

ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE

March 7, 2016

4:27 p.m.

MEMBERS PRESENT

Senator Cathy Giessel, Chair
Senator Mia Costello, Vice Chair
Senator John Coghill
Senator Bert Stedman
Senator Bill Stoltze
Senator Bill Wielechowski

MEMBERS ABSENT

Senator Peter Micciche

COMMITTEE CALENDAR

SENATE BILL NO. 163

"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: SB 163

SHORT TITLE: NATL. RES. WATER NOMINATION/DESIGNATION

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

01/29/16	(S)	READ THE FIRST TIME - REFERRALS
01/29/16	(S)	RES, FIN
02/15/16	(S)	RES AT 3:30 PM BUTROVICH 205
02/15/16	(S)	Heard & Held
02/15/16	(S)	MINUTE(RES)
03/07/16	(S)	RES AT 4:30 PM BUTROVICH 205

WITNESS REGISTER

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

POSITION STATEMENT: Testified in support of SB 163.

CHRIS PELOSO, Assistant Attorney General
Alaska Department of Law (DOL)
Juneau, Alaska

POSITION STATEMENT: Answered questions regarding SB 163.

ED FOGELS, Deputy Commissioner
Alaska Department of Natural Resources (DNR)
Juneau, Alaska

POSITION STATEMENT: Testified in support of SB 163.

MICHELLE HALE, Director
Division of Water
Alaska Department of Environmental Conservation (DEC)
Juneau, Alaska

POSITION STATEMENT: Answered questions regarding SB 163.

ACTION NARRATIVE

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CHAIR CATHY GIESSEL called the Senate Resources Standing Committee meeting to order at 4:27 p.m. Present at the call to order were Senators Stoltze, Stedman, Coghill, Wielechowski, Costello, and Chair Giessel.

SB 163-NATL. RES. WATER NOMINATION/DESIGNATION

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CHAIR GIESSEL announced consideration of SB 163.

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LARRY HARTIG, Commissioner, Department of Environmental Conservation (DEC), Anchorage, said SB 163 clarifies who can designate a "Tier 3" water in Alaska. He said that there are legal uncertainties whether the legislature has given this authority to DEC. The bill also makes a clear policy choice whether the legislature wants to have a say in the designation of a Tier 3 water, which is important given the ramifications of such a designation. Additionally, SB 163 provides a process for the public to make nominations and for the legislature to act on nominations.

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MR. HARTIG said [subsections] (b)-(e) in section 1 of the bill provide a process where DEC would gather nominations and supporting information and periodically transmit them to the legislature. The legislature can take a nomination and act on it

in the form of a bill, or it can ask agencies for a detailed report evaluating the pros and cons of the nomination. "That isn't spelled out in the bill itself, but certainly that's something that would be within the prerogative of the legislature to do," he explained.

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MR. HARTIG said the legislature can choose not to designate "a Tier 3 or Outstanding [National] Resource Water—those terms are synonymous," and it has a whole host of other options available. The legislature could protect an area by putting it into a state park or refuge, for example. He asked why the legislature should make the determination on Tier 3 waters and answered that a Tier 3 water is the highest level of protection under the Clean Water Act (CWA). The designation protects water from future pollution, including waters used for drinking, aquatic life, and recreation. The stream, he said, will be conserved in its existing state, regardless of the pros and cons of adding discharged pollutants. "So it has some large consequences when it's designated," he noted, and it will preclude "other dischargers" from new pollution, including pollutants from processing plants and mining.

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MR. HARTIG said federal requirements for a designation of an Outstanding [National] Resource Water (ONRW) include outstanding quality or purity, as well as exceptional recreational and ecological significance. He said DEC would not look at those [latter] factors when regulating water quality, which "sounds more like a game refuge or a state park," and it would not be within its purview. Water quality and purity "sounds more like DEC and water quality standards that we adopt and implement," but quality and purity describe all of the water in the state. New Jersey's outstanding water might be water that is not polluted, he said, but [unpolluted water] is ordinary in Alaska. A Tier 3 designation will depend on what additional factors in Alaska make water outstanding, he stated. "Do you make a conscious policy decision that we're just going have a lot of Tier 3 ONRW waters in Alaska, because we have a lot of special waters here?" He told the committee that there is no provision under federal law for "unwinding" a Tier 3 designation, so the designations could be for perpetuity. It will keep the water outstanding and there would be no logical reason to "reverse course," he stated. When looking at a nomination, the legislature has the tools for protecting such waters, but not in perpetuity, so it can carve out another mechanism, like creating parks or refuges. However, DEC would designate the water as

