

SCOMM

76:7

ORIGINALS

HOUSE SPECIAL COMMITTEE ON THE EXXON  
VALDEZ OIL SPILL CLAIMS SETTLEMENT

MISC. COURT CASES RELATING TO OIL  
SPILLS AND ENVIRONMENTAL DAMAGES



STATE OF OHIO, Petitioner,

v.

UNITED STATES DEPARTMENT OF  
THE INTERIOR, Manuel Lujan, Jr.,  
Secretary of Department of the Interior,  
Respondents,

Public Service Electric and Gas Co., et  
al., ASARCO Inc., Intervenor.

NATIONAL WILDLIFE FEDERATION,  
et al., Petitioner,

v.

DEPARTMENT OF THE INTERIOR  
and United States of America,  
Respondents,

Edison Electric Institute, American Mining  
Congress, Public Service Electric  
and Gas Co., American Petroleum  
Institute, ASARCO Inc., Chemical  
Manufacturers Association, Intervenor.

STATE OF NEW YORK, Department  
of Environmental Conservation,  
Petitioner,

v.

UNITED STATES DEPARTMENT OF  
THE INTERIOR, Manuel Lujan, Jr.,  
Secretary of Department of the Interior  
and United States of America, Respondents,

Edison Electric Institute, American Petroleum  
Institute, American Mining Congress,  
ASARCO Inc., Public Service Electric  
and Gas Co., Chemical Manufacturers  
Association, Intervenor.

STATE OF COLORADO, Petitioner,

v.

UNITED STATES DEPARTMENT OF  
THE INTERIOR, Manuel Lujan, Jr.,  
Secretary of Department of the Interior  
and United States of America, Respondents,

Edison Electric Institute, American Mining  
Congress, Public Service Electric  
and Gas Co., et al., American Petroleum  
Institute, ASARCO Inc., Chemical  
Manufacturers Association, Intervenor.

STATE OF NEW YORK, et  
al., Petitioners,

v.

UNITED STATES DEPARTMENT OF  
THE INTERIOR, Manuel Lujan, Jr.,  
Secretary of Department of the Interior  
and United States of America, Respondents,

American Mining Congress, Public Service  
Electric and Gas Co., et al., American  
Petroleum Institute, Edison Electric  
Institute, ASARCO Inc., Chemical  
Manufacturers Association, Intervenor.

COMMONWEALTH OF  
MASSACHUSETTS,

Petitioner,

v.

UNITED STATES DEPARTMENT OF  
THE INTERIOR, Manuel Lujan, Jr.,  
Secretary of Department of the Interior  
and United States of America, Respondents,

American Mining Congress, Public Service  
Electric and Gas Co., et al., American  
Petroleum Institute, Edison Electric  
Institute, ASARCO Inc., Chemical  
Manufacturers Association, Intervenor.

PEOPLE OF THE STATE OF CALIFORNIA,  
ex rel. John K. Van de Kamp,  
Attorney General of California, Petitioners,

v.

UNITED STATES DEPARTMENT OF  
THE INTERIOR, Manuel Lujan, Jr.,  
Secretary of Department of the Interior  
and United States of America, Respondents,

American Mining Congress, Public Service  
Electric and Gas Co., et al., American  
Petroleum Institute, Edison Electric  
Institute, ASARCO Inc., Chemical  
Manufacturers Association, Intervenor.

CHEMICAL MANUFACTURERS  
ASSOCIATION, Petitioner,

v.

UNITED STATES DEPARTMENT OF  
THE INTERIOR, Manuel Lujan, Jr.,

Secretary of Department of the Interior  
and United States of America,  
Respondents.

Edison Electric Institute, ASARCO Inc.,  
National Wildlife Federation, et  
al., Intervenor.

PUBLIC SERVICE ELECTRIC & GAS  
COMPANY, and Dana Corporation,  
Petitioners.

v.

UNITED STATES DEPARTMENT OF  
THE INTERIOR, Manuel Lujan, Jr.,  
Secretary of Department of the Interior  
and United States of America, Respon-  
dents.

Edison Electric Institute, ASARCO Inc.,  
National Wildlife Federation, et  
al., Intervenor.

NATIONAL WILDLIFE FEDERATION,  
et al., Petitioners,

v.

UNITED STATES DEPARTMENT OF  
THE INTERIOR, Manuel Lujan, Jr.,  
Secretary of Department of the Interi-  
or, Respondents.

STATE OF NEW YORK, et  
al., Petitioners.

v.

UNITED STATES DEPARTMENT OF  
THE INTERIOR, Manuel Lujan, Jr.,  
Secretary of Department of the Interi-  
or, Respondents.

Nos. 86-1529, 86-1575, 86-1580, 86-1585,  
86-1587, 86-1590, 86-1591, 86-1594,  
86-1597, 88-1291, 88-1366.

United States Court of Appeals,  
District of Columbia Circuit.

Argued Feb. 22, 1989.

Decided July 14, 1989.

States, environmental organizations,  
chemical industry trade association, manu-  
facturing company, and utility company  
sought review of regulations promulgated  
by the Department of Interior pursuant to  
the Comprehensive Environmental Re-  
sponse, Compensation, and Liability Act  
that governed recovery of money damages

from persons responsible for spills and  
leaks of oil and hazardous substances to  
compensate for injury such releases might  
inflict on natural resources. The Court of  
Appeals, Wald, Chief Judge, and Spotts-  
wood W. Robinson, III and Mikva, Circuit  
Judges, held that: (1) regulation limiting  
damages recoverable by government trust-  
ees for harmed natural resources to the  
lesser of cost of restoring or replacing  
equivalent of injured resource or lost use  
value of resource was contrary to clearly  
expressed intent of Congress and therefore  
invalid; (2) record would be remanded to  
DOI for clarification of its interpretation of  
its own regulations concerning applicability  
of CERCLA natural resource damage pro-  
visions to privately owned land that was  
managed or controlled by federal, state or  
local government; and (3) regulation pre-  
scribing hierarchy of methodologies by  
which lost use value of natural resources  
could be measured, that focuses exclusively  
on market values for such resources when  
market values are available, was not rea-  
sonable interpretation of CERCLA.

Ordered accordingly.

#### 1. Health and Environment § 25.5(5.5)

Department of Interior's regulation  
providing that damages for despoilment of  
natural resources shall be the lesser of  
restoration or replacement costs or dimin-  
ution of use values was directly contrary to  
intent of Congress as expressed in the  
Comprehensive Environmental Response,  
Compensation, and Liability Act and was  
therefore invalid. Comprehensive Environ-  
mental Response, Compensation, and Lia-  
bility Act of 1980, §§ 107(a)(C), (f)(1),  
301(c)(2), as amended, 42 U.S.C.A.  
§§ 9607(a)(C), (f)(1), 9651(c)(2).

#### 2. Statutes § 223.5(1)

Acquiescence by reenactment rule,  
that reenactment of statute without amend-  
ment implicitly ratifies agency regulations  
issued under statute's auspices, so long as  
Congress evidences its awareness of those  
regulations, is not applicable to situation in  
which regulations violate original statutory  
language and Congress' decision not to

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amend relevant statutory provisions evidently stems from belief that provisions have been clear all along.

### 3. Health and Environment $\S$ 25.15(12)

Record would be remanded to the Department of the Interior for clarification of its interpretation of its own regulations regarding availability of natural resource damages insofar as regulations might extend to lands not owned by government; Comprehensive Environmental Response, Compensation, and Liability Act does not limit definition of natural resources for which damages for injury may be imposed to resources owned by government and regulatory language tracked Act's definition, but regulatory comments appeared to exclude any privately owned property from ambit of natural resource damage provisions, no matter how heavily involved governmental entity might be in managing or otherwise controlling property. Comprehensive Environmental Response, Compensation, and Liability Act of 1980,  $\S$  101(16), 107(a)(C), as amended, 42 U.S.C. A.  $\S$  9601(16), 9607(a)(C).

### 4. Health and Environment $\S$ 25.5(5.5)

Department of the Interior's regulatory requirement that trustee consider only committed uses in ascertaining uses made of resource would be upheld as interpreted to apply only to calculation of diminution in use values during time required to achieve restoration or replacement of natural resource, for purposes of imposing damages, and as interpreted not to prohibit recovery of cost of restoring or replacing natural resource when that resource has no documented committed use. Comprehensive Environmental Response, Compensation, and Liability Act of 1980,  $\S$  107(a)(C), 301(c)(2), as amended, 42 U.S.C.A.  $\S$  9607(a)(C), 9651(c)(2).

### 5. Health and Environment $\S$ 25.5(5.5)

Department of the Interior's regulation prescribing hierarchy of methodologies by which lost use value of natural resources could be measured for purposes of imposing damages pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act was not reason-

able interpretation of the Act to extent regulation established strong presumption in favor of market price and appraisal methodologies, although regulation permitted nonmarket methodologies to be used when market for resource was not reasonably competitive. Comprehensive Environmental Response, Compensation, and Liability Act of 1980,  $\S$  107(a)(C), 301(c)(2), as amended, 42 U.S.C.A.  $\S$  9607(a)(C), 9651(c)(2).

### 6. Health and Environment $\S$ 25.5(5.5)

Department of the Interior should consider rule that would permit trustees to derive use values for natural resources by summing up all reliably calculated use values, however measured, so long as trustee did not double count, with market valuation serving as one factor to be considered, in determining damages to be imposed for harm to natural resources pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act. Comprehensive Environmental Response, Compensation, and Liability Act of 1980,  $\S$  107(a)(C), 301(c)(2), as amended, 42 U.S.C.A.  $\S$  9607(a)(C), 9651(c)(2).

### 7. Health and Environment $\S$ 25.5(5.5)

Discount rate was properly used to calculate present value of expected future injury in awarding damages for harm to natural resource pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, although possibility that value of particular resource or cost of particular restoration project would increase over time, as function of scarcity, faster than rise in general price level should be taken into account. Comprehensive Environmental Response, Compensation, and Liability Act of 1980,  $\S$  107(a)(C), 301(c)(2), as amended, 42 U.S.C.A.  $\S$  9607(a)(C), 9651(c)(2).

### 8. Health and Environment $\S$ 25.5(5.5)

Discount rate of 10% chosen by the Department of the Interior for calculating damages recoverable for expected future harm to natural resources pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act would be upheld. Comprehensive Environmental Re-

sponse, Compensation, and Liability Act of 1980, §§ 107(a)(C), 301(c)(2), as amended, 42 U.S.C.A. §§ 9607(a)(C), 9651(c)(2).

#### 9. Health and Environment ⇨25.5(5.5)

Department of the Interior's regulation allowing parties potentially responsible for damage to natural resources pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act to be assigned task of conducting natural resource damage assessment was not improper; CERCLA provision does not preclude government trustee from delegating task of conducting assessment, and assessment was required to follow methods outlined in assessment plan, which had to be drawn up as coordinated effort among all affected government trustees. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

#### 10. Administrative Law and Procedure ⇨453

##### Health and Environment ⇨25.5(9)

Department of the Interior's establishment of periods in which only parties potentially responsible for damages for harm to natural resources pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act would be notified of developments in assessment process and given opportunity to comment was not improper; after assessment plan had been drafted, it had to be made available to public, comments on assessment plan were eventually included in final report on assessment, and involving potentially responsible parties earlier in assessment process was not unreasonable. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

##### 11. Health and Environment ⇨25.5(5.5)

Department of the Interior's regulations limiting definition of "reasonable costs" of assessing natural resource damages for which liability may be imposed on responsible parties pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act to situations in which anticipated cost of assessment is ex-

pected to be less than anticipated damage amount was proper. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(C), as amended, 42 U.S.C.A. § 9607(a)(C).

##### 12. Health and Environment ⇨25.5(5.5)

Department of the Interior's regulation establishing acceptance criteria as framework for determining whether hazardous substance release actually caused injury to particular biological resource for which government trustee is seeking damages pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act would be upheld. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 107(a)(C), 301(c)(2), as amended, 42 U.S.C.A. §§ 9607(a)(C), 9651(c)(2).

##### 13. Health and Environment ⇨25.5(5.5)

Department of the Interior reasonably determined that costs of general scientific studies were noncompensable under Comprehensive Environmental Response, Compensation, and Liability Act's provision for recovery of reasonable assessment costs in awarding damages for injury to natural resource. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(C), as amended, 42 U.S.C.A. § 9607(a)(C).

##### 14. Health and Environment ⇨25.5(5.5)

Department of the Interior's regulations requiring states to adopt series of accounting and planning procedures that must be used in handling proceeds from any natural resource damage claims did not exceed rule-making authority granted DOI by the Comprehensive Environmental Response, Compensation, and Liability Act. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 301(c), as amended, 42 U.S.C.A. § 9651(c).

##### 15. Health and Environment ⇨25.5(10)

Department of the Interior's failure to provide for punitive damages in damages to be recovered for harm to natural resources pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act was consistent with the Act.

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Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 107(c)(3), 301(c), as amended, 42 U.S.C.A. §§ 9607(c)(3), 9651(c).

**16. Health and Environment** ⇨25.5(5.5)

Department of the Interior's inclusion of contingent valuation as methodology to be employed in assessing damages resulting from harm to natural resource for purposes of the Comprehensive Environmental Response, Compensation, and Liability Act was proper; contingent valuation process includes techniques of setting up hypothetical markets to elicit individual's economic valuation of natural resource, and the methodology qualified as best available procedure for determining damages flowing from destruction of or injury to natural resources if properly applied and structured to eliminate undue upward biases. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 301(c), as amended, 42 U.S.C.A. § 9651(c).

**17. Constitutional Law** ⇨278.1

**Health and Environment** ⇨25.5(5.5)

Applying rebuttable presumption to natural resource damage assessment arrived at through contingent valuation process, pursuant to Department of the Interior regulations promulgated pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act was not arbitrary and capricious and would not infringe due process rights of potentially responsible parties. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 301(c), as amended, 42 U.S.C.A. § 9651(c); U.S.C.A. Const. Amendments, 5, 14.

Petitions for Review of Orders by the United States Department of the Interior.

Erik D. Olson and Gordon Johnson, with whom Eric Glitzenstein, Washington, D.C., Michael Bean, Robert Abrams, Charles R. Dyas, E. Dennis Muchnicki, Columbus, Ohio, Michael R. Hope, James D. Ellman, James M. Shannon, Boston, Mass., Lee P. Breckenridge, Mary E. Hackenbracht, San Francisco, Cal., James E. Tierney, Marcia J.

Cleveland, Mary C. Jacobsen, Kenneth N. Tedford, Hartford, Conn., and Gary Powers were on the brief, for State and Environmental petitioners in nos. 86-1529, et al.

Francine A. Schott, Livingston, N.J., also entered an appearance, for petitioners in no. 86-1580.

Howard A. Kenison and Michael C. Donovan also entered appearances, for petitioners in no. 86-1585.

Susan M. Bernard, Washington, D.C., also entered an appearance, for petitioners in no. 86-1590.

Allene C. Zanger also entered an appearance, for petitioners in no. 86-1591.

John A. Zackrison, with whom Amy R. Sabrin, Jeffrey N. Martin and David F. Zoll, Washington, D.C., were on the joint brief for industry petitioners in 86-1529, et al., and also entered appearances, for intervenor Chemical Mfrs. Ass'n, in nos. 86-1575, 86-1580, 86-1585, 86-1587, 86-1590, 86-1591.

Edward W. Warren and Edmund B. Frost, Washington, D.C., also entered appearances, for petitioners in no. 86-1594.

Lawrence E. Blatnik, Atty., Dept. of Justice, with whom Roger J. Marzulla, Asst. Atty. Gen., Washington, D.C., and Margaret Kane Harrington were on the brief, for respondents in nos. 86-1529, et al.

Christopher Harris and Michael J. Brennan, Washington, D.C., with whom M. Elizabeth Cox, Edward M. Green, G. William Frick, Washington, D.C., Catherine Eshelman, John D. Fognani, Denver, Colo., John A. Zackrison, Jeffrey N. Martin, David F. Zoll, Toni K. Allen and Charles E. Di Leva, Washington, D.C., were on the joint brief, for intervenors.

Eric Glitzenstein, with whom Erik D. Olson, Washington, D.C., and Michael Bean were on the brief, for intervenors Nat. Wildlife Federation, Public Citizen, and Environmental Defense Fund in nos. 86-1529, et al.

Frank H. Morison and John D. Fognani, Denver, Colo., also entered appearances, for intervenor ASARCO, Inc. in nos. 86-



# STATE OF OHIO v. U.S. DEPT. OF THE INTERIOR

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Cite as 880 F.2d 432 (D.C. Cir. 1989)

1529, 86-1575, 86-1580, 86-1585, 86-1587, also entered appearances, for intervenor  
86-1590, 86-1591, 86-1594 and 86-1597. American Mining Congress in nos. 86-1575,

Edward H. Comer and William L. Fang, 86-1580, 86-1585, 86-1587, 86-1590 and 86-  
Washington, D.C., also entered appear- 1591.

ances, for intervenor Edison Elec. Institute Arnold S. Block, Philadelphia, Pa., also  
in nos. 86-1575, 86-1580, 86-1585, 86-1587, entered an appearance, for intervenor  
86-1590 and 86-1591. American Petroleum Institute in nos. 86-

Douglas E. McAllister, Phoenix, Ariz., 1575, 86-1580, 86-1585, 86-1587, 86-1590,  
Roderic T. Dwyer, and M. Elizabeth Cox 86-1591.

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WALD, Chief Judge, and  
SPOTTSWOOD W. ROBINSON III and  
MIKVA, Circuit Judges:<sup>1</sup>

Petitioners are 10 states, three environmental organizations ("State and Environmental Petitioners"), a chemical industry trade association, a manufacturing company and a utility company ("Industry Petitioners"), who seek review of regulations promulgated by the Department of the Interior ("DOI" or "Interior") pursuant to § 301(c)(1)-(3) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA" or the "Act"), as amended, 42 U.S.C. § 9651(c). The regulations govern the recovery of money damages from persons responsible for spills and leaks of oil and hazardous substances, to compensate for injuries such releases inflict on natural resources.<sup>2</sup> Damages may be recovered by state and in some cases the federal governments, as trustees for those natural resources.

Petitioners challenge many aspects of those regulations. State and Environmental Petitioners raise ten issues, all of which essentially focus on the regulations' alleged undervaluation of the damages recoverable from parties responsible for hazardous materials spills that despoil natural resources. Industry Petitioners attack the regulations from a different vantage point, claiming they will permit or encourage overstated damages. In addition, three public interest organizations ("Environmental Intervenors") defend the regulations from the attacks of Industry Petitioners, and a collection of corporations and industry groups ("Industry Intervenors") defend the regulations from the attacks of State and Environmental Petitioners.

1. Parts I, II, III, IV, VII, VIII, IX, X, XI and XII were authored by Judge Wald. Part XIII was authored by Judge Robinson. Parts V and VI were authored by Judge Mikva.

We hold that the regulation limiting damages recoverable by government trustees for harmed natural resources to "the lesser of" (a) the cost of restoring or replacing the equivalent of an injured resource, or (b) the lost use value of the resource is directly contrary to the clearly expressed intent of Congress and is therefore invalid. We also hold that the regulation prescribing a hierarchy of methodologies by which the lost-use value of natural resources may be measured, which focuses exclusively on the market values for such resources when market values are available, is not a reasonable interpretation of the statute. We remand the record to DOI for a clarification of its interpretation of its own regulations concerning the applicability of the CERCLA natural resource damage provisions to privately owned land that is managed or controlled by a federal, state or local government. We reject all other challenges to Interior's regulations.

#### I. BACKGROUND

##### A. Statutory Background

CERCLA, popularly known as Superfund, was enacted in 1980. Pub.L. No. 96-510, 94 Stat. 2767 (1980). Congress amended it in 1986, in the Superfund Amendments and Reauthorization Act ("SARA"), Pub.L. No. 99-499, 100 Stat. 1613 (1986). Unless otherwise specified, references to CERCLA in this opinion refer to the statute as amended.

CERCLA furnishes the executive branch with the authority to respond to actual and threatened releases of "hazardous substance[s]" and "pollutant[s] or contaminant[s]." § 104(a)(1), 42 U.S.C. § 9604(a)(1). Response actions may include both "removal" (i.e., cleanup of the spilled

2. The natural resource damage regulations are codified at 43 C.F.R. §§ 11.10-11.93 (1987).

substance) and "remedial action" (e.g., dredging, repair of leaking containers, collection of rainfall runoff, relocation of displaced residents). § 101(23)-(25), 42 U.S.C. § 9601(23)-(25). CERCLA established the Superfund as a source of expeditious payment for response actions, although ultimately the liability for response costs is placed on specified classes of responsible parties: past and present owners and operators of vessels and facilities; waste generators or other persons who arranged for disposal, treatment or transport of hazardous substances; and transporters of hazardous substances. §§ 111(a)(1), 107(a), 42 U.S.C. §§ 9611(a)(1), 9607(a). Responsible parties may be required to pay the response costs or, in some cases, to perform the response actions themselves. §§ 106(a), 107(a)(A)-(B), 42 U.S.C. §§ 9606(a), 9607(a)(A)-(B).

The relevant provisions of CERCLA in this case, however, go beyond the mere removal or remedying of spills. CERCLA provides that responsible parties may be held liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." § 107(a)(C), 42 U.S.C. § 9607(a)(C). Liability is to "the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State." § 107(f)(1), 42 U.S.C. § 9607(f)(1).<sup>3</sup> The Act provides for the designation of federal and state "trustees" who are authorized to assess natural resource damages and press claims for the recovery of such damages, both under CERCLA and under § 311 of the Federal Water Pollution Control Act (commonly referred to as the "Clean Water Act"), 33 U.S.C. § 1321. CERCLA § 107(f)(2), 42 U.S.C. § 9607(f)(2).

Congress conferred on the President (who in turn delegated to Interior) the responsibility for promulgating regulations governing the assessment of damages for natural resource injuries resulting from re-

leases of hazardous substances or oil, for the purposes of CERCLA and the Clean Water Act's § 311(f)(4)-(5) oil and hazardous substance natural resource damages provisions, 33 U.S.C. § 1321(f)(4)-(5). These regulations originally were required to be in place by December 1982. § 301(c), 42 U.S.C. § 9651(c). CERCLA prescribed the creation of two types of procedures for conducting natural resources damages assessments. The regulations were to specify (a) "standard procedures for simplified assessments requiring minimal field observation" (the "Type A" rules), and (b) "alternative protocols for conducting assessments in individual cases" (the "Type B" rules). § 301(c)(2), 42 U.S.C. § 9651(c)(2). Both the Type A and the Type B rules were to "identify the best available procedures to determine such damages." *Id.* The regulations must be reviewed and revised as appropriate every two years. § 301(c)(3), 42 U.S.C. § 9651(c)(3). Under the Act, a trustee seeking damages is not required to resort to the Type A or Type B procedures, but CERCLA as amended provides that any assessment performed in accordance with the prescribed procedure is entitled to a rebuttable presumption of accuracy in a proceeding to recover damages from a responsible party. § 107(f)(2)(C), 42 U.S.C. § 9607(f)(2)(C).

In August 1986, Interior published a final rule containing the Type B regulations for natural resource damage assessments, the subject of this lawsuit. Shortly thereafter, in October 1986, Congress adopted SARA, amending the natural resources damages provisions of CERCLA in several respects. For example, SARA provided that assessments performed by state as well as federal trustees were entitled to a rebuttable presumption, it provided for the recovery of prejudgment interest on damage awards, and it proscribed "double recovery" for natural resources damages. §§ 107(f)(2)(C), 107(a), 107(f)(1), 42 U.S.C. §§ 9607(f)(2)(C), 9607(a), 9607(f)(1). SARA also amended § 301(c) to require Interior to

§ 9607(f)(1).

3. Liability may also be to an Indian tribe for certain resources. § 107(f)(1), 42 U.S.C.



adopt any necessary conforming amendments to its natural resource damage assessment regulations within six months of the effective date of the amendments, "[n]otwithstanding the failure of the President to promulgate the regulations required under this subsection on the required [December 1982] date." § 301(c)(1), 42 U.S.C. § 9651(c)(1).

*B. The Natural Resource Damage Assessment Regulations*

Interior's response to its assigned task of promulgating regulations for assessing natural resource damages was, to put it charitably, relaxed. In January 1983, after the original statutory deadline had come and gone, Interior issued an advance notice of proposed rulemaking soliciting comments from the public on how to approach the development of the regulations. 48 Fed.Reg. 1,084 (1983). A second advance notice of proposed rulemaking seven months later summarized the comments received in response to the first notice. 48 Fed.Reg. 34,768 (1983). More than a year later, in January 1985, Interior published a notice inviting more public comments and suggesting meetings with interested members of the public. 50 Fed.Reg. 1,550 (1985).

In December 1985, five years after the enactment of CERCLA and three years after the statutory deadline, Interior published a proposed rule setting out (a) regulations concerning the assessment process generally (applicable to both Type A and Type B assessments) and (b) Type B rules in particular. 50 Fed.Reg. 52,126 (1985). A comment period originally set at 45 days was later extended an additional 15 days. 50 Fed.Reg. at 52,126; 51 Fed.Reg. 4,397 (1986).

Ultimately, on August 1, 1986, Interior published a final rule containing general natural resource damage assessment regulations as well as the Type B rules challenged in the present case. 51 Fed.Reg. 27,674 (1986) (codified at 43 C.F.R. §§ 11.10-11.93 (1987)).

The assessment process established by the Type B regulations has four phases.

In the "preassessment phase," a trustee that has become aware of a release of hazardous substances or oil makes an initial determination whether natural resources may have been affected. If further action is deemed warranted, the trustee enters the "assessment plan phase," in which an assessment strategy is mapped out. Next comes the "assessment phase," in which the trustee establishes whether there was in fact an injury to natural resources, quantifies the extent of the injury, and ascertains the appropriate dollar amount of damages caused by the release. Finally, in the "post-assessment phase," the trustee assembles a report documenting the assessment process and presents the responsible party with a demand for payment of damages. See 51 Fed.Reg. at 27,726-27.

The August 1986 regulations were promptly challenged by state governments, environmental groups, industrial corporations and an industry group.

Shortly after the issuance of the August 1986 regulations, Congress amended CERCLA by enacting SARA. As noted above, SARA gave Interior six months in which to conform its natural resource damage assessment rules to the amended statute. In response to SARA, Interior issued revised rules (following notice and comment) in February 1988. 53 Fed.Reg. 5,166 (1988). A state government and an environmental group filed additional challenges to these revised rules, which this court consolidated with the original case.

Interior's formulation of Type A rules (governing simplified damage assessments) was handled in a separate rulemaking proceeding. Following notice and comment, a set of Type A rules was issued as a final rule in March 1987. 52 Fed.Reg. 9,042 (1987). The Type A rules are the subject of a separate petition for review, which was briefed and argued simultaneously with the present case and is decided today in *State of Colorado v. Department of the Interior*, 880 F.2d 481 (D.C.Cir. 1989).

## II. STANDARD OF REVIEW

In reviewing an agency's interpretation of a statute, we first determine "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). If so, then both Interior and this court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781; accord *NLRB v. United Food & Comm'l Workers Union Local 23*, 484 U.S. 112, 108 S.Ct. 413, 421, 98 L.Ed.2d 429 (1987). This is "Step One" of *Chevron* analysis.

Whether Congress has made its intent clear and unambiguous does not depend on whether a particular phrase of the statutory text standing all alone resolves the matter. Rather, the court must look beyond "the particular statutory language at issue" and examine "the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313 (1988). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, — U.S. —, 109 S.Ct. 1500, 1504, 103 L.Ed.2d 891 (1989). Moreover, as the Supreme Court indicated in *Chevron* and has reiterated since then, the reviewing court must "employ[] traditional tools of statutory construction"—including, when appropriate, legislative history—to determine whether Congress "had an intention on the precise question at issue." *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. at 2781 n. 9; accord *United Food & Comm'l Workers Union*, 108 S.Ct. at 421; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48, 107 S.Ct. 1207, 1220-22, 94 L.Ed.2d 434 (1987). If the court, having studied the statutory text, structure and history, is left with the unmistakable conclusion that Congress had an intention on the precise question at issue, "that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. at 2781 n. 9.

If, on the other hand, the statute is ambiguous or is silent on a particular issue, this court must assume that Congress implicitly delegated to the agency the power to make policy choices that "represent[] a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Chevron*, 467 U.S. at 844-45, 104 S.Ct. at 2783, quoting *United States v. Shimer*, 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961). In that event, the court must defer to the agency's interpretation of the statute so long as it is reasonable and consistent with the statutory purpose. *Id.* This is "Step Two" of *Chevron* analysis.

We first take up the ten issues raised by State and Environmental Petitioners, followed by the one issue raised by Industry Petitioners.

## III. THE "LESSER-OF" RULE

[1] The most significant issue in this case concerns the validity of the regulation providing that damages for despoilment of natural resources shall be "the lesser of: restoration or replacement costs; or diminution of use values." 43 C.F.R. § 11.35(b)(2) (1987) (emphasis added).

State and Environmental Petitioners challenge Interior's "lesser of" rule, insisting that CERCLA requires damages to be at least sufficient to pay the cost in every case of restoring, replacing or acquiring the equivalent of the damaged resource (hereinafter referred to shorthandedly as "restoration"). Because in some—probably a majority of—cases lost-use-value will be lower than the cost of restoration, Interior's rule will result in damages award too small to pay for the costs or restoration. Petitioners point to a section of CERCLA providing that recovered damages must be spent only on restoration as evidence that Congress intended restoration cost-based damages to be the norm. As further proof of such a norm, the same section goes on to state that the measure of damages "shall not be limited by" the sums which can be used for restoration. Petitioners maintain that the "shall not be limited by" language clearly establishes restoration costs as a

"floor" measure of damages. Petitioners also rely on the legislative history of CERCLA and of SARA, claiming that it reinforces the sense of the text and documents Congress' primary emphasis on restoration of natural resources. In particular, they point to a House report on SARA, insisting that it, together with the other statutory indicators, proves conclusively that Congress intended restoration costs to be a minimum measure of damages in natural resource cases.

Interior defends its rule by arguing that CERCLA does not prescribe any floor for damages but instead leaves to Interior the decision of what the measure of damages will be. DOI acknowledges that all recovered damages must be spent on restoration but argues that the amount recovered from the responsible parties need not be sufficient to complete the job. DOI suggests two alternative meanings of the "shall not be limited by" phrase that do not construe it as a damages floor. Finally, DOI argues that the legislative history, like the statutory text, is ambiguous and that Interior's rule for measuring damages is a reasonable one.

Although our resolution of the dispute submerges us in the minutiae of CERCLA text and legislative materials, we initially stress the enormous practical significance of the "lesser of" rule. A hypothetical example will illustrate the point: imagine a hazardous substance spill that kills a rookery of fur seals and destroys a habitat for seabirds at a sealife reserve. The lost use value of the seals and seabird habitat would be measured by the market value of the fur seals' pelts (which would be approximately \$15 each)<sup>4</sup> plus the selling price per acre of land comparable in value to that on which the spoiled bird habitat was located.<sup>5</sup> Even if, as likely, that use value turns out to be far less than the cost of restoring the rookery and seabird habitat, it would

nonetheless be the only measure of damages eligible for the presumption of recoverability under the Interior rule.

After examining the language and purpose of CERCLA, as well as its legislative history, we conclude that Interior's "lesser of" rule is directly contrary to the expressed intent of Congress.

#### A. *The Contours of "the Precise Question at Issue"*

Commencing our *Chevron* analysis, we must first decide exactly what "the precise question at issue" is in the present case. *Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781. Much depends on accurately identifying that issue so as to decide whether Congress has "directly spoken" on it; if so, under *Chevron*'s "Step One" we must give effect to that unambiguously expressed intent. If not, we proceed instead to "Step Two" and determine whether Interior's construction of CERCLA is reasonable and consistent with the statutory purpose.

State and Environmental Petitioners posit that the precise question at issue in this case is what measure of damages must be applied in natural resource damage actions. They argue that Congress *did* address the precise question at issue by deciding that damages must at a minimum encompass the full cost of restoration in every case. See Pet. Br. 18-22. Therefore, petitioners say, this court must strike down the "lesser of" rule on *Chevron* Step One grounds.

