

**ALASKA STATE LEGISLATURE
HOUSE RESOURCES STANDING COMMITTEE**

February 17, 2020

1:03 p.m.

MEMBERS PRESENT

Representative John Lincoln, Co-Chair
Representative Geran Tarr, Co-Chair
Representative Grier Hopkins, Vice Chair
Representative Sara Hannan
Representative Chris Tuck
Representative Ivy Spohnholz
Representative Dave Talerico
Representative George Rauscher
Representative Sara Rasmussen

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 138

"An Act requiring the designation of state water as outstanding national resource water to occur in statute; relating to management of outstanding national resource water by the Department of Environmental Conservation; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 138

SHORT TITLE: NATIONAL RESOURCE WATER DESIGNATION

SPONSOR(S): REPRESENTATIVE(S) KOPP

04/17/19	(H)	READ THE FIRST TIME - REFERRALS
04/17/19	(H)	RES, FIN
04/29/19	(H)	RES AT 1:00 PM BARNES 124
04/29/19	(H)	Heard & Held
04/29/19	(H)	MINUTE(RES)
05/03/19	(H)	RES AT 1:00 PM BARNES 124
05/03/19	(H)	Heard & Held
05/03/19	(H)	MINUTE(RES)
02/10/20	(H)	RES AT 1:00 PM BARNES 124

02/10/20 (H) Heard & Held
02/10/20 (H) MINUTE (RES)
02/14/20 (H) RES AT 1:00 PM BARNES 124
02/14/20 (H) Heard & Held
02/14/20 (H) MINUTE (RES)
02/17/20 (H) RES AT 1:00 PM BARNES 124

WITNESS REGISTER

REPRESENTATIVE CHUCK KOPP
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Speaking as the sponsor of HB 138, provided comments and answered questions during the hearing of the bill.

TREVER FULTON, Staff
Representative Chuck Kopp
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Speaking on behalf of Representative Kopp, sponsor of HB 138, answered a question during the hearing of HB 138.

LINDSAY LAYLAND, Deputy Director
United Tribes of Bristol Bay
Dillingham, Alaska

POSITION STATEMENT: Provided comments and answered questions during the hearing of HB 138.

MARIE MARKS, Attorney
Legislative Legal Counsel
Legislative Legal Services
Legislative Affairs Agency
Juneau, Alaska

POSITION STATEMENT: Answered questions during the hearing of HB 138.

RANDY BATES, Director
Division of Water
Department of Environmental Conservation
Juneau, Alaska

POSITION STATEMENT: Answered questions during the hearing of 138.

EMMA POKON, Deputy Commissioner
Office of the Commissioner
Department of Environmental Conservation

Anchorage, Alaska

POSITION STATEMENT: Answered questions during the hearing of HB 138.

ACTION NARRATIVE

[1:03:14 PM](#)

CO-CHAIR GERAN TARR called the House Resources Standing Committee meeting to order at 1:03 p.m. Representatives Hannan, Talerico, Rauscher, Hopkins, Lincoln, and Tarr were present at the call to order. Representatives Spohnholz, Tuck, and Rasmussen arrived as the meeting was in progress.

HB 138-NATIONAL RESOURCE WATER DESIGNATION

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CO-CHAIR TARR announced that the only order of business would be HOUSE BILL NO. 138, "An Act requiring the designation of state water as outstanding national resource water to occur in statute; relating to management of outstanding national resource water by the Department of Environmental Conservation; and providing for an effective date."

[Before the committee was the committee substitute for HB 138, Version K, adopted as a working document during the bill hearing on 2/10/20.]

[1:06:05 PM](#)

The committee took an at-ease from 1:06 p.m. to 1:08 p.m.

CO-CHAIR TARR described supporting documents that were included in the committee packet.

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REPRESENTATIVE CHUCK KOPP, Alaska State Legislature, speaking as the sponsor of HB 138, said one concern he has heard about the bill is that it would create a greater hurdle to the designation of Tier 3 waters; however, this is not the case nor the intent of the bill. In fact, HB 138 would codify the existing process, and balances with it a science-based administrative process. [Submitting a nomination through] the advisory commission would be discretionary, and a nominator could directly ask a legislator to file a bill, although a recommendation by the

advisory commission would strengthen a nomination because of additional science-based information presented through the advisory commission. In addition, the advisory commission would provide nominators a process which currently does not exist. Representative Kopp turned to another concern that the legislative designation "sets the bar too high, I would again point out that the 118 legislative designated [refuges], preserves, sanctuaries, [and] parks that we have throughout the state, our river systems, all have been designated by the legislature" Regarding testimony related to Tier 2 water quality, he said the lower 12 miles of the Kenai River is a Tier 2 water system managed to a very high standard; any use or development there could not impede its existing uses which are trout and salmon. He pointed out currently, any "in perpetuity" restriction on a parcel of state land greater than 640 acres - one square mile - requires legislative approval; however, the Yakutat Forelands Tier 3 nomination is 1,875 square miles, and other nominations add up to nearly 350 river miles and collectively thousands of miles. Representative Kopp surmised a Tier 3 designation that covers thousands of square miles should have legislative approval.

