. In Idaho, a board vets and makes a recommendation to the legislature which makes a final determination. In Oregon, nominations are considered during the Triennial Water Quality Standards Review by the Environmental Quality Commission which makes the final decision. These examples show there is a degree of variability to each state’s Tier 3 nomination and designation process.

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<sup>3</sup> 40 CFR 131.12(b): “The State shall develop methods for implementing the antidegradation policy that are, at a minimum, consistent with the State’s policy...”

While the CWA requires states to have a designation process in place, it does not require that states designate waters. For example, Washington has a process but has not designated any waters as Tier 3 to date.

### History of Alaska's Antidegradation Outreach Efforts

In 1997, EPA approved Alaska's current antidegradation policy, with the stipulation that Alaska write implementation guidance. Those efforts did not begin until 2008, with a written report from a third party contractor that outlined several options for the state to develop antidegradation implementation and policy. In 2009, the Alaska Department of Environmental Conservation (DEC) hosted a public workshop on potential antidegradation guidance to inform and engage permittees, permit writers, Tribes and the public about these options. Following the workshop, DEC formulated and adopted Interim Antidegradation Methods in 2010.

Two years later, DEC assembled an antidegradation workgroup that included members from state resource agencies, industry, and non-governmental organizations to evaluate the options and provide recommendations on essential elements of potential policy. In 2013, the workgroup completed a final report that is publicly available on DEC's website at:

[http://dec.alaska.gov/water/wqsar/Antidegradation/docs/WorkgroupRpt\\_01\\_24\\_13\\_Final.pdf](http://dec.alaska.gov/water/wqsar/Antidegradation/docs/WorkgroupRpt_01_24_13_Final.pdf).

(A number of other helpful background documents on antidegradation and Tier 3 may also be found on DEC's website <http://dec.alaska.gov/water/wqsar/Antidegradation/Tiers123.html>.)

Proposed regulations were posted for public notice on January 1, 2014 for 90 days. Based on the feedback, the Division of Water (DOW) decided to hold an additional workshop in May 2015 to discuss and evaluate several specific issues. During the 2016 legislative session, the Governor introduced legislation (SB163 and HB283) to establish a statutory process for nominating waters for Tier 3 status, vetting the nominations and making a decision. In the proposed legislation, the Legislature would have had the final authority for making all Tier 3 designations. The bills received considerable public interest. Ultimately, the Governor requested the bills be set aside and committed the administration to more dialog with Tribes and stakeholders before offering another proposal. During this time (early 2016), the DOW Director traveled to several communities, including Haines, Yakutat, and Klawock, to talk about developing a Tier 3 process.

The purpose of DEC's 2017 additional outreach effort on Tier 3 options was to further inform and engage interested Alaskans, to open dialogue among stakeholders with different opinions, seek areas of consensus, and explore any additional ideas Tribes and the public had regarding the crafting of an effective Tier 3 nomination and designation process for Alaska. As DEC Commissioner Hartig has stated, we want a Tier 3 process that works well for all Alaskans, for all Alaska waters that might be nominated, and across time.

This additional public outreach focused on the Tier 3 nomination and designation process. Other aspects of DEC's proposed antidegradation implementation method requirements, which were not controversial, advanced through the standard public rule-making process. DEC's DOW proceeded this summer with proposed regulations specifically addressing Tier 1 and Tier 2 requirements, and a section addressing the analysis of discharges requiring permits to Tier 3 waters. This section on Tier 3 waters in the proposed regulations only applies after a water has been designated Tier 3. The proposed regulations were posted for public comment June 2, 2017 – August 7, 2017, after the

additional Tier 3 outreach efforts were completed. DEC's DOW is in the process of reviewing the comments it received on this set of proposed regulations and drafting a response to comments document. DEC plans to finalize the regulations this fall.

More information on the enhanced public outreach DEC did on the Tier 3 nomination and designation process, and planned "next steps," are described in the following sections.

## Description of 2017 Outreach Effort

Between February and May 2017, DEC conducted a series of public meetings and workshops. These efforts included:

- A Tier 3 Waters website with background information, possible alternative nomination and designation processes, and an online comment form where the public could submit feedback: <http://dec.alaska.gov/water/wqsar/Antidegradation/Tiers123.html>.
- A stakeholder letter (Appendix II) sent to all Tribes, stakeholders, legislators, permit holders, the DEC Water Quality Standards, Assessment and Restoration listserv, the DEC Antidegradation listserv, tribal listserv, and posted to the website.
- Presentation at the Alaska Forum on the Environment on February 7, 2017.
- Legislative Lunch & Learn in the Capitol on Thursday, March 9, 2017.
- Public Workshops in the Spring of 2017 as described below:

Designed as "roll-up-the-sleeves" workshops in the goals of a full sharing of ideas across different interest groups, and generating new ideas, the workshops were co-facilitated by Mike Walsh, on contract from the Foraker Group, and Michelle Hale, DEC Division of Water Director.

