

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6551 SENATE RESOURCES

955

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 1/8/90

FURTHER:

Date of 5-Day Notice: 1/8/90
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 1-8-90

RESOURCES Committee considered SJR 54

"no net loss of Wetlands" policy of the United States Army Corps of Engineers and the United States Environmental Protection Agency

and recommended:

- replace with _____ CS SJR 54 (Res) same title
- attached amendment(s) new title
- _____ letter of intent adopted

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

ATTACHES NEW FISCAL NOTE(S):

Department(s)/Date:

Department(s)/Date:

fiscal note(s) _____

zero fiscal note(s) Senate Resources
Committee

appropriation-no fiscal note

Governor's bill w/fiscal note

SIGNING DO PASS:

OTHER RECOMMENDATIONS:

[Signature]
[Signature]
[Signature]
[Signature]
[Signature]

[Signature]
Chair: Signature and Recommendation

DATE: DEC. 15, 1979

MIKE
Your copy

EBUS H.
8/11/79



**MEMORANDUM OF AGREEMENT¹
BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY
AND THE DEPARTMENT OF THE ARMY CONCERNING
THE DETERMINATION OF MITIGATION UNDER THE
CLEAN WATER ACT SECTION 404(b)(1) GUIDELINES**



I. Purpose

The United States Environmental Protection Agency (EPA) and the United States Department of the Army (Army) hereby articulate the policy and procedures to be used in the determination of the type and level of mitigation necessary to demonstrate compliance with the Clean Water Act (CWA) Section 404(b)(1) Guidelines ("Guidelines"). This Memorandum of Agreement (MOA) expresses the explicit intent of the Army and EPA to implement the objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, including wetlands. This MOA is specifically limited to the Section 404 Regulatory Program and is written to provide clarification for agency field personnel on the type and level of mitigation required to demonstrate compliance with requirements in the Guidelines. The policies and procedures discussed herein are consistent with current Section 404 regulatory practices and are provided in response to questions that have been raised about how the Guidelines are implemented.

Although the Guidelines are clearly applicable to all discharges of dredged or fill material, including general permits and Corps of Engineers (Corps) civil works projects, this MOA focuses on standard permits (33 CFR 325.5(b)(1))¹. This focus is intended solely to reflect the unique procedural aspects associated with the review of standard permits, and does not obviate the need for other regulated activities to comply fully with the Guidelines. EPA and Army will seek to develop supplemental guidance for other regulated activities consistent with the policies and principles established in this document.

This MOA is a directive for Corps and EPA personnel and must be adhered to when considering mitigation requirements for standard permit applications. The Corps will use this MOA when making its determination of compliance with the Guidelines with respect to mitigation for standard permit applications. EPA will use this MOA in developing its positions on compliance with the Guidelines for proposed discharges and will reflect this MOA when commenting on standard permit applications.

¹Standard permits are those individual permits which have been processed through application of the Corps public interest review procedures (33 CFR 325) and EPA's Section 404(b)(1) Guidelines, including public notice and receipt of comments. Standard permits do not include letters of permission, regional permits, nationwide permits, or programmatic permits.

II. Policy

A. The Council on Environmental Quality (CEQ) has defined mitigation in its regulations at 40 CFR 1508.20 to include: avoiding impacts, minimizing impacts, rectifying impacts, reducing impacts over time, and compensating for impacts. The Guidelines establish environmental criteria which must be met for activities to be permitted under Section 404.² The types of mitigation enumerated by CEQ are compatible with the requirements of the Guidelines; however, as a practical matter, they can be combined to form three general types: avoidance, minimization and compensatory mitigation. The remainder of this MOA will speak in terms of these more general types of mitigation.

B. The Clean Water Act and the Guidelines set forth a goal of restoring and maintaining existing aquatic resources. The Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions. In focusing the goal of no overall net loss to wetlands only, EPA and Army have explicitly recognized the special significance of the nation's wetlands resources. This special recognition of wetlands resources does not in any manner diminish the value of other waters of the United States, which are often of high value. All waters of the United States, such as streams, rivers, lakes, etc., will be accorded the full measure of protection under the Guidelines, including the requirements for appropriate and practicable mitigation. The determination of what level of mitigation constitutes "appropriate" mitigation shall be based on the values and functions of the aquatic resource that will be impacted. This determination shall not be based upon characteristics of the proposed project such as need, societal value, or the nature or investment objectives of the project's sponsor. "Practicable" shall be defined as in Section 230.10(a)(2) of the Guidelines. However, the level of mitigation determined to be appropriate and practicable under Section 230.10(d) may lead to individual permit decisions which do not fully meet this goal because the mitigation measures necessary to meet this goal are not feasible, not practicable, or would accomplish only inconsequential reductions in impacts. Consequently, it is recognized that no net loss of wetlands functions and values may not be achieved in each and every permit action. However, it remains a goal of the Section 404 regulatory program to contribute to the national goal of no overall net loss of the nation's remaining wetlands base. EPA and Army are committed to working with others through the Administration's interagency task force and other avenues to help achieve this national goal.

C. In evaluating standard Section 404 permit applications, as a practical matter, information on all facets of a project, including potential mitigation, is typically gathered and reviewed at the same time. Notwithstanding this procedural approach, the Corps will, except as indicated below, first make a determination that potential impacts have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be

²(except where Section 404(b)(2) applies).

mitigated to the extent appropriate and practicable by requiring steps to minimize impacts and, only as a last resort, compensate for aquatic resource values. This sequence will be considered satisfied where the proposed mitigation is in accordance with specific provisions of the Corps and EPA approved comprehensive plan that ensures compliance with the compensation requirements of this MOA, as set forth at Section II.B (examples of such comprehensive plans may include Special Area Management Plans, Advance Identification areas (Section 230.80), and State Coastal Zone Management Plans). In some circumstances, it may be appropriate to deviate from the sequence when EPA and the Corps agree the proposed discharge is necessary to avoid environmental harm (e.g., to protect a natural aquatic community from saltwater intrusion, chemical contamination, or other deleterious physical or chemical impacts), or EPA and the Corps agree that the proposed discharge can reasonably be expected to result in environmental gain. This environmental gain must be solely attributable to the project itself, exclusive of benefits which may accrue from proposed compensatory mitigation.

In determining "appropriate and practicable" measures to offset unavoidable impacts, such measures should be appropriate to the scope and degree of those impacts and practicable in terms of cost, existing technology, and logistics in light of overall project purposes. The Corps will give full consideration to the views of the resource agencies when making this determination.

1. **Avoidance.**³ Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative.⁴ The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a)(1) requires that, to be permissible, an alternative must be the least environmentally damaging practicable alternative. In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites⁵ are available and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment. Compensatory mitigation may not be used as a method to reduce environmental impacts in the selection of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).

2. **Minimization.** Section 230.10(d) states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit

³Avoidance as used in this MOA does not include compensatory mitigation.

⁴It is important to recognize that there are circumstances where the impacts of the project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed (40 CFR 230.10(e)).

⁵Special aquatic sites include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pool complexes.

conditions. Subpart H of the Guidelines describes several (but not all) means for minimizing impacts of an activity.

3. **Compensatory Mitigation.** Appropriate and practicable compensatory mitigation will be required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required. Compensatory actions (e.g., restoration of existing degraded wetlands or creation of man-made wetlands) should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site (on-site compensatory mitigation). If on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area (i.e., in close physical proximity and, to the extent possible, the same watershed). In determining compensatory mitigation, the functional values lost by the resource to be impacted must be considered. In most cases, in-kind compensatory mitigation is preferable to out-of-kind. There is continued uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success. Because the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration should be the first option considered.

In the situation where the Corps is evaluating a project where a permit issued by another agency requires compensatory mitigation, the Corps may consider that mitigation as part of the overall application for purposes of public notice, but avoidance and minimization shall still be sought.

Mitigation banking may be an acceptable form of compensatory mitigation under specific criteria designed to ensure an environmentally successful bank. Where a mitigation bank has been approved by EPA and the Corps for purposes of providing compensatory mitigation for specific identified projects, use of that mitigation bank for those particular projects will be considered as meeting the requirements of Section ILC.3 of this MOA, regardless of the practicability of other forms of compensatory mitigation. Additional guidance on mitigation banking will be provided. Simple purchase or "preservation" of existing wetlands resources may in only exceptional circumstances be accepted as compensatory mitigation. EPA and Army will develop specific guidance for preservation in the context of compensatory mitigation at a later date.

III. Other Procedures

A. Potential applicants for major projects should be encouraged to arrange preapplication meetings with the Corps and appropriate federal, state or Indian tribal, and local authorities to determine requirements and documentation required for proposed permit evaluations. As a result of such meetings, the applicant often revises a proposal to avoid or minimize adverse impacts after developing an understanding of the Guidelines

requirements by which a future Section 404 permit decision will be made, in addition to gaining an understanding of other state or tribal, or local requirements.

B. In achieving the goals of the CWA, the Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources. Measures which can accomplish this can be identified only through resource assessments tailored to the site performed by qualified professionals because ecological characteristics of each aquatic site are unique. Functional values should be assessed by applying aquatic site assessment techniques generally recognized by experts in the field and/or the best professional judgment of federal and state agency representatives, provided such assessments fully consider ecological functions included in the Guidelines. The objective of mitigation for unavoidable impacts is to offset environmental losses. Additionally for wetlands, such mitigation will provide, at a minimum, one for one functional replacement (i.e., no net loss of values)⁶, with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan, recognizing that this minimum requirement may not be relevant in some cases, as discussed in Section II.B of this MOA.

C. The Guidelines are established as the environmental standard for Section 404 permit issuance under the CWA. Aspects of a proposed project may be affected through a determination of requirements needed to comply with the Guidelines to achieve these CWA environmental goals. Other reviews, such as NEPA and the Corps public interest review, cannot be used to nullify any Guidelines requirements or to justify less rigorous Guidelines evaluations.

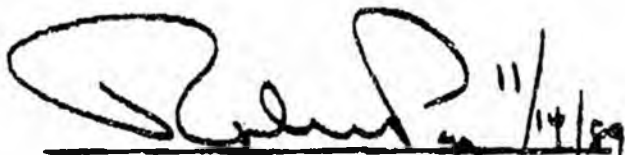
D. Monitoring is an important aspect of mitigation, especially in areas of scientific uncertainty. Monitoring should be directed toward determining whether permit conditions are complied with and whether the purpose intended to be served by the condition is actually achieved. Any time it is determined that a permittee is in non-compliance with mitigation requirements of the permit, the Corps will take action in accordance with 33 CFR Part 326. Monitoring should not be required for purposes other than these, although information for other uses may accrue from the monitoring requirements. For projects to be permitted involving mitigation with higher levels of scientific uncertainty, such as some forms of compensatory mitigation, long term monitoring, reporting and potential remedial action should be required. This can be required of the applicant through permit conditions.

⁶In most cases a minimum of 1 to 1 acreage replacement of wetlands will be required to achieve no net loss of values. However, this ratio may be greater where the functional values of the area being impacted are demonstrably high. Conversely, the ratio may be less than 1 to 1 for areas where the functional values associated with the area being impacted are demonstrably low and the likelihood of success associated with the mitigation proposal is high.

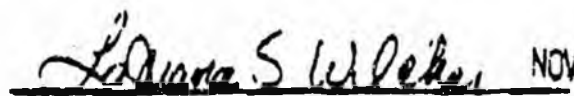
E. Mitigation requirements shall be conditions of standard Section 404 permits. Army regulations authorize mitigation requirements to be added as special conditions to an Army permit to satisfy legal requirements (e.g., conditions necessary to satisfy the Guidelines) [33 CFR 325.4(a)]. This ensures legal enforceability of the mitigation conditions and enhances the level of compliance. If the mitigation plan necessary to ensure compliance with the Guidelines is not reasonably implementable or enforceable, the permit shall be denied.

F. Nothing in this document is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of the agencies involved. Furthermore, formal policy guidance on or interpretation of this document shall be issued jointly.

G. This MOA shall take effect thirty (30) days after the date of the last signature below, and will apply to those completed standard permit applications which are received on or after the effective date. This MOA may be modified or revoked by agreement of both parties, or revoked by either party alone upon six (6) months written notice.


Robert W. Page (date)

Assistant Secretary of the Army
(Civil Works)

 NOV
LaJuana S. Wilcher (date)

Assistant Administrator for Water
U.S. Environmental Protection Agency



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Briefing Paper

Wetlands:

Implications of "No Net Loss"

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A. Issue summary

President George Bush is committed to the worthy cause of reversing the decline in the nation's remaining wetlands base. The White House Domestic Policy Council is acting on a national wetlands policy and several recommendations have been developed by the National Wetlands Policy Forum in which Alaska has participated.

While RDC shares in the concern about the alarming decline in the nation's wetlands base, a new national strategy to protect America's wetlands would pose serious impediments to community development in Alaska necessary to support present and future populations. The emerging "no net loss" wetlands policy would also jeopardize development of the state's natural resources, even on private lands. Since the majority of Alaska's tundra and coastal areas are deemed wetlands, the national strategy should be modified to conform to the realities and needs of Alaska.

B. Why Alaska should be exempted from "no net loss" theory

I. Alaska does not contribute to the wetlands problem

Alaska wetlands cover more than 170 million acres, accounting for over two-thirds of its non-mountainous land. The result is that wetlands of many types and descriptions form the bulk of the developable land. Therein lies the problem.

Approximately 99 million acres remain of the 215 million acres of wetlands that originally existed in the contiguous United States. Consideration of a new federal wetlands policy may have merit for states where the majority of the wetland base has been significantly altered or destroyed by erosion, settlement, agriculture, urban and/or industrial uses. However, Alaska wetlands are not endangered from a quantity or quality perspective. Over 99.95% of Alaska's wetlands remain intact, despite world-class energy and minerals development.

II. "No net loss" is a Catch-22 for Alaska

Since Alaska has almost double the wetlands acreage of the Lower 48 states, application of this national policy would have a disproportionately greater impact on the 49th State than on all the Lower 48 states combined. Ironically, the greatest impact of a national "no net loss" policy will be in the one state that does not have a wetlands loss problem. And thwarting development in Alaska wetlands will do nothing toward solving the wetlands problem where it exists -- in the Lower 48. Alaska should be rewarded, not punished for its model wetlands use. Adding the "final straw" of regulatory control through the "no net loss" concept would accomplish little but to stifle even modest economic growth in urban and rural Alaska, especially along the coast where most people live, work and recreate.

III. Alaska wetlands are different

Wetlands throughout most of Alaska's vast arctic and subarctic regions are different from the freshwater marshes and tidelands elsewhere. Much of Alaska's wetlands are underlain by permanently frozen ground that makes it impossible for these lands to provide most of the functions for which wetlands in the Lower 48 are valued. Important functions relating to flood control, ground water recharge and water quality maintenance are largely absent from permafrost wetlands. Fish and wildlife habitats also function differently in arctic wetlands.

In temperate-zone wetlands, habitat losses can result in corresponding losses to animal populations. Wildlife in these areas are clearly limited by wetland availability, but there is no shortage of habitat in Alaska's vast wetlands where many species of nesting birds tend to be highly dispersed.

Mortality factors outside Alaska are the biggest determinants in population sizes of many bird species nesting in the arctic. After nesting and rearing their young during the brief arctic summer, migratory waterfowl and shorebirds fly south to vanishing wintering grounds in the Lower 48 states and Central and South America. In these locations, the birds are highly vulnerable to hunting and transmission of infectious diseases, aggravated by the crowded conditions. In contrast, there is no evidence that the amount of available summer habitat in Alaska controls their abundance. The evidence does show that limited use of wetlands in Alaska for resource production has not caused any measurable effect on the wildlife populations.

IV. Alaska wetlands are "extra protected"

Recognizing that much of modern day Alaska development occurred following the passage of the National Environmental Protection Act, Alaska wetland losses have been kept to a minimum. Furthermore, about half of Alaska is already protected as federal and state parks, wildlife refuges, wilderness areas and other conservation units. Many of these lands were set aside when Congress passed the Alaska National Interest Lands Conservation Act of 1980. Moreover, a comprehensive set of local, state and federal laws and regulations ensure that all development on remaining lands is carefully scrutinized. The existing regulatory framework *does and will ensure* that wetland loss does not become a problem.

C. Emerging policy frustrates development

I. What is "no net loss?"

Strict implementation of a federal "no net loss" policy would require that wetlands acreage used for development would have to be compensated for by purchase, restoration or preservation of equivalent wetlands acreage. Such a requirement would jeopardize many projects because of enormous offsite mitigation costs. "No net loss" is also a difficult requirement for Alaska where wetlands predominate, where the bulk of Alaska is owned by the state and federal governments and where there has been relatively little development. Among community projects which would be severely impacted by a blanket "no net loss" application are schools, health care facilities, airstrips, roads and marine facilities. Even private construction projects would fall under the new expensive requirements.

II. Memorandum of Agreement

The "no net loss" concept is not yet law nor policy. Moreover, the concept has not been thoroughly defined and is open to widely varying interpretation. Yet the Environmental Protection Agency and the U.S. Army Corps of Engineers have taken an internal step to implement a "no net loss" policy through a recent Memorandum of Agreement on permits under Section 404 of the Clean Water Act.

Application of the MOA will place severe limitations on all future development in Alaska and may prevent future energy development in the state. In addition, the MOA has been promulgated without opportunity for public comment or interagency (state and federal) review, a violation of the Administrative Procedures Act.

While the agencies maintain that this MOA is merely a clarification of existing policy in light of the national goal of no overall net loss of wetlands functions and values, it represents a significant change from the current mitigation requirements of the section 404 (b) (1) guidelines. The 404 (b) (1) guidelines do not call for compensation in its mitigation requirements and have not previously been interpreted to do so. Yet the MOA sets up a mitigation decisionmaking process that includes compensatory mitigation, resulting in a very significant change in the way projects are permitted. The use of the MOA for implementation of new 404 (b) (1) mitigation requirements is in violation of the Administrative Procedures Act.

The MOA is not a clarification of existing policy, but is, in fact, a new policy directing the agencies to achieve no net loss of wetlands. It is inappropriate to adopt the goal of no overall net loss of wetlands through the MOA process prior to any resolution of the issue by the Administration or Congress. The MOA clearly undercuts efforts within the Administration and Congress to craft a workable wetlands policy. It should be immediately revoked.

