HJR

49

HOUSE COMMITTEE REPORT

1/26/94
Rules

(9)

Date Referred: January 18, 1994 FURTHER REFERRALS:

Date of Committee Action: 1/26/94

The RESOURCES Committee considered: HJR 49

HOUSE JOINT RESOLUTION NO. 49 FED REGS UNDER OIL POLLUTION ACT OF 1990

Requesting the United States Department of the Interior to clarify regulations being proposed under the Oil Pollution Act of 1990 relating to evidence of financial responsibility that must be shown by offshore facilities.

RECOMMENDATIONS:
be replaced with CS HJR 49 (res)

[ ] the same title
[X] a new title

[ ] have attached amendments(s)
[X] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact _____

[X] zero fiscal note D.E.C.

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Hudson	X	Finkelstein		X	
Carney	X	Davis		X	
Green	X				
Mulder	X				
Binder	X				
Williams	X				

W.K. Williams
CHAIRMAN'S SIGNATURE

8-LS1488\E
Lauterbach
1/25/94

CS FOR HOUSE JOINT RESOLUTION NO. 49( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE GREEN

A RESOLUTION

Requesting the United States Department of the Interior to adopt regulations that give a narrow interpretation to certain definitions under the Oil Pollution Act of 1990 relating to evidence of financial responsibility that must be shown by offshore facilities.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS the Oil Pollution Act of 1990 requires offshore facilities operating on most surface water and adjacent wetlands to maintain evidence of financial responsibility in the amount of $150,000,000; and

WHEREAS the federal definition of "wetlands" includes virtually all nonmountainous areas in Alaska; and

WHEREAS the Act defines "offshore facility" to include a structure, equipment, or device, other than a vessel or deep water port, used for the purpose of exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil in, under, or on any United States navigable or territorial water; and

WHEREAS the Act defines "facility" to specifically include motor vehicles, rolling stock, and pipelines; and

WHEREAS the Alaska State Legislature is concerned that, without further clarification, these definitions might be interpreted in regulations so that "offshore facilities" include marinas, port facilities, utility companies, gasoline filling stations, trucking companies, railroads, refineries, airports, farms, fishing boats and tenders, manufacturing plants, storage tanks, and pipelines, no matter how tangentially related to offshore oil exploration or production; and

WHEREAS this kind of interpretation would be much broader than intended by the Congress when it established financial responsibility requirements for offshore facilities; and

WHEREAS implementation of a $150,000,000 financial responsibility requirement on offshore facilities under a broad interpretation of the regulations would have a significantly adverse effect on Alaska villages and municipalities and would probably devastate the economy of Alaska; and

WHEREAS the Department of the Interior did not hold hearings in Alaska on the proposed regulations;

BE IT RESOLVED that the Alaska State Legislature respectfully urges the Department of the Interior to interpret the definitions of "navigable waters," "offshore facility," and "responsible party" in the financial responsibility regulations of the Oil Pollution Act as narrowly as possible; and be it

FURTHER RESOLVED that the Department of the Interior should propose to the Congress appropriate amendments to the Oil Pollution Act if narrowing regulations are not sufficient to protect the environment without inflicting extreme economic hardships; and be it

FURTHER RESOLVED that the Department of the Interior should hold hearings in Alaska before adopting any regulations under the Oil Pollution Act of 1990.

COPIES of this resolution shall be sent to the Honorable J. Bennett Johnston, U.S. Senator and Chair of the U.S. Senate Natural Resources Committee; the Honorable Bruce Babbitt, Secretary of the Interior; Tom Fry, Director, Minerals Management Service, U.S. Department of the Interior; and to the Honorable Ted Stevens and the Honorable Frank Murkowski, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress.

Alaska State Legislature

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DISTRICT 10

Representative Joe Green

OIL & GAS COMMITTEE
VICE-CHAIR, LABOR & COMMERCE COMMITTEE
JUDICIARY COMMITTEE
RESOURCES COMMITTEE
INTERNATIONAL TRADE & TOURISM COMMITTEE

LEGISLATIVE ASSISTANT

Sponsor Statement

House Joint Resolution 49

In August 1993 the Minerals Management Service (MMS) of the U.S. Department of the Interior published an "Advanced Notice of Proposed Rulemaking" in the Federal Register, initiating the process of implementing the financial responsibility section of the Oil Pollution Act of 1990 (OPA 90). Currently, the MMS requires a $35 million liability bond for Outer Continental Shelf (OCS) facilities. OPA '90 increased the financial threshold to $150 million, and expanded its application to navigable waters.

In the process of promulgating regulations to implement OPA '90 the MMS has interpreted the terms "navigable waters", "offshore facility", and "responsible party" in a very broad manner. Tom Fry, Director of the MMS has stated that "These definitions seem to create a financial responsibility requirement for any activity that can spill oil and is located in, on, or under most of the surface waters of the U.S. and adjacent wetlands."

The financial responsibility requirements apply both to commercial and private operations, and make no allowance for quantity. Read literally, if someone were to store or transport 5 gallons of petroleum-based fuel in, on, or under navigable waters - including wetlands - that person would fall under the OPA '90 requirements. These regulations will apply to marinas, port facilities, utility companies, gasoline filling stations, trucking companies, logging operations, railroads, refineries, airports, farms, fishing boats and tenders, pipelines, and many other Alaskans.

HJR 49 requests the MMS to reinterpret and narrow their definitions. Further, due to the problems caused by this, and other sections of OPA '90, this resolution asks the MMS to propose amendments to Congress to address these problems. Alaskans from Ketchikan to Anchorage to Kotzebue have written to support these redefinitions.

The MMS has scheduled a hearing on these regulations for February 16 in Anchorage. I am hopeful that HJR 49 can pass both houses of the legislature in a timely manner, so that it can be included as part of the official public record at those hearings.

HOUSE JOINT RESOLUTION NO. 49

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVE GREEN

Introduced: 1/18/94
Referred: Resources

A RESOLUTION

Requesting the United States Department of the Interior to clarify regulations being proposed under the Oil Pollution Act of 1990 relating to evidence of financial responsibility that must be shown by offshore facilities.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS 33 U.S.C. 2716(c) (sec. 1016, Oil Pollution Act of 1990) requires offshore facilities operating on most surface water and adjacent wetlands to maintain evidence of financial responsibility in the amount of $150,000,000; and

WHEREAS the federal definition of "wetlands" includes virtually all nonmountainous areas in Alaska; and

WHEREAS the Minerals Management Service, United States Department of the Interior, has proposed regulations that would define "offshore facility" to include a structure, equipment, or device, other than a vessel or deep water port, used for the purpose of exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil; and

WHEREAS this definition of "offshore facility" specifically includes motor vehicles, rolling stock, and pipelines located in, on, or under any United States navigable or territorial waters; and

WHEREAS the Alaska State Legislature is concerned that, without further clarification, the proposed language of this definition might be interpreted to include marinas, port facilities, utility companies, gasoline filling stations, trucking companies, railroads, refineries, airports, farms, fishing boats and tenders, manufacturing plants, storage tanks, and pipelines; and

WHEREAS this kind of interpretation would be much broader than intended by the Congress when it established financial responsibility requirements for offshore facilities; and

WHEREAS implementation of a $150,000,000 financial responsibility requirement on offshore facilities under a broad interpretation of the regulations would have a significantly adverse effect on Alaska villages and municipalities and would probably devastate the economy of Alaska; and

WHEREAS the Department of the Interior did not hold hearings in Alaska on the proposed regulations;

BE IT RESOLVED that the Alaska State Legislature respectfully urges the Department of the Interior to clarify the proposed definition of "offshore facility" in the financial responsibility regulations so that it will only apply to facilities that are more clearly offshore, as intended by the Congress under the Oil Pollution Act of 1990; and be it

FURTHER RESOLVED that the Department of the Interior should hold hearings in Alaska before finalizing any regulations under the Oil Pollution Act of 1990.

COPIES of this resolution shall be sent to the Honorable J. Bennett Johnston, U.S. Senator and Chair of the U.S. Senate Natural Resources Committee; the Honorable Bruce Babbitt, Secretary of the Interior; Tom Fry, Director, Minerals Management Service, U.S. Department of the Interior; and to the Honorable Ted Stevens and the Honorable Frank Murkowski, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. CS HJR 49 (res)

Revision Date:
Title: Federal Regulations Under OPA of 1990

Department Affected: Environmental Conservation
BRU: Spill Prevention and Response
Component: Industry Preparedness Program

Sponsor: Representative Sanders
Requester: House Oil & Gas

COMPONENT SERIAL NO. 1922

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						
FUND SOURCE						
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY94) cost: $

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Robert Poe, Director
Division: Information and Admimistrative Services
Phone: 465-5010
Date: 1/25/94

Approved by Commissioner: Robert Poe for MS
Agency: Department of Environmental Conservation
Date: 1/25/94

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(REV 10/93) g:/asdir/fn94/cshjr49.xls

Testimony on HJR 49
by the Division of Governmental Coordination
Before the
House Resources Committee
Alaska State Legislature

January 26, 1994

Remarks Prepared by Glenn Gray, Project Analyst

The Governor asked the Division of Governmental Coordination to prepare a consolidated State response to the financial responsibility rulemaking proposed by the U.S. Department of the Interior, Minerals Management Service (MMS). The proposed rulemaking relates to Section 1016 of the Oil Pollution Act of 1990 (OPA 90). The draft State response currently being reviewed by the Department of Law is submitted with this testimony.