- Monday, March 20 in Juneau
- Tuesday, March 21 in Anchorage
- Wednesday, March 22 in Fairbanks
- Thursday, March 23 by teleconference
- Tuesday, May 2 in Dillingham

## Summary of Meetings

The workshops were well attended by a diversity of individuals and interest groups including Tribes, local elected officials, state agencies, federal agencies, non-governmental organizations, fishing groups, representatives from the mining and oil and gas industries and construction businesses, and others. The workshops received coverage by the press, including articles in print and radio media. At least one non-profit environmental organization advertised the workshops via a one-click campaign, which generated emails to the Division of Water urging the Division to establish a process.

The public workshops were opened with a presentation by Director Hale on the state's antidegradation policy and its history. The rest of the time was organized around small group discussions of four central questions:

1. Who should be able to nominate waters?
2. What criteria should make waters eligible for nomination?

3. How should nominated waters be vetted?
4. Who should have designation authority?

Appendix VI lists the possible nomination criteria, vetting process, and options for designation authority the Department offered as a starting point for the discussions.

A note taker (DEC staff) was assigned to each table to record the broad concepts and comments discussed during each of the breakout questions. In Dillingham, a hired note taker captured the reports out from each table. See Appendix III for a summary of public comments and notes gathered during the public workshops. See also Appendices IV and V for a summary of written and electronically submitted comments, respectively.

## Common Threads and Differing Opinions

At both the 2017 and earlier workshops, there were two main groups with two distinct voices. One group is generally pro-regulation and pro-fishery and favored a science-based regulatory approach to Tier 3 nomination, with DEC or a Board as the designating authority. The other group is more pro-development and pro-resource extraction, preferring the ultimate designation authority to be in the hands of the legislature. While we have tried to capture the common threads generated in the workshops in this section, see Appendix III for a more detailed list of specific comments from workshop participants.

One misconception that surfaced at the workshops was that creating a Tier 3 process was optional for the State of Alaska. This is not the case. Since 1997, the U.S. Environmental Protection Agency has highlighted the need for the state to establish its antidegradation policy implementation procedures. As the EPA reiterated in an April 2016 letter, they prefer states develop their own Tier 3 process and are satisfied with the progress the State is making in engaging stakeholders in the dialogue toward a establishing a method.

Another persistent concern was that Tier 3 is a tool designed specifically to obstruct development. This is not necessarily the case, although at least two of the waters that have been nominated to date are in areas where there has recent mineral exploration and discussions of potential mining development.

### Criteria and Nomination Information

There was general agreement that all Alaskan residents and Tribes should have the right to nominate waters and that nominations from residents and organizations from outside Alaska should not be accepted. There was also consensus that less tangible qualities like the cultural value of a water should be taken into consideration, although it was not possible to discuss this idea in detail in the time we had at the workshops.

There is agreement that a nomination should include pertinent details, such as rationale to support a designation, information on land owners and communities that may be affected, the boundaries of the water nominated, including clear rules for tributaries (see Appendix VI for full list of proposed



Tier 3 criteria and nomination information), etc., and that the burden for providing that information should be on the nominator. Concern was expressed that the information requirement not be excessively burdensome on the nominator.

### **Vetting Process**

At least one workshop participant suggested that an alternatives analysis, analogous to the alternative analysis required under the National Environmental Policy Act or NEPA, be required. The purpose of this alternative analysis would be to assure that other potential means of protecting the proposed Tier 3 waters, and which might be a better tool for doing so, are considered before a Tier 3 designation is made. For instance, the alternative analysis might look at formal land use designations or controls on authorized activities as potential means to achieve the desired water quality protections, but with fewer potential collateral impacts as a Tier 3 designation.

At the outreach meetings and in legislative hearings, concern was expressed about the ability to amend a Tier 3 designation once it is made. It is unclear whether a designation is reversible, or whether a final determination could be reconsidered or amended. It is unclear how federal law might apply. At least one state, Utah, allows for the decrease of protection, *i.e.* for a re-categorization of a Tier 3 water; however, a high bar must be met before this can occur.

The answer to the question of who pays for the State agencies' work in analyzing the data and information supplied with a nomination is less straightforward. Some believe it is fair for a nominator to pay a fee to cover some portion of the costs incurred by the State agencies. Others believe that this "pay to play" violates environmental justice principles and is bad public policy. There wasn't the opportunity during the public workshops to discuss what work DEC and the other state agencies who might be involved in consideration of Tier 3 nominations might give up if asked to work on Tier 3 nominations without new resources<sup>4</sup>.

### **Designation Authority**

The point on which there was the most significant divergence of opinion, and often an apparent lack of willingness to compromise, was regarding who should have the authority to designate Tier 3 waters. Options discussed included having a state agency, a board, or the legislature make final Tier 3 designations. Opinions appeared to be firmly fixed, and there was not much room for meaningful discussion. Several members of the public provided comments relating to Alaska legal requirements they believe are relevant to the consideration of designation authority.