III. De facto application of "no net loss"

Industry and community leaders across Alaska warn that already some projects are being held hostage through a de facto application of "no net loss," even after they have been designed to avoid and minimize impact to the environment. A case in point is the Municipality of Anchorage's frustrated efforts to secure the needed permits to fill in some wetlands adjacent to its port for infrastructure expansion.

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The state and federal agencies participating in the exhaustive permit process all agree that the use of the land for port facilities is appropriate. However, they are demanding that Anchorage do substantial offsite mitigation. They agree that no mitigation is possible within the proposed development area, but the agencies want the city to spend anywhere from \$200,000 to \$1 million in some other area to create or enhance wetlands.

Outside Anchorage, other communities and development projects are facing major problems when it comes to wetlands. For example, federal agencies have asked North Slope oil and gas operators to rehabilitate wetlands or replace environmentally-sensitive wetlands as a condition for approving permits on the North Slope. The operators note that in lieu of an actual policy, federal agencies overseeing wetlands already have cited the "no net loss" goal in requiring mitigation on a permit by permit basis.

Additionally, native land ownership raises another issue unique to Alaska. Alaska natives received approximately 44 million acres of land from the federal government. These lands were conveyed specifically for development purposes in partial compensation for the extinguishment of their claims to aboriginal title, and to ease the transition from subsistence to a cash economy. A "no net loss" wetlands policy applied to these lands would restrict or preclude both native community development and economic opportunities associated with resource development, leaving little value to the land.

D. Alternatives for accommodating Alaska's position

A resolution passed at the Northwest Alaska Mayors' conference in Noorvik in November called on the federal agencies to revise their wetland protection programs for Alaska by concentrating on classification and protection of productive wetlands that actually provide vital fish and wildlife and water quality benefits. This approach recognizes fundamental differences which set Alaska wetlands apart from those in other states.

The adoption of a threshold approach, favored by the Municipality of Anchorage, is one possible alternative means to respond to Alaska's unique position. The threshold approach would allow states in which cumulative wetlands losses are less than 5%-20% of the state's total wetlands to be excluded from provisions of a national "no net loss" policy until the threshold has been met and exceeded. Another approach would be to more carefully define wetlands, distinguishing between "high value" and "low value" wetlands.

E. Recommendation

While the Council is committed to protecting and enhancing those wetlands in Alaska of greatest productivity and highest value, it believes a "no net loss" policy is not appropriate for Alaska. Such a policy in Alaska would accomplish nothing to slow wetlands losses in the contiguous U.S. where the root of the problem exists.

Instead, RDC favors an approach stressing *avoidance* and *minimization* of wetlands disturbances. Such an approach has worked well on the North Slope where the oil industry has successfully mitigated wetland losses by avoiding critical habitat and

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reducing the number and size of facilities. Despite the fact that oil exploration and development on the North Slope have resulted in 25% of the nation's daily domestic oil production, only 0.05% of the wetlands on the Slope have been disturbed. The impact of development has been minimal with no reduction in wildlife population.

RDC looks forward to working with the state and federal government on a national strategy that protects America's wetlands while providing flexibility to Alaska's unique position. Alaskans can support a balanced public policy, one which allows responsible development while keeping wetland losses to a necessary minimum.

F. RDC Action

The Resource Development Council has formed an Alaska Wetlands Action Coalition to spearhead a statewide effort to convince decisionmakers in Washington, D.C., to accommodate Alaska's unique position in the shaping of a national strategy to protect American wetlands.

RDC is organizing community, native and industry leaders under its wetlands coalition to work on the problem. The Council has assisted local communities in developing and advancing resolutions urging President Bush to not subject Alaska to a blanket policy that fails to consider the state's unique position in the wetlands issue. The Alaska Council of Mayors, Alaska Municipal League, the Southeast Conference, the Kenai Peninsula Borough, the Municipality of Anchorage, the Northwest Arctic Borough and other communities, including Seward and Nome, have passed resolutions. Resolutions expressing concern over the impacts of the proposed federal policy to Alaska are pending in a number of other communities.

RDC has published a detailed brochure focusing on Alaska wetlands and what the "no net loss" concept means to the state's economy. The brochure has been widely circulated throughout the state and has been distributed to key public officials in the Lower 48. In addition, the Council has featured in-depth reports of the wetlands issue in its monthly publication, the *Resource Review*.

RDC is working closely with the state and the legislature to adopt a strong unified position on wetlands. A major priority of its 1990 legislative agenda is to secure a definitive and strong position from the Legislature that articulates special consideration for Alaska in any federal "no net loss" wetlands policy. In the new year, RDC also plans to travel throughout the state to give wetlands presentations to affected communities.

For additional information, call RDC at 276-0700.

RDC ALERT

December 7, 1989

RE: Recent EPA/Army Corps Memorandum of Agreement (MOA) on the determination of mitigation under the Clean Water Act Section 404 (b)(1) guidelines

Enclosed is a briefing paper explaining "no net loss" as conceptualized to apply to the nation's wetlands. *Although the idea is under analysis by the Domestic Policy Council, at the direction of President Bush, it is not presently a policy.*

However, with the MOA signed November 14, the Environmental Protection Agency and the Army Corps of Engineers have asserted "no net loss" is a "goal." The purpose statement directs that the MOA "must be adhered to when considering mitigation requirements for standard permit applications." The effective date is December 15, 1989.

In the words of Governor Cowper, "this (MOA) eclipses the policy process and leaves States without a role in decisions affecting their economic futures." RDC, the Alaska delegation, industry officials, communities and the Governor are requesting the MOA be withdrawn.

ACTION NEEDED: 1. Write President Bush asking that the MOA be rescinded.
(Washington, D.C. 20500)

Reasons: It usurps Domestic Policy Council deliberations and violates the Administrative Procedures Act by "rule-making without public input."

2. *Send RDC copies of your letter. (RDC will send them to the Alaska delegation, the Governor, EPA, the Corps and the Domestic Policy Council.)

3. File your permits ASAP to avoid being subjected to the MOA, even though it is being challenged.

*RDC's FAX#(907) 276-3887

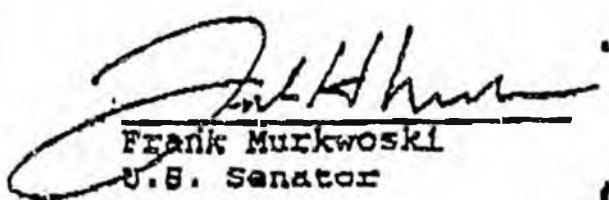
The Honorable Richard G. Darman
December 1, 1989
Page Two

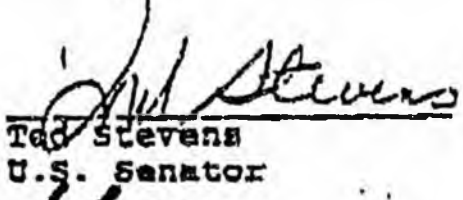
Both agencies admit that no measuring stick has been agreed to for determining whether they are meeting this new goal. The Corps does not know if it is trying to achieve no net loss of wetland functions at a District, Region, State or National level. The MOA claims to recognize that no net loss may not be achieved in each permit. But in the absence of guidance, the agencies will -- by default -- try to achieve no net loss on a permit by permit basis.

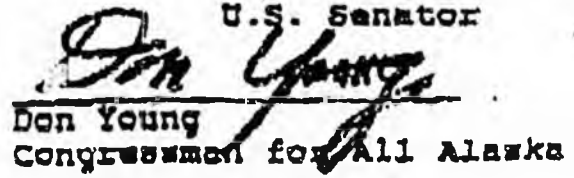
The MOA effectively requires no net loss to be the objective in each permit decision. Under the MOA, this objective would be abandoned only under limited circumstances. The absence of an alternative measuring stick forces a decision in each case between abandoning the national goal and rejecting the claim of special circumstance. This is particularly critical in Alaska. As you know, 60% of Alaska is estimated to be wetlands. While the "South 48" has lost 54% of its wetlands, Alaska has a net loss to date of .05% of its wetlands. We want to be part of the national program and we want to protect our wetlands, but an area 1/5th the size of the whole United States should be looked at as a whole and not on a permit by permit basis.

There is a need for a national wetlands policy, which should include a goal of no overall net loss. Alaska can play a constructive role in shaping a flexible but effective wetlands policy, and can be accommodated by such a policy.

However, this MOA does not advance that cause. It is more of a barrier than a help to developing a workable wetlands policy. It should be revoked. If it is not going to be revoked, then it should be withdrawn and subjected to appropriate public comment. At the very least it should be limited to the 48 contiguous states and a special study made of Alaska's need for a policy of protection of special wetlands and a recognition of our right to use our Statehood and Native lands to assure survival of our state.


Frank Murkwoski
U.S. Senator


Ted Stevens
U.S. Senator


Don Young
Congressman for All Alaska

AMENDMENT

by FRANK

TO: CSSJR 54 (Resources)

page 1 line 5, delete "Relating to"

insert "Opposing"

ACTION ALERT

RECEIVED

TO: All NWMA Members
From: E.A. Johnson
Committee Coordinator

JAN 6 1990

PI "HOLDSWORTH"

Re: ALASKA WETLANDS, The "No-Net-Loss" Policy

President Bush has stated that one of his administration's goals is reversing the loss of this Nation's wetlands. This idea was under analysis by the Domestic Policy Council but, on November 14, 1989, a memorandum of Agreement (MOA) was signed between the EPA and the Corps of Engineers, stating that "no-net-loss" is a goal. Effective date was December 15, but is now given as January 15, 1990. Operators who wish to be excluded from this no-net-loss policy must have their Clean Water Act Section 404 permits filed before January 14, 1990. Because over 170 million acres of Alaska is technically wetland, many of the small placer operations will be forced to cease operations, and the no-net-loss policy, if it is allowed to continue, will especially impact future development in Alaska, including mining operations and North Slope oil.

Take time to write the President and a few key members of the Senate Committee on the Environment and Public Works stating that this MOA should be rescinded because:

- 1.) This MOA circumvents the Administrative Procedures Act. It was made without the opportunity for full public review and comment. It implements binding policy in advance of guidance resulting from consideration of wetland issues by other departments in the administration and by Congress.
- 2.) "No-net-loss" must not be applied indiscriminately. Because of permafrost, much of Alaska is "technically" wetland but because much of Alaska remains undeveloped, 99.95% of the wetlands remain. Contrast this to a loss of nearly 54% in the "lower 48", and the inappropriateness of "no-net-loss" to Alaska becomes readily apparent.
- 3.) This seems to be another area where EPA is establishing more power. To have one agency influencing so many policies regarding public lands and industrial development does not serve this nation well. A consensus on these matters can only be obtained from a broad spectrum of public and government agency input at all levels. We need this consensus in order to develop rational public policy.

Again please take time to write. The approach to wetlands taken by EPA and the Corps of Engineers is inequitable to Alaska. If this MOA is not protested, it will also be applied in a "broad brush" manner in the "lower 48" and again without the opportunity for public input. A mailing list of potential recipients of your letter is provided on the back of this Action Alert.



NORTHWEST MINING ASSOCIATION
414 PEYTON BUILDING
SPOKANE WA 99201

The Executive Office of the President
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

The Honorable Quentin N. Burdick
Chairman, Senate Committee on Environment
and Public Works
SH-511 Hart Senate Office Bldg.
Washington, DC 20510-3401

The Honorable John H. Chaffee
Ranking Minority Member
Senate Committee on Environment
and Public Works
SD-567 Dirksen Senate Office Bldg.
Washington, DC 20510-3902

The Honorable Steve Symms
Member, Senate Committee on Environment
and Public Works
SH-509 Hart Senate Office Bldg.
Washington, DC 20510-1202

The Honorable Max Baucus
Member, Senate Committee on Environment
and Public Works
SH-706 Hart Senate Office Bldg.
Washington, DC 20510-2602

The Honorable Frank Murkowski
(Leading the Alaska Delegation
opposing the agreement)
SH-709 Hart Senate Office Bldg.
Washington, DC 20510-0202

Please send copies of your letters to:

Mr. Steve Borell, P.E.
Acting Exec. Director
Alaska Miners Association
501 Northern Lights Blvd. #203
Anchorage, AK 99503



Alliance for Juneau's Future, Inc.

BEST WISHES FOR GOOD HEALTH AND HAPPINESS IN 1990 AND FUTURE YEARS!!!

JANUARY 1990 PROGRAMS & ACTIVITIES

RECEIVED

JAN 3 1990

January 4, 1990

Thursday morning, 7 to 8 am at THE COOKHOUSE

PHIL R. HOLDSWORTH

Progress report on the various Alliance Committees including an up-date on the Wetlands No Net Loss Policy scheduled for implementation on January 15; status of the AJ mine project EIS; status of up-date on Juneau's Twenty Year Power Plan; status of Juneau access EIS and other Alliance committee reports. Invite member's interests in future Alliance programs and activities.

Thursday morning 10 to 11 am AT THE CENTENNIAL CENTER FOREST SERVICE VISITOR CENTER THEATRE

Meeting of Juneau-Klondike Gold Rush planning group; Review of plans for developing a gold mining exhibit at Centennial Hall and relating this to plans for the observance of the Klondike Centennial in Alaska, the Yukon and Seattle.

Thursday, noon-hour AJF, Inc. BOARD MEETING AT THE LIBRARY CONFERENCE ROOM

The Alliance Board will meet at noon in the Library Conference Room above the downtown parking garage. The agenda will include: Membership and finance report; the planned January-March Alliance meeting/activity schedule; coordination with and possible co-location with JEDC, the Greater Juneau Chamber of Commerce, Juneau Convention and Visitors Bureau and other organizations; possible position statement on issues now before the Alliance. All members as well as Board Members are welcome to attend.

JANUARY 9, TUESDAY 4:30 to 6:30 PM AT CENTENNIAL HALL

LEGISLATIVE WELCOME RECEPTION AT CENTENNIAL HALL. This welcome reception is in partnership with the Greater Juneau Chamber of Commerce, Juneau Convention and Visitors Bureau and other Juneau organizations. All Alliance members are encouraged to welcome Alaska's legislators back to Juneau.

JANUARY 11, THURSDAY MORNING, 7 to 8 am AT THE COOKHOUSE

Alliance Committee and Activity Reports
David Dorris, BLM, a brief progress report on the AJ project EIS
Status Report on the Mayor's Task Force on Fiscal Policy
and plans for the proposed Community Forum on Fiscal Policy

JANUARY 18, THURSDAY MORNING, 7 to 8 am AT THE COOKHOUSE

Alliance Committee and Activity Reports
Status Report on the Mayor's Task Force on Fiscal Policy & Public Forum

JANUARY 25, THURSDAY MORNING, 7 to 8 am AT THE COOKHOUSE

The A-J Mine Project; Overview of Mine Application & Project Plans
Harry Noah - Discussion leader

SUMMARY OF GENERAL MEMBERSHIP MEETING, THURSDAY, DECEMBER 21, 1989

This meeting of the Alliance for Juneau's Future began at 7:00 am at the Cookhouse. There were 43 in attendance including: Chuck Achberger, David Allison, Bill Brock, Tom Cashen, Lee Coffman, John Cooper, Bill Corbus, Dave Dawson, Fred Eastaugh, Don Harris, Rex Hermann, Ralph Hunt, Randall Jenkins, Jim Kohler, Skip Lakeman, Phyllis Lewis, Ladd Macaulay, Neil MacKinnon, Randy March, John McConnochie, Shorty and Evelyn Oliver, Tom Pittman, Rudy Ripley, John Sandor, Scott Spickler, Red Swanson, Debbie Talley, Lee Foreman, Susan Russo, Mike McKinnon, Don Tucker, Ira Winograd, Bev Ward and Gary Jenkins. Visitors were introduced and everyone welcomed.

Because of the Ridoubt Volcano and adverse weather conditions, Senator Ted Stevens had to cancel his Ketchikan - Juneau trip. It is expected that he will be visiting in Juneau in January or February, at which time we hope to have the Senator meet with our membership.

Gary Jenkins gave an excellent presentation on the Corps of Engineers/Environmental Protection Agency Memorandum of Agreement which would apply the "No Net Loss Policy for Wetlands" to Alaska lands. This Memorandum of Agreement was signed November 14-15, 1989, and was to take effect 30 days later, but implementation has been delayed for 30 days, but is now scheduled for implementation January 15, 1990. The Agreement concerns the determination of mitigation measures under the Clean Water Act Section 404(b)(1) guidelines.

Loss of wetlands in the 48 "contiguous" states is a serious problem with an estimated 54% of such lands disturbed or developed in those states. However, about 170 million acres of Alaska falls under the technical definition of wetlands and would be subject to this policy. Less than 1 % of Alaska's wetlands have been developed, but all of Alaska's wetlands would be subject to the No Net Loss Policy outlined in this Agreement.

Ira Winograd of the CBJ Staff provided maps which showed the areas within the Borough which would be classified as wetlands. Substantial Borough as well as private lands would be subject to the proposed restriction of this Memorandum of Agreement.

Gary Jenkins described some of the provisions of the Agreement and summarized the impact on both public and private lands. Although development of such private lands would be restricted or prohibited, the private land owner is not compensated for those restrictions imposed by the government.

The application of a No net Loss Policy for Alaska's 170 million acres of lands classified as Wetlands, will be a major obstacle to all forms of development in the state. Although this policy has merit in application to the 48 states where 54 % of the wetlands are developed or disturbed, it is unreasonable to apply this same policy to Alaska wetlands, where less than 1 % of such lands are developed.

In discussions which followed, Bev Ward reported that the Arctic Slope Regional Corporation had filed a law suit for Declaratory and Injunctive Relief. The City and Borough of Anchorage has also filed suit with Fairbanks also considering this same action. Governor Cowper has indicated the State of Alaska is also considering filing suit. In addition to a challenge of the merits of applying this policy to Alaska, the lawsuits already filed challenge the proposed application of this policy without following the public rule-making procedures required by the Administrative Procedure Act. This major policy action was developed without public hearings or the opportunity for public comment.

This very interesting meeting on this serious question closed at 8 am, with follow-up reports planned for future meetings of the Alliance. The Executive Committee of the Alliance met following the meeting to consider the Alliance position on this and other business. The Executive Committee agrees the proposed No-Net Loss Policy should not be applied to Alaska and will consider appropriate action on this matter.



