

# LEGAL SERVICES

## DIVISION OF LEGAL AND RESEARCH SERVICES LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-2450  
LAA.Legal@akleg.gov  
120 4th Street, Room 3


State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

### MEMORANDUM

February 6, 2023

**SUBJECT:** Nomination of an outstanding national interest water and Montana antidegradation policies  
(Work Order No. 33-LS0343\B)

**TO:** Senator Giessel  
Co-Chair Senate Resources Committee  
Attn: Julia O'Conner

**FROM:** Alpheus Bullard  
Legislative Counsel 

This memorandum accompanies a bill providing for the designation of a body of water in the state as an "outstanding national resource water" (ONRW). This bill makes one significant change from the prior version (Work Order No. 33-LS0343\A) by removing the subsection outlining a specific process for nominating a body of water as an ONRW.<sup>1</sup> While the state's antidegradation policies must satisfy certain federal requirements, it is likely that this version of the bill will meet those requirements.

#### **Nominating an outstanding national resource water**

While neither the Clean Water Act (CWA) nor regulation requires the state to have a specific process for nominating a body of water as an ONRW, the state must adopt and implement antidegradation policies and programs that are consistent with the three-tier structure of 40 C.F.R. 131.12.<sup>2</sup> 40 C.F.R. 131.12(a)(2)(i) provides that when the State identifies a body of water for antidegradation protection, it must "provide an opportunity for public involvement in any decisions about whether certain protections will be afforded the water body, and the factors considered when making these decisions."

---

<sup>1</sup> The relevant provision in the prior draft, Work Order No. 33-LS0343\A, provided:

The [Department of Environmental Conservation] shall accept nominations of water for designation as outstanding national resource water. The department may forward a nomination for outstanding national resource water to the legislature only if the department, the Department of Fish and Game, and the Department of Natural Resources agree to recommend designation of the water to the legislature.

<sup>2</sup> *Nat'l Wildlife Fed'n v. Browner*, Civil Action No. 95-1811 (JHG) at \*13, 1996 U.S. Dist. LEXIS 15321 (Oct. 11, 1996).

Similarly, 40 C.F.R. 131.12(b) requires that the State "provide an opportunity for public involvement during the development and any subsequent revisions of the implementation methods [of the State's antidegradation policy], and shall make the methods available to the public."<sup>3</sup>

Despite this version's removal of a specific means of nominating an ONRW, a court would likely find that the requirements of 40 C.F.R. 131.12 are met for the designation or de-designation of an ONRW under the bill. Under this version of the bill, any person could petition a legislator to introduce a bill designating, or revoking the designation, of an ONRW, and the passage of such a bill through the legislature would provide opportunity for the required public participation.

### **People's initiative power**

The bill<sup>4</sup> provides that a body of water in the state may only be designated as an ONRW by statute, and that only the Legislature may revoke an ONRW designation. While the bill does not facially address whether the people may designate an ONRW by initiative, and provides that only "the legislature"<sup>5</sup> may repeal an ONRW, an Alaska court is unlikely to find that the people have a right to designate, or revoke the designation of, an ONRW by initiative.

Under art. XI, sec. 7, Constitution of the State of Alaska, an initiative may not be used to "make or repeal appropriations." The Constitution does not provide a definition of "appropriations" for the purposes of that section, so "it has been the duty of [the Alaska Supreme Court] to distinguish between initiatives that permissibly regulate and those that impermissibly appropriate."<sup>6</sup> In *Mallott v. Stand for Salmon*, the Alaska Supreme Court summarized that one of the "core objectives of the constitutional prohibition on the use of initiative to make appropriations" is to "preserve to the legislature the power to make decisions concerning the allocation of state assets."<sup>7</sup>

In *Mallott*, the Court held that "an initiative must leave to the legislature ultimate decision-making authority to use specific public assets for specific purposes."<sup>8</sup>

---

<sup>3</sup> With the exception of amendments, not relevant to this bill, appearing at 88 FR 4296, 88 FR 5204, 88 FR 5748, and 88 FR 5789.