Interior also assumes that the precise question at issue here is what measure of damages must be applied in natural resource damage actions. Interior's position, however, is that Congress did *not* definitively address that question. See Resp. Br. 25-27; 51 Fed.Reg. 27,705. To support this view, Interior points out that Congress did not choose a particular measure of damages, opting instead to authorize the President to draft regulations governing

4. See U.S. Dept. of the Interior, "Measuring Damages to Coastal and Marine Natural Resources," vol. 1 at p. V-37 (mandating \$15 figure for valuation under Type A rules); see also 52 Fed.Reg. 9,092 (1987) (stating that \$15 value is consistent with valuation principles of Type B rules).

5. See Interagency Land Acquisition Conference, "Uniform Appraisal Standards for Federal Land Acquisitions" 9 (1973), Joint Appendix ("J.A.") 273; see also 43 C.F.R. § 11.83(c)(2).



the assessment of damages. § 301(c)(2), 42 U.S.C. § 9651(c)(2) (regulations shall "identify the best available procedures to determine . . . damages" and shall "take into consideration" certain listed factors, among others). Since Congress delegated the matter to the President (who turned it over to DOI), DOI argues that this case is governed by *Chevron* Step Two and that its "lesser of" rule must be upheld if not unreasonable or inconsistent with the statutory purpose.

We find both parties' arguments flawed in one important respect. Both fail to properly describe the "precise question at issue" in the "lesser-of" rule. That question is not what measure of damages should apply in any or all cases which are brought under the Act. As to that larger question, Interior is obviously correct in asserting that Congress delegated to it a considerable measure of discretion in formulating a standard. See § 301(c)(2), 42 U.S.C. § 9651(c)(2). The precise question here is a far more discrete one: whether DOI is entitled to treat use value and restoration cost as having equal presumptive legitimacy as a measure of damages.<sup>6</sup>

Interior's "lesser of" rule operates on the premise that, as the cost of a restora-

tion project goes up relative to the value of the injured resource, at some point it becomes wasteful to require responsible parties to pay the full cost of restoration. See 51 Fed.Reg. at 27,704-05; 50 Fed.Reg. at 52,141. The logic behind the rule is the same logic that prevents an individual from paying \$8,000 to repair a collision-damaged car that was worth only \$5,000 before the collision. Just as a prudent individual would sell the damaged car for scrap and then spend \$5,000 on a used car in similar condition, DOI's rule requires a polluter to pay a sum equal to the diminution in the use value of a resource whenever that sum is less than restoration cost. What is significant about Interior's rule is the point at which it deems restoration "inefficient." Interior chose to draw the line not at the point where restoration becomes practically impossible, nor at the point where the cost of restoration becomes grossly disproportionate to the use value of the resource, but rather at the point where restoration cost exceeds—by any amount, however small—the use value of the resource. Thus, while we agree with DOI that CERCLA permits it to establish a rule exempting responsible parties in some cases from having to pay the full cost of restoration of natural resources,<sup>7</sup> we also agree with Peti-

6. Although this formulation of the precise question at issue might be viewed as a narrow one, we remind that the *Chevron* Court itself cast the precise question at issue in that case in narrow terms as well. *Chevron* concerned the validity of an EPA regulation that treated all pollution-emitting devices within a given industrial grouping as though they were encased in a single "bubble," for purposes of deciding whether the installation or modification of one such device triggered a statutory requirement that a permit be obtained "for the construction and operation of new or modified major stationary sources." 467 U.S. at 839-40, 104 S.Ct. at 2780. The *Chevron* Court did not ask whether Congress addressed the question of what is a "stationary source[]" within the meaning of the amended Clean Air Act, 42 U.S.C. § 7502(b)(6). Rather, it asked whether "Congress . . . actually ha[d] an intent regarding the applicability of the bubble concept to the permit program." 467 U.S. at 845, 104 S.Ct. at 2783 (emphasis added).

7. This can be inferred from § 301(c)(2) of CERCLA. First, that provision delegates to the President the duty to formulate a measure of damages, which suggests some degree of latitude in deciding what measure shall apply. Sec-

ond, it states that the regulations "shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover." § 301(c)(2), 42 U.S.C. § 9651(c)(2). That suggests that DOI is permitted to apply use value in some cases and restoration cost in others (and both in yet others). See also 132 Cong.Rec. H9613 (daily ed. Oct. 8, 1986) (statement of Rep. Jones) ("Where, of course, restoration is technically impossible or the costs thereof are grossly disproportionate to the value of the resources to society as a whole, then other valuation measures, both market and nonmarket, must be used."). Scholars agree that recovery of full restoration cost in every case, no matter how large the sum is, is not required by CERCLA. See Anderson, *Natural Resource Damages, Superfund, and the Courts*, 16 B.C.Env'tl.Aff.L.Rev. 405, 446 (1989); Cross, *Natural Resource Damage Valuation*, 42 Vand.L.Rev. 269, 301, 329 (1989); Breen, *CERCLA's Natural Resource Damage Provisions: What Do We Know So Far?*, 14 Env'tl.L.Rep. 10,304, 10,309-10 (1984). DOI obviously has some latitude in deciding which measure applies in a given case: the rule might for instance hinge on the relationship between

tioners that it does not permit Interior to draw the line on an automatic "which costs less" basis.

Interior's "lesser of" rule squarely rejects the concept of any clearly expressed congressional preference for recovering the full cost of restoration from responsible parties. The challenged regulation treats the two alternative measures of damages, restoration cost and use value, as though the choice between them were a matter of complete indifference from the statutory point of view: thus, in any given case, the rule makes damages turn solely on which ever standard is less expensive. (An analogy would be a government procurement rule that dictated the purchase of the lowest-priced goods, regardless of whether they were domestically made or imported.) If Congress, however, in enacting CERCLA, clearly expressed an intention that DOI's damage measurement rules incorporate a distinct preference for restoration cost over use value, then the "lesser of" rule is inconsistent with that intent. Congress' expressed preference would mean that restoration cost must normally be preferred over use value despite use value being the "lesser" figure, except in unusual situations where the disadvantages or expenses were extreme. (Returning to our analogy, the lowest-price procurement rule would be invalid under *Chevron* Step One if it were promulgated under a statute clearly mandating a preference for domestic goods.) Based on the discussion that follows, we conclude that CERCLA unambiguously mandates a distinct preference for using restoration cost as the measure of damages, and so precludes a "lesser of" rule which totally ignores that preference.

#### B. Text and Structure of CERCLA

CERCLA provides that parties responsible for hazardous substance releases

restoration cost and use value (e.g., damages are limited to three-times the amount of use value), or it might hinge on the ability of the resource to recover (e.g., use value is the measure whenever restoration is infeasible). DOI has not, however, fashioned its rules along these lines.

8. Although at first glance these two sentences might seem inconsistent, a closer look reveals that the missing link is the absence of the

"shall be liable for . . . damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." § 107(a)(C), 42 U.S.C. § 9607(a)(C). The Regulations promulgated pursuant to § 107(a)(C) are to identify procedures for measuring damages that "shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover." § 301(c)(2), 42 U.S.C. § 9651(c)(2). While CERCLA thus empowers DOI to formulate a measure of damages, several other provisions of the Act make it clear that replacement cost and use value are not to be accorded equal presumptive legitimacy in the process.

#### 1. Section 107(f)(1) and the Measure of Damages

The strongest linguistic evidence of Congress' intent to establish a distinct preference for restoration costs as the measure of damages is contained in § 107(f)(1) of CERCLA. That section states that natural resource damages recovered by a government trustee are "for use only to restore, replace, or acquire the equivalent of such natural resources." 42 U.S.C. § 9607(f)(1). It goes on to state: "The measure of damages in any action under [§ 107(a)(C)] shall not be limited by the sums which can be used to restore or replace such resources." *Id.*<sup>8</sup>

#### a. Limitation on Uses of Recovered Damages

By mandating the use of all damages to restore the injured resources, Congress underscored in § 107(f)(1) its paramount restorative purpose for imposing damages at

phrase "or acquire the equivalent" in the latter sentence. This suggests (and the legislative history confirms) that damages recovered in excess of restoration or replacement costs must be spent on acquiring the equivalent of lost resources. See H.R. Rep. No. 253(IV), 99th Cong., 1st Sess. 50 (1985); see also *infra* p. 454 & n. 34.

all. It would be odd indeed for a Congress so insistent that all damages be spent on restoration to allow a "lesser" measure of damages than the cost of restoration in the majority of cases. Only two possible inferences about congressional intent could explain the anomaly: Either Congress intended trustees to commence restoration projects only to abandon them for lack of funds, or Congress expected taxpayers to pick up the rest of the tab. The first theory is contrary to Congress' intent to effect a "make-whole" remedy of complete restoration,<sup>9</sup> and the second is contrary to a basic purpose of the CERCLA natural resource damage provisions—that polluters bear the costs of their polluting activities.<sup>10</sup> It is far more logical to presume that Congress intended responsible parties to be liable for damages in an amount sufficient to accomplish its restorative aims. Interior's rule, on the other hand, assumes that Congress purposely formulated a statutory scheme that would doom to failure its goals of restoration in a majority of cases.<sup>11</sup>

In this connection, it should be noted that Interior makes no claim that a "use value" measure will provide enough money to pay

for any of the three uses to which all damages must be assigned: restoration, replacement or acquisition of an equivalent resource. Nor could Interior make such a claim, because its "lesser of" rule not only calculates use value quite differently from restoration or replacement cost but it also fails to link measurement of use value in any way to the cost of acquiring an equivalent resource. For example, Interior could not possibly maintain that recovering \$15 per pelt for the fur seals killed by a hazardous substance release would enable the purchase of an "equivalent" number of fur seals.

b. *The "Shall Not Be Limited By" Language*

The same section of CERCLA that mandates the expenditures of all damages on restoration (again a shorthand reference to all three listed uses of damages) provides that the measure of damages "shall not be limited by" restoration costs. § 107(f)(1), 42 U.S.C. § 9607(f)(1). This provision obviously reflects Congress' apparent concern that its restorative purpose for imposing

internalize the health and environmental costs of that activity into the costs of doing business.

See also *id.* at 31 ("Since S. 1480 is designed to assure that products reflect their true costs, the bill is at its most efficient when such actual costs [imposed by hazardous substance releases] are calculated to the penny."); 126 Cong. Rec. 30941 (1980) ("The guiding principle of those who wrote S. 1480 was that those found responsible for harm caused by chemical contamination should pay the costs of that harm.") (remarks of Sen. Mitchell).

9. See, e.g., 132 Cong. Rec. at H9613 (daily ed. Oct. 8, 1986) ("[The] purpose of the regime, rather, is to make whole the natural resources that suffer injury from releases of hazardous substances.") (remarks of Rep. Jones); 126 Cong. Rec. 30942 (1980) ("[W]e do not want damage to natural resources to await the workings of that [common-law tort litigation] process; we want prompt, full compensation in such cases so we can replant trees in the park...") (remarks of Sen. Mitchell). Under-scoring its intent to accomplish full restoration, Congress in 1980 provided that government trustees could recover restoration costs from Superfund whenever efforts to recover from responsible parties failed (for example, in a secret "midnight dumping" case where the responsible party cannot be determined, or where the responsible party is insolvent). See § 111(c)(2), (b)(2)(A), 42 U.S.C. § 9611(c)(2), (b)(2)(A); see *infra* note 11.

10. See, e.g., S. Rep. No. 848, 96th Cong., 2d Sess. 13 (1980), 1980 U.S. Code Cong. & Admin. News 6119.

The goal of assuring that those who caused chemical harm bear the costs of that harm is addressed in the reported legislation by the imposition of liability. Strict liability, the foundation of S. 1480, assures that those who benefit financially from a commercial activity

11. DOI states that federal or state agencies "are not precluded from supplementing damage funds with other monies to restore, replace, or enhance the injured natural resource." 51 Fed. Reg. 27,705. Those "other monies," however, cannot come from Superfund, as the enactment of SARA in 1986 cut off the availability of Superfund money for restoration of injured natural resources. See SARA § 517(a), Pub. L. No. 99-499, 100 Stat. 1772 (1986), codified at 26 U.S.C. § 9507(c)(1)(A)(ii) (Superfund money to be available "only" to carry out the purposes of, *inter alia*, "section 111(c) of CERCLA ... other than paragraphs (1) and (2) thereof") (emphasis added); *c.f.* CERCLA § 111(c)(2), 42 U.S.C. 9611(c)(2) (providing for Superfund expenditures on restoration of injured resources).



damages not be construed as making restoration cost a damages ceiling.<sup>12</sup> But the explicit command that damages "shall not be limited by" restoration costs also carries in it an implicit assumption that restoration cost will serve as the basic measure of damages in many if not most CERCLA cases. It would be markedly inconsistent with the restorative thrust of the whole section to limit restoration-based damages, as Interior's rule does, to a minuscule number of cases where restoration is cheaper than paying for lost use.<sup>13</sup>

## 2. Interior's Reading of CERCLA §§ 301 and 107

In the face of § 107's clear preference for restoration as the basic measure of natural resource damages, DOI and Industry Intervenors advance "ambiguities" in the language of §§ 301 and 107, asserting that those ambiguities are sufficient to permit Interior to promulgate the "lesser of" rule under *Chevron* Step Two.

### a. The "Take Into Consideration" Language

First, Interior argues that the "take into consideration" language of § 301(c)(2) delegates to Interior the decision of whether and how restoration cost should be taken into consideration. Resp. Br. 25-27; 51 Fed.Reg. 27,705. We have acknowledged that CERCLA does confer on DOI discretion in fashioning the measure of damages; indeed, if § 301(c)(2) were the only instruc-

tion Congress had given, DOI's argument would be a strong one. But the reality is that Interior's discretion is cabined by Congress' determination, as evidenced by the statutory text discussed above, that the measure of damages reflect a preference for restoration cost, at least where restoration is feasible and can be performed at a cost not grossly disproportionate to the use value of the resource. Thus, while DOI is correct in pointing to the "take into consideration" language as hinting at a measure of latitude on the part of DOI, the degree of latitude conferred by Congress is not infinite.

### b. The Assessment Costs Language

Industry Intervenors argue that the reference in § 107(a)(C) to including assessment costs in damages awards indicates, by the principle of *expressio unius est exclusio alterius*, that Congress intended only the one narrow departure from common-law damage measurement standards.<sup>14</sup> But this crabbed reading ignores the existence of § 301(c)(2), which states that the factors to be taken into account by the regulations "includ[e] but [are] not limited to" replacement cost and use value. Under the common law, the Industry Intervenors would have us believe, there are no other factors to consider. In light of § 301(c)(2), the *expressio unius* argument, at best a canon for construing statutes in the absence of more definite guidance within the four corners of the act itself, loses force.

nized for damage purposes guarantees that "lost use" will almost always be the chosen measure. Anderson, *supra*, at 442.

12. Interior's regulations provide that, when restoration costs are the "lesser" of the two possible measures, the trustee may recover not only restoration costs but also damages for "the diminution of use values during the period of time required to obtain restoration or replacement." 43 C.F.R. § 11.84(g)(1).

13. Commentators are unanimous in predicting that applying the "lesser of" rule will invariably favor the use value standard. See, e.g., Cross, *supra* note 7, at 307 ("Only about five percent of some resources, such as plants and animals, possess an established economic value."); Anderson, *supra* note 7, at 442; Kenison, Buchholz & Mulligan, *State Actions for Natural Resource Damages: Enforcement of the Public Trust*, 17 *Env'tl.L.Rep.* 10,437-39 (1987). The Anderson article points out that Interior's own strict definition of what "uses" will be recog-

14. Industry Intervenors advance a related argument, to the effect that Congress' choice of the word "damages" in § 107(a)(C) should be read to incorporate the common-law meaning of the term. In the first place, this argument loads a great deal of baggage onto an everyday word which has long since transcended its origins and is now defined in Webster's Dictionary as "compensation in money imposed by law for loss or injury." *Webster's New Collegiate Dictionary* 286 (1977). Moreover, as our examination of CERCLA's legislative history indicates, see *infra* pp. 454-56, Congress' dissatisfaction with the common law provided a central motivation for enacting CERCLA.

We do not think Congress' mere mention of assessment costs in § 107(a)(C) implicitly excludes all other non-common-law components of damages.

c. *The "Shall Not Be Limited By" Language*

Interior and Industry Intervenors propose several alternative readings of the "shall not be limited by" language of § 107(f)(1) in an effort to show that Congress did not unambiguously express a preference for restoration cost as the basic measure of CERCLA natural resource damages. None of their various constructions is plausible, however.

They first contend that the phrase "shall not be limited by" dictates not the measure of damages but the uses to which damages must be put. Industry Intervenors argue that Congress' "primary purpose" in this portion of § 107(f) was "to describe the appropriate uses of the natural resource damages *once they are recovered*, while making sure that section 107(f) did not contradict the scope of recovery set forth in section 107(a)(C)." Ind. Int. Br. 16 (emphasis in original). This is a difficult argument to understand, let alone accept. First, the notion that a sentence beginning with the words, "The measure of damages ... shall ..." refers only to the *uses* of damages rather than the proper *measure* of damages is counterintuitive, especially when the sentence immediately preceding it expressly refers to the *uses* of damages. Second, we fail to see why Congress need be concerned that § 107(f)(1) would "contradict the scope of recovery set forth in" § 107(a)(C). The latter section simply imposes liability for "damages" for injury or loss to natural resources (including assessment costs). Any conflict with subsection (f)(1) is of Industry's own making; it arises only if, as Industry does, one reads a common-law limitation into the word "dam-

ages." See *supra* note 14. The whole argument strikes us as circular. Indeed, the fact that subsection (f)(1) itself explicitly cross-references subsection (a)(C) as the source of liability indicates Congress' conscious design to read the two subsections as compatible and complementary: liability for "damages" is established in subsection (a)(C), while subsection (f)(1) orders DOI not to place a restoration-cost ceiling on the "measure of damages." Industry Intervenors' caution that subsection (f)(1) should not be read "to supplant the measure of damages established in" subsection (a)(C), Ind. Int. Br. 17, is superfluous: subsection (a)(C) does not purport to set a measure of damages, while subsection (f)(1) contains an explicit command regarding "[t]he measure of damages in any action under" subsection (a)(C).<sup>15</sup>

Alternatively, DOI and Industry Intervenors propose two readings of the phrase "shall not be limited by," both of which negate restoration costs as the preferred measure of damages.

First, they suggest that the phrase means that damages need not be measured by restoration costs at all; a different measure, *i.e.*, lost use value, is perfectly acceptable under appropriate circumstances. See 51 Fed.Reg. at 27,704-05. This reading, however, seems strained and does not accord with the usual meaning of the phrase "shall not be limited by." Its implausibility is even more obvious from context. The relevant passage reads as follows:

Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) of this section shall not be limited by the sums which can be used to restore or replace such resources.

15. Industry Intervenors tried rephrasing the point at oral argument, but without success. Counsel argued that the "measure of damages" provision of § 107(f)(1) does not expand on the "categories of recoverable cost" set forth in § 107(a)(C). This of course harks back to the *expressio unius* treatment accorded

§ 107(a)(C)'s mention of assessment costs, which we find unconvincing for reasons already stated. At any rate, § 107(a)(C) makes no mention of "categories of recoverable cost" or anything of the sort. Industry Intervenors' attempt to identify an ambiguity in this aspect of the statute fails.

§ 107(f)(1), 42 U.S.C. § 9607(f)(1). Plainly, the statute lists three legitimate uses of the money (restoration, replacement, or acquisition of an equivalent resource) and then states that the measure of damages shall not be limited by the amount of the first two listed purposes. This context makes it obvious that § 107(f)(1)'s "shall not be limited by" language was not designed to afford DOI the liberty of mandating a lesser measure of damages in all or most cases; rather, the measure of damages must not only be sufficient to cover the intended restoration or replacement uses in the usual case but may in some cases exceed restoration cost by incorporating interim lost use value as well.<sup>16</sup>

Interior posits still another reading of the "shall not be limited by" phrase: when restoration cost is used as the basic measure of damages, it is not to be a "ceiling" on damages. Interior's regulations incorporate this view: one regulation provides that, "[i]f restoration or replacement is to form the basis of the measure of damages, the diminution of use values during the period of time required to obtain restoration or replacement may also be included in the measure of damages." 43 C.F.R. § 11.84(g)(1). It seems strange, however, that Congress would single out one alternative measure of damages (restoration costs) and legislate specially to insure that interim use value damages would be added to it, at the same time it was content to let DOI set damages at the lowest amount calculable by any acceptable standard. The absurdity of this reading surfaces when we consider what happens when use value weighs in at a lower cost than restoration, say \$4 million versus \$5 million. Use value is used exclusively, and damages are set at \$4 million. But if restoration should weigh

in at \$3 million, damages can include additional millions for interim lost use, bringing the total beyond the \$4 million figure. See 43 C.F.R. § 11.84(g)(1). Surely Congress had no such mischievous result in mind.

Ultimately, notwithstanding Interior's and Industry's attempts to generate "ambiguities" in the statutory text, § 107(f)(1) of CERCLA evinces a clear congressional intent to make restoration costs the basic measure of damages.

### 3. Superfund Provisions

CERCLA's Superfund provisions lend additional weight to our conclusion that Interior's "lesser of" rule is not true to the statute. In CERCLA as originally enacted, public trustees could rely on Superfund money to pay for restoration in cases where they could not recover money from the polluters themselves (for example, where the responsible party had become insolvent, or where the responsible party had engaged in secret dumping and thus could not be identified).<sup>17</sup> SARA cut off the availability of Superfund money for natural resource restoration in 1986,<sup>18</sup> but the statutory provisions governing Superfund remain on the books and provide evidence of Congress' intent to require responsible parties to pay restoration costs. Under CERCLA, Superfund monies can be spent to redress harm to natural resources only to (1) assess the extent of the damages, and to (2) finance government trustees' "efforts in the restoration, rehabilitation, or replacement or acquiring the equivalent of any natural resources injured, destroyed, or lost as a result of a release of a hazardous substance." § 111(c)(1)-(2), 42 U.S.C. § 9611(c)(1)-(2). The statute, though, bars a trustee from obtaining Superfund money until it has first "exhausted

16. The legislative history makes it clear that amounts recovered in excess of restoration cost are to be spent on acquiring equivalent resources. See *infra* p. 454 & n. 34.

17. See S.Rep. No. 848, *supra* note 10, at 13 (purpose of fund is to finance response actions "where a liable party does not clean up, cannot be found, or cannot pay the costs of cleanup and compensation"); *id.* at 16 (existing statutes are inadequate "to deal with abandoned and inactive sites or with new cases of 'midnight

dumping' onto the ground"); *id.* at 80 (purpose of fund is "to assure prompt payment of valid claims where the claimant has been unable to obtain satisfaction from a liable party"); 126 Cong.Rec. 30932 (1980) (fund to pay cleanup costs and mitigate damages "where a liable party does not clean up or cannot be found") (remarks of Sen. Randolph).

18. See *supra* note 11.



all administrative and judicial remedies to recover the amount of such claim from persons who may be liable" under § 107 as responsible parties. § 111(b)(2)(A), 42 U.S.C. § 9611(b)(2)(A) (emphasis added). Interior's "lesser of" rule, however, means that in the majority of cases, the trustee cannot "recover the amount of such claim" from the responsible parties since use-based damages will be less.<sup>19</sup> So once again, Interior's rule appears to be out of sync with the statutory scheme and with CERCLA's decided emphasis on making polluters pay for restoration of spoiled resources.

#### 4. Settlement Provision

CERCLA's settlement provision provides that a federal trustee may settle a natural resource damages case only "if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged

by [the] release or threatened release of hazardous substances." § 122(j)(2), 42 U.S.C. § 9622(j)(2). Interior's "lesser of" rule is out of step with this settlement provision as well: taken together, they establish a ragged-edged scheme whereby a responsible party can settle only if it pays restoration costs, but those restoration costs will usually be more than it stands to lose by trying the case, if damages are awarded in court under the "lesser of" rule. Normally, a rational polluter would not settle for an amount larger than its potential liability.<sup>20</sup> Thus, we should be reluctant to attribute to Congress a Machiavellian intent to allow Interior to undermine its own settlement provision. The fact that Congress insisted on restoration costs as a floor for settlements shows it must have intended a similar measure of damages to operate in the litigation itself.<sup>21</sup>

19. CERCLA's legislative history supports this interpretation. The Senate CERCLA report states:

Monies from the Fund should be available to a State or the appropriate Federal agencies for use to restore, rehabilitate, or acquire the equivalent of such resources which have been injured, lost or destroyed. It should be noted, however, that in a case where the election to pursue an action in court is chosen, the measure of such resource damages shall not be limited to the sums which can be used to restore or replace such resources.

S.Rep. No. 848, *supra* note 10, at 84-85.

Industry intervenors dismiss this passage in the Senate report as "address[ing] a component of the bill that was never passed." Ind.Int.Br. 16. This is untrue. Although subsections (a)(2)(D) and (a)(2)(E) of § 4 of S. 1480 were never passed, the right of state and federal government trustees to recover was expressly authorized "under subsection (a)(2)(C) of this section"—the one subsection of the three that was eventually enacted in CERCLA. S. 1480, § 4(b), reprinted in 1 Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess., *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980* 488 (Comm. Print 1983) [hereinafter "*Legislative History*"]. The passage in the Senate report addresses subsection (C), not subsections (D) and (E).

20. In bargaining between rational actors, any settlement reached before trial will normally lie between the lower limit of potential liability (\$0, which represents a finding of no liability) and the upper limit of potential liability (under DOL's rule, this will be the "lesser of" use value or restoration cost). Each party will thus achieve its goal of averting the risk of an ad-

verse judgment, because the amount paid by the defendant to the plaintiff will lie somewhere between the two possible extremes that could result from a trial. The amount within that range that the parties will settle on depends partly on their prediction as to the likelihood of a verdict relieving the defendant of liability entirely or awarding damages in an amount smaller than the upper limit of potential liability.

Of course, the foregoing analysis omits transaction costs—such as lawyers' fees and downtime caused by litigation—which the defendant will add to the upper limit of its potential liability when deciding whether to make or accept a particular settlement offer. Given this, it is conceivable that a rational defendant would settle for an amount greater than the maximum potential damages award. Yet this would only happen where the defendant foresaw litigation burdens so enormous that, even after factoring in the likelihood of a verdict relieving him of liability entirely or awarding an amount less than the maximum potential award, acceding to the high settlement amount would be the least costly avenue for the defendant to take.

Interior's "lesser of" rule, on the other hand, envisions a scheme in which a defendant would accept a settlement figure (i.e., restoration cost) vastly greater than the amount it stands to lose at trial (i.e., use value). Given that the difference could often run into millions of dollars, it is difficult to see why Congress would construct such a scenario if it wanted to encourage settlement.

21. Counsel for Interior argues that § 122(j)(2) is not a measure-of-damages provision. This is a debater's point. Section 122(j)(2) is important

### 5. Double Recovery Provision

Section § 107(f)(1) provides that there shall be no "double recovery" against a responsible party, for "natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition." 42 U.S.C. § 9607(f)(1). This statutory language is yet another indication that Congress considered "recovery" for "natural resource damages" to "includ[e] the costs of . . . restoration, rehabilitation, or acquisition."

### 6. CERCLA and the Clean Water Act

The "lesser of" rule is also inconsistent with § 311(f)(4) and (5) of the Clean Water Act, to which Interior's natural resource damage regulations are applicable in accordance with § 301(c)(1) of CERCLA. Section 311 of the Clean Water Act provides that damages recoverable for releases of hazardous substances or oil covered by the CWA "shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed." 33 U.S.C. § 1321(f)(5).<sup>22</sup> Thus, the CWA expressly establishes restoration cost as the standard measure of damages.<sup>23</sup>

Interior nonetheless takes the position that its "lesser of" rule promulgated under CERCLA trumps the CWA standard. DOI points to § 304(c) of CERCLA, which states that "[i]n any case in which any provision of section 311 of the [CWA] is determined to be in conflict with any provisions of [CERCLA], the provisions of [CERCLA] shall apply." 42 U.S.C. § 9654(c). Interior's position of course assumes a conflict between the two statutes. We perceive none; quite the contrary. The CWA pro-

vides that damages must "include" restoration cost, while CERCLA provides that recovered sums must be spent on restoration and "shall not be limited by" restoration cost. These directives are in harmony: restoration is the basic measure of damages, but damages can exceed restoration cost in some cases. A compatible reading of the two statutes reinforces our view that restoration costs were the intended basis for damages in CERCLA and that there is no authorization for DOI to abandon Congress' strong preference for restoration, clearly expressed in two separate statutes enacted within three years of one another.

### C. Legislative History of CERCLA

The text and structure of CERCLA indicate clearly to us that Congress intended restoration costs to be the basic measure of recovery for harm to natural resources. We next examine the legislative history of CERCLA to ascertain if there are any countervailing indications to our conclusion and also to check on Interior's assertions that certain parts of the history are inconsistent with our conclusion and so render the statute ambiguous within the meaning of *Chevron*. Far from finding these arguments persuasive, we conclude that the legislative history of CERCLA—both in its original enactment in 1980 and in its amendment and reenactment in 1986—reinforces our interpretation of the text.

#### 1. The Enactment of CERCLA in 1980

The legislative history of CERCLA confirms that restoration costs were intended to be the presumptive measure of recovery. Senate proponents of the legislation, in the committee report<sup>24</sup> and on the Senate

22. Subsections 311(f)(4) and (f)(5) were added to the Federal Water Pollution Control Act in 1977. Pub.L. No. 95-217, § 58(g), 91 Stat. 1566 (1977).

23. See *Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 673 (1st Cir.1980), cert. denied, 450 U.S. 912, 101 S.Ct. 1350, 67 L.Ed.2d 336 (1981).

24. See S.Rep. No. 848, *supra* note 10, at 84-85 ("Monies from the Fund should be available to a State or the appropriate Federal agencies for use to restore, rehabilitate, or acquire the equivalent of such resources which have been injured, lost or destroyed. It should be noted, however, that in a case where the election to pursue an action under this legislation in court is chosen, the measure of such resource damages shall not be limited to the sums which can be used to restore or replace such resources.") (emphasis added); *id.* at 85 ("It should be noted that the Committee intended that actions to restore, re-

floor,<sup>25</sup> repeatedly emphasized that their primary objective in assessing damages for public resources was to achieve restoration.<sup>26</sup>

The history of the damages provision of CERCLA documents further Congress' intent to broaden government trustees' recovery beyond lost use value. As reported to the Senate floor, CERCLA's forerunner, S. 1480, allowed recovery for, *inter alia*, the following three categories of damages:

(C) any injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss;

(D) any loss of use of any natural resources, without regard to the ownership or management of such resources;

(E) any loss of income or profits or impairment of earning capacity resulting from personal injury or from injury

to or destruction of real or personal property or natural resources, without regard to the ownership of such property or resources....

habilitate, or replace natural resources under the provisions of this Act be accomplished in the most cost-effective manner possible." (emphasis added); *id.* ("[N]o restoration action concerning resource damage may take place until a plan outlining the steps to be taken has been developed and adopted....") (emphasis added); *id.* ("The process of developing such a plan will be of great assistance in avoiding unnecessary costs involved in restoring, rehabilitating, or replacing natural resources.") (emphasis added).

25. See, e.g., 126 Cong.Rec. 21377 (1980) ("The most important aspect of this bill from a national viewpoint is the provision of funds for the restoration, rehabilitation and replacement of natural resources.") (remarks of Sen. Gravel) (emphasis added); *id.* at 30941 (responsible parties to be liable for "[l]oss or damage to natural resources... including the cost of restoring injured or destroyed natural resources") (remarks of Sen. Mitchell) (emphasis added); *id.* ("Under this bill, if a toxic waste discharge injures both a tree and a person, the tree's owner, if it is a government, can promptly recover from the fund for the cost of repairing the damage, but the person cannot.") (remarks of Sen. Mitchell) (emphasis added); *id.* at 30942 ("we want prompt, full compensation in such cases so we can replant the trees in the park") (remarks of Sen. Mitchell) (emphasis added); *id.* at 30970 ("The legislation will provide for the restoration of natural resources which have been damaged....") (remarks of Sen. Williams) (emphasis added); *id.* at 30971 ("[t]he provision... for the restoration of damaged natural resources remains in the legislation we are considering today") (remarks of Sen. Chafee) (emphasis added).