## **Next Steps**

While stakeholders approached the workshops with decorum, they came with firm opinions on certain questions. It is apparent there may not be a Tier 3 process that will satisfy all stakeholder groups and Tribes. This said, there are areas where there appears to be more opportunity for agreement.

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<sup>4</sup> The review of Tier 3 nominations, to the extent not funded out of fees or other monies collected from nominees, would have to come out of the unrestricted general fund (UGF) of the reviewing agencies' budgets. Over the last four years, all state agencies have seen cuts in their UGF. DEC's UGF has been cut by 36% over that time period. Thus taking on any significant new work without new sources of funding to pay for it would result in other existing work having to be stopped.

It is generally agreed that the issue of who should decide Tier 3 nominations needs to be decided and settled, so that the four pending nominations can be addressed. This outreach effort has brought the issue to the forefront and was helpful in raising public awareness and understanding of the policy considerations before the Administration. The most consistent opinions heard at workshops was a call for transparency, for fairness, and for local and public input.

DEC will now work with other state agencies with an interest in the Tier 3 process in developing recommendations for next steps. DEC's goal is to propose a path forward by late fall of 2017. This would provide the opportunity to address any needs for regulatory or legislative action during the winter of 2017-18.

## Appendices

### Appendix I: State Antidegradation Policy 18 AAC 70.015

18 AAC 70.015. Antidegradation policy. (a) It is the state's antidegradation policy that

(1) existing water uses and the level of water quality necessary to protect existing uses must be maintained and protected;

(2) if the quality of a water exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality must be maintained and protected unless the department, in its discretion, upon application, and after compliance with (b) of this section, allows the reduction of water quality for a short-term variance under 18 AAC 70.200, a zone of deposit under 18 AAC 70.210, a mixing zone under 18 AAC 70.240, or another purpose as authorized in a department permit, certification, or approval; the department will authorize a reduction in water quality only after the applicant submits evidence in support of the application and the department finds that

(A) allowing lower water quality is necessary to accommodate important economic or social development in the area where the water is located;

(B) except as allowed under this subsection, reducing water quality will not violate the applicable criteria of 18 AAC 70.020 or 18 AAC 70.235 or the whole effluent toxicity limit in 18 AAC 70.030;

(C) the resulting water quality will be adequate to fully protect existing uses of the water;

(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

(E) all wastes and other substances discharged will be treated and controlled to achieve

(i) for new and existing point sources, the highest statutory and regulatory requirements; and

(ii) for nonpoint sources, all cost-effective and reasonable best management practices;

(3) 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; and

(4) if potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy described in this section is subject to 33 U.S.C. 1326 (commonly known as sec. 316 of the Clean Water Act).

(b) An applicant for a permit, certification, or approval who seeks to reduce water quality as described in (a) of this section shall provide to the department all information reasonably necessary for a decision on the application, including the information and demonstrations required in (a) of this section and other information that the department finds necessary to meet the requirements of this section.

(c) An application received under (a) of this section is subject to the public participation and intergovernmental review procedures applicable to the permit, certification, or approval sought, including procedures for applications subject to 18 AAC 15. If the department certifies a federal permit, the public participation and intergovernmental review procedures followed by the federal agency issuing that permit will meet the requirements of this subsection. (Eff. 11/1/97, Register 143; am 4/8/2012, Register 202)

Authority:	AS 46.03.010	AS 46.03.080	AS 46.03.110
	AS 46.03.020	AS 46.03.710	AS 46.03.720
	AS 46.03.050	AS 46.03.100	
	AS 46.03.070		



THE STATE  
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February 6, 2017

Dear Interested Party:

You are receiving this letter because we are interested in hearing from Alaskans as we work to establish a statewide process for nominating and designating Outstanding National Resource Waters, or Tier 3 waters. A Tier 3 designation requires that a waterbody be maintained and protected in its current state, with no new discharges of pollution allowed.

Over the past few years, Alaska's Department of Environmental Conservation (DEC) has drafted regulations and legislation related to Tier 3 and antidegradation, resulting in a considerable amount of public interest. Governor Bill Walker asked us to reach out across the state to provide additional information to the public, municipalities, tribes, industry, and others who might be interested in this topic, and have more discussion before any further action is taken.

First, a little background. The federal Clean Water Act uses the term "antidegradation" to describe the process and requirements a state will follow before it issues a permit allowing the discharge of wastewater into waters of the state, including rivers, lakes, streams, bays, harbors, and oceans. One element of antidegradation is the requirement that a state have a method for creating a special class of waters known as Tier 3 waters. Once a water is designated as a Tier 3 water, the only additional pollutants that are allowed to be added to the water would be temporary or limited in nature, such as those that would result from a construction project. In other words, the quality of the water must be maintained and protected.

