

**ALASKA STATE LEGISLATURE
HOUSE SPECIAL COMMITTEE ON FISHERIES**

March 15, 2016

10:02 a.m.

MEMBERS PRESENT

Representative Louise Stutes, Chair
Representative Neal Foster
Representative Bob Herron
Representative Craig Johnson
Representative Charisse Millett
Representative Jonathan Kreiss-Tomkins
Representative Dan Ortiz

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 283

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

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 283

SHORT TITLE: NATL. RES. WATER NOMINATION/DESIGNATION

SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

01/29/16	(H)	READ THE FIRST TIME - REFERRALS
01/29/16	(H)	RES
02/03/16	(H)	FSH REFERRAL ADDED BEFORE RES
02/03/16	(H)	BILL REPRINTED 2/3/16
03/15/16	(H)	FSH AT 10:00 AM GRUENBERG 120

WITNESS REGISTER

LARRY HARTIG, Commissioner
Department of Environmental Conservation (DEC)
Juneau, Alaska

POSITION STATEMENT: Presented HB 283 on behalf of the governor.

HEIDI KRITZ, Spokesperson
United Tribes of Bristol Bay
Dillingham, Alaska

POSITION STATEMENT: Testified in opposition to HB 283.

MARK VINSEL, Executive Administrator
United Fisherman of Alaska (UFA)
Juneau, Alaska

POSITION STATEMENT: Testified in opposition to HB 283.

GUY ARCHIBALD, Director
Inside Passage Water Keepers
Southeast Alaska Conservation Council (SEACC)
Juneau, Alaska

POSITION STATEMENT: Testified in opposition to HB 283.

MALENA MARVIN, Owner
Schoolhouse Fish Company
Petersburg, Alaska

POSITION STATEMENT: Testified in opposition to HB 283.

MELANIE BROWN, Fisherman
Naknek, Alaska

POSITION STATEMENT: Testified in opposition to HB 283.

ACTION NARRATIVE

[10:02:53 AM](#)

CHAIR LOUISE STUTES called the House Special Committee on Fisheries meeting to order at 10:02 a.m. Representatives Stutes, Herron, Ortiz, Millett, Kreiss-Tomkins, and Johnson were present at the call to order. Representative Foster arrived as the meeting was in progress.

HB 283-NATL. RES. WATER NOMINATION/DESIGNATION

[10:03:27 AM](#)

CHAIR STUTES announced that the only order of business would be HOUSE BILL NO. 283, "An Act relating to the nomination and designation of state water as outstanding national resource water; and providing for an effective date."

[10:04:15 AM](#)

LARRY HARTIG, Commissioner, Department of Environmental Conservation (DEC), introduced HB 283, companion bill to SB 63, paraphrasing from the sponsor statement, which read as follows [original punctuation provided]:

House Bill 283 (HB283) 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.

COMMISSIONER HARTIG continued to clarify the difference of the Tier 1, 2, and 3 designations, and the amount of pollutants that are allowed at each level. The Tier 3 allows no additional pollution, whereas the Tier 2 represents a multi-use waterway. Additionally, once designated Tier 3 status, the waters are not eligible for reclassification, he stressed.

10:12:31 AM

CHAIR STUTES asked whether other levels of classification can be modified, once designated.

COMMISSIONER HARTIG answered that there are no provisions for altering these classifications, but litigation and a court ruling could be brought against any tier status.

10:14:44 AM

REPRESENTATIVE KREISS-TOMKINS asked when did the U.S. Environmental Protection Agency (EPA) issue regulations requiring states to create processes for Tier 3 designations.

COMMISSIONER HARTIG answered that the requirement has been around for some time, regarding the tier designations. Federal law 40 CFR 131.12, requires states to have anti-degradation provisions, and it provides a specific list of inclusions. He reported on other states facing court challenges, and said Alaska's policy was adopted in 1997.

REPRESENTATIVE KREISS-TOMKINS asked, "What's happened in the last 17-plus years?"