Congress enacted OPA 90 in the aftermath of the *Exxon Valdez* oil spill. The purpose of Section 1016 of OPA 90 is to ensure there are adequate funds to respond to a potential oil spill. The financial responsibility requirements are different for vessels and offshore facilities. While there is a sliding scale for the amount of proof of financial responsibility required for vessels, offshore facilities must prove financial responsibility in the amount of $150 million, regardless of the size of the facility.

We believe Congress intended the offshore facilities provision of Section 1016 to apply to facilities traditionally considered offshore facilities, that is, oil exploration and development facilities in State marine waters and in the federal Outer Continental Shelf.

MMS attorneys have strictly interpreted the language of OPA 90. They believe the $150 million proof of financial responsibility may apply to facilities operated by individuals, businesses or State and local governments. The MMS thinks the financial responsibility requirements apply to all facilities which handle oil or oil products in onshore wetlands as well as areas traditionally considered offshore facilities.

The MMS bases their interpretation of the application of the financial responsibility requirements on the definitions in OPA 90 for "offshore facilities" and "navigable waters". In short, "offshore facilities" are considered those facilities located in on or under navigable waters of the U.S. The Clean Water Act definition of "navigable waters" includes onshore wetlands. Over one-half of Alaska is considered wetlands.

Only the largest companies operating in Alaska could meet the $150 million proof of financial responsibility requirement. Coverage is simply not available to small companies and individuals. Implementation of the rulemaking proposed by MMS would be devastating to Alaska. Individuals, businesses and State and local governments would be forced into noncompliance or to cease many of their operations. Rural poverty would increase and common necessities such as electricity, home heating oil and fuel would no longer be available.

We believe MMS could interpret the extent of application of the $150 million proof of financial responsibility more narrowly. First, since there is no direct reference to the Clean Water Act in the OPA 90 definition of "navigable waters", this term could be interpreted to include those waters commonly understood as offshore. Second, OPA 90 limits the application of Section 1016 to "responsible parties." A responsible party is defined as a lessee or permittee or "the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act . . ." (OCSLA).

The vague language of the definition of "responsible party" leads to different interpretations. While it could be argued that "applicable State laws" are those laws which are similar to the OCSLA, it can also be argued that this phrase includes all State laws. Even if all State laws are applicable, only those facilities which involve a government lease, permit, or a right of use and easement would need proof of financial responsibility of $150 million.

Should MMS be unwilling to narrow its interpretation of OPA 90 to include only those facilities traditionally considered as offshore facilities, it may be necessary to obtain clarification from Congress.

Regarding HJR 49, the DGC respectfully suggests that line four of page two be revised to omit the reference to fishing boats and tenders (if they are considered vessels). While the Coast Guard requires proof of financial responsibility for vessels, the required proof corresponds to the size of the vessel.

This concludes the testimony from the Division of Governmental Coordination.

Consolidated State Comments to the Minerals Management Service
Regarding OPA 90 Proof of Financial Responsibility Requirements

1/22/94 Draft

U.S. Department of the Interior
Minerals Management Service
Mail Stop 4700
381 Elden Street
Herndon, VA 22070-4817

DRAFT

Attention: Chief, Engineering and Standards Branch

The State of Alaska appreciates the opportunity to comment on the *Advance Notice of Proposed Rulemaking for OPA 90 Oil Spill Financial Responsibility Requirements for Offshore Facilities (Advance Notice)* published in the *Federal Register* on August 25, 1993. The efforts of Minerals Management Service (MMS) personnel who traveled to Alaska to discuss this issue last fall are also appreciated. We look forward to the February 1994 meeting which MMS will hold in Anchorage on this topic.

This response includes the concerns of State agencies as well as local coastal management districts in Alaska. Individual agencies and the coastal districts may also submit their comments on the *Advance Notice* directly to MMS.

The State of Alaska believes the proposed rulemaking far surpasses Congressional intent as expressed by OPA 90. By taking the broadest interpretation of legislative intent, the MMS intends to require **any** facility which uses oil or oil products in a wetland to provide proof of financial responsibility of $150 million. Enforcement of the proposed rulemaking would have a profound negative effect on the economy of Alaska and other states. Almost half of Alaska is considered wetlands by virtue of previous administrative rulemaking by the Army Corps of Engineers and other federal agencies. As a consequence of the broad expansion federal regulation of these wetlands, the financial requirements of the proposed rulemaking would force private businesses and local and State government agencies to cease certain essential operations. Adoption of the proposed regulations result in a chain-reaction of fiscal impacts which would upset the entire Alaska economy as well as the national economy.

In addition to economic impacts, the proposed rulemaking would inflict significant social impacts upon the people of Alaska. It would diminish the standard of living currently enjoyed by residents of rural areas, Native villages and urban areas. The availability of oil and refined products would decrease, thereby limiting transportation, electrical generation, and heating opportunities.

While this response focuses on Alaska's concerns, the proposed rulemaking would have serious and far-reaching national ramifications as well. Considering the relative abundance

of real and regulatory-created wetlands in Alaska, the proposed rulemaking would disproportionately affect Alaska's rural and urban communities both social and economically. The effects of implementation of the proposed rulemaking would be devastating in every community, creating havoc in such basic benefits as residential heating, electric power, and all forms of transportation beyond dog sleds.

The remainder of this letter provides specific comments on the proposed regulations. These comments address recommendations for further action by MMS and discuss Alaska's view on Congressional intent in the passage of OPA 90. The comments also address an alternative risk-based approach, discuss the likely inability to obtain coverage, summarize potential economic effects, suggest the use of Alaska's financial responsibility requirements, and address uncertainty about the scope of the proposed regulations.

RECOMMENDED ACTION ON PROPOSED RULEMAKING

The proposed rulemaking would require proof of financial responsibility which would be impossible to obtain in most instances. Unless an entity is large enough to self insure, it would have to use another means to prove financial responsibility. Most small businesses would be treated equally with the largest corporations and could not afford to provide $150 million proof of financial responsibility. Organizations and companies which provide insurance, reinsurance, and other forms of coverage simply do not have the capacity to cover the number of entities which would be required to have coverage under the proposed rulemaking.

The State of Alaska seriously doubts that it was the intent of Congress to place such a burden on both government agencies and small businesses. Because of the wide-ranging negative ramifications of the proposed rulemaking, the State of Alaska respectfully requests that MMS narrowly construe its authorities in implementing OPA 90 until the issues outlined in this letter are resolved.

We urge MMS to reevaluate its interpretation of OPA 90 definitions as those definitions pertain to both MMS's authority and the scope of operations and facilities to be covered by its rulemaking. The State recommends MMS reconsider its overly broad interpretation of the terms "navigable waters" and "offshore facilities". In addition, since the OPA 90 financial responsibility section (Section 1016) applies only to responsible parties, the definition of "responsible party" should be carefully considered. This definition clearly limits the scope of facilities affected by Section 1016. The State believes Congress intended to require only deepwater ports and facilities located offshore to provide proof of financial responsibility on the scale contemplated by MMS's rulemaking. Absent clear and convincing evidence that Congress intended such a result, MMS should construe its authority narrowly so as to minimize economic dislocation and hardship to the public. If MMS determines that legislative amendments are necessary to clarify its responsibilities, the State recommends the following changes be considered when seeking any legislative solution.

- **Limit Coverage to Offshore Facilities:** The $150 million proof of financial responsibility requirement should be limited to those offshore oil exploration and production facilities traditionally regulated by MMS.

- **Use State Financial Responsibility Requirements:** The language in Section 1019 of OPA 90 should be changed to allow substitution of State financial responsibility requirements for federal requirements in State waters. The State of Alaska's financial responsibility requirements are some of the most comprehensive in the world.

- **Exempt Small Operations:** The proposed financial responsibility requirements do not discriminate among operations which pose different levels of spill risks. A provision should be made for *de minimis* exceptions. A logical threshold should be established to exempt responsible parties who pose minimal risk. In other words, the liability should be commensurate with the risk.

- **Develop a Risk-Based Approach:** The words "up to" should be inserted before "$150 million" in all appropriate sections of the legislation. This change would allow MMS to assign liability levels for offshore facilities using a risk-based approach which considers the type and amount of crude oil or refined product which is produced, stored or transported by the facility.

In the event OPA 90 is to be amended, the State of Alaska would appreciate the opportunity to comment further on specific language and section changes.

CONGRESSIONAL INTENT

Breadth of Coverage

It is inconceivable that Congress intended to expand MMS's jurisdiction to the extent proposed by the *Advance Notice*. Regarding OPA 90 proof of financial responsibility provisions, a common-sense interpretation of Congressional intent would better serve the country than the very broad interpretation advanced by MMS.