The Clean Water Act requires that states have a process for designating Tier 3 waters, but does not require that states actually designate any waters. Once the process is established, the designation of waters is driven by state, not federal, law.

**Outreach on Tier 3**

We'd like to hear from you about what kind of process Alaska should use for nominating and designating Tier 3 waters. The process needs to work well for all Alaskans and for all waters of the state, now and in the future. The process should be transparent and allow any Alaskan to submit a nomination. The process should provide opportunity for local input, and for the thorough evaluation and vetting of a nomination using defined criteria.

To start the conversation, we have developed a website with background information, including three possible alternative nomination and designation processes, at

<http://dec.alaska.gov/water/wqsar/Antidegradation/Tiers123.html>. Please note that in providing these three alternative processes we are in no way trying to limit the discussion. We expect the public will propose more alternatives, perhaps taking pieces from these three options they like. For hard copies of this information, please contact KJ Hillgren at [kristen.hillgren@alaska.gov](mailto:kristen.hillgren@alaska.gov) or 907-465-4728.

We welcome written comments and suggestions on the Tier 3 process. We also plan to conduct four public workshops. These will be “roll-up-the-sleeves” workshops rather than formal hearings – we’re hoping to achieve a full sharing of ideas across different interest groups.

- Monday, March 20<sup>th</sup> in Juneau: 1-4pm
- Tuesday, March 21<sup>st</sup> in Anchorage: 1-4pm
- Wednesday, March 22<sup>nd</sup> in Fairbanks: 9am-12pm
- Thursday, March 23<sup>rd</sup> by teleconference: 4-7pm

You may register for the workshops through our web site at <http://dec.alaska.gov/water/wqsar/Antidegradation/Tiers123.html>. While we encourage pre-registration, you are welcome to attend even if you haven’t registered.

#### **Antidegradation Regulations**

Finally, DEC initially described a proposed Tier 3 process as part of a broader set of draft regulations that were released for public notice in 2014. Those draft regulations generally addressed how DEC would implement the State’s antidegradation policy as a whole, and included many other aspects besides those relating to Tier 3 waters. Because there has been so much public interest in developing a Tier 3 nomination and designation process, we decided to separate Tier 3 from the discussion of other aspects of antidegradation that had less public interest. We feel this will allow for a focused discussion solely on the issue of Tier 3 waters. We do still plan to go out for a subsequent public comment period on the remainder of the antidegradation draft regulations after the public workshops on Tier 3 have concluded. We want to focus our efforts on getting the Tier 3 discussion off to a good start first.

Thank you for your interest. We very much look forward to working with you on this matter of great importance to Alaska.

Sincerely,



Michelle Hale  
Director

## Appendix III: Tier 3 Workshop Notes and Comments – March and May 2017

### Tier 3 Workshop Notes and Comments

- I. Overall Impressions
  - a. The most hotly debated point was whether or not the legislature should be involved at all in the final designation determination.
  - b. Industry is concerned that environmental and tribal groups will use a Tier 3 designation to prevent economic development. Environmental and tribal groups are concerned that existing Tier 2 protections are insufficient, and that a legislative decision will be overly political.
- II. Question 1: Who should be able to nominate waters?
  - a. Residents of Alaska, including tribes, should be able to nominate.
  - b. Criteria for nominators should be broad and include Alaska partnership firms, corporations, businesses as well as Alaska residents.
  - c. PFD eligibility may be a good measure of residency.
  - d. No nominations should be accepted from Outside.
  - e. Should nominees have to prove some local tie to water body? Should property ownership be required?
  - f. Should some barriers be put up to prevent excessive nominations?
  - g. Should there be fees to help fund the process?
  - h. Should nominators have to prove that the nominated water isn't sufficiently protected by Alaska law? If they can't, what's the point of a nomination?
  - i. A group of at least 1,000 residents including a majority of citizens residing in closest geographic proximity, who can secure the sponsorship of that region's state representative and can provide the financial funding and bonding to establish the environmental baseline data.
- III. Question 2: What criteria should make waters eligible for nomination?
  - a. Waters should already be established as special in some other way, e.g., wild and scenic.
  - b. Any waters outside of federal lands would be subject to litigation if nominated because the Alaska Constitution controls state land, and the Alaska Constitution, in the commenter's opinion, supersedes the Clean Water Act.
  - c. Marine waters out to three miles from shore are state waters and therefore could be eligible for Tier 3 nomination.
  - d. Economic significance should be considered, e.g., the Kenai River's commercial and sport fishing is extremely important to the region and should make it eligible.
  - e. Cultural significance is extremely difficult to quantify, but should be somehow considered. How should tribal beliefs be balanced with industry interests? Should subsistence use be a consideration?
  - f. Should there be a cap on number of waters nominated at a time or designated in total to prevent a flood of nominations that would cost the state time and money?