**MEMORANDUM OF AGREEMENT
BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY
AND THE DEPARTMENT OF THE ARMY CONCERNING
THE DETERMINATION OF MITIGATION UNDER THE
CLEAN WATER ACT SECTION 404(b)(1) GUIDELINES**



I. Purpose

The United States Environmental Protection Agency (EPA) and the United States Department of the Army (Army) hereby articulate the policy and procedures to be used in the determination of the type and level of mitigation necessary to demonstrate compliance with the Clean Water Act (CWA) Section 404(b)(1) Guidelines ("Guidelines"). This Memorandum of Agreement (MOA) expresses the explicit intent of the Army and EPA to implement the objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, including wetlands. This MOA is specifically limited to the Section 404 Regulatory Program and is written to provide clarification for agency field personnel on the type and level of mitigation required to demonstrate compliance with requirements in the Guidelines. The policies and procedures discussed herein are consistent with current Section 404 regulatory practices and are provided in response to questions that have been raised about how the Guidelines are implemented.

Although the Guidelines are clearly applicable to all discharges of dredged or fill material, including general permits and Corps of Engineers (Corps) civil works projects, this MOA focuses on standard permits (33 CFR 325.5(b)(1))¹. This focus is intended solely to reflect the unique procedural aspects associated with the review of standard permits, and does not obviate the need for other regulated activities to comply fully with the Guidelines. EPA and Army will seek to develop supplemental guidance for other regulated activities consistent with the policies and principles established in this document.

This MOA is a directive for Corps and EPA personnel and must be adhered to when considering mitigation requirements for standard permit applications. The Corps will use this MOA when making its determination of compliance with the Guidelines with respect to mitigation for standard permit applications. EPA will use this MOA in developing its positions on compliance with the Guidelines for proposed discharges and will reflect this MOA when commenting on standard permit applications.

¹Standard permits are those individual permits which have been processed through application of the Corps public interest review procedures (33 CFR 325) and EPA's Section 404(b)(1) Guidelines, including public notice and receipt of comments. Standard permits do not include letters of permission, regional permits, nationwide permits, or programmatic permits.

II. Policy

A. The Council on Environmental Quality (CEQ) has defined mitigation in its regulations at 40 CFR 1508.20 to include: avoiding impacts, minimizing impacts, rectifying impacts, reducing impacts over time, and compensating for impacts. The Guidelines establish environmental criteria which must be met for activities to be permitted under Section 404.² The types of mitigation enumerated by CEQ are compatible with the requirements of the Guidelines; however, as a practical matter, they can be combined to form three general types: avoidance, minimization and compensatory mitigation. The remainder of this MOA will speak in terms of these more general types of mitigation.

B. The Clean Water Act and the Guidelines set forth a goal of restoring and maintaining existing aquatic resources. The Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions. In focusing the goal of no overall net loss to wetlands only, EPA and Army have explicitly recognized the special significance of the nation's wetlands resources. This special recognition of wetlands resources does not in any manner diminish the value of other waters of the United States, which are often of high value. All waters of the United States, such as streams, rivers, lakes, etc., will be accorded the full measure of protection under the Guidelines, including the requirements for appropriate and practicable mitigation. The determination of what level of mitigation constitutes "appropriate" mitigation shall be based on the values and functions of the aquatic resource that will be impacted. This determination shall not be based upon characteristics of the proposed project such as need, societal value, or the nature or investment objectives of the project's sponsor. "Practicable" shall be defined as in Section 230.10(a)(2) of the Guidelines. However, the level of mitigation determined to be appropriate and practicable under Section 230.10(d) may lead to individual permit decisions which do not fully meet this goal because the mitigation measures necessary to meet this goal are not feasible, not practicable, or would accomplish only inconsequential reductions in impacts. Consequently, it is recognized that no net loss of wetlands functions and values may not be achieved in each and every permit action. However, it remains a goal of the Section 404 regulatory program to contribute to the national goal of no overall net loss of the nation's remaining wetlands base. EPA and Army are committed to working with others through the Administration's interagency task force and other avenues to help achieve this national goal.

C. In evaluating standard Section 404 permit applications, as a practical matter, information on all facets of a project, including potential mitigation, is typically gathered and reviewed at the same time. Notwithstanding this procedural approach, the Corps will, except as indicated below, first make a determination that potential impacts have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be

²(except where Section 404(b)(2) applies).

mitigated to the extent appropriate and practicable by requiring steps to minimize impacts and, only as a last resort, compensate for aquatic resource values. This sequence will be considered satisfied where the proposed mitigation is in accordance with specific provisions of a Corps and EPA approved comprehensive plan that ensures compliance with the compensation requirements of this MOA, as set forth at Section II.B (examples of such comprehensive plans may include Special Area Management Plans, Advance Identification areas (Section 230.80), and State Coastal Zone Management Plans). In some circumstances, it may be appropriate to deviate from the sequence when EPA and the Corps agree the proposed discharge is necessary to avoid environmental harm (e.g., to protect a natural aquatic community from saltwater intrusion, chemical contamination, or other deleterious physical or chemical impacts), or EPA and the Corps agree that the proposed discharge can reasonably be expected to result in environmental gain. This environmental gain must be solely attributable to the project itself, exclusive of benefits which may accrue from proposed compensatory mitigation.

In determining "appropriate and practicable" measures to offset unavoidable impacts, such measures should be appropriate to the scope and degree of those impacts and practicable in terms of cost, existing technology, and logistics in light of overall project purposes. The Corps will give full consideration to the views of the resource agencies when making this determination.

1. **Avoidance.**³ Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative.⁴ The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a)(1) requires that, to be permissible, an alternative must be the least environmentally damaging practicable alternative. In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites⁵ are available and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment. Compensatory mitigation may not be used as a method to reduce environmental impacts in the selection of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).

2. **Minimization.** Section 230.10(d) states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit

³Avoidance as used in this MOA does not include compensatory mitigation.

⁴It is important to recognize that there are circumstances where the impacts of the project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed (40 CFR 230.10(c)).

⁵Special aquatic sites include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pool complexes.

conditions. Subpart H of the Guidelines describes several (but not all) means for minimizing impacts of an activity.

3. **Compensatory Mitigation.** Appropriate and practicable compensatory mitigation will be required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required. Compensatory actions (e.g., restoration of existing degraded wetlands or creation of man-made wetlands) should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site (on-site compensatory mitigation). If on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area (i.e., in close physical proximity and, to the extent possible, the same watershed). In determining compensatory mitigation, the functional values lost by the resource to be impacted must be considered. In most cases, in-kind compensatory mitigation is preferable to out-of-kind. There is continued uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success. Because the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration should be the first option considered.

In the situation where the Corps is evaluating a project where a permit issued by another agency requires compensatory mitigation, the Corps may consider that mitigation as part of the overall application for purposes of public notice, but avoidance and minimization shall still be sought.

Mitigation banking may be an acceptable form of compensatory mitigation under specific criteria designed to ensure an environmentally successful bank. Where a mitigation bank has been approved by EPA and the Corps for purposes of providing compensatory mitigation for specific identified projects, use of that mitigation bank for those particular projects will be considered as meeting the requirements of Section ILC.3 of this MOA, regardless of the practicability of other forms of compensatory mitigation. Additional guidance on mitigation banking will be provided. Simple purchase or "preservation" of existing wetlands resources may in only exceptional circumstances be accepted as compensatory mitigation. EPA and Army will develop specific guidance for preservation in the context of compensatory mitigation at a later date.

III. Other Procedures

A. Potential applicants for major projects should be encouraged to arrange preapplication meetings with the Corps and appropriate federal, state or Indian tribal, and local authorities to determine requirements and documentation required for proposed permit evaluations. As a result of such meetings, the applicant often revises a proposal to avoid or minimize adverse impacts after developing an understanding of the Guidelines

requirements by which a future Section 404 permit decision will be made, in addition to gaining an understanding of other state or tribal, or local requirements.

B. In achieving the goals of the CWA, the Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources. Measures which can accomplish this can be identified only through resource assessments tailored to the site performed by qualified professionals because ecological characteristics of each aquatic site are unique. Functional values should be assessed by applying aquatic site assessment techniques generally recognized by experts in the field and/or the best professional judgment of federal and state agency representatives, provided such assessments fully consider ecological functions included in the Guidelines. The objective of mitigation for unavoidable impacts is to offset environmental losses. Additionally for wetlands, such mitigation will provide, at a minimum, one for one functional replacement (i.e., no net loss of values)⁶, with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan, recognizing that this minimum requirement may not be relevant in some cases, as discussed in Section II.B of this MOA.

C. The Guidelines are established as the environmental standard for Section 404 permit issuance under the CWA. Aspects of a proposed project may be affected through a determination of requirements needed to comply with the Guidelines to achieve these CWA environmental goals. Other reviews, such as NEPA and the Corps public interest review, cannot be used to nullify any Guidelines requirements or to justify less rigorous Guidelines evaluations.

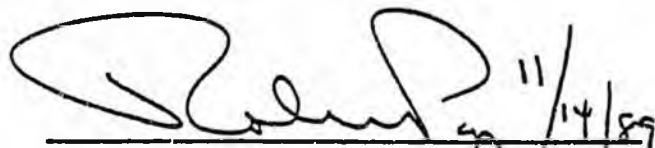
D. Monitoring is an important aspect of mitigation, especially in areas of scientific uncertainty. Monitoring should be directed toward determining whether permit conditions are complied with and whether the purpose intended to be served by the condition is actually achieved. Any time it is determined that a permittee is in non-compliance with mitigation requirements of the permit, the Corps will take action in accordance with 33 CFR Part 326. Monitoring should not be required for purposes other than these, although information for other uses may accrue from the monitoring requirements. For projects to be permitted involving mitigation with higher levels of scientific uncertainty, such as some forms of compensatory mitigation, long term monitoring, reporting and potential remedial action should be required. This can be required of the applicant through permit conditions.

⁶In most cases a minimum of 1 to 1 acreage replacement of wetlands will be required to achieve no net loss of values. However, this ratio may be greater where the functional values of the area being impacted are demonstrably high. Conversely, the ratio may be less than 1 to 1 for areas where the functional values associated with the area being impacted are demonstrably low and the likelihood of success associated with the mitigation proposal is high.

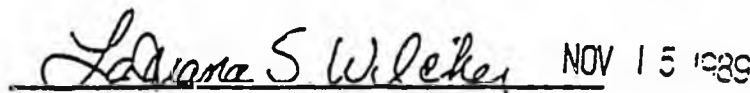
E. Mitigation requirements shall be conditions of standard Section 404 permits. Army regulations authorize mitigation requirements to be added as special conditions to an Army permit to satisfy legal requirements (e.g., conditions necessary to satisfy the Guidelines) [33 CFR 325.4(a)]. This ensures legal enforceability of the mitigation conditions and enhances the level of compliance. If the mitigation plan necessary to ensure compliance with the Guidelines is not reasonably implementable or enforceable, the permit shall be denied.

F. Nothing in this document is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of the agencies involved. Furthermore, formal policy guidance on or interpretation of this document shall be issued jointly.

G. This MOA shall take effect thirty (30) days after the date of the last signature below, and will apply to those completed standard permit applications which are received on or after the effective date. This MOA may be modified or revoked by agreement of both parties, or revoked by either party alone upon six (6) months written notice.



 Robert W. Page (date)
 Assistant Secretary of the Army
 (Civil Works)



 U LaJuana S. Wilcher (date)
 Assistant Administrator for Water
 U.S. Environmental Protection Agency

WIKE
Your copy
EBS H
8/11/7

EFFECTIVE DEC. 15, 1979



**MEMORANDUM OF AGREEMENT¹
BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY
AND THE DEPARTMENT OF THE ARMY CONCERNING
THE DETERMINATION OF MITIGATION UNDER THE
CLEAN WATER ACT SECTION 404(b)(1) GUIDELINES**



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1. Avoidance.³ Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative.⁴ The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a)(1) requires that, to be permissible, an alternative must be the least environmentally damaging practicable alternative. In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites⁵ are available and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment. Compensatory mitigation may not be used as a method to reduce environmental impacts in the selection of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).

2. Minimization. Section 230.10(d) states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit

³Avoidance as used in this MOA does not include compensatory mitigation.

⁴It is important to recognize that there are circumstances where the impacts of the project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed (40 CFR 230.10(c)).

⁵Special aquatic sites include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pool complexes.

conditions. Subpart H of the Guidelines describes several (but not all) means for minimizing impacts of an activity.

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In the situation where the Corps is evaluating a project where a permit issued by another agency requires compensatory mitigation, the Corps may consider that mitigation as part of the overall application for purposes of public notice, but avoidance and minimization shall still be sought.

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III. Other Procedures

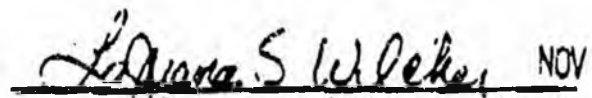
A. Potential applicants for major projects should be encouraged to arrange preapplication meetings with the Corps and appropriate federal, state or Indian tribal, and local authorities to determine requirements and documentation required for proposed permit evaluations. As a result of such meetings, the applicant often revises a proposal to avoid or minimize adverse impacts after developing an understanding of the Guidelines

E. Mitigation requirements shall be conditions of standard Section 404 permits. Army regulations authorize mitigation requirements to be added as special conditions to an Army permit to satisfy legal requirements (e.g., conditions necessary to satisfy the Guidelines) [33 CFR 325.4(a)]. This ensures legal enforceability of the mitigation conditions and enhances the level of compliance. If the mitigation plan necessary to ensure compliance with the Guidelines is not reasonably implementable or enforceable, the permit shall be denied.

F. Nothing in this document is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of the agencies involved. Furthermore, formal policy guidance on or interpretation of this document shall be issued jointly.

G. This MOA shall take effect thirty (30) days after the date of the last signature below, and will apply to those completed standard permit applications which are received on or after the effective date. This MOA may be modified or revoked by agreement of both parties, or revoked by either party alone upon six (6) months written notice.


Robert W. Page (date) 11/14/69
Assistant Secretary of the Army
(Civil Works)


LaJuana S. Wilcher (date) NOV
Assistant Administrator for Water
U.S. Environmental Protection Agency



Resource Development Council for Alaska, Inc.

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Briefing Paper

Wetlands:

Implications of "No Net Loss"

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Congressman Don Young

A. Issue summary

President George Bush is committed to the worthy cause of reversing the decline in the nation's remaining wetlands base. The White House Domestic Policy Council is acting on a national wetlands policy and several recommendations have been developed by the National Wetlands Policy Forum in which Alaska has participated.

While RDC shares in the concern about the alarming decline in the nation's wetlands base, a new national strategy to protect America's wetlands would pose serious impediments to community development in Alaska necessary to support present and future populations. The emerging "no net loss" wetlands policy would also jeopardize development of the state's natural resources, even on private lands. Since the majority of Alaska's tundra and coastal areas are deemed wetlands, the national strategy should be modified to conform to the realities and needs of Alaska.

B. Why Alaska should be exempted from "no net loss" theory

I. Alaska does not contribute to the wetlands problem

Alaska wetlands cover more than 170 million acres, accounting for over two-thirds of its non-mountainous land. The result is that wetlands of many types and descriptions form the bulk of the developable land. Therein lies the problem.

Approximately 99 million acres remain of the 215 million acres of wetlands that originally existed in the contiguous United States. Consideration of a new federal wetlands policy may have merit for states where the majority of the wetland base has been significantly altered or destroyed by erosion, settlement, agriculture, urban and/or industrial uses. However, Alaska wetlands are not endangered from a quantity or quality perspective. Over 99.95% of Alaska's wetlands remain intact, despite world-class energy and minerals development.

II. "No net loss" is a Catch-22 for Alaska

Since Alaska has almost double the wetlands acreage of the Lower 48 states, application of this national policy would have a disproportionately greater impact on the 49th State than on all the Lower 48 states combined. Ironically, the greatest impact of a national "no net loss" policy will be in the one state that does not have a wetlands loss problem. And thwarting development in Alaska wetlands will do nothing toward solving the wetlands problem where it exists -- in the Lower 48. Alaska should be rewarded, not punished for its model wetlands use. Adding the "final straw" of regulatory control through the "no net loss" concept would accomplish little but to stifle even modest economic growth in urban and rural Alaska, especially along the coast where most people live, work and recreate.

III. Alaska wetlands are different

Wetlands throughout most of Alaska's vast arctic and subarctic regions are different from the freshwater marshes and tidelands elsewhere. Much of Alaska's wetlands are underlain by permanently frozen ground that makes it impossible for these lands to provide most of the functions for which wetlands in the Lower 48 are valued. Important functions relating to flood control, ground water recharge and water quality maintenance are largely absent from permafrost wetlands. Fish and wildlife habitats also function differently in arctic wetlands.

In temperate-zone wetlands, habitat losses can result in corresponding losses to animal populations. Wildlife in these areas are clearly limited by wetland availability, but there is no shortage of habitat in Alaska's vast wetlands where many species of nesting birds tend to be highly dispersed.

Mortality factors outside Alaska are the biggest determinants in population sizes of many bird species nesting in the arctic. After nesting and rearing their young during the brief arctic summer, migratory waterfowl and shorebirds fly south to vanishing wintering grounds in the Lower 48 states and Central and South America. In these locations, the birds are highly vulnerable to hunting and transmission of infectious diseases, aggravated by the crowded conditions. In contrast, there is no evidence that the amount of available summer habitat in Alaska controls their abundance. The evidence does show that limited use of wetlands in Alaska for resource production has not caused any measurable effect on the wildlife populations.

IV. Alaska wetlands are "extra protected"

Recognizing that much of modern day Alaska development occurred following the passage of the National Environmental Protection Act, Alaska wetland losses have been kept to a minimum. Furthermore, about half of Alaska is already protected as federal and state parks, wildlife refuges, wilderness areas and other conservation units. Many of these lands were set aside when Congress passed the Alaska National Interest Lands Conservation Act of 1980. Moreover, a comprehensive set of local, state and federal laws and regulations ensure that all development on remaining lands is carefully scrutinized. The existing regulatory framework *does and will ensure* that wetland loss does not become a problem.

C. Emerging policy frustrates development

I. What is "no net loss?"

Strict implementation of a federal "no net loss" policy would require that wetlands acreage used for development would have to be compensated for by purchase, restoration or preservation of equivalent wetlands acreage. Such a requirement would jeopardize many projects because of enormous offsite mitigation costs. "No net loss" is also a difficult requirement for Alaska where wetlands predominate, where the bulk of Alaska is owned by the state and federal governments and where there has been relatively little development. Among community projects which would be severely impacted by a blanket "no net loss" application are schools, health care facilities, airstrips, roads and marine facilities. Even private construction projects would fall under the new expensive requirements.