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REPRESENTATIVE KOPP turned to another concern, that science has been removed from the [Tier 3 designation] process. He stated HB 138 would require that a nomination meet a minimum of criteria in order to be considered by the commission, which "injects science into the process whereas ... our current process, it does not." The criteria require the nomination include information on water quality, an explanation of what makes the waterbody exceptional, and the impact of the designation to users. He observed the aforementioned criteria bring fair, evidenced-based vetting into a process that is now simply a policy call by the legislature.

REPRESENTATIVE HANNAN returned attention to areas that have been already protected by the legislature, such as the Chilkat River State Critical Habitat Area ("critical habitat"), created in 1972, and the Alaska Chilkat Bald Eagle Preserve ("eagle preserve"), created in 1982. She reported the nominators of the Chilkat River for Tier 3 designation do not believe the protections in place protect the water and uplands of the Chilkat River.

REPRESENTATIVE KOPP said the aforementioned areas are protected to a high standard under a Tier 2 designation. A Tier 2

designation protects any uses in the area necessary for the ecological system to thrive. When compared with the Tier 3 standard, the difference is "in perpetuity." He noted there are few Tier 3 protections in Oregon and California, and Tier 3 protections are significantly above Tier 2.

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TREVER FULTON, Staff, Representative Chuck Kopp, Alaska State Legislature, on behalf of Representative Kopp, sponsor of HB 138, explained the aforementioned 118 state designated areas, including [areas on the Chilkat River], achieved designation through a legislative process that created certain restrictions on activities on the land, but the designations do not specifically address activities on the water. He pointed out the procedure to place similar restrictions on the water should also be a legislative process.

REPRESENTATIVE HANNAN surmised two separate legislative bodies sought protection for habitat and the waterway by establishing the [Chilkat River State Critical Habitat Area and the Alaska Chilkat Bald Eagle Preserve], but ongoing discussion of Tier 3 water indicates those areas may not have protection sufficient to prevent degradation of the water [in the Chilkat River]. She remarked:

I've looked at a number of states, when they've created their Tier 3 statutes, have rolled in, in essence creating the grandfather category of all these that have previously, either congressionally or legislatively, been protected [and] need to be grandfathered in so you don't have to start over and come back and ask for that protection because we've already - [for example,] Glacier Bay National Park we presume, meets the water quality levels that our state statute would be creating in Tier 3, but just to clarify in case lawyers 50 years from now say, "Well it wasn't Tier 3, it was just a national park."

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REPRESENTATIVE KOPP said:

I would be surprised if any state has grandfathered in large sweeping areas that are already protected - preserves, parks, waterbodies - because each Tier 3 designation is, is quite exceptional, which is why I,

I mentioned ... most states are, have very few of these designations. ... I would also say, and I think we need to all remind all our constituents, is right now we have a process that has failed - no nominations are being taken up.

REPRESENTATIVE KOPP restated provisions within HB 138.

CO-CHAIR LINCOLN, in response to Representative Kopp, read from Montana legislation related to Tier 3 designation as follows [document not provided]:

all state service waters located wholly within the boundaries of designated national parks or wilderness areas as of October 1, 1995, are outstanding resource waters ... other state waters may be designated in the future, subject to approval by the legislature.

CO-CHAIR LINCOLN said at least one state initiated its Tier 3 designation process by broadly designating waters within national parks and wilderness areas.

REPRESENTATIVE SPOHNHOLZ directed attention to a document [entitled, Partial State Summary of ONRW/Tier 3 Designations March 2019]], that indicated Utah, which is also a resource extraction state, has numerous designations. She said Utah and several other states have boards or commissions that [designate], and designations may or may not also require legislation.

REPRESENTATIVE KOPP said Utah's constitution differs from Alaska's; his intent is to create a process consistent with Alaska's constitution, which reserves the power to the legislature unless the legislature delegates its power. Further, he urged the committee to focus its discussion away from the good or bad aspects of a Tier 3 designation and back to the process of Tier 3 nominations.

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REPRESENTATIVE SPOHNHOLZ observed other states have Tier 3 water designations and cautioned there may be unwarranted alarm about the designations. She said:

I don't get the sense that we're like absolutely locking up waters by ... having Tier 3 water designations ... we're putting some bumpers on it,

which I think is good. ... I don't think that it is the end of the world if we pass this legislation and set in, set in place a process that is transparent for the public, that's consistent with our constitution, I also don't think that we would be ending all development in the state of Alaska if we were to ... increase the number of Tier 3 water designations in the state

CO-CHAIR TARR asked for more information on the advisory commission as to its membership and the economic impact analysis that is required for a complete nomination.