- g. How should nominees account for long-term natural changes like glacial melt, climate change, etc.?
  - h. Wildlife should be considered as well, as in Mono Lake in California. Does something unique live/spawn/grow/overwinter there?
  - i. How should ‘water’ be defined? Should wetlands count?
- IV. Question 3: How should nominated waters be vetted?
- a. With limited staff and money, the state should have some way to prioritize the evaluation of nominated waters. First come, first serve?
  - b. Baseline water quality must be established in order to determine existing water quality, but the testing should not be as extensive or expensive as to create a barrier to nomination. How many years of data is fair to require?
  - c. An alternatives analysis should be required.
  - d. The applicant should pay a portion of the costs (perhaps on a sliding scale and capped at \$10,000?).
  - e. The 2014 draft regulations included the terms “sufficient and credible water quality data,” but who determines credibility?
  - f. The process shouldn’t require all factors to be met to be considered significant.
  - g. The process of anti-degradation should be no more onerous than permitting to allow degradation.
  - h. How will the public be notified?
  - i. A listserv should be created to keep stakeholders informed about nominations.
  - j. The process should include public comment and hearing *at the site* or in the area of the nominated water. Local stakeholders must be included.
  - k. What are the standards of timeliness? Nominees and their neighbors have already been left in limbo for too long.
  - l. Web outreach is not enough—active outreach is necessary.
  - m. There should be a structure or formula provided to help communities hold meetings and grapple with these same questions.
- V. Question 4: Who should have designation authority?
- a. Some participants thought that DEC and sister resource agencies (DF&G, DNR) should be considered the gatekeepers/evaluators of nominations, and legislative authorities should have final say. However, legislators should have a deadline. An idea might be to give the legislature one session to approve or deny a designation. If no vote is taken, then the DEC’s decision should stand. This may not be Constitutional; however, a similar approach could be DEC making an interim decision which must then be made permanent by the legislature passing a law upholding the designation (see AS 38.05.300 for a similar Alaska Department of Natural Resources process). See Appendix IV 2.(j) of this report for more information of this point.
  - b. Others thought that the DEC Commissioner should make the final decision.



- c. Some would like to have an additional step to make sure they get their say. The legislature should be involved so their representatives can intervene.
- d. Establish a Tier 3 Board? Alaska already has so many boards. They are expensive, time-consuming, etc.
- e. Boards can also be political since board members are appointed by the Governor.
- f. Any board should show a cross section of society with at large seats for locals.
- g. A local/sub-regional committee should make the final call (local advisory board).
- h. Maybe a currently operating board could be co-opted and Tier 3 added to their workload.

VI. Common Concerns

- a. Someone should have authority to un-designate. Perhaps a periodic review also?
- b. Some are concerned about how tributaries to a Tier 3 would be permitted or not.
- c. How is 'grandfathering' judged in permitted discharges on a Tier 3?
- d. How are temporary and limited discharges judged? What's temporary enough? What if a village needs to relocate due to climate change? Could they get a special dispensation to discharge?
- e. In Alaska, unlike other states, the headwaters are sometimes in Canada. Would this be resolved internationally?

There were approximately 152 attendees at the four public workshops. Due to space limitations, a list of workshop attendees is not included in the report. A list of attendees is available upon request.

## Appendix IV: Written Comments

In addition to feedback received via workshops, DEC also received written responses from various stakeholders. These comments are summarized below. They are presented in two sections: before and after the 2017 public workshops.

1. Before the 2017 Public Workshops
  - a. Several commenters thought that science should be involved in the decision making process, that the decision to designate rests with DEC rather than the legislature, that there is an open and transparent delegation process, and that process and criteria be well defined.
  - b. Commenters also suggested that the process should also include consideration of ecological and cultural values.
  - c. Suggestions were made to designate waters in national and state parks, wildlife refuges, and wilderness areas. One suggestion was that these waters automatically be designated. The other suggestions was to start there if we had to designate something.
  - d. Another concern is how to fund the designation process. In Montana, the applicant pays all fees, which could potentially be a barrier to entry in Alaska. A commenter recommended a ‘middle road’ policy where the cost is shared, as in the DNR inflow stream reservation.
  - e. Some commenters opposed a legislative designation while others supported a legislative designation. Still others commented that a Water Quality Board could be created to review nominations. One commenter thought that a Water Quality Board would be the least expensive and most responsive to the public with minimum politicization as long as there was a balance of seats for agencies and private citizens.
  - f. Another option would be to have a Tier 2.5, which could be designated by the DEC, whereas Tier 3 could be the province of the legislature.
  - g. Concern was expressed that a Tier 3 designation could be used to stop development.
  - h. A commenter expressed concern that there is no un-designation process after a water is designated Tier 3.
2. After the 2017 Public Workshops
  - a. A couple of commenters expressed frustration that it has been two decades since the ADEC has been given antidegradation authority and no designation process has been established.
  - b. Several commenters advocated that the DEC should handle the designation process, nominations should be made by Alaskan individuals and groups, criteria for nomination should be on par with those for an APDES application, a definite timeline should be established, and nominations should include cultural and subsistence values.