II. Memorandum of Agreement

The "no net loss" concept is not yet law nor policy. Moreover, the concept has not been thoroughly defined and is open to widely varying interpretation. Yet the Environmental Protection Agency and the U.S. Army Corps of Engineers have taken an internal step to implement a "no net loss" policy through a recent Memorandum of Agreement on permits under Section 404 of the Clean Water Act.

Application of the MOA will place severe limitations on all future development in Alaska and may prevent future energy development in the state. In addition, the MOA has been promulgated without opportunity for public comment or interagency (state and federal) review, a violation of the Administrative Procedures Act.

While the agencies maintain that this MOA is merely a clarification of existing policy in light of the national goal of no overall net loss of wetlands functions and values, it represents a significant change from the current mitigation requirements of the section 404 (b) (1) guidelines. The 404 (b) (1) guidelines do not call for compensation in its mitigation requirements and have not previously been interpreted to do so. Yet the MOA sets up a mitigation decisionmaking process that includes compensatory mitigation, resulting in a very significant change in the way projects are permitted. The use of the MOA for implementation of new 404 (b) (1) mitigation requirements is in violation of the Administrative Procedures Act.

The MOA is not a clarification of existing policy, but is, in fact, a new policy directing the agencies to achieve no net loss of wetlands. It is inappropriate to adopt the goal of no overall net loss of wetlands through the MOA process prior to any resolution of the issue by the Administration or Congress. The MOA clearly undercuts efforts within the Administration and Congress to craft a workable wetlands policy. It should be immediately revoked.

III. De facto application of "no net loss"

Industry and community leaders across Alaska warn that already some projects are being held hostage through a de facto application of "no net loss," even after they have been designed to avoid and minimize impact to the environment. A case in point is the Municipality of Anchorage's frustrated efforts to secure the needed permits to fill in some wetlands adjacent to its port for infrastructure expansion.

The state and federal agencies participating in the exhaustive permit process all agree that the use of the land for port facilities is appropriate. However, they are demanding that Anchorage do substantial offsite mitigation. They agree that no mitigation is possible within the proposed development area, but the agencies want the city to spend anywhere from \$200,000 to \$1 million in some other area to create or enhance wetlands.

Outside Anchorage, other communities and development projects are facing major problems when it comes to wetlands. For example, federal agencies have asked North Slope oil and gas operators to rehabilitate wetlands or replace environmentally-sensitive wetlands as a condition for approving permits on the North Slope. The operators note that in lieu of an actual policy, federal agencies overseeing wetlands already have cited the "no net loss" goal in requiring mitigation on a permit by permit basis.

Additionally, native land ownership raises another issue unique to Alaska. Alaska natives received approximately 44 million acres of land from the federal government. These lands were conveyed specifically for development purposes in partial compensation for the extinguishment of their claims to aboriginal title, and to ease the transition from subsistence to a cash economy. A "no net loss" wetlands policy applied to these lands would restrict or preclude both native community development and economic opportunities associated with resource development, leaving little value to the land.

D. Alternatives for accommodating Alaska's position

A resolution passed at the Northwest Alaska Mayors' conference in Noorvik in November called on the federal agencies to revise their wetland protection programs for Alaska by concentrating on classification and protection of productive wetlands that actually provide vital fish and wildlife and water quality benefits. This approach recognizes fundamental differences which set Alaska wetlands apart from those in other states.

The adoption of a threshold approach, favored by the Municipality of Anchorage, is one possible alternative means to respond to Alaska's unique position. The threshold approach would allow states in which cumulative wetlands losses are less than 5%-20% of the state's total wetlands to be excluded from provisions of a national "no net loss" policy until the threshold has been met and exceeded. Another approach would be to more carefully define wetlands, distinguishing between "high value" and "low value" wetlands.

E. Recommendation

While the Council is committed to protecting and enhancing those wetlands in Alaska of greatest productivity and highest value, it believes a "no net loss" policy is not appropriate for Alaska. Such a policy in Alaska would accomplish nothing to slow wetlands losses in the contiguous U.S. where the root of the problem exists.

Instead, RDC favors an approach stressing *avoidance* and *minimization* of wetlands disturbances. Such an approach has worked well on the North Slope where the oil industry has successfully mitigated wetland losses by avoiding critical habitat and

Page 5

reducing the number and size of facilities. Despite the fact that oil exploration and development on the North Slope have resulted in 25% of the nation's daily domestic oil production, only 0.05% of the wetlands on the Slope have been disturbed. The impact of development has been minimal with no reduction in wildlife population.

RDC looks forward to working with the state and federal government on a national strategy that protects America's wetlands while providing flexibility to Alaska's unique position. Alaskans can support a balanced public policy, one which allows responsible development while keeping wetland losses to a necessary minimum.

F. RDC Action

The Resource Development Council has formed an Alaska Wetlands Action Coalition to spearhead a statewide effort to convince decisionmakers in Washington, D.C., to accommodate Alaska's unique position in the shaping of a national strategy to protect American wetlands.

RDC is organizing community, native and industry leaders under its wetlands coalition to work on the problem. The Council has assisted local communities in developing and advancing resolutions urging President Bush to not subject Alaska to a blanket policy that fails to consider the state's unique position in the wetlands issue. The Alaska Council of Mayors, Alaska Municipal League, the Southeast Conference, the Kenai Peninsula Borough, the Municipality of Anchorage, the Northwest Arctic Borough and other communities, including Seward and Nome, have passed resolutions. Resolutions expressing concern over the impacts of the proposed federal policy to Alaska are pending in a number of other communities.

RDC has published a detailed brochure focusing on Alaska wetlands and what the "no net loss" concept means to the state's economy. The brochure has been widely circulated throughout the state and has been distributed to key public officials in the Lower 48. In addition, the Council has featured indepth reports of the wetlands issue in its monthly publication, the *Resource Review*.

RDC is working closely with the state and the legislature to adopt a strong unified position on wetlands. A major priority of its 1990 legislative agenda is to secure a definitive and strong position from the Legislature that articulates special consideration for Alaska in any federal "no net loss" wetlands policy. In the new year, RDC also plans to travel throughout the state to give wetlands presentations to affected communities.

For additional information, call RDC at 276-0700.

RDC ALERT

December 7, 1989

RE: Recent EPA/Army Corps Memorandum of Agreement (MOA) on the determination of mitigation under the Clean Water Act Section 404 (b)(1) guidelines

Enclosed is a briefing paper explaining "no net loss" as conceptualized to apply to the nation's wetlands. *Although the idea is under analysis by the Domestic Policy Council, at the direction of President Bush, it is not presently a policy.*

However, with the MOA signed November 14, the Environmental Protection Agency and the Army Corps of Engineers have asserted "no net loss" is a "goal." The purpose statement directs that the MOA "must be adhered to when considering mitigation requirements for standard permit applications." The effective date is December 15, 1989.

In the words of Governor Cowper, "this (MOA) eclipses the policy process and leaves States without a role in decisions affecting their economic futures." RDC, the Alaska delegation, industry officials, communities and the Governor are requesting the MOA be withdrawn.

ACTION NEEDED: 1. Write President Bush asking that the MOA be rescinded.
(Washington, D.C. 20500)

Reasons: It usurps Domestic Policy Council deliberations and violates the Administrative Procedures Act by "rule-making without public input."

2. * Send RDC copies of your letter. (RDC will send them to the Alaska delegation, the Governor, EPA, the Corps and the Domestic Policy Council.)

3. File your permits ASAP to avoid being subjected to the MOA, even though it is being challenged.

*RDC's Fax#(907) 276-3887

Alaska's Mayors Speak Out



© Third Eye Photography 1989

"The Mat-Su Borough has the oldest and one of the largest agriculture areas in Alaska, coupled with the entire gamut of minerals the nation needs, from coal to gravel, and a strong recreation industry. The proposed 'no net loss' policy would spell an end to projects supporting those vital industries. Can you imagine having to purchase land outside Alaska to replace wetlands which had to be crossed to build a necessary highway, port, tourist facility or school in Alaska?"

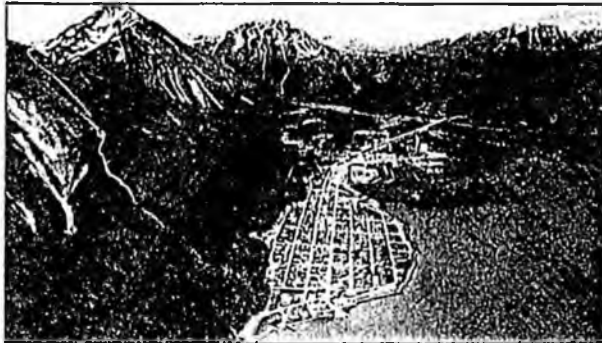
- Dorothy Jones, Mayor, Matanuska-Susitna Borough



Carl Portman

"Applied to Alaska, a national policy of 'no net loss' of wetlands has the potential to stop economic development in every community. The 'no net loss' concept is not flexible to Alaska's unique position. We deserve a balanced public policy, one which allows responsible development while keeping wetland losses to a necessary minimum."

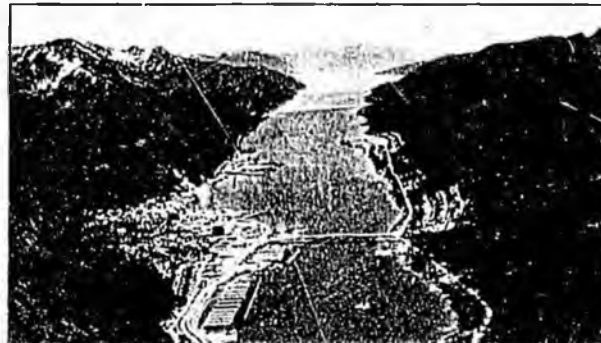
- Jerome Selby, Mayor, Kodiak Island Borough



AeroMap U.S.

"Unfortunately, the 'no net loss' policy is already being enforced by some federal agencies and its detrimental effect is becoming evident. However, Alaska is not the problem, nor should it be viewed as the solution to wetlands loss in the contiguous United States. Even with recent world-class developments, 99.95% of Alaska's wetlands are intact. That means there is no effective way to create new wetlands in most of Alaska to satisfy the demands of such a federal policy."

- Don Gilman, Mayor, Kenai Peninsula Borough



AeroMap U.S.

"Like many other coastal communities, Juneau highly values its wetlands. They serve as wildlife habitat, as recharge zones for groundwater, and as recreational sites. For us, wetlands also represent the only buildable land remaining in our community. Because of our concerns for wetland use, we undertook an exhaustive study to identify and protect high-valued wetlands and to identify others suitable for reasonable development. Yet many believe our work has been largely ignored because of a federal regulatory scheme that fails to recognize our own paramount interests in land use and our ability to represent the public interest."

- Bruce Botelho, Mayor, City and Borough of Juneau

ALASKA'S WETLANDS

"No Net Loss" and What It Means to Alaska's Economy



John Rense, NANA

Resource Development Council
for Alaska Inc.

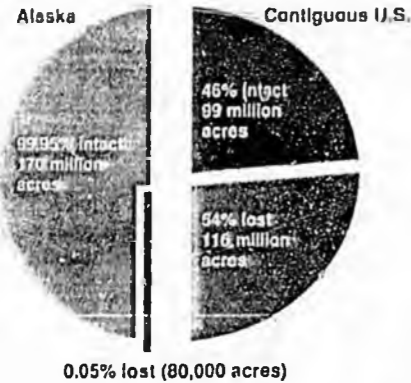
Box 100516, Anchorage, Alaska 99510-0516 907/276-0700

10/89

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Alaska's Wetlands Are Not In Danger

Comparison of Wetland Losses In Alaska and Contiguous U.S.



0.05% lost (80,000 acres)

In the contiguous United States, development has taken a toll on wetlands, over 54% of which have been affected. And wetland use continues at a high rate from agriculture, human settlement, industry, and other causes. It is clear that wetland loss in the rest of the nation is an important issue.

In contrast, Alaska has achieved its economic importance to the nation with the disturbance of only about 80,000 acres of the state's wetlands. This represents only 0.05% of the estimated 170 million acres of wetlands in Alaska at the time Alaska became a territory in 1867. Even if that 80,000 acres could be totally returned to their original status, the result would be insignificant, both in terms of Alaska's wetlands and those of the nation as a whole. Such restoration would offset the loss of wetlands in the contiguous 48 states by only seven one-hundredths of one percent (0.07%).

In a nationwide perspective, the current annual wetland reduction of 275,000 acres in the contiguous 48 states is about three and one-half times the total estimated acreage of all wetlands used in Alaska since 1867.

ALASKA CONSERVATION UNITS*

- National Wildlife Refuge
- National Parks, Preserves, and Monuments
- BLM Land (NCA, NRA)
- National Wild and Scenic River
- National Forest System
- State Parks

*NOTE: This map does not include state game refuges, critical habitat areas, and game sanctuaries.

SOURCE: U.S.G.S. Alaska Map E (1987)

This map shows Alaska a major state and federal conservation units, which account for about half of the land in the state. These units include wildlife refuges, parks, forests, and recreation areas. In fact, Alaska has 62% of all federally designated Wilderness lands. Much of the land outside of these conservation units in Alaska is considered wetlands under the broad federal definition.

The Trans-Alaska Pipeline, Alaska's economic lifeline.



World-class mineral development such as the Red Dog Mine will entail crossing wetlands.



North Slope oilfields provide 25% of U.S. domestic oil production, yet less than 0.02% of Alaska's wetlands have been disturbed by this development.

Interior Alaska provides numerous recreational opportunities.



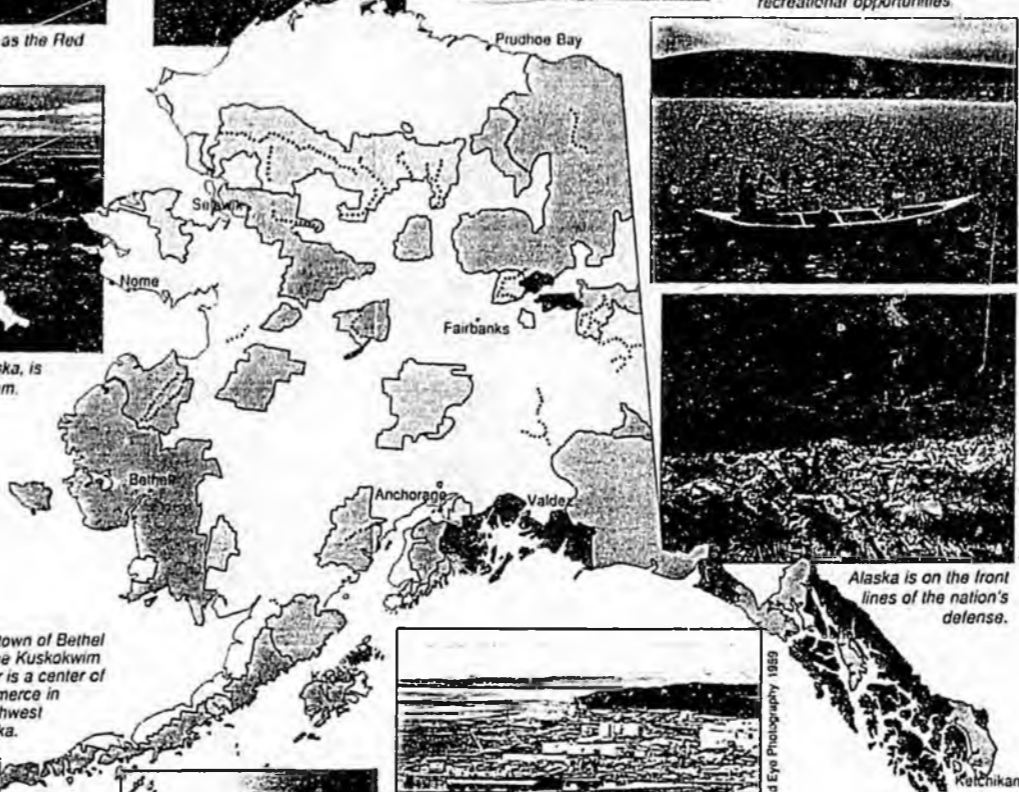
The village of Selawik, like many in Alaska, is built on wetlands near a navigable stream.



The town of Bethel on the Kuskokwim River is a center of commerce in Southwest Alaska.



Dutch Harbor in the Aleutians serves a large fishing fleet, which depends on adequate port and processing facilities.



Kodiak is the number one commercial fishing port in the nation in terms of value of the catch.



Anchorage's port is an important sea link.



Alaska is on the front lines of the nation's defense.

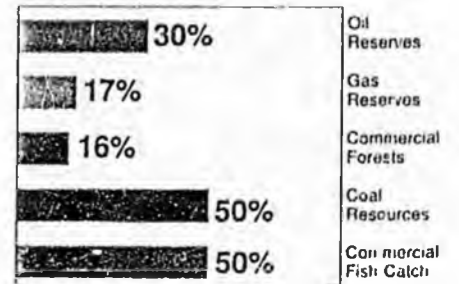


Ketchikan Pulp

Logging and fishing are important elements in the economy of Southeast Alaska.

Alaska's Economy Is Important To The Nation

Alaska's Percentages of Total U.S. Resources



Alaska has achieved its current level of development while preserving 99.95% of its wetland acreage. Surely, environmentally sound development of the state's huge resource potential can proceed without any significant impact to its wetlands. The continued economic viability of the state depends on it.

Private sector industries associated with the development of Alaska's resources form the cornerstone of Alaska's economy and fund 95% of state government operation and services.

The Alaska seafood industry accounts for approximately 50% of the nation's commercial fish catch, while Alaska's oil industry provides 25% of U.S. domestic oil production. The state also has 30% of the nation's oil reserves. The unparalleled beauty of Alaska has long been one of the state's greatest resources, attracting hundreds of thousands of visitors each year.

Hardrock minerals may be Alaska's greatest undeveloped resource. Of the 30 minerals the U.S. must now purchase abroad, 22 are found in Alaska, many in commercial concentrations. About 50% of the nation's coal reserves are found in Alaska. Some 16% of the commercial forest lands in the U.S. are in Alaska.

If Alaska is to continue to develop its private sector and contribute its resources to the nation, reasonable expansion of the state's infrastructure must be allowed. This will inevitably include careful use of wetlands. Ports, roads, airports, visitor facilities, and other vital infrastructure are key to maintaining the viability of Alaska's basic economy.

