SB

361

FAX TRANSMITTAL

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OFFICE OF THE GOVERNOR

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Alaska Oil and Gas Association

AOGA

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February 19, 1998

Ms. Diane Mayer, Director
Division of Government Coordination
P. O. Box 110030
Juneau, Alaska 99811-0030

Dear Ms. Mayer:

The Alaska Oil and Gas Association greatly appreciates your willingness to meet with us over the past months to discuss permit streamlining issues. We were also pleased to be invited to participate in the Permit Streamlining Workshop last September. The Workshop was valuable in identifying current problems and issues related to implementation of the Alaska Coastal Management Program and State permitting processes.

AOGA supports the concept of permit streamlining, however, as you already are aware, AOGA's basic position on SB 186 is that we cannot support the bill as currently drafted. Our principal concern is the integration and overlap of the ACMP consistency process in the proposed streamlining permitting process.

At the same time, SB 186 has put some innovative concepts "on the table" and we are willing to commit the time necessary to work with the administration and the legislature toward the goal of giving Alaska a model permitting system. When Mike Abbott, of the Governor's Office, first briefed AOGA on SB 186, he indicated the administration was willing to work with the legislature, and specifically Representative Therriault, on a melding of concepts in SB 186 and CSHB 28.

We recommend that ACMP provisions be separated from SB 186 and the role and jurisdiction of the AMCP be subject to separate analysis, perhaps through CSHB 28. SB 186 could then become the vehicle to draft legislation that is focused on developing a project management structure and integrated process for State agency permitting.

Hopefully we can come to agreement on some issues for resolution this session and identify others for work sessions this summer.

The idea of putting together a model permitting system in Alaska is an intriguing one and seemed to have a strong undercurrent of interest at the Permit Streamlining Workshop. There was also general agreement that policy decisions (i.e. at the legislative and administrative level) need to be made about the role and authority of the ACMP, local, and state governments in permitting processes.

The current complexity and overlap of various permitting processes, the differing information requirements, uncertainty in permitting schedules and the potential for substantial delays due to jurisdictional and other issues clearly demand that state government and the regulated community find a different way of doing business. This requires an analysis of what is working and what needs to be fixed as a starting point for development of permit streamlining legislation.

As a result of the introduction of SB 186 and CSHB 28 we have been working through our own exercise on (1) what are the elements of a model permit system? (2) can a single permitting process fit every size of project, or do different size projects need to be processed differently?

Some principles of a model permitting system that are important to AOGA include:

- predictable, enforceable, *enforced* schedule
- accountable decision maker
- enforceable, *enforced* resolution of permit decision process
- clearly defined role of all participants in the permit process
- clear definition of real parties of interest
- clearly defined process and time line for appeals
- flexibility for phasing
- maximize coordination with federal permits
- standardize and define a "completed application"
- standardize and define a process for public input, comment and review

We have also completed a preliminary overview of "what works" in the permitting process now and we would be glad to share these thoughts with you.

As we committed, we have attached detailed remarks of our concerns about SB 186 for your review. We have also identified provisions of the bill that might resolve some of the key permitting problems identified in the Workshop by ourselves and others—if the challenges of a multi-tiered system can be resolved.

Again, we have been impressed by your willingness to work with us. The coordinating work of your office has made it possible for completion of projects essential to the continued production of oil and gas in Alaska.

Thank you for your time.

Sincerely,

JUDITH BRADY
Executive Director

JB:ts

cc: Representative Gene Therriault
Representative Joe Green
Commissioner John Shively, DNR
Commissioner Michele Brown, DEC
Pat Pourchot, Legislative Director, Office of the Governor
Mike Abbott, Economic Development Assistant, Office of the Governor

Attachment
February 18, 1998

Detailed Comments on SB 186
Alaska Oil & Gas Association

AOGA's basic position on SB 186 is that we cannot support the bill as currently drafted. Our principal reason is that SB 186 is intertwined with processes related to the Alaska Coastal Management Program (ACMP) as our comments below detail. SB 186 essentially codifies and even potentially exacerbates certain practices, which are the cause of confusion and overlap between authorities and jurisdictions of local and state governments and the ACMP.

We recommend that ACMP provisions be separated from the bill and the role and jurisdiction of the ACMP be subject to separate analysis, perhaps through CSHB 28. SB 186 could then become the vehicle to draft legislation that is focused on developing a project management structure and integrated structure for State agency permitting.

A second problem is that SB 186 does not provide for predictable permit/review/appeal timelines. Predictable timelines in these areas are essential to any successful permitting program, yet the bill does not include schedules or provide mechanisms for discipline.

We believe this is a problem that can be remedied. The current review clock specified in 6 AAC 50 is one of the strengths of the coordinated process provided by ACMP. The challenge is to find a mechanism whereby schedules are established for projects of various sizes and complexity and the types of permit required. Deadlines can be specified and mechanisms put in place to enforce them.

1. Provisions of SB 186 that could be the basis of a model permitting system

SB 186 puts on the table several concepts that could be the basis for a model permitting system. "The devil is in the details", as all parties agreed at the Streamlining Workshop. Following is a brief outline of the key points of SB 186, along with some of the basic challenges that we might all work together to solve. You will recall that these "challenges" were identified by all the participants at the Streamlining Workshop.

- A coordinated project-based permitting process for all project approvals for a permit applicant desiring "one stop shopping".

The practical challenges to resolve include:

(1) How to mesh and coordinated disparate permitting processes--involving permits of differing technical complexity and different, sometimes uncertain, processing schedules.

The coordinated process presents little improvement if the process becomes equivalent to the longest approval required for a project. The list of permits and approvals covered by SB 166 in Sec. 46.41.010 covers a range of potential processing schedules and technical complexity.

(2) How to accommodate the need for phased review & approval of project permits.

Due to the nature of some projects, the permitting process needs to allow the flexibility for review and approval of permits needed for incremental elements of the project during the various phases of development. This is a complex issue, which needs to be worked through to provide appropriate flexibility in the permitting process to accommodate the need for both applicants and agencies to phase review and approval of project permits.

(3) How to give the coordinating agency sufficient authority without creating another regulatory tier or a "super agency".

A single coordinating agency for projects that have more than one permit is a strength of the current system under the ACMP. Instead of creating another regulatory tier or a "super agency", as appears to be proposed in SB 166, the coordinating agency should be given sufficient authority to impose discipline on the process with respect to agencies meeting mandated or agreed deadlines.

- *A single project application.*

A single project application as provided in Sec. 46.41.050 has some merit. The challenge will be developing one application useful to all agencies and all size projects because, as we all know, the information requirements for the State permit applications listed in Sec. 46.010 vary considerably.

- *A consolidated public comment period for project permits.*

A consolidated public comment period makes considerable sense since it has the potential to reduce the burden on agencies, the public and applicant. However, in common with the above comments, it is unclear how the process can accommodate the disparate processes represented by the multitude of State permits. For example, the process for an air quality control operating permit involves a public notice on a draft permit near the end of the process after a lengthy technical review whereas other processes notice the permittee's application.

A related issue involves the process for public comment. The key would be certainty. Sec 46.41.080 is very vague with respect to the standards for public meetings and hearings. In some permit processes public hearings are only required if requested by a party that has standing.

- Approval of a project through a coordinated decision process.

Approval of a project through a coordinated decision process, involving issuance of all project permits at the same time would bring certainty to the permitting process if there was a specified time frame for completion of the permit process.

Again, as discussed above, the challenges revolve around the varying technical complexity of project permits and related review time frames. In addition project phasing needs to be accommodated in the process.

- A single appeals process.

The challenges, yet again, revolve around "how" and "who". How can we set up a single appeals process and at the same time accommodate separate agency jurisdiction? Should we use the Administrative Procedures Act or set up a new, untried system (which always results in legal test cases on procedure). Who should have standing to appeal? The procedure as proposed in Sec. 46.41.100 gives standing to almost any party to appeal a permit decision. AOGA believes there needs to be a reasonable level of standing established for appellants.

2. Policy questions raised by SB 186

SB 186 appears to envision state permitting as an ACMP-based process; The policy question raised is does the State of Alaska want to move from a local government/state agency permitting process to an ACMP permitting process? Should the ACMP be part of the State permitting process, or should the ACMP be the permitting process?

Related questions include how much authority should local districts have (1) to interpret state agency regulations, even when the agency disagrees with the interpretation; (2) to apply conditions to permits that have no statutory authority (homeless stipulations); (3) to override local government laws or planning ordinances (text of SB 186 at p. 21, Sec. 46. 40.100(c)).

These are substantive questions that will change the future of how the state operates. The questions have to do with ACMP's relationship with local and state government authority.

SB 186 is based upon the ACMP model with coastal management policies and process given the same weight and authority as local governments and state agencies. As such, the bill carries with it many of the frustrations expressed by participants of the Streamlining Workshop, including local government and state agency officials, of overlapping, unclear lines of authority and jurisdiction. In fact the bill has the potential to exacerbate those problems by codifying policy and practice that are not currently in statute or regulation.

The bill, as drafted, appears to expand the substantive scope and impact of the ACMP upon permitting, and to legislatively ratify certain practices now of questionable legality, including the imposition of ACMP stipulations upon agency permits. Our major concerns are as follows.

(1) The bill expands the definitions of both a "consistency determination" and an "affected coastal resource district".

Under proposed AS 46.40.096 (text of SB 186 at p. 20), a consistency review would now be required for any permitted activity or use "*that could affect land or water uses or natural resources of the coastal zone....*" Id. This definition appears to be entirely new and very broad indeed.

In addition, under proposed AS 46.41.950(1) (text of SB 186 at p. 15), an "*affected coastal resource district*" would now be defined as a district "*that may experience a direct and significant impact from a proposed project....*" Id.

This provision would apparently create extraterritorial jurisdiction for district programs by requiring that projects outside their established boundaries be consistent with the program if there "may" be such an impact. This is contrary to the original intent of the ACMP, to the established jurisdictional reach of local governments, which comprise the coastal districts, and to existing ACMP statutes which limit district program authority to coastal areas "within the district." *See current AS 46.40.030(1).*

(2) SB 186 would lead to the unrestricted imposition of ACMP stipulations upon permits.

The following provisions would appear to confer blanket authority to impose ACMP conditions of any kind upon permits. No current statute authorizes this practice. Serious policy and legal questions are raised about whether such conditions can or should be imposed, especially when they may be beyond the permitting agency's own statutory authority.

See proposed AS 46.41.090(c) ("the opinions of consistency may be predicated upon adoption of specific stipulations....");

.090(e) ("the final permit decision shall include a copy of any draft permits and related stipulations...."); and

.090(f)(3) ("if the Alaska Coastal Management Program consistency statement is predicated on a stipulation, that stipulation must be specifically described in the consistency statement..."); proposed 46.41.990(4)(A) (defining "consistency statement" in part as "any necessary stipulations, conditions, or modifications to the proposed project specifically described by reference to the related permit"); and

proposed 46.40.100(b) ("in addition to existing remedies, a state agency whose permit contains a stipulation added as a condition of consistency determination has the authority to enforce that stipulation through a request for injunctive relief to the superior court").

(3) Affected coastal resource districts are given a direct and active statutory role in consistency determinations for state permits.

While existing law merely provides for consistency review comments from districts, see *current AS 46.40.096(d)(1)*, the new bill now first requires each affected district to provide its opinion on consistency and any proposed stipulations. See *proposed AS 46.41.090(c)*.

More importantly, SB 166 then provides that the consistency determination shall be made by the coordinating agency *"in consultation with....the affected coastal districts..." Proposed AS 46.41.090(d)*.

While the extent of the district's role in the consistency decision is apparently left to be defined by regulation, there can be no question but that these requirements create a far stronger statutory role for districts than existing law.

In short, the districts would be decision-makers in a consistency determination, not just commenters upon it. Because districts are also made parties of right to the appeal, see *proposed 46.41.100(d)*, the districts would now have mandatory roles both in the consistency decision and in any appeal of the decision. Putting local districts in the role of both petitioner and decision-maker will result in due process problems.

(4) The bill statutorily mandates review of 84 state permits or requirements of various kinds.

See proposed AS 46.41.020(b). Possible exemptions are narrowly defined and subject to imposition of unspecified "conditions." *See proposed 46.41.0420(b).* No statute currently defines or specifies what actions must be subject to a consistency determination; instead, the DGC has administratively listed matters for which such review is to be required.

While there may well be a need to reexamine this process, a presumptive determination by the legislature that review is required for all such actions both substantively expands existing law and diminishes administrative flexibility. For example, as you know some of our members question whether contingency plans are in fact a project, use or activity properly subject to a consistency review under existing law. Proposed 46.41.010(d)(5) would nevertheless require such review by statute.

As pointed out earlier, we believe that the above provisions of SB 188 implicate substantive questions about the scope and nature of ACMP review for projects in Alaska. In our view, it will be very difficult to address these ACMP concerns in the already complex context of permit streamlining; this is why we have concluded that ACMP issues should be addressed separately. Once the ACMP issues are addressed, we believe that ACMP procedures could indeed be integrated in a neutral fashion into the overall context of permit streamlining.

We appreciate that others may have a different perspective or different interpretation of the effect of SB 188 with respect to the ACMP. These are certainly complex areas of policy, law, and procedure about which reasonable people may disagree.

We are committed to participate in these discussions.