REPRESENTATIVE KOPP said the intent of the bill is to create a balanced commission; he suggested the commission could become more balanced by additional seats for tribal entities and business interests. As far as the economic impact analysis, he said, "If I was to speak legislative intention into the record, it would be 'reasonableness' and I think the advisory commission, collectively, because they would be a balanced board, would be looking at what was reasonable, because the nomination can be as small as one square mile or you know, 1,835 square miles, they might require more for an area that big" He stressed the economic analysis would reflect what is important from the view of the nominator.

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LINDSAY LAYLAND, deputy director, United Tribes of Bristol Bay (UTBB), informed the committee UTBB is a tribal consortium working to protect the traditional way of life of the Yup'ik, Alutiiq, and Dena'ina people of Bristol Bay; UTBB represents 15 tribal governments making up over 80 percent of the region's population. Tribal members depend on a subsistence way of life to sustain cultural, physical, and spiritual wellbeing, a way of life rooted in the pristine environment provided by the Bristol Bay watershed, which is why it is necessary to include cultural significance as a determining factor in designating outstanding national resource waters (ONRWs). Ms. Layland said in the late 2000s, tribal partner Nunamta Aulukestai nominated the Kaktuli River in the Bristol Bay watershed for a Tier 3 waterbody designation; the Kaktuli River is critical to the health of the Bristol Bay watershed and its fishery. In 2016, UTBB submitted a proposed antidegradation Tier 3 ONRW nomination and designation process that included scientific review, public participation, and ecological, recreational, economic, subsistence, and cultural factors. In 2018, UTBB supported the

Department of Environmental Conservation (DEC) in collecting public testimony in Bristol Bay on the nomination and designation process; public testimony revealed the need for cultural significance to be added to the existing definition of an ONRW and that DEC should be the governing body in ONRW designations. Further, UTBB supports tribal governments' influence in developing a fair, culturally relevant, environmentally appropriate, and economically sensible ONRW designation process. Ms. Layland stressed UTBB and others must continue to have a role in the ONRW process; in fact, after years of involvement providing constructive proposals, Bristol Bay organizations are faced with a bill that undermines elements of Tier 3 nomination criteria. The nomination proposal for the Kaktuli River is dormant, but the resolution is paramount to the people of Bristol Bay and its multi-billion dollar commercial fishing industry: to omit cultural significance as a factor in the designation process is to omit the culture of the indigenous people of the state and their stewardship of the land and water.

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MS. LAYLAND directed attention to the bill's provision to establish a water advisory commission, which would add a politically-motivated aspect to the process because members of the commission would be appointed by a partisan governor. Further, HB 138 directs that one seat on the commission would be reserved for a tribal entity or a Native corporation; however, Native corporations are not synonymous with tribal governments, but serve as for-profit entities with differing priorities and values from tribes. Ms. Layland said, "So in no way is it adequate or appropriate for tribes to continue to be tokenized on commissions with one seat on a politicized commission that limits tribal voice to be truly heard and considered." An additional concern is that federally recognized tribes are not eligible to nominate ONRWs: HB 138 directs a resident of the state can nominate, and a resident is legally defined as a person, which does not explicitly include federally recognized tribes. She stressed future proposed versions of the bill must include tribal governments as entities that may nominate Tier 3 waters along with other entities that are currently eligible. Ms. Layland concluded UTBB supports a public process - not a political process - that is a science-based process and includes consideration of ecological and cultural values, and which places decision-making authority with DEC. She noted UTBB would submit written testimony and stated UTBB opposes the bill as written.

REPRESENTATIVE RASMUSSEN pointed out the commissioner of DEC is appointed by the governor and confirmed by the legislature; she questioned why a nomination process facilitated by DEC would be less of a political process than a legislative approval process.

MS. LAYLAND clarified UTBB does not oppose just the commission; she acknowledged both [the advisory commission] appointed by the governor and the legislative body are political; however, DEC should be the governing body in ONRW decisions because the legislature delegated authority to DEC to establish water quality standards.

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REPRESENTATIVE RASMUSSEN remarked:

I'm a little bit confused as to how one person, who is selected through a political process - the commissioner is appointed through a political process - how that's less concerning than the legislative approval process.

MS. LAYLAND opined the DEC commissioner would not be the sole authority reviewing the applications and nominations; DEC staff, who have lengthy expertise in water quality, would review nominations and make recommendations.

REPRESENTATIVE TUCK asked how the bill undermines the criteria for a Tier 3 nomination.

MS. LAYLAND explained cultural significance is not mentioned in the bill as [a criterion] in the nomination of Tier 3 waters, therefore, not including cultural significance as a critical element discounts subsistence activities.

CO-CHAIR TARR asked Ms. Layland for a definition of cultural resource that could be written into legislation.

MS. LAYLAND offered to provide a definition.

CO-CHAIR TARR stated HB 138 raises a question as to whether the legislature can delegate designation of Tier 3 water to DEC; the executive branch has advised not, however, a differing legal opinion has been provided by Legislative Legal Services, Legislative Affairs Agency.