COMMISSIONER HARTIG explained that DEC regulations stipulate policy for issuing permits, as promulgated under state law. He described the federal and state permit exchange that has been used for compliance with the Clean Water Act and to ensure anti degradation practices. However, the way the department was handling the permits was not set out explicitly in guidance or regulation. In 2010 DEC issued interim guidance and began a public process to vet proposed regulations. Workshops were held, and input taken to determine how best to handle the requirement. The process being developed caused constitutional questions to arise of whether a state agency or the legislature holds the authority for designating a waterway as conservation status; Tier 3. The attorney general (AG) has been involved and the legal question remains.

[10:19:41 AM](#)

REPRESENTATIVE HERRON asked about the existence of Tier 3 or Tier 1 waters in the state.

COMMISSIONER HARTIG replied that Tier 1 designations have been made, via regulation, but none for Tier 3.

REPRESENTATIVE HERRON ascertained that the majority of Alaskan waters are designated Tier 2.

COMMISSIONER HARTIG replied, correct.

REPRESENTATIVE HERRON asked what will occur if Alaska fails to create a process for designating Tier 3 waters, and not satisfy the federal mandate.

COMMISSIONER HARTIG speculated that the federal government will enforce the requirement, and possibly take the lead for designating Alaska's waters.

[10:21:57 AM](#)

CHAIR STUTES asked whether any waters in Alaska have been proposed for Tier 3 designation.

COMMISSIONER HARTIG said DEC has received four nominations, which are: Bristol Bay watershed; Kaktuli River, Chilkat River, and the Yakutat forelands watershed. The department has not taken action due to the ambiguity that exists around the process, he pointed out.

[10:23:22 AM](#)

REPRESENTATIVE ORTIZ observed that, to this point, Alaska has been operating without an adopted policy.

COMMISSIONER HARTIG said that a policy exists, but DEC lacks guidance for the implementation process.

REPRESENTATIVE ORTIZ asked what has transpired to prompt the introduction of the bill.

COMMISSIONER HARTIG responded that DEC has an anti-degradation policy, 18 AAC 70.15, which contains elements of the process. Hundreds of permits have been issued under this policy, without challenge. However, a series of cases have been brought,

outside of Alaska, which created concern for how explicit the DEC guidance policy needs to be in order to meet the EPA requirements. Thus, the agency is working proactively to create a clear guidance policy.

[10:25:43 AM](#)

REPRESENTATIVE KREISS-TOMKINS asked if it's accurate to say that Alaska lacks a process for implementing existing policy.

COMMISSIONER HARTIG clarified that the policy has been implemented for nearly two decades, but today the implementation process is coming under scrutiny. Today's political climate requires explicit, transparent, guidance policies.

REPRESENTATIVE KREISS-TOMKINS restated that the bill proposes to solve a problem; that being the lack of a process for designating Tier 3 waters.

COMMISSIONER HARTIG explained that the anti-degradation policy, as implemented by DEC, deals with all tier designations but, until now, no Tier 3 waters had been proposed. He said:

How we take in nominations and how we decide nominations [for Tier 3 waters], that has not been in any kind of guidance or regulation. That's new because nobody had ever proposed any before; now we [have] four [nominations].

REPRESENTATIVE KREISS-TOMKINS clarified that there is no current process for designating Tier 3 waters.

COMMISSIONER HARTIG said a process exists: legislation. At any time, he explained, an interested party could approach the legislature requesting a bill be drafted to designate Tier 3 waters. The administration believes that the decision should be held at the legislative level, and not be designated via the agencies permit process. He said the legislature has the ability to complete the most comprehensive review, as well as provide for the public process component.

[10:30:13 AM](#)

REPRESENTATIVE KREISS-TOMKINS returned to the possibility of the federal government designating Alaska's Tier 3 waters, and asked how that might occur given Commissioner Hartig's testimony that the process does exist, as held by the state legislature.

COMMISSIONER HARTIG said an ambiguity exists in the system. The department has authority from the legislature to implement the federal Clean Water Act, which stipulates the anti-degradation provisions. Further, the legislature has granted DEC the authority to set water quality criteria, and to protect waterway use. The question is, does that include the authority for designating Tier 1, 2, and 3 waters. The possibility for naming Tier 2.5 waters also exists. The AG's office is debating the question and has opined that there may be a constitutional prohibition for the state agency to enact a Tier 3 designation. The federal government would provide procedural guidance should a court rule that DEC retains the designation authority but continues to lack a clear process.