<sup>4</sup> Note that these comments are equally applicable to the prior version of the bill (Work Order No. 33-LS0343\A).

<sup>5</sup> Using the phrase "the legislature" in this instance (at the bill's sec. 46.03.085(c)) is problematic. It does not acknowledge the governor's veto authority over bills. I would suggest the use of "by statute" instead.

<sup>6</sup> *Mallott v. Stand for Salmon*, 431 P.3d 159, 164 (Alaska 2018).

<sup>7</sup> *Id.* at 165 (quoting *Pullen v. Ulmer*, 923 P.2d 54, 64 (Alaska 1996)).

An initiative also effects an appropriation if it infringes on the legislature's ability to allocate resources among competing uses—that is, if it fails 'to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs'—by forcing the legislature to make a particular allocation decision in the future or by removing certain allocation decisions from the legislature's range of discretion.<sup>9</sup>

The Court noted that "[t]he legislature does not truly retain control over public assets if the voters may forbid it from using those assets in a particular manner."<sup>10</sup> The standard for water quality regulation of an outstanding national resource water is set out in federal regulation: "[w]here 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."<sup>11</sup> The department has described the standard; "if a water were to be designated by the state as a Tier 3 water, new or increased discharges that would lower or degrade the existing water quality would not be allowable unless they were temporary or limited."<sup>12</sup> Because this standard would likely completely prevent the legislature from permitting projects that result in the permanent destruction of outstanding national resource water, a court would likely find that an initiative nominating outstanding national resource water was an unconstitutional appropriation.<sup>13</sup> If an ONRW designation is an unconstitutional appropriation, then the people are similarly prohibited from revoking the designation of an ONRW by initiative under the Alaska Constitution's art. XI, sec. 7.

---

<sup>8</sup> *Id.* at 170.

<sup>9</sup> *Id.* at 166 (internal citations omitted).

<sup>10</sup> *Id.* at 170.

<sup>11</sup> 40 C.F.R. 131.12. An identical standard appears in the state's antidegradation policy, at 18 AAC 70.015.

<sup>12</sup> Division of Water, Alaska Department of Environmental Conservation, *Outstanding National Resource Water (Tier 3 Water) Fact Sheet* (2018). Available at <http://dec.alaska.gov/media/4800/tier-3-factsheet-032018.pdf>.

<sup>13</sup> *See Mallott*, 431 P.3d at 170 ("Because 17FSH2 would completely prevent the legislature from permitting projects that result in the permanent destruction of anadromous fish habitat, the initiative constitutes an unconstitutional appropriation as written.").

**Montana antidegradation requirements**

In response to a memorandum to your office concerning Work Order No. 33-LS0343\A, you stated<sup>14</sup> that it was your understanding that the State of Montana had a process for revoking the designation of a water body as an ONRW. While it's possible that an ONRW designation has been repealed by the Montana Legislature, I am not aware of any Montana statute that provides for legislative revocation of an ONRW. Montana has a process for the Montana Department of Environmental Quality (MDEQ) to revise the classification of certain water bodies,<sup>15</sup> but "[the MDEQ]] may not issue an authorization to degrade state waters that are classified as outstanding resource waters."<sup>16</sup> A rule adopted by the MDEQ classifying a body of state water as an ONRW is not effective until approved by the legislature.<sup>17</sup> However, no Montana statute specifically addresses legislative revocation of an ONRW.<sup>18</sup>

If you have questions, do not hesitate to contact me.

ALB:mis  
23-020.mis

Attachment

---

<sup>14</sup> January 27, 2023, email from your office.

<sup>15</sup> MCA 75-5-302.

<sup>16</sup> MCA 75-5.303(7).

<sup>17</sup> MCA 75-5-316(9).

<sup>18</sup> For more on Montana's treatment of ONRW, see MCA 75-5-315 (Outstanding resource waters — statement of purpose) and MCA 75-5-316 (Outstanding resource water classification — rules — criteria — limitations — procedure — definition).