S. 1480, 96th Cong., 2d Sess. § 4(a)(2), reprinted in 1 *Legislative History*, supra note 19, at 487-88 (emphasis added). Although (D) and (E), which related to private party recovery, were later dropped from the bill, they evidence a sharp contrast with the language of (C), which governed recovery by public trustees (and which was retained in the enacted version of CERCLA).<sup>27</sup> Private parties could recover damages only for lost use values, but public trustees were to be allowed under the language of (C) to recover for the loss of the natural resources themselves, based presumably on some measure other than lost use.<sup>28</sup>

26. The House concurred in the Senate version of the bill without amendment. 126 Cong.Rec. 31981 (1980).

27. See CERCLA § 107(a)(C), 42 U.S.C. § 9607(a)(C) (establishing liability for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release"). Only government trustees could recover the damages described in subsection (C), both under the original language of the bill, S. 1480, 96th Cong., 2d Sess. § 4(b), reprinted in 1 *Legislative History*, supra note 19, at 488, and under CERCLA as enacted, § 107(f)(1), 42 U.S.C. § 9607(f)(1).

28. Curiously, Industry Intervenor's derive a very different meaning from the history of S. 1480. They argue that the deletion of the "loss of use" language of (D) means there can be no "additional and separate recovery for loss of use." Ind. Int. Br. 15. (Interior also adopted this view at oral argument, although it is inconsistent with Interior's own regulations, which provide for the recovery of both restoration cost and interim lost-use value in some cases. See 43 C.F.R. § 11.84(g)(1).) This argument is flawed by its failure to recognize that (D) and (E) listed lost-use and lost-profit damages separately for a reason: in contrast to the damages available only to government trustees under subparagraph (C), the damages under (D) and (E) were to be made available to private parties. The significance of S. 1480's early formulation lies not in the subsequent deletion of subparagraphs (D) and (E); rather, the existence of (C), (D) and (E) side by side in an early draft of CERCLA shows that Congress always considered sub-



The draft of S. 1480 is even more instructive when viewed alongside the 1978 amendments to the Outer Continental Shelf Lands Act (OCSLA), from which the language of S. 1480 appears to have been borrowed. Section 303(a)(2) of OCSLA authorizes damage claims for, *inter alia*, the following:

(C) injury to, or destruction of, natural resources;

(D) loss of use of natural resources;

(E) loss of profits or impairment of earning capacity due to injury to, or destruction of, real or personal property or natural resources....

43 U.S.C. § 1813(a)(2)(C)-(E). As was the case with the proposed version of CERCLA, OCSLA makes the damages under paragraph (C) available only to the federal or state governments, while (D) and (E) relate to private party recovery. OCSLA § 303(b), 43 U.S.C. § 1813(b). The legislative history of paragraph (C) of OCSLA makes it clear that restoration costs are the standard of recovery. See H.R. Rep. No. 590, 95th Cong., 1st Sess. 182 (1977), 1978 U.S. Code Cong. & Admin. News 1450, 1588 ("If natural resources are damaged or destroyed by an oil discharge, Federal or State governments may recover the costs and expenses of restoring, repairing, or replacing such resources."); see also H.R. Conf. Rep. No. 1474, 95th Cong., 2d Sess. 131 (1978), 1978 U.S. Code Cong. & Admin. News 1450, 1730.<sup>29</sup> Given the similarity between OCSLA and the CERCLA § 107(a)(C) provision for recovery of "damages for injury to, destruction of, or loss of natural resources," Congress' use of restoration as the standard for damages under OCSLA provides further evidence that CERCLA likewise envisions restoration cost as the primary standard of recovery.

Interior, however, advances a supposed "ambiguity" in the legislative history of

paragraph (C)—ultimately enacted into CERCLA—to state a broad measure of damages encompassing, in the majority of cases at least, restoration costs.

29. The regulations under OCSLA, which were promulgated by the Coast Guard, explicitly recognize that damages under 43 U.S.C. § 1813(a)(2)(C) consist of the following:

CERCLA. The 1980 Senate report on CERCLA contains the following statement:

The Committee received testimony indicating that both short- and long-term damages to natural resources resulted from releases of hazardous substances and that standardized techniques for assessing both the biological and economic damages from such releases should be developed. Testimony also indicated that it was appropriate and necessary for the State or in some instances the Federal Government acting as trustee for such resources to seek *restitution for such damages or restoration of such resources*.

S. Rep. No. 848, *supra* note 10, at 84 (emphasis added). Interior argues that the use of the word "or" in the italicized phrase indicates that Congress did not necessarily envision restoration costs as the basic measure of damages. Resp. Br. 29.

We see no basis for Interior's assumption that the word "restitution" is equivalent to "use value." Furthermore, we do not read the statute as mandating that restoration costs are the minimum measure in every natural resource case. We (though not petitioners) acknowledge some degree of latitude on the part of DOI to establish use value as the measure of damages in some class or classes of cases. The precise question before us is whether DOI can use the "lesser of" rule to decide when use value will be the chosen measure and when restoration costs will be chosen instead. The appearance of the word "or" in the Senate report is completely unresponsive to this issue.

## 2. The Enactment of SARA in 1986

CERCLA's "shall not be limited by" language, its mandate that recovered funds be used solely for restoration activities, and the statements of its sponsors and support-

(1) The cost to restore, rehabilitate, or acquire the equivalent of the natural resource; and

(2) Any additional associated economic loss actually suffered.

33 C.F.R. § 136.217 (1988).

ers during its passage in 1980 all point in one direction: a distinct preference for restoration costs as the normative standard for damages. Congress' enactment of SARA in 1986 also provides strong evidence<sup>30</sup> that a restoration measure of damages was the statute's original intent. Of controlling importance in the SARA phase is a House report indicating that, while the "shall not be limited by" language of the original statute would be retained, Interior's demonstrated "confusion" about what that phrase meant<sup>31</sup> should be resolved in light of Congress' strong emphasis on restoration of resources.<sup>32</sup>

While not altering the relevant phrases of § 107(f) in any basic way, SARA

changed the permissible uses for damages from "restore, rehabilitate, or acquire the equivalent" to "restore, replace, or acquire the equivalent," in order to avoid the redundancy of "restore" and "rehabilitate," and to conform the exclusive use clause to the language of the "shall not be limited by" damages clause. See H.R.Rep. No. 253(IV), *supra* note 8, at 50 (emphasis added).<sup>33</sup>

In the accompanying Report of the House Committee on Merchant Marine and Fisheries, explicating how the new § 107(f)(1) would work, its sponsors made their intent unmistakable that restoration costs were to be the preferred measure of

30. One commentator has suggested that the 1986 comments "were not contemporaneous with the passage of damage valuation authority and [thus] are postenactment legislative history." Cross, *supra* note 7, at 329-30 n. 329. Yet the 1986 comments are not postenactment in the usual sense of the term. They were voiced during consideration of a measure that amended and reenacted the entire CERCLA statute. More specifically, SARA amended § 107(f)(1), which contains the limitations on the uses of recovered damages and the "shall not be limited by" passage. While one might suggest that SARA left the operative words in place and made changes that are not significant for purposes of measuring damages, see Cross, *supra*, at 330 n. 329, a key House report sets out the SARA sponsors' view that the statute, both as enacted in 1980 and as amended, clearly had restoration as its "primary purpose." H.R.Rep. No. 253(IV), *supra* note 8, at 50. We read the report as indicating that Congress made a conscious decision not to amend the operative language of § 107(f)(1) because it was deemed "clear" all along. *Id.* We think it would be misguided to dismiss that report as mere postenactment history.

31. Although the challenged rules had not yet been published in the Federal Register when the House report was issued in October 1985, Interior had by that time drafted and publicly discussed the "lesser of" rule. See "Type B Technical Information Document: Techniques to Measure Damages to Natural Resources" (Public Review Draft) (1985), J.A. 468, 488-90.

32. Interior disagrees sharply with State and Environmental Petitioners over the degree of importance that should be ascribed to floor statements made by various legislators during consideration of SARA. As Interior points out, more than one House member complained that certain Senators had made floor statements, in support of a conference committee version of SARA, in which they related "what the legisla-

tion might have said or what they wish it said." 132 Cong.Rec. H9563 (daily ed. Oct. 8, 1986) (statement of Rep. Dingell). On this basis, Interior urges us to accord no credence to the views expressed by those vocal critics of the "lesser of" rule. In fact, we rely on other aspects of SARA and its legislative history as establishing the invalidity of the "lesser of" rule.

33. SARA also divided the original single sentence containing the "shall not be limited by" language and the restriction on the uses of recovered damages into three sentences, in order to provide that funds recovered by the federal government need not receive further congressional appropriation before being spent on restoration of injured resources. The language of CERCLA as enacted in 1980 was as follows:

Sums recovered shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State government, but the measure of damages shall not be limited by the sums which can be used to restore or replace such resources.

§ 107(f), 42 U.S.C. § 9607(f) (prior to amendment). The language as amended by SARA provides as follows:

Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) of this section shall not be limited by the sums which can be used to restore or replace such resources.

§ 107(f)(1), 42 U.S.C. § 9607(f)(1).

damages. The committee report indicated that the "shall not be limited by" passage, while "essentially a restatement of the language of" the 1980 version, was aimed at ending what had been a "source of some confusion." H.R.Rep. No. 253(IV), *supra* note 8, at 50. "It is clear from [the] language [of § 107(f)(1)] that the *primary purpose* of the resource damage provisions of CERCLA is the *restoration or replacement of natural resources* damaged by unlawful releases of hazardous substances." *Id.* (emphasis added). Such an unequivocal statement of purpose is irreconcilable with DOI's "lesser of" rule, which would in a majority of cases risk underfunded, half-finished restoration projects.

The same House report went on to explain:

[T]he final clause [dealing with use of damages to acquire a suitable equivalent resource] is necessary because a situation could arise in which the amount of damages caused by a release of hazardous substances is in excess of the amount that could realistically or productively be used to restore or replace those resources. That is, the total amount of damages may include the costs of restoration and the value of all the lost uses of the damaged resources ... from the time of the release up to the time of restoration. Since the damages contemplated by CERCLA include both, the total amount of damages recoverable would exceed the restoration costs alone.

34. As the report indicates, Congress intended that trustees in some cases be permitted to recover damages greater than the sum required to restore the resource. The excess would represent interim use value, the value of the lost uses from the time of the spill until the completion of the restoration project. At the same time, Congress required that all the funds nonetheless be spent on restoration, replacement or acquisition of an equivalent resource. § 107(f)(1), 42 U.S.C. § 9607(f)(1). Interior apparently has difficulty accepting this premise, see Resp.Br. 33, but it is dictated by the plain terms of CERCLA, and the House Committee on Merchant Marine and Fisheries report indicates that it was part of a conscious design. That report states that the excess over restoration costs must be used to acquire the equivalent of the damaged re-

The Committee therefore intends than [*sic*: probably should be "that"] any excess funds recovered shall be used, in such an instance, for the third purpose spelled out in the language of the amendment, which is to "acquire the equivalent of the damaged resource."

H.R.Rep. No. 253(IV), *supra* note 8, at 50 (emphasis added). The House report thus explicitly assumes that damages "contemplated by CERCLA" will normally include restoration costs at a minimum, plus interim lost-use value in appropriate cases.<sup>34</sup> (This House amendment to § 107(f)(1) was adopted by the Conference Committee, H.R.Conf.Rep. No. 962, 99th Cong., 2d Sess. 204-05 (1986), and Representative Jones, a SARA sponsor, referred to H.R. Rep. No. 253(IV) as a good source of explanation for the SARA amendments. 132 Cong.Rec. H9612 (daily ed. Oct. 8, 1986).) In the face of this passage, the plausibility of the "lesser of" rule, which purposely allows damage recoveries to be set at an amount too small to accomplish restoration (or replacement or acquisition of an equivalent resource), becomes suspect indeed.

Interior's effort to discount the House report fails. Citing the passage quoted above, Interior states: "Although the report recognizes that damages measured might be found to exceed restoration costs, that does not mean that recovery should exceed restoration costs." Resp. Br. 33 (emphasis in original). We are at a loss to see how Interior can draw such a distinction between "damages" and "recovery" when the key phrase of the sentence is "damages recoverable."<sup>35</sup> In sum, Interi-

source—even though the original resource will eventually be restored. H.R.Rep. No. 253(IV), *supra* note 8, at 50. Perhaps the committee intended the "equivalent" resource to stand in for the injured one while restoration was underway, in light of the fact that some resources such as mature forests might require many years to restore. At any rate, what matters for our purposes is that the statute and its legislative history indicate that Congress intended damages to at least cover restoration costs.

35. Indeed, if the committee did not think that the recovery should exceed restoration costs, one wonders why the report immediately goes on to stipulate how those "excess funds recovered shall be used."



or has not dissuaded us from the view that Congress in its 1986 SARA amendments to CERCLA reiterated its intention to make restoration costs the basic measure of recovery.<sup>36</sup>

SARA's legislative history also indicates that Congress consciously paralleled CERCLA's provision of Superfund monies for restoration activities and its imposition of liability on responsible parties to defray the expenses of those activities. A House report on SARA explicitly refers to § 111(c)(2)'s provision for using Superfund monies as the model for § 107(f)(1)'s limitation on the uses of recovered damages, noting:

This language [of § 107(f)(1)] is modeled after section 111(c)(2) of CERCLA ... but the money is recovered from the responsible party, not from the fund itself.

H.R.Rep. No. 253(IV), *supra* note 8, at 50.

If CERCLA's damages provision was expressly "modeled after" Superfund's provision allowing claims for restoration costs, the two provisions must incorporate similar theories of recovery. In sum, Interior's rule preventing government trustees from recovering the full cost of restoration clearly runs against the statutory grain.

### 3. Congress' Rejection of the Premises Underlying the "Lesser-Of" Rule

CERCLA's legislative history undergirds its textual focus on recovering restoration costs as the primary aim of the natural

36. This impression is strengthened by the fact that Congress in 1986 enacted for the first time the settlement provision and the double-recovery provision. As indicated above, those provisions are cast in such a way as to dictate the assumption that Congress intended responsible parties to be liable for restoration costs.

37. We note in passing that the "lesser of" standard does not apply in all non-CERCLA contexts. See, e.g., *Denoyer v. Lamb*, 22 Ohio App. 3d 136, 490 N.E.2d 615, 618-19 (1984) (restoration cost is proper measure where property is used for a residence or for recreation, so long as restoration cost is not "grossly disproportionate" to diminution in market value); *Heninger v. Dunn*, 101 Cal.App.3d 858, 162 Cal.Rptr. 104, 106-09 (1980) (restoration cost is proper measure where owner has a personal reason for

resource damages provisions. Furthermore, it shows that Congress soundly rejected the two basic premises underlying Interior's "lesser of" rule—first, that the common-law measure of damages is appropriate in the natural resource context, and second, that it is economically inefficient to restore a resource whose use value is less than the cost of restoration.

#### a. CERCLA and the Common-Law Measure of Damages

DOI and Industry Intervenors argue that Congress intended that damages under CERCLA would be calculated according to traditional common-law rules. Accepting for the sake of argument the contention that the "lesser of" rule reflects the common law,<sup>37</sup> support for the proposition that Congress adopted common-law damage standards wholesale into CERCLA is slim to nonexistent. DOI contends that Congress meant to adopt traditional methods of damage measurement, "[i]n the absence of clearly expressed Congressional intent to deviate from [the] common law rule." 51 Fed.Reg. at 27,705. The legislative history illustrates, however, that a motivating force behind the CERCLA natural resource damage provisions was Congress' dissatisfaction with the common law.<sup>38</sup> Indeed, one wonders why Congress would have passed a new damage provision at all if it were content with the common law.

Nor are we persuaded by Interior's reference to a colloquy on the Senate floor be-

restoring land to its original condition, so long as restoration cost is not unreasonably disproportionate to diminution in market value); Restatement (Second) of Torts § 929, comment b (1977).

38. See, e.g., S.Rep. No. 848, *supra* note 10, at 13-14 ("[T]raditional tort law presents substantial barriers to recovery... [C]ompensation ultimately provided to injured parties is generally inadequate."); H.R.Rep. No. 172(1), 96th Cong., 1st Sess. 17 (1979) ("Common law remedies [are] ... inadequate to compensate victims in a fair and expeditious manner"); 126 Cong. Rec. 26347 (1980) ("Existing environmental, common, compensatory, and liability laws are not adequate ... [and] provide little or no relief for cleanup and compensation.") (remarks of Rep. Weiss).

tween Senator Simpson, a vocal opponent of CERCLA in committee who ultimately voted in favor of the bill, and Senator Stafford, a CERCLA sponsor. Senator Simpson stated: "I ... trust that the traditional legal rules for calculating of damages for injury in tort will be observed as part of cost effectiveness," citing as an example the measurement of damages as the lesser of lost use value or restoration cost. 126 Cong.Rec. 30,986 (1980). Interior quotes Senator Stafford as responding: "Yes, the Senator is correct." Resp. Br. 30. In all fairness, Interior's brief indicates by an ellipsis with the customary three dots that material between the query and the answer has been left out. The reality, however, is that in the interim Senator Simpson turned away from the measure-of-damages topic entirely and discussed in over 200 words an entirely unrelated provision of the statute before Senator Stafford said, "Yes, the Senator is correct," in response to a specific point on the unrelated topic. Based on what we read, there was no completed exchange between the two Senators on the subject at hand. In the face of Congress' stated dissatisfaction with the common law, Interior's reliance on this colloquy to justify its adherence to common-law damage measures is misplaced.

#### b. CERCLA and Economic Efficiency

Alternatively, Interior justifies the "lesser of" rule as being economically efficient. Under DOI's economic efficiency view, making restoration cost the measure of damages would be a waste of money whenever restoration would cost more than the use value of the resource. Its explanation of the proposed rules included the following statement:

[i]f use value is higher than the cost of restoration or replacement, then it would be more rational for society to be compensated for the cost to restore or replace the lost resource than to be compensated for the lost use. Conversely, if

restoration or replacement costs are higher than the value of uses foregone, it is rational for society to compensate individuals for their lost uses rather than the cost to restore or replace the injured natural resource.

50 Fed.Reg. at 52,141. See also 51 Fed. Reg. at 27,704 ("lesser of" rule "promotes a rational allocation of society's assets").

This is nothing more or less than cost-benefit analysis: Interior's rule attempts to optimize social welfare by restoring an injured resource only when the diminution in the resource's value to society is greater in magnitude than the cost of restoring it. And, acknowledgedly, Congress did intend CERCLA's natural resource provisions to operate efficiently. For one thing, the Act requires that the assessment of damages and the restoration of injured resources take place as cost-effectively as possible.<sup>39</sup> Moreover, as we have indicated, there is some suggestion in the legislative history that Congress intended recovery not to encompass restoration cost where restoration is infeasible or where its cost is grossly disproportionate to use value. See *supra* note 7.

The fatal flaw of Interior's approach, however, is that it assumes that natural resources are fungible goods, just like any other, and that the value to society generated by a particular resource can be accurately measured in every case—assumptions that Congress apparently rejected. As the foregoing examination of CERCLA's text, structure and legislative history illustrates, Congress saw restoration as the presumptively correct remedy for injury to natural resources. To say that Congress placed a thumb on the scales in favor of restoration is not to say that it forswore the goal of efficiency. "Efficiency," standing alone, simply means that the chosen policy will dictate the result that achieves the greatest value to society. Whether a particular choice is efficient depends on how the various alternatives are valued.

assessments and restoration actions to be accomplished "in the most cost-effective manner possible").

39. See § 107(a)(C), 42 U.S.C. § 9607(a)(C) (assessing liability for "the reasonable costs of assessing such injury, destruction, or loss"); S.Rep. No. 848, *supra* note 10, at 85-86 (damage

Our reading of CERCLA does not attribute to Congress an irrational dislike of "efficiency"; rather, it suggests that Congress was skeptical of the ability of human beings to measure the true "value" of a natural resource.<sup>40</sup> Indeed, even the common law recognizes that restoration is the proper remedy for injury to property where measurement of damages by some other method will fail to compensate fully for the injury.<sup>41</sup> Congress' refusal to view use value and restoration cost as having equal presumptive legitimacy merely recognizes that natural resources have value that is not readily measured by traditional means.<sup>42</sup> Congress delegated to Interior the job of deciding at what point the presumption of restoration falls away, but its

repeated emphasis on the primacy of restoration rejected the underlying premise of Interior's rule, which is that restoration is wasteful if its cost exceeds—by even the slightest amount—the diminution in use value of the injured resource.

#### 4. Acquiescence-by-Reenactment Argument

DOI and Industry Intervenors argue finally that Congress' failure to amend the "shall not be limited by" language of § 107(f)(1) in 1986 indicates that Congress acquiesced in Interior's "lesser of" rule. Concededly, Congress, in enacting SARA, amended § 107(f)(1) of CERCLA without changing the "shall not be limited by" phrase, even after Interior published its

40. This skepticism is shared by many scholars. See, e.g., Anderson, *supra* note 7, at 443 ("Direct consumer behavior will not produce prices if resources are not directly traded in markets, which is often the case with resources for which damages under the Superfund may be recovered."); *id.* at 451 ("[T]he difficulty [of a lesser-of rule] is that environmental damage computations and selection of damage assessment methodologies involve great uncertainty. Lost use value is a difficult concept to define even qualitatively, but an even greater problem comes in quantifying the lost use values."); Cross, *supra* note 7, at 307-08, 325; Breen, *supra* note 7, at 10,307 (Estimates of use value as being smaller than restoration cost "may sometimes be the result of the market failing to value important ecological attributes.... [The use value] measure may ignore the 'consumer surplus' involved—the difference between what the user would be willing to pay and the good's price.").

Cross explains how the use of restoration cost as a presumptive measure of damages does not repudiate the goal of economic efficiency:

At first glance, restoration cost appears to be inferior, because it is a cost-based, supply-side measure, rather than a demand-side, value-based measure of natural resource value. For this reason, when natural resource economics advances far enough to provide an adequate demand-side measure, reliance on restoration cost will become inappropriate. At present, however, the economic tools for valuing natural resources are of questionable accuracy.... [Using restoration cost as the measure of damages] acknowledges the current ignorance of economic valuation of resources by adopting a cautious, preservationist approach.

Cross, *supra*, at 331-32. Others agree that restoration cost can generally be estimated more accurately and easily than can the value of an injured resource. See Anderson, *supra*, at 442, 445; Breen, *supra*, at 10,307.

41. See, e.g., *Trinity Church v. John Hancock Mut. Life Ins. Co.*, 399 Mass. 43, 502 N.E.2d 532, 536 (1987) (restoration cost is proper measure where diminution in market value is unsatisfactory or unavailable as a measure of damages, as in the case of structural damage to a church); *Weld County Bd. of Comm'rs v. Slovek*, 723 P.2d 1309, 1316-17 (Colo.1986) (court may, in its discretion, award restoration cost where award of diminution in market value would not adequately compensate owner for some personal reason, provided that restoration cost is not "wholly unreasonable" in relation to diminution in value); see also *supra* note 37.

42. Before Interior promulgated its "lesser of" rule, Interior's own staff recognized that the pursuit of economic efficiency does not necessarily mean that restoration should be avoided whenever its costs exceed the economic value of a resource. See J.A. 2061. Recognizing CERCLA's "strong bias towards restoration," a 1985 draft paper on the assessment of natural resource damages argued that in the case of natural resources committed to specific uses by law (such as parks, wilderness areas and wildlife refuges), restoration is "economic[ally] feasible" whenever restoration costs are not "significantly greater than the economic value of the resource." J.A. 2063-64 (emphasis added). This view was incorporated into the proposed rules, which would have established a class of "special resources" to which the "lesser of" rule would not apply; instead, restoration cost would be recoverable so long as restoration were feasible at a cost not "grossly disproportionate to the benefits gained." 50 Fed.Reg. at 52,154. This rule ultimately was rejected in favor of blanket application of the "lesser of" rule to all natural resources. 51 Fed.Reg. at 27,725.



initial formulation of the challenged "lesser of" rule. And there are indeed cases holding that reenactment of a statute without amendment implicitly ratifies the agency regulations issued under its auspices, so long as Congress evidenced its awareness of those regulations. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n. 66, 102 S.Ct. 1825, 1841 n. 66, 72 L.Ed.2d 182 (1982); *IBEW Local No. 474 v. NLRB*, 814 F.2d 697, 711-12 (D.C.Cir.1987). Yet it is also true that the acquiescence-by-reenactment rule loses force where the regulations are found to have violated the clear terms of the statute to begin with. If, as we have concluded, CERCLA itself required the measure of damages to incorporate a distinct preference for restoration costs, and DOI's 1986 regulations ran contrary to that dictate, Congress' amendment of CERCLA later that year without modifying the statutory text in response to DOI's erroneous interpretation is not dispositive. As a general matter, we would be reluctant to hold that the failure to amend an already-clear statutory command generates "ambiguity" where none existed before.

But we need not decide that question as a general matter, because in the present case Congress did, in fact, respond to Interior's erroneous damage measure in a committee report, which expressed dissatisfaction with the "confusion" surrounding § 107(f)(1) and reiterated that the "primary purpose" of CERCLA's natural resource damages provisions was restoration or replacement of natural resources. H.R.Rep. No. 253(IV), *supra* note 8, at 50; see also *supra* pp. 42-46. The report stated unequivocally that damages recoverable under CERCLA "include both" restoration cost and lost use value for the period between the spill and the completion of restoration. *Id.* Although Interior might argue from the report's description of § 107(f)(1) as "the source of some confusion" that the House committee was acknowledging "ambiguity" within the meaning of *Chevron*, the report's vigorous and exasperated effort to put an end to the "confusion" once and for all accords more easily with our understanding (and Congress') that the

1980 version of CERCLA made the matter clear in the first place. Immediately following its "confusion" sentence, the report states that "[b]oth the amendment and the present language of CERCLA" require that recovered sums be spent on restoration, replacement, or acquisition of equivalent resources. *Id.* (emphasis added). The report continues: "It is clear from this language that the primary purpose of the resource damage provisions of CERCLA is the restoration or replacement of natural resources damaged by unlawful releases of hazardous substances." *Id.* (emphasis added). Thus, Congress apparently declined to amend the pertinent language of § 107(f)(1) precisely because it deemed the language to have been clear all along. This view of Congress' 1986 mindset is consistent with the fact that no legislator even proposed a change in the relevant statutory language. DOI's acquiescence argument would not automatically prevail even if Congress had considered and rejected a SARA bill expressly overruling the "lesser of" regulation. See *Firestone Tire & Rubber Co. v. Bruch*, — U.S. —, 109 S.Ct. 948, 956, 103 L.Ed.2d 80 (1989). Here, given that no such bill was ever introduced, the acquiescence argument is weaker still. See 2A C. Sands, *Sutherland on Statutory Construction* § 49.09 at 401 (4th ed. 1984) ("The presumption of acquiescence and adoption can be rebutted by other legislative history.").

[2] Were we to infer congressional approval of Interior's rules because it did not amend the statute to explicitly repudiate them, we would in effect be insisting that a Congress legislatively reiterate an already clear statutory command in order to fend off an impermissible interpretation. As we all know, many statutes are on the books for which no congressional majority could presently be garnered either to reenact or to repeal, yet those acts continue as valid law; indeed, a canon of equal worth with the acquiescence-by-reenactment rule is the one disfavoring repeal by implication. We conclude that the acquiescence-by-reenactment rule is not applicable to a situation where the regulations violate the original

statutory language and where Congress' decision not to amend the relevant statutory provisions evidently stems from a belief that the provisions have been clear all along.

#### D. Conclusion

Our reading of the complex of relevant provisions concerning damages under CERCLA convinces us that Congress established a distinct preference for restoration cost as the measure of recovery in natural resource damage cases. This is not to say that DOI may not establish some class of cases where other considerations—i.e., infeasibility of restoration or grossly disproportionate cost to use value—warrant a different standard. We hold the "lesser of" rule based on comparing costs alone, however, to be an invalid determinant of whether or not to deviate from Congress' preference.

#### IV. THE PUBLIC OWNERSHIP RULE

[3] The second issue raised by State and Environmental Petitioners is whether the regulations invalidly limit the availability of natural resource damages to cases where the resources harmed (such as land, water, air, fish and wildlife) are owned by federal, state, local or foreign governments, rather than by private parties. The critical language in the DOI regulations mirrors the language of the statute, but State and Environmental Petitioners complain that DOI's comments accompanying the publication of the regulations articulate an understanding of the regulation that is inconsistent with the statute. The issue is further complicated by the statements of DOI counsel at oral argument, which put yet another interpretive gloss on the regulation.

##### A. The Statute

##### 1. Statutory Language

The critical language is contained in CERCLA's definition of the term "natural

resources." The statute provides that responsible parties shall be liable for "damages for injury to, destruction of, or loss of natural resources." § 107(a)(C), 42 U.S.C. § 9607(a)(C). In the "definitions" sections, the statute provides that "natural resources" are resources "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States[.] . . . any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe." § 101(16), 42 U.S.C. § 9601(16). The difficult questions, obviously, center around the series of phrases: "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" a state or federal or foreign government.

Initially we deal with one argument presented by State and Environmental Petitioners that is without merit. They point to a section of CERCLA providing that liability for harm to natural resources "shall be to the United States Government and to any State for *natural resources within the State* or belong to, managed by, controlled by, or appertaining to such State" and to Indian tribes and their members in some circumstances. § 107(f)(1), 42 U.S.C. § 9607(f)(1) (emphasis added). State and Environmental Petitioners argue on the basis of this section that CERCLA covers injuries to any land, water, air, fish and wildlife that exist "within [a] State"—a reading which, if true, would establish natural resource damage liability for harm to all private as well as public property. This interpretation, however, rips the "within the State" phrase out of its statutory context. "[N]atural resources within the State" incorporates § 101(16)'s definition of "natural resources" as resources "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" the state. Thus it is this series of phrases, and not the "within the State" language, that controls the issue.<sup>43</sup>

43. One might wonder why CERCLA § 107(f)(1) uses the phrase "within the State" at all, especially since it is followed immediately by the

words "or belonging to, managed by, controlled by, or appertaining to such State." State and Environmental Petitioners advance a theory

Further textual evidence is provided by CERCLA's references to resources held by Indian tribes and their members. CERCLA (as amended by SARA) includes in its definition of "natural resources" those resources "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by . . . any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe." § 101(16), 42 U.S.C. § 9601(16) (emphasis added). This addition of the Indian clauses in 1986 expanded but combined the definition of "natural resources" to include some resources under purely private ownership. No such provision would have been necessary if Congress either in 1980 or in 1986 had intended "natural resources" to generally include resources under purely private ownership.

It should be noted, however, that while the statute excludes purely private resources, it clearly does not limit the definition of "natural resources" to resources owned by a government. If that were the meaning of § 101(16), then all the phrases other than "belonging to" would be surplusage. If the words "managed by, held in trust by, appertaining to, or otherwise controlled by" mean anything at all, they must refer to certain types of governmental (federal, state or local) interests in privately-owned property.<sup>44</sup>

## 2. Legislative History

The legislative history of CERCLA further illustrates that damage to private property—absent any government involvement, management or control—is not covered by the natural resource damage provisions of the statute. Early drafts of CERCLA would have covered private prop-

erty. See H.R. 7020, 96th Cong., 2d Sess. § 5 (1980), reprinted in 2 *Legislative History*, supra note 19, at 40 (damages to include "all damages for personal injury, injury to real or personal property, and economic loss, resulting from such release or threatened release"); H.R. 85, 96th Cong., 1st Sess. § 103(a)(2), reprinted in 2 *Legislative History* at 487 (damages to include "injury to, or destruction of, real or personal property"); S. 1480, 96th Cong., 1st Sess. § 4(a)(2)(A), reprinted in 1 *Legislative History* at 169 (damages to include "any injury to, destruction of, or loss of any real or personal property"). Each of these proposed provisions was rejected and the statute's "natural resources" formulation was adopted instead. Congress quite deliberately excluded purely private property from the ambit of the natural resource damage provisions.

that the phrase "held in trust by" appears only in § 101(16) while the phrase "within the State" appears only in § 107(f)(1). They infer from this that Congress believed the two to be synonymous; i.e., all privately owned land within a state is deemed to be held in trust by that state.