[10:32:21 AM](#)

REPRESENTATIVE HERRON commented that it appears caution may be required for designating waterways Tier 3; however, having federal intervention also needs to be avoided. The Tier 2.5 is an interesting designation, he noted, and asked if that status would allow a future legislature to revisit and possibly amend the designation.

COMMISSIONER HARTIG stated his belief that a subsequent legislature could vote to change a previously enacted designation.

REPRESENTATIVE HERRON asked whether a local boundary commission might be useful as a designation council.

COMMISSIONER HARTIG said yes, and pointed out that some states have seated a commission or advisory board. He opined that the legislature would be best to hold control over the designation process, and theorized on the benefits of such an arrangement.

[10:37:57 AM](#)

CHAIR STUTES stated her understanding that Alaska is neither compelled, nor required, to have Tier 3 designated waters.

COMMISSIONER HARTIG concurred, and added that a policy and process for designation remains as a federal requirement. The decision for whether or not to designate is held by the state, he underscored.

[10:38:35 AM](#)

REPRESENTATIVE KREISS-TOMKINS asked how many other states share Alaska's lack of a clearly defined process; save designation by the legislature.

COMMISSIONER HARTIG offered to provide further information.

[10:40:51 AM](#)

REPRESENTATIVE JOHNSON asked for clarity on how the department would be presenting recommendations regarding a designation process to the legislature in order to have appropriations authorized to conduct a study.

COMMISSIONER HARTIG said the vision is to have the public nominate waterways to DEC and the department would forward the list to the legislature for consideration. The elected officials would make determinations and prioritizations. Funds would then be appropriated to the agency to conduct necessary watershed analysis and formulate a response for further consideration by the legislature.

REPRESENTATIVE JOHNSON clarified that the initial legislative step would require specific funding, from either the capital or operating budget, and the final designation of a watershed would reside with the legislature.

COMMISSIONER HARTIG concurred.

REPRESENTATIVE JOHNSON asked whether the funds appropriation would result in starting or ending the process.

COMMISSIONER HARTIG stepped through the process: waters are publicly nominated; nominees are provided to the legislature for review; and the legislature chooses what further steps to take. The legislative steps to be taken might include: no action; direction to DEC to generate a comprehensive, legislative, report for possible action; or acknowledgment that a waterway should be designated Tier 3 via direct action. However, without authority from the legislature, the agency will not act on making Tier 3 designations, and funding will be necessary to study nominated watersheds.

REPRESENTATIVE JOHNSON stated that the authority for DEC to implement Tier 3 would be granted by virtue of an appropriation act being passed by the legislature. He referred to the bill, page 1, lines [5]-7, which read as follows:

Sec. AS 46.03.085. Outstanding national resource water. (a) Water of the state may not be designated as outstanding national resource water as specified in 40 C.F.R. Part 131.12 except by an act of the legislature.

REPRESENTATIVE JOHNSON said it's necessary to clarify that agency authorization will require a statutory act, not just an appropriations act.

COMMISSIONER HARTIG restated the steps envisioned, and pointed out that amendments to the bill are being entertained.

REPRESENTATIVE JOHNSON opined that, as currently written, the appropriation could serve as the required legislative act, thus providing DEC the authority to make Tier 3 designations.

COMMISSIONER HARTIG said, "That wasn't our intent."

[10:48:38 AM](#)

REPRESENTATIVE HERRON suggested that a Tier 3 status should require a minimum of two positive acts by the legislature: one to begin the review, and one to implement the designation.

[10:49:08 AM](#)

REPRESENTATIVE KREISS-TOMKINS maintained interest in receiving additional information: How other states have handled this federal requirement; which states have not enacted a process to designate Tier 3 waters; and a copy of the AG's opinion indicating a legal ambiguity regarding DEC's ability to designate Tier 3 waters. He opined that a legislative act does not appear to be required for DEC to designate waters to a tier status.

COMMISSIONER HARTIG clarified that the AG has not issued a formal opinion.