"No Net Loss" Threatens Alaska's Economic Independence

A new nationwide policy has been proposed to achieve no overall net loss of the nation's wetlands. Unless it is modified, this policy would apply to Alaska. If implemented, it would severely impact Alaska's ability to maintain its contribution to the nation's economy.

Alaska relies on resource development for its economic base, yet only 80,000 acres of wetlands have been used for *all* forms of development in Alaska, including the building of towns and roads. This amounts to 0.05% of Alaska's 170 million acres of wetlands. In contrast, the rest of the nation has seen the loss of over 54% of its wetlands—a loss over 1,000 times greater than the wetland loss in Alaska. The need for wetland preservation is clear in the contiguous 48 states. In Alaska, however, a problem simply does not exist.

Alaska Depends on Its Resources

Alaska is a state of vast physical dimensions. Covering 375 million acres, it stretches over 2,000 miles from west to east and over 1,000 miles from north to south. The climate ranges from the moderate maritime in Southeast Alaska to the harsh arctic on the North Slope.

Most think of Alaska as a land of great mountains, yet surprisingly, about 45% of the state's land area is covered by wetlands. In fact, wetlands account for about 74% of Alaska's non-mountainous area. Thus, wetlands of many types and descriptions form the bulk of the developable land in the state.

With its rich endowment of oil and gas, fish, minerals, and forests, Alaska is America's treasure chest of natural resources. As national and global consumption trends demand more resources, Alaska will continue to provide a vital part of the domestic supply. And through the wise use and management of its resources, Alaska has the means to diversify its economy while helping to provide the nation's essential raw materials.

Though Alaska already makes a substantial contribution to the nation's resource needs, only a

tiny fraction of its wetlands have been modified. And since oil and gas, minerals, fisheries, timber, and tourism are the mainstays of Alaska's economy, the economic importance of resource development cannot be overlooked in wetland policies.

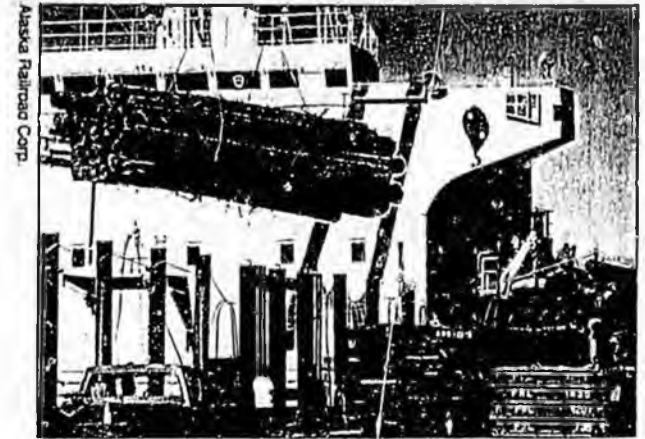
Alaska Has a Right to Develop Its Economy

"No net loss" of wetlands means that any wetlands used for development would have to be replaced in the national wetland inventory by either creating new wetlands or reclaiming previously disturbed ones. Many Alaskan communities are built in wetlands or on narrow strips of flat land between mountains and the sea, and any expansion is impossible without sacrificing some wetlands. The state's capital Juneau, for example, would not have an airport if it wasn't for filling wetlands. Furthermore, there are essentially no disturbed wetlands in the state to be reclaimed. Many public and private projects in Alaska would be held hostage to the costs of "no net loss."

Most coastal communities in Alaska are undertaking port and harbor development and expanding marine repair facilities. Most have to rely on water-based transportation for fishing, processing, recreation, and tourism. The infrastructure must be built for the most part across wetlands.

Alaska's economic base—and vital community development in rural and urban Alaska—would be crippled if a nationwide policy of "no net loss" of wetlands was applied to the 49th State. In fact, such a policy would deprive Alaskans of their right to economic growth through judicious development of their natural resources. While the policy may be applicable to the contiguous 48 states, it is clearly not appropriate for Alaska. Such a policy in Alaska would accomplish nothing to slow wetland losses in the contiguous U.S. Moreover, Alaska is a public land state, with less than 1% of its lands in conventional private ownership. The federal government owns 60% and the state 28% of Alaska's lands.

Alaska is also in a unique position because of the



Timber from Alaska's interior is loaded on a ship at the Port of Anchorage.

Alaska Native Claims Settlement Act of 1971. This law provided compensation in land and money to Alaska's natives in exchange for their aboriginal claims. Congress also intended that the lands selected by the natives be available for development.

Wetlands are Already Strictly Regulated

Additional policies to protect wetlands are not necessary in Alaska. A comprehensive set of state, federal, and local laws and regulations ensures that all development is carefully scrutinized before it begins. Not only that, but about half of Alaska is already protected as federal and state parks, wildlife refuges, wilderness areas, and other conservation units. Many of these lands were set aside when Congress passed the Alaska National Interest Lands Conservation Act in 1980, placing over 100 million acres in these conservation units, *with the expressed purpose that the remaining land be developed*. The coastal regions of Alaska are also protected under the Alaska Coastal Zone Management Program.

The existing regulatory framework, as well as Alaska's unique geographical setting, will ensure that wetland loss does not become a problem there. Adding another layer of regulatory control through the "no net loss" concept would accomplish little but to stifle economic growth throughout Alaska—from the smallest village to metropolitan Anchorage.

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STATE OF ALASKA

THE LEGISLATURE

1987

Source

Legislative
Resolve No.

CSHJR 27(Res) am

27



Relating to the United States Army Corps of Engineers' permits for dredging or filling wetlands.

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

WHEREAS the United States Congress recently renewed legislation known as the Clean Water Act; and

WHEREAS sec. 404 of the Clean Water Act directs the United States Army Corps of Engineers to regulate the discharge of dredged or fill material into the waters of the United States, including wetlands; and

WHEREAS the federal government continues to play a principal role in determining what development may take place on federal, state, and private land in the state because of the high prevalence of wetland areas in Alaska; and

WHEREAS the current regulations often result in decisions that are not in the best interest of the local economy and the state economy as a whole; and

WHEREAS a large percentage of the state's wetlands are caused by underlying permafrost; and

WHEREAS the underlying permafrost and Alaska climatic conditions cause these permafrost wetlands to freeze solid for up to eight months of the year; and

WHEREAS because of the relatively flat topography of a preponderance of the permafrost wetland areas, water movement in these areas is often localized with no hydrologic connection to any ground or surface body of water; and

WHEREAS, as a result of these soil, climatic, and topographic features, the majority of the state's permafrost wetlands

do not provide the beneficial characteristics normally attributed to wetlands, such as a habitat for rearing fish and shellfish, water purification, groundwater recharge, or flood water absorption and release; and

WHEREAS state wetlands provide valuable habitat for migratory waterfowl for three or four months of the year; and

WHEREAS with an estimated 164,000,000 acres of wetlands in the state, limited development on a portion of the wetlands will not effectively restrict the available habitat; and

WHEREAS Alaska's permafrost wetlands are significantly different than wetlands found in the contiguous United States, both in quantity and values, and therefore warrant a different approach with respect to identification, permitting, and protection; and

WHEREAS, in certain permafrost soils, the benefits of surface-to-groundwater filtration and recharge are more efficiently achieved after the permafrost wetlands have been cleared; and

WHEREAS the present United States Army Corps of Engineers sec. 404 wetlands permit process is causing needless delay in development by individual homebuilders, subdivision developers, and state industry in general; and

WHEREAS the delay caused by the necessity of obtaining a sec. 404 permit is compounded by northern Alaska's limited construction season where the loss of 60 to 90 days may cause the loss of an entire construction season; and

WHEREAS the United States Congress has acknowledged Alaska's unique permafrost wetlands characteristics through the exemption of "permafrost soils in Alaska with a high potential for agricultural development" from the "swampbuster" provisions of the Food Security Act of 1985; and

WHEREAS the State of Alaska should direct its own destiny wherever and whenever possible, particularly with regard to the management of state land and assisting individual residents of the state in the management of their privately held land;

BE IT RESOLVED by the Alaska State Legislature that the Governor is respectfully requested to work closely with the Alaska Congressional delegation to secure regulatory recognition and relief from the United States Army Corps of Engineers, Environmental Protection Agency, and the United States Fish and Wildlife Service, for Alaska's unique permafrost wetlands in the sec. 404 dredge or fill permit program; and be it

FURTHER RESOLVED that the Governor is respectfully requested to review the 1983 Department of Environmental Conservation report regarding state assumption of the United States Army Corps of Engineers sec. 404 wetlands permitting process and report the Governor's findings to the legislature within the first 10 days of the Second Session of the Fifteenth Alaska State Legislature.

COPIES of this resolution shall be sent to the Honorable Judith A. Brady, commissioner of natural resources; the Honorable Don W. Collinsworth, commissioner of fish and game; the Honorable

Dennis D. Kelso, commissioner of environmental conservation; Colonel Wilbur Gregory, Alaska District Engineer, U.S. Army Corps of Engineers; Lee M. Thomas, Administrator, Environmental Protection Agency; Frank H. Dunkle, Director, U. S. Fish and Wildlife 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.

LANSTON CHINN
BOROUGH MANAGER



TELEPHONE
(907) 248-4224
FAX
(907) 248-6633

Bristol Bay Borough

BOX 189 • NAKNEK, ALASKA 99633

RESOLUTION 89-25


RELATING TO ALASKA NOT BEING SUBJECTED TO A BLANKET NATIONAL POLICY FOR "NO NET LOSS" OF WETLANDS

- WHEREAS, the Domestic Policy Council is considering advancing a national "no net loss of wetlands" policy for Presidential approval; and
- WHEREAS, the perceived need for a "no net loss" policy is caused by wetlands loss in the continental United States, not Alaska; and
- WHEREAS, the original concept of wetlands has become increasingly expanded since the Clean Water Act was implemented; and
- WHEREAS, 88% of the total land mass of Alaska is still owned by the Federal or State governments who already exercise strict control over its development; and
- WHEREAS, Alaska's wetlands area cover approximately 1700 million acres and only 80,000 acres (0.05%) of Alaska's wetlands have been altered since 1867; and
- WHEREAS, Alaska's wetlands are not endangered from a quantitative or qualitative perspective; and
- WHEREAS, most coastal communities in Alaska are undertaking port and harbor development and expanding marine repair facilities and rely on water based transportation for the marine highway system, fishing, processing, recreation and tourism; and
- WHEREAS, said port facilities and other infrastructure will be built to some degree on wetlands; and
- WHEREAS, local communities have been actively attempting to diversify their economies away from the petroleum sector and such diversification is extremely dependent on the aforementioned infrastructure; and
- WHEREAS, Alaska is actively trying to attract more business to support its rich fisheries and bring it ashore, supporting the home fleet and creating value-added jobs to build its economy; and

- WHEREAS, local communities in Alaska have already undertaken responsible management of wetlands resources through development of coastal management programs which are incorporated into the overall Alaska Coastal Management Program and approved in accordance with the requirements of the coastal Zone Management Act (CZMA) in addition to the Alaska Corps of Engineers Section 404 permitting program; and
- WHEREAS, an absolute prohibition on any further "loss" or "use" of wetlands is inappropriate in relatively undeveloped Alaska and will be an onerous detriment to the coastal communities of Alaska without producing any beneficial effect on the wetlands situation in the continental United States; and
- WHEREAS, the Army Corps of Engineers has classified all of Bristol Bay Borough as wetlands using air photography and a not net loss policy would completely stop development in the Borough; and
- WHEREAS, the Army Corps of Engineers will not perform site specific determinations regarding the presence of wetlands;

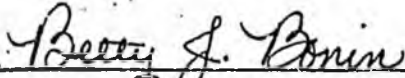
NOW THEREFORE BE IT RESOLVED, that the Bristol Bay Borough Assembly respectfully requests that President Bush, in coping with wetlands problems in other states, will consider the negative effects a "no net loss policy" will have on vital economic development in Alaska and will avoid subjecting Alaska to a blanket policy which portends so much potential harm to its communities.

PASSED AND APPROVED BY THE ASSEMBLY OF THE BRISTOL BAY BOROUGH this 4/26
day of December, 1989.



Mayor

ATTEST:



Borough Clerk

Senate Floor
amended

AMENDMENT #1

by FRANK

TO: CSSJR 54 (Resources)

page 1 line 5, delete "Relating to"

insert "Opposing"

Congress of the United States

Washington, D.C. 20515

8 January 1990

Lajuana S. Wilcher
Assistant Administrator for Water
Environmental Protection Agency
Washington, D.C. 20460

Robert W. Page
Assistant Secretary of the Army (Civil Works)
Department of the Army
The Pentagon
Washington, D.C. 20310

Re: Memorandum of Agreement between the Environmental Protection
Agency and the Department of the Army Concerning the Determination of
Mitigation Under the Clean Water Act Section 404 (b)(1) Guidelines dated
November 15, 1989 ("MOA")

Dear Ms. Wilcher and Mr. Page:

As representatives of the State of Alaska, we request that you rescind the above referenced MOA and address changes to the wetlands permitting process within the context of the President's ongoing wetlands policy development. As a less satisfactory alternative, we request that you delete from the MOA the many substantial provisions which deviate from existing policy and procedure.

We endorse the stated objective of the MOA - to streamline the wetlands permitting process. In that regard, staff representatives of our offices have worked with your staffs over the last month to try to reach agreement on language that would clarify the intent and scope of the MOA. However, it is our judgment that clarifying language alone will not address our primary concern with the MOA. That concern, as we have repeatedly expressed to you, is that the MOA constitutes a major change in policy regarding implementation of the 404 (b)(1) guidelines. As such, the changes it proposes would be more appropriately accomplished within the purview of the larger policy development on wetlands conservation.

Other Departments in the Administration, States, and citizens who participated in the National Wetlands Forum have been anxious to continue their involvement in this important issue. We had no opportunity to participate in the process that produced the MOA. Besides these procedural aspects, which are being litigated, we have at least three areas of difficulty with the MOA.

In general, the MOA departs from existing policy by attempting to implement a "no net loss" of wetlands goal. The concept of "no net loss" does not exist in the Clean Water Act, the Guidelines, or the Corps regulations. While it may be possible to interpret these authorities in a manner consistent with "no net loss," none of them have been so interpreted to date.

Lajuana Wilcher
Robert Page
5 January 1990
Page Two

The President has adopted the "no net loss" goal as a means of preserving and protecting our remaining wetlands. We fully support that general objective. However, the President has also directed the Domestic Policy Council to develop a policy for achieving the goal of "no net loss". The MOA, by attempting to implement a "no net loss" goal, preempts the established DPC task force process.

In particular, the MOA makes at least two significant changes in existing policy by mandating compensatory mitigation and requiring strict adherence to a rigid sequenced approach in all permit applications. In our discussions, you have argued that, since the MOA provides exceptions to these two requirements, they are not mandatory and therefore do not constitute changes in existing policy. We respectfully disagree.

What was previously the rule, i.e., compensatory mitigation only when required by the public interest and flexible sequencing, has now become the exception. When the MOA is implemented by agency staff, the exceptions will only be used as a last resort. The result will be to force the permit applicant to prove, most likely on appeal at great expense, that his application should be subject to the exceptions and not the general rule. This is clearly a change in existing policy.

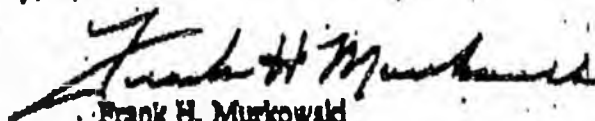
Moreover, the exceptions are essentially meaningless. The MOA does recognize that the "minimum one for one functional replacement" standard for compensatory mitigation "may not be relevant in some cases." Yet, it limits those cases to situations where the mitigation is "not feasible, not practicable, or would accomplish only inconsequential reductions in impacts." The exception from rigid sequencing is even narrower. Departure from rigid sequencing is permitted only in the very few instances where the project is necessary to avoid environmental harm or where it will result in environmental gain.

We cannot reach any conclusion other than that the EPA and the Corps are attempting to implement major policy changes with respect to the wetlands permitting process with the MOA. In so doing, you are ignoring the public comment and review protections of the Administrative Procedures Act and preempting the President's established process through the Domestic Policy Council.

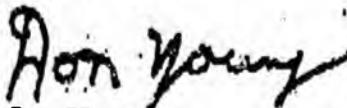
Sincerely,



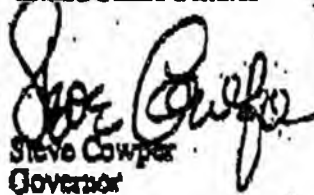
Ted Stevens
United States Senator



Frank H. Murkowski
United States Senator



Don Young
Congressman for all Alaska



Steve Cowper
Governor

cc: The Honorable William K. Reilly
The Honorable Richard B. Cheney
The Honorable Richard G. Darrman
The Honorable John H. Sununu

S J R

58

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 1/9/90

FURTHER:

Date of 5-Day Notice: 1-18-90
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 1-22-90

Resources _____ Committee considered _____ SJR 58

Endorsing a proposal in pending federal legislation to establish citizens' advisory committees to assist in the development and implementation of oil discharge contingency response plans.

and recommended:

- replace with _____ CS _____ same title
- attached amendment(s) new title
- _____ letter of intent adopted

- do pass
- do not pass
- no recommendation
- individual recommendations
- further referral to _____

ATTACHES NEW FISCAL NOTE(S):
Department(s)/Date:

Department(s)/Date:

fiscal note(s) _____

zero fiscal note(s) DEC

appropriation-no fiscal note

Governor's bill w/fiscal note

SIGNING DO PASS:

OTHER RECOMMENDATIONS:

[Handwritten signatures]

[Handwritten signature]

 Chair: Signature and Recommendation



Alaska State Legislature

SENATE

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

JAN 9 1990

January 9, 1990

TO: Senator Bette Fahrenkamp
Chair, Senate Resources Committee

FROM: Senator Mike Szymanski *MS*

SUBJECT: SJR 58, relating to pending federal legislation establishing citizens' advisory committees to assist in development and implementation of oil discharge contingency response plans.

SJR 58 has been referred to the Senate Resources Committee and I would like to request that a committee hearing be held as soon as possible on this resolution. Congress is due to reconvene this month and it is expected that the House/Senate Conference Committee on S. 686 and H.R. 1465 will be considering the consensus language very shortly.

This resolution has been developed with members of fishing groups, environmental groups and industry.

Thank you for your consideration of this request.



