

ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE

March 15, 2019

3:30 p.m.

MEMBERS PRESENT

Senator Chris Birch, Chair
Senator John Coghill, Vice Chair
Senator Cathy Giessel
Senator Lora Reinbold (online)
Senator Click Bishop
Senator Scott Kawasaki
Senator Jesse Kiehl

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 51

"An Act requiring the designation of state water as outstanding national resource water to occur by law; relating to the authority of the Department of Environmental Conservation, the Department of Fish and Game, and the Department of Natural Resources to nominate water for designation as outstanding national resource water; 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: SB 51

SHORT TITLE: NATL. RES. WATER NOMINATION/DESIGNATION

SPONSOR(s): RESOURCES

02/11/19	(S)	READ THE FIRST TIME - REFERRALS
02/11/19	(S)	RES, FIN
03/15/19	(S)	RES AT 3:30 PM BUTROVICH 205

WITNESS REGISTER

TREVOR FULTON, Staff

Senator Birch
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Provided an overview of SB 51.

ANDREW SAYERS-FAY, Director
Division of Water
Alaska Department of Environmental Conservation
Juneau, Alaska

POSITION STATEMENT: Answered questions regarding SB 51.

ACTION NARRATIVE

[3:30:21 PM](#)

CHAIR CHRIS BIRCH called the Senate Resources Standing Committee meeting to order at 3:30 p.m. Present at the call to order were Senators Coghill, Giessel, Kiehl, and Chair Birch.

SB 51-NATL. RES. WATER NOMINATION/DESIGNATION

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CHAIR BIRCH announced the consideration of Senate Bill 51 (SB 51).

He detailed that SB 51 is an act requiring the designation of state waters as outstanding national resource waters to occur by law, sponsored by the Senate Resources Committee. The designation of state waters as outstanding national resource waters could have broad impacts on resource development, recreation, and a range of other activities on state lands and waters.

He explained that he introduced SB 51 to ensure that the authority to designate state waters as outstanding national resource waters lies where the state constitution intends it to, within the hands of the legislature. Federal regulators have already signaled that legislative approval would be an appropriate means of designation; likewise, the Alaska Department of Environmental Conservation's current internal policy defers designation to the legislature.

He specified that SB 51 would codify the designation of state waters as outstanding national resource waters process and by doing so provides certainty for developers, conservationists, and state and local regulators alike.

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SENATOR KAWASAKI joined the committee meeting.

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TREVOR FULTON, Staff, Senator Birch, Alaska State Legislature, Juneau, Alaska, explained that SB 51 would codify a process for designating Outstanding National Resource Waters, commonly referred to as "Tier 3 waters." The Alaska Constitution clearly places the responsibility for significant land-and-water-use decisions in the hands of the legislature.

He detailed that Article 8, Section 7, reads, "The legislature may provide for the acquisition of sites, objects, and areas of natural beauty or of historic, cultural, recreational, or scientific value. It may reserve them from the public domain and provide for their administration and preservation for the use, enjoyment, and welfare of the people."

He explained that Article 8, Section 2, holds that, "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 the people."

He said an example of the expressed constitutional mandate in practice is the 118 State Legislatively Designated Areas which includes refuges, sanctuaries, critical habitat areas, ranges, special management areas, forests, parks, recreation areas, preserves, public use areas, recreation rivers, and recreational mining areas which total nearly 12-million acres of "designated lands and waters" throughout the state. Each of the "designated lands and waters" areas were designated by legislative approval, not through executive or agency fiat.

He noted that Alaskan voters have also spoken clearly on where the ultimate authority for land-and-water-use designations should reside. In 2014, voters approved by a margin of nearly two-to-one the "Bristol Bay Forever" initiative which was designed to give the legislature final say in whether to allow the development of large-scale-mining projects in the Bristol Bay area. SB 51 simply continues the strong precedent of ensuring significant land-and-water-use decisions; in this case, Tier 3 water body designations reside in the hands of the legislature. A Tier 3 designation bestows the highest level of water quality protection under the federal Clean Water Act.