February 28, 2001

BY FACSIMILE TO 907-465-3075:
ORIGINAL FOLLOWING BY U.S. MAIL

Mr. Randy Bates
Division of Governmental Coordination
Office of the Governor
P.O. Box 110030
Juneau, Alaska 99811-0030

Re: Comments on Proposed Revisions to ACMP Regulations (6 AAC 50)

Dear Mr. Bates:

Thank you for this opportunity to comment on the proposed revisions to the Alaska Coastal Management Program (ACMP) procedural regulations found in 6 AAC Chapter 50. It is obvious that a great deal of hard work went into reorganizing and attempting to clarify the existing regulations. That effort resulted in several improvements.

As revised, however, the proposed regulations create several problems (identified below) that do not exist in the current regulations. Some of these problems stem from revisions to the "Definitions" in Article 9 and, therefore, could be remedied by (i) restoring deleted definitions; (ii) adding precise definitions for undefined terms; or (iii) editing newly proposed definitions. A few of the problems cannot be remedied so easily and thus it may be more prudent to refrain from adopting the problematic provisions.

Specific Comments

1. <u>Use of the "Optional Preliminary Consistency Determination" would result in abandonment of the carefully prescribed processes and, in effect, could convert the ACMP review process into a mini-NEPA process by requiring the coordinating agency to make determinations about potential impacts which it is not authorized to do under Alaska law</u>.

   The proposed regulations painstakingly establish processes for conducting the three basic types of ACMP review (for state regulated activity; for federal activity; for federally regulated activity). Those processes prescribe time lines for the various steps in the processes, allowing the coordinating agency sufficient discretion to extend deadlines within the time line if appropriate (e.g., to accommodate the need for additional information or further review).

   The "Optional Preliminary Consistency Determination" process described in proposed 6 AAC 50.910 would undermine the established processes. It would allow the coordinating agency to abandon the time lines set forth for each of the three ACMP review processes and create new, project-specific processes and schedules based on a determination by the coordinating agency "that the project is likely to have more than minimal impacts to coastal uses or resources..." and will attract "significant public interest...." This separate "option" to abandon the established processes is entirely unnecessary in light of the flexibility allowed in adjusting the schedules for the established processes.

   Additionally, the standard for invoking this separate review "option" is ill defined and thus potentially could result in arbitrary and capricious decisionmaking as to whether to exercise the option. This is due largely to the fact that "minimal impact" is proposed to be defined as "a negligible disturbance to coastal uses or resources." Thus, the definition is circular: "negligible disturbance" has no more meaning than "minimal impact." Further, "negligible disturbance" is not proposed to be defined, and could not be readily defined in any meaningful way that would support decisions about whether to follow the established processes or to set up a project-specific process.

   Finally, this proposal to allow use of a special, potentially much longer, review process when the coordinating agency "determines" that impacts will be more than "minimal" is analogous to the National Environmental Policy Act (NEPA) process' distinction between environmental analyses (EAs) and environmental impact statements (EISs). Alaska's Legislature, however, has not authorized the transmutation of the ACMP into a mini-NEPA process. In view of the limited and specific purposes and authorities

underlying the ACMP, proposed 6 AAC 50.910 should **not** be adopted.

Similarly, the test for deciding between a 30-day and a 50-day review process should not rest on the degree of impacts anticipated (e.g., "minimal impacts") as proposed 6 AAC 50.235 contemplates. Under the existing regulations, that decision is based on how much time the agencies are expected to need to coordinate their authorizations and issue permits. There is not necessarily a direct correlation between the degree of potential impacts and the time required to issue authorizations, especially where the standard for whether impacts are "minimal" is itself an undefined "negligible disturbance" test. The potential for disputes and for allegations of inequitable application and/or abuse of discretion will be great if the degree of potential impacts is used as the measure for the length of the review process.

Accordingly, proposed 6 AAC 50.235 should be revised to restore the existing approach of choosing between the 30 and 50 day processes based on how much time the agencies need to issue authorizations. That will obviate the need for the coordinating agency to make qualitative "determinations" about the degree of "impacts," something that is clearly beyond the coordinating agency's scope of authority as the coordinator of the ACMP process. With proposed 6 AAC 50.910 eliminated and proposed 6 AAC 50.235 modified, the circular definition for "minimal impacts" at proposed 6 AAC 50.990(33) can be eliminated as well.

2. The proposed regulations' inconsistent references to "the ACMP" or "the program" versus the "enforceable policies" of the ACMP create confusion and the potential for disputes about (i) what an applicant must certify; (ii) what may be commented upon; (iii) what may be the bases for conditions; and (iv) what is at the heart of the consistency determination.

In many places, the proposed regulations speak of consistency with the enforceable policies of the ACMP, thus clearly tying the provisions in question to one of the two concrete components of the ACMP. Those two components are the enforceable policies of the coastal resource districts and the substantive regulatory standards in 6 AAC 80 & 85. In other places, however, the proposed regulations speak of a project being "consistent with the ACMP" or with "the program" generally (e.g., proposed 6 AAC 50.200, 365, 375, 385(b)(3), 405 & 990(14)). These inconsistent references create significant ambiguities, especially in light of the proposed changes to key definitions.

The proposed revisions to the "Definitions" section would eliminate the definition of "consistent" (bracketed deletion following proposed 6 AAC 50.990(16)) and would reduce the definition of "ACMP" to a generic description of what the mnemonic stands for–"Alaska Coastal Management Program." As such, the proposed revisions

would rob the relevant definitions of all references to standards (e.g., regulatory ones in 6 AAC 80, the district enforceable policies). Thus, it would no longer be possible to use the definitions to make sense of the operative provisions in which the expression "consistent with the ACMP" appears.

The simple solution would be to retain the current definitions for "ACMP" and "consistent." Without those definitions, the regulations will be hopelessly ambiguous in several respects, such that neither an applicant, nor the public, nor the review participants, nor the council or a court reviewing a disputed determination will be able to tell what was contemplated by references to "consistent with the ACMP." Another (less simple) solution would be to modify the language "the ACMP" or "the program" every time such an expression is used throughout the regulations, so that the regulatory standards and enforceable policies constituting the ACMP are clearly referenced. Retention of these key definitions as well as the suggested language modifications would best clarify consistent application of the ACMP process.

3. <u>The "alternative measure" term used in numerous places throughout the proposed regulations is ill defined, creating confusion about what such measures are and how they are to be used</u>.

The term "alternative measure" appears in several different contexts in the proposed regulations. This is a new term, not used in the current regulations. In some contexts, it appears to be synonymous with a "condition" or "stipulation" which must be imposed to ensure consistency with the ACMP standards (regulations and enforceable policies). In other contexts, use of the term suggests measures which can be proposed by someone (e.g., the coastal resource district), but which are simply optional ways of achieving consistency with the ACMP substantive standards. (See, for example, proposed 6 AAC 50.365, which suggests that the federal agency must be informed of any and all measures it might add to the project to persuade the state that the federal project is consistent.) In addition, the term is sometimes used in conjunction with the concept of achieving consistency with "the ACMP." Thus, its varied use compounds the ambiguity problem identified in 2 above.

Indeed, in the proposed definition for the term itself, this compounding problem appears. Proposed 6 AAC 50.990(4) states: "'alternative measure' means a requirement necessary to ensure the activity is consistent with the ACMP." Since significant changes are proposed for the current definitions of "ACMP" (proposed to be made generic) and "consistent" (proposed to be eliminated), the proposed definition of "alternative measure" is itself highly ambiguous. In context, use of the term creates much confusion.

For instance, if adopted, proposed 6 AAC 50.055(b)(2) would allow a coastal resource district to "include an alternative measure identified in a final consistency determination issued under 6 AAC 50.265 in an authorization for the project that is issued under the coastal resource district's Title 29 authority." It is unclear whether this would allow the district to include in its authorization only an "alternative measure" expressly identified as necessary for consistency with the district's enforceable policies, or to include any of several proffered "alternative measures" no matter how those measures relate to the ACMP standards.

At a minimum, the definition for "alternative measure" needs to be further developed (either within the definition itself, or by retaining the current definitions for "consistent" and "ACMP"). Otherwise, disputes about what "alternative measures" can be proposed by review participants and imposed on project proponents are inevitable. Additionally, each of the many places in the regulations where the term "alternative measure" is used needs to be scrutinized in light of the definition ultimately chosen, to ensure that no ambiguities remain.

4. <u>The various proposed regulations affecting the scope of the ACMP would inappropriately expand the coordinating agency's discretion, creating the potential for errors or abuses that could result in artificially broad, duplicative reviews</u>.

Proposed 6 AAC 50.025 abandons the existing requirement that the scope of review be based on specific kinds of information (e.g., the applicant's proposal and the coastal project questionnaire) and instead relies on the coordinating agency to "determine the scope of the project subject to a consistency review." If adopted, it would set the minimum scope quite broadly, requiring among other things inclusion of each "activity" needing an agency authorization, as well as activities that do not, if the "project," as proposed, could not be conducted without those activities. Thus, the regulation would require the coordinating agency (in consultation with the resource agencies) to make a determination of the scope of the "project," which necessarily would require determining what the "project" is as proposed by the applicant.

"Project," however, would be a defined term under the proposed regulations (6 AAC 50.990(22)). It would mean "all activities that will be part of a proposed coastal development, including associated facilities, ***that are subject to the consistency review requirements under this chapter***." (Emphasis added.) To "determine the scope of the project" as required by proposed section 025, the coordinating agency, therefore, necessarily would have to decide what activities "are subject to the consistency review requirements," which in turn requires determining the scope of the review. Thus, the definition of "project" does not inform the determination required under section 025 at all; it depends on it. Accordingly, the coordinating agency is left only with its

discretion, and advice from the resource agencies; the proposed regulations provide no guidance on how to exercise that discretion.

In addition, proposed 6 AAC 50.700 would vest the coordinating agency with discretion to require that the ACMP review for a "project" include activities already determined categorically consistent with the ACMP standards (via a previous categorical or general consistency determination, or a general concurrence determination). In fact, that would be the default position, subject only to the possibility that the agency might exclude those activities from the project-specific review if they constitute a "temporary use with minimal impacts to coastal uses and resources." Since "minimal impacts" would be defined as "negligible disturbance," once again the determination would be left to the unguided discretion of the coordinating agency.

Perhaps the simplest solution to most of these problems would be to eliminate proposed subsection (a) of 6 AAC 50.025 and convert proposed subsection (b) into concrete, objective criteria to be used in setting the scope of the review. Those changes would obviate the need to clarify the definition of "project," at least in this context. As to categorically consistent activities for which an applicant can obtain a general permit that has already gone through the ACMP process, there is no reason to broaden the scope of review to, in effect, re-review those activities. Proposed 6 AAC 50.700 should be modified accordingly.

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As a general comment, some of the problems identified above evidence a trend toward vesting the coordinating agency with decisionmaking-type discretion far broader than necessary for an agency that, in its regulatorially directed coordinator role, is supposed to be coordinating the ACMP review process, not usurping other State and Federal regulatory agency's purview in making independent decisions about the permittability of a proposed activity. An ACMP consistency determination is not a super-permit governing all aspects of a development project. Rather, it is supposed to be the memorialization of a collaborative process of review in which the coordinating agency serves as facilitator. As such, any proposed changes to the ACMP process regulations in 6 AAC 50 should be carefully crafted to avoid shifting the coordinating agency's role toward making substantive decisions such as whether a proposed "project" will have only "minimal impacts."

If you have any questions about the general or specific comments above, please feel free to contact me at 907-586-3340.

Very truly yours,

Terry L. Thurbon

Alaska Oil and Gas Association

AOGA

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Judith Brady, Executive Director

February 28, 2001

Mr. Randy Bates
Division of Governmental Coordination
Office of the Governor
P.O. Box 110030
Juneau, Alaska 99811-0030

Re: Comments on proposed changes to Consistency Review Regulations: 6 AAC 50

Dear Mr. Bates:

Thank you for the opportunity to comment on the proposed consistency regulations for the Alaska Coastal Management Program (ACMP). As you know, these regulations are critical to the continued exploration, development, production and transportation of Alaska's oil and gas resource.

This letter and attached comments represent the views of the Alaska Oil & Gas Association (AOGA). AOGA is a private, non-profit trade association whose member companies represent the majority of oil and gas exploration, production, transportation, refining and marketing activities in Alaska.

Virtually all of the oil and gas exploration, production, transportation and refining activity, and key elements of the pipeline activity in the State of Alaska, take place in coastal districts. Industry permitters and environmental staff work regularly with coastal districts, state and federal agencies and Division of Governmental Coordination (DGC) personnel. Company permitters have day-in, day-out experience with the 6 AAC 50 regulations. We know what works and what doesn't work in the consistency process. We appreciate this opportunity to work with the DGC and the Coastal Policy Council (CPC) in taking the first new look at the coastal management consistency regulations in 17 years.

The proposed new title for 6 AAC 50 is: "Alaska Coastal Management Program (ACMP) Implementation". This is an accurate description of what these regulations do — they

"implement" the coastal management program. They are the *directions* for how to make the ACMP work - the *directions for decision-making* to the resource agencies, the coastal districts, the DGC and the permitted public. As with any set of directions, the clearer they are, the better the program will work.

The first stage of this comprehensive revision endeavor—the internal agency/DGC/coastal district stage –has taken a lot of time. DGC personnel have said that the internal agency working group and/or DGC personnel have met almost every two weeks for the last two years. The internal draft has gone through at least two major rewrites - and this is before the public comment period even opened.