Alaska State Legislature

Senator Mike Szymanski

While in Session:
P.O. Box V
Juneau, Alaska 99811
(907) 465-4978

Interim:
3111 C Street, Suite 510
Anchorage, Alaska 99503
(907) 561-7617
or
165 E. Parks Highway
Wasilla, Alaska 99687
(907) 376-6453

January 19, 1990

TO: Senate Resources Committee Members

FROM: Senator Mike Szymanski *MS*

SUBJECT; SENATE JOINT RESOLUTIONN 58, relating to the establishment of citizens' advisory committees in federal legislation.

In the enclosed packet, you will find the following supporting information for this resolution:

- 1) Letter from Ann Rothe, President of the Regional Citizens Advisory Committee, explaining the evolution and purpose of the Committee and the status of federal legislation.
- 2) Regional Citizens Advisory Committee Members
- 3) Consensus Language for the Conference Committee which has been drafted and approved by the Regional Citizens Advisory Committee and endorsed by Senator Stevens and Senator Murkowski;
- 4) Federal Legislation which will be considered in Conference Committee, including
 - a. Congressional Record - House with the Young amendment
 - b. H.R. 1465, page 143
 - c. S. 686 by Senator Murkowski
- 5) List of Conferees
- 6) Resolution of support from the City of Cordova
- 7) Resolution of Support from the Kenai Peninsula Borough

Senate District E

Mat-Su Borough • Sitka Anchorage • Bar/Indian • Girdwood • Nikiski • Cooper Landing • Hope • Seward • Prince William Sound

REGIONAL CITIZENS ADVISORY COMMITTEE
750 West Second Avenue, Suite 200
Anchorage, Alaska 99501
(907) 694-9068

January 17, 1990

Senator Bettye Fahrenkamp, Chairman
Alaska State Senate Resources Committee
P.O. Box V
Juneau, Alaska 99811

Dear Senator Fahrenkamp:

I am writing to express the support of the Regional Citizens Advisory Committee for Senate Joint Resolution No. 58 now under co.sideration by your committee.

The formation of the Regional Citizens Advisory Committee (RCAC) was a cooperative effort between Alyeska Pipeline Service Company (Alyeska) and citizens of Prince William Sound and adjacent areas impacted by the Exxon Valdez oil spill. Efforts to organize this group were guided by recognition of the fact that participation of an informed citizenry is essential to insuring that potential environmental impacts from the operation of the Trans Alaska Pipeline Terminal, including operation of oil tankers served by the terminal, are minimized.

For your information, I have attached a copy of the list of the members of RCAC. The members came together in June of 1989 for two purposes:

- 1) To review Alyeska's revised oil spill prevention and response plan for Prince William Sound; and
- 2) To develop a plan of action for the formation of a permanent citizens' oversight group to monitor operation of the Trans Alaska Pipeline Terminal and oil tanker traffic served by terminal.

RCAC members provided Alyeska with our comments on the Prince William Sound Oil Spill Prevention and Response Plan released August 1. Our comments were incorporated into major revisions

to the plan released December 31. We are presently reviewing these revisions and will submit our comments to Alyeska in mid February.

Our chosen course of action for developing a permanent citizens oversight group was to incorporate as a nonprofit organization under Section 501(c)(3) of the Internal Revenue Code and enter into a contract with Alyeska that requires them to provide funding for the citizens group and establishes a formal and verifiable process for insuring that the advice provided by the citizens group is given serious consideration by the company.

We were chartered as a nonprofit corporation by the State of Alaska on December 26, 1989. The organizational meeting of the newly incorporated Regional Citizens Advisory Committee was held January 15. At that meeting, we elected our corporation officers and approved bylaws. Contract negotiations with Alyeska are nearing completion and we anticipate we will have a final contract ready to sign by the end of this week.

While we were organizing RCAC here in Alaska, we were aware that the concept of a citizens advisory committee had been included in oil spill legislation pending in Congress. We carefully reviewed Title V of Senate Bill 686 (authored by Senator Murkowski) and Title VIII of House Bill 1465 (authored by Senator George Miller of California), which deal with the establishment of citizens oversight groups. We felt Senator Murkowski's legislation most closely reflected what we felt was needed, except that it did not provide enough regional representation.

We rewrote Senator Murkowski's Title V to provide broader citizen oversight and took our language to Washington, D.C. in the hope that we could get it included in HB 1465 before it passed the House. Although we were asking for our language to be inserted very late in the House debate on the bill, Congressman Don Young agreed that he would see what he could do. After reviewing the direction of the debate on HB 1465, Congressman Young thought our language would have greater success if he could find another vehicle for its passage. He changed the federal oversight authority outlined in our language from the Environmental Protection Agency (EPA) to the U.S. Coast Guard and attached it to the Coast Guard appropriations bill which passed the House November 7, 1989.

When the House version of the Coast Guard appropriations bill reached the Senate, Young's Amendment (our language) was deleted. The Senate felt the Young Amendment should not have

been attached to Coast Guard appropriations, but should be considered along with S 686 and HB 1465 by the House-Senate conference committee for oil spill legislation to be convened in February. We intend to carry our language to conference committee staff next week.

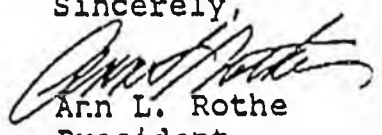
I have included for your information our final recommendations on this language. Please note that we have given the federal oversight authority back to the EPA because we felt our concerns over the operation of the Trans Alaska Pipeline Terminal and tanker traffic through Prince William Sound fall primarily in their purview as the lead federal agency charged with responsibility for enforcement of the Clean Water Act. We have contacted the offices of Senators Stevens and Murkowski and Congressman Young, and have received assurances that they will help us in our efforts.

In the meantime, we are continuing the task of building our organization. We have established four working subcommittees: Oil Spill Prevention and Response, Port Operations and Vessel Traffic Systems, Terminal Operations and Environmental Monitoring, and Scientific Research and Review. We intend to hold public meetings over the next three months in locations throughout the region represented by our committee to take public comment regarding the scope and purpose of these subcommittees and seek nominations for subcommittee members. In addition, we will seek nominations for ex-officio members from the state and federal regulatory agencies responsible for overseeing terminal operations and tanker traffic in the Sound.

I hope this provides you with an understanding of the purpose and commitment of the Regional Citizens Advisory Committee. On behalf of our committee, I respectfully request that you give your strong support to SJR No. 58.

If you have further questions regarding the Regional Citizens Advisory Committee, please do not hesitate to contact me.

Sincerely,



Arn L. Rothe
President

Enclosures

cc: Members, Regional Citizens Advisory Committee

December 12, 1989

RCAC MEMBERS

NAME	ADDRESS	PHONE	FAX
BOB BRODIE CITY OF KODIAK	710 MILL BAY RD. KODIAK, AK 99615	486-3224(WK) 486-3079(HM)	486-4009
JIM BUTLER KENAI PENINSULA	144 N. BINKLEY AVE SOLDOTNA, AK 99669 560-27-0535	262-7815(WK) 283-5633(HM)	262-1892
CHARLES CHRISTIANSEN LARSEN BAY	BOX 8 LARSEN BAY, AK 99615	847-2211	847-2239
BILL WALKER CITY OF VALDEZ	509 W. 3rd AVE. ANCHORAGE, AK 99501	263-8251 274-7522	263-8320
CHRIS GATES CITY OF SEWARD	5th & ADAMS BOX 167 CITY HALL SEWARD, AK 99664	224-3331(WK) 224-8667(HM)	224-3248
MARILYN LELAND C.D.F.U.	BOX 939 CORDOVA, AK 99574 SS# 384-48-2011	424-3447(WK) 424-7778(HM)	424-3430
JOHN McMULLEN PWSAC	PWSAC OFFICE CORDOVA, AK 99574 SS# 386-32-5722	424-7511(WK)	424-7514
DAVE MOFFAT CITY OF WHITTIER	BEGICH TOWERS CONDO 504 WHITTIER, AK 99693 SS# 179-16-2663	472-2327(WK) 472-2443(HM)	472-2404
STACY PASCAL CHUGACH ALASKA CORP.	3000 A STREET SUITE 400 ANCHORAGE, AK 99503	563-8866(WK) 272-2272(HM)	563-8402
TIM ROBERTSON CITY OF SELDOVIA	DRAWER B SELDOVIA, AK 99663	234-7469(WK) 234-7491(HM)	234-7430
ANN ROTHE NATL WLD. FEDERATION	750 W. 2ND AVE SUITE 200 ANCHORAGE, AK SS# 479-70-4492	258-4800(WK)	258-4811
JEROME SELBY KODIAK ISLAND BOROUGH	710 MILL BAY RD KODIAK, AK 99615	486-5736(WK)	486-2886
MARGE TILLON CITY OF HOMER	P.O. BOX 935 HOMER, AK 99603	235-7085(HM)	235-7085
MEAD TREADWELL CITY OF CORDOVA	FIRST STREET BOX 1210 CORDOVA, AK 99574	424-6248(WK) 277-3042(HM)	424-6000

12/06/89 DRAFT
ACAC RECOMMENDATIONS FOR FEDERAL LEGISLATION
GOVERNING CITIZENS OVERSIGHT OF TERMINAL AND TANKER OPERATIONS
IN ALASKA

ACAC recommends that the Conference Committee include the Amendment to H.R. 1465 offered by Rep. Young dated 11/7/89 with our suggested changes in the Committee's final bill on oil spill prevention, liability and compensation. Mr. Young's amendment with our recommended changes is provided below:

SEC. ____ . TERMINAL AND TANKER OVERSIGHT AND MONITORING

(a) SHORT TITLE.--This title may be sited as the "Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Act of 1989."

(b) DEMONSTRATION PROGRAMS.--

- (1) ESTABLISHMENT.--There are established two Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Demonstration Programs (hereinafter referred to as "Programs") to be carried out in the State of Alaska.
- (2) ADVISORY FUNCTION.--The function of these programs shall be advisory only.
- (3) PURPOSE.--Prince William Sound Program shall be responsible for environmental monitoring of the terminal facilities in Prince William Sound and the crude oil tankers operating in Prince William Sound. The Cook Inlet Program shall be responsible for environmental monitoring of the terminal facilities and crude oil tankers operating in Cook Inlet located south of the latitude at Point Possession and north of the latitude at [AMATUL] Amatuli Island, including offshore facilities in Cook Inlet.
- (4) SUITS BARRED.--No program, association, council, committee or other organization created by this section may sue any person or entity, public or private, concerning any matter arising under this section except for the performance of contracts.

(c) OIL TERMINAL FACILITIES AND OIL TANKER OPERATION ASSOCIATION.--

- (1) ESTABLISHMENT.--There is established an Oil Terminal Facilities and Oil Tanker Operations Association (hereinafter referred to as the "Association") for each of the Programs established in subsection (b).
 - (2) MEMBERSHIP.--Each Association shall be comprised of four individuals as follows:
 - (A) One individual shall be designated by the owners and operators of the terminal facilities and shall represent those owners and operators;
 - (B) One individual shall be designated by the owners and operators of the crude oil tankers call and the terminal facilities and shall represent those owners and operators;
 - (C) One individual shall be an employee of the State of Alaska, shall be designated by the Governor of the State of Alaska, and shall represent the State Government; and
 - (D) One individual shall be an employee of the Federal Government, shall be designated by the President, and shall represent the Federal Government.
 - (3) RESPONSIBILITIES.--Each Association shall be responsible for reviewing policies relating to the operation and maintenance of the oil terminal facilities and crude oil tankers which affect or may affect the environment in the vicinity of their respective terminals. Each Association shall provide a forum among the owners and operators of the terminal facilities, the owners and operators of crude oil tankers calling at those facilities, the United States, and the State of Alaska to discuss and to propose resolution of all permits, plans, and site-specific regulations governing the activities and actions of the terminal facilities which affect or may affect the vicinity of the terminal facilities and of crude oil tankers calling at those facilities.
- (d) REGIONAL CITIZENS' ADVISORY COUNCILS.--
- (1) MEMBERSHIP.--Each Council shall be comprised of voting and non-voting members and follows:

(A) VOTING MEMBERS.--Voting members shall be Alaska residents and, except as provided in clause (vii) of this paragraph, shall be appointed by the Governor from a list of nominees provided by each of the following interests, with one representative appointed to represent each of the following interests, taking into consideration the need for regional balance on the Council--

(i) local commercial fishing industry organizations, the members of which depend on the fisheries resources of the waters in the vicinity of the terminal facilities;

(ii) the aquaculture association(s) in the vicinity of the terminal facilities;

(iii) Alaska Native Corporations and other Alaska Native organizations the members of which reside in the vicinity of the terminal facilities;

(iv) environmental organizations the members of which reside in the vicinity of the terminal facilities;

(v) recreational organizations the members of the which reside in or use the vicinity of the terminal facilities;

(vi) the Alaska State Chamber of Commerce, to represent the locally based tourist industry;

(vii) (I) for the Prince William Sound terminal facilities Council, one representative selected by each of the following municipalities: Cordova, Whittier, Seward, Valdez, Kodiak, the Kodiak Island Borough, and the Kenai Peninsula Borough;

(II) for the Cook Inlet terminal facilities Council, one representative selected by each of the following municipalities: Homer, Seldovia, Anchorage, Kenai, Kodiak, the Kodiak

Island Borough, and the Kenai Peninsula Borough.

(B) NON-VOTING MEMBERS.--One ex-officio, non-voting representative shall be designated by, and represent, each of the following--

- (i) Environmental Protection Agency;
- (ii) Coast Guard;
- (iii) U.S. Forest Service;
- (iv) Department of the Interior;
- (v) Alaska Department of Environmental Conservation;
- (vi) Alaska Department of Fish and Game;
- (vii) Alaska Department of Natural Resources; and
- (viii) Division of Emergency Services,
[ALASKA DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS] Alaska Department of Military and Veterans Affairs.

(3) TERMS.--

(A) THREE YEARS.--The voting members of each council shall be appointed for a term of three years except as provided for in subparagraph (3)(B) of this paragraph.

(B) INITIAL APPOINTMENTS.--The terms of the first appointments shall be--

(i) for the appointments by the Governor of the State of Alaska, one third shall serve for three years, one third shall serve for two years, and one third shall serve for one year; and

(ii) for the representatives of municipalities required by subsection (d)(2)(A)(vii) a drawing of lots among the appointees shall determine that one third of that group serves for three years, one third serves for two years, and the remainder serve for one year.

(4) SELF-GOVERNING.--Each Council shall elect its own chairperson, select its own staff, and make policies with regard to its internal operating procedures. After the initial organizational meeting called by the [SECRETARY OF

TRANSPORTATION) Administrator of the Environmental Protection Agency under subsection (i) of this section, each Council shall be self-governing.

(5) DUAL MEMBERSHIP PROHIBITED.--No individual selected as a member of the Council shall serve on the Association.

(6) DUTIES OF THE COUNCIL.--Each Council shall--

(A) provide advice and recommendations to the Association on policies, permits, and site-specific regulations relating to the operation and maintenance of terminal facilities and crude oil tankers which affect or may affect the environment in the vicinity of the terminal facilities;

(B) monitor through the committee established under subsection (e) of this section, the environmental impacts of the operation of the terminal facilities and crude oil tankers;

(C) monitor those aspects of terminal facilities and crude oil tanker operations and maintenance which affect or may affect the environment in the vicinity of the terminal facilities;

(D) review through the committee established under subsection (f) of this section, the adequacy of oil spill prevention and contingency plans for the terminal facilities and the adequacy of oil spill prevention and contingency plans for crude oil tankers operating in Prince William Sound or Cook Inlet;

(E) recommend to the Association --

(i) standards and stipulations for permits and site-specific regulations intended to minimize the impact of terminal facilities and crude oil tanker operations on the environment in the vicinity of the terminal facilities;

(ii) modifications in terminal facilities operations and maintenance intended to

minimize the impact of terminal facilities operations on the environment in the vicinity of the terminal facilities and to minimize the risk of oil spills;

(iii) modifications of crude oil tanker operations and maintenance in Prince William Sound and Cook Inlet intended to minimize the risk and mitigate the impact of oil spills; and

(iv) modifications to the oil spill prevention and contingency plans for terminal facilities and for crude oil tankers in Prince William Sound and Cook Inlet intended to enhance the ability to prevent and respond to an oil spill.

(F) create additional committees of the Council as necessary to carry out the above functions, including a scientific and technical advisory committee to the Prince William Sound Council.

(7) NO ESTOPPEL.--No Council shall be held liable under state or federal law for costs or damages as a result of rendering advice pursuant to this title. Nor shall any advice given by a council, association or program representative or agent be grounds for estopping the interests represented by each Council from seeking damages and other appropriate relief [IN THE EVENT OF A SPILL].

(8) SCIENTIFIC WORK.--In carrying out its research development and monitoring functions, each Council shall review the scientific work undertaken by or on behalf of the terminal operators or crude oil tanker operators as a result of a legal requirement to undertake that work. Each Council shall also review the relevant scientific work undertaken by or on behalf of any government entity relating to the terminal facilities or crude oil tankers. To the extent possible, to avoid unnecessary duplication, the Council shall coordinate its work with the scientific work performed by or on behalf of the terminal operators and with the scientific work performed by or on behalf of the operators of the crude oil tankers.

(e) COMMITTEE FOR TERMINAL AND OIL TANKER OPERATIONS AND ENVIRONMENTAL MONITORING.--

(1) MONITORING COMMITTEE.--Each Council shall establish a standing Terminal and Oil Tanker Operations and Environmental Monitoring Committee (hereinafter referred to as the "Monitoring Committee") to devise and manage a comprehensive program of monitoring the environmental impacts of the operations of terminal facilities and of crude oil tankers while operating in Prince William Sound and Cook Inlet. The membership of the Monitoring Committee shall be made up of members of the Council, citizens and recognized scientific experts selected by the Council.

(2) DUTIES.--In fulfilling its responsibilities, the Monitoring Committee shall--

(A) advise the Council on a monitoring strategy that will permit early detection of environmental impacts of terminal facilities operations and crude oil tanker operations while in Prince William Sound and Cook Inlet;

(B) develop monitoring programs and make recommendation to the Council on the implementation of those programs;

(C) at its discretion, select and contract with universities and other scientific institutions to carry out specific monitoring projects authorized by the Council pursuant to an approved monitoring strategy;

(D) complete any other tasks assigned by the Council; and

(E) provide written reports to the Council which interpret and assess the results of all monitoring programs.