For reasons set out below, we do not believe Congress held such a view. Rather, the expression "within the State" permits a state to recover damages not only for resources owned by, managed by, appertaining to or otherwise controlled by the state government, but also for

## B. The Regulations and Accompanying Commentary

The critical language of the DOI regulation, 43 C.F.R. § 11.14(z), precisely mirrors the CERCLA definition of "natural resources." State and Environmental Petitioners challenge, however, the DOI comments accompanying publication of the regulations. These comments—they say—suggest a too-narrow reading of the statutory/regulatory language to prohibit recovery for injury to publicly managed private property.

The preamble to the final rule contained the following two statements:

The Department believes that Congress has defined "natural resources" with sufficient specificity to leave no doubt that resources owned by parties other than Federal, State, local or foreign govern-

resources owned by, managed by, appertaining to or otherwise controlled by a local government or a foreign government—if those resources exist "within the State." This makes sense because the definition of "natural resources" in § 101(16) includes resources appertaining to local and foreign governments, while the liability provision of § 107(f)(1) does not empower those governments to bring actions for damages.

44. See Breen, supra note 7, at 10,305-06.



ments (i.e., privately-owned resources) are not included....

The Department notes, as stated above, that section 101(16) of CERCLA clearly indicates that damage to privately-owned natural resources are not to be included in natural resource damage assessments.

51 Fed.Reg. at 27,696.

Taken at face value, these comments appear to exclude *any* privately owned property from the ambit of the natural resource damage provisions, no matter how heavily involved a governmental entity may be in managing or otherwise controlling the property. This reading of the statute would ignore everything that comes after the words "belonging to." If DOI's position is truly that the statute and the regulation limit recovery for damages to resources where title is held by a governmental entity, it would pose a serious risk of running afoul of CERCLA.

Counsel for DOI has given us strong reason to believe, however, that the statements in the preamble should not be read so literally. At oral argument, counsel stated that the reach of the CERCLA natural resource damage provisions does not hinge solely on ownership—or, for that matter, on the exercise of a formal document transferring the property to a government entity to be held in trust. Rather, a substantial degree of government regulation, management or other form of control over the property would be sufficient to make the CERCLA natural resource damage provisions applicable. (For example, a state law requiring owners of tideland property to permit public access could well bring the land within the ambit of CERCLA's natural resource damage provisions. See, e.g., *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S.Ct. 791, 799 n. 12, 98 L.Ed.2d 877 (1988) ("even in some of these States—i.e., even where tidelands are privately held—public rights to use the tidelands for the purposes of fishing, hunting, bathing, etc., have long been recognized").) Whether this assertion by DOI counsel or the statements con-

tained in the preamble state the official position of DOI is not altogether clear. Since the DOI regulations themselves track the statutory language precisely, we remand the record to the agency for a clarification of its interpretation of its own regulations insofar as they may extend to lands not *owned* by the government.

#### V. THE "COMMITTED USE" REQUIREMENT

[4] The regulations provide that "[b]efore estimating damages based on the diminution of use values under § 11.83 of this part, the uses made of the resource services identified in the Quantification phase should be determined." 43 C.F.R. § 11.84(b)(1). In ascertaining the "uses made of a resource," a trustee may consider only "committed uses":

Only committed uses, as that phrase is used in this part, of the resources or services over the recovery period will be used to measure the change from the baseline resulting from injury to a resource. The baseline uses must be reasonably probable, not just in the realm of possibility. Purely speculative uses of the injured resource are precluded from consideration in the estimation of damages.

43 C.F.R. § 11.84(b)(2). A "committed use" is defined as

either: a current public use; or a planned public use of a natural resource for which there is a documented legal, administrative, budgetary, or financial commitment established before the discharge of oil or release of a hazardous substance is detected.

43 C.F.R. § 11.14(h).

Environmental petitioners object that the "committed use" requirement is inconsistent with congressional intent because for many natural resources, it will be difficult for trustees to document currently committed uses. Few existing uses, especially in remote areas, have been surveyed and recorded, and "legal, administrative, budgetary, or financial commitment[s]" may be poorly documented before a discharge occurs.

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We uphold the "committed use" criterion because we interpret it as applying only to the calculation of use values. Because we also invalidate the current version of the "lesser of" rule, the "committed use" requirement is relevant, as the regulations now stand, only to the calculation of diminution in use values during the period required to achieve restoration or replacement, *see* 43 C.F.R. § 11.84(g), with one exception not important here, *see* 43 C.F.R. § 11.62(b)(ii), (iii) (establishing that standards of the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-9, or the Clean Water Act, 33 U.S.C. §§ 1251-1376, can be used to define "injury" to a surface water resource only if the resource is "committed" to a use protected by those statutes). Viewed in this light, the "committed use" standard is an eminently reasonable construction of the statute, because it avoids the need for unreliable, and likely self-serving, speculation regarding future possible uses. Congress directed DOI to select the "best available" methodologies for determining damages, 42 U.S.C. § 9651(c)(2), and a procedure that permitted unduly speculative assessments would not fulfill this intent. Given that the "committed use" concept does not restrict trustees' ability to recover damages except for use values lost during the interim period before restoration is complete, we find that DOI's approach does not unduly restrict recovery of damages for natural resource injuries.

Our decision to uphold the "committed use" requirement is premised on our interpretation of the regulation to mean that a trustee is not prohibited from recovering the costs of restoring or replacing a natural resource, even when that resource has no documented "committed use." This was confirmed by counsel for DOI at oral argument. Although the preamble to the rules contains some stray language to the contrary, *see* 51 Fed.Reg. 27,713, 27,772 (1986), we believe the construction we rely on today is the best interpretation of the regulations. The "committed use" language appears in a section aimed at determining "uses made of a resource" for purposes of "estimating damages based on the diminution of use values," 43 C.F.R. § 11.84(b)(1).

The "committed use" standard immediately follows, in subsection 11.84(b)(2). By their terms and structure the regulations thus provide that proof of a "committed use" is not a prerequisite to recovery of restoration costs. Moreover, imposing such a requirement on calculations of restoration cost would be irrational because a resource can be restored to its *ex ante* condition, or a replacement resource acquired, without the need to determine the precise uses to which that resource had previously been put. DOI's concern about speculative estimates of value is entirely absent when restoration cost, rather than use value, is the focus of damage assessment.

We uphold the "committed use" requirement on this basis.

#### VI. THE HIERARCHY OF ASSESSMENT METHODS

[5] The regulations establish a rigid hierarchy of permissible methods for determining "use values," limiting recovery to the price commanded by the resource on the open market, unless the trustee finds that "the market for the resource is not reasonably competitive." 43 C.F.R. § 11.83(c)(1). If the trustee makes such a finding, it may "appraise" the market value in accordance with the relevant sections of the "Uniform Appraisal Standards for Federal Land Acquisition," *see* 43 C.F.R. § 11.83(c)(2). Only when neither the market value nor the appraisal method is "appropriate" can other methods of determining use value be employed, *see* 43 C.F.R. § 11.83(d).

Environmental petitioners maintain that Interior's emphasis on market value is an unreasonable interpretation of the statute, under the so-called "second prong" of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845, 104 S.Ct. 2778, 2783, 81 L.Ed.2d 694 (1984), and we agree. While it is not irrational to look to market price as one factor in determining the use value of a resource, it is unreasonable to view market price as the *exclusive* factor, or even the predominant one. From the bald eagle to the blue whale and snail darter, natural

resources have values that are not fully captured by the market system. See *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 673-74 (1st Cir. 1980), cert. denied, 450 U.S. 912, 101 S.Ct. 1350, 67 L.Ed.2d 336 (1981). DOI's own CERCLA 301 Project Team recognized that "most government resources, particularly resources for which natural resource damages would be sought[,] may often have no market." DOI has failed to explain its departure from this view. Indeed, many of the materials in the record on which DOI relied in developing its rules regarding contingent valuation expressed the same idea; it is the incompleteness of market processes that gives rise to the need for contingent valuation techniques. Courts have long stressed that market prices are not to be used as surrogates for value "when the market value has been too difficult to find, or when its application would result in manifest injustice to owner or public," *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123, 70 S.Ct. 547, 549, 94 L.Ed. 707 (1950); see also *United States v. Cors*, 337 U.S. 325, 332, 69 S.Ct. 1086, 1090, 93 L.Ed. 1392 (1949) (warning against making "a fetish" of market value, "since that may not be the best measure of value in some cases"). As we have previously noted in the context of the "lesser of" rule, see *supra* note 40, market prices are not acceptable as primary measures of the use values of natural resources. See generally Anderson, *Natural Resources Damages, Superfund, and the Courts*, 16 *Env'tl. Aff.* 405, 442-46 (1989). We find that DOI erred by establishing "a strong presumption in favor of market price and appraisal methodologies." 51 Fed.Reg. 27,720 (1986).

We are not satisfied that the problem is solved by the provision in section 11.83(c)(1) permitting nonmarket methodologies to be used when the market for the resource is not "reasonably competitive." There are many resources whose components may be traded in "reasonably competitive" markets, but whose total use values are not fully reflected in the prices they command in those markets. Interior itself provides ample proof of the inadequacy of the "rea-

sonably competitive market" caveat. For example, DOI has noted that "the hierarchy established in the type B regulation" would dictate a use value for fur seals of \$15 per seal, corresponding to the market price for the seal's pelt, see 52 Fed.Reg. 9,092 (1987). Another example of DOI's erroneous equation of market price with use value is its insistence that the sum of the fees charged by the government for the use of a resource, say, for admission to a national park, constitutes "the value to the public of recreational or other public uses of the resource," 43 C.F.R. § 11.83(b)(1), because "these fees are what the government has determined to represent the value of the natural resource and represent an offer by a willing seller," 51 Fed.Reg. 27,719 (1986). This is quite obviously and totally fallacious; there is no necessary connection between the total value to the public of a park and the fees charged as admission, which typically are set not to maximize profits but rather to encourage the public to visit the park, see 16 U.S.C. §§ 460k-3, 460l-6a. In fact, the decision to set entrance fees far below what the traffic would bear is evidence of Congress's strong conviction that parks are priceless national treasures and that access to them ought to be as wide as possible, and not, as DOI would have it, a sign that parks are really not so valuable after all.

Neither the statute nor its legislative history evinces any congressional intent to limit use values to market prices. On the contrary, Congress intended the damage assessment regulations to capture fully all aspects of loss. CERCLA section 301(c)(2) commands Interior to "identify the best available procedures to determine [natural resource] damages, including both direct and indirect injury, destruction or loss." 42 U.S.C. § 9651(c)(2). The Senate CERCLA report stated that assessment procedures should provide trustees "a choice of acceptable damage assessment methodologies to be employed [and should] select the most accurate and credible damage assessment methodologies available." S.Rep. No. 848, 96th Cong., 2d Sess. 85-86 (1980). The

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current rules defeat this intent by arbitrarily limiting use values to market prices.

[6] On remand, DOI should consider a rule that would permit trustees to derive use values for natural resources by summing up all reliably calculated use values, however measured, so long as the trustee does not double count. Market valuation can of course serve as one factor to be considered, but by itself it will necessarily be incomplete. In this vein, we instruct DOI that its decision to limit the role of non-consumptive values, such as option and existence values, in the calculation of use values rests on an erroneous construction of the statute. The regulations provide that "[e]stimation of option and existence values shall be used only if the authorized official determines that no use values can be determined," 43 C.F.R. § 11.83(b)(2); see also *id.* at § 11.83(d)(5)(ii). This limitation apparently reflects Interior's crabbed interpretation of CERCLA explained in the preamble to the regulations:

The Department notes that § 11.83(b) has been changed to explicitly state that option and existence values may be estimated in lieu of use values only when use values cannot be determined. Ordinarily, option and existence values would be added to use values. However, section 301(c) of CERCLA mentions only use values. Therefore, the primary emphasis in this section is on the estimation of use values.

51 Fed.Reg. 27,719 (1986).

DOI has erroneously construed the statute. First, section 301(c)(2) requires Interior to "take into consideration factors including, but not limited to . . . use value." 42 U.S.C. § 9651(c)(2) (emphasis added). The statute's command is expressly not limited to use value; if anything, the language implies that DOI is to include in its regulations other factors in addition to use value. Second, even under its reading of section 301(c), DOI has failed to explain why option and existence values should be excluded from the category of recognized use values. Indeed, the CERCLA 301 Project Team draft referred to option and existence values as "non-consumptive use

values" (emphasis added). Option and existence values may represent "passive" use, but they nonetheless reflect utility derived by humans from a resource, and thus, *prima facie*, ought to be included in a damage assessment. See Cross, *Natural Resource Damage Valuation*, 42 Vand.L. Rev. 269, 285-89 (1989) (noting that surveys reveal that the option and existence value of national parks may be quite large). DOI is entitled to rank methodologies according to its view of their reliability, but it cannot base its complete exclusion of option and existence values on an incorrect reading of the statute.

We hold that the hierarchy of use values is not a reasonable interpretation of the statute.

#### VII. THE TEN PERCENT DISCOUNT RATE

[7] State and Environmental Petitioners next challenge Interior's decision to use a discount rate to calculate the present value of an expected future injury. Petitioners challenge both the decision to discount a future injury for present value and Interior's choice of a ten percent rate. See 43 C.F.R. § 11.84(e). As petitioners point to no CERCLA provision addressing the precise question in issue, their burden is to show that the imposition of the discount rate was unreasonable or contrary to the statutory purpose.

Petitioners' central argument appears to be that discounting for present value will by its nature "severely undervalue[]" long-term injury to natural resources. But this argument is misplaced: the point of the CERCLA natural resource damage provisions is to make polluters pay the costs of restoring or replacing damaged resources or acquiring their equivalent. If a release of hazardous substances will necessitate a restoration project costing  $x$  dollars five years from now, CERCLA requires that the responsible party pay a sum sufficient to cover those costs *at that time*. Due to the inherent time-value of money (coupled with the effects of inflation), an amount significantly less than  $x$  dollars invested today will yield CERCLA's required  $x$  dollars at the time the restoration costs are

incurred five years from now. Using the proper interest rate as a discount rate, it is possible to calculate how much money must be collected today to equal  $x$  dollars in the future. The danger of undervaluation arises from an underestimate of the *future* cost of restoration or from an incorrect discount rate, not from the basic process of discounting itself.

State and Environmental Petitioners' two additional concerns are therefore closer to the target. First, they argue that there is uncertainty as to the correct discount rate. Second, they argue that natural resources will tend to become scarcer over time and hence more valuable; consequently, there is too much uncertainty as to the future cost of restoring or replacing damaged resources to permit an accurate discount rate.

[8] As to the first point, a discount rate by its nature involves a predictive judgment about future rates of interest.<sup>45</sup> Apart from the truism that the proper discount rate is always a matter of uncertainty, petitioners have given us no reason to substitute our judgment for that of Interior and of the Office of Management and Budget, whose circular provided the ten percent figure chosen. 43 C.F.R. § 11.84(e)(2). While DOI's explanation of its decision to adopt the Office of Management and Budget figure certainly was terse, we decline to step in and undermine what is first and foremost a policy choice.<sup>46</sup>

As to the second point, we agree that Interior should take into account the possibility that the value of a particular resource or the cost of a particular restoration project will increase over time, as a function of scarcity, faster than the rise in the general price level. If such an increase can be reasonably foreseen, it should be

reflected in the estimate of the *future* cost of a restoration project; if the estimated future cost is reasonably accurate, then the application of a discount rate to arrive at a *present* value cannot itself be objectionable. Interior's regulations provide that uncertainties as to the cost of future restoration are to be considered in the assessment process and factored into the analysis.<sup>47</sup> So long as the trustee performing the assessment takes into account—as the regulations provide it should—the possibility that restoration costs might rise faster than the general price level, State and Environmental Petitioners' arguments against the use of a discount rate are without merit.

#### VIII. THE ALLEGEDLY PREFERENTIAL TREATMENT OF PRPs

State and Environmental Petitioners allege that Interior's regulations give potentially responsible parties (PRPs)—i.e., those parties who may be held responsible for the release of hazardous substances and be required to pay natural resource damages—"inappropriate, preferential treatment compared to that given States and the public." Pet. Br. 66. Petitioners challenge the rules' provision allowing PRPs to be assigned the task of conducting a natural resource damage assessment. They also challenge the rules' establishment of periods in which only a PRP, and not members of the public, will be notified of developments in the assessment process and be given the opportunity to comment. We consider the two challenges in turn, keeping in mind *Chevron's* command that, unless Congress addressed the precise question in issue, Interior's interpretation of CERCLA must be upheld if it is reason-

45. Ordinary interest rates include an inflation-compensation component which will account for changes in the future cost of natural resource restoration or replacement due solely to a change in the general price level.

46. We note that we are merely deferring to DOI's choice of the 10 percent figure; DOI is free to revise the discount rate at some future time, so long as it sets forth a reasonable justification for doing so.

47. See 43 C.F.R. § 11.84(d) (providing that "significant uncertainties concerning the assumptions made in all phases of the assessment process" should be taken into account and alternative assumptions should be considered for the purpose of arriving at a damages figure); see also 51 Fed.Reg. 27,722 (explaining § 11.84(d)).

able and consistent with the statutory purpose.

A. *Delegation of the Assessment Process to PRPs*

1. *Delegability of Assessment Tasks Generally*

[9] The regulation authorizing assessments by PRPs provides as follows:

At the option of the authorized official and if agreed to by any potentially responsible party or parties acting jointly, the potentially responsible party or any other party under the direction, guidance, and monitoring of the authorized official may implement all or any part of the Assessment Plan finally authorized by the authorized official.

43 C.F.R. 11.32(d).

State and Environmental Petitioners aim a fusillade of challenges against the practice of letting a PRP conduct an assessment; they compare it to appointing the defendant in a tort suit as a special master to decide on the proper amount of damages. Petitioners base their legal argument on statutory language providing that designated state and federal officials "shall assess damages" and that only assessments "made by a Federal or State trustee" are accorded a rebuttable presumption of correctness. § 107(f)(2)(A)-(B); § 107(f)(2)(C).

The § 107 argument is unpersuasive. The "shall assess damages" language does not indicate that a government trustee has no power to delegate the task of conducting the assessment, even when the trustee retains final authority over the assessment methods and oversees the work. Indeed, reading the "shall assess damages" language as narrowly as petitioners do would compel the implausible conclusion that Congress intended to prevent government trustees from hiring subcontractors to undertake the technically demanding tasks associated with an assessment.

As it turns out, the legislative history shows that Congress did consider the precise question at issue. Section 107(f)(2) was added to the statute by SARA in 1986.

Its purpose was described in a House report as follows:

The amendment makes clear that the responsibility to assess damages for injury to natural resources lies with the federal agency designated as the natural resource trustee for those resources.... Of course, by specifying that the federal natural resource trustees shall assess damages, *the Committee does not intend to foreclose their flexibility to reach agreements with potentially responsible parties whereby the parties themselves undertake the assessments.*

H.R.Rep. No. 253(IV), *supra* note 8, at 49 (emphasis added). Thus, the House Committee on Merchant Marine and Fisheries plainly envisioned that a government trustee could delegate to a PRP the job of "undertak[ing]" an assessment. As for the argument that the delegation of assessment tasks to PRPs is "contrary to fundamental principles of fairness and jurisprudence" due to potential conflicts of interest, Pet. Br. 71, the committee apparently considered that danger to be outweighed by the desirability of granting trustees the "flexibility" to delegate assessment tasks when the trustees deem it appropriate to do so. At least one senator disagreed, taking to the Senate floor to denounce Interior's policy of permitting PRPs to conduct damage assessments. See 132 Cong.Rec. S14930 (daily ed. Oct. 3, 1986) (statement of Sen. Baucus). Even if we viewed Senator Baucus' statement as an indication that the evidence of congressional intent on this particular issue is somewhat ambiguous, we would nonetheless uphold Interior's rule as reasonable and not inconsistent with the statutory purpose. A PRP conducts an assessment only if an authorized government official calls on it to do so. 43 C.F.R. § 11.32(d). The assessment must follow the methods outlined in the assessment plan, which must have been drawn up as a coordinated effort among all affected government trustees, state and federal. *Id.* § 11.32(a)(1). The delegation rule is not unreasonable.

2. *Specific Aspects of the Delegation Rule*

State and Environmental Petitioners argue that, even if some delegation is permis-



sible, Interior's rule goes too far. First they point out that, where the harmed natural resources are located on federal property, the appropriate federal agency shall serve as "lead authorized official." 43 C.F.R. § 11.32(a)(1)(ii)(B). That agency will act as final arbiter of disputes among trustees whenever trustees representing different governments or agencies fail to reach a consensus. 43 C.F.R. § 11.32(a)(1)(ii)(A). Thus, the federal agency has the power to delegate assessment tasks to a PRP over the objections of state trustees. We find nothing in such an arrangement unreasonable or contrary to statutory purpose. It is entirely reasonable to appoint a tiebreaker to resolve disagreements among government entities, and the federal agency whose land is most directly affected seems the logical choice.

State and Environmental Petitioners raise yet another point, arguing that the regulations empower trustees to delegate the PRPs not only "ministerial" tasks but also "the authority to make discretionary decisions" about the extent of liability resulting from their own conduct. Pet. Br. 71; see also Reply Br. 32. This fear is largely imaginary. The regulation leaves the decision of which assessment tasks to delegate in the hands of the lead authorized official. Whatever that official decides to delegate, the PRP's assessment work must take place "under the direction, guidance, and monitoring of the authorized official." 43 C.F.R. § 11.32(d). The PRP does not have free rein to conduct any kind of assessment it wishes; rather, it must "implement ... the Assessment Plan finally approved by the authorized official." *Id.* As DOI indicated in its preamble to the rules, "all actions taken by potentially responsible parties to implement an Assessment Plan occur under the ultimate approval and authority of the authorized official acting as trustee." 51 Fed.Reg. at 27,704. The PRP "functions in a strictly ministerial role. The final choice of methodologies rests solely with the authorized official." *Id.* Although petitioners complain that the regulation fails to identify which decisions are ministerial and which are discretionary, we do not perceive that to be a fatal defi-

ciency. The trustee has absolute authority to direct and control the PRP in the assessment function: that should be enough to permit flexibility while still retaining ultimate accountability with a public trustee.

#### B. Public Notice and Comment

[10] State and Environmental Petitioners challenge another aspect of the DOI rules that allegedly accords preferential treatment to PRPs. At certain stages in the preassessment and assessment plan phases, PRPs receive notice of what the government trustees are doing along with the opportunity to comment on it, while members of the public are denied the same rights of notice and comment at that time. And, although the state trustee of an affected resource enjoys full participation in all stages of the process, other state agencies stand in the same position as the public: they too are denied the notice and comment rights accorded PRPs. Petitioners fail to persuade us, however, that the notice and comment provisions are unreasonable or contrary to the statutory purpose.

Under the regulations, a government trustee first undertakes a "preassessment screen" and then decides whether a full-fledged natural resource assessment is to be performed. At that point, the trustee notifies the PRPs of its intent to perform an assessment, but the regulations do not require that the public or other state agencies be notified. See 43 C.F.R. § 11.32(a)(2)(iii)(A)-(B). Later, after an assessment plan has been drafted, it must be made available to the public; comments on the assessment plan are eventually included in the final report on the assessment. 43 C.F.R. § 11.32(c)(1)-(2). Likewise, any significant modifications to the assessment plan are subject to similar notice and comment regulations. 43 C.F.R. § 11.32(e).

In an effort to show that such limited participation of the public is contrary to the purpose of the statute, petitioners point to a CERCLA provision stating that a trustee can develop a plan for the expenditure of recovered damages only "after adequate public notice and opportunity for hearing

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and consideration of all public comment." § 111(i), 42 U.S.C. § 9611(i). They also point to provisions requiring public comment on remedial actions and Superfund settlements. §§ 117, 122(d)(2), 122(i), 42 U.S.C. §§ 9617, 9622(d)(2), 9622(i). Yet, far from proving their point, the fact that Congress expressly provided for notice and comment in these other contexts suggests that its failure to do so at the preassessment stage was a considered decision. As to the rules' reasonableness, DOI explains that PRPs merit more involvement in the pre-assessment process than does the general public because PRPs have a stake in the cost-effectiveness of the assessment methods chosen. DOI also contends that involvement of PRPs early in the process will tend to promote settlement of natural resource damage claims. Given that the public is notified and its comments are heard once an assessment plan is drafted, we cannot say that Interior's regulations are unreasonable.<sup>48</sup>

#### IX. LIMITATION ON RECOVERY OF ASSESSMENT COSTS

[11] CERCLA imposes liability on responsible parties for, *inter alia*, the "reasonable costs of assessing" natural resource damages. § 107(a)(C), 42 U.S.C. § 9607(a)(C). The statute does not define the term "reasonable costs." State and Environmental Petitioners challenge a provision in the DOI regulations limiting the definition of "reasonable costs" to situations where "the anticipated cost of the assessment is expected to be less than the anticipated damage amount." 43 C.F.R. § 11.14(ee). Petitioners characterize the rule as "inflexible" and "irrational."

There is no indication that Congress had in mind a particular definition of "reasonable costs." The legislative history of CERCLA indicates, however, that Congress

intended natural resource damage assessments to be "accomplished in the most cost-effective manner possible," that they be "efficient as to both time and cost," and that they be the "most accurate and efficient for accomplishing the mandates of this legislation." S.Rep. No. 848, *supra*, at 85-86. The idea behind Interior's regulation is that it is wasteful to devote more resources to a damage assessment than can be recovered by the trustee for the loss of the resource itself. This principle is a rational one and is consonant with the statutory purpose. Nor is the rule inflexible: a trustee that launches an inexpensive assessment of what is initially thought to be a minor amount of environmental harm is free to expand the assessment if it uncovers evidence showing that the "anticipated damage amount" will be larger than previously believed.<sup>49</sup> We therefore decline to overturn the rule.

#### X. THE ACCEPTANCE CRITERIA

State and Environmental Petitioners challenge Interior's regulation establishing a set of "acceptance criteria" as a framework for determining whether a hazardous substance release actually caused injury to the particular biological resource (such as a flock of birds or a school of fish) for which a government trustee is seeking damages.

In order to establish causation under the acceptance criteria, the trustee must show that (i) the "biological response" alleged to have been precipitated by the hazardous substance release is a "commonly documented" response to oil or hazardous substance spills, (ii) oil or hazardous substances are "known to cause" such a response in field studies, (iii) oil or hazardous substances are "known to cause" such a response in controlled experiments, and (iv) the biological response can be measured by

48. Petitioners also argue that the DOI rules create the possibility that there will be one administrative record for those "in the know" and another for the general public. Pet.Br. 75-76. Yet the regulations provide for one record, which must contain documentation of all significant decisions made as well as public comments and responses to those comments. See 43 C.F.R. §§ 11.32(c), 11.32(e), 11.90.

49. Moreover, even if a state trustee spends more on an assessment than 43 C.F.R. § 11.14(ee) permits it to recover, the trustee can nonetheless recover the amount of "reasonable costs" as defined by that rule. Thus, the trustee will have to pick up the tab, unreimbursed, for only the amount in excess of "reasonable costs."

a technique that is practical to perform and has been "adequately documented in scientific literature." 43 C.F.R. § 11.62(f)(2). Additionally, the trustee must show that the biological response identified in accordance with these acceptance criteria actually differs from the condition of similar organisms in a "control area"—i.e., an unpolluted area that is otherwise similar to the polluted area. 43 C.F.R. § 11.62(f)(3).

Petitioners launch a general attack at all of these requirements as being "extraordinarily burdensome" and as requiring "virtually absolute scientific proof" of causation. Pet. Br. 82. They allege, in conclusory terms, that the acceptance criteria require a greater quantum of evidence of causation than the common law requires; this, they say, is both unreasonable and contrary to CERCLA's purpose of liberalizing the traditional causation-of-injury standard. Pet. Br. at 85; Reply Br. 36. Petitioners also complain that, unless a trustee can find already-published scientific studies—field studies as well as controlled experiments—documenting the particular biological response complained of, the trustee must undertake such studies at its own expense, unreimbursed by the parties responsible for the spill. This, petitioners say, is contrary to the command of § 107(a)(C), which provides that responsible parties are liable for the reasonable costs of assessing damages. Pet. Br. 83.

#### A. The Regulations

Interior's regulations define an actionable "injury" as "a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource," resulting directly or indirectly from an oil spill or hazardous substance release. 43 C.F.R. § 11.14(v). For biological resources, an injury is deemed to have resulted from such a release if the concentration of the substance is sufficient to cause the resource or its offspring to suffer death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions, or physi-

cal deformations. *Id.* § 11.62(f)(1).<sup>50</sup> To determine whether a sufficient showing of causation has been made, the regulations establish the following acceptance criteria, all four of which must be met.

(i) The biological response is often the result of exposure to oil or hazardous substances. This criterion excludes biological responses that are caused predominantly by other environmental factors such as disturbance, nutrition, trauma, or weather. The biological response must be a commonly documented response resulting from exposure to oil or hazardous substances.

(ii) Exposure to oil or hazardous substances is known to cause this biological response in free-ranging organisms. This criterion identifies biological responses that have been documented to occur in a natural ecosystem as a result of exposure to oil or hazardous substances. The documentation must include the correlation of the degree of the biological response to the observed exposure concentration of oil or hazardous substances.

(iii) Exposure to oil or hazardous substances is known to cause this biological response in controlled experiments. This criterion provides a quantitative confirmation of a biological response occurring under environmentally realistic exposure levels that may be linked to oil or hazardous substances exposure that has been observed in a natural ecosystem. Biological responses that have been documented only in controlled experimental conditions are insufficient to establish correlation with exposure occurring in a natural ecosystem.

(iv) The biological response measurement is practical to perform and produces scientifically valid results. The biological response measurement must be sufficiently routine such that it is practical to perform the biological response measurement and to obtain scientifically valid results. To meet this criterion, the

<sup>50</sup> In addition to these "viability" injuries, a biological resource can be deemed injured if the concentration of the hazardous substance in the

organisms exceeds federal food and drug standards or state health standards for edible organisms.



biological response measurement must be adequately documented in scientific literature, must produce reproducible and verifiable results, and must have well defined and accepted statistical criteria for interpreting as well as rejecting results.

43 C.F.R. § 11.62(f)(2). In addition to meeting the acceptance criteria, the trustee must show a "statistically significant difference in the biological response between samples from populations in the assessment area and in the control area." 43 C.F.R. § 11.62(f)(3).

#### B. Analysis

[12] Petitioners argue that the acceptance criteria are contrary to the statutory command that the standard of proof of causation-of-injury under CERCLA be less strict than that required by the common law. We conclude that CERCLA is ambiguous on this point, and that Interior's reading of the Act—as retaining traditional causation analysis for determining whether a hazardous substance release caused a particular injury—is therefore permissible under *Chevron* Step Two. We also reject petitioners' argument that the acceptance criteria are unreasonable within the meaning of *Chevron*. As to the non-compensability of the costs of general scientific studies under § 107(a)(C), we conclude that the statute is ambiguous and that Interior's construction of it is a permissible one.

#### 1. CERCLA and the Common-Law Causation Standard

The statutory text of CERCLA provides no clues as to whether proof of causation-of-injury should be less strict than that required by the common law. Section 107(a)(C) provides that responsible parties are liable for damages for injury to natural resources "resulting from" a release of hazardous substances or oil. 42 U.S.C. § 9607(a)(C). Section 301(c)(2) offers no further guidance: the regulations under it must specify protocols for determining the type and extent of "both direct and indirect

injury, destruction, or loss." 42 U.S.C. § 9651(c)(2).