"Tier 3 or not." He said that by putting it all together, "we" think it is more appropriate for the legislature to be the decision maker. This bill has been put forward because "we need to go forward and designate to EPA [Environmental Protection Agency] what our process is for designating Tier 3 waters," which is a requirement of the Clean Water Act and EPA regulation. If this is not done, there is the risk of EPA or a court "forcing us to do it" or providing a federal process for designating Tier 3 water," he explained.

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CHAIR GIESSEL noted a March 22, 2016, letter from Mr. Hartig responding to committee member questions, and she expressed appreciation on how well the letter was done. Senator Coghill had said there should be a process for reversing a designation, and she referred to the following statement from Mr. Hartig's letter:

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

CHAIR GIESSEL asked where Mr. Hartig got the above information on rescinding a designation.

COMMISSIONER HARTIG said it is an area of confusion, because no provision in the EPA regulations or in the Clean Water Act addresses this. He said he is not aware of any state that has tried to reverse protections. He said his take is that if DEC designated a Tier 3 water based on water quality, purity, and recreational and ecological values, it would be through a regulatory process. He does not see how DEC could come back and say it made a mistake unless an extraordinary event occurred, like a volcanic mud flow. He added that it would be difficult to prove that DEC made a wrong decision after considerable process and review.

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COMMISSIONER HARTIG said he does not know if there would be more room to reverse a designation legislatively, because the body could, perhaps, look at other factors and considerations, but no other state has tried it. He noted that the statements in his

letter came from the Department of Law, and it might be that the legislature could rescind a designation with a bill, but he said he did not know if that would be legal.

CHAIR GIESSEL said that this committee knows that the state has had minimal mapping and is still discovering new resources to develop. She said she could envision a situation where there is a desire to develop a resource upriver from a waterbody that had been designated Tier 3, and "we" would want to "undeclare" the Tier 3 designation.

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COMMISSIONER HARTIG said if the legislature did not want a perpetual Tier 3 determination, it could craft whatever solution it wanted to protect the nominated water without risking [future development options].

CHRIS PELOSO, Assistant Attorney General, Department of Law (DOL), Juneau, said that he does not believe that the EPA has contemplated removing a [Tier 3] designation, so there is nothing in the Clean Water Act about it. He opined that the designations were designed to be permanent, like a national forest or park. If the legislature were to put in statute that designations could be removed under certain conditions, "we would have to take that back to EPA and see what they said about it." He said the EPA may provide comments or may find it acceptable, but no state has gone through that process, so it is impossible to know whether that would work.

SENATOR COGHILL said, "I would like to suggest to EPA that they contemplate it," but he understands that there should be fairly compelling reasons to reverse a designation. He stated that the legislature would do the same if it created a state park and then carved out a part of it for some reason. He asked if the EPA has a preemptive right.

MR. PELOSO answered that the EPA has some approval authority over certain things that the state does, and Alaska's Tier 3 process would go to the EPA. But since there is nothing in the regulations about how to reverse a designation, "I don't believe that EPA has a process of how they would do that." He said the state would have to talk to the people in Region 9 of the EPA, "and see what their general feelings on this are." He added that EPA may have to do some rulemaking.

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SENATOR COSTELLO pointed to line 2, page 2, of SB 163 whereby "the commissioner shall transmit [a list of nominations] to the legislature for consideration." That implies some action of some sort, she stated. Generally a report is provided to the legislature, but the bill takes it a step further, and she asked if there has to be some action taken. Secondly, it seems that every year the same waters could be proposed and transmitted for consideration, and, over a period of decades, "you would build this body of political movement to designate some of these waters, when, in fact, once the legislature considers them, it seems like they should be taken off the list and not allowed to be put back on the list for a period of time, perhaps a decade or something."