[10:50:50 AM](#)

REPRESENTATIVE JOHNSON pointed out that Lake Tahoe is a Tier 3 designation, and said it is apparent, when crossing the California/Nevada border that the Nevada side hosts large scale development, but the California side shows very little. He

asked for information on how these two states handle the shared designation.

COMMISSIONER HARTIG offered to provide further information.

REPRESENTATIVE JOHNSON expressed a need for caution, regarding locking up waters that may be principle for future development.

[10:52:39 AM](#)

CHAIR STUTES opened public testimony.

[10:52:57 AM](#)

HEIDI KRITZ, Spokesperson, United Tribes of Bristol Bay, stated opposition to HB 283. She named the tribes she represents from the Bristol Bay area and pointed out the Native's dependence on traditional subsistence practices. The tribes do not support politicizing the determination of outstanding national resource waters, she opined, and said the decisions should be science based. Alaskans need the ability to engage in the process for nominating Tier 3 waters and to protect watersheds for continued traditional use. She said:

We cannot support this bill as Alaskans deserve a fair, just, and scientific based process for this important tool to recognize and preserve our waters that support our bountiful resources that support our communities and state.

[10:55:24 AM](#)

MARK VINSEL, Executive Administrator, United Fisherman of Alaska (UFA), stated opposition to HB 283 and stressed the importance for having a clearly defined policy for nominating and recognizing Tier 3 waters using science based decisions. He recommended that DEC retain purview over the process and determinations, in collaboration with the Department of Natural Resources (DNR) and the Alaska Department of Fish & Game (ADF&G), as well as include public hearings. The bill is in a skeletal form and subject to "tightening up," he noted and suggested that the word "may" throughout the proposed language is ineffective.

REPRESENTATIVE HERRON indicated how the bureaucratic make-up of DEC may change in the future and asked whether the final

determinations wouldn't be better served in the hands of the people's elected representatives.

MR. VINSEL acknowledged that a legislative role may be necessary; however, a robust process involving the public and other state agencies, is optimal.

11:00:22 AM

GUY ARCHIBALD, Director, Inside Passage Water Keepers, Southeast Alaska Conservation Council (SEACC), stated opposition to HB 283 and clarified the use of Tier 3 waterways: The designation bans permanent or long term degradation of water quality by a permitted discharger. A grandfather law exists for any existing dischargers, which are already in place. Additionally, other uses that do not require discharge, such as boating and fishing, are allowed. A Tier 3 designation does not ban industry from operating on the land or discharging into the water. Industry would be required to treat any effluent to match the existing quality of the water that receives the discharge or utilize an alternative land based application, such as the deep well injection used by oil and gas companies, or recycling, which is what the Pogo Mine utilizes. A misconception appears to exist regarding the difference between the Tier 2 and Tier 3 designations, he opined and explained the differences: A citizen can nominate a Tier 2 water body for Tier 3 designation, through gathering published science, collecting additional scientific data, and submitting the information to DEC. The agency invokes a process and possibly reclassifies the waterway, as requested. When that occurs, a timeline is instigated that limits the amount of time for the additional discharge, or new pollution, to be allowed into the water body. He reported that Alaskan waterways are assumed to be Tier 2 status, and, further, little data exists on the majority of Alaskan watersheds; 99.7 percent lack scientific study. Also, no mandate exists that baseline water quality be determined prior to the agency permitting discharge. The process should be handled the same as any land use or other action that is permitted under the purview of DEC, or DNR he opined. The process should be clearly defined, handled as an administrative procedure, and based on a consistent set of scientifically determined criteria. Further, it should be a public process, with open hearings. Additionally, he pointed out, two states stand out as having extensive Tier 3 designated waterways: Colorado with 6,000 and New Mexico with 2,000. Both of these states also host robust natural resource extraction industries and vibrant economies.

[11:04:27 AM](#)

REPRESENTATIVE ORTIZ asked for elaboration on the opposition statement.

MR. ARCHIBALD qualified that SEACC's opposition is due to DEC lacking a specific and clear set of criteria on which to base designations. Allowing the legislature to make the decision, would unnecessarily politicize the process, he opined.

[11:06:08 AM](#)

REPRESENTATIVE JOHNSON inquired whether SEACC, or the witness personally, have been involved in a petition drive regarding the Bristol Bay watershed area.