The legislative history is ambiguous, as well. The causation-of-injury issue must, of course, be viewed against the backdrop of Congress' general concern for liberalizing the standards of the common law. See, e.g., S.Rep. No. 848, *supra* note 10, at 13-14 ("[T]raditional tort law presents substantial barriers to recovery.... [C]ompensation ultimately provided to injured parties is generally inadequate."); see also *supra* note 38. There is little evidence, however, that Congress specifically intended to ease the standard of proof for showing that a particular spill caused a particular biological injury. The Congressional Research Service report cited by petitioners does discuss causation-of-injury standards as one of the then-existing obstacles to recovery under the common law, but it is largely descriptive, not critical. The report states:

[P]laintiffs in toxic pollution suits may have substantial difficulty in proving that a particular exposure to a pollutant was the cause in fact of an injury. The case studies reinforce the notion that such problems of proof can be significant barriers to recovery.

See Senate Comm. on Environment and Public Works, 96th Cong., 2d Sess., *Six Case Studies of Compensation for Toxic Substances Pollution: Alabama, California, Michigan, Missouri, New Jersey, and Texas; A Report Prepared Under the Supervision of the Congressional Research Service of the Library of Congress* 517 (Comm. Print 1980), J.A. 2893. A citation to it in the Senate CERCLA report<sup>51</sup> certainly does not rise to the level of an unambiguous signal that Congress wanted DOI to liberalize the common-law causation standard.

Additional evidence supports the proposition that CERCLA never declared itself on this matter. While debating the passage of CERCLA in 1980, Congress considered two provisions (one ultimately rejected and the

51. The Congressional Research Service study was commissioned by two Senate sponsors of CERCLA and was cited in the Senate Report

accompanying S. 1480. S.Rep. No. 848, *supra* note 10, at 320-21 & n. 4.

Cite as 880 F.2d 432 (D.C. Cir. 1989)

other ultimately enacted) both of which clearly called for liberalization of the traditional common-law causation standards in contexts other than the one at issue in this case.

First, Congress considered and rejected a nontraditional causation standard in relation to a never-enacted provision establishing liability for the medical expenses of persons injured by hazardous substance spills. An early bill contained the following provision:

(c) *Notwithstanding the ordinary requirements for proof of cause in fact or proximate cause of damage, injury, or loss, a person liable under this section for any discharge, release, or disposal of any hazardous substance shall be liable for all medical expenses under [never-enacted] subsection (a)(2)(F) of this section if a reasonable person could conclude that such medical expenses and the injury or disease which caused them are reasonably related to such discharge, release or disposal....*

S. 1480, 96th Cong., 1st Sess. § 4(c), reprinted in 1 *Legislative History, supra* note 19, at 171 (emphasis added). This suggests that, when it wanted to, Congress knew how to reject "the ordinary requirements" for proof of causation.

CERCLA as enacted contains another clear—if somewhat less explicit—rejection of traditional causation standards. Section 107's imposition of liability on the four enumerated classes of responsible parties<sup>52</sup> does not require in all cases that the defendant have in fact caused the release. *State*

*of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044-45 (2d Cir.1985). The *Shore Realty* court noted that the language of § 107(a)—which imposes liability on responsible parties connected with a vessel or facility "from which there is a release"—does not itself lay down a causation requirement. 759 F.2d at 1043 n. 16, 1044 & n. 18. The court went on to point out that each of the defenses to liability contained in § 107(b) "carves out from liability an exception based on causation." 759 F.2d at 1044. A defendant can make out a § 107(b) defense by showing that the substance release was caused solely by an act of God, an act of war, or the unforeseeable act or omission of a third person (other than an employee or agent of the defendant or one whose act occurs in connection with a contractual relationship with the defendant). 42 U.S.C. § 9607(b). Reading into § 107(a) a requirement that the defendant caused the substance release would thus render the § 107(b) defenses surplusage. The *Shore Realty* court concluded accordingly that a party who cannot make out a § 107(b) defense cannot avoid liability by arguing that it did not cause the substance release.<sup>53</sup> Since Congress made its modification of traditional causation standards clear in the *Shore Realty* context of the causal relation between a responsible party and a hazardous substance release, we find noteworthy its failure to similarly alter the traditional rules concerning the causal relation between a substance release and the biological injuries alleged to have resulted from it.<sup>54</sup>

52. Responsible parties include past and present owners of vessels and facilities; persons who arrange for the disposal, treatment or transport of hazardous substances; and transporters of hazardous substances. § 107(a), 42 U.S.C. § 9607(a).

53. The *Shore Realty* court also found evidence in the legislative history to bolster its conclusion. See 759 F.2d at 1044-45. The *Shore Realty* holding has found wide acceptance in the courts. See, e.g., *United States v. Miami Drum Services*, 25 *Envil.Rep.Cas.* (BNA) 1469, 1986 WL 15327 (S.D.Fla.1986); *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F.Supp. 984 (D.S.C.1984).

54. Petitioners refuse to acknowledge a difference between these two types of causation. See Reply Br. 37 n. 26 (arguing that "the operative [statutory] language" is the same in both contexts). In this they are mistaken. The *Shore Realty* line of cases involves the causal link between the defendant's acts and the substance release. The operative language is the "from which there is a release" phrase of § 107(a) and the contrasting language of § 107(b), which establishes defenses based on a showing that "the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by" an act of God, an act of war, or the unforeseeable acts of an unrelated third party. 42 U.S.C. § 9607(b). The issue in the present case involves the causal link be-

In sum, while we agree with petitioners that Congress expressed dissatisfaction with the common law as a norm in several areas of damage assessment, we conclude that CERCLA is at best ambiguous on the question of whether the causation-of-injury standard under § 107(a)(C) must be less demanding than that of the common law.<sup>55</sup> Consequently, we uphold Interior's plausible reading of CERCLA as adopting traditional causation standards in this context.

## 2. The Reasonableness Test

We also reject petitioners' argument that the acceptance criteria are unreasonably stringent. Indeed, it appears that the acceptance criteria will, in some cases, make a government trustee's job of proving causation relatively easy. DOI's listing of the 18 types of biological responses that are deemed to have fulfilled the acceptance criteria will certainly speed recovery in those cases. See 43 C.F.R. § 11.62(f)(4).<sup>56</sup>

We consider Interior's acceptance criteria to be a reasonable choice of a standard method for assessing harm to natural resources and to be generally in accord with congressional intent. See S.Rep. No. 848, *supra* note 10, at 85 (decrying "the absence of a standardized system for assessing [natural resource] damage which is effi-

cient as to both time and cost"). Their strictness may be justified as an attempt to effect Congress' intent that the "best available" methods of assessment be used in a statutory scheme that accords a presumption of correctness to damage assessments conducted in accordance with Interior's rules. §§ 301(c)(2), 107(f)(2)(C), 42 U.S.C. §§ 9651(c)(2), 9607(f)(2)(C). Biological responses for which there currently are inadequate data to satisfy the acceptance criteria are not rendered non-actionable by Interior's rules; the rules merely deprive the government trustee in such a case of § 107(f)(2)(C)'s rebuttable presumption.

"The acceptance criteria do not require absolute scientific certainty." 51 Fed.Reg. 27,710. It is sufficient that the response have been "predominately" caused by a substance release. *Id.* The prior studies and proof need not be on a chemical-specific or species-specific basis; the acceptance criteria can be satisfied by studies linking chemically similar substances to injuries in biologically similar species. See 51 Fed.Reg. 27,710.<sup>57</sup>

Finally, while Interior's rules appear to require that the field and laboratory studies corroborating the site-specific evidence of biological injury have been published in technical journals,<sup>58</sup> Interior's explanation

tween the substance release and the biological injuries alleged to have resulted from it. The operative language here is that of § 107(a)(C), which establishes liability for "injury to, destruction of, or loss of natural resources ... resulting from such a release." 42 U.S.C. § 9607(a)(C). *Shore Realty* does not address the issue presented in this case.

55. This ambiguity is not resolved in petitioners' favor by a floor comment made by a sponsor of SARA in 1986. See 132 Cong.Rec. S14931 (daily ed. Oct. 3, 1986) (remarks of Sen. Baucus). Although Senator Baucus criticized the acceptance criteria as "inordinately stringent," *id.*, SARA did not amend any of the CERCLA provisions pertaining to the causation-of-injury standard. (Nor is this an instance, as with the "lesser of" rule, where Congress made it clear that its failure to amend the operative language stemmed from its belief that the statutory language was clear all along. Cf. *supra* pp. 452-55.) Given that SARA left the relevant provisions unchanged, and given that the history of CERCLA's original passage in 1980 suggests Congress did not intend to diverge from the common-law causation-of-injury standard, Senator Baucus'

1986 comment does not compel the conclusion that the Act *unambiguously* requires a liberalization of traditional causation analysis.

56. Interior's rules do not limit the acceptance criteria to those 18 types of biological responses. A government trustee is free to develop its own list of biological responses that meet the acceptance criteria.

57. The possibility that scientific studies could make such substitutions and still fulfill the acceptance criteria should allay petitioners' concern that studies could never be performed on endangered species because doing so would involve harming some of the few remaining members of the species.

58. We do find the rules somewhat unclear as to exactly what, if anything, must have been published to be considered reliable under the rules. The acceptance criteria require that "the biological response measurement must be adequately documented in scientific literature." 43 C.F.R. § 11.62(f)(2)(iv). The preamble to the rules states that the acceptance criteria are designed



for that requirement is a reasonable one. In essence, the requirement of "adequate[ ] document[ation] in scientific literature" ensures that decisionmakers will not be misled by the *post hoc ergo propter hoc* fallacy—the fallacy of assuming that, simply because a biological injury occurred after a spill, it must have been caused by the spill. Interior correctly recognizes that attaching liability to injuries that bear only a speculative causal relationship to a particular substance release would run counter to Congress' desire for a "fair" damage assessment mechanism. S.Rep. No. 848, *supra*, at 85. Requiring that the site-specific evidence be corroborated by field and laboratory studies published in journals guarantees that scientific conclusions will have been aired publicly and will have been subjected to peer criticism before they are relied on in a CERCLA natural resource damages case. While, in our view, the requirement of publication is unusually stringent, we cannot say that it is an unreasonable policy choice. Consequently, we uphold that aspect of the acceptance criteria in accordance with *Chevron's* command.

### 3. Noncompensability of General Studies

[13] We also reject petitioners' challenge to Interior's contention that the costs of general studies are noncompensable under § 107(a)(C)'s provision for the recovery of reasonable assessment costs. Interior stated in its preamble to the final rules that "it is inappropriate that experimental research studies to advance general scientific understanding be included as a part of a specific natural resource damage claim." 51 Fed.Reg. 27,710. Although petitioners argue that this places an unfair financial burden on state and federal trustees, they do not persuade us that Interior's reading of CERCLA is incorrect or unreasonable.

to reject "biological responses for which a paucity of information exists in the technical literature." 51 Fed.Reg. 27,710. The preamble also states, in relation to the field and laboratory studies required by subparagraphs (ii) and (iii), that "[t]he Department recognizes the technical merit of the peer review process for publication of research findings." *Id.*

Indeed, Congress considered and rejected a provision that would have provided funding for scientific research concerning, *inter alia*, "the effects of hazardous substances on living and nonliving resources." S. 1480, 96th Cong., 2d Sess. § 6(a)(1)(I), reprinted in 1 *Legislative History, supra* note 19, at 524-25. That funding would have come out of Superfund in any event, rather than from the pockets of responsible parties,<sup>59</sup> but it suffices to note that Congress never enacted that version of S. 1480. Petitioners fail to produce any evidence that Congress intended general research on the biological effects of hazardous substance spills to be compensable under the assessment costs provision of § 107(a)(C).

## XI. AUDIT REQUIREMENTS

[14] State and Environmental Petitioners challenge Interior's regulations requiring states to adopt a series of accounting and planning procedures that must be used in handling the proceeds from any natural resource damage claims. See 43 C.F.R. §§ 11.92, 11.93. They argue that DOI exceeded the rulemaking authority granted it in CERCLA, and that the rules usurp state sovereign powers by "micromanag[ing] State accounting and planning procedures." Pet. Br. 86-87.

DOI's rulemaking authority derives from § 301(c) of CERCLA, which provides that officials designated by the president "shall promulgate regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance for the purposes of this chapter." 42 U.S.C. § 9651(c). To be valid, the accounting regulations must be "reasonably related to the purposes of the enabling legislation." *Community for Creative Non-Violence v. Kerrigan*, 865 F.2d 382, 385 (D.C. Cir. 1989), quoting *Mourning v. Family Publications*

59. S. 1480 was proposed in 1980, long before SARA added the § 111(b)(2) requirement that a trustee exhaust all efforts at obtaining the amount of a Superfund claim from parties who are liable under § 107.

*Serr, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318 (1973). Regulations are in excess of statutory authority "if they 'bear[] no relationship to any recognized concept of' the particular statutory terms at issue." *Planned Parenthood Federation of America v. Heckler*, 712 F.2d 650, 655 (D.C.Cir.1983), quoting *Batterton v. Francis*, 432 U.S. 416, 428, 97 S.Ct. 2399, 2407, 53 L.Ed.2d 448 (1977). Although petitioners argue that the handling of recovered damages is entirely unrelated to "the assessment of damages," we deem the relationship between the two to be sufficiently close to bringing the regulations under the statutory language.

Moreover, the standardization of accounting and planning procedures for recovered damages is a reasonable goal that is entirely consistent with the statutory purpose. CERCLA provides that funds recovered by state trustees can be spent only on restoration, replacement or acquisition of equivalent resources. § 107(f)(1), 42 U.S.C. § 9607(f)(1). Funds cannot be spent until a plan has been developed and adopted by all the affected state and federal authorities. § 111(i), 42 U.S.C. § 9611(i). The legislative history of the 1986 SARA amendments underscores Congress' determination that recovered sums be spent solely on restoration, replacement or acquisition and that expenditures be carefully planned. See H.R.Rep. No. 253(IV), *supra* note 8, at 49-50, 53. State governments can hardly be heard to complain about intrusion into their sovereign spheres when they seek to recover damages under a federal statute that limits the uses to which those damages can be put. DOI's promulgation of accounting and planning requirements is a perfectly sensible means of ensuring that state trustees obey the statutory command.

## XII. PUNITIVE DAMAGES

[15] State and Environmental Petitioners challenge the regulations' failure to provide for the recovery of punitive damages. Arguing that CERCLA does not clearly preclude recovery of punitive damages, petitioners apparently reason from

that proposition that Interior must provide for punitive damages. That, of course, misses the point of *Chevron*. Even accepting petitioners' assertion that Congress did not decide whether punitive damages would be available, petitioners would have to show that DOI's exclusion of punitive damages is unreasonable or contrary to the statutory purpose—a showing that would be difficult to make.

The fatal blow to petitioners' position, however, is the evidence that Congress did make a conscious determination that punitive damages would be generally unavailable. CERCLA is replete with indications that Congress intended to provide for compensatory damages only. The most critical indication of this is contained in § 301(c), which provides that the regulations are to identify

the best available procedures to determine such damages, including both direct and indirect injury, destruction or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.

42 U.S.C. § 9651(c). There would be no need to establish the "best available procedures" to measure compensatory damages if a rounded-off punitive damages figure could be assessed against a responsible party as well. Further evidence of congressional intent is furnished by the express provision for punitive damages where a responsible party refuses to comply with removal or remedial action orders. See § 107(c)(3), 42 U.S.C. § 9607(c)(3). The fact that Congress provided for punitive damages in that specific context but not in all natural resource damage actions indicates clearly—especially when viewed alongside all the other evidence—that Congress intended the general measure of damages to be compensatory, not punitive. Interior's reading of the statute is correct under the first prong of *Chevron*, and petitioners' challenge fails.

## XIII. CONTINGENT VALUATION

### A. The Regulatory Background

[16] When a natural resource is injured by a discharge of oil or release of a hazard-

ous substance, an authorized official<sup>60</sup> assesses the damages resulting.<sup>61</sup> DOI has prescribed methodologies for estimating in any such instance the amount of money to be sought as recompense. Either DOI's restoration methodology<sup>62</sup> or one of its use methodologies<sup>63</sup> must be employed in calculations of damages.<sup>64</sup> The issue we now address concerns one of the latter.

DOI's natural resource damage assessment regulations define "use value" as the value to the public of recreational or other public uses of the resource, as measured by changes in consumer surplus, any fees or other payments collectable by the government or Indian tribe for a private party's use of the natural resource, and any economic rent accruing to a private party because the government or Indian tribe does not charge a fee or price for the use of the resource.<sup>65</sup>

The regulations provide several approaches to use valuation. When the injured resource is traded in a market, the lost use value is the diminution in market price.<sup>66</sup> When that is not precisely the case, but similar resources are traded in a market, an appraisal technique may be utilized to determine damages.<sup>67</sup> When, however, neither of these two situations obtains, non-marketed resource methodologies are avail-

able.<sup>68</sup> One of these is "contingent valuation" (CV), the subject of controversy here.

The CV process "includes all techniques that set up hypothetical markets to elicit an individual's economic valuation of a natural resource."<sup>69</sup> CV involves a series of interviews with individuals for the purpose of ascertaining the values they respectively attach to particular changes in particular resources. Among the several formats available to an interviewer in developing the hypothetical scenario embodied in a CV survey are direct questioning, by which the interviewer learns how much the interviewee is willing to pay for the resource; bidding formats, for example, the interviewee is asked whether he or she would pay a given amount for a resource and, depending upon the response, the bid is set higher or lower until a final price is derived; and a "take or leave it" format, in which the interviewee decides whether or not he or she is willing to pay a designated amount of money for the resource.<sup>70</sup> CV methodology thus enables ascertainment of individually-expressed values for different levels of quality of resources, and dollar values of individuals' changes in well-being.<sup>71</sup> The regulations also sanction resort to CV methodology in determining "option"<sup>72</sup> and

60. "Authorized official" means the Federal or State official to whom is delegated the authority to act on behalf of the Federal or State agency designated as trustee, or an official designated by an Indian tribe, pursuant to section 126(d) of CERCLA, to perform a natural resource damage assessment." 43 C.F.R. § 11.14(d) (1988). See also CERCLA § 107(f)(2), 42 U.S.C. § 9607(f)(2) (Supp. IV 1986).

61. 43 C.F.R. § 11.80(a)(1) (1988).

62. *Id.* § 11.81.

63. *Id.* § 11.83.

64. *Id.* § 11.80(c).

65. *Id.* § 11.83(b)(1).

66. *Id.* § 11.83(c)(1).

67. *Id.* § 11.83(c)(2).

68. *Id.* § 11.83(d).

69. *Id.* § 11.83(d)(5)(i).

70. Type B Technical Information Document; "Techniques to Measure Damages to Natural Resources," DOI CERCLA 301 Project (1987) at 2-35-2-36, J.A. 850-851 [hereinafter Type B Technical Information Document]. This document was prepared by DOI to accompany the Type B rules. See Natural Resource Damage Assessments, Final Rule, 51 Fed.Reg. 27,720 (1986) [hereinafter Final Rule].

See also R. Bishop & T. Heberlein, *The Contingent Valuation Method* (paper presented at National Workshop on Non-Market Valuations Methods and Their Use in Environmental Planning, University of Canterbury, New Zealand (December 2-5, 1985)) (discussing bidding game, open-ended question, payment-card, dichotomous-choice and contingent ranking formats) at 7-11, J.A. 3017-3022.

71. Type B Technical Information Document, *supra* note 70, at 2-31, 2-32, J.A. 846, 847.

72. Option value is the dollar amount an individual is willing to pay although he or she is not currently using a resource but wishes to reserve the option to use that resource in a certain state of being in the future. Final Rule, *supra* note



"existence" values.<sup>74</sup>

Industry Petitioners' <sup>75</sup> complaint is limited to DOI's inclusion of CV in its assessment methodology.<sup>76</sup> They claim fatal departures from CERCLA on grounds that CV methodology is inharmonious with common law damage assessment principles, and is considerably less than a "best available procedure."<sup>77</sup> These petitioners further charge that DOI's extension of CERCLA's rebuttable presumption to CV assessments is arbitrary and capricious, and violative of the due process rights of a potentially responsible party. We find none of these challenges persuasive.

#### B. Consistency With CERCLA

Industry Petitioners point out that at common law there can be no recovery for speculative injuries, and they contend that CV methodology is at odds with that principle. CV methodology, they say, is rife with speculation, amounting to no more than ordinary public opinion polling.

70, 51 Fed.Reg. at 27,692, 27,721. For example, an individual who does not plan to use a beach or visit the Grand Canyon may nevertheless place some value on preservation of the resource in its natural state for personal enjoyment in the event of a later change of mind.

73. Existence value is the dollar amount an individual is willing to pay although he or she does not plan to use the resource, either at present or in the future. The payment is for the knowledge that the resource will continue to exist in a given state of being. Final Rule, *supra* note 70, 51 Fed.Reg. at 27,692, 27,721. Though lacking any interest in personally enjoying the resource, an individual may attach some value to it because he or she may wish to have the resource available for others to enjoy.

74. 43 C.F.R. § 11.84(d)(5)(i) (1988).

75. Industry Petitioners are the Chemical Manufacturers Association, the Dana Corporation, and the Public Service Electric and Gas Company. The Chemical Manufacturers Association consists of 75 national and multinational corporations producing chemicals. The Dana Corporation, a manufacturer, has 44 American subsidiaries and affiliates, and 116 foreign subsidiaries and affiliates. Public Service Electric and Gas Company is a utility licensed to supply electricity and gas in New Jersey, and has two subsidiaries.

76. We have found DOI's current hierarchy of use values inconsistent with CERCLA. See Part

We have already noted our disagreement with the proposition that the strictures of the common law apply to CERCLA.<sup>78</sup> That much of industry petitioners' argument to the contrary thus fades away. CERCLA does, however, require utilization of the "best available procedures" for determinations of damages flowing from destruction of or injury to natural resources,<sup>79</sup> and Industry Petitioners insist that CV methodology is too flawed to qualify as such. In their eyes, the CV process is imprecise, is untested, and has a built-in bias and a propensity to produce overestimation.

It cannot be gainsaid that DOI's decision to adopt CV was made intelligently and cautiously. DOI scrutinized a vast array of position papers and discussions addressing the use of CV.<sup>80</sup> It recognized and acknowledged that CV needs to be "properly structured and professionally applied."<sup>81</sup> It eliminated a feature of CV, as originally proposed, that might have resulted in overly high assessments.<sup>82</sup> We find DOI's pro-

VI *supra*. This does not affect the manner in which the CV methodology operates, or whether it produces sufficiently accurate results to be included in the regulations.

77. Industry Petitioners also contend that DOI's natural resource damage assessment regulations are invalid to the extent that they authorize resort to CV methodology for purposes of calculating option and existence values. These, they assert, are nonuse values, and as such are not allowable under CERCLA. It suffices to point out that we have already rejected this conclusion. See Part VI *supra*. Option and existence values are non-consumptive values compensable under the terms of CERCLA.

78. See Part III(c)(3)(a) *supra*.

79. CERCLA § 301(c)(2), 42 U.S.C. § 9651(c)(2) (1982).

80. See *infra* note 83.

81. Final Rule, *supra* note 70, 51 Fed.Reg. at 27,721.

82. DOI, in the face of critical comments, "recognize[d] that the application of willingness-to-accept," formerly a factor in option and existence valuation, "can lead to more technical difficulties and uncertainties than willingness-to-pay." Final Rule, *supra* note 70, 51 Fed.Reg. at 27,721. The conclusion was reached that, as studies

mulgation of CV methodology reasonable and consistent with congressional intent, and therefore worthy of deference.

The primary argument of Industry Petitioners is that the possibility of bias is inherent in CV methodology, and disqualifies it as a "best available procedure." In evaluating the utility of CV methodology in assessing damages for impairment of natural resources, DOI surveyed a number of studies which analyzed the methodology, addressed the shortcomings of various questionnaires, and recommended steps needed to fashion reliable CV assessments.<sup>83</sup> For example, an early study by the Water Resources Council advised that questions in CV surveys be "carefully designed and pretested,"<sup>84</sup> a warning DOI was quick to heed.<sup>85</sup>

Industry Petitioners urge, however, that even assuming that questions are artfully drafted and carefully circumscribed, there is such a high degree of variation in size of the groups surveyed, and such a concomitant fluctuation in aggregations of damages, that CV methodology cannot be considered a "best available procedure."<sup>86</sup> We think this attack on CV methodology is insufficient in a facial challenge to invali-

date CV as an available assessment technique. The extent of damage to natural resources from releases of oil and hazardous substances varies greatly, and though the impact may be widespread and severe, it is in the mission of CERCLA to assess the public loss.<sup>87</sup> Certainly nothing in CV methodology itself shapes the injury inflicted by an environmental disaster, or influences identification of the population affected thereby. The argument of Industry Petitioners strikes at CERCLA, not CV's implementation, and can appropriately be considered only by Congress.

Similarly, we find wanting Industry Petitioners' protest that CV does not rise to the status of a "best available procedure" because willingness-to-pay—a factor prominent in CV methodology—can lead to overestimates by survey respondents. The premise of this argument is that respondents do not actually pay money, and likely will overstate their willingness-to-pay. One study relied upon by Industry Petitioners<sup>88</sup> hypothesizes that respondents may "respond in ways that are more indicative of what they would like to see done than how they would behave in an actual mar-

indicated, use of willingness-to-accept—meaning an individual is to be paid to forfeit his interest in a resource, as opposed to the individual himself paying to preserve that interest—yielded disproportionately high dollar assessments. For example, one study showed that actual payments for goose hunting licenses were \$880,000 while willingness-to-sell was \$1,411,000, and willingness-to-pay was only \$293,000. See Bishop & Heberlein, *Measuring Values of Extra Market Goods: Are Indirect Measures Biased?*, 61 *Amer.J.Agric.Econ.* 926 (1979).

83. DOI examined 23 CV studies, in each of which the analysis included the implications of CV use in valuing damaged natural resources. Type B Technical Information Document, *supra* note 70, at 2-40-2-43, J.A. 855-857. DOI also consulted 323 articles and studies relating to natural resource assessments, including many treatises addressing CV methodology, and compiled them in an annotated bibliography. *Id.* at A-3-A-66, J.A. 862-925.

84. Water Resources Council Procedures, 44 Fed. Reg. 72,892, 72,958, Subpart K, App. 2, § (a)(3) (1979).

85. Final Rule, *supra* note 70, 51 Fed.Reg. at 27,721.

86. Industry Petitioners cite a study estimating the combined option and existence values to Texas residents of whooping cranes at \$109,000,000 (13.9 million Texas residents × \$7.13). The estimate rested upon responses to a survey eliciting the amount an individual would pay for a permit to visit the National Wildlife Refuge where the whooping crane winters. Had the survey been nationwide in scope, the estimate would have been \$1.58 billion. Brief for Industry Petitioners at 14 n. 24 (referring to J. Stoll & L. Johnson, *Concepts of Value, Non-market Valuation, and the Case of the Whooping Crane* (Natural Resources Working Paper Series, National Resource Workgroup, Dep't of Agricultural Economics, Texas A & M Univ.) (1984) at 23-24, J.A. 2828-2829).

87. Thus, in the whooping crane scenario referred to by Industry Petitioners, see note 86 *supra*, the intent of CERCLA would be realized, not contravened, by a more expansive survey and a correspondingly higher assessment of damages if people beyond the borders of Texas were affected.

88. Bishop & Heberlein, *supra* note 82, at 926.

ket,"<sup>89</sup> and also observes that the converse is possible.<sup>90</sup> The simple and obvious safeguard against overstatement, however, is more sophisticated questioning. Even as matters now stand, the risk of overestimation has not been shown to produce such egregious results as to justify judicial overruling of DOI's careful estimate of the caliber and worth of CV methodology.<sup>91</sup>

Industry Petitioners' also challenge the use of CV after an oil leak or a hazardous waste release has occurred. They fear that application of CV methodology in those circumstances is fraught with a significant bias leading to overvaluation of the damaged resources. As a practical matter, it would be prohibitively expensive, if not physically impossible, to solicit individual valuations of each and every natural resource, or even a sizeable number thereof, in order to avoid any upward bias in the event that the resource is later damaged. Moreover, in light of CERCLA's preference for restoration, it would be a terrible waste of time and energy to conduct broad-scale valuation interviewing beforehand. While, depending on whether interviewing occurs before or after damage, the results may differ somewhat, that alone does not reduce CV methodology to something less than a "best available procedure." We have no cause to overturn DOI's considered judgment that CV methodology, when

properly applied, can be structured so as to eliminate undue upward biases.

We sustain DOI in its conclusion that CV methodology is a "best available procedure." As such, its conclusion in the Natural Resource Damage Assessment regulations was entirely proper.

#### C. Presumption of Validity of CV Assessments

[17] Industry Petitioners mount two challenges to the rebuttable presumption that CERCLA confers upon natural resource damage assessments.<sup>92</sup> They argue that DOI did not respond fully to their comments regarding CV methodology, with the result that attachment of the presumption to a CV assessment would be arbitrary and capricious. They also contend that inclusion of the presumption is an infringement of a potentially responsible party's due process rights.

CERCLA accords a rebuttable presumption to determinations and assessments of damages to natural resources when made "in accordance with [DOI's] regulations."<sup>93</sup> The regulations contain a similar provision.<sup>94</sup> Industry Petitioners charge that DOI did not respond adequately to the criticisms they leveled at CV methodology. They further charge that DOI's justification for the use of CV to measure option

*Id.* at 33, J.A. 2309. The study further reported that "while contingent valuation appears to be biased even under the best circumstances, the degree of bias does not appear to be sufficient to rule out the results in public decision-making. In our judgment, contingent valuation is a promising approach to the valuation of non-market commodities." *Id.*

89. *Id.* at 927.

90. The study states that if people believe (correctly or incorrectly) that their responses will influence actual fees they may be more concerned about keeping their fees low than revealing their true values to the investigator.

*Id.* at 927. Another study acknowledges that respondents may have an incentive to overstate, but likewise remarks that an incentive to understate exists equally. See E. Yang, R. Dower & M. Menefee, *The Use of Economic Analysis in Valuing Natural Resource Damages, An Overview*, *Env'tl. Law Inst.* 1, 59 (grant paper) (1983), J.A. 2843, 2851.

91. A third study cited by Industry Petitioners, R. Bishop, T. Heberlein, M. Welsch & R. Baumgartner, *Does Contingent Valuation Work? Results of the Sandhill Experiment* (research paper delivered at Cornell University) (Aug. 5-8, 1984), J.A. 2277, concludes that "although contingent valuation is somewhat inaccurate, we have been surprised at how well it performed."

92. "Any determination or assessment of damages to natural resources for the purposes of this chapter and section 1321 of Title 33 [the Clean Water Act] made by a Federal or State trustee in accordance with the regulations promulgated under section 9651 of this title shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of Title 33." 42 U.S.C. § 9607(f)(2)(C) (Supp. IV 1986).

93. *Id.*

94. 43 C.F.R. § 11.91(c) (1988).



and existence values was insufficient, and that the bestowal of the presumption in these circumstances was arbitrary and capricious.

A leading concern voiced by Industry Petitioners was that CV had never been employed to assess damages for injury to a natural resource, and the untested and hypothetical nature of CV methodology was also disturbing to them. A second concern that these petitioners believe went unaddressed was that DOI had not delineated when or how CV might be utilized, and thus had left potentially responsible parties without guidance on that score. DOI's response is that it dealt with each in a comprehensive and understandable manner.

Agency action is arbitrary or capricious if the agency has

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of a problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference, in view or the product of agency expertise.<sup>95</sup>

And when an agency relies upon an economic model, it is incumbent upon it to "provide a full and analytical defense" of the model.<sup>96</sup> Use of a predictive model acknowledges implicitly that there are instances in which various factors will affect

the outcome, and the agency must "explain[] the assumptions and methodology it used in preparing the model."<sup>97</sup> On the other hand, the agency's choice of model and its application must be respected when the record discloses that the agency "examine[d] the relevant data and articulate[d] a reasoned basis for its decision."<sup>98</sup>

In the case before us, CV methodology was thoroughly investigated, comments were analyzed and dealt with, and changes were made to refine the use of CV. The record does not support the claim that DOI's treatment of industry petitioners' comments was arbitrary or capricious.