MR. FULTON noted that in 1983, the Environmental Protection Agency (EPA) defined Tier 3 waters as, "Waters of exceptional, recreational, or ecological significance" in which water quality shall be maintained and protected from degradation in perpetuity. The EPA further mandated that each state establish a process for designating "outstanding national resource waters" (ONRW).

He said currently, the State of Alaska has no formal process for designating Tier 3 waters; this puts the state at risk of violating the Clean Water Act, opens the possibility of the EPA imposing their own designation process, and leaves stakeholders, both developers and conservationists alike, with uncertainty about the ONRW designation process.

He set forth that SB 51 solves the designation problem by codifying a Tier 3 designation process consistent with how lands and waters of the state have always been designated for conservation by legislative approval rather than departmental decision; however, SB 51 does not entirely exclude departments from these important decisions.

He explained that by law, the Department of Environmental Conservation (DEC) is the state agency responsible for meeting Clean Water Act requirements and for establishing the Tier 3 designation. By requiring DEC to consult with the Alaska Department of Natural Resources (DNR) for evaluation impacts on land uses and the Alaska Department of Fish and Game for the evaluation of impacts to habitat and wildlife prior to setting a Tier 3 recommendation to the legislature, SB 51 also ensures that Tier 3 nominations benefit from scientific scrutiny and technical review by the appropriate executive branch subject matter experts.

He said Tier 3 designation could be an important tool for the protection of human and environmental health; however, such a designation is a significant policy decision that could restrict a range of activities not only on state waterbodies but also on adjacent lands. Mining activity and other large scale resource development projects would obviously be impacted by Tier 3 designations, but other examples of perhaps less considered activities would include road and building construction, motor boats, seafood processing, municipal wastewater discharge, residential and commercial septic systems, stormwater discharges, landfills, timber harvesting, and quarries and gravel pits located near Tier 3 watersheds. Such wide-ranging impacts effectively make Tier 3 designation a de facto land-use

decision; as such, the final decision for Tier 3 designation should properly and definitively reside in the hands of the legislature, SB 51 does just that.

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CHAIR BIRCH announced that Senator Reinbold is online.

SENATOR REINBOLD confirmed being online.

SENATOR KAWASAKI pointed out that Alaska is not the only state that is taking over primacy with respect to water. He asked how other states have decided to nominate Tier 3 designations.

MR. FULTON referenced a "frequently asked questions" document for SB 51 that addressed Tier 3 designations in other states as follows:

Examples from other states include waters that are part of national or state parks, wildlife refuge or wilderness areas, special trout waters, federal Wild and Scenic Rivers or other unique waters. States including Washington, Idaho, and Nevada have not designated any ONRWS; Oregon has designated one; California has designated two; all waters in national parks are ONRWS in Montana; and Arizona has designated 22 waters as ONRWS.

He pointed out that Alaska's constitution is different than any other state. The Alaska Constitution explicitly states that the designation decision process should be a legislative process.

SENATOR KAWASAKI asked if the bill sponsor is taking the constitutional requirement in Article 7 to deal specifically that every time something comes up the legislature has to do it, or in other parts of the constitution it says the legislature has the responsibility for supporting education; however, it does not mean that the legislature does it every time, it means that the legislature creates the body of law and the administration implements it.

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MR. FULTON replied that the Alaska Constitution's mandate places the decision in the hands of the legislature.

SENATOR KAWASAKI opined that the decision is more of a policy call where alternatively, like other states that were mentioned, the state could create the law. He noted that Mr. Fulton

mentioned that designation was an important policy decision where a law is created. He pointed out that alternatively, the legislature could proceed in a different way where it can veto a designation by DEC. He opined that it is the chair's prerogative to consider alternatives.

CHAIR BIRCH explained that the objective is to try and identify a path forward that would recognize and respect the importance of having a process identified as well as the people identified that would want to participate. He remarked that given the importance and magnitude of designation decisions as well as being consistent with other aspects of the state's code, going back to the legislature seems like the right thing to do.

SENATOR KIEHL noted that Mr. Fulton used the phrase "perpetuity" in his overview. He said he had not seen the use of "perpetuity" in his research on prior legislation. He pointed out that the American College of Environmental Lawyers have said they did not believe the designations were in "perpetuity." He asked Mr. Fulton to explain the notion that a Tier 3 designation would be irrevocable.