The original regulations have been in place since 1984. Almost immediately it became evident that there were various problems, some serious, with interpretation and application. Public policy questions as to effects of certain sections on other state statutes, legal ambiguities arising from vague language, individual agency permit timelines that were never reconciled with the consistency timelines, and just the plain practical difficulties of applying seemingly mutually exclusive requirements have continued to cause time-wasting internal agency disputes, and disagreements with coastal districts and the permitted public. These disputes have had increasingly troublesome effects: agencies and DGC gridlocked in reviews of the ABC List and there have been some noticeable slow downs in the permitting process.

Since 1984 various proposals for changes in these regulations have been made, many by agency or DGC permitters who are tasked with "making this work". You have pointed out you have "stack of files" on your desk from 1984 "when folks started proposing changes to these regulations". Several attempts at a complete revision process have failed. Different reasons are given for this failure: simply a lack of time or focus by administrations; or the fact that some interest groups and agencies benefit from ambiguous language and maneuver to retain it; or the lack of political will to make those few critical decisions that have plagued the consistency process almost since its inception.

The consistency process has "worked" through those years because it has been patched together with agency "guidance policies", Memorandums of Understanding (MOUs), ad hoc opinions from assistant attorney's general, internal memorandums, unwritten "but understood" practices, and most especially, the good judgment of individual agency staff and DGC coordinating staff. The irony has been that the most public of process...the coastal management program...has been implemented by the most subjective and internalized practices, in part because of the ambiguities of its 6 AAC 50 regulations.

AOGA recognizes the achievement of Director Patrick Galvin, coordinator Randy Bates, and the CPC members for initiating this first formal review and revision of the consistency regulations. It is important that this process does not fail. It is important that these revisions resolve the long-standing issues, rather than just bury them under more vague language. It is important that practices that have arisen out of institutionalized "understanding" or internal unpublished memoranda are examined. It is important that public policy issues be identified and options provided to the CPC for resolution. It is important that we take this opportunity to make the

implementing directions for the ACMP clear and precise or the agencies will spend the next 17 years writing new "guidance policies", new Memorandums of Understanding, and new internal memorandums. The test for these regulations will be whether or not they are so clear that all past "guidance policies", MOUs, etc., can be thrown out and these published, *public* regulations will be the reliable guide for consistency decisions.

In this submittal letter, AOGA will offer recommendations on the "next steps" of this regulation process; highlighting, in summary, the strengths and the weaknesses of the proposed regulations. Our detailed comments are attached.

Recommendations for "Next Steps" in the Process

In summary, those recommendations are: (1) that individuals in the agencies with direct project permitting experience be assigned to the working group charged with the review of public comments; (2) that the working group to review the public comments be expanded to include knowledgeable public representatives; and, (3) that after the public comments are considered, the regulations be re-issued for a second public review.

We also suggest that when the regulations are re-issued, DGC identify the public policy and legal issues and include a section-by-section public roundtable discussion with the CPC so the public and council members can hear the pros and cons of policy and/or legal alternatives offered.

AOGA's first recommendation is that agency personnel with direct permitting experience be part of the team that reviews public comment.

Does it make any difference whether or not the regulations governing the permitting of projects in the coastal zone are reviewed by individuals with direct permitting experience?

We have found that it does. These are the "working" regulations of the entire coastal management program. The goals of these regulations are to establish a "solid platform for implementing the ACMP"; to create a "predictable review process"; to "establish and clarify the process" and to "provide up to date regulations that are clear and efficient." Alaska has a complicated dual permitting system with ACMP overlying and intertwined with local, state and federal permitting systems. Alaska has a "networked" system which simultaneously is supposed to protect the authority of each individual agency *and* the enforceable standards of the coastal districts. The inherent conflict means reaching a balance is a complicated process. A regulatory section that "sounds good" may have unintended consequences on the rest of the regulatory system, disrupt the balance or simply be unworkable from a practical standpoint.

We have found in our own industry review of these regulations that individuals who have been directly involved in the dozens...or sometimes hundreds...of decisions, negotiations and timing issues related to permitting a project have a different sense of both "predictable" and "efficient" than individuals who have never been involved in the actual permitting of a project. We found this difference in perspective even between industry personnel with *direct* permitting experience

and those industry planners, managers and attorneys who have indirect experience *reviewing* permit actions.

The challenge for the team reviewing the public comments and for CPC members, many of whom (like most of us) have not been directly involved in project permitting, will be to sort through the "sounds good" from the "works as intended". Our understanding is that this draft of project permitting regulations was drafted internally by agency personnel with limited or no *direct* project permitting experience in their own agencies. Based on our own experience, we are recommending that the upcoming working group to review public comment consciously include agency personnel with direct project permitting experience.

Second, we recommend that knowledgeable public members be appointed to the working group to review these public comments. Such task groups or stakeholder groups have been established in the past with good results. It seems to us that there must be some real interaction and working through of approaches if these regulations are to meet the goals of this project. AOGA will make a formal request to the Director of DGC that such a task group be established.

Third, AOGA recommends that after the public comments are considered, the regulations be revised and reissued for a second public review. If the revisions address the questions that need to be answered in this regulation, both the agencies and the public will have a strong interest in a second round of comments. The agency internal review took almost two years. The public review should not be hurried when there is no need to do so and when the end product will certainly be affected.

Finally, as a subset of what we believe may be useful, AOGA suggests that when the regulations are re-issued, DGC identify the public policy and legal issues addressed or involved. Many of the issues have statewide or program wide public policy implications. Issues with these implications should be identified, along with a range of options and preferred options.

We also suggest that in the second round of public comment, the CPC hold a section-by-section roundtable discussion with the agencies and the public so all parties can have the benefit of hearing different perspectives.

We suggest "section by section" review by the CPC because, from our own experience, it became evident that there is simply no way to make a considered judgment without one. From a practical standpoint, we would also recommend at least two half-day sessions, although four half-day sessions would be more reasonable given the complexity of these regulations.

Strengths of the Proposed Implementing Regulations

The format of the proposed regulations—breaking them out into Articles of general applicability—is a long needed structural change. The attempt to more clearly define public participation as well as spell out the steps in the elevation and review process, while needing both clarification and legal review, are important. Of particular concern is the lack of standards for elevations and the question of how elevation decisions are made. It appears to us that decisions must be made both at the director and the commissioner level through a vote. It also

seems that an agency should not be able to elevate the same issue more than once. The appeal process also needs more thought. It would be useful to do a flow chart for the elevation/appeal/ petition process. The challenge will be to protect all parties rights without making the ACMP the target of choice of special interest groups.

Two new sections are of significant importance: Article 7 (General and Nationwide Permits, Categorically Consistent Determinations, General Consistency Determinations, and General Consistency Concurrences) and Article 8 (Project Modifications and Renewals of Authorization.) Both have been an area of agency gridlock. Both are essential to the project consistency system. Both articles need extensive review, discussion and explanation. Definitions are needed for all of the Article 7 sections. The ABC List has been a matter of internal agency dispute. Three years ago DGC issued a "white paper" on some of the ABC List issues. Other agencies may or may not have responded. In order for there to be a public discussion and resolution of these issues they have to be clearly identified. It would be helpful if DGC would identify internal agency issues. Of equal value would be definitions/standards for the A List, B List, C List and the other categories included in Article 7.

Weaknesses of the Proposed Regulations

As a general comment, these proposed regulations, like the current regulations, still fail to clearly define how the coastal consistency review process is supposed to work. During the public workshops it was evident that even industry permitters, who are knowledgeable with the program, were confused. There seems to be the same confusion among agency personnel who will be charged with implementation. There is no question that this is a complicated program dealing often with complex projects. This makes it all the more necessary that the *working direction*, these regulations, be as clear as possible.

In key areas the language and standards of the regulations are even more subjective, vague and undefined than the current regulations. The response to this criticism at workshops was to rely on the "good judgment" of the program administrators. This is an unacceptable approach. It does not provide a standard for decision-making; continues to leave the process open to legal challenges and agency gridlock; and diminishes the ability of the program to protect and maintain coastal resources and uses. The areas of greatest concern are listed below:

- <u>The proposed regulations fail to resolve the traditional conflicts of the consistency process.</u> The most serious and disappointing weakness of the proposed regulations is that they simply fail to resolve the traditional conflicts of the consistency process: applicability, scope of review, jurisdiction, timing, "homeless stipulations" and coordination. For instance:

  (a) Current ambiguous language concerning applicability of the ACMP and scope of review has become even more vague. The single most important goal of implementing regulations must be to clarify applicability of projects to consistency review.

  (b) The proposed regulations do not clarify how Alaska's "networked" system works in practice and more seriously, do not solve the timing issues related to coordination of

some permits that, in actual fact, defeat the entire concept of a "networked" program. The relative roles, responsibilities and authorities of the agencies and DGC, vis-`a-vis a "networked" review, is not at all clear, nor is there resolution of the timing issues related to coordination of some permits, notably Alaska Department of Environmental Conservation (DEC) air quality permits and Department of Natural Resources (DNR) right-of-way leasing. If agency permits do not have timelines that fit within a 30 or 50-day schedule, there can be no "networked" program. This is an issue for both small and large projects.

(c) The role and authority of coastal districts, as described in these proposed regulations, is more subjective and thus more uncertain. The proposed regulations embody an expansive, undefined scope of local coastal program jurisdiction which needs to be examined in terms of the enabling statutes and overall public policy.

(d) The proposed regulations codify the practice of adopting homeless stipulations (called "alternative measures" in the regulations). This practice raises both public policy and legal questions. This is a critical issue for the ACMP. There is no question that coastal districts have the right and responsibility to develop enforceable policies. This is the heart of the program. What is questionable are the implementing practices that have slowly developed through the years. This regulatory review provides the opportunity for open discussion on homeless stipulations.

- The proposed regulations adopt a permit coordination approach that decreases rather than increases the predictability of the process. Under these proposed regulations there is no assurance that the review will be concluded and permits issued by a certain date. Again, there is no question that some projects offer special challenges, however the attempts in these proposed regulations to satisfy "time out" concerns of some agency staff members have, in cumulative effect, derailed the entire process. For instance:

(a) Previously established timelines are simply lost in the multiple exceptions. The timelines for federal projects are now more certain than the timelines for state projects.

(b) The proposed regulations "front load" the application process (and make it uncertain to predict when "day one" starts) and at the same time allow even more extensions and agency requests for "additional information" during the rest of the process, which almost always stops the clock yet again.

Predictable permitting and predictable timelines are a "make or break" issue. The working season, particularly on the North Slope, is so short that if permits are delayed it can mean the entire "season " is lost. And that may mean the project is lost. The importance of this issue cannot be over-emphasized.

None of the issues addressed by these regulations are easy issues. All have been areas of serious controversy among agencies. The importance of this regulation project is that, for the first time

in 17 years, these controversies are now in the public arena and can be resolved.

We look forward to working with you on these issues.

Thank you for your consideration of these comments.

Sincerely,

JUDITH BRADY
Executive Director

Attachment

ALASKA STATE LEGISLATURE

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Senate
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Senate Bill 361 Permit Coordination and Coastal Zone Management

SPONSOR STATEMENT:

Alaska's permitting system is overdue for a complete review and overhaul. Developed piecemeal over the 43 years since statehood, our state's current process for approving resource development projects is increasingly a lengthy and disjointed process that confuses the public, agencies, and applicants alike. Industries from across the state have stepped forward to ask for clarity, consistency, and timeliness. It is time for a change that works for Alaska.

The current process requires separate applications for each permit needed for a single project. Each agency reviews the applications separately according to its own timetable and requirements. Public notice and hearings on the applications may be conducted separately, under different standards, resulting in a duplication of effort and expense for all. Permits may be appealed to different agencies, even though each appeal is based on a common set of facts.

Also, if a project lies within a coastal zone, an additional set of steps is added to the process. The Alaska Coastal Management Program (ACMP) requires that all permits issued by state agencies within a coastal zone be consistent with the respective plans developed by a coastal resource district. Since Alaska's coastal zone boundaries include more than 44,000 miles of coastline and can extend inland along river drainages as far as 250 miles, most resource development projects in Alaska require such a consistency determination. While Senate Bill 361 reforms the process by which a project's consistency determination is established, it preserves the requirement that projects be consistent with the ACMP.

Over the years, various proposals have emerged from the front-line permitting staff, division directors, and commissioners at our resource agencies suggesting changes. Nonetheless, reform has failed to materialize. Senate Bill 361 is based on various proposals that have been proposed over the years.

For the foreseeable future, Alaska's economy will be dependent upon the development of our natural resources. As the policy-making body of state government, we must remove those aspects of our permitting system that have been used not as a means to provide public input and accountability, but as tools to needlessly delay those projects which are critical to our state's future prosperity and revenues.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 361
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Environmental Conservation
Title: Permit Coordination and Coastal Zone Management
BRU: Administrative Services
Component: Office of the Commissioner
Sponsor: Senate State Affairs
Requester: Senate State Affairs
Component No. 633

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	*	*	*	*	*	*
Travel	*	*	*	*	*	*
Contractual	*	*	*	*	*	*
Supplies	*	*	*	*	*	*
Equipment	*	*	*	*	*	*
Land & Structures	*	*	*	*	*	*
Grants & Claims	*	*	*	*	*	*
Miscellaneous	*	*	*	*	*	*
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	*	*	*	*	*	*
1003 GF Match	*	*	*	*	*	*
1004 GF	*	*	*	*	*	*
1005 GF/Program Receipts	*	*	*	*	*	*
1037 GF/Mental Health	*	*	*	*	*	*
Other (Specify Type--Do not abbreviate)	*	*	*	*	*	*
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time	*	*	*	*	*	*
Part-time	*	*	*	*	*	*
Temporary	*	*	*	*	*	*

ANALYSIS: *(Attach a separate page if necessary)*

* The Department is not able to determine the fiscal impact at this time.