Industry Petitioners also perceive a lack of guidance by DOI on the ways in which CV methodology may be employed. This critique ignores the fact that the scenarios of natural resource damage are myriad. DOI responded to comments on CV, including those seeking more information on utilization of CV methodology.<sup>99</sup> As DOI explained, the propriety and form of CV is largely shaped by the nature and extent of the environmental mishap.<sup>100</sup> For example, a representative population for survey purposes cannot be determined prior to damage to a resource; only the scope of an accident will provide the information needed to design a survey covering the population.<sup>101</sup> The physical area damaged may also weigh in the determination of whether to conduct in-person, telephone, or mail surveys,<sup>102</sup> though DOI has expressed a pref-

<sup>95</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2867, 77 L.Ed.2d 443, 458 (1983).

<sup>96</sup> *Eagle-Picher Indus. v. EPA*, 245 U.S.App.D.C. 179, 195, 759 F.2d 905, 921 (1985) (footnote omitted).

<sup>97</sup> *Id.* at 195, 759 F.2d at 921 (footnote omitted).

<sup>98</sup> *NRDC v. Herrington*, 247 U.S.App.D.C. 340, 370, 768 F.2d 1355, 1385 (1985); see also *Eagle-Picher Indus. v. EPA*, *supra* note 96, 245 U.S.App.D.C. at 195-196, 759 F.2d at 921-922; *Small Refiner Lead Phase-Down Task Force v. EPA*, 227 U.S.App.D.C. 201, 203, 705 F.2d 506, 535 (1983); *Sierra Club v. Costle*, 211 U.S.App.D.C. 336, 370-371, 657 F.2d 298, 332-333 (1981); *American Pub. Gas Ass'n v. FPC*, 186 U.S.App.D.C. 23, 54, 567 F.2d 1016, 1037 (1977).

<sup>99</sup> See Final Rule, *supra* note 70, 51 Fed.Reg. at 27,720-27,722. See also Type B Technical Information Document, *supra* note 70, at iii, J.A. 816.

<sup>100</sup> See Final Rule, *supra* note 70, at 27,720.

<sup>101</sup> DOI reasserted on numerous occasions that selections of methodologies and their application pivoted on the scope of injury, which necessitated case-by-case determinations by the authorized official. See Final Rule, *supra* note 70, at 27,720-27,722.

<sup>102</sup> Type B Technical Information Document, *supra* note 70, at 2-39, J.A. 854. At the outset the group comprising a representative population of affected individuals must be chosen. Although in-person interviews were seen as being generally more reliable, telephone and mail surveys may be resorted to equally.

erence for in-person interviews.<sup>103</sup> In sum, DOI recognized the need for flexibility and a case-by-case approach to surveys, and concluded that CV methodology could be utilized as a "valid, proven technique[]" when properly structured and professionally applied.<sup>104</sup> We find that the regulations provide sufficient guidance concerning the use of CV.

We perceive no greater merit in Industry Petitioners' substantive and procedural due process assaults upon attachment of the rebuttable presumption to CV assessments pursuant to DOI's regulations. The substantive due process challenge has not surmounted the presumption of constitutionality afforded statutes affecting economic regulation. As the Supreme Court has declared,

[i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.<sup>105</sup>

We see nothing arbitrary or irrational about the rebuttable presumption conferred upon natural resource assessments, including those utilizing CV methodology. On the contrary, the procedures preconditioning damage assessments<sup>106</sup> support the logic of the presumption, without which

would loom the specter of prolonged battles of experts and other heavy burdens on the calendars of adjudicating tribunals.

The procedural due process claim concentrates on the role of the authorized official<sup>107</sup> in damage assessment proceedings. Deeming the official an interested party with discretionary power to exclude potentially responsible parties from the assessment process, Industry Petitioners assert a violation of their procedural due process rights in light of the presumption accorded CV assessments. To be sure, the official is under a duty to assess the injury to natural resources and collect damages therefor, and to that extent he or she is an interested party. We do not agree, however, that potentially responsible parties will be totally excluded from participation in the proceedings forerunning a damage determination.<sup>108</sup> Nor do we agree that the coupling of the rebuttable presumption to a CV damage determination contravenes procedural due process standards.

Industry Petitioners bottom their due process thesis on *United Retail & Wholesale Employees v. Yahn & McDonnell, Inc.*,<sup>109</sup> wherein the Third Circuit invalidated a provision of the Multiemployer Pension Plan Amendments of 1980<sup>110</sup> which conferred a rebuttable presumption of validity upon the amount determined by pension fund trustees to be owing by a withdrawing employer. The court found a con-

103. *Id.*

104. Final Rule, *supra* note 70, 51 Fed.Reg. at 27,721.

105. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752, 766 (1976) (citations omitted).

106. See 43 C.F.R. §§ 11.23-11.25 (the preassessment screen: generally, information on the site, preliminary identification of resources potentially at risk); §§ 11.30-11.35 (the assessment plan: generally, content, development, deciding on Type A or Type B assessments, confirmation of exposure, economic methodology determination); §§ 11.61-11.64 (injury determination phase: generally, injury definition, pathway determination, testing and sampling methods); and §§ 11.70-11.73 (quantification phase: generally, service reduction quantification, baseline services determination, resource recoverability analysis).

107. See note 60 *supra*.

108. The regulations provide for notice to potentially responsible parties that the official will perform an assessment, 43 C.F.R. § 11.32(a)(2)(B) (1988); public involvement in reviewing the assessment plan, including involvement by potentially responsible parties, *id.* § 11.32(c)(1); and participation by potentially responsible parties, at the option and under the supervision of the official, in the assessment itself, *id.* § 11.32(d). Potentially responsible parties must thus be indulged significant opportunities for involvement and input into the assessment process.

109. 787 F.2d 128 (3rd Cir.1986), *aff'd without opinion by an equally divided court*, 481 U.S. 735, 107 S.Ct. 2171, 95 L.Ed.2d 692 (1987).

110. 29 U.S.C. § 1401(a)(3)(A) (1982).

lict of interest arising from the fact that "as fiduciaries of the plan, trustees have a natural inclination and may even consider it a duty to maximize the fund by extracting as much money as possible from withdrawing employers."<sup>111</sup> Additionally, the trustees would become personally liable if the plan were not adequately funded, and naturally had an interest in protecting themselves.<sup>112</sup> The case before us is quite different. Authorized officials without fault do not become personally liable should damages assessed or recovered turn out to be inadequate, nor do they have any other sort of personal stake in the determination or recovery. The purpose of such an assessment is to ascertain the amount of compensation due the public for an injury to the public's natural resources, and all sums recovered must be devoted to restoration of damaged resources or acquisition of equivalents.<sup>113</sup> We conclude that Industry Petitioners' procedural due process challenge must fail.

#### XIV. CONCLUSION

DOI's Type B Natural Resource Damage Assessment Regulations are upheld on review as to the following issues: the "committed use" requirement (Part V), the adoption of a ten percent discount rate (Part VII), the treatment of potentially responsible parties (Part VIII), the limitation on recovery of assessment costs (Part IX), the acceptance criteria (Part X), the audit requirements (Part XI), the unavailability of punitive damages (Part XII), and the adoption of contingent valuation methodology (Part XIII). We grant the petition for review with respect to the "lesser of" rule (Part III) and the hierarchy of assessment methods (Part VI). We also remand the public ownership rule (Part IV) for DOI's reasoned consideration and explanation. We instruct DOI to proceed as expeditious-

ly as possible in issuing new regulations in conformance with this opinion.

*It is so ordered.*



STATE OF COLORADO, Petitioner,

v.

UNITED STATES DEPARTMENT OF the INTERIOR, and Manuel Lujan, Jr., Secretary of the United States Department of the Interior, Chemical Manufacturers Association and American Petroleum Institute, Intervenor.

NATIONAL WILDLIFE FEDERATION, Public Citizen, Inc., and Environmental Defense Fund, Petitioners,

v.

UNITED STATES DEPARTMENT OF the INTERIOR, Chemical Manufacturers Association and American Petroleum Institute, Intervenor.

Nos. 87-1265, 87-1266.

United States Court of Appeals,  
District of Columbia Circuit.

Argued Feb. 22, 1989.

Decided July 14, 1989.

State and environmental groups petitioned for judicial review of "type A" rules promulgated by Department of Interior pursuant to CERCLA. The Court of Appeals, Mikva, Circuit Judge, held that: (1) regulations were proper in respect to their scope, and (2) remand was required to permit development of standard procedures

111. *United Retail & Wholesale Employees v. Yahn & McDonnell*, *supra* note 109, 787 F.2d at 138.

112. *Id.* at 139-40. But see *Washington Star Co. v. International Typographical Union Negotiated*

*Pension Plan*, 235 U.S.App.D.C. 1, 10, 729 F.2d 1502, 1511 (1984).

113. CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1) (Supp. IV 1986).

ATTORNEY GENERAL



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precondition of the sale that the financial world view the transaction as a mere "pooling of interests," and that the Internal Revenue Service view it as a simple change in corporate form. As the *Cincoos* court observed in holding a company liable although its parent's stock was used to purchase the assets of its predecessor:

It is difficult to understand how the transaction delineated by the Agreement can be a mere sale of assets for purposes of a transfer of liability for obligations and at the same time a tax exempt exchange under 26 U.S.C. sec. 368(a) which cannot be a mere purchase of assets.

*Cincoos*, 400 F.Supp. at 581; see also *In re Master Key Antitrust Litigation*, 1977-1 Trade Cases (CCH) at 71,734 (holding that a transaction was a *de facto* merger for the purposes of imposing antitrust liability on the successor corporation in part because the transaction was structured as a reorganization to take advantage of section 368(a)(1)(C) tax breaks).

In summary, this Court will not enforce Aerovox's attempt to separate the burdens from the benefits of acquiring Belleville. The transaction was structured to provide the maximum continuity possible. Aerovox continued to trade on the goodwill built up by Belleville and remained to its customers and creditors an essentially unchanged company. But for the putative disclaimer of PCB liability, the transaction was indistinguishable from a *de jure* merger.<sup>15</sup> It would be manifest injustice under these circumstances to permit Aerovox to contract away Belleville's liability for PCB contamination. However, as *de facto* merger is an equitable doctrine, the Court believes it is appropriate under the circumstances, so long as no additional burden of proof is placed upon the plaintiffs, to re-

quire that the assets of Belleville must first be looked to to satisfy any damages resulting from the releases of Belleville. That said, the Court leaves until further hearing a decision on the burden each party will bear at trial.



IN RE ACUSHNET RIVER & NEW BED-  
FORD HARBOR: PROCEEDINGS  
RE ALLEGED PCB POLLUTION.

Civ. A. No. 83-3882-Y.

United States District Court,

D. Massachusetts.

April 27, 1989.

United States and one defendant in complex environmental litigation petitioned for approval of proposed partial settlement decree involving defendant's liability for injury to natural resources allegedly caused by release of PCBs during its operation of manufacturing plant. Wildlife federation moved to intervene. Nonsettling defendant moved to impose conditions on approval of proposed decree and to hold evidentiary hearing. The District Court, Young, J., held that: (1) wildlife organization was entitled to permissive intervention for limited purposes of arguing legal requirements applicable to any consent decree, appropriate measure of natural resources damages and legal requirements for cleanup; (2) settling defendant was entitled to protection from contribution liability.

15. The foregoing analysis, establishing that this transaction was a *de facto* merger, also establishes that Aerovox, the purchaser corporation, is a mere continuation of Belleville, the seller corporation. Thus, the transaction falls within the continuation exception to the general rule of purchaser nonliability, as well as the *de facto* merger exception.

Indeed, the distinction between the two exceptions seems more apparent than real. Upon examination, the *de facto* merger exception sub-

sumes the continuation exception. See, e.g., *Dryden*, 739 F.2d at 693 (holding that "The key element of a 'continuation' is a common identity of the officers, directors and shareholders in the selling and purchasing corporations") quoting *Leaves v. Cincinnati, Inc.*, 565 F.2d 437, 440 (7th Cir.1977); *Lumbar v. Mag-NA*, 621 F.Supp. 1529, 1535 (S.D.N.Y.1985) (holding that "[f]or a *de facto* merger to occur, there must be continuity of the successor and predecessor corporations").

ty to nonsettlers if settlement was fair, adequate and reasonable; (3) proposed decree could not be approved until federal natural resources trustees agreed to covenant not to sue; and (4) proposed decree did not include "reopener" provision to permit United States to sue settling defendant for presently unknown damages caused by release of PCBs.

Ordered accordingly.

### 1. Federal Civil Procedure ¶320

In addition to considering whether motion for permissive intervention is timely, federal district court must consider nature and extent of intervenor's interest, whether intervention will unduly delay or prejudice adjudication of rights of original parties, whether applicant will benefit by intervention, whether intervenor's interests are adequately represented by other parties and whether intervenors will significantly contribute to full development of underlying factual issues and just and equitable adjudication of legal questions presented. Fed. Rules Civ. Proc. Rule 24(b), 28 U.S.C.A.

### 2. Federal Civil Procedure ¶320

Wildlife organization's motion for permissive intervention in environmental litigation dealing with injury to natural resources was not untimely, even though it was brought more than three and one-half years after suit was commenced, where organization believed itself adequately represented by state and federal governments until proposed partial settlement was announced. Fed. Rules Civ. Proc. Rule 24(b), 28 U.S.C.A.

### 3. Federal Civil Procedure ¶320

Wildlife organization would be permitted to intervene in environmental litigation three and one-half years after suit was commenced where, because of proposed partial settlement agreement, state and federal governments no longer adequately represented organization's interests in matter, given substantial divergence in their views on natural resources damages and cleanup; intervention would not delay matters for existing parties and would provide guidance to court on extremely complex

legal and factual issues. Fed. Rules Civ. Proc. Rule 24(b), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

### 4. Health and Environment ¶25.5(10)

Comprehensive Environmental Response, Compensation, and Liability Act defendants are jointly and severally liable. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., as amended, 42 U.S.C.A. § 9601 et seq.

### 5. Contribution ¶8

Federal district court is obligated to interpret contribution provisions of Comprehensive Environmental Response, Compensation and Liability Act to avoid frustration of Act's remedial purpose of encouraging settlement by preventing nonsettlers from seeking contribution from settlers and promoting expeditious resolution of harmful environmental conditions. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101 et seq., 113(f)(2), as amended, 42 U.S.C.A. §§ 9601 et seq., 9613(f)(2).

### 6. Statutes ¶306

Court should not construe statute so as to render any of it a nullity.

### 7. Compromise and Settlement ¶15(1)

Sovereigns were not responsible for bearing loss caused by discounted settlement of natural resources damages to one of several joint tortfeasors in suit under Comprehensive Environmental Response, Compensation, and Liability Act, where statute specifically provided that settlor's settlement "reduced" potential liability of nonsettling defendants by amount of settlement only. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 113(f)(2), as amended, 42 U.S.C.A. § 9613(f)(2).

### 8. Compromise and Settlement ¶15(1)

Comprehensive Environmental Response, Compensation, and Liability Act does not limit use of covenant not to sue as part of settlement to those instances where potentially responsible party agrees to ful-

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ly restore damaged natural resources, but does require United States to drive hardest bargain it can; thus, partial settlement which required corporation charged with environmental pollution to pay \$2 million in natural resources damages and to undertake appropriate actions necessary to protect and restore natural resources in suit in which natural resources claim would be tried before response costs claim would satisfy congressional intent if and when federal natural resources trustee agreed to covenant not to sue. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 122(j)(2), as amended, 42 U.S.C.A. § 9622(j)(2).

#### 9. Compromise and Settlement ¶7

Lack of reopening clause in settlement of natural resources damages against one defendant, which would have allowed United States to sue defendant for presently unknown damages caused by release of PCBs, violated requirements of Comprehensive Environmental Response, Compensation, and Liability Act as well as intent of Congress and was not in public interest. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 122(f)(6)(B), as amended, 42 U.S.C.A. § 9622(f)(6)(B).

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Wm. Gerald McElroy, Jr., John T. Harding, Jr., Zelle & Larson, Waltham, Mass., for Employers Ins. of Wausau.

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Bert J. Capone, Deborah S. Griffin, Peabody & Arnold, Boston, Mass., for Home Ins. Co. and Lexington Ins. Group.

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Erik D. Olson, Nat. Wildlife Federation, Washington, D.C., for Nat. Wildlife Federation.

#### MEMORANDUM AND ORDER CONCERNING PARTIAL SETTLEMENT

YOUNG, District Judge.

These partially consolidated cases are presently before the Court for approval of a Partial Consent Decree (the "Proposed Decree") between the plaintiffs, the United States of America and the Commonwealth of Massachusetts (hereinafter, the "sovereigns"), and the defendant AVX Corporation ("AVX").<sup>1</sup> The Proposed Decree attempts to resolve the liability of AVX for injury to natural resources allegedly caused by the release of polychlorinated biphenyls ("PCBs") during its ownership

and operation of a capacitor manufacturing plant adjacent to New Bedford Harbor. The underlying action was brought, *inter alia*, under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. sec. 9607.<sup>2</sup> In addition, the Natural Wildlife Federation moved to intervene in the underlying action, in part to oppose the Proposed Decree.

#### 1. *The Motion of the National Wildlife Federation to Intervene*

A settlement agreement of two million dollars (\$2,000,000) and a proposed judgment approving the settlement was filed with this Court on March 4, 1987. Notice of the proposed settlement was published in the Federal Register on March 12, 1987. 52 Fed.Reg. 7671 (March 12, 1987). On March 27, 1987, Aerovox Incorporated ("Aerovox") moved this Court to impose conditions on its approval of the Proposed Decree and to hold an evidentiary hearing.

As a preliminary matter, this Court must determine whether to permit the intervention of the National Wildlife Federation (the "Federation") which seeks, *inter alia*, to contest the Proposed Decree. The Federation seeks to represent the interests of its members who live in the New Bedford Harbor area. The Federation initially sought intervention as of right pursuant to Fed.R.Civ.P. 24(a) and the CERCLA intervention provision, 42 U.S.C. sec. 9612(f). The Federation, setting its sights somewhat lower at the hearing on intervention, now seeks permissive intervention subject

1. Taken together, these partially consolidated cases constitute a substantial complex litigation. As recognized by the American Law Institute Complex Litigation Project, "In massive environmental clean-up litigation what already is a highly complex basic dispute is compounded by the complexity of deciding the applicability of insurance coverage as well as assigning liability among multiple insurers." American Law Inst., Complex Litigation Project 17 ( Tent. Draft No. 1, April 14, 1989).

This memorandum continues the discussion of the pre-trial issues raised in these partially consolidated cases. It is intended to be read with the Court's earlier decisions concerning jurisdiction and parties. *Acushnet River and New Bedford Harbor: Proceedings Re Alleged*

*PCB Pollution*, 675 F.Supp. 22 (D.Mass.1987) ("Acushnet I"), the right to jury trial. *Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution*, 712 F.Supp. 994 (D.Mass. 1989) ("Acushnet II") and successor liability. *Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution*, 712 F.Supp. 1010 (1989) ("Acushnet III").

2. The sovereigns filed amended complaints in early 1984 to include claims for recovery of governmental response costs incurred and to be incurred, for injunctive relief under CERCLA, and for claims under other federal and state environmental statutes and state common law.

to certain conditions pursuant to Fed.R. Civ.P. 24(b).<sup>3</sup> These conditions are as follows:

(1) The Federation may brief and argue the legal requirements applicable to any proposed consent decree lodged with this Court for consideration and approval.

(2) The Federation may brief and argue the appropriate measure of natural resource damages under CERCLA.

(3) The Federation may brief and argue the legal requirements for cleanup under CERCLA.

(4) The Federation may, with leave of the Court, brief and argue other legal issues in this case.

(5) The Federation may take an appeal from a judgment it views as adverse on issues (1) through (4) above.

(5) The Federation may not participate in discovery, the examination of witnesses, or the taking or contesting of evidence.

[1] Whether to grant permissive intervention is a matter left largely to the discretion of the district court. *E.g.*, *United States Postal System v. Brennan*, 579 F.2d 188, 191-92 (2d Cir.1978) (observing that "[p]ermissive intervention is wholly discretionary with the trial court" whose decision "may only be disturbed for clear abuse of discretion"); 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, sec. 1923 at 512-14 (2d ed. 1986). The rule requires that the application to intervene be timely.<sup>4</sup> In addition, several other factors are to be considered:

3. Rule 24(b)(3) provides in pertinent part:

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action:

(2) when an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

4. This Court observes that the timeliness inquiry considers four factors:

1) the length of time the applicants knew, or reasonably should have known, of their interest before they petitioned to intervene; 2) the

nature and extent of the intervenor's interest, whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties, whether the applicant will benefit by the intervention, whether the intervenor's interests are adequately represented by the other parties, and whether the intervenors will significantly contribute to the full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented. *E.g.*, *Brennan*, 579 F.2d at 191-92; *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir.1977); see also *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 782 F.2d 452, 472 (5th Cir. 1984), cert. denied, 469 U.S. 1019, 105 S.Ct. 434, 83 L.Ed.2d 360 (1984).

[2] This Court holds that the application is timely. Although this suit had been filed approximately three and one-half years before the Federation sought to intervene, the Federation believed itself adequately represented by the sovereigns until the proposed settlement was announced. Without at all impugning the motives or conduct of the sovereigns, the Court notes that, upon review of that proposed settlement, the Federation apparently believed the settlement to be a betrayal.<sup>5</sup> It then moved promptly to intervene. On these facts, this Court refuses to hold the application untimely as matter of law. To do otherwise would promote a sort of prophylactic intervention whereby parties would be com-

prejudice to existing parties due to the applicant's failure to petition for intervention promptly; 3) the prejudice that applicants would suffer if they were not allowed to intervene; and 4) unusual circumstances militating for or against intervention[.]

*Gervy v. Gellert*, 697 F.2d 452, 455 (1st Cir. 1983) (citations omitted); see also *Culbreth v. Dukakis*, 630 F.2d 15, 20-24 (1st Cir.1980). Obviously, there is some overlap between these factors and the factors generally listed below that are considered in granting or denying permissive intervention.

5. Under the *Gervy* analysis, see *supra* note 4, this Court holds that the sudden revelation of a divergence of interests between the sovereigns and the intervenor constitutes an unusual circumstance militating for intervention.

pelled to intervene in matters simply to protect their rights to participate in these matters downstream on the more or less remote chance that a party apparently protecting the intervenors' interests might someday betray them. Such a result would obviously be expensive and inefficient. Permitting parties like the Federation to intervene keeps the number of parties in a dispute at a minimum unless and until a real divergence of interests arises.<sup>6</sup>

This final point addresses another factor in the calculus: the adequacy of representation by another party. The Court holds that the sovereigns no longer adequately represent the Federation's interests in this matter. The sovereigns argue that their ultimate goal and that of the Federation are one and the same: "the restoration of the natural resources of New Bedford Harbor." Plaintiffs' Opposition to Motion of National Wildlife Federation to Intervene at 36 n. 23. Thus, they argue, the differences between themselves and the Federation concern means, not ends. *Id.*

[3] However, such an analysis is a triumph of formalism over reality. The differences in the measure of damages sought by the sovereigns as opposed to the Federation are substantial. The sovereigns apparently believe that "the proper measure of [natural resource] damages is the lesser of the costs of restoring or replacing the injured resources and the resources' lost

use value." Plaintiffs' Reply to Brief of the National Wildlife Federation in Opposition to Proposed Partial Consent Decree at 21 (Docket # 1213) (emphasis in original). The Federation asserts that the correct measure is far more sweeping: the cost of restoration or replacement of the natural resources, or failing that, of the acquisition of equivalent resources, plus the lost use value. Reply Brief of the National Wildlife Federation to the Parties' Opposition to NWF's Motion for Permissive Intervention Subject to Certain Conditions at 8 n. 5 (Docket # 1244) (emphasis added). "The exact amount of money damages that the sovereigns recover, one imagines, may well have a profound impact on the ultimate quality of the Harbor. Thus, the substantial divergence of views on the proper measure of damages between the sovereigns and the Federation necessarily renders the former's representation of the latter inadequate."<sup>7</sup>

By permitting intervention in this matter, this Court assuredly will promote the just and equitable adjudication of the legal question before it. Although the conditions the Federation voluntarily places on its intervention prevent it from contributing to the factual development of this case, its legal arguments will undoubtedly round out the considerations before this Court as the above discussion regarding the measure of damages makes clear.

6. The Court further notes that the putative intervenor will be prejudiced if intervention is denied to the extent that it will be unable to appeal the granting of summary judgment or the resolution of any of the legal issues on which it wishes to be heard. The prejudice to existing parties caused by intervention is addressed below.

7. Some of the defendants cite *Moosehead Sanitary District v. E.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir.1979) which established that when a party and a potential intervenor have the same ultimate goal in a litigation, a presumption of adequate representation arises and argues that therefore the Federation's motion should be denied. Opposition of AVX Corporation, et al. to Motion of National Wildlife Federation to Intervene (Docket # 1216) at 15-16. There are two problems with this analysis. First, on its face *Moosehead* considered only intervention of right under Rule 24(a) and thus not the loosened standards of Rule 24(b). *Id.* at 52 n. 5. Second,

*Moosehead's* requirement of the same ultimate goal is rather manipulable. In the instant case, for example, one may characterize the goals of the Federation and the sovereigns as being one and the same—the remedying of the New Bedford Harbor's pollution—or as divergent—respectively, the restoration of the Harbor's natural resources along with payment for their lost use value versus the recovery of the lesser amount of the restoration of the resources or the lost use value. Given the realities of this litigation—specifically the substantial difference in possible recoveries under these two theories of damages—for the purposes of permissive intervention, this Court holds that there is significant adversity of interests between the sovereigns and the Federation. For the same reason, this Court holds that the Federation satisfies even the heightened showing required by *United Nuclear Corp. v. Carson*, 696 F.2d 141, 144 (1st Cir.1982) to show inadequacy of the government's representation of the public interest.



Moreover, intervention will not cause undue prejudice or delay to the present parties. Analysis of this factor generally focuses on how the untimely entry of an intervenor into the fray may undo the work the parties have already done. With respect to future settlements or future consideration of the appropriate measure of natural resource damages or the legal requirements for cleanup under CERCLA, the Federation's participation in the process cannot undo any such work. No potential settlements are very far advanced as far as this Court knows. Further, the cleanup and natural resource damages issues remain unresolved and thus another view of the law will merely sharpen the debate, not reopen or delay matters. With respect to the Proposed Decree, as a practical matter the Court has already heard and read the Federation's argument. Thus, its input is already part of the calculus and any prejudice or delay from such arguments has already occurred.

True, the right to appeal that the Federation gains by intervention obviously increases the likelihood that any settlement approved by this Court will in fact be appealed. Several considerations, however, mitigate any ill effects of such a possibility. First, should the decree presently before the Court be approved, any appeal would appear to be interlocutory and thus must attend the end of AVX's participation in the case. The two million dollar settlement is to be paid to the sovereigns promptly after approval of the decree and thus the threat of an appeal by the Federation will not delay the money reaching the sovereigns' coffers. Even more significantly, no restoration or replacement of natural resources can begin until after the cleanup is finished. Far from having even begun yet, the cleanup awaits completion of studies by the sovereigns that will determine the most efficacious manner of proceeding. Thus, for aught this Court can see, none of the

settlement money will be spent for years to come in any event.

Admittedly, should the Court of Appeals at some point vacate the instant settlement as improvidently approved, considerable time, effort, and money of the sovereigns and AVX will have been wasted. This Court, however, is still disposed to grant intervention. First, the Court observes with respect and diffidence that, given the broad discretion granted to trial courts to approve such settlements, the risk of reversal on this point seems acceptable in light of the benefits that settlement will confer on these parties. Second, this one settlement constitutes a relatively small part of this entire litigation and the nature of the intervention that the Federation seeks—the right to argue and to appeal with respect to settlements as well as the issues of cleanup and natural resource damages—is quite limited. Viewing the matter in the context of this entire massive litigation, the possible undue prejudice that may result to the existing parties discounted by the probability that such prejudice will ever occur is insufficient to offset the strong arguments for permitting intervention.

One further reason exists to allow intervention. Without intending any criticism of the sovereigns' advocacy, such intervention permits another voice and set of concerns to participate in the resolution of an extremely complex matter, both factually and legally—that necessarily is taking this Court and the parties into the heretofore largely uncharted waters of a relatively new statute. The further guidance of an additional entity, especially one with some expertise in the subject at hand, is therefore not lightly to be shunned. Indeed, as the balance of this opinion will reveal, the Federation's impact in shaping this litigation cannot be denied.

For these reasons, the Court GRANTS the Federation's motion to intervene permissively, subject to the conditions listed above.<sup>5</sup> One further restriction is imposed

5. The First Circuit's recent decision in *United States v. Metropolitan Dist. Comm'n*, 845 F.2d 2 (1988), cited by the sovereigns, does not require a different result. There, the court affirmed the district court's decision to deny intervention by

a public interest group and several towns contiguous to Massachusetts Bay in a Federal Water Pollution Control Act case. The court specifically found that the trial judge did not abuse his broad discretion by denying intervention on the

which, the Court observes, is more a clarification in line with the Federation's intent than a substantive condition. The Federation may not argue to the jury the conclusions to be drawn from any evidence taken at trial or otherwise address any jury impaneled in this matter.

## II. The Proposed Decree

### A. The Non-Settlers' Motion.

[4] In October, 1986, Congress passed the Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499, sec. 101 *et seq.*, 100 Stat. 1618 (1986) ("SARA") amending CERCLA. Among the numerous changes it wrought in CERCLA, SARA added provisions covering settlements of CERCLA claims and, in particular, the question of contribution.<sup>9</sup> Included was a provision that, for the first time, granted settlers protection from contribution liability to non-settlers. The complete provision, 42 U.S.C. sec. 9613(f)(2), provides:

**Settlement.**—A person who has resolved its liability to the United States or a State in an administrative or judicially

liability issue. The trial court denied intervention because, *inter alia*, such intervention was untimely. The district court noted that the putative intervenors' interest in the litigation was apparent arguably as far back as June, 1983, *United States v. Metropolitan Dist. Comm'n*, 679 F.Supp. 1154, 1161 (D.Mass.1988), yet they did not seek intervention until October, 1987, more than two years later. (The Federation represents, and no party disputes, that, although the district court opinion in *Metropolitan Dist. Comm'n* is silent on the matter, the trial court docket reveals intervention was not sought until October, 1987.) Unlike the instant case, those intervenors' motions clearly were untimely.

9. The doctrine of contribution allows a settlor who has paid all or a portion of a judgment to seek contribution from other jointly and severally liable parties. At common law, a settlement by the plaintiff with one or more joint tortfeasors does not release the settling defendants from contribution. The common law rule discourages the settlement of cases because the defendant settlor remains potentially liable for contribution. The Uniform Contribution Among Joint Tortfeasors Act, sec. 4, 12 U.L.A. 63 (1975), and most state statutes, including that of Massachusetts, release the settlor from liability for contribution. See, e.g., Mass.Gen.Laws ch. 231B, sec. 4.

10. *Aarvorn* asserts that SARA's addition of subsection 113(f)(2) to CERCLA was not intended

approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

Congress passed this provision to encourage settlement of CERCLA cases. Previously, settlers had no statutory assurance that any settlement that they reached with the EPA would end their liability in a case because non-settlers might later seek contribution from them. In an attempt to offset this disincentive to settle, the Environmental Protection Agency ("EPA") adopted a policy of reducing its judgment against non-settlers to the extent necessary to extinguish the settlor's liability to the non-settlers. See 50 Fed.Reg. 5034, 5039 (Feb. 5, 1985). SARA's contribution provision eliminates the need for such a policy where the settlement is "administrative or judicially approved."<sup>10</sup>

to change the EPA's settlement policy, but is simply another protection mechanism for achieving the fair and reasonable apportionment of damages among joint tortfeasors. This Court disagrees. The EPA's policy is best understood as a proper attempt by an agency to fill in the interstices of an incomplete statutory framework that was supplanted by a later clear directive from Congress. That clear directive necessarily trumps the old EPA policy.