MR. ARCHIBALD responded, "No."

[11:06:25 AM](#)

REPRESENTATIVE KREISS-TOMKINS asked about other states that lack a defined process for designating Tier 3 waters.

MR. ARCHIBALD answered that other states are in the same stage of creating a process as Alaska, and named Idaho for one. A variety of processes have been adopted across the nation, he reported, some are administrative, others rely on the legislature only, and in some cases a board is entrusted with the duties. Some states utilize a combination of these approaches and the results vary widely, he finished.

[11:07:25 AM](#)

REPRESENTATIVE JOHNSON asked if SEACC, or its national governing body, donated money to the petition drive to limit a large scale mine in Bristol Bay.

MR. ARCHIBALD responded, "Not to my knowledge."

[11:08:37 AM](#)

MALENA MARVIN, Owner, Schoolhouse Fish Company, stated opposition to HB 283, paraphrasing from a prepared statement, which read as follows [original punctuation provided]:

Thanks for letting me submit testimony today. The following are notes from my remarks in committee

today. To be clear, I oppose HB 283, because our family's commercial fishing business is dependent on protection of clean water.

We are members of the Seafood Producers Co-op, Petersburg Vessel Owners Association, Alaska Trollers, and others, and my partner Eric Grundberg has been fishing out of Petersburg for over a decade.

We are starting a direct-market small seafood business here in Petersburg, Schoolhouse Fish Co., and are also part of a new League of Alaskan Direct Market fishermen.

Weakening the state's ability to protect clean water does not help family fishermen like us. We benefit from and are thankful that the state has invested a lot of money and time into marketing Alaska's waters as pure and clean. This bill undercuts that investment.

I was shocked to learn about this bill. It's a big step in the exact opposite direction we need to go. We should be strengthening, not weakening, our ability to protect clean water since fishing is our state's biggest jobs creator and our state's most sustainable industry.

Alaska should be working to implement a clearly non-partisan process for ensuring Tier III waters are considered. These designations should be open to thorough public review by an agency experienced with considering scientific criteria, as would be the case if they are processed by an agency or consortium of agencies led by DNC.

I do not believe that a partisan legislature heavily influenced by mining and oil corporations is the right place to carry out implementation of the Clean Water Act. Alaska's legislature has an uncommonly short session and is neck deep in very serious budget issues that will not be resolved anytime soon. The Clean Water Act should be fully implemented in Alaska by agencies with the experience, scientific expertise and staff bandwidth to do a thorough and non-partisan job.

Despite Commissioner Hartig's failure to properly answer this question when brought in committee today, it is common knowledge that Alaska is one of the last states to avoid implementing this part of the Clean Water Act. This is despite the fact that we have the greatest economic stake in clean water.

Let's remember why we have the Clean Water Act - to ensure our water stays fishable, swimmable, and drinkable for future generations. We should be doing everything we can to support this goal, not weaken it.

Representative Craig Johnson's insinuation in committee that Tier III designations could "lock up water for development forever" is [not] factual and disingenuous. Tier III designations only prevent pollution, not development, and I think we can all agree that Alaska welcomes development that does not pollute water. His use of Lake Tahoe as an analogy was a poor comparison lacking in fact and heavy on innuendo.

As a member of United Fishermen of Alaska member groups, I'd have to agree with Mr. Vinsel that a robust public process is the best way to protect Alaska's outstanding waters.

[11:14:12 AM](#)

MELANIE BROWN, Fisherman, stated opposition to HB 283, citing the necessity for Alaska's waterways to be protected. Nominations have been languishing, despite the importance to the communities that rely on clean water. The legislature should not be in charge of this type of decision, as members are not trained scientists. Once deemed to be a Tier 3 waterway, there should be no reason for a need to reverse that decision, she opined.

[11:17:41 AM](#)

CHAIR STUTES closed public testimony and announced HB 283 as held over.

CHAIR STUTES thanked the participants and announced the next meeting.

[11:18:26 AM](#)

ADJOURNMENT

There being no further business before the committee, the House Special Committee on Fisheries meeting was adjourned at 11:18 a.m.