- c. The factors to consider during nomination should include ecological, recreational, cultural, and subsistence values. The designation should incorporate scientific information and be a transparent process.
- d. In responding to the question “Who shall fund?” a commenter said that the parties making the nomination should find funding and “substantially carry the costs to monitor any future impacts or changes to the water quality.” The commenter was concerned that the cost of nominations would become a tax burden on the general public since they would be paying for those designations through the loss of their rights of access and utilization awarded in Article VIII of the Alaska Constitution.
- e. In responding to the question about public process, a commenter suggested that only Alaska citizens who have resided in the state for at least 10 years prior to the nomination should have a say in the public process to eliminate people migrating to the State to influence designations.
- f. A commenter advocated for three public hearings prior to designation, one in the Mat-Su area, one in the Southeast, and one in the interior north of the Alaska Range, and only after the nomination has been determined to be eligible.
- g. A couple of commenters advocated that the legislature make the final determination.
- h. A commenter responded to the use of the terms “pristine” and “exceptional,” in one of the public workshops by recommending the following language: “A water is eligible for Tier 3 classification if, when compared to other waters in Alaska, the water either 1. has exceptional commercial, recreational or subsistence significance; or 2. has characteristics that are rare and of significant scientific or ecological value.” The purpose of the language is to make Tier 3 reviews comparative to other waters in Alaska and not to waters in the Lower 48.
- i. A commenter felt that it was not possible to develop a set of statutory standards to reliably guide ADEC in such a decision; nor could ADEC be expected to have the expertise to resolve the core public policy issues involved. For these reasons, the commenter believed that the legislature must ultimately make any Tier 3 decision.
- j. A commenter felt that there were constitutional issues with a hybrid approach where DEC would nominate waters for legislature approval, and should the legislature fail to act by the end of session, the nomination would stand. The commenter cites the 1980 ruling *State v. A.L.I.V.E.* in which “the Alaska Supreme Court held that a statute empowering the legislature to disapprove agency regulations by concurrent resolution was unconstitutional.”
- k. A commenter suggested that required information should include the geographic boundaries of the water, and the names and contact information of the nominating parties. It should be incumbent upon the nominators to demonstrate to the state and to their community that the water meets the criteria of a Tier 3 water designation. DEC should provide guidance, rather than requirements, to the nominating parties.
- l. Similarly, another commenter suggested that the following provisions should be included in the designation process: citizens or organizations should be able to

nominate, water bodies should be evaluated by scientists (including anthropologists) using objective criteria, state resource agencies should be involved, the public should have input during the process, and the final determination should be made by a board of scientists rather than the legislature. In addition, the process should be adopted as regulations, rather than legislation.

There were approximately 31 commenters who submitted written comments. This number includes letters of support. Due to space limitations, a list of commenters is not included in the report, but is available upon request.

## Appendix V: Electronically Submitted Comments

As previously mentioned, the Tier 3 outreach workshops became subject to a one-click email campaign by an environmental non-profit organization. The contents of each message were identical, so they are presented here only once:

Ms. Hale,

I believe DEC should make the decision to designate Outstanding National Resource Waters in Alaska. An ONRW designation process should be science-based and not political. Alaskans have a vested interest in protecting our waters and deserve to have a voice in the decision-making process. For that reason, an ONRW process should consider ecological, recreational, and cultural reasons for protecting our clean water and fisheries resources. DEC should adopt a process without delay.

Comments submitted through the DEC’s Tier 3 website were generally either supporting or questioning the need for Tier 3 designations. The most salient comments have been selected and quoted below.

<b>Generally Supportive of Tier 3 Designations</b>	<b>Generally Questioning the Need for Tier 3 Designations</b>
<p>With things like the Pebble mine back on the drawing board...it is critical our state protects what the federal administration so readily seeks to let companies pollute. Rivers and waters in Alaska rely on clean water for recreation, fisheries, tourism, and subsistence.</p>	<p>I am not against a good, solid process for Tier 3, but for the Chilkat Valley, Tier 3 would essentially close our community down...When we already have Tier 2, why would any group want to shut down this waterway. I understand this is public lands, how is it one group can dictate who and who can't use it?</p>
<p>I am in favor of the legislature making the final determination of any Tier 3 waters in Alaska. They are the only body that can consider all aspects and impacts of such a designation. I trust that they will get ample input from the scientific community, tribal entities, industry, fisherman, and all other stakeholders. I am concerned that if this decision is made by DEC, DNR, or any other group that we will spend the next decade in expensive lawsuits that will not benefit Alaskans.</p>	<p>Certain groups and individuals are out to stop mining in the state...Tier 3 will have a detrimental economic effect, as well as a subsistence and recreational effect on the residents of, in my case, Haines. I need some more explanation on how this will benefit/suppress residents and/or the environment and why more regulations are needed.</p>
<p>I would like the ADEC to finalize the process of designating Tier 3 waterways to protect our rivers. As 43-year Alaskan residents, my husband and I depend upon clean rivers for our salmon fishing livelihood. We are currently subsistence users and want to keep our streams viable for use.</p>	<p>I recognize that the state has to identify this process. I would add a word of caution. Before a water body can advance to Tier 3 protection, a critical question to answer is, "Does it really need the protection that Tier 3 imposes?" Functionally a Tier 3 is equal to a no development zoning requirement. I for one</p>