Admittedly, the few decided cases do not clearly point this way. The court in *City of New York v. Exxon Corp.*, 697 F.Supp. 677 (S.D.N.Y. 1988) seems to have dismissed but not to have decided the significance of subsection 113(f)(2). The court noted that "section 113(f)(2) apparently compels the non-settlers to absorb the shortfall" between the settlement and the settlor's proportional share. 697 F.Supp. at 681 n. 5. Elsewhere, the court acknowledged that some other courts have applied the Uniform Comparative Fault Act (essentially the EPA's pre-SARA policy) to post-SARA settlements. 697 F.Supp. at 683 n. 9. These latter cases are indeed puzzling to this Court in that they fail even to discuss the language of subsection 113(f)(2). *Lynner Corp. v. Chem. Waste Management, Inc.*, 690 F.Supp. 1409, 1418 (E.D.Pa.1988) (adopting the Uniform Comparative Fault Act approach in a cleanup settlement); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, No. 83 C 1142, 1987 WL 27348 (N.D.Ill.1987) (adopting a similar rule in a cleanup settlement).

The result is a powerful tool—actually a carrot and a stick—placed in the hands of the EPA to obtain settlements. The carrot the EPA can offer potential settlers is that they need no longer fear that a later contribution action by a non-settlor will compel them to pay still more money to extinguish their liability. In addition to this protection, settlers themselves are enabled to seek contribution against non-settlers. 42 U.S.C. sec. 9612(f)(3)(B). As for the stick, if the settlor pays less than its proportionate share of liability, the non-settlers, being jointly and severally liable,<sup>11</sup> must make good the difference. In this respect, the words of the statute are clear: the potential liability of the others is reduced "by the amount of settlement," not by the settlor's proportionate share of any damages ultimately determined to have been caused.<sup>12</sup>

This result is in keeping with Congress' intent to encourage CERCLA settlements and reduce the time and expense of enforcement litigation that necessarily diverts money from cleanup and restoration.<sup>13</sup> Were the law otherwise, the responsibility of a settlor for damages would need to be

fully litigated by the sovereigns and the non-settlers to determine the settlor's proportional share, thus largely duplicating the aspects—and expense—of the litigation the settlement was designed to avoid.<sup>14</sup>

The two non-settlers opposing the Proposed Decree—Aerovox and Belleville Industries, Inc. ("Belleville")—argue correctly that, for AVX to gain contribution protection, this Court must approve the settlement pursuant to 42 U.S.C. sec. 9612(f)(2). Before approving such a settlement, this Court must ascertain "that it is fair, adequate, and reasonable, and consistent with the Constitution and the mandate of Congress." *City of New York*, 697 F.Supp. at 682 (citation omitted); see also *United States v. Seymour Recycling Corp.*, 554 F.Supp. 1834, 1837 (S.D.Ind.1982) (pre-SARA CERCLA case).

A multiplicity of factors are considered in evaluating whether the Proposed Decree before this Court is fair and reasonable. The protection of the public interest is paramount. *Seymour Recycling Corp.*, 554

Finding these cases unpersuasive, this Court chooses to follow the plain language of the statute and holds that subsection 113(f)(2) of SARA has supplanted the EPA's prior policy.

11. The parties do not dispute, and it is generally the case, that CERCLA defendants are jointly and severally liable. Indeed, the concept of contribution only makes sense in a context of joint and several liability. See, e.g., *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802 (S.D.Ind.1983); Garber, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments*, 14 Ecology L.Q. 365, 368-69 (1987) (gathering cases). Exceptions to this rule have been made where a violator's actions have had a de minimis effect and where apportionment is readily accomplished, for example where the harms caused are distinct or are otherwise capable of a reasonable and rational division. See Garber, *supra*, at 368-69 & n. 12.

12. Massachusetts law yields the same result. See Mass.Gen.Laws ch. 231B, sec. 4.

13. See *City of New York*, 697 F.Supp. at 683 (noting that the SARA amendments were intended to "expedite effective remedial actions and minimize litigation") (quoting 42 U.S.C. sec. 9622(a)); 132 Cong.Rec. H9564 (daily ed. Oct. 8, 1986) (statement of Rep. Lott) ("I am pleased to report that the idea of encouraging settlements is no longer considered ground breaking

but now is a simple and obvious matter of good policy. Costly protracted litigation threatens the effectiveness of the Superfund Program and consumes resources better spent on cleanup."); Garber, 14 Ecology L.Q. at 373-74; Note, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 Va.L.Rev. 123, 124-26, 135 (1988).

14. Were the law otherwise, the sovereigns would be involved in litigating the exact share of each of the settlers for the overall liability in order to determine the remaining amount to be recovered from the non-settlers, surely a dauntingly difficult, expensive and time-consuming task. It thus might cost the sovereigns more to settle with one party than not to settle since, if the sovereigns do not settle, they can merely prove that all five defendants have polluted and seek recovery from all or any one of them in any proportion the sovereigns choose because the defendants in such a case are generally jointly and severally liable. Admittedly, the non-settlers may bring contribution actions against each other no matter how this provision is interpreted. But the sovereigns need not be party to such litigation under this Court's interpretation of the statute, thus fulfilling Congress' intention to encourage settlement, to save the sovereigns' litigation expenses, and to keep the cost of pollution on the potentially responsible parties.



F.Supp. at 1837. Among the other factors a district court should consider in measuring the fairness and reasonableness of a settlement are:

a comparison of the strengths of plaintiffs' case versus the amount of the settlement offer; the likely complexity, length, and expense of the litigation; the amount of opposition to the settlement among affected parties; the opinion of competent counsel; and, the stage of the proceedings and the amount of discovery already undertaken at the time of the settlement.

*E.E.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir.1985) (citations omitted), cert. denied, 478 U.S. 1004, 100 S.Ct. 3233, 92 L.Ed.2d 709 (1986); see also *City of New York*, 697 F.Supp. at 692 (employing a similar list of factors).

The district court's opinion in *City of New York* provides additional helpful guidance:

In assessing [the above factors], however, the Court's role is not unlimited. Settlements are to be encouraged and the court does not "have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." [*City of Detroit v. Grinnell Corp.*], 495 F.2d [448] at 458. [2nd Cir.1974] And "where there has been arms length bargaining among the parties (and) sufficient discovery has taken place to enable ... counsel to evaluate accurately the strengths and weaknesses of the plaintiff's case ... there is a presumption in favor of the settlement." *Wellman v. Dickinson*, 497 F.Supp. 824, 830 (S.D.N.Y.1980), aff'd, 647 F.2d 163 (2d Cir.1981), particularly where "a government agency committed to the protection of the public interest" has participated in and endorsed the agreement. *Id.* [;] [*cf. Federal Trade Comm'n v. Standard Financial Mgt. Corp.*, 836 F.2d 404, 408 (1st Cir.1987) (holding that the trial court "should accord some substantial deference to [an] agency's determination that [a] settlement is appropriate" in a deceptive trade practices case) (citation omitted).] Finally, in addition to the general

federal policy favoring settlements, see *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir.1960), the reviewing court must be mindful that Congress, in enacting the 1980 amendments to CERCLA sought to "expedite effective remedial actions and minimize litigation." Section 122(a).

The balance to be struck between the policies favoring settlements and the need to safeguard the public interest in cases of this type was best summarized in *United States v. Corvols Development Corp.*, 454 F.Supp. 1217 (D.N.Y. 1978):

It is not the Court's function to determine whether this is the best possible settlement that could have been obtained but rather the Court's duty is to determine "whether the settlement is within the reaches of the public interest." *Id.* at 1222 (quoting *United States v. Gillette Company*, 406 F.Supp. 713, 716 [D.Mass.1975]).

697 F.Supp. at 692-93.

An analysis of all the above factors reveals that Aerovox and Belleville have failed to overcome the material in the record that favors approving this settlement. With respect to the mandate of Congress, the various discernable intentions of Congress can be gleaned from the cases, statutory language, and legislative history. First, that body adopted CERCLA to provide the government with the authority and mechanisms to combat hazardous substance spills, leaks, and other releases. Hazardous waste disposal poses a serious and increasing threat to the environment. Congress realized that it was imperative "that the Federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal." *Dedham Water Co. v. Cumberland Farms Dairy Inc.*, 806 F.2d 1074, 1081 (1st Cir.1986) (citing *United States v. Reilly Tar & Chem. Corp.*, 546 F.Supp. 1100, 1112 [D.Minn. 1982]).

CERCLA was designed "to protect and preserve public health and the environ-

Cite as 712 F.Supp. 1019 (D.Mass. 1989)

ment." *Dedham Water*, 805 F.2d at 1081. That Congressional purpose is better served through settlements which provide funds to enhance environmental protection, rather than the expenditure of limited resources on protracted litigation. Without question, Congress passed the SARA amendments to encourage settlements for this very reason.<sup>15</sup> Indeed, subsection 113(f), as well as section 122, both added to CERCLA by the SARA amendments, are devoted to facilitating just such arrangements.

[5] Section 4, as noted above, the contribution protection provision in CERCLA subsection 113(f)(2) encourages settlement by preventing non-settlers from seeking contribution from settlers. This Court is obligated to interpret the contribution provisions of CERCLA to avoid frustration of the Act's remedial purpose. *United States v. Mottolo*, 605 F.Supp. 898, 902 (D.N.H. 1985). An evaluation of the Proposed Decree which overemphasizes the importance of its potential effect on the non-settlers, which Aarvox and Belleville appear to advocate, would frustrate the statute's goal of promoting expeditious resolution of harmful environmental conditions. This Court, therefore, holds that in measuring whether the Proposed Decree is fair, reasonable, and protective of the public interest the effect on the non-settlers is not determinative, but is merely one factor in the calculus. Such an interpretation of subsection 113(f)(2) promotes the intent of Congress by giving the federal government a powerful tool necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal.

15. See *supra* note 13.

16. See *infra* at 1036-38.

17. See *supra* at 1026-27.

18. This case is *United States v. Lovett et al.*, No. 86-180-Y. Of it, this Court has written: The ambitious indictment sought to be tried here is a prime example of the sweeping powers Congress has conferred upon the executive branch (through passage of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. sec. 1962). This indictment lists well over twenty predicate acts and involves the

Third, the Proposed Decree between the sovereigns and AVX is consistent with the mandate of Congress. The Court's review of the record assures it that the terms of the Proposed Decree are fair and adequate, that the settlement is reasonable under the facts, and that, with but two exceptions,<sup>16</sup> it protects the public interest. See *Culbreth v. Dukakis*, 680 F.2d 15, 23 (1st Cir.1980); *Seymour Recycling Corp.*, 554 F.Supp. at 1337; *United States v. Hooker Chem. & Plastics Corp.*, 540 F.Supp. 1067, 1072 (W.D.N.Y.1982).

Court approval of the Proposed Decree between the sovereigns and AVX is in the public interest. The voluntary settlement of litigation is high in judicial favor both generally, see, e.g., *Citizens For a Better Environment v. Gorsuch*, 718 F.2d 1117, 1126 (D.C.Cir.1983), cert. denied, 467 U.S. 1219, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984), and in CERCLA actions in particular.<sup>17</sup>

The settlement of the natural resource damages action between the sovereigns and AVX will save the sovereigns, and subsequently the public, considerable time and money that would otherwise be expended at trial. Settlement provides substantial funds for the rehabilitation of New Bedford Harbor without the risks and costs of lengthy litigation.

The immediate transfer of funds is a significant factor because it gives the sovereigns control over and the interest derived from a substantial amount of money. The start of any trial in the instant matter, already long delayed by a protracted criminal case the Court is trying in Springfield, Massachusetts,<sup>18</sup> remains uncertain. The

presentation of evidence concerning conduct in various locations in Connecticut, Maine, Massachusetts, New York, New Jersey, Ohio, and Pennsylvania. The government's witness list includes 325 names. Thousands of documents and items of tangible evidence are expected to be introduced. The trial itself is estimated to last from six to twelve months. *United States v. Lovett et al.*, No. 86-180-Y, slip op. at 36 (D.Mass. May 4, 1989). The aggregate reimbursement of counsel appointed under the Criminal Justice Act, 18 U.S.C. sec. 3006A, to represent these indigent defendants has exceeded \$800,000 in the pre-trial jury selection phase

first two of several related trials in the instant case, running concurrently, are expected to last three to four months and the substantial expense of such a trial will accord with its length.<sup>19</sup>

Moreover, a trial of this claim would be complex, lengthy, expensive and uncertain as an examination of five aspects of this litigation will demonstrate. First, the scope of provable natural resource damages in this matter is hotly disputed by the parties whose divergent approaches would result in widely varying recoveries should any liability be found. Second, it may be difficult to link the harm caused by any PCB release from the AVX facility to the PCB's found elsewhere in the Harbor. AVX began operating its New Bedford Harbor plant in 1938. Years may have passed between the time of the releases and any quantifiable impact upon the Harbor; years more may have passed before any such impact was first discovered. Moreover, at least two types of hazardous PCB waste were allegedly released into the Harbor by the operators of the two different New Bedford plants. Those two plants have been under the management and control of five different corporate owners. Damage caused by the behavior of AVX may be difficult to measure and distinguish from damage caused by other plant operators. Third, and relatedly, the responsibility for the condition of New Bedford Harbor is diffuse in another respect. The sov-

ereigns here seek to recover only for that injury to natural resources caused by PCB contamination, yet the Harbor appears rife with a variety of contaminants. It may prove difficult to distinguish whether some injury is caused by PCB's or by other pollutants. While problems of divisibility of the injury and damages due to PCB contamination may be less a concern to the sovereigns because they may well be able to hold the defendants jointly and severally liable, protracted contribution litigation among any non-settlers may be necessary. Fourth, the unsettled nature of CERCLA law, which the myriad pretrial motions in this matter reflect, argues in favor of this settlement. The inherent uncertainty in such a state of affairs makes settlement desirable for the parties and satisfies the public interest by securing a substantial recovery in the face of unknown and perhaps unknowable odds. Fifth, AVX sold its interest in the plant in 1973, seven years before the passage of CERCLA, and pre-enactment damages to natural resources stemming from pre-enactment releases are not compensable under CERCLA. 42 U.S.C. sec. 9607(f)(1). Thus, whether, and to what extent, the sovereigns will be able to recover for natural resource damages from AVX remains in doubt. In light of these factors and the novelty of this action, this Court rules that the settlement of the natural resource damages claim under section 107 of CERCLA between the sovereigns

of these proceedings." *United States v. Levenson*, 704 F.Supp. 1152, 1165 n. 12 (D.Mass.1989). Trial commenced in this case on January 9, 1989. The aggregate cost of the representation of these indigent defendants stood at \$1,088,932 after three months of trial.

19. This Court, in an earlier pre-trial order, required the sovereigns to proceed separately against each of the alleged polluters in trying their claims for injury to natural resources (though it later consolidated the trials against Bellaville and Aroveton). Due to the exhaustive—and exhausting—pre-trial orders entered herein, the parties have been required to request the admission of each and every fact they seek to establish. With the universe of facts thus established, the individual trials have been limited to four months apiece. The jury proceedings are scheduled to run from 9 a.m. to 1 p.m. on each trial day and the related jury waived trials involving insurance coverage for each of the al-

leged polluters will run concurrently from 2-3 p.m. on the same trial days. The cost to the public of devoting such extensive judicial resources to these cases is not insignificant. In 1987, exclusive of any of the parties' legal costs, it was estimated that one day of trial in a United States District Court costs the public \$10,000-\$15,000. See *Chappes v. Commonwealth of Massachusetts*, 659 F.Supp. 1220, 1226 n. 9 (D.Mass.1987), *reversed on other grounds sub nom.*, *Chappes v. Voss*, 843 F.2d 25 (1st Cir. 1988). Inflation no doubt has rendered this figure conservative. Moreover, the enormous burden of trying cases such as *United States v. Levenson*, see *supra* note 18, and these cases, virtually back-to-back, necessarily means that scarce judicial resources will be unavailable for other litigants, equally deserving, who have waited just as long for justice. These facts highlight the institutional benefits to be gained from prompt, just settlements.



and AVX is fair, reasonable, and in the public interest.

Turning to the other factors in the matrix, the Court notes that only two of the four non-settlers oppose the settlement. In addition, none of the non-settlers disputes that this settlement was arrived at by competent counsel after protracted arms-length negotiations. Without question, that settlement is based on the extensive discovery that has already occurred in this case.<sup>20</sup> That discovery renders unnecessary the evidentiary hearing Aerovox has requested.<sup>21</sup>

Moreover, the explanation for the amount of the settlement is reasonable. Aerovox contends that on its face settlement is unreasonable where the sovereigns are seeking 50 to 70 million dollars in natural resource damages and are offering to

extinguish the liability of one of the five jointly and severally liable defendants for a mere two million dollars. However, despite what the sovereigns are seeking now in damages, their unchallenged assertion is that, at the time this settlement was negotiated, they had estimated the damages to be 30 million dollars. Discounting that sum in light of the complexity of the case, the novelty of the law and the problems of proof, the sovereigns determined that twelve million dollars would be a satisfactory overall settlement of this aspect of the case at that time. Dividing that figure in half between the two allegedly polluting plants involved left six million dollars to be collected from AVX, Aerovox and Belleville.<sup>22</sup> The sovereigns sought 2.3 million dollars from each of the first two, and 1.4

Reduced up to 100%  
to settlement figure

20. "Creative lawyers ... have shown that both justice and efficiency can be achieved by those willing to stretch the bounds of the existing procedural scheme." American Law Inst., Complex Litigation Project 11 (Tent. Draft No. 1, April 14, 1989). As mentioned above, see *supra* note 19, one of this Court's pre-trial orders requires that each litigant request the admission, pursuant to Fed.R.Civ.P. 16 and 36, of every fact which it intends affirmatively to prove at trial. The order bars the litigants from offering affirmative evidence on any point as to which no request has been filed and requires that each request be detailed "to the level of specificity of a patent claim." In this fashion the Court sought to establish the entire universe of facts with which it and the jury must wrestle in this complex litigation. As a result, the sovereigns have filed tens of thousands of requests for admission, the great bulk of which are supported by detailed data gleaned from exhaustive discovery and trial preparation materials. The notebooks in which the requests are cataloged fill four full bookcases.

21. Of course, there are other reasons not to hold an evidentiary hearing. First, such a hearing would amount to a trial on the merits in terms of the time and expense involved. Such a hearing is impractical given the facts to dispute and is not required by precedent or policy. See *City of New York*, 697 F.Supp. at 689-92 (denying a hearing regarding a CERCLA settlement). In *United States v. Ketchikan Pulp Co.*, 430 F.Supp. 83 (D.Alaska 1977), the parties disagreed as to the scope of an approval hearing for a consent decree in an action brought under the Federal Water Pollution Control Act, 33 U.S.C. sec. 1311 *et seq.* The Ketchikan court ruled that "[a]lthough the court is obligated to protect the public interest it is not necessary to hear all the evidence to perform that function." *Id.* at 84.

Moreover, to grant inevitably lengthy hearings in cases such as this would either frustrate the express intent of Congress to encourage settlements or negate the benefits of any settlement that resulted. See *supra* note 13. This Court does not require a factual presentation to support every settlement reached by a government agency. "Unless a consent decree is unfair, inadequate or unreasonable, it ought to be approved.... [T]he courts should pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment." *Sanitation and Exchange Commission v. Randolph*, 736 F.2d 525, 529 (9th Cir.1984); accord *United States v. Jackson*, 519 F.2d 1147, 1151 (5th Cir.1975).

The objecting non-settlers generally assert that the record before the Court is insufficient. Without more concrete objections to the settlement—other than the amount versus the damages sought, an argument disposed of elsewhere—a full-blown evidentiary hearing which would amount to a fishing expedition is neither necessary nor prudent. See *City of New York*, 697 F.Supp. at 692 (holding that generalized assertions that the record before the court is insufficient are not enough to require a hearing). The Court also notes that courts largely have followed the cleanup versus monetary settlement distinction in determining whether to hold hearings. See *id.* at 689-91 (discussing the cases and declining to give a hearing regarding a monetary settlement).

22. The other allegedly polluting plant was owned, at all material times, first by the defendant Cornell-Dubilier Electronics, Inc., and then by the defendant Federal Pacific Electric Company. Apparently, the sovereigns demanded the remaining six million dollars from these two defendants.

negotiation, one imagines, resulted in the final figure of two million dollars. Cf. *City of New York*, 697 F.Supp. at 686 (accepting a settlement that required seven of fifteen main defendants to settle their liability for approximately fourteen million dollars where the estimated remediation cost was 400 million dollars).

As noted above, this Court is not required to ensure that the sovereigns have struck the best deal possible. Nor must this Court ensure that the settlement is perfectly calibrated in terms of shares of liability so long as it is generally fair and reasonable. Thus, the Court is not disturbed that AVX may have owned the polluting plant the longest and thus, if all other factors are ignored, may be assumed to have caused the most pollution. On the other hand, AVX may well deserve a premium, at least in the view of the sovereigns, for being the first defendant to settle, and for doing so well in advance of the trial of its portion of the case. Fairness does not require, when later discovery and developments in the law convince the sovereigns that the damages are greater and their case stronger than they first appeared, that AVX should be required to pay more. Quite the contrary—AVX deserves, and the sovereigns apparently have seen fit to award, a lower settlement amount for its having negotiated in good faith early on. If this price is no longer available to the other defendants, they have only themselves to blame; and if the SARA amendments, with respect to contribution, leave the remaining defendants on the natural resource damages issue facing greater liability than their pro rata share, "their dispute is with Congress." *City of New York*, 697 F.Supp. at 684.

[6.7] Finally, this Court is unpersuaded by Aerovox's argument that, if the sovereigns chose to settle AVX's portion of the case for two million dollars, the sovereigns

would bear the loss for any shortfall caused by the discounted settlement. That is, the non-settlers should not be required to make up the difference for the sovereigns' mistaken settlement strategy by paying the remainder of the settlor's share as well as their own.

The problem with this approach is that it would effectively read out of subsection 113(f)(2) the last phrase: "[the settlor's settlement] reduces the potential liability of the others by the amount of the settlement." 42 U.S.C. sec. 9613(f)(2). A court should not construe a statute so as to render any of it a nullity. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249, 105 S.Ct. 2387, 2594, 86 L.Ed.2d 168 (1985), but Aerovox's argument would do just that. It is self-evident that generally defendants do not settle litigation for the full value of the asserted damages. Faced with a demand for full damages, a defendant might just as well go to trial, save for the litigation costs and possible interest on a resulting judgment. Thus, in the general run of CERCLA cases, this Court imagines that defendants will generally settle for substantially less—indeed, often for far less given the inherent problems of proof in these cases—than the asserted damages. The Court further imagines that in all of these cases the non-settlers will be able to muster the very argument raised here: fairness requires a proportionate reduction. And so the last phrase of the statute, squarely placing the balance of the settled share on the non-settlers, disappears. This Court will not so frustrate Congress' will.

B. The National Wildlife Federation's Contention that the Proposed Decree is Not in Compliance with Section 122 of CERCLA.

The National Wildlife Federation moves that this Court reject the Proposed Decree because it does not comply with the intent

23. Belleville is no longer actively engaged in business and has transferred all its assets to Aerovox. *Acquiesce I*, 673 F.Supp. at 38. As a practical matter, therefore, the discount offered Belleville appears to reflect the additional difficulty of obtaining testimony from its insurer

since that party, Lumbermens Mutual Casualty Co., like the insurers of all the defendants, is defending under a reservation of right and is vigorously pursuing a pre-trial declaration that it has no coverage obligations to Belleville.

or provisions of CERCLA, is not fair, adequate and reasonable, and is not in the public interest. More specifically, the Federation contends that the Proposed Decree does not provide for full restoration and replacement of the injured natural resources and that it waives claims for future damages in contravention of CERCLA's intent and in violation of two provisions of section 122 of CERCLA, 42 U.S.C. sec. 9622.

The first provision in question, subsection 122(j)(2), the natural resource damages settlement provision of CERCLA, provides:

An agreement under this section may contain a covenant not to sue under section 9607(a)(4)(C) of this title for damages to natural resources under the trusteeship of the United States resulting from the release or threatened release of hazardous substances that is the subject of the agreement, but only if the Federal natural resource trustee has agreed in writing to such covenant. The Federal natural resource trustee may agree to such covenant if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged by such release or threatened release of hazardous substances.

42 U.S.C. sec. 9622(j)(2).

The Federation interprets subsection 122(j)(2) to require that any consent decree entered into under the CERCLA settlement provision that includes a covenant not to sue for natural resource damages under subsection 107(a)(4)(C) must also provide for full restoration and replacement of the injured natural resources (or acquisition of equivalent resources) as required by the language of, and policies underlying, CERCLA. The Proposed Decree between the sovereigns and AVX includes a covenant not to sue AVX for natural resource damages. The Federation argues that the Proposed Decree should not be approved because the sovereigns' settlement for substantially less than the full natural resource damages asserted means that the Proposed Decree necessarily fails to pro-

vide for the "actions necessary to protect and restore" New Bedford Harbor under the mandate of section 122.

The second provision in question, subsection 122(f)(6)(A), states:

(6) Additional condition for future liability

(A) Except for the portion of the remedial action which is subject to a covenant not to sue under paragraph (2) or under subsection (g) of this section (relating to de minimis settlements), a covenant not to sue a person concerning future liability to the United States shall include an exception to the covenant that allows the President to sue such person concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time the President certifies under paragraph (3) that remedial action has been completed at the facility concerned.

42 U.S.C. sec. 9622(f)(6)(A).<sup>24</sup>

The Federation interprets this subsection to mean that CERCLA settlements including a covenant not to sue must contain a "reopener" clause that permits future litigation between the United States and the settlers concerning further damage due to presently unknown conditions. Because the Proposed Decree contains no such clause—indeed, the sovereigns, in the Proposed Decree, explicitly promise not to sue AVX for damages presently unknown caused by the release of PCB's, Proposed Decree at para. VII—the Federation argues it should not be approved.

The Federation's argument, at first glance, appears to fail primarily because the requirements of section 122 apply only to a natural resource damages settlement that is part of the settlement of a larger cleanup. Indeed, both the language of the statute and the legislative history lend significant support to this view.

Admittedly, section 122 is not a model of clarity. The thrust of its provisions, however, suggest that it is intended to reach

caption to this provision not relevant here.

24. 42 U.S.C. sec. 9622(f)(6)(B) provides an ex-



cleanup settlements. Its opening provision, subsection 122(a), which is best understood as an introduction of sorts, grants the President authority to enter into agreements: "to perform any response actions.... Whenever practicable and in the public interest, ... the President shall act to facilitate agreements under this section ... in order to expedite effective remedial actions and minimize litigation." 42 U.S.C. sec. 9622(a) (emphasis added). The subsections of section 122 that follow provide the President with a variety of procedures through which to achieve and structure such cleanup settlements. Those sections, as one would expect, largely focus on the cleanup aspects of such a settlement.<sup>25</sup>

The legislative history, from beginning to end, further emphasizes the concern of Section 122 with cleanup settlements. As the 1985 House Judiciary Committee Report stated, "This new section sets forth a series of provisions designed to encourage and facilitate negotiated private party cleanups of hazardous substances in those situations where negotiations have a realistic chance of success." H.R.Rep. No. 253, 99th Cong., 1st Sess., pt. 2, at 29 (1985) (emphasis added). Accord H.R.Rep. No. 253, 99th Cong., 1st Sess., pt. 5, at 58 (1985) ("This new section 122 is intended to encourage and establish procedures and protections pertaining to negotiated private party cleanup of hazardous substances where such cleanup is in the public interest") (emphasis added). Congress was concerned with and condemned past "sweetheart deals that EPA negotiated with [potentially responsible parties] several years ago that led to the resignation of Rita Lavelle and Anne Burford," and passed section 122 to ensure that the "EPA can

negotiate tough settlements with [potentially responsible parties] in the interest of cleaning up a site more quickly.... Settlement should only occur if the President is satisfied that the site will be cleaned up more quickly and at least as completely as it would be if the fund were to perform the cleanup. Without doubt, settlement of cases is not an opportunity to avoid any of the cleanup requirements or procedures of the act." 132 Cong.Rec. S14,918 (daily ed. Oct. 3, 1986) (statement of Sen. Mitchell). The Joint Explanatory Statement of the Committee of Conference was no less clear with respect to the cleanup orientation of section 122 in describing the initial versions as passed by the Senate and the House:

The Senate amendment authorizes the President to enter into settlement agreements with potentially responsible parties for the payment or conduct of remedial action.

The House amendment confirms the authority of the ... EPA to enter into settlement agreements with responsible parties regarding the clean-up of sites where hazardous substances have been or are threatened to be released.

H.R.Conf.Rep. No. 962, 99th Cong., 2d Sess. 251 (1986) (SARA Conf.Rep.) (emphasis added). The Conference substitute provision similarly emphasized cleanup settlements:

The purposes of the settlement procedures set forth in section 122 are to expedite settlements and to assure the effective clean-up of Superfund sites.

*Id.* at 252 (emphasis added).<sup>26</sup>

Viewed in this context, neither subsection 122(j) (covenant not to sue) nor subsection 122(f)(6)(A) (reopener clause), strictly

25. For example, subsection 122(c)(1) ties the scope of a covenant not to sue to the permanency of the remedy (i.e., cleanup) undertaken by the parties. Subsection 122(d)(1) explicitly discusses "agreement[s] ... with respect to remedial action...." (Emphasis added.) Subsection 122(e)(1) provides for special notice and monitoring procedures for use when "a period of negotiations ... would facilitate an agreement with potentially responsible parties for taking response action ... and would expedite remedial action." (Emphasis added.)

26. See also 132 Cong.Rec. H9563 (daily ed. Oct. 3, 1986) (Statement of Conf. Comm. Chair, Rep. Dingell) (Section 122 was "designed to facilitate settlement negotiations to expedite effective site cleanup by private parties....") (emphasis added); 132 Cong.Rec. S14,903 (daily ed. Oct. 3, 1986) (Statement of Sen. Stafford, Senate floor manager for SARA) (Section 122's purpose is to encourage government agencies "to increase their efforts to impose the burden and costs of cleanups on responsible parties through the use of settlement agreements") (emphasis added).

speaking, seems applicable to this settlement. Subsection 122(f) on its face pertains to "agreement[s] under this section." 42 U.S.C. 9622(f)(2). Because section 122 covers cleanup settlements, subsection 122(f) therefore would not seem to apply to settlements limited to natural resource damages.<sup>27</sup> This result is not necessarily illogical, as the Federation asserts. Congress, for example, may have been concerned that natural resource damages claims otherwise would be lost in the rush to secure a cleanup settlement and thus moved to strengthen substantially the hand of the federal natural resource trustee. Such a concern is at least muted where the natural resource damages claim is settled separately.<sup>28</sup>

With respect to subsection 122(f)(5)(A), it similarly does not appear to apply to this non-cleanup settlement, as the Federation essentially admits. See Reply of the Natural Wildlife Federation to Plaintiffs' Response to NWF's Opposition to Proposed Partial Consent Decree (Docket # 1235) at 5. Indeed, it does not seem to apply by its own terms, nor in the context of section 122 as a whole. Subsection 122(f)(5)(A) states, "Except for the portion of the remedial action [subject to covenants not to sue under other section 122 provisions,] a covenant not to sue a person concerning future liability to the United States shall include an exception to the covenant [making the person liable for future releases arising from conditions unknown] at the time the President certifies . . . that remedial action has been completed at the facility concerned." (Emphasis added.) Such language strongly suggests that the subsec-

tion is concerned with cleanup settlements. The legislative history, to the extent it addresses this aspect of subsection 122(f), confirms this interpretation. Senator Stafford, for example, stated that "the bill reaffirms the President's authority to preserve the ability to take enforcement actions . . . if any future problems develop at a site cleaned up under a consent decree." 82 Cong.Rec. S14,904 (daily ed. Oct. 3, 1986) (emphasis added); see also 82 Cong.Rec. S14,919 (daily ed. Oct. 3, 1986) (Statement of Sen. Mitchell on subsection 122(f)).