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MARIE MARKS, attorney, Legislative Legal Counsel, Legislative Legal Services, Legislative Affairs Agency, referred to a legal memo from [Emily Nauman, Legislative Legal Services], dated 5/2/19 that addresses whether DEC has the authority to designate water as outstanding national resource water (ONRW). Ms. Marks said the legislature has delegated general authority to DEC to regulate pollution and to establish water quality standards. Further, courts have allowed the legislature to delegate broad authority to agencies when they are regulating a narrow field, as in this issue. She stated the legislature is authorized to delegate broad authority to the executive branch to address a narrow field of regulation.

REPRESENTATIVE TUCK questioned why a former DEC commissioner said he did not believe he had authority.

MS. MARKS deferred to the Department of Law or the executive branch regarding the perspectives of executive branch agencies.

REPRESENTATIVE TUCK asked how regulations for Tier 1, Tier 2, and Tier 3 differ.

MS. MARKS deferred to DEC to discuss its ability to designate Tier 1 and Tier 2; she expressed her understanding Tier 1 and Tier 2 designations come with the authority to regulate water quality and purity standards. She restated the legislature has granted DEC broad authority to regulate water quality standards and pollution.

REPRESENTATIVE HOPKINS posited if the legislature designates ONRW, whether the statute can include specific exemptions into the designation and have the designation remain Tier 3. For example, exemptions for certain recreational use or other uses.

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MS. MARKS advised the Clean Water Act requires each state to establish antidegradation policies and federal regulations require each state to adopt a policy to maintain and protect waters of exceptional recreational and ecological significance that constitute an outstanding national resource. The federal law does not require a state to designate waters for protection but requires that states have a mechanism for nominating and designating these waters. In addition, federal law does not require the process to include specific criteria.

REPRESENTATIVE SPOHNHOLZ referred to a document [entitled, State of Alaska Department of Environmental Conservation Division of Water Policy and Procedure Guidance Relating to the Nomination and Designation of Tier 3 Waters] dated 11/21/18. She remarked:

... we actually have a policy and procedure document that is dated November 21, 2018, that, from the Department of Environmental Conservation, Division of Water, that actually says, not that they didn't have the authority, but that they were unable to reach consensus in their sort of, stakeholder engagement process in order to develop a process ... so it wasn't that they didn't believe they had the authority but that they just literally couldn't get to consensus. And they reference about ten years' worth of stakeholder engagement which I think is interesting going back to the ... earlier comments that "Oh we have kind of a political problem really more than a policy problem," ... or as much as a policy problem, let me correct that.

[1:50:34 PM](#)

REPRESENTATIVE HANNAN asked Ms. Marks whether a process that would satisfy the federal requirement could be a process that the state legislature nominates and designates Tier 3 waterways via a bill.

MS. MARKS expressed her understanding there is not a restriction under the federal regulations on what the process could entail.

REPRESENTATIVE HANNAN remarked:

Legislatures already have the authority to designate - protect the status for lands within their boundary, but the feds say we have to have one to designate outstanding national waterways, so if we simply reiterate that we, the legislature, have the authority to designate both our land and waters, we've satisfied the EPA, and ... that could be our process to comply with the federal law

MS. MARKS explained EPA can approve or disapprove Alaska's policy and if the policy is disapproved, EPA will notify the state how to obtain approval. If the state fails to comply, EPA can overrule and create a federal policy that complies with

its interpretation of the Clean Water Act. However, as long as EPA agrees with the state policy, Representative Hannan's statement is correct.

CO-CHAIR TARR asked whether a Tier 3 designation equates with a "set aside" of waters or a management policy for waters.

MS. MARKS said the legislature has delegated to DEC broad authority to regulate through AS 46.03.080, therefore, DEC can establish standards for water quality and purity and regulations or policies, not only related to Tier 3 water, but to regulate pollution and water. The ability of DEC to designate water as Tier 3 water flows from its broad authority, which can include many categories.

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RANDY BATES, director, Division of Water, DEC, gave brief introductory remarks.

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The committee took a brief at-ease.

MR. BATES said Alaska's waters are currently well-managed through DEC's robust permitting process. Current policy, dated 11/21/18, directs nominators to send Tier 3 water nominations to a legislator or legislative committee for consideration as a bill, a policy that would be codified in statute by HB 138. He said DEC believes a designation of Tier 3 water is an appropriation of state resources and therefore, is within the purview of the legislature. Mr. Bates directed attention to [question number 5 from a document provided in the committee packet entitled, "Questions and Invited Testimony for Monday"], which asked: What can and cannot be discharged into a Tier 1, Tier 2, and Tier 3 waterbody and what activities are limited in a Tier 3 waterbody? He explained all discharges are permitted under the Alaska Pollutant Discharge Elimination System (APDES) program and 18 Alaska Administrative Code (ACC) 83 APDES regulations; DEC does not classify or designate waters as Tier 1 or Tier 2 because protection levels are determined during the permitting process for a wastewater discharge according to water quality standard regulations. Tier 1 waters are waters for which not all water quality criteria are met, which can be due to natural or manmade pollution. Tier 2 waters are high quality waters in which all water quality criteria are met. Tier 3 waters are outstanding and are required to be preserved in their

current status. Mr. Bates directed attention to a document [entitled, "Alaska Department of Environmental Conservation Division of Water Outstanding National Resource Water (Tier 3 water) Fact Sheet"], included in the committee packet. He further explained regulated wastewater point source discharges - a permitted activity - and non-point source discharges, which degrade or lower the water quality of a designated Tier 3 water, are not allowable with the exception of activities that would result in a temporary short-term and limited change in the water quality.