MR. PELOSO said DEC does not have the authority to force the legislature to do anything, so when it proposes something for consideration, the legislature can choose not to act on it. He said he can amend the language to make that clearer. Regarding nominations that are not approved or deliberated, he said, taking [those waters] off "the list" could be handled through regulation. "I don't suspect it would necessarily be a problem to work out a process for how nominations that were not considered are dealt with," he stated.

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ED FOGELS, Deputy Commissioner, Department of Natural Resources (DNR), Juneau, said DNR has worked with DEC on SB 163, and he absolutely agrees that this is an issue that needs to be solved. The state has to have its own process or EPA will create one, he noted. He said a Tier 3 designation could have significant impacts on land and water uses that DNR authorizes both within and upstream of the proposed Tier 3 areas. The fiscal note shows that DNR permitting could be complicated by a Tier 3 designation, and it may be more difficult or impossible to permit land uses, like point source discharges, that impact the quality of Alaska's Tier 3 waters. Uses may not even be allowed, so people may not be applying or looking in those areas to do any of those kinds of uses. He said he is not sure how much additional work an analysis would take, but he is sure there will be additional workload if DNR was faced with issuing "these authorizations" within or upstream of a Tier 3 designation. He said DNR recognizes the potentially significant restrictions on land and water uses within a Tier 3 area, which will be similar to those on state parks, wildlife refuges, and other special areas; therefore, the legislature should make these decisions.

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SENATOR COGHILL asked about flowing water and "up shore," and he said there would be a permitting problem for DNR. He asked about land next to a standing water body and about permitting recreational cabins near water. He asked what other land management near a waterbody is going to be impacted.

MR. FOGELS answered that there are some unknowns, but most mines have a point discharge that would require a DEC permit, and mines near Tier 3 standing waters would likely not get a permit. A person who wanted to apply for a lodge with a waste water disposal system near a lake or a standing body of water, "that would likely, in our view, be 'unpermissible'." If DNR had to authorize water removal from a lake, it would depend on how it would impact the quality of the water. It would all be part of the analysis, he stated.

SENATOR COGHILL asked about taking water for fire suppression, and he stressed being very careful about designations. It would be a real barrier if DNR had to ask DEC [to use Tier 3 water].

MR. FOGELS said he will get back to the committee on using designated waters for fire suppression.

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SENATOR STOLTZE asked for examples of medicinal and mineral waters, and if they will be impacted by [Tier 3] designations.

MR. FOGELS said there are mineral springs that may be used for medicinal purposes. Alaska has a lot of hot springs, but he does not know if there are designated medicinal waters.

CHAIR GIESSEL said there is a hot springs in the Fairbanks area that touts having medicinal waters.

SENATOR STOLTZE said fire suppression is a DNR activity, and the Governor's letter has no reference to DNR being involved. Should DNR have a more formalized role in the ONRW process?

MR. FOGELS said DNR has been working on SB 163. There is a question as to what role the resource agencies should have. The agencies can provide a list of nominated waters to the legislature, or the legislature can deliberate and then ask for input from the agencies. He hopes that he can come before the legislature to clearly explain the economic ramifications of protecting water under Tier 3 designations. He pointed out that an agency process can encounter "frontloading," and it can be pretty significant and decisions can be challenged or appealed.

SENATOR STOLTZE said that the United Fishermen of Alaska (UFA) has a different priority and does not want legislative involvement, and it certainly has a record of not supporting a lot of mining and other activities, including tourism. "They have a death grip on one of our departments, and I'd sure hate to have them have a death grip on several others if there's another process they're suggesting." He said there are people on the committee who have a few months remaining in their legislative terms, and he sure would like to see DNR's process and involvement formalized, because the "cadre of folks" at DEC do not have the same type of enthusiasm for the constitutional charge of DNR. He added that DEC has a different interpretation of Article XIII than he thinks the founders did, and DEC is closer to the mission of the fishermen than the mission of DNR. He stated that DNR should be elbowing its way into this discussion, and "you should be more forcefully shoving your way into this if you're following your constitutional mission."

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CHAIR GIESSEL said that is the very reason that the committee has DNR present today. She asked about "the role of Canadian waters." Many of Alaska's rivers start in Canada, she said, so "how's that going to work?"