	cannot see a reason for any marine waters of Alaska to ever require Tier 3 protection.
I see Tier 3 designations as essential. For my family, community, and industries like tourism, for ALL ALASKANS, these will tell the world how much we value and depend on special waters.	Those who start the Tier 3 designation process should foot the bill for all the studies required to get a designation.
The underlying theme should be “is this the Last Frontier for exploitation?” Arguably the last stronghold for pacific salmon and wildlife, it should be an issue of national security to preserve our state’s treasures.	The Tier 3 designation for rivers in Alaskan needs to go away, this rivers designation could potentially be very devastating to communities who are trying to create economic opportunities for their citizens...Maybe DEC should address their state ferries discharging of waste from their boats rather than make life more difficult for our communities.
As a long-time Bristol Bay salmon fisherman, I appreciate how critical water quality is. Tier Three water quality designation decisions should be made by professional water quality managers at DEC and other state agencies. This process should not be forced into the political arena.	A Tier 3 designation is far too restrictive to any waterway. This is a HUGE responsibility...If this process were given to DEC it would not be in the hands of a non-biased group. I live in a community where the environmentalist will go house to house with blatant lies to push this designation. It would be devastating to this community and our economy.
Growing up on the Hudson River in New York I got to witness firsthand the ruin...of pollution and open sewage into a river...The river is making a comeback due to legislation and environmental law. With the cleanup people are returning to the river for activities spurring economic growth and business. Clean water just makes sense.	I am against Tier 3 in the Chilkat Valley, it will stop my 20 years + of fishing off the banks of the river. I really believe this is a funding ploy by the ADEC clean waters department to support this Tier 3. I’ve read about the other Tier 3 rivers, lakes, etc. and I’m not impressed by the regulations.
The process should be evaluated by a scientific board using objective criteria of the state’s three resource agencies, and the public should have a say. Final designation should be decided by a board of scientists as a regulatory action.	“Wilderness Waters” should be designated by the appropriate State legislative body, not an administrative agency.

<p>The administration needs to start rulemaking for nomination and designation of tier 3 waters this year. Should have been 20 years ago. The process should be handled by ADEC because they have the expertise. Not the legislature. Any Alaskan or Alaskan group should be able to nominate and it should not be a burden and should be done in an appropriate timeline. Could be like APDES applications. Cultural and subsistence values should be included. Tier 3 support our economy.</p>	<p>No point-source discharge permits at all? Declare which specific facilities would be banned...Many communities lack basic infrastructure now. It is cruel and unreasonable to block rural Alaskans' opportunities to improve necessary and basic infrastructure...FERC hydropower licensing regulation may be helpful model. Refer to three-stage consultation process in 18 CFR 4.38.</p>
<p>We support a method that sets forth a transparent public process with clear timelines to ensure that nominations will be considered and decided in a reasonable timeframe. We recommend a process for reconsideration of a final determination.</p>	<p>To keep the process of designation and nomination transparent for all stakeholders, the legislature should be the governing body. Whether it is social economic impacts, to grandfathered rights of an area, it could easily be devastating to a community.</p>

There were approximately 74 commenters, who submitted comments via the DEC's Tier 3 website. Due to space limitations, a list of commenters is not included in the report. A list of commenters is available upon request.