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MR. BATES continued to what would be allowed in a Tier 3 waterbody and said Tier 3 water designations require maintenance of the level of water quality at the time of designation. Previously permitted discharges would be allowed to continue; however, previously permitted discharges would not be allowed to increase their volume or concentration. Further, new point source discharges would not be allowed, unless there would be no change to the baseline water quality. He advised Tier 3 designation would likely prohibit any new industrial or municipal discharges.

REPRESENTATIVE HOPKINS surmised if the Chena River were designated a Tier 3 waterway, [current levels of pollutants discharged into the river] would be "grandfathered" in and would not need to stop.

MR. BATES said correct. The department would evaluate the current baseline water quality and establish that level of water quality in the designation.

REPRESENTATIVE HOPKINS questioned whether an entity, such as the City of Fairbanks, or a village, would be allowed to install a new septic system, or a new city water system, which would affect a Tier 3 waterway.

MR. BATES said a point source discharge, such as an outfall or pipe, that changes the water quality to exceed known values would not be allowed.

REPRESENTATIVE HOPKINS gave an example of water coming from a mine that changes the water quality but does not lower the water quality.

MR. BATES was unsure about a facility that gathers and cleans water; however, as long as the discharge from a point source facility does not affect the water quality, or create exceedances, the facility would be allowed. In further response to Representative Hopkins, he said:

When we go through the permitting process [DEC] would take a look at the designation, make sure that that permitted activity doesn't degrade water quality there. If that's the case, we would be able to issue that permit, and that facility would be able to go ahead and operate as they would ... with the conditions in the permit that we would put in place to maintain that water quality. There would most likely be sampling and monitoring going on, on a routine basis, to make sure that the discharge of that facility is not degrading water quality beyond the parameters that are set out.

REPRESENTATIVE HOPKINS has heard recreational motorboats would not be allowed under a Tier 3 designation. He asked for more detail on recreational activities disallowed in a Tier 3 waterway.

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MR. BATES expanded the question as follows: If activities such as motorboats, cleaning fish, culture camps, and private septic systems continue beyond short term, could they be denied under Tier 3 designations? He answered the aforementioned activities are not typically regulated under the Clean Water Act permitting requirements, and thus typically don't result in long-term persistent degradation of water quality; however, in the case of impairment, the waterbody would be designated as impaired, and DEC would develop a waterbody recovery plan to reduce pollutants.

REPRESENTATIVE HOPKINS gave an example that the operator of a leaking outboard motor driven down a Tier 3 waterway would not be fined by DEC or EPA for a water quality violation because his/her action is not regulated by the Clean Water Act.

MR. BATES stated DEC does not regulate non-point source activities such as discharges from a motorboat.

REPRESENTATIVE RASMUSSEN asked for DEC's definition of short-term uses.

MR. BATES explained short-term is not in perpetuity or over years; for example, short-term can be a day, a week, a month, and in rare occurrences, a year or more. Further, point source activities may be a construction project, building a bridge, road construction, or other activities that occur for a short duration of time - not a continual discharge - but temporary in time and space.

REPRESENTATIVE RASMUSSEN read from the Alaska State Constitution, article 8, section 2, as follows:

General Authority. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the state, including land and waters, for the maximum benefit of its people.

REPRESENTATIVE RASMUSSEN pointed out the recreational use of a waterbody could continue over a 20- to 30-year period of time; for example, the use of jet skis and motorboats on Big Lake each summer, which causes chemicals to enter the water. She asked whether the impact of recreational use could be the equivalent of discharge from resource development; if so, she surmised the legislature would have to decide whether recreation or development activities provide the maximum benefit of the people. She said the definition of short-term use is very vague and questioned why the state has stringent permitting processes for development but allows recreational activities to potentially damage bodies of water without repercussion.

MR. BATES restated jet skis and motorboats are considered non-point source activities; if DEC detected a change in the water quality of a Tier 3 waterbody, it would develop a recovery plan that could reduce recreational use to address the water quality issue.

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The committee took a brief at-ease.