Prepared by: Mary Siroky
Phone 465-5355
Division: Statewide Public Services
Date/Time 4/19/02 3:00 p.m.
Approved by: Kurt Fredriksson Deputy Commissioner
Date 4/19/2002
Agency: Department of Environmental Conservation

(Revised 9/2001 OMB)

Fiscal Note - DEC

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 361
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Office of the Governor
Title "An Act relating to coordination of the application, review..of project permits..CPC..ACMP.."
BRU Governmental Coordination
Component Governmental Coordination
Sponsor Senate State Affairs
Requester (S) STA
Component No. 18

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	*	*	*	*	*	*
Travel	*	*	*	*	*	*
Contractual	*	*	*	*	*	*
Supplies	*	*	*	*	*	*
Equipment	*	*	*	*	*	*
Land & Structures	*	*	*	*	*	*
Grants & Claims	*	*	*	*	*	*
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time	*	*	*	*	*	*
Part-time	*	*	*	*	*	*
Temporary	*	*	*	*	*	*

ANALYSIS: *(Attach a separate page if necessary)*
Indeterminate fiscal note at this time.

Prepared by: Patrick Galvin, Director
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Division Governmental Coordination
Date/Time 4/19/02 12:00 AM
Approved by: David Ramseur, Chief of Staff
Date 4/19/2002
Agency Office of the Governor

(Revised 9/2001 OMB)

Fiscal Note ~ DGC

SB

363

22-LS1713\L
Kurtz
5/3/02

CS FOR SENATE BILL NO. 363( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to communications and elections, and to campaign misconduct in the second degree; relating to disclosure by individuals of contributions to candidates; and providing for an effective date."

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

*** Section 1.** AS 15.13.040(d) is amended to read:

(d) Every individual, person, or group making **an** [A CONTRIBUTION OR] expenditure shall make a full report, upon a form prescribed by the commission, of

(1) [CONTRIBUTIONS MADE TO A CANDIDATE OR GROUP AND] expenditures made on behalf of a candidate or group

(A) as soon as the total [CONTRIBUTIONS AND] expenditures **exceed** [TO THAT CANDIDATE OR GROUP REACHES] $500 in a year; and

(B) for all subsequent [CONTRIBUTIONS AND] expenditures [TO THAT CANDIDATE OR GROUP] in a year whenever the total

[CONTRIBUTIONS AND] expenditures [TO THAT CANDIDATE OR GROUP] that have not been reported under this paragraph **reach** [REACHES] $500;

(2) unless exempted from reporting by (h) of this section, any expenditure whatsoever for **a communication** [ADVERTISING IN NEWSPAPERS OR OTHER PERIODICALS, ON RADIO, OR ON TELEVISION; OR, FOR THE PUBLICATION, DISTRIBUTION, OR CIRCULATION OF BROCHURES, FLYERS,] or other campaign material for any candidate or ballot proposition or question.

* **Sec. 2.** AS 15.13.040(e) is amended to read:

(e) The report required under (d) of this section must contain the name, address, principal occupation, and employer of the individual filing the report, and an itemized list of expenditures. The report shall be filed with the commission [BY THE CONTRIBUTOR] no later than 10 days after the [CONTRIBUTION OR] expenditure is made. [A COPY OF THE REPORT SHALL BE FURNISHED TO THE CANDIDATE, CAMPAIGN TREASURER, OR DEPUTY CAMPAIGN TREASURER AT THE TIME THE CONTRIBUTION IS MADE.]

* **Sec. 3.** AS 15.13.090 is amended to read:

Sec. 15.13.090. Identification of communication. (a) All [ADVERTISEMENTS, BILLBOARDS, HANDBILLS, PAID-FOR TELEVISION AND RADIO ANNOUNCEMENTS, AND OTHER] communications [INTENDED TO INFLUENCE THE ELECTION OF A CANDIDATE OR OUTCOME OF A BALLOT PROPOSITION OR QUESTION] shall be clearly identified by the words "paid for by" followed by the name and address of the candidate, group, or individual paying for the advertising. In addition, candidates and groups must identify the name of their campaign chairperson.

(b) The provisions of (a) of this section do not apply when the **communication** [ADVERTISEMENT]

(1) is paid for by an individual acting independently of any group and independently of any other individual;

(2) is made to influence the outcome of a ballot proposition as that

term is defined by AS 15.13.065(c); and

(3) is made for

(A) a billboard or sign; or

(B) printed material other than an advertisement made in a newspaper or other periodical.

* **Sec. 4.** AS 15.13.380(c) is amended to read:

(c) Promptly after the final date for filing statements and reports, the commission shall notify all persons who have become delinquent in filing them [, INCLUDING CONTRIBUTORS WHO FAILED TO FILE A STATEMENT IN ACCORDANCE WITH AS 15.13.040,] and shall make available a list of these delinquents for public inspection. The commission shall also report to the attorney general the names of all candidates in an election whose campaign treasurers have failed to file the reports required by this chapter.

* **Sec. 5.** AS 15.13.390(a) is amended to read:

(a) A person who fails to register when required by AS 15.13.050(a) or who fails to file a properly completed and certified report within the time required by AS 15.13.040(d) - (f), 15.13.060(b) - (d), [15.13.080(c),] 15.13.110(a)(1), (3), or (4), (e), or (f) is subject to a civil penalty of not more than $50 a day for each day the delinquency continues as determined by the commission subject to right of appeal to the superior court. A person who fails to file a properly completed and certified report within the time required by AS 15.13.110(a)(2) or 15.13.110(b) is subject to a civil penalty of not more than $500 a day for each day the delinquency continues as determined by the commission subject to right of appeal to the superior court. A person who violates a provision of this chapter, except a provision requiring registration or filing of a report within a time required as otherwise specified in this section, is subject to a civil penalty of not more than $50 a day for each day the violation continues as determined by the commission, subject to right of appeal to the superior court. An affidavit stating facts in mitigation may be submitted to the commission by a person against whom a civil penalty is assessed. However, the imposition of the penalties prescribed in this section or in AS 15.13.380 does not excuse that person from registering or filing reports required by this chapter.

* **Sec. 6.** AS 15.13.400(4) is amended to read:

(4) "expenditure"

(A) means a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, incurred or made for the purpose of

(i) influencing the nomination or election of a candidate or of any individual who files for nomination at a later date and becomes a candidate;

(ii) use by a political party;

(iii) the payment by a person other than a candidate or political party of compensation for the personal services of another person that are rendered to a candidate or political party; or

(iv) influencing the outcome of a ballot proposition or question;

(B) does not include a candidate's filing fee or the cost of preparing reports and statements required by this chapter;

(C) includes an express communication and an electioneering communication, but does not include an issues communication;

* **Sec. 7.** AS 15.13.400 is amended by adding new paragraphs to read:

(13) "communication" means an announcement or advertisement disseminated through print or broadcast media, including radio, television, cable, and satellite, the Internet, or through a mass mailing, excluding those placed by an individual or nongroup entity and costing $500 or less and those that do not directly or indirectly identify a candidate;

(14) "electioneering communication" means a communication that

(A) directly or indirectly identifies a candidate;

(B) addresses an issue of national, state, or local political importance and attributes a position on that issue to the candidate identified; and

(C) occurs within the 30 days preceding a primary election or a

municipal election, or within the 60 days preceding a general election;

(15) "express communication" means a communication that, when read as a whole, and with limited reference to external events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate;

(16) "issues communication" means a communication that

(A) directly or indirectly identifies a candidate; and

(B) addresses an issue of national, state, or local political importance.

* **Sec. 8.** AS 15.56.014(a) is amended to read:

(a) A person commits the crime of campaign misconduct in the second degree if the person

(1) knowingly circulates or has written, printed or circulated a letter, circular, or publication relating to an election, to a candidate at an election, or an election proposition or question without the name and address of the author appearing on its face;

(2) except as provided by AS 15.13.090(b), knowingly prints or publishes an advertisement, billboard, placard, poster, handbill, paid-for television or radio announcement, or [OTHER] communication**, as that term is defined in AS 15.13.400,** intended to influence the election of a candidate or outcome of a ballot proposition or question without the words "paid for by" followed by the name and address of the candidate, group, or individual paying for the advertising or communication and, if a candidate or group, with the name of the campaign chair;

(3) knowingly **makes a communication, as that term is defined in AS 15.13.400,** [WRITES OR PRINTS AND CIRCULATES, OR HAS WRITTEN, PRINTED AND CIRCULATED, A LETTER, CIRCULAR, BILL, PLACARD, POSTER, OR ADVERTISEMENT IN A NEWSPAPER, ON RADIO OR TELEVISION]

(A) containing false factual information relating to a candidate for an election;

(B) that the person knows to be false; and

(C) that would provoke a reasonable person under the circumstances to a breach of the peace or that a reasonable person would construe as damaging to the candidate's reputation for honesty **or** [,] integrity, or **to** the candidate's qualifications to serve if elected to office.

* **Sec. 9.** AS 15.13.080 is repealed.

* **Sec. 10.** This Act takes effect immediately under AS 01.10.070(c).

CAMPAIGN FINANCE REFORM SERIES

REGULATING ELECTIONEERING:
DISTINGUISHING BETWEEN "EXPRESS ADVOCACY" & "ISSUE ADVOCACY"

BY GLENN MORAMARCO

BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

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This paper is one of a series of papers issued by the Brennan Center exploring issues of money and politics. The following titles are part of the series:

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By Burt Neuborne

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By Burt Neuborne

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By Glenn Moramarco

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Cover design by Jennifer Eisenpresser

About the Author

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Table of Contents

Introduction

For most of this century, one of the primary goals of federal campaign finance laws has been to restrict wealthy interests from exerting undue influence over the political process. Thus, in 1907, Congress passed legislation that prevented corporations from making financial contributions or expenditures in connection with any election for federal office. Forty years later, the ban was extended to labor unions, and in the early 1970s, Congress passed the Federal Election Campaign Act (FECA), which sought, among other things, to limit contributions by "fat cat" or wealthy donors to political parties and candidates.

Although these reforms did not completely remove the influence of "big money" from politics, the reforms nevertheless enjoyed some modest success in preventing the appearance of corruption that arises when wealthy donors and powerful corporations contribute directly and heavily to political campaigns. However, in recent years these reforms have lost their effectiveness, as wealthy donors, including prohibited contributors such as corporations and labor unions, have evaded the clear intent of the law.

In the 1996 federal elections, corporations, labor unions, political parties, and advocacy groups spent an estimated $135 to $150 million in advertisements that were wholly unregulated by the federal government because, the sponsors of the ads claimed, they were engaged in "issue advocacy" rather than "express advocacy." However, rather than educating the public broadly about issues, the typical "issue ad" mentioned a single candidate, targeted the segment of the public eligible to vote for that candidate, began to run when an election was imminent, and ended abruptly on Election Day.

The following is an example of an advertisement, run during the 1996 campaign, which the sponsor claimed was an unregulated "issue ad" rather than a regulated electioneering ad:

> It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions. Call Congressman Ganske. Tell him to protect America's environment. For our families. For our future.

The sponsors of this advertisement claim it is an "issue ad" because, rather than urging viewers to "vote against" or "defeat" Congressman Ganske, the ad merely urges them to call Congressman Ganske. Surgically excising explicit words of advocacy, such as "elect" or "defeat," they claim, converts blatant electioneering into mere "issue advocacy," which is wholly unregulated and immune from federal disclosure laws.

Of course, to the eyes of the voting public, the above advertisement is indistinguishable from electioneering ads that Congressman Ganske's opponent would run. This ad and the vast majority of so-called "issue ads" that appeared during the 1996 federal election season had the unmistakable intent of encouraging the viewer to vote for or against

particular candidates. Although there are no reliable estimates concerning the dollar amount spent on "issue advocacy" in state and local races, it is nevertheless clear that the problem is not limited to federal elections. The presentation of electioneering ads under the guise of "issue advocacy" has given rise to a separate parallel track of wholly unregulated electioneering, a development that threatens to make a mockery of the entire scheme of federal and state campaign finance regulation.

This paper reviews the history of the rise of "issue advocacy," describes the current legal landscape, and explains some of the leading regulatory approaches for defining "express advocacy" and "issue advocacy" in a more realistic and constitutionally-permissible manner. ❑

"Issue Advocacy" and "Express Advocacy" -- The Paradigm Cases

The phrase "issue advocacy," like the phrase "express advocacy," appears nowhere in the statutes that comprise federal campaign finance law. Rather, the concepts were created by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), which held that political advertisements that expressly advocate the election or defeat of a candidate are subject to federal regulation, but political advertisements that merely relate to political issues (without expressly advocating the election or defeat of a candidate) are not subject to regulation.

Relying on the *Buckley* decision, some lower federal court decisions have adopted a very narrow, bright-line test -- the "magic words" test. Under the "magic words" test, regardless of the intent of the speaker or the effect of the advertisement on the listener, an advertisement that fails to use "magic words" such as "elect," "defeat," "support," "reject" (or nearly identical synonyms) is considered "issue advocacy" rather than "express advocacy." However, the proper legal test for defining "express advocacy" and "issue advocacy" remains a hotly contested legal issue. Before that issue can be addressed, it is necessary to understand what it is the law is attempting to differentiate between when it uses the terms "issue advocacy" and "express advocacy."