Like similar legislation in Alaska, OPA 90 was enacted in the aftermath of the *Exxon Valdez* oil spill. The State believes Congress intended the new financial responsibility requirements to apply to facilities traditionally considered offshore facilities and deepwater ports. Because the OPA 90 definition of "offshore facilities" specifically mentions territorial waters, it appears Congress did not intend to include onshore areas. If Congress had intended to include onshore areas in the definition of offshore facilities, it would not have created a separate definition for "onshore facilities". Instead, Congress would have chosen a term other than "offshore facilities" if it meant to include "onshore facilities" in the definition.

Notwithstanding the issue of Congressional intent in defining "onshore facilities" or "navigable waters", the definition of "responsible party" narrows the type of facilities covered by the financial responsibility requirements. The definition of "responsible party" differentiates between vessels, onshore facilities and offshore facilities. The part of the definition which addresses offshore facilities limits responsible parties to the

> **lessee** and **permittee** of the area in which the facility is located or the **holder of a right of use and easement** granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) . . . (emphasis added)

This definition appears to exclude motor vehicles, aircraft, and facilities which do not require leases or permits. In addition, the State believes Congress intended "applicable State law" to include only laws which address offshore oil and gas lease sales, exploration and production. A thorough discussion of the limits imposed by the term "responsible party" is not included in the *Advance Notice*.

If Congress had intended to require small businesses, State agencies and local governments to provide proof of financial responsibility, it seems logical that it would have required a sliding scale of financial responsibility commensurate with the risk associated with a potential oil spill. Did Congress knowingly intend to require a small fuel distributor or local governments in rural Alaska to provide proof of financial responsibility for $150 million when the financial risk of a potential spill would be far less?

We simply cannot believe Congress intended to place such a heavy burden on coastal communities and State agencies. Coastal communities often have multiple fuel storage sites, each of which would potentially trigger the $150 million proof of financial responsibility requirement proposed in MMS's rulemaking. It is difficult to believe that Congress intended such absurd results. At $150 million per site, communities, the small businesses within them, and regional school districts would be subject to obligations which they simply could not meet. Moreover, because of their limited risk, these types of facilities should never be categorized the same as offshore production platforms.

Environmental Protection

Assuming one of the basic purposes of OPA 90 is to protect the environment from oil spills, the limitations of financial responsibility requirements to meet this end should be recognized. While a Certificate of Financial Responsibility (COFR) may show that an operation has the capital to respond to an oil spill, it does not prevent an oil spill from occurring. The State of Alaska has placed priority on oil spill prevention. For example, the Alaska Department of Community and Regional Affairs and the Alaska Department of Environmental Conservation are working to assure that rural tank farms will not leak oil. Rather than focussing on financial responsibility requirements, the environment might be better protected if more federal funds were available to assure that oil spills will not occur.

RISK-BASED APPROACH

The $150 million OPA 90 requirement for proof of financial responsibility does not differentiate between serious and negligible risks. Considering only oil and gas exploration and development activities, specific kinds of oil-related activities pose significantly different risks. For example, vessels transporting oil contribute to almost half the oil discharged into marine waters. Excluding atmospheric, natural, municipal and runoff sources of oil, transportation-related spills account for 97 percent of oil entering marine waters. On the other hand, facilities associated with offshore production cause less than three percent of the oil input into marine waters[1].

A reasonable financial responsibility assessment should base its requirements on risks related to a possible oil spill. It should reflect the location of the facility, the amount of oil or refined product, and the type of product associated with the facility.

INABILITY TO OBTAIN COVERAGE

Two questions should be answered before implementing the proposed financial responsibility requirements. First, will those affected be able to obtain coverage? Second, for those who could conceivably obtain coverage, would it be affordable? The State of Alaska believes that the answer to these questions is no for anyone other than a Fortune 500 company.

Obtaining $150 million in financial responsibility will be costly to even those companies in the upper Fortune 500 category. Because of their financial strength, such companies would be able to purchase what is known as excess layers of coverage once they have provided approximately $100 million in self insurance. It is likely that these companies would have to obtain the additional $50 million of coverage from several different sources. Companies would pass these costs to the public.

Companies outside of the Fortune 500 category would not likely be able to meet the proposed proof of financial responsibility requirements. The availability of coverage is directly linked to the health and solvency of insurers and their capacity to provide coverage. Capacity, in this sense, means the legal and financial ability to provide coverage. Market availability of coverage is also dependent on the willingness of the insurance industry to accept certain risks. Most insurers are disinclined to write this form of pollution liability coverage.

Alaska, like all states, limits the amount of risk an insurer can undertake (AS 21.12.010). This risk limitation is based on the amount of a company's capital and surplus. An insurer who is licensed to sell insurance for risks in Alaska can only issue a policy with less risk

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[1]Michael J. Kennish, Ph.D., *Ecology of Estuaries: Anthropogenic Effects*, Boca Raton: CRC Press, 1992, pp. 66-67.

exposure than ten percent of its capital and surplus. As used here, capital and surplus refers to the amount of money available for the payment of claims and other obligations. In other words, before a company can cover one policy for $150 million, it must have at least $1.5 billion in capital and surplus. There are few property and casualty insurers licensed in the United States which have the necessary surplus to legally write the required coverage proposed by the MMS.

When one considers the State-imposed risk limitation along with the willingness of insurers to provide pollution coverage, the options to obtain coverage decrease significantly. The State of Alaska knows of only three insurance conglomerates that are willing to write this form of pollution liability coverage. Two of these groups do not have the required surplus to issue even one single policy for the full liability limits of $150 million as required by the proposed rulemaking.

In some circumstances where it is difficult to obtain insurance, states allow unlicensed companies to provide insurance. It is possible companies could obtain pieces of coverage through these unlicensed companies which would combine to provide the required $150 million proof. These sources are not subject to State regulatory oversight, and as such, are not subject to the same financial oversight as licensed companies.

The reinsurance market is another alternative to provide the proposed financial responsibility coverage. Financial difficulties currently experienced by London-based reinsurance enterprises, however, make them unable to absorb additional risks of this magnitude.

Some oil-related companies which operate vessels obtain liability coverage from Protection and Indemnity Clubs (P&I Clubs) for their marine-related risks. These organizations provide coverage through a complex system. Usually, members must cover some of the costs of an oil spill, the group as a whole covers some of the costs, and reinsurance covers the remaining costs. It is unlikely, however, that P&I Clubs would have the ability or desire to cover onshore facilities affected by the proposed rulemaking.

Again, for even those companies which could obtain the proposed level of financial responsibility, there will be additional problems. Costs of providing this proof would likely be passed on to the consumer possibly placing commodities and services out of reach to most Alaskans and small businesses.

It should be noted that other means exist to assure adequate funding for oil spill clean up. For instance, the Oil Liability Trust Fund (26 U.S.C. 9509) is available for oil spill expenses authorized by Section 1012 of OPA 90. As well, many states have similar funds. Alaska's fund is known as the Oil and Hazardous Substance Release Response Fund (AS 46.08.010).

POTENTIAL ECONOMIC EFFECT

The potential economic consequences of the proposed rulemaking are overwhelming. Taken to an extreme, which appears to be the case in the *Advance Notice*, the proposed regulations would have wide-ranging effects. Activities in Alaska's wetlands, which comprise virtually half of the State, would require coverage of $150 million of financial responsibility. The result would be a decline in general commerce, a decrease in essential government services, increased hardships in rural areas including Native villages, and a swift blow to Alaska's vital oil and gas industry. Each of these topics is discussed in more detail below.

General Effect on Commerce

The proposed rulemaking would likely have a crippling effect on Alaska's economy sending it into a tailspin which could result in a severe depression. Because of its unique abundance and geographic distribution of its populated communities, most of Alaska's commerce occurs in wetlands. While some of these areas may not appear to be wetlands at first glance, they have been defined by regulation to be so. Consequently, the proposed regulations potentially affect distribution of home heating oil, bulk storage of fuel, gas stations, outfitter-guide operations, eco-tourism operators, floatplane companies, and the trucking industry.

If only applied to fuel distributors, the proposed regulations would have a mind-boggling effect. Most rural Alaska communities use diesel fuel to generate electric power. Even assuming it would be possible to obtain a $150 million proof of financial responsibility for distributions serving those communities, fuel prices would rise to an unreasonable level. Businesses which could afford to provide the required proof of financial responsibility would have to pass the costs to the consumer. Such a requirement would likely force rural fuel distributors and owners of storage facilities to cease operations.

The effect on the fishing industry would also be devastating. Vessels could no longer be legally fueled at refueling docks because the small companies operating these facilities would not be able to meet the financial responsibility requirements. As a result, the Alaska fishing industry would be forced to violate these regulations in order to remain in business.

Tourism, another important industry in Alaska, would decline because tourism-related companies which handle fuel would no longer be in business. It should be noted that most wilderness adventure businesses transport fuel for use in vehicles, boats, lanterns and camp stoves. Bush pilots also transport tourists and hunters along with fuel provisions to remote locations. Tour operators which store fuel for busses could also be forced out of business.