MR. FULTON explained that when he says, "in perpetuity," just as any bill enacted by the legislature can be undone by a future legislature or alternatively by a voter initiative, it would not be in perpetuity in the sense that it would go counter to that.

He said as far as the permanence of the designation outside of the legislative process, the Clean Water Act, 40 CFR 131.12, is the federal regulation code where the Tier 3 designation process stems from. The code essentially reads that Tier 3 waters would have to be maintained and protected; however, the code does not explicitly say "in perpetuity," but the code does set up an anti-degradation policy that says nothing can be contributed to the designated water beyond a limited duration that would cause more or less permanent degradation to the water, noting that there is no timeframe on a short-term duration. He summarized that "in perpetuity" is implied.

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SENATOR KIEHL replied that he read Mr. Fulton's explanation differently regarding "short term" versus "permanent" degradation. He noted that Mr. Fulton also mentioned that Tier 3 designations would stop roadbuilding, but the bill's "frequently asked question" document as well as the EPA's website mentioned temporary degradation, like roadwork, would be allowed.

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SENATOR BISHOP joined the committee meeting.

MR. FULTON specified that his intent was to say that the potential to impact road construction activities would depend on the duration and the runoff from the road construction activities; however, just as any large-scale resource development project could impact water quality, so can a road construction project.

SENATOR KIEHL addressed Article 2 in the Alaska Constitution regarding constraint on the legislature's power to pass a bill, noting that the bill states that the legislature cannot consider designation without commissioner approval.

MR. FULTON explained that the sponsor's intent is that the bill would not tie the hands of a future legislature. Per discussions with Legislative Legal, SB 51 would not tie the hands of a future legislature. The process that SB 51 creates could be circumvented by any legislator at any time. SB 51 would not prohibit an individual legislator or a committee from introducing a bill to nominate a water body as Tier 3.

SENATOR KIEHL asked why the step in the legislation.

MR. FULTON asked if he was referring to the three resource departments that would be included in the conversation.

SENATOR KIEHL answered yes.

MR. FULTON explained that it adds a level of scientific scrutiny and subject matter expertise to the process that is much needed. The legislature does not necessarily have the same resources that the departments have to give the subject matter a fair shake.

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SENATOR COGHILL expressed appreciation for Senator Kiehl's questions. He opined that the expectation is the legislature could designate as well as un-designate. Having a by-law requirement is the better way to designate; for example, putting a park system together where the legislature could undo some parks too. He asked if the Tier 3 designation is something that the federal government says, "This is what it is, we can accept it or not, but once that designation is given it's really under the requirements of the federal law."

MR. FULTON explained that the EPA would sign off on the designation process, not on a designation of a specific water body.

SENATOR COGHILL asked him to confirm that the state would have to follow the federal rule regarding degradation requirements once a designation is established.

MR. FULTON deferred the question to the department.

SENATOR COGHILL inquired how flexible a designation is. "Do we always have to say what the Clean Water Act says or do we have flexibility?"

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ANDREW SAYERS-FAY, Director, Division of Water, Alaska Department of Environmental Conservation, Juneau, Alaska, explained that the federal government sets up the requirements once a Tier 3 designation occurs. The designation does not tie the hands of a future legislature. In conversations with the EPA, the agency made it clear that the intent for a designation by law be in perpetuity, but the state legislature can choose in the future to change the designation. He noted that the designation only allows temporary and limited degradation in a Tier 3 water.

SENATOR GIESSEL noted that a similar bill was entertained by the Senate Resources Committee in 2016 where DEC indicated that there is not federal regulation or guidance specifically addressing how or whether a state's Tier 3 designation can be reversed or modified. The EPA has said there is no federal regulation regarding Tier 3 reversal or modification. She said it sounds like the state could reverse. She asked if her recollection was correct that Montana added reversibility to Tier 3 water designation.

MR. SAYERS-FAY answered that he would follow up with the information. He explained that when the EPA approves a designation process, the agency expects that the designation will be followed.

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SENATOR GIESSEL asked how many states have not completed a Tier 3 designation process.