The paradigms are relatively easy to describe. A paradigmatic "issue advocacy" advertisement: (1) addresses an issue of national or local political importance, (2) discusses only the issue and not the actions of particular political actors in regard to that issue, and (3) is broadcast at a time when legislative or executive action on the issue may be pending or contemplated, but no election is imminent.

Recent examples of the "issue advocacy" paradigm are advertisements that labor unions ran in late 1993, when the Senate was considering ratification of the North American Free Trade Agreement (NAFTA):

> In Washington, big corporations and lobbyists are spending millions making false claims about the NAFTA trade deal. But across America, people going to factories, to farms, to offices know it means jobs going south. Economists who've studied job loss say we'll lose up to 500,000 jobs to NAFTA. Americans want to expand trade, but not by trading away their jobs. NAFTA: It's a bad deal for America, and Americans know it.

When these anti-NAFTA advertisements were broadcast, there was no national election pending, and the primary purpose of the advertisements was to sway public and Congressional opinion on this important public policy choice.

Similarly, in late 1993 and early 1994, when President Clinton proposed comprehensive national health care reform, the Health Insurance Association of America ran a series of paradigmatic "issue advocacy" radio and television spots. The advertisements featured an ordinary American couple -- Harry and Louise -- discussing their fears about the proposed health care reform package. Again, there were no national elections pending, and the advertisements were intended to sway public opinion against health care reform and convince Congress to reject the President's health care initiatives.

A paradigmatic "express advocacy" advertisement: (1) names one or more individual candidates for public office, (2) attributes one or more actions or beliefs to the candidate, (3) appears in close proximity to an election, and (4) explicitly urges the viewer to vote either for or against the candidate. The following advertisement is an example of "express advocacy":

> Senator Smith is standing in the way of reform. Voting against curbs on frivolous lawsuits that cost jobs. What's worse, Senator Smith's made a career of putting the rights of criminals ahead of the rights of victims. Voting to deny employers the right to keep convicted felons out of the workplace. That's wrong, that's liberal, but that's Senator Smith. On Tuesday, vote against Senator Smith.

The majority of political advertisements that appear during an electoral season fall in between these paradigms. The decision to classify an advertisement as either "express advocacy" or "issue advocacy" has enormous practical implications. If the communication is deemed to be "express advocacy," then three consequences follow under federal election law. First, the communication is subject to disclosure rules. FECA requires that speakers engaging in "express advocacy" disclose the sources of their money and the nature of their expenditures. Second, the communication is subject to source restrictions. FECA bars certain speakers, such as corporations and unions, from spending money to engage in "express advocacy." Third, the communication is subject to fund-raising restrictions. FECA limits not only the sources from which speakers may raise their money, but also the size of contributions they may receive.

If, however, the communication is deemed to be "issue advocacy," then the communication is not, and indeed cannot constitutionally be, subject to regulation, including source restrictions, fund-raising restrictions, or even public disclosure. Thus, it is vitally important that campaign finance law be able to distinguish intelligently between "issue advocacy," which is intended to educate the public about important public issues, and "express advocacy," which is intended to persuade a voter to support or defeat a particular candidate at the polls. ❑

The Supreme Court Invents "Issue Advocacy"

In 1974, on the heels of President Nixon's resignation and public hearings on the Watergate scandals, Congress built on reforms begun initially in 1971, and enacted FECA -- a comprehensive set of campaign reforms that established: (1) contribution limits for donations to politicians and political parties; (2) expenditure limits that applied to private parties, political parties, and those seeking public office; (3) disclosure rules for both contributions and expenditures; and (4) public financing of presidential elections. These reforms, which were set to go into effect with the upcoming 1975-76 election cycle, were immediately challenged in the courts.

The Supreme Court reviewed the constitutionality of FECA in *Buckley v. Valeo*, 424 U.S. 1 (1976). In general, the Court upheld the disclosure rules and the public financing of presidential elections. However, on the issue of limits on campaign contributions and expenditures, the Court issued a split decision. The Court upheld the limits on contributions as necessary to further the government's compelling interest in avoiding corruption or the appearance of corruption. However, the Court struck down the limits on expenditures as violating a candidate's First Amendment rights without serving a compelling government interest.

FECA attempted to regulate not only candidate and party expenditures, but also expenditures by private parties. One section of FECA imposed a $1,000 limit on expenditures "relative to a clearly identified candidate." Another section of FECA imposed reporting requirements for persons who make independent expenditures of over $100 "for the purpose of influencing" a federal election. The Court in *Buckley* concluded that these regulations presented potential problems both of vagueness and overbreadth.

Under First Amendment "void for vagueness" jurisprudence, the government cannot punish someone without providing a sufficiently precise description of what conduct is legal and what is illegal. A vague or imprecise definition of "express advocacy" might serve to "chill" some political speakers who, although they desire to engage in discussions of political issues, may be afraid that their speech could be construed as electioneering. The Court in *Buckley* found that the FECA regulations, which applied to expenditures "relative to a clearly identified candidate" and "for the purpose of influencing an election" were not sufficiently precise to provide the certainty necessary for those wishing to engage in political speech.

Similarly, the overbreadth doctrine in First Amendment jurisprudence is concerned with a regulation that, however precise, sweeps too broadly and reaches constitutionally protected speech. In *Buckley*, the Court was concerned that a regulation that applies to any expenditure that is done "for the purpose of influencing" a federal election or that is "relative to a clearly identified candidate" could encompass not only direct electioneering, but also protected speech on issues of public and political importance. For example, the Harry and Louise health care advertisements, which were intended to be "issue advocacy" communications, might nevertheless have the effect of *influencing* viewers to oppose Democrats in general or President Clinton in particular. If the FECA regulations were interpreted to reach all expenditures that merely mention a political candidate or could influence the outcome of a federal election, the sweep would be broad indeed.

In order to avoid these vagueness and overbreadth problems, the Court held that the government's regulatory power under FECA would be construed to reach only funds used for communications that "expressly advocate" the election or defeat of a clearly identified candidate. Thus, it was the Supreme Court, and not the Congress, that invented the distinction between "express advocacy," which may be regulated, and "issue advocacy," which cannot be regulated. Although the words "express advocacy" and "issue advocacy" appear nowhere in the statutory language, they are now an important part of the statutory and constitutional federal election law framework.

The "Magic Words" Test

In an important footnote in the *Buckley* opinion, the Supreme Court provided some guidance on how to decide whether a communication is "express advocacy" or "issue advocacy." The Court stated that its construction of FECA would limit the reach of the statute "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" It is this footnote from *Buckley* that has led some to conclude that the Supreme Court has adopted a "magic words" test for distinguishing between "express advocacy" and "issue advocacy." Under the "magic words" approach, unless a communication contains one of the words listed by the Supreme Court in this footnote, or a near-perfect synonym, the communication is "issue advocacy," regardless of the intent of the speaker or the likely reaction of any reasonable listener.

Proponents of the "magic words" approach interpret it strictly. Thus, the following advertisement, even if aired within days of an election, would be considered "issue advocacy" by strict constructionists:

> Congresswoman Smith voted to increase income taxes, sales taxes and capital gains taxes by over a billion dollars. Then she voted against the largest property tax cut in history. Is she: (a) a liberal, (b) a big spender, (c) out of touch, or (d) all of the above? If you said "(d) all of the above," you've made the right call. Make another right call to Congresswoman Smith. She never met a tax she didn't hike.

Because the tag line on the ad says "call" Congresswoman Smith rather than "defeat" Congresswoman Smith, it would be deemed an "issue ad" under the strict "magic words" approach. If adopted by the courts, the "magic words" approach, with its narrow and wooden definition of "express advocacy" would create a potentially massive loophole in the campaign finance laws that would allow advocacy groups and prohibited donors to spend unlimited resources on unregulated electioneering advertisements like the one cited above.

The Appellate Courts Disagree About How To Define "Express Advocacy"

The Supreme Court has only once applied the "express advocacy" test to a concrete set of facts, and that case, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1980), has aspects that both support and undermine the "magic words" approach. In that case, Massachusetts Citizens for Life, a nonprofit corporation, published a "Special Election Edition" of its newsletter which urged its readers to "vote pro-life" in an upcoming primary election, listed every candidate for state and federal office, and identified each candidate's view on pro-life issues, together with a disclaimer stating that the newsletter did not endorse any particular candidate.

The Supreme Court held that, despite the disclaimer, the pro-life newsletter contained "express advocacy." The Court began its analysis by returning to *Buckley*, and reiterating that a finding of "express advocacy" depends upon the use of language such as "vote for," "elect," or "support." However, despite the fact that the newsletter used the explicit phrase "vote pro-life," the Court did not limit its analysis to the mere presence or absence of these "magic word..." Rather the Court examined the newsletter as a whole and rested its decision on the "essential nature" of the message and what it conveyed "in effect." Thus, *Massachusetts Citizens for Life* can be read as supporting a test for "express advocacy" that looks beyond the mere presence or absence of "magic words" and considers the context and true intent of a communication.

Because the Supreme Court has not definitively settled the issue of how to differentiate between advertisements that constitute "issue advocacy" and advertisements that constitute "express advocacy," the issue has been left to the lower federal courts. The federal courts of appeals have split in their interpretation of "issue advocacy."

One of the earliest decisions in this area is *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). In that case a private citizen, Harvey Furgatch, placed a full page advertisement in the *New York Times* and the *Boston Globe* that was critical of President Carter during the week preceding the 1980 election. Furgatch's advertisement stated that President Carter was "cultivat[ing] the fears, not the hopes, of the voting public," and "degrading the electoral process and lessening the prestige of the office." Furgatch's advertisement accused President Carter of trying "to buy entire cities, the steel industry, the auto industry, and others with public funds" during the election campaign. Finally, the advertisement warned that "[i]f he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT."

The FEC sued Furgatch for, among other things, failing to report his expenditures on these newspaper advertisements. The United States Court of Appeals for the Ninth Circuit held that, even though Furgatch's advertisements did not use any of the "magic words" listed in *Buckley*, they nevertheless expressly advocated the defeat of President Carter, and thus had to be reported to the FEC as independent expenditures.

According to the appellate court, the "magic words" test urged by Furgatch would preserve the First Amendment interest in unfettered expression only at the expense of eviscerating FECA. Nominally independent campaign spenders could too easily circumvent the Act by simply avoiding certain key words while conveying a message that is unmistakably an electioneering message. The Court held that a communication is "express advocacy" when the communication, when read as a whole and with limited reference to external events, is reasonably susceptible to interpretation only as an exhortation to vote for or against a specific candidate.

Despite this important early ruling by the United States Court of Appeals for the Ninth Circuit, the recent trend among federal appellate courts has been to adopt the "magic words" approach for "express advocacy." For example, in *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997), the FEC brought an enforcement action against the Christian Action Network, alleging that the following advertisement, which was aired in the weeks leading up to the November 3, 1992 presidential election, should not have been funded with corporate money because it expressly advocated the defeat of President Clinton and Vice-President Gore:

Bill Clinton's vision for America includes job quotas for homosexuals, giving homosexuals special civil rights, allowing homosexuals in the armed forces. Al Gore supports homosexual couples' adopting children and becoming foster parents. Is this your vision for a better America? For more information on traditional family values, contact the Christian Action Network.

Despite the obvious intent of this television commercial, the United States Court of Appeals for the Fourth Circuit, in very strong language, criticized the FEC's position that the ad, which failed to use "magic words" such as "defeat" or "vote against," was expressly advocating the defeat of Clinton and Gore. The court found that the Supreme Court had limited the FEC's regulatory authority to communications containing explicit words urging election or defeat of candidates. ❑

The Real World Practices

Corporations, labor unions, political parties, and advocacy groups have seized upon the "magic words" approach adopted by some courts and have engaged in multi-million dollar electioneering campaigns under the guise of "issue advocacy." A recent report by the Annenberg Public Policy Center at the University of Pennsylvania examined the "issue advocacy" expenditures of 27 organizations in the 1995-96 election cycle (groups such as the AFL-CIO, the NRA, the NEA, and the Sierra Club) and found that these 27 organizations alone spent an estimated $135 million to $150 million in election-related advertising. This was at a time when all federal candidates for office combined (President, Senate, and House of Representatives) spent an estimated $400 million on advertising. Indeed, in some races, "issue advocacy" spending by interested groups exceeded the advertising expenditures of the candidates themselves. As the Annenberg Center noted, this level of spending by unregulated groups is "unprecedented, and represents an important change in the culture of campaigns."

The "issue advocacy" advertisements sponsored by these organizations are virtually indistinguishable from the campaign commercials put out by the candidates. For example, during the 1996 election season, Citizens for the Republic Education Fund, a tax-exempt organization founded by Lyn Nofziger on June 20, 1996, spent hundreds of thousands of dollars on "issue ads" that were intended to help Republican Senate candidates. Citizens for the Republic Education Fund aired the following television commercial against Arkansas Democratic Senate candidate Winston Bryant:

> Senate candidate Winston Bryant's budget as Attorney General increased 71%. Bryant has taken taxpayer funded junkets to the Virgin Islands, Alaska, and Arizona. And spent about $100,000 on new furniture. Unfortunately, as the state's top law enforcement official, he's never opposed the parole of any convicted criminal, even rapists and murderers. And almost 4,000 Arkansas prisoners have been sent back to prison for crimes committed while they were out on parole. Winston Bryant: government waste, political junkets, soft on crime. [Superimposed: Call Winston Bryant and tell him to give the money back.]