CO-CHAIR TARR returned attention to [questions 9 and 10 from a document provided in the committee packet entitled, "Questions and Invited Testimony for Monday"], which read [original punctuation provided]:

9. How would a Tier 3 designation impact village sewer or water septic system?

10. What is the difference between point and non-point sources of pollution?

MR. BATES said point source is defined as a discernable, confined, and discreet conveyance including a pipe, ditch, channel, tunnel, conduit, well, container, rolling stock, or vessel or other floating craft, from which pollutants could be discharged; non-point source means a source of pollution other than a point source. For example, a non-point source could be runoff from a parking lot to a nearby stream; a point source could be discharge from a cruise ship outfall.

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EMMA POKON, deputy commissioner, Office of the Commissioner, DEC, further explained a regulated or permitted facility is issued a wastewater permit by DEC which limits what could be discharged from the facility; however, DEC may not have control over non-point source discharges such as runoff from vehicles on a road, even though there may be a cumulative impact from non-point source pollutants to the water quality standards of a waterbody.

MR. BATES directed attention to question 11 which read [original punctuation provided]:

11. How would DEC regulate point v. non-point sources of pollution in a tier 3 water?

MR. BATES said DEC could not authorize any new or increased point source discharges if they have the effect of changing the quality of a Tier 3 water. For non-point sources, DEC would use its enforcement authority for discharge to a Tier 3 waterbody that degrades the quality of water; non-point sources would not be allowed to degrade the water quality of a Tier 3 waterbody. As related to septic systems in villages, he advised DEC authorizes septic system discharges to subsurface water via [engineering plan reviews]; septic systems are designed to avoid discharge to surface water and, therefore, are not supposed to affect surface waters.

REPRESENTATIVE HOPKINS gave an example of above ground septic systems which discharge drinkable water and that are currently in use in the U.S. and Canada. He asked whether above ground

systems discharging clean water would be allowable as a point source discharge.

MS. POKON pointed out DEC typically issues permits for point source discharges deemed not to violate the state's water quality standards; however, the water quality in a Tier 3 waterbody may be higher than DEC's current standards thus DEC would not be able to authorize a discharge even though the discharge would not result in a violation of DEC's water quality standards. She clarified there are limitations to DEC's ability to authorize a discharge because it would lower the water quality, even though the water quality would not be below DEC's standards.

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REPRESENTATIVE HOPKINS asked for the difference between changing water quality and degrading water quality and whether the water discharged from a Lifewater Engineering Company septic system - which is cleaner than the water in the river in which it is discharged - would be allowed.

MS. POKON said if the discharge does not result in an adverse impact on the water quality, it would be allowable.

REPRESENTATIVE RAUSCHER asked, "Is that as the water is tested when it becomes a Tier 3? So, everything that's discharging into it that day is grandfathered in?"

MR. BATES said yes. When a Tier 3 waterbody is designated, the designation is based on the waterbody's current water quality parameters, with all activities contributing to the water quality baseline.

REPRESENTATIVE RAUSCHER questioned whether a waterbody could be so large that a discharge would not change the quality of the water; for example, can a sewer discharge into a large body of water and "does it matter?"

MR. BATES expressed his understanding any degradation of the water quality anywhere in the waterbody would be ...

REPRESENTATIVE RAUSCHER suggested "a little drop of anything in there and you wouldn't be able to detect the water quality."

MR. BATES offered to research the question.

REPRESENTATIVE RASMUSSEN asked whether DEC has records of water quality for all the bodies of water in the state; if so, how long have records been kept and how often measurements taken are.

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MR. BATES said DEC does not have a comprehensive list of all the waterbodies in the state and their water quality characteristics; at the time of a Tier 3 nomination, the nominator must develop water quality baseline information. However, if DEC has baseline information, it will share with the nominator.

REPRESENTATIVE HANNAN surmised Representative Rauscher's questions are related to mixing zones, which are allowed under Tier 2 permitting; she asked whether mixing zones are ever permitted in Tier 3 waterbodies and how long, under a Tier 2 permit, is a mixing zone allowed to degrade Tier 2 water.

MR. BATES offered to provide responses to questions related to mixing zones.

REPRESENTATIVE HANNAN returned attention to the Chilkat River, which flows along Chilkat State Park, an eagle preserve, and a critical habitat area; she asked whether DEC has a role in regulations related to these areas, which are a result of legislative processes that have designated some protection. She further questioned whether these areas are afforded any special status, as relates to permitted water degradation, or whether the current legislative designations fail to provide any special protection for water.

MS. POKON explained DEC protects water quality for all uses; for example, water quality can be protected for swimming and for certain aquatic species. She remarked:

For DEC in Alaska, with a few exceptions, we're looking at all uses. I think part of the protection provided by those designations is park or critical habitat, part of what you're getting at there, that is limiting the, the activity that can happen within the boundaries of that area, and so you're not going to see, you know, the, the mine that's seeking a permit to discharge into the waterbody because that activity is going to be limited by the, the land designation.