Also, the mining and timber industries would be adversely affected. Resource development companies must use fuel to carry out activities in wetland areas. Few of these companies could obtain proof of financial responsibility for $150 million.

Effect on Government Operations

Many local and State government agencies would be affected by the proposed rulemaking. The State Department of Transportation stores fuel in locations across the State for highway maintenance operations. Rural village governments store diesel fuel to generate power and provide heat. In addition, field personnel must carry fuel with them during extended trips to field locations. Virtually every one of these operations would be covered by the proposed rulemaking.

Effect on Rural Villages

The proposed rulemaking could close rural schools, compel rural communities to abandon electric power generation facilities, and force rural residents into further poverty. There are no practical alternatives to diesel-powered electrical generation to most Alaska villages due to the limited extent of electrical interties. Besides the economic effect, social implications would be significant. Reduced availability of fuel would substantially curtail subsistence activities.

Consider just the effect the rulemaking would have on the operators of the 325 tank farms located in rural Alaska. The total capacity of all of these tank farms is approximately 1.5 times the amount of oil spilled by *Exxon Valdez*, yet rural Alaska would be burdened with the task of providing nearly $48 billion of financial responsibility.

As an example of the effects the proposed rulemaking would have on rural Alaska, consider the Native village of Chevak, located in the Yukon-Kuskokwim delta. The population base of approximately 600 people is not enough to support the costs of obtaining proof of financial responsibility for facilities which handle or store oil or oil products. Consequently, the village's eight tank farms would have to close. Individual tank farms are operated by the village school, the local government, the electric utility, a Native corporation, and a private entity. The proposed rulemaking would limit or shut down operations at the school. The electric utility would no longer be able to generate power from diesel fuel. The airport would have to close, thereby limiting residents' contact with the rest of Alaska. Fuel would not be available to power vehicles. Residents would have to scavenge a limited supply of driftwood to fuel wood stoves. Subsistence activities would be curtailed because the villagers would no longer be able to obtain fuel to power outboard motors or snow machines.

The description of the effects of the proposed rulemaking on the residents of Chevak appears to be absurd, however, this scenario is a plausible outcome of implementing the rulemaking as MMS currently proposes. Effectively, the residents of this and other rural Alaska communities would be forced to accept a much reduced standard of living because of a senseless government standard. Implementing the proposed rulemaking would increase rural poverty, encourage depopulation of villages, and decrease health conditions and life expectancy of Alaska's rural population.

Effect on the Oil Industry

Requiring proof of financial responsibility of $150 million for responsible parties in the oil industry also will have negative effects, not only on Alaska but on the nation as well. While large oil companies may be able to meet this requirement, the smaller companies can not. The proposed regulations would force smaller companies to abandon operations in Alaska and throughout the lower 48 states. This result is entirely inconsistent with the Administration's stated goals of reducing imports, stimulating domestic production, reducing our balance of trade and generally stimulating the domestic economy.

For example, none of the companies providing drilling services on the North Slope are likely to be able to obtain $150 million of proof of financial responsibility. Similarly, geophysical survey companies which must store and transport fuel would be adversely affected. These companies transport fuel for use in completing remote seismic surveys. Likewise, the proposed rulemaking could lead to the shutdown of other oil field support contractors who work on the North Slope and in Alaska's Cook Inlet region. Without the support provided by these small companies, lessees would have to provide these services, the cost of which would affect decisions regarding abandonment and production of marginal oil fields.

The proposed rulemaking would provide yet another disincentive for offshore oil and gas exploration in an area already characterized by high costs and low returns. Alaska is experiencing a decline in offshore exploration activities. Generally, implementation of this rulemaking would simply hasten the exodus of domestic explorationists. A reduction in domestic oil exploration and production would result in a tremendous loss of employment, add a greater burden on government to provide social services to unemployed workers, lead to greater dependence on foreign oil, and compromise national security.

Implementation of the proposed rulemaking would result in a further loss of federal and State oil and gas revenues. A decrease in production would result in a corresponding decrease in royalty revenues. Considering remaining oil production, wellhead prices could rise due to increased costs to producers to provide the necessary proof of financial responsibility which would also reduce State and federal revenues.

USE OF ALASKA FINANCIAL RESPONSIBILITY REQUIREMENTS

Section 1019 of OPA 90 provides for state enforcement of financial responsibility requirements in State navigable waters. We encourage the substitution of current State of Alaska financial responsibility requirements for those operations located in or under State navigable waters.

The financial responsibility requirements in Alaska are some of the most comprehensive in the world. They take into account varying levels of risk associated with each category of operator and differentiate between crude and noncrude oil. In addition, operators storing less than 5,000 barrels of crude oil, or less than 10,000 barrels of noncrude oil are exempt from

financial responsibility requirements. Only tankships would be required by State law to provide $150 million or greater proof of financial responsibility. Alaska law requires crude oil pipelines and offshore exploration and production facilities to provide proof of financial responsibility of $50 million.

It may also be appropriate to consider implementation of approved methods of providing proof of financial responsibility in Alaska waters as outlined in statute (AS 46.04.040) and in the Alaska Administrative Code (18 AAC 75.205 et. seq.). When developing its approved means of providing proof of financial responsibility, the State of Alaska worked with the oil and insurance industries and other interested parties to assure these provisions were reasonable, practical and effective.

UNCERTAINTY RELATING TO THE PROPOSED RULEMAKING

Uncertainty regarding who is covered by the proposed regulations is exemplified in MMS documents concerning the proposed rulemaking. For example, the undated news release from the Alaska OCS Region which accompanied the August 25, 1993 MMS news release states that the financial responsibility requirements could affect facilities which handle oil or oil products including federal, state, municipal and private facilities. During our meeting with MMS personnel from Washington D.C., we were informed that federal facilities would not be affected by the proposed rulemaking. When addressing who will be affected, both the *Advanced Notice* and comments made by MMS personnel suggest certain groups "may" be affected. It is difficult to provide meaningful comments on proposed regulations when it is uncertain who these regulations are intended to affect.

It appears that MMS is also uncertain regarding Congressional intent. When addressing intent, MMS personnel referenced the OPA 90 Conference Report, but it is unclear what other sources have been investigated to determine Congressional intent. It also appears that limitations imposed by the definition of "responsible party" have not been carefully considered. Because this proposed rulemaking could potentially cripple commerce within Alaska and other states, we urge MMS to adopt a more practical approach and reevaluate its preliminary determination on the jurisdictional requirements of OPA 90.

CONCLUSION

In summary, MMS's interpretation of OPA 9[illegible] financial responsibility requirements would profoundly affect Alaska and other states. The proposed rulemaking would be an unwarranted impediment to commerce and government operations. Additionally, implementation of the proposed rulemaking would not provide reasonable protection of the environment. Failure to provide exemptions, exclusions or modifications to the application of the proposed regulations would force many government agencies and private businesses into non-compliance.

Since a large part of Alaska is considered navigable waters (i.e., wetlands), under the proposed regulations small businesses and local governments would be required to provide $150 million proof of financial responsibility. Most facility operators, however, would not be able to obtain this level of financial responsibility. Noncompliance would subject them to astronomical fines and possible civil and criminal charges. Since most of these entities could not afford to pay the fines, the proposed financial responsibility requirements would force facility owners and government agencies to cease many vital services.

The State of Alaska respectfully requests MMS to restrict its rulemaking for the proof of financial responsibility portion of OPA 90 to those operations and activities traditionally within MMS's jurisdiction. We appreciate the opportunity afforced by MMS to comment and we look forward to the upcoming workshop in Anchorage.

Sincerely,

Paul C. Rusanowski, Ph.D.
Director

City and Borough of Sitka

304 LAKE STREET. SITKA, ALASKA. 99835

January 20, 1994

Joseph P. Green, Chairman
Committee on Oil and Gas
Alaska House of Representatives
Capitol Building
Juneau, Alaska 99801-1182
FAX 465-6790

Re: HJR No. 49

Dear Representative Green,

As Municipal Administrator for the City and Borough of Sitka, Alaska I am writing to inform you of Sitka's support of your sponsored House Joint Resolution No. 49.

We oppose these U.S. Mineral Management Service proposed regulations as those affected within the City and Borough of Sitka would find it impossible to comply and still remain in business.

Your effort to pass HJR No. 49 is greatly appreciated.

Sincerely,

Gary L. Paxton
Administrator
City and Borough of Sitka
FAX 747-7403

END

01-21-1994 01:33PM FROM

RAPA

Rural Alaska Power Association

January 21, 1994

Representative Joe Green
Alaska State Legislature
Capitol Building
Juneau, Alaska 99801-1182

Dear Representative Green,

The Rural Alaska Power Association Board of Directors and Membership are certainly in full support of HJR 49. The regulations as proposed in OPA-90 would destroy all our rural power plants ability to serve their customers as they would not be able to obtain the proposed $150,000,000 in insurance coverage.