Because the ad urges the viewer to "call Winston Bryant," rather than vote against him, the Citizens for the Republic Education Fund considered this an issue advertisement, not subject to federal regulation, rather than "express advocacy," which would have been subject to spending limits and disclosure.

Similarly, the Democratic National Committee in 1996 ran an advertisement in which the announcer states:

> Protect families. For millions of working families, President Clinton cut taxes. The Dole/Gingrich budget tried to raise taxes on eight million. The Dole/Gingrich budget would've slashed Medicare $270 billion, cut college scholarships. The President defended our values, protected Medicare. And now a tax cut of $1,500

> a year for the first two years of college, most community colleges free. Help adults go back to school. The President's plan protects our values.

Because the advertisement never used the magic words, "vote for" Clinton or "defeat" Dole, the Democratic National Committee considered this an issue ad that did not expressly advocate the reelection of President Clinton or the defeat of Senator Dole.

The "magic words" approach is a loophole that threatens to swallow the entirety of federal campaign financing law. The bans on corporate and labor union expenditures are rendered meaningless when corporations and labor unions run multi-million dollar advertising campaigns that target individual legislators for defeat under the banner of "issue advocacy." Similarly, the $5,000 limit on contributions to PACs, which was upheld by the Supreme Court, is rendered meaningless when individuals contribute sums substantially in excess of that amount in order to fund multi-million dollar advertising campaigns that attempt to influence the outcome of specific electoral races. And the expenditure limits which the presidential candidates voluntarily agreed to abide by as a condition for receiving public matching funds are rendered meaningless when the national party committees run unregulated advertising campaigns that mirror those of their nominees. ❑

"Magic Words" and First Amendment Jurisprudence

The federal court decisions that reject the Ninth Circuit approach in *Furgatch* and adopt a "magic words" test for "express advocacy" construe *Buckley* as imposing restrictions that are beyond those imposed in any other First Amendment context. In every area of First Amendment jurisprudence, courts are required to engage in delicate line drawing between protected speech and speech that properly may be regulated. For example, in another election-related context -- union representation elections -- employers are permitted to make "predictions" about the consequences of unionizing, but they may not issue "threats." Although the courts have developed an extensive jurisprudence to distinguish between "predictions" and "threats," there is no bright-line test, and an employer could harbor considerable uncertainty as to whether the words he is about to utter are either protected under the First Amendment or sanctionable as illegal advocacy.

Similarly, in libel cases involving the press, an area of core First Amendment concern, the Court has eschewed the simple bright-line approach of imposing liability based on the truth or falsity of the statement published. Instead, the Court utilizes a multi-factor analysis that examines, among other things, whether the subject of the statement is a public figure, whether the statement involves matters of public concern, whether the speaker acted with reckless disregard for the truth or falsity of the statement, and whether a reasonable reader would perceive the statement as stating actual facts or merely rhetorical hyperbole.

In no area of First Amendment jurisprudence has the Court mandated a wooden, mechanical test that ignores context and purpose. In no area of First Amendment jurisprudence has the Court held that the only constitutionally permissible test is one that would render the underlying regulatory scheme unenforceable. It is doubtful, therefore, that the Supreme Court in *Buckley* intended to single out election regulations as requiring a mechanical, formulaic, and utterly unworkable test.

Moreover, many of those courts that have adopted the "magic words" approach have applied it uncritically to all of the various different types of possible election law restrictions, and have thereby failed to grapple with the important distinction in First Amendment jurisprudence between restrictions on speech and mere disclosure rules. In *Buckley*, the Court made it clear that the governmental interests that justify disclosure of election-related spending are broader than the governmental interests that justify prohibitions or restrictions on election-related speech. When legislation does not proscribe speech, there is less of a concern about either chilling or vagueness. Thus, even if certain advertisements cannot be prohibited because they are arguably within the ambit of "issue advocacy," it does not follow that the speaker cannot be required to disclose the funding sources for those ads. If a legislature were to pass a law requiring, for example, that the source of funds be disclosed for every communication whose cost exceeds $10,000 and mentions a specific candidate for public office within 60 days of an election, such a law might well be upheld regardless of how "express advocacy" and "issue advocacy" are defined in other contexts.

Finally, and most importantly, even if *Buckley* should be read as limiting the current

regulatory reach of FECA to advertisements using "magic words," that holding would not foreclose future legislatures, either state or federal, from adopting new legislation that regulates electioneering or defines "express advocacy" more broadly. The decision to narrowly construe a statute to save it from potential vagueness and overbreadth problems does not prevent further legislative refinements that eliminate those problems. For example, in the obscenity context, the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), provided specific examples of "hard core" sexual conduct that could be prohibited under state or federal obscenity laws. In a companion case, *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973), the Court stated that, if necessary to eliminate potential vagueness and overbreadth problems in federal obscenity statutes, the Court was prepared to narrowly construe such statutes to reach only those specific examples of "hard core" sexual conduct specifically delineated in *Miller v. California*. However, the Court made it clear that Congress remained free to enlarge upon this narrowing construction and go beyond the specifically enumerated "magic acts." *12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. at 130 n.7 ("Of course, Congress could always define other specific 'hard core' conduct.")

This same reasoning doubtless applies in the election law context. In *Buckley*, the Court was confronted with FECA regulations that purported to regulate all expenditures that were "relative to a clearly identified candidate" and "for the purpose of influencing" an election -- two very broad and imprecise phrases. When the Court chose to save FECA from constitutional invalidity by narrowly construing these phrases to reach only "express advocacy," it was forced to invent its own definition of "express advocacy" without any legislative language to use as a guide. Even if the Court intended to limit "express advocacy" in FECA to "magic words," future legislative attempts to regulate electioneering activity are not necessarily bound by that limitation. Future legislatures are, of course, bound by the vagueness and overbreath concerns that undergird the *Buckley* decision. But as long as the legislation is both sufficiently narrow and precise, future legislatures are free to adopt a more refined definition of "express advocacy" and regulate electioneering activity in a manner that accords with political reality. *See Miller v. California*, 413 U.S. at 25 (the function of the Court is not to propose regulatory schemes, but instead to await concrete legislative efforts while providing the general principles for acceptable constitutional definitions). ❑

Recent Attempts To Better Define "Express Advocacy"

Spurred in part by the abuses of the last election cycle, where corporations, labor unions, political parties, and advocacy groups spent hundreds of millions of dollars on advertisements that they claimed were mere "issue ads" despite a clear electioneering intent, the government and reformers inside and outside of government have attempted to codify a definition of "express advocacy" that goes beyond the "magic words" approach and better reflects real world electioneering practices. Prominent among the recent attempts to define "express advocacy" are two different general approaches: (1) a "reasonable person" approach, which has been adopted by the FEC, and (2) a delimited time-period approach, which has been proposed in the Senate. These two approaches demonstrate the tension inherent in any attempt to satisfy simultaneously the Supreme Court's dual concerns regarding vagueness and overbreadth. The "reasonable person" approach tends to tilt in favor of increased breadth of coverage, but sacrifices some clarity. The "delimited time-period" approach offers clarity, but raises issues of potential over- and under-breadth of coverage. Either of these two approaches, however, is a clear improvement over the unworkable "magic words" approach.

The FEC Adopts a "Reasonable Person" Approach

The FEC promulgated a regulation which incorporated a "reasonable person" approach into its definition of "express advocacy." Under the regulation, "express advocacy" is defined to include not only those communications which contain "magic words," but also communications that "[w]hen taken as a whole and with limited reference to external events such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates(s) . . . ." The regulation further states that, under its reasonable person approach, the electoral portion of the communication must be "unmistakable, unambiguous, and suggestive of only one meaning."

The definition of "express advocacy" contained in this FEC regulation attempts to codify the expanded definition of "express advocacy" that met with the court's approval in *Furgatch*. It goes beyond "magic words" by incorporating a "reasonable person" standard that applies in only a very narrow set of circumstances. In short, if "magic words" are not used, the advertisement is "express advocacy" only if the electioneering purpose of the advertisement is unmistakable, unambiguous, and so clear that reasonable minds simply could not differ. Thus, the regulation attempts to bring within the regulatory sphere some of the most egregious instances of electioneering that occur without the use of "magic words."

Despite its narrow reach, this regulation was immediately challenged in the courts as an unconstitutional encroachment on free speech. In *Maine Right to Life Committee, Inc. v. FEC*, 914 F. Supp. 8 (D. Me. 1996), a non-profit membership corporation brought suit in federal district court in Maine, arguing that this definition of "express advocacy" was beyond the FEC's authority because it was both too broad and unconstitutionally vague. The trial court concluded that this FEC definition of "express advocacy," although derived from the appellate language in the *Furgatch* opinion,

goes further than permitted by Supreme Court precedent. In a thoughtful opinion, the trial court nevertheless showed great sympathy for the FEC's regulatory attempt:

> [T]he Federal Election Campaign Act is designed to avoid excessive corporate financial interference in elections and the FEC presumably has some expertise on the question what form that interference may take based on its history of complaints, investigations and enforcement actions. . . . Language, moreover, is an elusive thing. The topic here is communication and it is commonplace that the meaning of words is not fixed, but depends heavily on context as well as the shared assumptions of speaker and listener. . . . One does not need to use the explicit words "vote for" or their equivalent to communicate clearly the message that a particular candidate is to be elected. [This] appears to be a very reasonable attempt to deal with these vagaries of language and, indeed, is drawn quite narrowly to deal with only the "unmistakable" and "unambiguous," cases where "reasonable minds cannot differ" on the message. "Limited reference to external events" is hardly a radical idea. It is required even by the *Buckley* terminology. After all, how does one know that "support" or "defeat" means an election rather than an athletic contest or some other event without considering the external context of a federal election with specific candidates?

Despite these words of endorsement, the court reluctantly concluded that *Buckley* and *Massachusetts Citizens for Life* required the more rigid "magic words" approach. The court believed that the Supreme Court endorsed a bright line test in order to protect free speech, regardless of the effect on enforcement of the election laws. As the court noted, "[t]he result is not very satisfying from a realistic communications point of view and does not give much recognition to the policy of the election statute to keep corporate money from influencing elections in this way." Thus, although the court candidly indicated that it believed that "the FEC had the better of the argument on its regulation so far as the logic of language is concerned," it nevertheless concluded that *Buckley* had foreclosed anything other than the narrow "magic words" test.

This trial court decision was affirmed by the United States Court of Appeals for the First Circuit. Because that decision conflicts with the decision by the United States Court of Appeals for the Ninth Circuit in *Furgatch*, the government asked the Supreme Court to review the case and resolve the split among the appellate courts. The Supreme Court declined to consider the case, and thus the split remains.

Senators Propose a Delimited Time Period Approach

In response to criticism that the "reasonable person" approach and other similar tests that involve subjective criteria are too vague, some reformers have sought to define "express advocacy" through clearly delimited criteria that expand upon the "magic words" approach. Prominent among these types of reforms is a "delimited time period" approach. Under this approach, any advertisement that airs within a specified period of time prior to an election is deemed "express advocacy" if it refers to a specifically identified candidate.

In the McCain-Feingold Bill introduced in the Senate in 1997, for example, the definition of "express advocacy" included not only

communications that contain "magic words," but also communications that advocate the election or defeat of a candidate by "referring to one or more clearly identified candidates in a paid advertisement... within 60 calendar days preceding the date of an election...." Under this delimited time period approach, a potential speaker knows with certainty which advertisements will be deemed "express advocacy," since the criteria -- explicitly referring to a candidate and the date on which the advertisement is communicated -- are clear and objectively determined.

The principal objection leveled against the delimited time period approach is that it is potentially overbroad. One can imagine an advertisement which, although its intent is to influence the debate on an issue, mentions or depicts a political candidate who is strongly identified with that issue. Thus, for example, opponents of the Vietnam War might desire to air an anti-war advertisement that depicts President Johnson, or opponents of some more recent congressional initiative might desire to produce advertisements that depict Newt Gingrich.

Despite these theoretical possibilities, the delimited time period approach is based on the common-sense recognition that, in the real world, advertisements that depict candidates and are run shortly before an election are almost invariably intended to influence the election or defeat of the depicted candidate. In fact, the public rarely sees commercials depicting a politician or political candidate except immediately before an election, and those commercials are broadcast in that time frame precisely because they are intended to influence the outcome of the imminent election.

Under McCain-Feingold's delimited time period approach, a person who desires to produce an issue advertisement is given clear notice of what is and is not permissible. Advertisements that simply discuss issues, without naming candidates are always permissible. Advertisements that are communicated more than 60 days prior to an election must simply avoid the use of "magic words." Advertisements that are communicated within 60 days of an election can discuss issues, as long as the ads do not depict a particular candidate.

