

Antidegradation and Outstanding National Resource Waters – White Paper

Over 99% of Alaska’s water is of exceptional water quality. High quality waters support the habitat necessary to sustain Alaska’s world class salmon runs, native fish species, wildlife, commercial, recreational and subsistence fisheries, and recreation and tourism across the state. Clean water is one of Alaska’s greatest resources. For that reason, the decision to protect clean water or allow it to be polluted is very important to all Alaskans.

Background on Antidegradation and Outstanding National Resource Waters

Antidegradation is one of the core principles of the Clean Water Act (CWA) and one of the three components of water quality standards (the other two are designated uses and water quality criteria). At its most basic, antidegradation is how the State protects clean water and decides whether to allow pollution of water.

Alaska’s antidegradation policy creates three categories of waters, referred to as “tiers.” Tier 1 waters are those waters that just meet water quality criteria or may be impaired for certain water quality criteria. Tier 2 waters are those waters that exceed water quality criteria. Tier 3, or Outstanding National Resource Waters (ONRWs), are those waters “of a national or state park or wildlife refuge or a water of exceptional recreational or ecological significance.”¹ The Alaska Department of Environmental Conservation (DEC) has stated “the key criteria for Tier 3 designation is that the water must be exceptional, important, unique, or sensitive ecologically or offer unique or important recreational uses.”²

When an ONRW designation is made, the water quality in that water body must be maintained and protected. It does not prohibit development, but no new discharges are allowed if it would degrade existing water quality. Pollutant discharges to tributaries are also limited if it would lower water quality in the ONRW. (There is a narrow exception for temporary discharges.)

There are currently no ONRWs in Alaska.

Alaska’s Development of Antidegradation Implementation Procedures

The Environmental Protection Agency’s (EPA) regulations under the CWA require each state to have an antidegradation policy and implementation methods as an element of the state’s water quality standards.³ DEC adopted an antidegradation policy in 1997, but failed to adopt implementation methods for years, and only recently began developing final implementation methods.

In 2010, DEC issued Interim Antidegradation Implementation Methods (Interim Methods) as a guidance document without any public process. Under the Interim Methods, there

¹ 18 AAC 70.015(a)(3); *see also* 40 C.F.R. § 131.12(a)(3) (EPA regulation defining ONRWs as waters that “constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges, and waters of exceptional recreational or ecological significance”).

² Alaska Department of Environmental Conservation (ADEC) Division of Water, Outstanding National Resource Water (Tier 3 Water), Fact Sheet at 1.

³ 40 C.F.R. § 131.12(a).

are two processes for designating ONRWs: through the Legislature, or by submitting a nomination to DEC for consideration during the triennial review process. Despite having received nominations, DEC has not moved forward to review the pending nominations or designate any ONRWs.

In 2014, DEC proposed a complete antidegradation implementation methods package for public review. Under that proposal, ONRW designations would be made by the Legislature. However, DEC would review and prioritize nominations and submit only selected nominations to the Legislature for its consideration.⁴

In 2016, the Governor introduced two bills in the Legislature (one in each chamber) to address ONRW designations. The bills would have required the Legislature to designate ONRWs. The bills did not designate any waters as ONRWs.

There is nothing in current law that prohibits DEC from designating ONRWs. DEC's authority to regulate water resources is broad and the agency is vested with authority to adopt water quality standards and implement the CWA.⁵ Instead, the Governor made a policy choice to have designation authority rest with the Legislature and not with DEC. In the transmittal letters accompanying the bills, the Governor wrote that “[g]iven the far-reaching consequences, the final authority for designation should rest with the Legislature and not with DEC.”⁶

Various groups pushed back on the bills, successfully. In multiple hearings, people testified that the Legislature was not the appropriate body to designate ONRWs and that there needed to be a better process. In the face of the strong opposition, the Governor withdrew the bills, saying that there would be additional public opportunity to weigh in on the right ONRW process for Alaska.

DEC is now moving forward with a series of public workshops to discuss ONRW designations. This is not technically a formal public comment period, but there are opportunities for public engagement. First, DEC is holding a series of public workshops. The workshops are March 20th, 21nd, 22rd, and 23rd in Juneau, Anchorage, Fairbanks, and telephonically respectively. Anyone can attend and more information (including registration) is available online: <http://dec.alaska.gov/water/wqsar/Antidegradation/Tiers123.html>. DEC is also accepting comments, via an online form (same website).

⁴ DEC has yet to finalize these rules; it has indicated that it will be issuing another proposal for public review and comment in the Spring or Summer of 2017, but that ONRW process will not be a part of that rulemaking. DEC will address ONRWs through a separate process and on a separate timeline.

⁵ AS 46.03.020(10)(A), .080; *see also Kelso v. Rybachek*, 912 P.2d 536, 540–41 (Alaska 1996) (nothing that “the State has broad discretion in developing water quality regulations”).

⁶ Letter from Governor Bill Walker to Speaker Chenault, House Journal at 1518 (Jan. 29, 2016); Letter from Governor Bill Walker to President Meyer, Senate Journal at 1707 (Jan. 29, 2016).