Enclosed is a copy of the letter we drafted further defining our opposition to the regulations.

Thank you for having the vision and courage to stand up for all Alaskans to say NO to this type of mindless, costly, non-productive regulatory mis-informed, mis-directed output from Washington. Bravo for you!

Sincerely,

Linda Dianne Rabb

Linda Dianne Rabb
Executive Director

CC: RAPA Board of Directors

P.O. Box 100214 • Anchorage, Alaska 99510 • Phone (907) 245-[illegible]

KAPA

Rural Alaska Power Association

January 20, 1994

Chief, Engineering & Standards Branch
Department of the Interior
Minerals Management Service
Mail Stop 4700
381 Elden Street
Herndon, Virginia 22070-4817

Dear Sir,

On behalf of our Board of Directors and Member electric utilities in rural Alaska these comments are submitted. The development of new regulations that would require corporations and individuals to post $150 million in liability insurance before they can legally move or store oil or oil products across navigable waters is the most absurd piece of misguided, misdirected, unformed attempt to solve one problem by creating an even bigger problem that I have been witness to in recent years.

The financial responsibility requirements of OPA '90 will adversely affect the businesses and livelihoods of numerous Alaskans as over 70 percent of Alaska's inhabitable land can be classified as wetlands. Almost all cities, towns and villages are built along "navigable waters". This type of legislative and regulatory hamstringing of our small business will be the death knell of any hope of economic recovery our great country may have.

If the intent was to insure the people affected by large catastrophic spills of oil tankers cargo, then the amendments to statute offer the only solution to this regulatory morass. Do not draft unenforceable, unmaneageable, and unreasonable regulations which will make an entire nation of lawbreakers who are unable to comply with the financial responsibility section of OPA '90.

Sincerely,

Linda Dianne Rabb

Linda Dianne Rabb
Executive Director

CC: RAPA Board
Resource Development Council
President Bill Clinton
Alaska Delegation in Congress

P.O. Box 100214 • Anchorage, Alaska 99510 • Phone (907) 345-5771 • Fax (907) 345-[illegible]

KONIAG, INC.

• 4300 B Street, Suite 407, Anchorage, AK 99503 (907) 561-2668 • FAX (907) 562-5258 •

Jeff

January 19, 1994

Joseph P. Green, Chairman Committee on Oil & Gas
Alaska State House of Representatives
Capitol Building
Juneau, AK 99801-1182

Dear Representative Green:

Please be advised that Koniag, Inc. fully supports your House Joint Resolution No. 49 regarding the proposed M.M.S. regulations pertaining to the Oil Pollution Act of 1990.

It should be clear to everyone that the proposed requirement of anyone in the oil transport/handling business to "commit and maintain $150 million to clean up a spill" is ludicrous at best.

That such a regulation would have a devastating effect on Alaska (and other states) is probably a gross understatement.

We wish you the best in getting H.J.R. 49 passed expeditiously.

Sincerely,

KONIAG, INC.

Uwe L. Gross
Chief Executive Officer

f: OPA 90

OPA '90: Alaskans must respond

By Paul Fuhs 1/3/94
For the Journal of Commerce

If your business, school or home, boat dock, farm, etc. moves or stores oil, you are required to have a bond of $150 million!

This strange quirk of federal law is getting a lot of attention as the public comment period on the Oil Pollution Act of 1990 (OPA '90) has just been extended. The Department of the Interior's Minerals Management Service has recently issued an "Advanced Notice of Proposed Rulemaking" through which it will write the law's implementation regulations.

OPA '90 was Congress's effort to meet the goal of ensuring that there would be the finances to clean up major oil spills, anytime and anywhere in U.S. waters. The March, 1989, transportation disaster of the Exxon Valdez was clear in the public mind. The feelings of outrage and impotence fanned the flames of national conscience. The battle cry of "do something!" reverberated through the halls of Congress.

What was a well-intentioned legal framework became the equivalent of a "drive-by shooting."

The intended target of large tanker spills may have been hit. The tragedy is that small business in America became the victim. The 91-page federal law, a reaction to the $2 billion oil cleanup in Prince William Sound, imposed a $150 million bond on all "offshore facilities."

The idea of "fair penalties" is ignored in Section 1016(c). It states:

"...each responsible party with respect to an offshore facility shall establish and maintain evidence of responsibility of $150,000,000..."

The legislation has no flexibility and the punishment is totally out of proportion with the crime. If fully implemented and enforced, this law will require the same bonding at the Valdez oil terminal tank farm and the Unalakleet school heating oil storage tank.

The distortion of the legislative intent of this law lies in the interpretation of three key terms:

"Offshore facilities": This goes beyond offshore drilling and production rigs. There is no "minimum size" or potential risk. Inland pipelines, tanker trucks, neighborhood gas stations and marinas, and even residential storage tanks will all be required to have separate bonds, even on the same site and operated by the same owners.

"Navigable waters" is defined in the bill as "waters of the United States," which includes wetlands. The regulatory net has now gone from singular offshore platforms to anything on land which is "wet," or adjacent to wetlands. In Alaska, that means 70 percent of our real estate will be affected (the other 30 percent is statistically vertical or glacial!).

"Responsible party" is no longer used in the context of Outer Continental Shelf leasing. OPA '90 defines this term as anyone who is involved in the transport of any quantity of oil products over land which is "wet."

To protect Alaska's small businesses from these inappropriate regulations, this section of the law must be changed. We do not have the fleet of small, independent oil producers, on or offshore, that other states have. However, Alaska does have "facilities" in every community, rural hospital, village school, remote airstrip, tourist lodge, cold storage facility, dock, mining camp, and scientific research station.

"Certificates of financial responsibility," as the bonds are known, are cost-prohibitive, if they are available at all, at any price. Small businesses that include their own power generation capacity are about to become the victims of good intentions gone astray. While aiming at the prevention of another Exxon Valdez, the Congress has used the wrong artillery and will certainly "take out" small business across the nation, not just Alaska.

No one will argue with the goal. However, the Department of the Interior and the Congress must be the responsible for the impacts of their stray bullets. The penalty must be proportional to the risk. This law requires that the end user of the petroleum products absorb the costs or do without. In Alaska, "doing without" can be the difference between life and death. It will have a pervasive economic cost, with a good chance of environmental costs as well.

Alaskans must speak with one voice on this subject. The Minerals Management Service will hold a public hearing in Anchorage in February. You can participate in person, or write, by contacting:

Offshore Operations and Safety Management
Minerals Management Service
Mail Stop 4700
381 Elden Street
Herndon, VA 22070-1575
Or, fax 703-787-1675.

Send this section of OPA '90 back to Congress to change and refocus on the appropriate goal. The bonding requirements must be tailored to the safety record and the worst-case scenario of a site-specific spill. "Offshore" should not get in the definitional trap of "wetlands."

The governor, the Department of Commerce and Economic Development and other executive branches are working to bring sanity to this discussion.

Paul Fuhs is Commissioner of the State Department of Commerce and Economic Development.

Municipality of Anchorage

OFFICE OF THE MAYOR

P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
TELEPHONE: (907) 343-4431
FAX: (907) 272-1991

Tom Fink, Mayor

December 20, 1993

Chief, Engineering & Standards Branch
Interior Dept., Minerals Management Service
Mail Stop 4700, 381 Elden Street
Herndon, Virginia 22070-4827

RE: **OIL POLLUTION ACT OF 1990, LIABILITY REQUIREMENTS**

Dear Sir:

This letter responds to your Advanced Notice of Proposed Rulemaking that would require citizens to post a $150 million liability bond before transporting oil products across navigable waters.

According to the notice, there is no minimum amount of oil products stored or transported that would be excluded from the liability bond requirement. In addition, aside from peoples' inability to pay for such liability insurance or good reasons for their doing so, we know of no companies willing to provide coverage of such magnitude.

I do not believe Congress intended the liability insurance requirement to cover activities on lakes, rivers, streams and wetlands, but rather intended it for major offshore oil operations. As written, it would place an unacceptable burden on municipal operations and residents alike, particularly because it would include activities in navigable waters deemed "wetlands." It would create an administrative nightmare for the most routine of municipal activities, with no apparent benefits.

We must strongly object when employees, employers and local governments are forced to adhere to regulations that have such far-reaching effects on their freedom and which fail to reflect even the slightest measure of common sense.

Sincerely,

Tom Fink

Tom Fink

rec'd 12/20/93

I work for an electric utility and work with the inventory / reports / expenses. Every cost that would affect the barge outfits is passed to the utility which in turn passes it to the customers. The state has in its statutes mechanisms that use electricity costs to determine the PCE rate, the state "bush" subsidy. The increased cost to the users of the fuel will affect the state, which won't in any way benefit the U.S. The solution most practical is to require the individual state to cover every "potential spiller" under one $150 mil policy! We need an "umbrella" and then we'll get the dogs down from up there and put real people in charge!