MR. FOGELS said that is a good question, and DNR is having discussions with Canada regarding resource development over the border from Southeast Alaska. But Tier 3 designation is US law, and he does not believe there is any direct legal recourse if a water was [impacted] if "something happened on the other side." That would be beyond the authority and expertise of DNR, he explained.

SENATOR COSTELLO asked if Alaska can be exempt from the law, considering how important resource development is to the economy.

MR. FOGELS said he is experienced with the Clean Water Act and finds it highly unlikely that Alaska can be exempt, but the state might be able to "push back" on certain aspects and see how EPA responds. "I'm totally behind looking at avenues that we could do something like that--test the waters a little bit, so to speak."

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MICHELLE HALE, Director, Division of Water, Department of Environmental Conservation (DEC), Juneau, said the requirements

for the antidegradation process have been clearly spelled out in federal regulations since 1983, and it is in the Clean Water Act revision of 1987. The antidegradation process includes a Tier 3 nomination and designation process, and "in our experience we would not be able avoid that requirement." The requirement is just to have the process, and there is no requirement to make designations, she added.

CHAIR GIESSEL said that is a key point; "this is about a designation process, not that it would necessarily be used."

MS. HALE said yes. Many states have processes and have never used them, she explained, but if Alaska does not create a process, it faces two risks: the EPA will come in and create a process, "and it may not be the process that we want," and the second risk is litigation. "We have been sued about our ... lack of antidegradation implementation procedures, which includes the Tier 3 nomination and designation process." She said she would like to not be sued again, but that risk is there.

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SENATOR STOLTZE asked if Alaska is really in charge of the process. "If the feds tell us we can drive, but we're going to have a gun stuck in our ribs during the whole driving route, which is in perpetuity" He asked if Governor Walker's administration has confidence in the federal government "that many of us don't have."

COMMISSIONER HARTIG said it is a requirement that each state have a process to consider nominations of Tier 3 waters, but EPA has made it clear in its guidance that it will not compel a state to designate any particular water. That will be up to the states, he explained, but states just have to have a process. That is shown by the past decades, because some states have no Tier 3 waters. Washington and Oregon have none, and California only has two, he noted. Tier 3 status is a big consideration, and EPA has not tried to force them on the states. His said his one concern is that a member of the public will attempt to force action on a nomination. If the legislature says DEC has the authority to designate Tier 3 waters, and if a nomination came in and DEC did not act on it, Mr. Hartig could see somebody asking for a court order for the agency to take official action since it will be within its duties. Whereas, if the legislature has the authority, then there will be legislative prerogative, "and I don't see it very likely that a judge would come in and try to force the legislature to take up a bill."

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SENATOR STOLTZE said it sounds like citizens can get organized, and they can get "somebody who used to be a U.S. senator to get the federal government to bring in the feds, and we don't know how to get them out." He said that is a question directed to the commissioner or the highest ranking DNR person.

COMMISSIONER HARTIG said he does not see a great risk that EPA would try to force the legislature to act on or even consider a bill for a Tier 3 designation. He said he has never seen an action like that in any state under the Clean Water Act. He said he sometimes questions whether the EPA has the authority to do some of the things it does, but based on 40 years of experience working on the CWA he has never seen something like that.

SENATOR WIELECHOWSKI said he appreciates the input provided by industry, and unfortunately, in a resource development state, sometimes there is conflict between fish and mining. It does not help to demonize a group, and he said he appreciates the letters that were provided by both organizations. The letters were well thought out, he said, and they were both advocating strongly for their interests. The United Fishermen of Alaska provided well-reasoned testimony, and, he said, it has been actively involved in the regulatory process. The UFA is trying to protect fish, and the miners are trying to protect the mines—"I don't think it helps us to demonize anyone."

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CHAIR GIESSEL said she appreciated DNR's presence, and she noted that there are letters from UFA, Yakutat Tlingit Tribe, Alaska Miners Association, and others, which will all be posted online. She said the committee will take public testimony on Friday or Monday. [SB 163 was held in committee.]

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CHAIR GIESSEL adjourned the Senate Resources Standing Committee at 5:11 p.m.