The commercials listed below in the column on the left, all of which were broadcast during the 1996 election, were considered issue ads by their sponsors. Under the McCain-Feingold proposal, these advertisements would all be recharacterized as "express advocacy." However, the advocacy organizations, if their true intent is to educate the public rather than influence the outcome of a specific election, could easily reformulate these ads as shown in the column on the right, and run those advertisements any time, even within days of an election. Additionally, because the ads in the column on the left fail to use "magic words," under the McCain-Feingold proposal they can be broadcast without change as "issue ads" when an election is more than 60 days away. ❑

EXPRESS ADVOCACY

Announcer: They worked hard all their lives. They're our neighbors, our friends, our parents. They earned Social Security and Medicare. But Congressman X voted five times to cut their Medicare. Even their nursing home care. To pay for a $16,892 tax break he voted to give the wealthy. Congressman X, it's not your money to give away. Don't cut their Medicare. They earned it.

Announcer: Some things are wrong. They've always been wrong. And no matter how many politicians say they're right, they're still hateful and wrong. Stand up for the right values. Call Representative X today. Ask him why he voted against the Flag Protection Amendment. Against the values we hold dear. The Constitutional Amendment to safeguard our flag, because America's values are worth protecting.

Announcer: Election year. There'll be a lot flying through the air. But when you look through the mud, you see what Congressman X has helped to achieve: The first real cut in spending since World War II. 270 wasteful government programs eliminated. Historic welfare reform that requires recipients to work for their benefits. Why would we ever go back to the past? When you see the mud, remember the accomplishments. Call Congressman X and tell him to keep on reforming our government.

ISSUE ADVOCACY

Announcer: They worked hard all their lives. They're our neighbors, our friends, our parents. They earned Social Security and Medicare. Now *Congress* wants to cut their Medicare, even their nursing home care. Why? To pay for a $16,892 tax break for the wealthy. *Write or phone your Congressman and tell him* not to cut Medicare. They earned it.

Announcer: Some things are wrong. They've always been wrong. And no matter how many politicians say they're right, they're still hateful and wrong. Stand up for the right values. Call *your Congressman and ask him to support* the Flag Protection Amendment. *Get Congress to support* the values we hold dear. The Constitutional Amendment to safeguard our flag, because America's values are worth protecting.

Announcer: Election year. There'll be a lot flying through the air. But when you look through the mud, you see what *Congress* has achieved: The first real cut in spending since World War II. 270 wasteful government programs eliminated. Historic welfare reform that requires recipients to work for their benefits. Why would we ever go back to the past? When you see the mud, remember the accomplishments. *Call your Congressman and urge* him to keep on reforming our government.

As the above examples illustrate, it is possible to define "express advocacy" in a manner that both upholds the intent of the federal election laws (by preventing blatant electioneering with unregulated expenditures), while providing clear notice to advocacy groups concerning the limits imposed on "issue advocacy" when an election is imminent. Although the delimited time period approach has a broader sweep than some advocacy groups might ideally desire, it nevertheless provides a very wide berth for true issue-oriented campaigns, even when they are conducted in the midst of a federal election. The rule of thumb would be, if you are interested in advancing an issue, rather than a candidate, then stick to the issue being advanced, rather than the political personalities who may be associated with the issue, at least when an election is imminent.

Additional Approaches and Refinements

The "reasonable person" approach and the delimited time-period approach do not, of course, exhaust the spectrum of possible reforms that can provide the requisite level of certainty without prohibiting too much non-electioneering speech. Another model for reform is an intent-based approach, which attempts to regulate advertisements based on the speaker's actual intent. Under this approach, a statute might prohibit, for example, advertisements in which the speaker's "primary purpose" is to influence voters to elect a clearly identified candidate.

The intent-based approach raises no serious concerns in regard to overbreadth — it is narrowly-tailored to reach only those advertisements that are truly intended to be electioneering ads. Neither is it impermissibly vague, for if there is one thing that any individual speaker surely knows, it is his or her own purpose or intent. Of course, the problem arises at the enforcement stage, since although an individual speaker will know his or her own intent, that intent cannot be objectively ascertained by a fact-finder. In practice, the enforcement of an intent-based approach would likely mirror the enforcement of a "reasonable person" approach. A person is presumed to intend the normal consequences of his actions, and regulators would assume that the intent of an advertisement can be discerned from how the ad is received by the viewing public.

A regulatory solution to defining "express advocacy" and "issue advocacy" can adopt one or more of these approaches, in whole or in part. There are also a multitude of refinements that can be made to any of these approaches. For example, one could add a dollar threshold, adopt various targeting requirements, adopt higher burdens of proof, use legal presumptions, or allow limited exemptions, to name just a few possibilities.

A dollar threshold, for example, is useful for insuring that the election law does not inhibit *de minimis* electoral communications and likewise does not become a trap for small and unsophisticated groups not engaging in a significant amount of electioneering. Thus, a statute could specify that expenditures by an individual or organization during an election cycle that, in the aggregate, amount to less than perhaps $10,000 are not subject to regulation.

A separate targeting requirement is helpful in ensuring that the regulations are narrowly tailored to reach advertisements that are in fact intended to influence the outcome of a particular election. Thus, a regulation could prohibit communications that refer to a clearly identified candidate and are "targeted to or substantially distributed in the geographic area in which the

candidate is seeking election." Under this refinement, if the Sierra Club, for example, wants to educate the American public concerning the anti-environmental record of the Speaker of the House, it can do so during an election year if the ads are run nationally rather than targeted to the media market for the Speaker's district.

Another method for addressing potential overbreadth problems in the "reasonable person" or intent-based approaches is to raise the standard of proof required for an exercise of regulatory power. For example, there is a world of difference between regulating an advertisement which a reasonable person could interpret as containing an electioneering message, and regulating advertisements that no reasonable person could take as containing anything other than an electioneering message. The first approach sweeps in all ads that are arguably electioneering, while the latter approach sweeps in only those ads that are indisputably electioneering. Similarly, an intent-based approach could require a regulator to present "clear and convincing" evidence of a speaker's electioneering intent before finding an election law violation, a standard which would reduce the likelihood of government over-regulation of speech that is close to the line.

The use of presumptions provides another potential refinement that can serve to address the overbreadth issue in regard to any of these approaches. For example, an intent-based approach could incorporate a rebuttable presumption that ads which mention a candidate and are aired within a certain time frame are for an electioneering purpose. Because the presumption is rebuttable, rather than conclusive, there is less risk of overbreadth. Thus, the Vietnam War protestors discussed above could air their advertisement depicting President Johnson, although they would be on notice that, if the ad is run close to an election in which President Johnson is a candidate, the burden will be on them to demonstrate their non-electioneering intent. The use of objective presumptions, while providing speakers with a high degree of certainty concerning what type of speech will normally be subject to regulation, also provides a safety-valve that allows speakers to demonstrate that their communication, although in a format usually associated with electoral advocacy, is in fact not electioneering.

Finally, exemptions can also be provided for specific electioneering conduct that raises heightened First Amendment concerns. For example, an exemption can be provided for speech with an electioneering message that is communicated solely to an organization's own membership. Such an exemption eliminates the possibility that prohibitions on electioneering will attempt to reach regular editions of a newsletter put out by a corporation or labor union and sent only to their members. Similarly, an exemption can be tailored for non-partisan voting cards, such as those put out by the League of Women Voters.

As this short discussion indicates, reform initiatives are not limited to any single approach for defining "express advocacy." There are several different types of approaches that provide the requisite level of certainty without restricting too much speech that truly is not electioneering in nature. Likewise, there are many refinements which can, in principle, help make the major approaches more narrowly-tailored to reach only electioneering speech. ❑

Conclusion

Any attempt by campaign finance reformers to expand the definition of "express advocacy" beyond "magic words" will likely lead to a court challenge until the Supreme Court resolves the split among the appellate courts concerning this issue. While the Court in *Buckley* was properly concerned that an ambiguous test for "express advocacy" might serve to chill constitutionally protected "issue advocacy," that concern does not justify a wooden "magic words" test that elevates form over substance and eviscerates the effectiveness of the entire regulatory scheme governing electioneering. In every area of First Amendment jurisprudence, courts are required to engage in delicate line drawing between protected speech and speech that properly may be regulated. It is unlikely that the First Amendment requires, in the area of election regulations alone, a mechanical, formulaic test that readily invites evasion.

The challenge facing campaign finance reformers seeking to regulate electioneering communications is to develop a test for "express advocacy" that meets the Supreme Court's dual concerns regarding vagueness and overbreadth, which are necessarily in tension with each other. The test must be clear enough so that persons or organizations seeking to engage in political advertising will be able to determine with reasonable certainty beforehand whether an advertisement will be treated as regulated "express advocacy." Additionally, the test must be broad enough to cover situations in which an electioneering intent and message are clear, but not so broad as to sweep in true "issue advocacy." Recent proposals by the FEC and Congressional reformers are promising attempts to define "express advocacy" and "issue advocacy" in both a more realistic and a constitutionally permissible manner. ❑

BRENNAN CENTER FOR JUSTICE

AT NYU SCHOOL OF LAW

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Alaska State Legislature

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Senate Rules Committee

Senator Randy Phillips, Chair

Sec. 15.13.090. Identification of communication.

(a) All advertisements, billboards, handbills, paid-for television and radio announcements, and other communications intended to influence the election of a candidate or outcome of a ballot proposition or question shall be clearly identified by the words "paid for by" followed by the name and address of the candidate, group, or individual paying for the advertising. In addition, candidates and groups must identify the name of their campaign chairperson.

(b) The provisions of (a) of this section do not apply when the advertisement

(1) is paid for by an individual acting independently of any group and independently of any other individual;

(2) is made to influence the outcome of a ballot proposition as that term is defined by AS 15.13.065 (c); and

(3) is made for

(A) a billboard or sign; or

(B) printed material other than an advertisement made in a newspaper or other periodical.

Senator John Cowdery, Vice-Chair
Senator Rick Halford, Senator Gene Therriault, Senator Johnny Ellis
Senator_Randy_Phillips@legis.state.ak.us

AS 15.13.090

Alaska State Legislature

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Senate Rules Committee

Senator Randy Phillips, Chair

SB 363, "An Act relating to electioneering communications and communications intended to influence the outcome of an election and to campaign misconduct in the second degree; and providing for an effective date."

Sponsor Statement

SB 363, "Electioneering Communications", seeks to require parties, groups, and non-group entities making "electioneering communications" to disclose the source of funds used to pay for the communications.

SB 363 defines "electioneering communications" as a communication that is intended to influence the election of a candidate and that clearly identifies one or more candidates or political parties and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.

Senator John Cowdery, Vice-Chair
Senator Rick Halford, Senator Gene Therriault, Senator Johnny Ellis
Senator_Randy_Phillips@legis.state.ak.us

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Senate Rules Committee

Senator Randy Phillips, Chair

SB 363 "An Act relating to electioneering communications and communications intended to influence the outcome of an election and to campaign misconduct in the second degree; and providing for an effective date."

Sectional Analysis

Sec. 1. Adds "electioneering communications" to list of communications in AS 15.13.090(a) that require "paid for by" identification. Adds requirement that the total production costs of advertising be disclosed.

Sec. 2. Adds a new subsection to AS 15.13.090 requiring parties, groups, and non-group entities making communications identified in 15.13.090(a) to disclose the source of funds used to pay for the communication.

Sec. 3. Adds electioneering communications to the lists of communications covered in AS 15.56.014(a), which defines the crime of campaign misconduct in the second degree.

Sec. 4. Adds a definition of "electioneering communications" to AS 15.60.010.

Sec. 5. Provides for an immediate effective date.

Senator John Cowdery, Vice-Chair
Senator Rick Halford, Senator Gene Therriault, Senator Johnny Ellis
Senator_Randy_Phillips@legis.state.ak.us

Sectional Analysis

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 363
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: OOG
Title: An Act relating to electioneering communications
BRU: Elections
Component: Elections
Sponsor: Senate Rules
Requester: Senate State Affairs
Component No.: 21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual	0.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Prepared by: Gail Fenumiai, Election Administrative Supervisor
Phone 465-3935
Division: Division of Elections
Date/Time 4/22/02 2:31 PM
Approved by: Lieutenant Governor Fran Ulmer
Date 04/22/2002
Agency: Office of the Lieutenant Governor

(Revised 9/2001 OMB)

Fiscal Note - Elections

SCR

4

ALASKA STATE LEGISLATURE
SENATOR RANDY PHILLIPS
Senate District L

Session (Jan-May)
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Juneau, AK 99801
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Toll Free Anchorage Area
800-478-4950

Interim
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Eagle River, AK 99577
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(907) 694-4948 Fax

February 12, 2001

Honorable Gene Therriault
Senate State Affairs Committee
State Capitol
Juneau, AK 99801

Re: SCR 4 Tartan Day
Request for Hearing

Dear Chairman Therriault, Gene,

As sponsor of SCR4, designating April 6, 2001, as Alaska Tartan Day, I respectfully request a hearing in the Senate State Affairs Committee as soon as possible.

I would also like to request a teleconference to the Anchorage LIO so that Mr. Ray McDonald may testify in favor of the resolution.

Thank you for your assistance.

Sincerely,

Senator Randy Phillips

ALASKA STATE LEGISLATURE
SENATOR RANDY PHILLIPS
Senate District L

Session (Jan-May)
State Capitol, Rm 103
Juneau, AK 99801
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Interim
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(907) 694-4949
(907) 694-4948 Fax

February 12, 2001

Honorable Gene Therriault
Senate State Affairs Committee
State Capitol
Juneau, AK 99801

Re: SCR 4 Tartan Day
Sponsor Statement

Dear Chairman Therriault, Gene,

In recognition of Americans of Scottish descent and in support of their cultural activities, which enhance the spectrum of diversity in Alaska, I proudly sponsor SCR4, designating April 6, 2001 as Alaska Tartan Day.