Darlene Holmberg
Box 171
Aniak, AK 99557-0171
(907) 675-4334

4221

The rules proposed to implement the Oil Pollution Act of 1990 must be revised to reflect the intent of Congress. In a state where the majority of the land is classified as "wetlands," virtually any movement of fuel products by residents for subsistence, personal or commercial use would result in a violation of law. It will be impossible for most, if not all individuals and businesses to comply with the financial responsibility bonding requirement. It will be just as impossible for government entities (schools, cities, utilities) to comply.

In our local area fuel products are over $2.00 per gallon (in surrounding villages the price can exceed $5.00 per gallon). It is utilized for all aspects of life: heating homes/subsistence camps, generating power, operating boats/snowmachines, etc. Adding this financial responsibility requirement to shippers (it has to come here by water), truckers (it has to be delivered), and finally users (who have to take it to their various use locations) will certainly inflate the price to such a point that a law abiding citizen cannot afford the basic necessities!

To validate your comments, please fill in completely:

Signature John K. Handeland Date: December 23, 1993

Name John K. Handeland, Mayor

Address City of Nome, Box 281

City Nome State Alaska Zip 99762

Phone (907) 443-5242 Fax (907) 443-5349

Optional

DEADLINE FOR MAILING THESE COMMENTS:
FRIDAY, DECEMBER 24, 1993

Send To:

Chief, Engineering & Standards Branch
Department of the Interior

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

☐ 1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

☐ KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 451-2811
FAX: (907) 451-2846

☒ P.O. BOX 110300 - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

November 3, 1993

Tom Fry, Director
Department of the Interior
Mineral Management Service
Mail Stop 4700
381 Elden Street
Herdon, Virginia 22070-4817

Re: Rulemaking under the Oil Pollution Act of 1990

Dear Mr. Fry,

I have reviewed the "Special Information for Alaska," attached to the August 25, 1993 news release announcing proposed rulemaking requiring all operators of facilities handling oil and oil products to provide evidence of financial responsibility.

I am pleased to learn that the Department of Interior believes that the term "navigable waters" traditionally has included wetlands, among other water bodies. As the news release states, large areas of Alaska have been classified as wetlands. Therefore, because title to all navigable waters passed to Alaska at statehood, the state holds title to much more submerged land than Alaskans previously realized.

Now that the Department has made this position clear, I expect that the United States will disclaim interest in all Alaska's wetlands when the state formally asserts title to them.

Very truly,

Charles E. Cole
Attorney General

CEC/JG

cc: Bruce Babbitt
John D. Leshy

ALASKA MUNICIPAL LEAGUE

217 Second Street, Suite 200 ▪ Juneau, Alaska 99801 ▪ Tel (907)586-1325. Fax (907)463-5480

January 25, 1994

TO: Representative Bill Williams, Chair
and Members, House Resource Committee

FROM: Kent E. Swisher, Executive Director

RE: **HJR 49 - Federal Regulations Under OPA 90**

The Alaska Municipal League supports passage of HJR 49. The League specifically opposes unfunded federal mandates as evidenced by the passage of AML Resolution No. 94-2 at the November 1993 annual meeting (copy attached).

The mandate to require municipalities, businesses, and individuals to obtain $150 million in liability insurance before they can legally move or store oil products across navigable waters would be devastating. The proposed regulations by the U.S. Minerals Management Service will adversely affect municipalities and cities in Alaska as many of them are surrounded by navigable waters, which includes wetlands.

The Alaska Municipal League supports HJR 49, which urges the clarification of the proposed definition of "offshore facility" in the financial responsibility section so that it will only apply to facilities that are more clearly offshore, as intended by the Congress under the Oil Pollution Act of 1990.

cc: Rep. Joe Green
Chair, House Committee on Oil and Gas

LAW OFFICES OF
KEMPPEL, HUFFMAN AND GINDER
A PROFESSIONAL CORPORATION

ROGER R. KEMPPEL
RICHARD R. HUFFMAN
PETER C. GINDER
DONALD C. ELLIS

ANDREW J. FIERRO
GEORGE S. HARRINGTON JR.
BOBBY DEAN SMITH

255 E. FIREWEED LANE, SUITE 200
ANCHORAGE, ALASKA 99503-2094
TELEPHONE (907) 277-1604
TELECOPIER (907) 276-2493

January 25, 1994

Representative Joe Green
Room 114
State Capitol
Juneau, Alaska 99801-1182
Attention: Jeff Logan

VIA FACSIMILE: 465-4316

Re: Committee Substitute for House Joint Resolution No. 49

Dear Mr. Logan:

I am writing as general counsel for the Alaska Rural Electric Cooperative Association, Inc. ("ARECA"). ARECA is a non-profit corporation whose members consist of the numerous electric cooperatives located throughout the state of Alaska. Those cooperatives located in rural Alaska for the most part rely upon diesel generation for power production. In turn, bulk fuel storage facilities are located in the villages to provide a ready supply of fuel for the diesel generators. These facilities in numerous instances may be located upon wetlands, and, in any event, most are supplied by a fuel-filled pipeline terminating on lake, river, or bay. Diesel fuel is delivered to these facilities by a barge.

The Mineral Management Services' ("MMS") proposed rules with respect to oil spill financial responsibility in the amount of $150 million would devastate many of these utilities. ARECA's members can only hope that MMS uses common sense in promulgating these proposed regulations. It is ARECA's position that when OPA 90 was enacted, Congress was thinking of oil platforms when drafting the financial responsibility requirements in the law.

For these reasons, ARECA strongly supports passage of the Committee Substitute for House Joint Resolution No. 49. If you need any additional information concerning this matter, please feel free to give me a call.

Sincerely yours,

KEMPPEL, HUFFMAN AND GINDER, P.C.

Roger R. Kemppel

Roger R. Kemppel
General Counsel for Alaska Rural Electric Cooperative, Inc.

RRK:lbf

cc: Dave Hutchens, Executive Director
Alaska Rural Electric Cooperative, Inc.

ALASKA STATE LEGISLATURE
Representative Gail Phillips

November 15, 1993

The Honorable Bruce Babbitt
Department of Interior
1849 C Street NW
Washington, DC 20240

Dear Mr. Secretary Babbitt:

In late August, the Minerals Management Service published an "Advanced Notice of Proposed Rulemaking" in the Federal Register aimed at implementing the Oil Pollution Act of 1990 (OPA). That Act would require individuals, corporations and school districts alike to post $150 million worth of liability insurance before they can legally move or store oil or oil products across or over navigable waters in Alaska and elsewhere. I am writing in urgent protest to this rulemaking.

As you are aware, a very high percentage of Alaska's lands are wetlands and many of our rivers, streams, and lakes are navigable waters which would be covered under these regulations. A requirement for $150 million in liability bonding would affect a major portion of our industries, schools, individuals and transporters of any fuel source to rural Alaska so adversely that it would force them out of business entirely. In particular, the lack of any minimum quantity of oil covered under these rules would force individuals storing only a few gallons for generators or other equipment to violate the law or to get the $150 million in liability bonding.

While Tom Fry, Director of the Minerals Management Service, is asking for input into their rulemaking process regarding the OPA requirements, the agency claims that ". . . the $150 million liability requirement is a statutory demand and that it is outside the scope of the regulations to provide relief from the higher liability level," according the "Resource Review", October 1993 edition.

Session: State Capitol, Juneau, Alaska (907) 465-2689 • Interim: P.O. Box 3304, Homer, Alaska 99603 (907) 235-2921

Introduced by: Mayor Selby
Requested by: Division of Governmental Coordination
Drafted by: Community Development Department
Introduced: 12/02/93
Adopted: 12/02/93

KODIAK ISLAND BOROUGH
RESOLUTION NO. 93-40

A RESOLUTION OPPOSING THE AMOUNT OF FINANCIAL RESPONSIBILITY REQUIRED IN PROPOSED RULEMAKING BY THE MINERALS MANAGEMENT SERVICE

WHEREAS, the Department of Interior's Minerals Management Service (MMS) has published a notice of proposed rulemaking advising all operators of facilities handling oil and oil products located in, on, or under navigable waters of the United States that they will need to provide evidence of financial responsibility; and

WHEREAS, the Oil Pollution Act of 1990 (OPA 90) mandates the development of new regulations to implement provisions of the law that increase financial responsibility requirements to $150 million; and

WHEREAS, for the first time, all operators in, on, or under navigable waters of the United States and its territories, will face new regulations establishing the identical $150 million requirement; and

WHEREAS, OPA 90 potentially broadens the categories of activities that fit the definition of offshore facilities; and local oil and gasoline storage and distribution centers and boat harbors, for example, could be affected; and

WHEREAS, the proposed rulemaking represents an unfunded federal mandate to the State and local governments in Alaska; and

WHEREAS, the proposed rulemaking contains no threshold levels, and facilities of any and all sizes are subject to the $150 million financial responsibility requirement; and

WHEREAS, the proposed rulemaking would pose a serious threat to local fuel distributors; and

WHEREAS, the proposed rulemaking will hit local governments and small operators especially hard, potentially causing serious financial hardship; and

Resource Development Council
for Alaska, Inc.