REPRESENTATIVE HANNAN advised a mine that has applied for a permit is located adjacent to, but outside, the eagle preserve so, [the developers of the mine] believe there is no discharge permit needed, due to its location upriver from the preserve. She surmised the protection of land that has been designated by the legislature in various ways does not grant protection to water under current state law; in fact, to protect the waterway, specific legislation to protect the water is required.

[2:36:04 PM](#)

MR. BATES observed the eagle preserve and the critical habitat area are designated by the Alaska Department of Fish and Game (ADFG), and the other area is a state park [designated by the Division of Parks and Outdoor Recreation, Department of Natural Resources (DNR)]; ADFG and DNR designate areas for independent and specific purposes, as defined by ADFG and DNR statutes. Tier 3 waters are the purview of DEC, thus the purpose of designating the waterway as Tier 3 waters would be so DEC could address the water quality issues. He expressed his belief the designations from the other agencies do not have the authority to manage water quality.

REPRESENTATIVE HANNAN asked whether DEC has the authority to regulate water quality over federally protected lands such as Glacier Bay National Park and Preserve.

MS. POKON stated DEC holds primacy under the Clean Water Act for issuing Alaska Pollutant Discharge Elimination System (APDES) permits and would be the regulatory authority for discharge to state waters and to waters in "a federally owned area."

REPRESENTATIVE HANNAN asked whether waters surrounding Glacier Bay National Park and Preserve meet Tier 3 status and if a Tier 3 designation would provide additional protection. Further, she questioned whether DEC asserts said waters already have a Tier 3 level of protection because they [surround] federally designated parkland.

[2:38:53 PM](#)

MS. POKON answered:

DEC believes that our water quality standards are protective of water quality for both human health and the environment. I think the, the Tier 3 designation is, is more protective, but in terms of what

pollutants may be discharged, if our water quality standards are met, we believe that's protective as to human health and the environment.

CO-CHAIR TARR surmised in the example of a national park, because activities are restricted on land and water in a national park, DEC would never receive a permit application for activities in that location.

MS. POKON said, broadly speaking, yes. She added the authority of one agency to manage the land as a park differs from DEC's authority to protect water quality; however, both agencies would address what activities are allowed and under what conditions.

CO-CHAIR TARR remarked:

Under the point source ... you're going to issue a permit when you go to issue that permit, you're going to evaluate whether it's a Tier 1 or a Tier 2 or a Tier 3 waterbody. Under the nonpoint source, we don't have primacy ... so those activities, so long as they wouldn't violate the underlying water quality standards as established in the State of Alaska, could be allowable activities in a Tier 3 waterbody so long as the long-term impact was flatlined

MS. POKON clarified if nonpoint sources are impairing water quality DEC would seek to address that issue.

[2:42:03 PM](#)

REPRESENTATIVE RASMUSSEN asked Ms. Marks whether DEC, DNR, and ADFG were - at the same time - granted statutory authority to regulate their respective jurisdictions.

MS. MARKS was unsure and offered to provide comparisons of when statutes granting authority for the eagle preserve were enacted compared to those of DEC. She asked which DNR statutes Representative Rasmussen wished her to review.

REPRESENTATIVE RASMUSSEN reported previous testimony revealed the legislature delegated the authority to regulate water to DEC in 1971 and the Clean Water Act was not in effect until 1983. Because there was no Tier 3 water status in 1971, and DEC statutes have not been updated, she questioned whether DEC's authority [over Tier 3 waters] is valid.

MS. MARKS explained AS 46.03.080, enacted in 1971, provided DEC broad authority to regulate water, and which has been applied very broadly since 1971 and supported by the courts; she noted the legislature has the ability to limit and restrict DEC's authority but has not done so, and opined laws subsequent to 1971 would not restrict DEC's authority granted in AS 46.03.080 and AS 46.03.050.

[2:46:32 PM](#)

REPRESENTATIVE TUCK stated the executive branch advised [the designation of Tier 3 waters] should be a legislative decision, because a designation would be an appropriation of state resources, and asked Ms. Marks for the legislature's constitutional authority statement.

MS. MARKS advised the constitution does not define appropriation, but appropriation has been defined through case law and interpreted to mean the legislature can make an allocation decision or choose not to do so; therefore, the issue is whether the allocation of resources can be delegated to a department. She opined the allocation of resources is within the legislature's purview and the courts have ruled the legislature can delegate to a department the decision on how and where to use resources, whether it is an allocation or an appropriation.

REPRESENTATIVE TUCK surmised Tier 1 and Tier 2 designations are also appropriations that have been legislatively delegated to DEC.

MS. MARKS remarked:

Whether it comes from the constitutional authority to allocate resources or where it comes through a constitutional authority to, to, basically manage the state's resources, generally. So, there's two constitutional provisions: the legislature can appropriate, which includes allocating resources as well as the legislature has the ability to manage the state's resources. Whether it comes from either of those two, that ability of the legislature to make those decisions can be delegated

MS. MARKS opined the ability to appropriate is one constitutional ground and the authority can also come from the legislature's constitutional right to manage the state's

resources. She concluded it is very clear the legislature has delegated the authority to DEC.