(f) COMMITTEE FOR OIL SPILL PREVENTION, SAFETY, AND EMERGENCY RESPONSE.--

(1) TECHNICAL OIL SPILL COMMITTEE.--Each Council shall establish a standing technical committee (hereinafter referred to as the "Oil Spill Committee") to review and assess measures

designed to prevent oil spills and the planning and preparedness for responding to, containing, and cleaning up oil spills. The membership of the Oil Spill Committee shall be made up of members of the Council, citizens and recognized technical experts selected by the Council.

- (2) DUTIES.--In fulfilling its responsibilities, the Oil Spill Committee shall--
- (A) periodically review the respective oil spill prevention and contingency plans for the terminal facilities and for the crude oil tankers while in Prince William Sound or Cook Inlet, in light of new technological developments and changed circumstances;
 - (B) monitor periodic drills and testing of the oil spill contingency plans for the terminal facilities and for crude oil tankers while in prince William Sound and Cook Inlet;
 - (C) study wind and water currents and other environmental factors in the vicinity of the terminal facilities which may affect the ability to prevent, respond to, contain, and clean up an oil spill;
 - (D) identify highly sensitive areas which may require specific protective measures in the event of a spill in Prince William Sound or Cook Inlet;
 - (E) monitor developments in oil spill prevention, containment, response and cleanup technology;
 - (F) periodically port organization, operations, incidents, and the adequacy and maintenance of vessel traffic systems designed to assure safe transit of vessels pertinent to terminal operations;
 - (G) periodically review the standards for tankers bound for, loading at, exiting from or otherwise using the terminal facilities; and
 - (H) Complete any other tasks assigned by the Council; and
 - (I) provide written reports to the Council outlining its findings and recommendations.

(g) AGENCY COOPERATION.--On and after the expiration of the 180-day period following the date of enactment of this section, each Federal department, agency, or other instrumentality shall, with respect to all permits, site-specific regulations, and other matters governing the activities and actions of the terminal facilities which affect or may affect the vicinity of the terminal facilities, consult with the appropriate Council prior to taking substantive action with respect to the permit, site-specific regulation, or other matter. This consultation shall be carried out with a view to enabling the appropriate Association and Council to review the permits, site-specific regulations, or other matters and make appropriate recommendations regarding operations policy or agency actions. Prior consultation shall not be required if an authorized Federal agency representative reasonably believes that an emergency exists requiring action without delay.

(h) RECOMMENDATIONS OF THE COUNCIL.--In the event that the Association does not adopt or significantly modifies before adoption any recommendation of the Council made pursuant to the authority granted to the Council in subsection (d), the Association shall provide, in writing, within five days of its decision, to the Council notice of its decision and a written statement of reasons for its rejection or significant modification of the recommendation.

(i) ADMINISTRATIVE ACTIONS.--Appointments, designations, and selections of individuals to serve as members of the Associations and Councils under this section shall be submitted to the [SECRETARY OF TRANSPORTATION] Administrator of the Environmental Protection Agency prior to the expiration of the 120-day period following the date of the enactment of this section. On or before the expiration of the 180-day period following the enactment of this section, the [SECRETARY] Administrator shall call an initial meeting of each Association and Council for organizational purposes.

(j) LOCATION AND COMPENSATION.--

- (1) LOCATION.--Each Association and Council established by this title shall be located in the State of Alaska.
- (2) COMPENSATION.--No member of an Association or Council shall be compensated for the member's services as a member of the Association or Council, but shall be allowed travel expenses, including per diem in lieu of subsistence, at a

rate established by such Association or Council not to exceed the rates authorized for employees of agencies under sections 5702 and 5703 of title 5, United States Code. However, each Council may enter into contracts to provide for compensation and expenses to members of the committees created under subsections (d), (e), and (f) of this section.

(k) FUNDING.--

(1) REQUIREMENT.--Approval of [THE] all contingency plans and licenses required of owners and operators of the Cook Inlet and Prince William Sound terminal facilities and crude oil tankers shall be effective only so long as the respective Association and Council for a facility are funded pursuant to paragraph (2) of this section.

(2) RESPONSIBILITY.--

(A) PRINCE WILLIAM SOUND.--The owners and operators of terminal facilities or crude oil tankers in Prince William Sound shall provide, for the establishment and operation of the environmental oversight and monitoring program in Prince William Sound, \$2,000,000 annually, adjusted annually by the Anchorage Consumer Price Index.

(B) OIL SPILL FUND.--Subject to appropriations laws, the Secretary of the Treasury shall make available from the Oil Spill Liability Trust Fund to the [SECRETARY OF TRANSPORTATION] Administrator of the Environmental Protection Agency such sums, in addition to those available pursuant to subparagraph (A), as the [SECRETARY] Administrator deems necessary to operate the Prince William Sound Program established by this section.

(C) COOK INLET PROGRAM.--

(i) Subject to appropriations laws, the Secretary of the Treasury shall make available from the Oil Spill Liability Fund to the [SECRETARY OF TRANSPORTATION] Administrator of the Environmental Protection Agency such sums as the

CITY OF CORDOVA, ALASKA

RESOLUTION 90-14

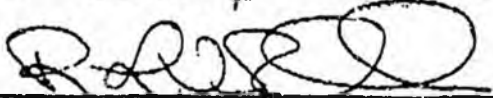
A RESOLUTION OF THE CITY OF CORDOVA, ALASKA
TO SUPPORT SENATE JOINT RESOLUTION NO. 58

WHEREAS, the City of Cordova, Alaska, urges the State of Alaska to support SJR 58 endorsing a proposal in Federal Legislation to establish Citizens' Advisory Committees to assist in the development and implementation of oil discharge contingency response plans, and

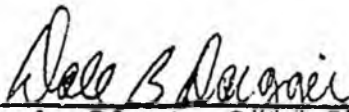
WHEREAS, the City of Cordova supports the Citizens' involvement in the contingency planning.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Cordova, Alaska, hereby supports and strongly urges the State of Alaska to continue endorsing the SJR 58.

PASSED AND APPROVED THIS 17th DAY OF January, 1990.



Mayor Robert Van Brocklin


for D. Lynda Plant, City Clerk



KENAI PENINSULA BOROUGH

144 N. BINKLEY • SOLDOTNA, ALASKA 99669
PHONE (907) 282-4441

DON GILMAN
MAYOR

January 16, 1990

Senator Mike Szymanski
Room 11, Capital
P.O. Box V
Juneau, AK. 99811

RE: Senate Joint Resolution 58

Dear Senator Szymanski:

I would like to convey my support for Senate Joint Resolution 58, which endorses a proposal in pending federal legislation establishing regional citizen advisory councils to assist in the development of oil spill prevention and response plans in Cook Inlet and Prince William Sound.

The Kenai Peninsula Borough, along with native corporations, oil impacted local communities and impacted user groups, has worked since the oil spill to establish such a citizen advisory committee. The result has been the interim Regional Citizen Advisory Committee in Prince William Sound. This group provides a forum that will facilitate communication between the oil transportation industry, local communities and area user groups. It will also provide local input in oil spill prevention and response strategies as they are developed.

I would urge the Alaska Legislature to support this aspect of pending federal legislation and pass SJR 58 to document their support.

Sincerely,

Jim Butler
for Don Gilman
Mayor

cc: Sen. Fahrenkamp
Sen. Fischer
Rep. Navarre
Rep. Swack

FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: SJR 58
Advisory Committees
 Sponsor: Szymanski
 Requestor: S. Resources

Agency Affected: Environmental Conservation
 BRU: _____
 Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

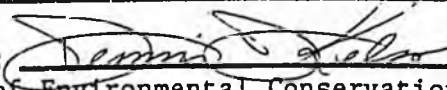
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS : (Attach a separate page if necessary)

The FY 90 effect would also be a zero impact.

Prepared by: Gail Gatton
 Division: Administrative Services

Phone: 465-2600
 Date: 1/22/90

Approved by Commissioner: 
 Agency: Department of Environmental Conservation

Date: January 22, 1990

Distribution (by preparer):

Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

(D) **DEFINITIONS.**—For purposes of this section—

- (1) "tanker" means a self-propelled tank vessel that is constructed or adapted to carry oil in bulk in the cargo spaces; and
- (2) "barge" means a nonself-propelled vessel constructed or adapted to carry oil in bulk as cargo.

SEC. 214. OILER FARE REPORT CLARIFICATION

Section 664(c) of title 14, United States Code, is amended as follows:

- (1) in paragraph (1) by striking "collected stating—" and substituting "collected under any law stating—" and
- (2) in paragraph (2) by inserting "under any law" after "collected" the first time it appears.

SEC. 215. REVIEW OF CRIMINAL RECORDS OF ISSUING AND RENEWING SEAMEN'S LICENSES

Chapter 71 of title 46, United States Code is amended—

- (1) in section 7101—
 - (A) by redesignating subsection (f) as subsection (g); and
 - (B) by inserting after subsection (e) the following:
 - "(f) This Secretary shall conduct a review of the criminal record of each individual who applies for a license under this section;" and
 - (2) in section 7103—
 - (A) by inserting "(f)" before "A license"; and
 - (B) by adding at the end the following:
 - "(f) The Secretary shall conduct a review of the criminal record of each holder of a license issued under this part who applies for renewal of that license under this section."

SEC. 216. BOND FOR THE CORRECTION OF MILITARY RECORDS

Not later than 6 months after the date of the enactment of this act, the Secretary of Transportation shall—

- (1) amend part 63 of title 58, Code of Federal Regulations, governing the proceedings of the board established by the Secretary under section 1952 of title 10, United States Code, to ensure that an application for correction of military records is processed expeditiously and that final action on the application is taken within 10 months of its receipt; and
- (2) appoint and maintain a permanent staff, and a panel of civilian officers or employees to serve as members of the board, which are adequate to ensure compliance with paragraph (1) of this subsection.

SEC. 217. CONVEYANCE OF MARINE ARMORTRATION VESSELS

Before acquiring a vessel for use by the Coast Guard, the Secretary of Transportation, the Commandant of the Coast Guard, as appropriate, shall review the inventory of vessels acquired by the Secretary or the Secretary of Commerce as the result of a default under title XI of the Merchant Marine Act, 1936 (16 App. U.S.C. 1271-1273c), to determine whether any of those vessels are available for use by the Coast Guard.

SEC. 218. PROHIBITION AGAINST REDUCTION IN SERVICES

Notwithstanding any other law, the Secretary of Transportation may not reduce the level of Coast Guard activity during fiscal year 1990 to increase drug law enforcement. Amounts made available from all sources to carry out Coast Guard activities are equal to or greater than the amounts used to carry out Coast Guard activities during fiscal year 1989.

SEC. 219. SUSPENSION AND REVOCATION OF SEAMEN'S LICENSES FOR ALCOHOL ABUSE

(A) **IN GENERAL.**—Chapter 77 of title 46, United States Code, is amended by adding the following new section:

"§ 7704a. Alcohol abuse as grounds for revocation

(a) The Secretary shall suspend or revoke a license, certificate of registry, or merchant mariner's document if the Secretary determines the holder is a current or chronic abuser of alcohol.

(b) Any determination by the Secretary to suspend or revoke a license, certificate of registry, or merchant mariner's document under this section shall be based on the severity of abuse of alcohol by the holder and the length of time necessary to control that abuse.

(c) The Secretary shall conduct necessary investigations to determine if a holder is a current or chronic abuser of alcohol if the Secretary receives information regarding any alcohol-related misconduct of the holder.

(d) A suspension of a license, certificate of registry, or merchant mariner's document under subsection (a) shall remain in effect until the former holder provides sufficient proof that the former holder is no longer a current or chronic abuser of alcohol."

(b) **CLERICAL AMENDMENT.**—The context for chapter 77 of title 46, United States Code, is amended by adding "7704a. Alcohol abuse as grounds for revocation." after "7204. Dangerous drug as grounds for revocation."

SEC. 220. REQUIREMENT TO REPORT SEXUAL OFFENSES

(A) **IN GENERAL.**—Chapter 101 of title 46, United States Code is amended by—

- (1) deleting section 10104; and
- (2) adding the following new section:

"§ 10104. Requirement to report sexual offenses

(a) A master or other individual in charge of a documented vessel shall report to the Secretary a complaint of a sexual offense prohibited under chapter 109A of title 18, United States Code.

(b) A master or other individual in charge of a documented vessel who knowingly fails to report in compliance with this section is liable to the United States Government for a civil penalty of \$5,000."

(b) **CLERICAL AMENDMENT.**—The analysis for chapter 101 of title 46, United States Code, is amended by striking "10104. Regulations" and inserting "10104. Requirement to report sexual offenses."

SEC. 221. SOUTHEAST LIGHTHOUSE PRESERVATION

(a) (1) The Secretary of the department in which the Coast Guard is operating shall convey, by any appropriate means, all right, title and interest of the United States in the Block Island Southeast Lighthouse to the Block Island Southeast Lighthouse Foundation (hereafter referred to as the "Foundation") of the town of New Shoreham, Rhode Island.

(2) The purpose of this conveyance is to establish and maintain a nonprofit center for the public at the Block Island Southeast Lighthouse for interpretation and preservation of the culture of the United States Coast Guard and Block Island's maritime history.

(b) The conveyance shall be made—

- (1) without payment of consideration;
- (2) subject to the condition that if the property, or any part of the property, ceases to be used for the purpose of this section, title to all such property shall be deemed to have immediately reverted to the United States; and
- (3) subject to such other terms and conditions as the Secretary of the department in which the Coast Guard is operating may impose.

(c) The conveyance shall include provisions necessary to assure that—

- (1) the light, antennas, sound signal, and associated equipment which are active aids to navigation shall continue to be operated and maintained by the United States;
- (2) the Foundation will not interfere or allow its interests to be in any manner with national

national aids without written permission of the United States;

(3) there is reserved to the United States the right to relocate, replace, or add any navigational aids or make any changes on any portion of the property as may be necessary for a navigational purpose;

(4) the United States shall have the right, at any time, to enter the property without notice to maintain navigational aids; and

(5) the United States shall have an easement for access to the property to maintain navigational aids.

(d) The Secretary of the department in which the Coast Guard is operating shall identify, describe, and determine the properties to be conveyed under this section.

(e) For purposes of this section, "Block Island Southeast Lighthouse" means the lighthouse and attached keeper's dwelling, several ancillary buildings, a fog signal, and land necessary to carry out the purpose of this section located in the town of New Shoreham, Rhode Island.

AMENDMENT OFFERED BY MR. YOUNG OF ALASKA

Mr. YOUNG of Alaska, Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. Young of Alaska: Page 21, after line 22, add the following new section—

"SEC. 2. TERMINAL AND TANKER OVERTIGHT AND MONITORING

"(a) **SHORT TITLE.**—This section may be cited as the "Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Act of 1989".

"(b) **DEMONSTRATION PROGRAMS.**—

"(1) **TERMINAL AND TANKER ENVIRONMENTAL OVERTIGHT AND MONITORING DEMONSTRATION PROGRAMS.**—There are established two Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Demonstration Programs (hereinafter referred to as "Programs") to be carried out in the State of Alaska.

"(2) **ADVISORY FUNCTION.**—The function of these Programs shall be advisory only.

"(3) **PURPOSE.**—Prince William Sound Program shall be responsible for environmental monitoring of the terminal facilities in Prince William Sound and the crude oil tankers operating in Prince William Sound. The Cook Inlet Program shall be responsible for environmental monitoring of the terminal facilities and crude oil tankers operating in Cook Inlet located south of the latitude at Point Possession and North of the latitude at Amaral Island, including offshore facilities in Cook Inlet.

"(4) **STATUS BARRED.**—No program, association, council, committee or other organization created by this section may sue any person or entity, public or private, concerning any matter arising under this section.

"(c) OIL TERMINAL PROGRAMS AND OIL TANKER OPERATIONS ASSOCIATION.—

"(1) **ESTABLISHMENT.**—There is established an Oil Terminal Facilities and Oil Tanker Operations Association (hereinafter referred to as "Association") for each of the Programs established in subsection (b).

"(2) **MEMBERSHIP.**—Each Association shall be comprised of four individuals as follows:

"(A) One individual shall be designated by the owners and operators of the terminal facilities and shall represent those owners and operators;

"(B) One individual shall be designated by the owners and operators of the crude oil tankers calling at the terminal facilities and shall represent those owners and operators;

"(C) One individual shall be an employee of the State of Alaska, shall be designated by the Governor of the State of Alaska, and shall represent the State government; and

"(D) One individual shall be an employee of the Federal Government, shall be design-

Items #2 and #3

- Consensus language

- Fed' legislation

HOUSE CONFEREES ON H.R. 1465MERCHANT MARINE AND FISHERIES COMMITTEEDEMOCRATS

JONES (KURT OXLEY)
 STUDDS (WILL STELLE)
 TAUZIN (ROY WILLIS)
 CARPER (CHRISTOPHE TULU)
 MANTON (JIM MATTHEWS)

REPUBLICANS

DAVIS (SHERRY STEELE)
 YOUNG (LEE FORSGREN)
 LENT (KIP ROBINSON)
 SHUMWAY (LARRY FLICK)

PUBLIC WORKS AND TRANSPORTATIONDEMOCRATS

ANDERSON (ERROL TYLER)
 NOWAK (ERROL TYLER/KATHY EVANS)
 BOSCO (JASON LYLES)
 BORSKI (MANOR PRUITT)
 MINETTA (JOHN KARREN)

REPUBLICANS

HAMMERSCHMIDT (GABE ROZSA)
 STANGLAND (GABE ROZSA)
 SHUSTER (SCOTT LOWRY)

SCIENCE, SPACE, AND TECHNOLOGYTITLE VIIDEMOCRATS

ROE (PHIL STEFFEN)
 SCHEUER (MIKE RODENMYER)
 TANNER (VICKI WALLING)
 NOWAK (KATHY EVANS)
 BROWN, GEORGE (HOLLY WELLS)

REPUBLICANS

WALKER (BILL WICHTERMAN)
 SCHNEIDER (PETER MARX)
 MORRISON, SID (JIM STODA)

FOREIGN AFFAIRSTITLE IIIDEMOCRATS

FASCELL (TOM ADAMS)
 YATRON (TIM TERRY)
 OWENS, WAYNE (SCOTT KEARIN)
 LANTOS (JOAN NYKODYM)
 FEIGHAN (JIM SWEENEY)

REPUBLICANS

BROOMFIELD (DAN FINN)
 BEREUTER (DARREL CHOAT)
 MILLER, JOHN (CHUCK BROCHE)

SENATE CONFEREES ON H.R. 1465

ENVIRONMENT AND PUBLIC WORKS

DEMOCRATS

BURDICK (BOB DAVIDSON)
MOYNIHAN (ROY KIENITZ)
MITCHELL (KATE KIMBALL)
BAUCUS (KATE KIMBALL)
LAUTENBERG (JEFF MORALES)
BREAUX (MARSHA JONES/JEFF SCHRYVER)

REPUBLICANS

CHAFFEE (RICH INNES)
DURENBERGER (EDWARD GARVEY)
WARNER (CLAUDIA McMURRAY)
JEFFORDS (BRIAN KEEFE)
HUMPHREY (JEFF MERRIFIELD)

COMMERCE, SCIENCE, AND TRANSPORTATION

DEMOCRATS

HOLLINGS (PENNY DALTON/MIKE NESSMAN)
INOUE (PHYLLIS MINN)
KERRY (GRAHAM CHISHOLM)
BREAUX (MARSHA JONES/JEFF SCHRYVER)

REPUBLICANS

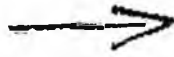
DANFORTH (BOB EISENBUD)
PACKWOOD (JOHN STEPHENS)
STEVENS (LISA SUTHERLAND
EARL COMSTOCK)

B1 H15
H

101ST CONGRESS
1ST SESSION

H. R. 1465

IN THE SENATE OF THE UNITED STATES



NOVEMBER 15 (legislative day, NOVEMBER 6), 1989

Received

AN ACT

To establish limitations on liability for damages resulting from oil pollution, to establish a fund for the payment of compensation for such damages, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

4 (a) SHORT TITLE.—This Act may be cited as the "Oil
5 Pollution Act of 1989".