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035
Phone 907/276-0700 Fax 276-3887

October 28, 1993

Chief, Engineering & Standards Branch
Department of Interior
Minerals Management Service
Mail Stop 4700
381 Elden Street
Herndon, Virginia 22070-4817

Dear Chief:

In September, the Minerals Management Service held a small briefing in Anchorage about the development of regulations mandated by the Oil Pollution Act of 1990. The regulations would require corporations and individuals alike to post a $150 million liability bond before they could legally store or transport oil or oil products across navigable waters.

Since the proposed regulations would have a very serious impact on Alaska, the Resource Development Council requests the Minerals Management Service to schedule public hearings in Alaska at Barrow, Nome, Fairbanks, Anchorage and Ketchikan. The Advance Notice of Proposed Rulemaking has received very little attention in Alaska, where up to 70 percent of the state's non-mountainous lands would fall under the new regulatory requirements. The requirements would have a disproportionate heavy impact on Alaska, affecting a wide range of businesses and citizens in all socio-economic classes.

The liability requirement sets up a situation that is going to be impossible for most businesses and individuals in Alaska to comply with, including rural school districts and utilities, as well as health care facilities, private homes and businesses. Unfortunately, most companies and individuals that will be affected by the ANPR are not aware of the process underway and its implications.

In order to make sure that those most affected have an opportunity to provide critical input and help with the development of new rules that are fair and equitable, hearings should be held in Alaska on this issue.

Sincerely,

RESOURCE DEVELOPMENT COUNCIL
for Alaska, Inc.

Carl Portman
Communications Director

ALASKA STATE LEGISLATURE
Representative Gail Phillips

November 15, 1993

The Honorable Bruce Babbitt
Department of Interior
1849 C Street NW
Washington, DC 20240

Dear Mr. Secretary Babbitt:

In late August, the Minerals Management Service published an "Advanced Notice of Proposed Rulemaking" in the Federal Register aimed at implementing the Oil Pollution Act of 1990 (OPA). That Act would require individuals, corporations and school districts alike to post $150 million worth of liability insurance before they can legally move or store oil or oil products across or over navigable waters in Alaska and elsewhere. I am writing in urgent protest to this rulemaking.

As you are aware, a very high percentage of Alaska's lands are wetlands and many of our rivers, streams, and lakes are navigable waters which would be covered under these regulations. A requirement for $150 million in liability bonding would affect a major portion of our industries, schools, individuals and transporters of any fuel source to rural Alaska so adversely that it would force them out of business entirely. In particular, the lack of any minimum quantity of oil covered under these rules would force individuals storing only a few gallons for generators or other equipment to violate the law or to get the $150 million in liability bonding.

While Tom Fry, Director of the Minerals Management Service, is asking for input into their rulemaking process regarding the OPA requirements, the agency claims that ". . . the $150 million liability requirement is a statutory demand and that it is outside the scope of the regulations to provide relief from the higher liability level," according the "Resource Review", October 1993 edition.

Session: State Capital, Juneau, Alaska (907) 465-2689 • Interim: P.O. Box 3304, Homer, Alaska 99603 (907) 235-2921

Therefore, I can't emphasize strongly enough the need for making our opposition to these newly proposed rules known. I encourage your strong consideration of the dire impacts these rules will have on Alaskans if they go into effect. Anything you can do to alleviate this potential problem will be greatly appreciated by all Alaskans.

Sincerely,

Gail Phillips

Representative Gail Phillips
HOUSE MAJORITY LEADER

GP:jmj

cc: Chief, Engineering & Standards
Department of the Interior

Sen. Frank Murkowski
Sen. Ted Stevens
Rep. Don Young

Resource Development Council
Arctic Power
Alaska State Chamber
Alaska Support Industry Alliance

Introduced by: Mayor Selby
Requested by: Division of Governmental Coordination
Drafted by: Community Development Department
Introduced: 12/02/93
Adopted: 12/02/93

KODIAK ISLAND BOROUGH
RESOLUTION NO. 93-40

A RESOLUTION OPPOSING THE AMOUNT OF FINANCIAL RESPONSIBILITY REQUIRED IN PROPOSED RULEMAKING BY THE MINERALS MANAGEMENT SERVICE

WHEREAS, the Department of Interior's Minerals Management Service (MMS) has published a notice of proposed rulemaking advising all operators of facilities handling oil and oil products located in, on, or under navigable waters of the United States that they will need to provide evidence of financial responsibility; and

WHEREAS, the Oil Pollution Act of 1990 (OPA 90) mandates the development of new regulations to implement provisions of the law that increase financial responsibility requirements to $150 million; and

WHEREAS, for the first time, all operators in, on, or under navigable waters of the United States and its territories, will face new regulations establishing the identical $150 million requirement; and

WHEREAS, OPA 90 potentially broadens the categories of activities that fit the definition of offshore facilities; and local oil and gasoline storage and distribution centers and boat harbors, for example, could be affected; and

WHEREAS, the proposed rulemaking represents an unfunded federal mandate to the State and local governments in Alaska; and

WHEREAS, the proposed rulemaking contains no threshold levels, and facilities of any and all sizes are subject to the $150 million financial responsibility requirement; and

WHEREAS, the proposed rulemaking would pose a serious threat to local fuel distributors; and

WHEREAS, the proposed rulemaking will hit local governments and small operators especially hard, potentially causing serious financial hardship; and

WHEREAS, it appears that the private insurance market does not have the capacity to provide for the financial responsibility requirement, even if it was financially feasible for those subject to the requirement to obtain it; and

WHEREAS, the proposed rulemaking is vague and difficult to interpret, especially in terms of its application;

NOW, THEREFORE, BE IT RESOLVED BY THE ASSEMBLY OF THE KODIAK ISLAND BOROUGH THAT:

Section 1: The Kodiak Island Borough Assembly is opposed to the amount of financial responsibility required in the proposed rulemaking publicly noticed by the federal Minerals Management Service.

Section 2: The Assembly urges the MMS to prepare workable regulations that are fair and equitable, and truly relate to the potential impact an operator might cause should an oil spill occur.

ADOPTED BY THE ASSEMBLY OF THE KODIAK ISLAND BOROUGH THIS 2ND OF DECEMBER, 1993

KODIAK ISLAND BOROUGH

Jerome M. Selby, Borough Mayor

Jack L. McFarland, Presiding Officer

ATTEST:

Donna F. Smith

Donna F. Smith, CMC, Borough Clerk

STATE OF ALASKA / WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

DIVISION OF SPILL PREVENTION AND RESPONSE
410 Willoughby Avenue, Suite 105
Juneau, AK 99801-1795

Telephone: (907) 465-5250
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October 26, 1993

Department of Interior
Minerals Management Service
381 Elden Street
Herdon, VA 22070-4817

Attention: Chief, Engineering and Standards Branch

Dear Sir or Madam:

Re: **ANPRM 30 CFR Part 253, Oil Spill Financial Responsibility for Offshore Facilities**

The Alaska Department of Environmental Conservation (DEC) has reviewed the Minerals Management Service's (MMS) proposed rule to implement oil spill financial responsibility requirements of the Oil Pollution Act of 1990 (OPA 90).

As presently drafted, DEC believes the proposed rule far exceeds the intent of OPA 90 and the traditional jurisdiction and mission of MMS. We recommend you redirect the scope of your rulemaking effort. Specifically, MMS should:

1) **Choose a more appropriate interpretation of the term "navigable waters".** For the purpose of implementing OPA 90, MMS should limit its role to the Outer Continental Shelf and state submerged lands outside of traditional lines of demarcation. The move to include state wetlands in this rulemaking is particularly objectionable.

2) **Rely on State of Alaska financial responsibility requirements in State waters.** State of Alaska financial responsibility requirements are some of the most comprehensive in the world. They take into account varying levels of risk associated with each category of oil operator in the State, and differentiate between crude and noncrude oil - AS 46.04.040 (copy enclosed). Operators storing less than 5,000 barrels of crude oil, or less than 10,000 barrels of noncrude oil, are exempt from financial responsibility requirements - AS 46.04.050 (copy enclosed). Financial responsibility amounts of $150 million or greater are not applied to any operation in Alaska other than crude oil tankships.

Crude oil pipelines and offshore exploration and production facilities, those operations appropriately regulated by MMS under OPA 90, are required to show proof of financial responsibility in the amount of $50 million in State waters. DEC does not object to MMS regulating these operations, offshore, at the $150 million level, since those are the specific operations we believe Congress intended to apply that amount to.

3) **Exempt small operators not within MMS's regulatory expertise and traditional jurisdiction.** The proposed rules radically expand MMS's scope of jurisdiction and the type of facilities regulated, and fail to recognize any difference in risk between small and large operators. Since a $150 million financial responsibility requirement is set in statute, MMS should decide which operations pose a threat of that magnitude and exempt all smaller operators. Clearly, Congress did not intend to impose such a burden on the small operators who would be affected by your proposed rule.

I am disappointed that MMS has not exercised its discretion to interpret and carry out Congressional intent in a more realistic manner. I suggest that MMS reconsider the scope of this rulemaking before going any further.