[2:50:27 PM](#)

REPRESENTATIVE TALERICO pointed out there is a difference between statute and regulations. He recalled the state, within the past three years, made regulatory changes to the Alaska Administrative Code (AAC) and asked whether the updates are related to the topic under discussion.

MS. POKON confirmed DEC finalized regulations in 2018 that addressed how Tier 3 waters would be managed once designated, but not how a Tier 3 waterbody is designated, which is the issue before the committee.

CO-CHAIR LINCOLN returned attention to a document included in the committee packet [entitled, "State of Alaska Department of Environmental Conservation Division of Water Policy and Procedure Guidance Relating to the Nomination and Designation of Tier 3 Waters"] dated 11/21/18, and read:

The current process for nominating Tier 3 water involves proposing the introduction of legislation to make the designation.

CO-CHAIR LINCOLN surmised there was a position taken by DEC regarding a nomination and asked Ms. Pokon to clarify her statement.

MS. POKON explained the regulations in the AAC addressed how a Tier 3 water would be managed; the aforementioned guidance [policy and procedure] document is a statement of DEC's position that the designation follow a legislative process.

CO-CHAIR LINCOLN asked:

It's not the administrative code and it's not in regulation, but is ... it fair to say that it is the policy of DEC that a Tier 3 nomination be designated by legislation ... or is a guidance document not really policy ...?

[2:54:29 PM](#)

MS. POKON indicated yes. The current process is through legislative designation.

REPRESENTATIVE RASMUSSEN asked when the current process was put in effect.

MR. BATES stated the policy was put in place during the last administration and the intent of the current commissioner of DEC to is uphold and implement the guidance document; HB 138 would codify the policy.

CO-CHAIR TARR returned attention to [question number 3 from a document provided in the committee packet entitled, "Questions and Invited Testimony for Monday"], which read: 2019 email from EPA to DEC regarding DEC satisfying Clean Water Act requirement for antidegradation implementation. What has changed since then?

MR. BATES said in 2010, there was a guidance in place; in 2018, DEC replaced the 2010 policy guidance and EPA confirmed that the 2018 policy guidance is a reasonable policy.

CO-CHAIR TARR concluded the 2018 guidance document is considered the official policy.

MR. BATES said yes and restated the 2010 policy has been superseded by the 2018 guidance document.

REPRESENTATIVE TUCK directed attention to a document included in the committee packet entitled, "Department of Environmental Conservation 18 AAC 70 Water Quality Standards Amended as of April 6, 2018," on pages 2 and 4, which read, in part [original punctuation provided]:

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;

(4) any water quality-based effluent limitations established in accordance with 33 U.S.C 131(b)(1)(C) (Clean Water Act, sec. 301(b)(1)(C). (Eff. 11/1/97, Register 143; am 4/8/2012, Register 202; am 4/6/2018, Register 226)

Authority: AS 46.03.010, AS 46.020, AS 46.03.050, AS 46.03.080, AS 46.030.100, AS 46.03.110, AS 46.03.710, AS 46.03.720

REPRESENTATIVE TUCK pointed out DEC's aforementioned document indicates, for the purposes of the antidegradation policy, DEC has authority. He asked whether DEC would issue regulations in this regard.

[2:58:39 PM](#)

MS. POKON agreed DEC claims the authority to establish water quality standards and to preserve water quality in Alaska. She added:

When you translate to the EPA regulations, and their Tier 1, Tier 2, Tier 3 framework, we're implementing ... the Tier 1, and the Tier 2, as the director said earlier, through the permitting process. And so, we establish what the existing uses are and then what water quality standards are necessary to protect those uses. The difference with Tier 3 is the, the room that we have to, or the room that we don't have, to allow uses of that water, even if they're protective of those water quality standards, but would ... reduce the water quality but not to a level that's below what our water quality standards are.

CO-CHAIR LINCOLN returned attention to the designations of special areas, such as critical habitat and the eagle preserve, and asked whether DEC currently manages water quality downstream of special designated areas. He continued:

[Currently], like Tier 1, Tier 2, you're supposed to manage for existing uses, or existing purposes, and you have a lot of discretion in ... defining what those are and what sort of water, water quality, [and if] your parameters are compatible with those uses. When you're making those determinations do you take into account, like critical habitat areas and things like that [which] are downstream from any proposed discharge?

MS. POKON responded:

... I'm not familiar enough with everything in our permits to, to say definitively whether or not there is something that explicitly is addressing critical habitat or some other land use designation downstream. But as I said earlier our water quality standards are set to protect all uses of water, so we'll establish

what the water quality standard is based on what, based on the science that's protective of human health and the environment. And that, you know, we think is, is necessary to ensure there isn't going to be harm to those uses.

[HB 138 was held over.]

[3:02:25 PM](#)

ADJOURNMENT

There being no further business before the committee, the House Resources Standing Committee meeting was adjourned at 3:02 p.m.