If you have any questions or need additional information, please do not hesitate to call my office.

Sincerely,

Senator Randy Phillips

SCR

5

Senator Lyman F. Hoffman

Alaska State Legislature
State Capitol • Juneau, Alaska 99801-1182 • (907) 465-4453

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Bethel
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Chignik Lagoon
Chignik Lake
Clark's Point
Cold Bay
Dillingham
Dutch Harbor
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Egegik
Ekuk
Ekwok
False Pass
Goodnews Bay
Igiugig
Iliamna
Ivanof Bay
Kasigluk
King Cove
King Salmon
Kipnuk
Kokhanok
Kokhanok Bay
Koliganek
Kongiganak
Kwethluk
Kwigillingok
Levelock
Manokotak
Naknek
Napakiak
Napaskiak
Nelson Lagoon
New Stuyahok
Newhalen
Nikolski
Nondalton
Nunapitchuk
Oscarville
Pedro Bay
Perryville
Pilot Point
Platinum
Port Alsworth
Port Heiden
Port Moller
Portage Creek
Quinhagak
Saint George Island
Saint Paul Island
Sand Point
Shemya
South Naknek
Squaw Harbor
Togiak
Tuntutuliak
Twin Hills
Ugashik
Unalaska
Unga

Memo

To: Senator Gene Therriault
Senate State Affairs Committee

From: Senator Lyman F. Hoffman

Date: February 27, 2001

Re: Senate Concurrent Resolution 5

Please schedule SCR 5, requesting the declaration of March 18-24, 2001 as Inhalant and Poison Awareness Week, for a hearing in your committee.

Thank you.

P.O Box 886 • Bethel, Alaska 99559 • (907) 543-3541

Senator Lyman F. Hoffman

Alaska State Legislature
State Capitol • Juneau, Alaska 99801-1182 • (907) 465-4453

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Cold Bay
Dillingham
Dutch Harbor
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Ekuk
Ekwok
False Pass
Goodnews Bay
Igiugig
Iliamna
Ivanof Bay
Kasigluk
King Cove
King Salmon
Kipnuk
Kokhanok
Kokhanok Bay
Koliganek
Kongiganak
Kwethluk
Kwigillingok
Levelock
Manokotak
Naknek
Napakiak
Napaskiak
Nelson Lagoon
New Stuyahok
Newhalen
Nikolski
Nondalton
Nunapitchuk
Oscarville
Pedro Bay
Perryville
Pilot Point
Platinum
Port Alsworth
Port Heiden
Port Moller
Portage Creek
Quinhagak
Saint George Island
Saint Paul Island
Sand Point
Shemya
South Naknek
Squaw Harbor
Togiak
Tuntutuliak
Twin Hills
Ugashik
Unalaska
Unga

Senate Concurrent Resolution 5
Declaring March 18-24, 2001 Inhalant and Poison Awareness Week

Sponsor Statement

Inhalant abuse is a growing problem nationwide, and Alaska is seeing its share of expanding abuse. Inhalants - gas, paint, glue, cleaning products and many other substances - are toxic chemicals that can have serious and lasting effects on the body.

The Yukon-Kuskokwim Health Corporation received a federal grant for the Inhalant Intervention Project to operate a residential inhalant treatment center in Bethel. Naming March 18-24, 2001 as Inhalant and Poison Awareness Week will increase understanding of the use and risks of inhalant abuse.

There is a National Inhalant Prevention Coalition that has developed National Inhalants & Poisons Awareness Week - an annual program that takes place the third week in March. Alaska will join 800 organizations in 46 states who observe Inhalant and Poison Awareness Week.

P.O Box 886 • Bethel, Alaska 99559 • (907) 543-3541

ABOUT INHALANTS

They're all over your house. They're in your child's school. In fact, you probably picked some up the last time you went to the grocery store. Educate yourself. Find out about inhalants before your children do.

Most parents are in the dark regarding the popularity and dangers of inhalant use. But children are quickly discovering that common household products are inexpensive to obtain, easy to hide and the easiest way to get high. According to national surveys, inhaling dangerous products is becoming one of the most widespread problems in the country. It is as popular as marijuana with young people. More than a million people used inhalants to get high just last year. By the time a student reaches the 8th grade, one in five will have used inhalants.

What is inhalant use? Inhalant use refers to the intentional breathing of gas or vapors with the purpose of reaching a high. Inhalants are legal, everyday products which have a useful purpose, but can be misused. You're probably familiar with many of these substances -- paint, glue and others. But you probably don't know that there are more than 1,000 products that are very dangerous when inhaled -- things like typewriter correction fluid, air-conditioning refrigerant, felt tip markers, spray paint, air freshener, butane and even cooking spray. See Products Abused as Inhalants for more details.

Who is at risk? Inhalants are an equal opportunity method of substance abuse. Statistics show that young, white males have the highest usage rates. Hispanic and American Indian populations also show high rates of usage. See Characteristics of Users and Signs of an Inhalant User for more details.

What can inhalants do to the body? Nearly all abused products produce effects similar to anesthetics, which slow down the body's function. Varying upon level of dosage, the user can experience slight stimulation, feeling of less inhibition or loss of consciousness. The user can also suffer from **Sudden Sniffing Death Syndrome.** *This means the user can die the 1st, 10th or 100th time he or she uses an inhalant.* Other effects include damage to the heart, kidney, brain, liver, bone marrow and other organs. Results similar to Fetal Alcohol Syndrome may also occur when inhalants are used during pregnancy. Inhalants are physically and psychologically addicting and users suffer withdrawal symptoms. See Damage Inhalants Can Cause to the Body and Brain, Long-Term Effects of Inhalant Usage and Signs and Symptoms of a Long-Term User for more details.

What can I do if someone I know is huffing and appears in a state of crisis? If someone you know is huffing, the best thing to do is remain calm and seek help. Agitation may cause the huffer to become violent, experience hallucinations or suffer heart dysfunction which can cause **Sudden Sniffing Death Syndrome.** Make sure the room is well ventilated and call EMS. If the person is not breathing, administer CPR. Once recovered, seek professional treatment and counseling. See What To Do If Someone is Huffing

for more details.

Can inhalant use be treated? Treatment facilities for inhalant users are rare and difficult to find. Users suffer a high rate of relapse, and require thirty to forty days or more of detoxification. Users suffer withdrawal symptoms which can include hallucinations, nausea, excessive sweating, hand tremors, muscle cramps, headaches, chills and delirium tremens. Follow-up treatment is very important. If you or someone you know is seeking help for inhalant abuse, you can contact the National Inhalant Prevention Coalition at 1-800-269-4237 for information on treatment centers and general information on inhalants. Through a network of nationwide contacts, NIPC can help (**but not guarantee**) finding a center in your area that treats inhalant use.

What should I tell my child or students about inhalants? It is never too early to teach your children about the dangers of inhalants. Don't just say "not my kid." Inhalant use starts as early as elementary school and is considered a gateway to further substance abuse. Parents often remain ignorant of inhalant use or do not educate their children until it is too late. Inhalants are not drugs. They are poisons and toxins and should be discussed as such. There are, however, a few age appropriate guidelines that can be useful when educating your children. See Tips for Teachers for more details on how much to tell your children or students in the classroom about inhalants.

How can I educate my community about inhalants? NIPC leads the annual **National Inhalants & Poisons Awareness Week (NIPAW)** every third week in March. The next campaign will be held March 18-24, 2001. This community mobilization campaign has proven to be an effective tool for fighting inhalant abuse. In Texas, where the campaign originated, inhalant use decreased following widespread involvement in NIPAW. For details on the campaign and NIPAW coordination in your community, see NIPAW 2001 .

How can I be put on the NIPC mailing list? To receive current inhalant news and information, contact NIPC with your name, organization (if applicable), address, phone, fax and e-mail. Also, please indicate how you heard about the National Inhalant Prevention Coalition or how you found NIPC on the Web. Subscriptions to the NIPC newsletter and general information booklet "Inhalants: The Silent Epidemic" are free, but a voluntary payment or contribution is requested.

National Inhalant Prevention Coalition
1201 W. Sixth Street, Suite C-200
Austin, Texas 78703
phone: 800-269-4237 or 512-480-8953
fax: 512-477-3932
e-mail: nipc@io.com

HOME PAGE

PRODUCTS ABUSED AS INHALANTS

Volatile Solvents

Adhesives	model airplane glue, rubber cement, household glue
Aerosols	spray paint, hairspray, air freshener, deodorant, fabric protector
Solvents and gases	nail polish remover, paint thinner, type correction fluid and thinner, toxic markers, pure toluene, cigar lighter fluid, gasoline, carburetor cleaner, octane booster
Cleaning agents	dry cleaning fluid, spot remover, degreaser
Food products	vegetable cooking spray, dessert topping spray (whipped cream) whippets
Gases	nitrous oxide, butane, propane, helium

Anesthetics

Anesthetic	nitrous oxide, ether, chloroform

Nitrites

(Nitrite room odorizers)

Amyl	"Poppers," "Snappers"
Butyl	"Rush," "Locker room," "Bolt," "Climax," also marketed in head shops as "video head cleaner"

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HOME PAGE

SCR

6

During Session, January - May:
State Capitol, Room 115
Juneau, Alaska 99801
(907) 465-2095
465-3810 fax

During Interim, June - December:
716 W 4th Ave, Suite 520
Anchorage, Alaska 99501
(907) 269-0240
269-0242 fax

Senator Loren Leman

Senate Concurrent Resolution 6

April 2001 Sexual Assault Awareness Month

- **Sexual Assault in Alaska Needs Attention**
  Sexual assault crimes in Alaska are presently the highest, per capita, in the nation today. This crime has an occurrence of 2.4 times the national average. While 1,859 cases of child sexual abuse were reported to the Division of Family and Youth Services last year alone, unreported incidents are eight times higher. An estimated one in four women in Alaska will likely to fall victim to this crime.

- **Combating Sexual Assault**
  Sexual assault is an underreported crime and public awareness must be elevated in order to fight Alaska's occurrence rates. It is hoped that awareness will bring more offenders to justice as a result of increased reporting and will give Alaskans a better understanding of the avenues to assistance for victims and families.

- **Alliances**
  SCR6 encourages schools, churches, community organizations, public and private institutions, families and individuals to participate in the prevention and eventual elimination of sexual assault. It will boost the efforts of Alaska's first Statewide Sexual Violence Prevention Conference in September 2001.

- **Other States**
  Sexual Assault Awareness month has been proclaimed by 36 other states, according to the National Sexual Violence Resource Center. Five states have designated other months. April was designated national Sexual Assault Awareness Month because rape crisis centers throughout the United States agreed upon this date at a meeting of the National Coalition Against Sexual Assault in the late 1980's to better coordinate nationwide efforts at preventing, educating and promoting a better understanding of sexual assault.

Senator_Loren_Leman@legis.state.ak.us • www.akrepublicans.org/Leman.htm

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465-3810 fax

During Interim, June - December:
716 W 4th Ave, Suite 520
Anchorage, Alaska 99501
(907) 269-0240
269-0242 fax

Senator Loren Leman

MEMO

TO: Senator Gene Therriault, Chairman
Senate State Affairs Committee

FROM: Senator Loren Leman

DATE: February 28, 2001

RE: Scheduling Senate Concurrent Resolution 6: April 2001 Sexual Assault Awareness Month.

Please Schedule **SCR6: April 2001 Sexual Assault Awareness Month** at your earliest possible convenience.

I introduced this legislation to support the proclamation of April 2001 as Sexual Assault Awareness Month. SCR6 expresses the legislature's desire to increase public awareness concerning the prevalence of sexual assault and the avenues available to combat it.

Senator_Loren_Leman@legis.state.ak.us • www.akrepublicans.org/Leman.htm

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SCR 6
(S) Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected:
Title: April 2001 Sexual Assault Awareness Month
BRU:
Component:
Sponsor: Senator Leman
Requester: Senate State Affairs
Component Number:

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Prepared by: SENATE STATE AFFAIRS COMMITTEE Phone 465-4522

Senator: /s/ SENATOR THERRIAULT Date 3/7/01
Committee Chair

Fiscal Note

During Session, January - May:
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Juneau, Alaska 99801
(907) 465-2095
465-3810 FAX

During Interim, June - December:
716 W 4th Ave, Suite 520
Anchorage, Alaska 99501
(907) 269-0240
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Senator Loren Leman

Sponsor Statement – Senate Concurrent Resolution 6

"Relating to the proclamation of April 2001 as Sexual Assault Awareness Month."

Senate Concurrent Resolution 6 expresses the legislature's desire to increase public awareness about the undue prevalence of sexual assault in Alaska.

Sexual Assault incidents in Alaska occur at a rate of 2.4 times the national average. SCR6 encourages schools, community organizations, public and private institutions as well as families and individuals to participated in emphasize and combat this grave and disgraceful problem.

Sexual Assault Awareness Month will bolster the impact of Alaska's first Statewide Sexual Violence Prevention Conference, to be held in September 2001.

SCR6 will promote discussion of this devastating problem among Alaska residents. With only one in eight rapes reported, sexual assault is the most under reported crime in Alaska. Heightened awareness can only improve the overall occurrence statistics and at the very least, help to bring offenders to justice through increased reporting and understanding of sexual assault.

Prepared by John Joeright, Legislative intern to Senator Loren Leman, (465-3841)
Last updated February 28, 2001.