6 (b) TABLE OF CONTENTS.—The contents of this Act
7 are as follows:

Task Force p. 143.

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B2 115

1 with the Interagency Committee and the agencies represent-
2 ed on the Interagency Committee.

1 provisi-
2 U.S.C.

3 (10) The applicant shall disseminate results of oil pollu-
4 tion prevention, removal, mitigation, and environmental ef-
5 fects research and development, as appropriate, through
6 technology transfer, training, and other educational pro-
7 grams.

3 Sub

4
5 SEC. 81

8 (g) FUNDING.—Not to exceed \$28,000,000 of amounts
9 in the Fund shall be available annually, without fiscal year
10 limitation, to carry out this section. For each of fiscal years
11 1990, 1991, 1992, 1993, and 1994, \$1,000,000 of such
12 amount shall be available for each regional center established
13 under subsection (f).

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14 **TITLE VIII--TRANS-ALASKA**
15 **PIPELINE SYSTEM**

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15 pa

16 SEC. 8001. SHORT TITLE.

16 (c

17 This title may be cited as the "Trans-Alaska Pipeline
18 System Reform Act of 1989".

17 U.S.C.

18

19 SEC. 8002. REFERENCES TO TRANS-ALASKA PIPELINE
20 AUTHORIZATION ACT.

19 "

20

21 Except as otherwise expressly provided, whenever in
22 this title an amendment or repeal is expressed in terms of an
23 amendment to, or repeal of, a section or other provision, the
24 reference shall be considered to be made to a section or other

21 in

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24 p

B3 of 15

1 provision of the Trans-Alaska Pipeline Authorization Act (43
2 U.S.C. 1651-1635).

8 **Subtitle A—Improvements to Trans-**
4 **Alaska Pipeline System**

5 **SEC. 8101. LIABILITY WITHIN THE STATE OF ALASKA AND**
6 **CLEANUP EFFORTS.**

7 (a) **CAUSE OF ACCIDENT.**—Section 204(a)(1) of the
8 Trans-Alaska Pipeline Authorization Act (43 U.S.C.
9 1653(a)(1)) is amended by striking out “caused by” in the
10 first sentence and inserting in lieu thereof “caused solely by”.

11 (b) **REMOVAL OF LIMITATION.**—Section 204(a) of the
12 Act (43 U.S.C. 1653(a)) is amended—

13 (1) by striking out paragraph (2); and

14 (2) by redesignating paragraphs (3), (4), and (5) as
15 paragraphs (2), (3), and (4), respectively.

16 (c) **CLEANUP EFFORTS.**—Section 204(b) of the Act (43
17 U.S.C. 1653(b)) is amended in the first sentence—

18 (1) by inserting after “any area” the following:
19 “in the State of Alaska”;

20 (2) by inserting after “any activities” the follow-
21 ing: “related to the trans-Alaska pipeline system, in-
22 cluding operation of the terminal,”; and

23 (3) by inserting after “other Federal” the first
24 place it appears the following: “or State”.

1 SEC. 8102. TRANS-ALASKA PIPELINE LIABILITY FUND.

1 or c

2 (a) TERMINATION OF CERTAIN PROVISIONS.—Section
3 204(c) of the Act (43 U.S.C. 1653(c)) is amended by adding
4 at the end the following new paragraph:

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4 rog:

5 "(13) Paragraphs (1) through (14) shall apply to claims
6 pending against the Fund, but only with respect to incidents
7 occurring before the date of the enactment of the Trans-
8 Alaska Pipeline System Reform Act of 1989."

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9 (b) CAUSE OF ACCIDENT.—Section 204(c)(2) of the
10 Trans-Alaska Pipeline Authorization Act (43 U.S.C.
11 1653(c)(2)) is amended by striking out "caused by" in the
12 first sentence and inserting in lieu thereof "caused solely by".

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13 (c) DAMAGES.—Section 204(c) of the Act (43 U.S.C.
14 1653(c)) (as amended by subsection (a)) is further amended by
15 adding at the end the following new paragraph:

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16 "(14) For any claims against the Fund, the term 'dam-
17 ages' shall include, but not be limited to, the net loss of
18 taxes, revenues, fees, royalties, rents, or other revenues in-
19 curred by a State or a political subdivision of a State due to
20 injury, destruction, or loss of real property, personal proper-
21 ty, or natural resources, or diminished economic activity due
22 to the discharge."

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23 (d) PAYMENT OF CLAIMS BY FUND.—Section 204(c)(3)
24 of the Act (43 U.S.C. 1653(c)(3)) is amended by adding at
25 the end the following: "The Fund shall pay a valid claim
26 under this section, including such \$14,000,000, if the owner

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B5 of 15

1 or operator of a vessel has not paid any such claim within 90
 2 days after such claim has been submitted to such owner or
 8 operator. Upon payment of any claim, the Fund shall be sub-
 4 rogated under applicable State and Federal laws to all rights
 5 of any person entitled to recover under this subsection, sub-
 6 ject to the limit of liability of the owner and operator under
 7 this Act. In any action brought by the Fund against an owner
 8 or operator or an affiliate thereof to recover amounts under
 9 this paragraph, the Fund shall be entitled to recover pre-
 10 judgment interest, costs, and reasonable attorney's fees."

11 (e) OFFICERS OR TRUSTEES.—Section 204(c)(4) is
 12 amended—

13 (1) by inserting "(A)" after "(4)"; and

14 (2) by adding at the end the following:

15 "(B) No present or former officer or trustee of the Fund
 16 shall be subject to any liability incurred by the Fund or by
 17 the present or former officers or trustees of the Fund, other
 18 than liability for gross negligence or willful misconduct.

19 "(C)(i) Subject to clause (ii), each officer and each
 20 trustee of the Fund—

21 "(I) shall be indemnified against all claims and li-
 22 abilities to which he or she has or shall become subject
 23 by reason of serving or having served as an officer or
 24 trustee, or by reason of any action taken, omitted, or
 25 neglected by him or her as an officer or trustee; and

B6915

1 “(II) shall be reimbursed for all attorney’s fees
2 reasonably incurred in connection with any claim or
3 liability.

4 “(ii) No officer or trustee shall be indemnified against, or
5 be reimbursed for, any expenses incurred in connection with,
6 any claim or liability arising out of his or her gross negli-
7 gence or willful misconduct.”.

8 (f) TRANS-ALASKA PIPELINE SYSTEM.—Section
9 204(c) of the Act (48 U.S.C. 1653(c)) (as amended by subsec-
10 tions (a) and (c)) is further amended by adding at the end the
11 following:

12 “(15)(A) Amounts in the Oil Spill Liability Fund estab-
13 lished by section 9509 of the Internal Revenue Code of 1986
14 shall be made available to the extent provided in appropria-
15 tion Acts for the following purposes directly related to safe
16 and environmentally sound operation of the trans-Alaska
17 pipeline system:

18 “(i) Payment of the reasonable costs (but not
19 more than \$5,000,000 annually) to the Federal Gov-
20 ernment with respect to activities in the State of
21 Alaska, and the reasonable costs (but not more than
22 \$2,000,000 annually) to the State of Alaska, necessary
23 for agency personnel to conduct studies regarding, and
24 to monitor and enforce compliance with, applicable
25 safety, health, and environmental standards.

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1 “(ii) Payment of the reasonable costs (but not
2 more than \$5,000,000 annually) of the Presidential
3 Task Force and the audit of the trans-Alaska pipeline
4 system.

5 “(B) Amounts may only be made available under sub-
6 paragraph (A)(i) to the State of Alaska if the State matches
7 such amounts on a dollar-for-dollar basis.”.

* 8 SEC. 3103. PRESIDENTIAL TASK FORCE.

9 The Act is amended by adding at the end thereof the
10 following new section:

11 “PRESIDENTIAL TASK FORCE; ADVISORY COUNCIL

12 “SEC. 207. (a) ESTABLISHMENT OF TASK FORCE.—

13 (1) There is hereby established a Presidential Task Force on
14 the Trans-Alaska Pipeline System (hereinafter referred to as
15 the ‘Task Force’) composed of the following nine members
16 appointed by the President:

17 “(A) One member appointed to serve as cochair-
18 man of the Task Force.

19 “(B) One member nominated by the Governor of
20 Alaska who will serve as cochairman of the Task
21 Force.

22 “(C) Three members, 1 of whom shall be nomi-
23 nated by the Secretary of the Interior, 1 by the Ad-
24 ministrator of the Environmental Protection Agency,
25 and 1 by the Secretary of Transportation, and all of
26 whom shall be Federal employees.

1 “(D) Three members, 1 of whom shall be nomi-
 2 nated by the Commissioner of Fish and Game, 1 by
 8 the Commissioner of Environmental Conservation, and
 4 1 by the Commissioner of Natural Resources of the
 5 State of Alaska, and all of whom shall be State
 6 employees.

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7 “(E) One member nominated by the National
 8 Academy of Engineering.

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9 “(2)(A) Except as provided in subparagraphs (B) and
 10 (C), members shall be appointed for terms of 3 years.

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11 “(B) Of the members first appointed—

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12 “(i) three shall be appointed for a term of 3 years;

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13 “(ii) three shall be appointed for a term of 4
 14 years; and

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15 “(iii) three shall be appointed for a term of 5
 16 years.

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17 “(C) Any member appointed to fill a vacancy occurring
 18 before the expiration of the term for which his or her prede-
 19 cessor was appointed shall be appointed only for the remain-
 20 der of such term. A member may serve after the expiration of
 21 his or her term until a successor has taken office.

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22 “(3) Members shall, to the extent approved in appro-
 23 priation Acts, receive the daily equivalent of the minimum
 24 annual rate of basic pay in effect for grade GS-15 of the
 25 General Schedule for each day (including travel time) during

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1 which they are engaged in the actual performance of duties
2 vested in the Task Force, except that members who are
3 State, Federal, or other governmental employees shall re-
4 ceive no compensation under this paragraph in addition to the
5 salaries they receive as such employees.

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and

6 “(4) The cochairmen of the Task Force shall appoint a
7 Director to carry out administrative duties. The Director may
8 hire such staff and incur such expenses on behalf of the Task
9 Force as are authorized by the Task Force and for which
10 funds are available.

ears;
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11 “(5) Employees of the Task Force shall not, by reason
12 of such employment, be considered to be employees of the
13 Federal Government for any purpose.

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14 “(b) DUTIES OF TASK FORCE.—(1) The Task Force
15 shall conduct a comprehensive audit and review of operations
16 of the trans-Alaska pipeline system, make recommendations
17 to the President, the Congress, and the Governor of Alaska,
18 and function as a forum for improved oversight and enforce-
19 ment of safety and environmental laws related to the trans-
20 Alaska pipeline system.

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21 “(2) The scope of the audit shall include matters related
22 to operations of the trans-Alaska pipeline system and the ter-
23 minal at the Port of Valdez, Alaska.

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24 “(3) As part of such audit, the Task Force shall conduct
25 a comprehensive review of the trans-Alaska pipeline system

1 in order to specifically advise the President, the Congress,
2 and the Governor of Alaska concerning—

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3 “(A) whether the holder of the Federal and State
4 right-of-way is, and has been, operating in full compli-
5 ance with applicable agreements and laws;

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6 “(B) the operational and structural soundness of
7 the pipeline, terminal, and related onshore facilities;

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8 “(C) necessary improvements for the pipeline, ter-
9 minal, and related onshore facilities in terms of oper-
10 ational safety, public health, and environmental protec-
11 tion;

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12 “(D) necessary improvements in the oil spill re-
13 sponse capabilities and contingency plans for the pipe-
14 line, terminal, and related onshore facilities; and

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15 “(E) necessary improvements in security for the
16 pipeline, terminal, and related onshore facilities.

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17 “(4)(A) The Task Force shall retain at least 1 independ-
18 ent consulting firm with technical expertise in engineering,
19 transportation safety, the environment, and other applicable
20 areas to assist the Task Force in carrying out this subsection.
21 Such firm shall have extensive experience in carrying out
22 audits of the nature to be carried out by the Task Force.

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23 “(B) Contracts with any such firm shall be entered into
24 on a nationally competitive basis, and the Task Force shall
25 not select any firm with respect to which there may be a

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1 conflict of interest in assisting the Task Force in carrying out
2 its audit and review.

8 “(5) The Task Force shall provide an opportunity for
4 public comment on its activities and shall consult on a regular
5 basis with the Trans-Alaska Pipeline Terminal Advisory
6 Council established pursuant to subsection (c).

7 “(6) The Task Force shall transmit (and make available
8 to the public), within 6 months after the date of enactment of
9 this paragraph, a report to the President and the Congress of
10 its findings, conclusions, and recommendations made as a
11 result of carrying out such audit.

12 “(7) The President shall, within 90 days after receiving
13 the Task Force's report, transmit a report to the Congress
14 and the Governor of Alaska containing comments on
15 whether—

16 “(A) the Alyeska Pipeline Service Company or its
17 successor is, and has been, operating in full compliance
18 with the right-of-way permits granted for the trans-
19 Alaska pipeline;

20 “(B) the President intends to direct the Secretary
21 of the Interior to exercise authority pursuant to section
22 203(e) of the Trans-Alaska Pipeline Authorization Act
23 to amend or modify the Federal right-of-way agree-
24 ment;

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1 “(C) the President intends to recommend to the
2 Governor of Alaska that the State right-of-way agree-
3 ment be amended or modified; and

4 “(D) the President intends to take other measures
5 to implement the Task Force's findings and recommen-
6 dations.

7 “(8) The Task Force shall prepare an annual report on
8 its activities and submit such report to the President, the
9 Congress, and the Governor of Alaska.

10 “(9) The Comptroller General of the United States, and
11 any of his or her duly authorized representatives, shall have
12 access, for purposes of audit and examination, to any books,
13 documents, papers, and records of the Task Force that are
14 pertinent to the funds received and expended by the Task
15 Force.

16 “(10) The Task Force shall cease to exist on the date
17 which is 10 years after the date of enactment of this para-
18 graph.

19 “(11) With respect to safety, operations, and other mat-
20 ters related to the pipeline facilities (as such term is defined
21 in section 202(4) of the Hazardous Liquid Pipeline Safety
22 Act of 1979) of the trans-Alaska pipeline, the Task Force
23 shall not perform any functions which are the responsibility of
24 the Secretary of Transportation under the Hazardous Liquid
25 Pipeline Safety Act of 1979.

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1 “(c) TRANS-ALASKA PIPELINE TERMINAL ADVISORY
 2 COUNCIL.—(1) Not later than 90 days after the date of en-
 3 actment of this Act, the operator of the trans-Alaska pipeline
 4 system, on behalf of the companies which possess the Federal
 5 right-of-way granted by the Secretary of the Interior, shall
 6 establish and fund the reasonable costs of the Trans-Alaska
 7 Pipeline Terminal Advisory Council (hereinafter referred to
 8 as the ‘Advisory Council’).

9 “(2) The Advisory Council shall assist the owners and
 10 operator of the trans-Alaska pipeline and Federal and State
 11 officials in developing policies, permits, plans, and regulations
 12 relating to the monitoring, operation, and maintenance of the
 13 terminal and related facilities of the trans-Alaska pipeline
 14 that may affect safety, public health, and the environment.
 15 The Advisory Council shall serve as a forum for the industri-
 16 al users, owners, and operators of the terminal facilities to
 17 work cooperatively with residents of interested communities.

18 “(3) The Governor of Alaska may appoint to the Advi-
 19 sory Council the following members from among the resi-
 20 dents of Valdez, Cordova, and other communities:

21 “(A) one member who shall serve as chairman;

22 “(B) two members of the fishing industry;

23 “(C) two members of Alaska Native organiza-
 24 tions;

1	“(D) two members of environmental organiza-	1
2	tions;	2
3	“(E) two members from local governments; and	3
4	“(F) two members from the tourism industry or	4
5	other business community.	5
6	“(4)(A) Except as provided in subparagraphs (B) and	6
7	(C), members shall be appointed for terms of 2 years.	7
8	“(B) Of the members first appointed—	8
9	“(i) six shall be appointed for a term of 4 years;	9
10	“(ii) three shall be appointed for a term of 3	10
11	years; and	11
12	“(iii) two shall be appointed for a term of two	12
13	years.	13
14	“(C) Any member appointed to fill a vacancy occurring	14
15	before the expiration of the term for which his or her prede-	15
16	cessor was appointed shall be appointed only for the remain-	16
17	der of such term. A member may serve after the expiration of	17
18	his or her term until a successor has taken office.	18
19	“(D) Members shall receive, to the extent provided in	19
20	appropriation Acts, the daily equivalent of the minimum	20
21	annual rate of basic pay in effect for grade GS-15 of the	21
22	General Schedule for each day (including travel time) during	22
23	which they are engaged in the actual performance of duties	
24	vested in the Advisory Council.	