Sincerely,

Michael A. Conway
Director

MM\jsg (G:\SPAR\ANPRM.MMS)

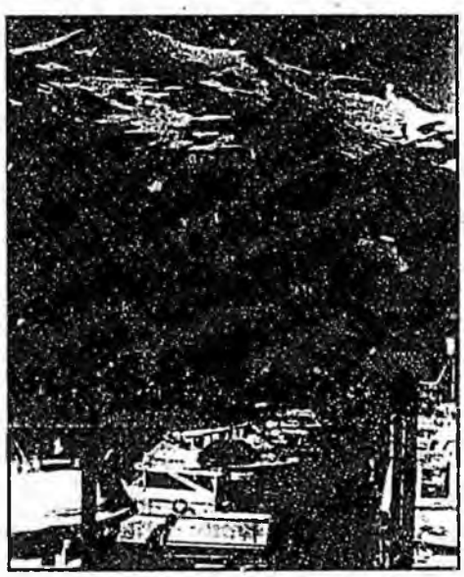
Enclosures (2): AS 46.04.040
AS 46.04.050

cc: John Sandor, Commissioner
John Katz, Governor's Office, Washington, D.C.
Dr. Paul Rusanowski, Governor's Office, Division of Governmental Coordination
Regional Administrators (4)

Resource Review

December 1993 A monthly publication of the Resource Development Council, Inc.

OPA liability regulations "unenforceable"



The financial liability requirements of OPA '90 will also apply to private and public marinas.

Alaskans from Kodiak to Kotzebue send clear message to Washington

Alaskans, rural and urban, from Kodiak to Teller, and from all walks of life, are sending in a wave of critical comments to the U.S. Minerals Management Service (MMS) over the development of new regulations that would require corporations and individuals alike to post $150 million in liability insurance before they can legally move or store oil or oil products across navigable waters.

In response to a feature article in the October Resource Review and a recent RDC "Action Alert," Alaskans are writing MMS in large numbers to tell federal regulators how the financial responsibility requirements of the Oil Pollution Act of 1990 (OPA '90) will affect their businesses and livelihoods.

So far the message MMS is hearing is that the financial responsibility requirements of OPA '90 will adversely affect many segments of the economy and "result in unenforceable regulations," according to Tom Fry, Director of MMS.

In late August, MMS published an "Advanced Notice of Proposed Rulemaking" in the Federal Register aimed at implementing the financial responsibility section of OPA '90. The financial responsibility requirements of the law apply to both commercial and private operations and can be read to literally include any person or persons transporting or storing any oil or oil products on or over navigable waters. The law makes no exceptions for quantity. In theory, if one moves as little as five gallons of oil or diesel on a sled behind a snowmachine across navigable waters, that person is responsible to the OPA '90 requirements.

State, federal and municipal facilities, as well as schools, airports, boat harbors, electric cooperatives, bulk fuel tank owners, wilderness lodges and many businesses and individuals would fall under the requirements.

In the past, a $35 million liability bond was required for Outer Continental Shelf (OCS) facilities, but OPA '90 increased financial responsibility to $150 million and expanded its application to navigable waters. According to

(Continued to page 4)

"It appears that the private insurance market does not have the capacity to provide for the financial responsibility requirement, even if it was financially feasible for those subject to the requirement to obtain it." Mayor Jerome Selby, Kodiak Island Borough

Amendments to statute offer only solution to regulatory dilemma

(Continued from page 1)

Fry, the term "navigable waters" includes most of the surface waters in the United States and adjacent wetlands. Moreover, "offshore facilities" is considered, under the law, any facility located in, on or under any of the navigable waters of the United States.

"These definitions seem to create a financial responsibility requirement for any activity that can spill oil and is located in, on, or under most of the surface waters of the United States and adjacent wetlands," Fry said. "This goes beyond the offshore oil platforms with which the MMS is familiar."

Fry confirmed that OPA '90 applies to state and municipal governments that operate facilities. "This could be significant to states such as Alaska, where many small communities maintain and operate oil fueled electric generating facilities."

Fry said public responses center mostly on the broad scope of the definition "offshore facility" and the probability that $150 million in liability bonding would not be available or could not be afforded the majority of those potentially affected by the law.

"At $150 million, we believe that very few companies can self-insure; therefore, insurance, as evidence of oil spill financial responsibility, will probably gain increasing importance when the oil spill financial responsibility requirements of OPA '90 are implemented," Fry said.

The MMS would like to be able to develop approaches to implement OPA '90 in a reasonable and balanced way that preserves the purpose of financial responsibility without creating economic hardships, Fry said. "We are trying to determine what, if any, flexibility is available within the confines of the statute."

So far, however, the federal agency claims the language of the statute leaves it with very little discretion. Fry warned unless the agency follows the law as literally stated, "our regulations may fail on one or more key issues if challenged in the courts."

The financial responsibility section of the law is based on broad definitions such as "offshore facility," "navigable waters" and "responsible parties." RDC is urging MMS to seek amendments to the statute to address these definitions and bring regulations in line with the original intent of Congress.

Representative Gail Phillips, Majority Leader of the Alaska House of Representatives, warned Secretary of the Interior Bruce Babbit that MMS's newly proposed rules will have dire consequences on Alaskans if they go into effect.

"A requirement for $150 million in liability bonding would affect a major portion of our industries, schools, individuals and transporters of any fuel source to rural Alaska so adversely that it would force them out of business entirely," Phillips warned. "In particular, the lack of any minimum quantity of oil covered under these rules would force individuals storing only a few gallons for generators or other equipment to violate the law or get the $150 million in liability insurance."

The Kodiak Island Borough passed a resolution opposing the financial responsibility section of OPA '90, noting that the proposed rulemaking "represents an unfunded federal mandate to the State and local governments in Alaska." The resolution warned that the rulemaking will hit local governments and small operators especially hard, potentially causing serious financial hardship. "It appears that the private insurance market does not have the capacity to provide for the financial responsibility requirement, even if it was financially feasible for those subject to the requirement to obtain it," the resolution stated.

MMS is considering holding a public hearing in Anchorage in February.

Alaska State Legislature

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DISTRICT 10

CHAIR, OIL & GAS COMMITTEE
VICE CHAIR, LABOR & COMMERCE COMMITTEE
JUDICIARY COMMITTEE
RESOURCES COMMITTEE
INTERNATIONAL TRADE & TOURISM COMMITTEE

ECONOMIC TASK FORCE

Representative Joe Green

November 30, 1993

Mr. Tom Fry, Director
Minerals Management Service
Department of the Interior
Washington D.C.

Subject: OPA 90, Section 1016; Financial Responsibility Requirements

Dear Mr. Fry:

This letter applies to your remarks on the above subject matter, presented to the Merchant Marine and Fisheries Committee on October 26, 1993.

The potential financial responsibilities are so enormous to many Alaskans that our public input must be received and weighed carefully. In that regard, your October 20th schedule is commendable, but somewhat perplexing in that three of the four meetings are in the lower 48, in November, 1993 yet you plan the fourth meeting in Anchorage, Alaska "during 1994". In that same announcement you stated that the comment period ends December 24, 1993. This would imply to me that the meeting here in Anchorage is superfluous and won't be considered.

In your above referenced presentation you mentioned that facility can be given the broadest possible interpretation to even include rolling stock and pipelines. You further defined offshore facility as "...any facility of any kind located in, on, or under any of the navigable waters of the United States and ...located in, on, or under any other waters...". Since the Coast Guard considers even intermittent tributaries as navigable even though they may be dry or frozen throughout most of the year and if that's not inclusive enough, you then include any other waters just to make sure of complete coverage. This is indeed a broad interpretation.

But perhaps the most objectionable item is your inclusion of "adjacent wetlands". Because the Corps of Engineers definition of wetlands includes permafrost, nearly all non-mountainous land in Alaska is therefore considered wetlands.

Sir, I implore you to reconsider these extremely broad and unnecessary definitions of areas and facilities requiring the proof of a prohibitive $150 million financial responsibility. This would severely impact a fragile commerce base in Alaska and, quite likely, shut down most of our native villages. Surely you don't intend to do this.

Finally, I respectfully submit that your meeting on September 28, 1993 in Juneau, Alaska and the after-the-fact meeting to be held sometime "during 1994" in Anchorage, appear to have been scheduled so as to avoid meeting with the Alaska representatives you should be talking to . Our legislative sessions run from early January to mid-May in Juneau and as citizen legislators we return to our respective districts for the remainder of the year. Obviously your scheduling, described above, skillfully avoided meeting with the proper personnel.

I suggest you keep open the comment period to include the Anchorage meeting and scheduling it on a date that will allow the Anchorage representatives to attend. After all, over half of the state's representatives come from the Anchorage area.

Sincerely,

Joseph P. Green, Chairman
House Oil and Gas Committee

cc: Senator Drue Pearce, Alaska State Senate
Representative Ramona Barnes, Speaker of the Alaska House of Representatives
Representative Gail Phillips, Majority Leader Alaska State House of Representatives
Alaska Congressional Delegation