## Appendix VI: Possible nomination criteria, vetting process, and options for designation authority

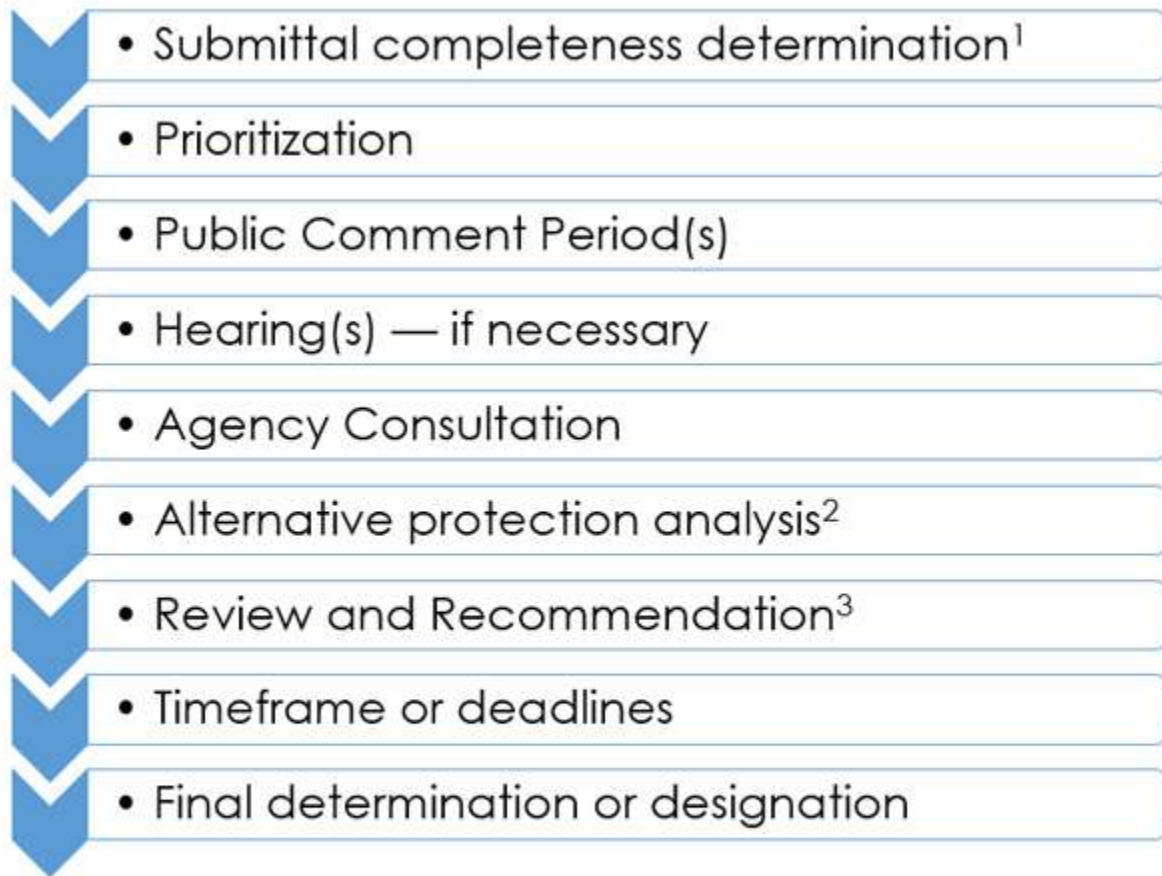
### Possible Tier 3 Criteria and Nomination

- a. To be eligible for Tier 3 designation the water must have exceptional characteristics relative to other state of Alaska water including one or more of the following:
  1. 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;
  2. The water is of exceptional ecological, economic, or recreational significance; or
  3. The water is an exceptional and rare example of its type regardless of whether the water is considered high quality.
  
- b. Any water or segment thereof that meets (a) (1), (2), or (3) may be nominated for Tier 3 designation. A nomination for Tier 3 designation may be submitted by any resident of Alaska. The nomination must include current contact information for the nominator and the following required information about the water proposed for Tier 3 designation:
  1. The name, description, and geographic location;
  2. The boundaries or extent, including maps, sufficient to define the water;
  3. Identification of land ownership adjacent and proximal to the proposed water, including information on whether those lands have a designated or protection status;
  4. Rationale and information to support a Tier 3 designation that meets the conditions listed in (a) including the required comparison to other state of Alaska water 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 nominations, such as:
    - A. Any additional information on land owners, stakeholders, or communities that may be affected by the proposed designation and their 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 that supports the proposed designation.

#### Possible Tier 3 Vetting Process



<sup>1</sup> by department or agency board

<sup>2</sup> e.g. other state “tools” that could provide the desired use protection

<sup>3</sup> by agency, board, or other

#### Options for Tier 3 Designation Authority

**Option 1.** The legislature would be the final designating authority, via a statutory revision. This option allows for two proposed paths:

1. The entire nomination and designation process is specified in statute, including criteria, required nomination information, vetting procedure, public process, etc.; **OR**
2. The statute specifies final legislative designation authority and directs DEC to develop regulations specifying the nomination process, including criteria, required nomination information, vetting procedure, public process, etc.

**Option 2.** A board would be formed. As recommended by the 2011-12 Antidegradation Workgroup, a board of representatives would evaluate nominations.

This option allows for at least three proposed designating authority paths:

1. The Tier 3 Board would be the final designation authority.
2. The Tier 3 Board would review, vet, and submit a recommendation to the legislature which has final designation authority.
3. The Tier 3 Board would review, vet, and submit a recommendation to the Governor who has final designation authority.

**Option 3.** DEC or the Governor is the final designating authority. DEC establishes a process in regulation that includes the nomination criteria, a nomination process, DEC's vetting process of nominations, and a public process for evaluating DEC's draft designation decision. A decision would be finalized either by DEC or DEC would make a recommendation to the Governor for final action.

**Hybrid and Alternative Options.** Some combination of the above. For example, if the decision is made by a board or DEC, should there be a delayed effective date to allow the legislature the opportunity to weigh in?