MR. SAYERS-FAY answered that he did not have an answer.

CHAIR BIRCH announced that SB 51 will be held in committee. He said his intent is to bring SB 51 back up for consideration on March 20 where public testimony will be heard.

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SENATOR KAWASAKI asked to put questions on the record so that committee members can get answers at the bill's next hearing. He referenced a new section that the bill will add to AS 46.03 as follows:

- AS 46.03.085 (b):
 - The department shall accept nominations of water for designation as outstanding national resource water. The department may forward a nomination for outstanding national resource water to the legislature only if the department, the Department of Fish and Game, and the Department of Natural Resources agree to recommend designation of the water to the legislature.

He noted Senator Kiehl's question regarding the legality of whether the new section meant that the legislature cannot bring something forward. He asked that the committee receive a legal opinion on the proposed section.

He referenced similar legislation in 2016 where a list of nomination criteria was enumerated that included: relatively pristine condition; and exceptional ecological, economic, or recreational significance. He asked why the list in the Code of Federal Regulation (CFR) is not being used for the criteria in SB 51.

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MR. FULTON answered that the legality issue that Senator Kawasaki questioned is being addressed and something will be shared with the committee when the bill is heard again. He addressed the second question on why a list of nomination criteria was not listed in SB 51 and explained that the sponsor's intent is to start with something cleaner and build from there, perhaps leaving the criteria questions to be answered in regulation.

SENATOR KAWASAKI asked what other states do and if there are a number of states that do not currently have Tier 3 water nominations in their state statute and who does that in lieu of the Tier 3 nominating process.

MR. FULTON replied that he will get back to Senator Kawasaki.

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MR. SAYERS-FAY explained that all states are under the obligation to have a Tier 3 designation process and so states over time have been fulfilling that obligation, the remaining states that do not have one are still working towards that. He said the division will get back to Senator Kawasaki on what processes the states that have adopted something looks like.

SENATOR KAWASAKI addressed a memo that states DEC has some statutory authority under the Clean Water Act and whether the statute language in SB 51 is necessary or if the department can do the nominating process on their own through regulation.

MR. FULTON answered that it is the sponsor's understanding that DEC could have the authority on their own without SB 51, but the larger question pertains to satisfying the constitutional mandate regarding large, significant land and water use decisions are ultimately being decided by the legislature as per the 118 other land-use designations that are legislatively designated land units.

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SENATOR GIESSEL addressed the bill's "frequently asked questions" document and noted that there are five nominated Tier 3 water designations. She surmised that the legislature would take the five nominations and determine whether the designations should be adopted as Tier 3 water.

MR. FULTON answered yes.

MR. SAYERS-FAY concurred with Senator Giessel and explained that the federal requirements under the Clean Water Act dictate that a designation process be in place. DEC has received nominations, but the department does not have a process to address them. He detailed that amendments have been made to the Clean Water Act over time so the authority that the department may have been granted raises the question as to the legislature's intent to grant DEC the authority to designate a Tier 3 water, that is why the department has not felt comfortable on the question of designation. He said the department thinks that the legislature should be on the record to make a designation.

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SENATOR COGHILL emphasized that legislators are the trustees of the public's trust doctrine, both in the state's constitution and in case law.

SENATOR KIEHL asked Mr. Fulton to address the sponsor's intent that the legislature is making land-use decisions.

MR. FULTON answered that the sponsor's belief is that because Tier 3 water designations could have such significant impacts on land-use activities, they are de facto land-use decisions. The regulations requiring the state to have a Tier 3 designation process in place speaks specifically to water quality standards, but the implications are much larger than that.

SENATOR COGHILL explained that that a Tier 3 designation prohibits any new activities and expansion of existing activities that changes the water quality. He pointed out that Alaska has a lot of land around a lot of water.

SENATOR KIEHL noted earlier testimony about what expertise the legislature and the agencies have. He said he is concerned for the future of water where decisions are made based on land use.

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CHAIR BIRCH held SB 51 in committee.

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There being no further business to come before the committee, Chair Birch adjourned the Senate Resources Standing Committee meeting at 4:05 p.m.