[8] Despite the apparent thrust of the language and the legislative history of section 122 in general and the two specific provisions in particular, this Court remains troubled by a holding that the two provisions do not apply to this settlement. Admittedly section 122 in general and the two provisions in particular appear to apply only in the context of a cleanup settlement. Yet no separate corresponding provision addresses the requirements of a natural resource settlement preceding a cleanup settlement. The lack of such a provision is fully explained by the fact that, customarily, natural resource damages settlements follow or are contemporaneous with cleanup settlements. This is so because, customarily, natural resource damages are viewed as the difference between the natural resource in its pristine condition and the natural resource after the cleanup, together with the lost use value and the costs of assessment. As a residue of the cleanup action, in effect, they are thus not generally settled prior to a cleanup settlement. For the reasons set forth in *Acushnet II*,

27. Indeed, Rep. Jones, apparently referring to subsection 122(f), noted in his remarks to the House that "the conference report requires EPA to notify all Federal trustees of any effort to negotiate cleanup agreements with responsible parties where there may be damages for natural resources." 132 Cong.Rec. H9612 (daily ed. Oct. 8, 1986). Clearly then, the natural resource damages settlement provision of subsection 122(f) appears to be intended by Congress to apply to the cleanup settlement context.

28. A ruling that subsection 122(f) does not apply would appropriately prompt some concern. Such an interpretation of section 122 permits it to be easily side-stepped by parties clever

enough to bifurcate the settlement into two agreements—one for the cleanup and one for the natural resource damages. Indeed, courts would need to beware of such potential, collusive results and be prepared to thwart them by refusal to sanction such settlements that seek to evade by artful drafting the clear intent of Congress. In any event, such concerns are not present in this case. The procedural posture of this litigation—specifically, the fact that the natural resource damages claims will be tried before the cleanup claims—fully explains why this natural resource damages settlement proceeds and is separate from any cleanup settlement.

see *id.* at 906-97, in the instant matter, the sovereigns' natural resource damages claim will be tried before the response costs claim.<sup>29</sup> Thus, this case presently stands in a procedural posture that Congress, in all likelihood, did not foresee. Even though Congress, never anticipating the circumstances of the instant matter, had no intent one way or the other whether the two provisions in question should apply to the Proposed Decree, this Court holds that they do apply in order to fulfill the more general intent of Congress with respect to the proper manner of settling CERCLA actions.

Moreover, had this Court held that these provisions do not apply, the general intent of Congress with respect to settlements still could not be ignored. As noted above, one of the factors that a court must consider in evaluating a consent decree is its consistency "with ... the mandate of Congress." *City of New York*, 697 F.Supp. at 692; see also *United States v. Seymour Recycling Corp.*, 554 F.Supp. at 1287 (pre-SARA CERCLA case). Thus, regardless whether the provisions of section 122 apply to settlements limited to natural resource damages claims, the statute without question represents Congress' clearest statement on CERCLA settlements in general and natural resource damages settlements in particular.

With respect to subsection 122(j)(2), Congress' concerns expressed therein—that "the potentially responsible party agree[] to undertake appropriate actions necessary to protect and restore the natural resources

damaged ..."—apply equitably to the instant Proposed Decree. Thus, on this alternative ground, the Court must examine the settlement to ensure that the Congressional mandate has been satisfied.

The Court holds that it has. The Federation argues that subsection 122(j)(2) means that a settlement is only possible where the potentially responsible party agrees to fully restore the damaged natural resources. The only support for this position is a snippet of legislative history.<sup>30</sup> Such an interpretation seems neither requisite nor wise. Quite clearly, few settlements would ever be possible where the United States' bottom line is 100% of asserted damages. Nearly all defendants would prefer to go to trial thereby thwarting the clear intent of Congress, discussed above, to promote CERCLA settlements.

An interpretation of the statute more in keeping with the intent of, as well as the language employed by, Congress is one that requires the United States to assess the strengths and weaknesses of its case and drive the hardest bargain it can. As fully outlined above, this Court is satisfied the United States<sup>31</sup> has done just that with respect to this aspect of the case and therefore holds that the settlement satisfies the Congressional intent that AVX, through the payment of two million dollars, "undertake appropriate actions necessary to protect and restore the natural resources damaged" in New Bedford Harbor. 42 U.S.C. sec. 122(j)(2). However, the Court is unaware of any indication in the record be-

29. Due to the Court's inability to commence the trial of this action as soon as it might wish, see *supra* at 1029 & n. 18, it may yet be that the administrative predicates for trial of the response costs claim will be laid before the first segment of the trial of the natural resource damages claims gets underway. Should that be the situation, the Court will consider whether it is in the interest of justice to frame jury questions as to the response costs claim and try that claim to the same jury that considers the claim for natural resource damages.

30. The remarks of Representative Jones, Chairman of the Merchant Marine Committee, one of the committees reporting SARA to the full House, contains the history in question: "[A] covenant not to sue may be agreed to by a

Federal trustee only if the responsible party agrees to restore, rehabilitate or acquire the equivalent of damaged natural resources." 112 Cong.Rec. H9617 (daily ed. Oct. 2, 1986). The Court finds this statement unpersuasive because Representative Jones made it in the course of sketching the broadest outlines of the bill, rather than in an analysis of what particular language in that bill means. Thus, the words are more a shorthand description than an interpretation of subsection 122(j)(2).

31. Subsection 122(j)(2) states "the Federal natural resource trustee [as the one who] may agree to such covenant [not to sue as is contained in the Proposed Decree]." 42 U.S.C. sec. 122(j)(2).



Cite as 712 F.Supp. 1009 (D.Mass. 1989)

fore it that the Federal natural resource trustee (the "trustee") has agreed to the covenant not to sue. Until such time as the Court is made aware that the trustee does so agree, the Court may not and will not approve the Proposed Decree.

[9] Just as with subsection 122(f)(2), even had this Court held that subsection 122(f)(6)(A) did not apply to the Proposed Decree, the underlying policy expressed therein by Congress informs this Court's evaluation of the Proposed Decree. The thrust of this subsection is to ensure that the federal government, and thus ultimately the taxpayer, does not bear the costs of future unknown damages. Rather, such costs appropriately should be borne instead by those responsible for the pollution. This is in keeping with Congress' intent to make responsible parties pay for the problems caused by their own pollution.

*Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986). Indeed, the legislative history leaves no doubt that preventing potentially responsible parties from escaping future liability was a primary concern of Congress. As Senator Stafford stated,

[C]ovenants not to sue for undetected contamination at a site [pursuant to subsection 122(f)(6)(B)] are included in consent decrees under extremely rare circumstances. In over 200 cases settled under the Superfund Program, the Government has included such covenants in only two or three cases. The provision anticipates no increase in or expansion of this policy or its rate of application.

122 Cong.Rec. S14,904 (daily ed. Oct. 3, 1986) (emphasis added).

Across the aisle, Senator Mitchell was equally emphatic about the dangers of releasing potentially responsible parties from future liability:

In addition, it is important for the President [when considering whether to include a covenant not to sue] to ask a basic question: Who will pay if there is a problem in the future? So little is known about much of the contamination at Superfund sites, that it is difficult to be

sure that no future liability will occur.... [F]uture enforcement action should be an option under the covenants to assure that the public health is protected. From the perspective of the public, if the President does not use every option at the President's disposal to protect the public health, then the public is placed at a severe disadvantage.

122 Cong.Rec. S14,919 (daily ed. Oct. 3, 1986). See also 52 Fed.Reg. 28,032, 28,040-41 (July 27, 1987) (stressing the Congressional concern that potentially responsible parties should remain liable if an agreed upon settlement proves inadequate to protect the environment and the public health).

Congress' response to these concerns was to require reopening provisions except in those rare cases where "extraordinary circumstances" were present. 42 U.S.C. sec. 9622(f)(6)(B). Indeed, the House Conference Report reveals that a provision more hospitable to reopeners was replaced by a tougher measure in the Conference:

The conference substitute deletes the House provision regarding a potentially responsible party's ability to obtain a covenant not to sue without a "reopener" for unknown conditions if that responsible party contributes to a "Groundwater and Surface Water Protection Fund" for any future problems at the facility. Instead, new section 122(f)(6)(B) is added to require, except in extraordinary circumstances, reopeners for unknown conditions. The provision now states that settlements shall not be granted without reopeners for unknown conditions, except in extraordinary circumstances where all other terms and conditions of the settlement agreement are sufficient to protect health and the environment from any future releases at or from the facility. This provision should be implemented in a manner consistent with the current application of the Administration settlement policy as to unknown conditions.

H.R.Conf.Rep. No. 962, 99th Cong., 2d Sess. 355 (1986) (emphasis added).

This Congressional concern is as applicable to a natural resource damages settlement as it is to a cleanup settlement. In both cases, unknown conditions can lead to further releases causing further damages. Admittedly, requiring such a provision will make settlements somewhat more difficult to achieve. Beyond peradventure, however, Congress is willing to accept such a trade-off in return for greater security that the settlement will adequately resolve a pollution problem in the cleanup context and no reason is evident why that intent should not apply to the natural resource damages context.

As noted, the present Proposed Decree contains no such responder clause. Indeed, some of the language in it appears expressly to guarantee AVX that the sovereigns will not sue AVX for unknown damages in the future caused by the release of PCBs. Proposed Decree at para. VII. On the record before the Court, no "extraordinary circumstances," as the term is used in subsection 122(f)(6)(B), appear present that would place this case in that rare one percent of cases identified by Senator Stafford that warrant the absence of such a clause. The Court thus rules that the lack of a responder clause is a violation of subsection 122(f)(6)(A) as well as against the intent of Congress and not in the public interest.

For the reasons stated above, the Proposed Decree is approved in all respects and every particular save two: 1) it is not clear to the Court on this record that the trustee has agreed to the covenant not to sue, 42 U.S.C. sec. 122(f)(2), and 2) the Proposed Decree fails to include a "responder" provision as "an exception to the covenant (not to sue) that allows the President to sue [AVX] concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions that are unknown at the time [of the entry of the Proposed Decree]." See 42 U.S.C. 9622(f)(6)(A). Should the trustee agree to the covenant and the parties negotiate such a responder provision and resubmit the Pro-

posed Decree as thus amended, the Court will act thereon promptly.



Elizabeth DOLE, Secretary of Labor,  
United States Department of  
Labor, Plaintiff,

v.

PAPA GINO'S OF AMERICA,  
INC., Defendant.

Civ. A. No. 85-897-MA.

United States District Court,  
D. Massachusetts.

May 11, 1989.

Secretary of Labor brought action against employer to enforce overtime provisions of Fair Labor Standards Act. On cross motions for partial summary judgment, the District Court, Massena, J., held that restaurant chain's "associate managers" were employees rather than executives, and thus subject to overtime wage provisions of Fair Labor Standards Act.

Judgment for government.

#### 1. Labor Relations ¶1223

Restaurant chain's "associate managers" were employees rather than executives, and thus subject to overtime wage provisions of Fair Labor Standards Act; managers served as management trainees, primarily performing crew member work as training to be executives. Fair Labor Standards Act of 1938, §§ 7(a)(1), 13(a)(1), 29 U.S.C.A. §§ 207(a)(1), 213(a)(1).

#### 2. Labor Relations ¶1197

Employer asserting that employees making over \$260 per week are executives, and thus exempt from overtime wage provision of Fair Labor Standards Act may prove that such employees had management as their primary duty through evi-

the federal courts. No particular period of limitations has been formulated as to such proceedings. Since the right was developed as an adjunct to a proceeding to enforce an award, perhaps the most reasonable limitations period would be any pertaining to a section 301 enforcement suit. There is, however, no analogous limitations period in the Massachusetts Arbitration Act for applications to confirm, see Mass.G.L. c. 150C, § 10. The Federal Arbitration Act does, however, provide a one-year limitations period, 9 U.S.C. § 9; but even assuming, without deciding, the advisability of adopting that period, plaintiff's action here would have been timely brought.

We accordingly find the present action was not time barred.<sup>10</sup>

*Affirmed.*



**COMMONWEALTH OF PUERTO RICO**  
et al., Plaintiffs, Appellees,

v.

The SS ZOE COLOCOTRONI, her  
Engines, Appurtenances, etc., et  
al., Defendants, Appellants.

No. 78-1543, 79-1468.

United States Court of Appeals,  
First Circuit.

Argued March 10, 1980.

Decided Aug. 12, 1980.

Commonwealth of Puerto Rico and  
local Environmental Quality Board sued

10. Noting that its motion to dismiss is not properly deemed a responsive pleading, see Fed.R.Civ.P. 12(a), the Company further contends that the district court erred by ruling on the Union's remand request without affording it any opportunity to "respond to the merits of the Union's complaint." Whatever technical merit there might be in this argument, we can discern no prejudice stemming from the district court's action. Its motion to dismiss aside, the Company had a chance to respond to the Union's subsequent motion for remand, though it chose instead to stand silent. Moreover, the

tramp oil tanker in rem, tanker's owner and latter's insurance underwriters to recover for environmental damage caused to Commonwealth coastline after oil was pumped to refloat the tanker which had gone aground on a reef. The United States District Court for the District of Puerto Rico, Juan R. Torruella, J., 456 F.Supp. 1327, awarded plaintiffs over six million dollars for cleanup costs and environmental harm, and defendants appealed. The Court of Appeals, Levin H. Campbell, Circuit Judge, held that: (1) it was not abuse of discretion to strike defendants' pleadings on liability issue; (2) Puerto Rican environmental statute created both cause of action for environmental damage caused by the oil spill and designated EQB as the proper party to sue; (3) damages were not limited to loss of market value of the affected property; (4) primary standard for damages was costs reasonably incurred in rehabilitating the environment without grossly disproportionate expenditures; and (5) it was error to award over five million dollars for replacement value of destroyed animals, which were of commercial useless value and which assertedly would perish if returned to oil soaked sands but would probably replace themselves naturally if and when restoration took place.

*Affirmed in part, vacated in part and remanded for further proceedings.*

**1. Champerty and Maintenance — 1**

Receipt by Commonwealth of Puerto Rico of \$162,194 grant from Environmental Protection Agency for litigation expenses in

Company has had a full opportunity, of which we assume it availed itself, to brief and argue before this court any points which it might have raised in a responsive pleading below. Finally, and importantly, the Company in its brief now expressly disavows interest in receiving the very relief we assume would be appropriate to cure the alleged error—a remand to the district court so that an answer to the Union's complaint could be filed. We are simply at a loss to see what harm to the Company resulted from the timing of the district court's action.



connection with coastal oil spill did not constitute "maintenance" in the common law sense and grant was not required to be set up against Commonwealth's recovery. Fed. Rules Civ.Proc. Rule 60, 28 U.S.C.A.; 26 L.P.R.A. § 2003; Federal Water Pollution Control Act, § 106(a), 33 U.S.C.A. § 1256(a).

See publication Words and Phrases for other judicial constructions and definitions.

## 2. Constitutional Law — 305(3)

### Federal Civil Procedure — 1455

Striking defendants' pleadings on liability issue and their petition for exoneration from and limitation of liability was not too severe a sanction for attempt to avert scheduled depositions by purporting to admit liability and luring plaintiffs into false sense that liability issue was settled; defendants' conduct was inexcusably recalcitrant and materially prejudiced plaintiffs' preparation and court's efforts to keep protracted suit moving forward, and there was no violation of due process or abuse of discretion. Fed.Rules Civ.Proc. Rules 4(d)(3), 37(b), 28 U.S.C.A.; 46 U.S.C.A. §§ 183, 185; U.S.C.A.Const. Amend. 5.

## 3. Federal Courts — 896

Although findings of liability were redundant once defendants' pleadings had been stricken as regards liability issue, the trial court's attitude was not "poisoned" by alleged unwarranted reliance on depositions of vessel crew and master in rendering liability findings as depositions were received only in support of claim for punitive damages.

## 4. Insurance — 645(1)

Where admiralty action to recover for oil spill involved no cross claims between insurers and vessel owners and all other defendants' pleadings on liability were stricken, including insurers' defenses based on terms and conditions of the insurance contract, the insurers were properly barred from raising against plaintiffs the contract defense that policy exempted coverage of losses engendered by owner's knowing use of an unseaworthy vessel.

## 5. Federal Courts — 79

To sustain in personam jurisdiction over a foreign corporation a federal court must find both that personal jurisdiction is authorized by the local statute and that exercise of such jurisdiction does not violate the due process requirement that the non-resident defendant have certain "minimum contacts" with the forum state, which contacts must be such that assertion of jurisdiction comports with traditional notions of fair play and substantial justice. Fed.Rules Civ.Proc. Rule 4(e), 28 U.S.C.A.; Puerto Rico Rules of Civil Procedure, Rule 4.7, 32 L.P.R.A. Appendix II; U.S.C.A.Const. Amends. 5, 14.

## 6. Federal Courts — 84

Action of English insurance underwriters in regularly insuring vessels which visited Puerto Rico satisfied both statutory and constitutional test for assertion of personal jurisdiction under Puerto Rico long-arm statute in action to recover for environmental damages sustained when an insured vessel, laden with crude oil, ran aground off Puerto Rico, especially in view of services available through local Puerto Rican correspondent, notwithstanding that underwriters did not sell insurance in Puerto Rico. Fed.Rules Civ.Proc. Rule 4(e), 28 U.S.C.A.; Puerto Rico Rules of Civil Procedure, Rule 4.7, 32 L.P.R.A. Appendix II.

## 7. Insurance — 617

Where an insurer has the means available to structure its primary conduct so as to control the area within which it will be subject to direct action, where it is undoubtedly aware that objects of its policies are regularly present in a particular jurisdiction and where it not only does not act to curtail such presence but actively promotes it by providing contractual services in the jurisdiction, such an insurer is amenable to personal jurisdiction in the forum. Fed. Rules Civ.Proc. Rule 4(e), 28 U.S.C.A.; Puerto Rico Rules of Civil Procedure, Rule 4.7, 32 L.P.R.A. Appendix II.

## 8. Territories — 32

Puerto Rico, as owner of real property primarily affected by oil spill would, like any private landowner, have a cause of

action in admiralty to recover whatever damages it could prove under conventional principles for its private economic loss as measured by diminution of fair market value in the affected coastal land. Jones Act, § 8, 48 U.S.C.A. § 749; Admiralty Jurisdiction Act, 46 U.S.C.A. § 740.

**9. Health and Environment ⇐25.7(23)**

Puerto Rico had right of action as a governmental entity to recover for loss of living natural resources, such as mangrove trees and small animals attached more or less permanently to Commonwealth land, which resources were damaged because of oil spill from defendant tanker; Environmental Quality Board was proper party to bring the action and, also, since Commonwealth had legislatively authorized bringing of suits and had earmarked funds recovered for special use, such an action was construed as taking place of any implied common-law action the Commonwealth, as trustee, might have brought. 12 L.P.R.A. §§ 1131(29), 1132(b); 24 L.P.R.A. § 595.

**10. Admiralty ⇐18**

An oil spill on navigable waters is a breach of federal maritime law and, hence, action under Puerto Rican environmental legislation to recover for damage to Commonwealth property because of oil spill was cognizable in admiralty. 12 L.P.R.A. § 1131(29).

**11. Admiralty ⇐1.20(5)**

Where the injury occurs in the territorial waters of the state, the general rule is that admiralty will give broad recognition of the authority of the states to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction.

**12. Damages ⇐108**

Under the traditional rule the measure of damages for tortious injury to real property is the difference in the commercial or market value of the property before and after the event causing injury but where the property can be restored to its original condition for a sum less than the diminution

in value the cost of restoration may be substituted as a measure of damages.

**13. Health and Environment ⇐25.7(23)**

Under Puerto Rican statute empowering Environmental Quality Board to recover total value of damages caused to the environment such as by pollution, measure of damage caused Commonwealth land because of oil spill was not limited to market value of comparable property in the vicinity. 12 L.P.R.A. § 1131.

**14. Health and Environment ⇐25.7(23)**

Fact that Commonwealth of Puerto Rico did not intend, and perhaps was unable, to exploit for commercial purposes oil-damaged plant and animal life and Commonwealth coastal areas which supported such life did not prevent a damage remedy in face of clearly stated legislative intent of environmental legislation, to compensate for "the total value of the damages caused to the environment and/or natural resources." 12 L.P.R.A. § 1131(29).

**15. Health and Environment ⇐25.7(23)**

Appropriate primary standards for determining amount recoverable by Commonwealth of Puerto Rico for oil spill damage to Commonwealth coastline and animal and plant life thereof was the cost reasonably to be incurred to restore or rehabilitate the environment or as close thereto as feasible without grossly disproportionate expenditures, with focus on steps that a reasonable and prudent sovereign would take and with attention to such factors as technical feasibility, harmful side effects, compatibility with or duplication of expected natural regeneration and point after which further efforts become either redundant or disproportionately expensive. 12 L.P.R.A. §§ 1131(29), 1132(b); 24 L.P.R.A. § 59

**16. Health and Environment ⇐25.7(2)**

Where direct restoration of an area affected by pollution is either physical impossible or so disproportionately expensive that it would not be reasonable to undertake such remedy, some other measure of damages may be reasonable, at least where process of natural regeneration w

be too slow to ensure restoration within a reasonable time, with alternatives including acquisition of other resources or comparable lands for public parks or, in case of woodlands, reforestation of a similar proximate site, bearing in mind that damages for such alternative measures should be reasonable and not grossly disproportionate to harm caused and ecological values involved. 12 L.P.R.A. §§ 1131(29), 1132(b); 24 L.P.R.A. § 595; Federal Water Pollution Control Act, §§ 311(a)(8), (f), (f)(4, 5), 33 U.S.C.A. § 1321(a)(8), (f), (f)(4, 5); Outer Continental Shelf Lands Act, §§ 301(9), 303(a)(2)(C, D) as amended 43 U.S.C.A. §§ 1811(9), 1813(a)(2)(C, D); Submerged Lands Act, § 2(e), 43 U.S.C.A. § 1301(e).

#### 17. Health and Environment ⇐25.7(23)

Ultimate purpose of a remedy for environmental damage should be to protect the public interest in a healthy, functioning environment and not to provide a windfall to the public treasury. Federal Water Pollution Control Act, § 311(a)(8), (f), (f)(4, 5), 33 U.S.C.A. § 1321(a)(8), (f), (f)(4, 5); Outer Continental Shelf Lands Act, §§ 301(9), 303(a)(2)(C, D) as amended 43 U.S.C.A. §§ 1811(9), 1813(a)(2)(C, D); Submerged Lands Act, § 2(e), 43 U.S.C.A. § 1301(e); 12 L.P.R.A. § 1131(29).

#### 18. Health and Environment ⇐25.7(23)

Restoration plan, which was estimated to cost approximately \$7 million and which focused on removing damaged mangrove trees and oil-impregnated sediments from large area of public land damaged by oil spill and replacing them with clean sediment and container-growing mangrove plants was properly rejected as impractical, inordinately expensive and unjustifiably dangerous to health, mangroves and marine animals still present in the isolated shoreline area. 12 L.P.R.A. § 1131.

#### 19. Health and Environment ⇐25.7(23)

Although environmental legislation, such as Clean Air Act and Outer Continental Shelf Lands Act speak, in places, of replacement as a part of the appropriate recovery for environmental damage, such references, in context, should be interpreted

as meaning replacement as a component in a practice plan for actual restoration; thus, for example, if a state were seeking to restore a damaged area of forest a portion of the damages sought might be allocated to replacement of wild birds or game or such other creatures as would not be expected to regenerate naturally within a relatively finite period even with appropriate restoration. Federal Water Pollution Control Act, § 311(a)(8), (f), (f)(4, 5), 33 U.S.C.A. § 1321(a)(8), (f), (f)(4, 5); Outer Continental Shelf Lands Act, §§ 301(9), 303(a)(2)(C, D), (b)(3) as amended 43 U.S.C.A. §§ 1811(9), 1813(a)(2)(C, D), (b)(3); Submerged Lands Act, § 2(e, g), 43 U.S.C.A. § 1301(e, g); 12 L.P.R.A. § 1131.

#### 20. Health and Environment ⇐25.7(23)

In awarding damages to Commonwealth of Puerto Rico for oil spill damage to Commonwealth shoreline and plant and animal life thereon it was improper to use replacement value of animals allegedly permanently destroyed or damaged, especially as the small, commercially valueless creatures would promptly perish if returned to oil-soaked sands but would probably replace themselves naturally if and when restoration took place. 12 L.P.R.A. § 1131.

#### 21. Health and Environment ⇐25.7(23)

Although it was error to award replacement value of destroyed organism as damages recovered by Commonwealth of Puerto Rico for oil spill damage to mangrove area of Commonwealth shoreline, the Commonwealth was entitled to opportunity to show that some lesser steps were feasible that would have a beneficial effect on the mangrove ecosystem without excessive destruction of existing natural resources or disproportionate cost, with cost projected for carrying out of such reasonable lesser steps being an appropriate award of damages. 12 L.P.R.A. § 1131.

Owen McGivern, New York City, with whom John W. Wall, Peter S. Dealy, Gary B. Schmidt, Donovan, Leisure, Newton & Irvine, Daniel J. Dougherty, Mary Louise Montgomery, Kirlin, Campbell & Keating,



New York City, Leo F. Glynn, Richard A. Dempsey, and Glynn & Dempsey, Boston Mass., were on brief, for defendants, appellants.

Nicolas Jimenez, San Juan, P.R., with whom William A. Graffam and Jimenez & Fuste, San Juan, P.R., were on brief, for plaintiffs, appellees.

Kenneth S. Kamlet, Elizabeth F. Kroop, Washington D.C., Marshall Coleman, Atty. Gen., Washington, D.C., Timothy G. Hayes, Asst. Atty. Gen., Richmond, Va., Commonwealth of Virginia, Francis X. Bellotti, Atty. Gen., Stephen M. Leonard, Asst. Atty. Gen., Boston, Mass., Commonwealth of Massachusetts, Richard S. Cohen, Atty. Gen., Cabanne Howard, Asst. Atty. Gen., Augusta, Maine State of Maine, Jim Smith, Atty. Gen., Martin S. Friedman, Asst. Atty. Gen., Tallahassee, Fl., State of Florida, Mark White, Atty. Gen., Douglas Caroom, Asst. Atty. Gen., Austin, Tex., State of Texas, Stephen H. Sachs, Atty. Gen., John B. Griffith, Asst. Atty. Gen., Annapolis, Md., State of Maryland, Rufus L. Edmisten, Atty. Gen., William Raney, Asst. Atty. Gen., Raleigh, N.C., State of North Carolina, Robert Abrams, Atty. Gen., Beryl Kuder, Asst. Atty. Gen., New York City, State of New York, Sarah Chasis, and Jane Bloom, New York City, on brief, for The National Wildlife Federation, et al., as amici curiae.

Jose A. Quiles, U.S. Atty., San Juan, P.R., Alice Daniel, Asst. Atty. Gen., Eldon V. C. Greenberg, Gen. Counsel, Michael A. Levitt, Atty., National Oceanic and Atmospheric

Administration, William Kanter, and Allen van Emmerik, Attys., Dept. of Justice, Civil Division, Washington, D.C., on brief, for the United States of America, as amicus curiae.

Before COFFIN, Chief Judge, CAMPBELL, Circuit Judge, and WYZANSKI,\* Senior District Judge.

LEVIN H. CAMPBELL, Circuit Judge.

In the early morning hours of March 18, 1973, the SS ZOE COLOCOTRONI, a tramp oil tanker, ran aground on a reef three and a half miles off the south coast of Puerto Rico. To refloat the vessel, the captain ordered the dumping of more than 5,000 tons of crude oil into the surrounding waters. An oil slick four miles long, and a tenth of a mile wide, floated towards the coast and came ashore at an isolated peninsula on the southwestern tip of the island—a place called Bahia Sucia. The present appeal concerns an action in admiralty brought by the Commonwealth of Puerto Rico and the local Environmental Quality Board (EQB) to recover damages for harm done to the coastal environment by the spilled oil.<sup>1</sup>

[1] Defendants<sup>2</sup> have raised numerous objections to the district court's judgment awarding plaintiffs \$6,164,192.09 in damages for cleanup costs and environmental harm. The primary objections are that the district court: (1) abused its discretion in striking defendants' pleadings on the issue of liability as a sanction for defendants' conduct during the discovery process; (2)

\* Of the District of Massachusetts, sitting by designation.

1. Several other actions that were initially consolidated with this one have been settled or adjudicated. The United States recovered \$840,366.01 in cleanup costs, interest and statutory penalties against the owners of the oil tanker; we refused to enlarge this award by adding attorney's fees and additional prejudgment interest. *United States v. M/V Zoe Colocotroni*, 602 F.2d 12 (1st Cir.1979). Local fishermen and owners of a nearby salt pond settled their claims for property damage and lost income for \$55,000 and \$75,000 respectively. A local hotel's claim for riparian damages and loss of business was also settled, for \$13,500.

2. Defendants in this action are the SS ZOE COLOCOTRONI (in rem); the owners—Marbonanza Compania Naviera, S.A., Colocotroni, Ltd., and/or Colocotroni Brothers, S.A.; and the insurance underwriters—the West of England Ship Owners Mutual Protection and Indemnity Association (hereinafter West of England-Luxembourg) and the West of England Ship Owners Mutual Insurance Association (hereinafter West of England-London). The two West of England firms (hereinafter collectively West of England) were sued under Puerto Rico's direct action statute, 26 L.P.R.A. § 2003, as insurers of the ZOE COLOCOTRONI and her owners. West of England's contention that the district court lacked personal jurisdiction over the two firms is discussed in Part IV *infra*.

erred in considering depositions of the ship's master and crew on the issue of liability and in making findings as to liability after that issue had been removed from the case; (3) lacked personal jurisdiction over the underwriters West of England-Luxembourg and West of England-London; (4) erred in finding plaintiffs had standing to sue for environmental damages; (5) applied the wrong standard in measuring damages; (6) made certain erroneous findings of fact on damages; and (7) erred in denying defendants' Rule 60 motion for relief from judgment.<sup>3</sup> The facts and circumstances of the oil spill and its aftermath are set forth in detail in the district court's opinion, *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 456 F.Supp. 1327 (D.P.R. 1978). After a brief review of these facts and of the trial testimony, we will address defendants' contentions in turn.

# I.

The following facts found by the district court are not in serious dispute. On March 15, 1978, the ZOE COLOCOTRONI departed La Salina, Venezuela, carrying 187,670 barrels of crude oil en route to Guayanilla, Puerto Rico. For the first two days of the voyage, the vessel proceeded by celestial navigation. The last star fix, however, was taken at 1859 hours on March 17. For the next eight hours, the ship proceeded by

dead reckoning. As the vessel approached the south coast of Puerto Rico, it was, the district court stated, "hopelessly lost." At 0300 hours on March 18, the ship grounded on a reef. Efforts to free the tanker by alternately running the engines in forward and reverse were unsuccessful. After ten minutes, the captain ordered the crew to lighten ship by emptying the cargo of crude oil into the sea.<sup>4</sup> By the time the vessel refloated, some 1.5 million gallons of crude oil—5,170.1 tons—had poured into the surrounding waters.

The oil floated westward from the site of the spill throughout the daylight hours of March 18, and began coming ashore after nightfall. Bahia Sucia is a crescent-shaped bay facing southeastward from the Cabo Rojo peninsula, which forms the southwest tip of Puerto Rico. The oil entered Bahia Sucia, washed onto the beaches, and penetrated the mangrove forests that line the western edge of the bay. The oil was particularly thick in three areas: around the rocky tip of the peninsula, in a section of mangroves known as West Mangrove between a point called "Hermit One" and an inlet called "Dogman's Cove,"<sup>5</sup> and on the open beach area stretching along the northern edge of the bay. In addition, as the tide ebbed and flowed, oil entered the tidal flats behind the mangrove fringe, coating the roots of mangroves growing deeper in the forest and soaking into the sediments.

3. Defendants also argue that receipt by the Commonwealth of a \$162,194 grant from the Environmental Protection Agency (EPA) for litigation expenses in connection with the Bahia Sucia oil spill constituted "maintenance" in the common law sense. In the alternative, defendants argue the amount of the grant should be set off against any recovery to which the plaintiffs may be entitled. These arguments are specious. See generally Corbin on Contracts § 1423 (no illegality in assisting another to maintain a suit by advancing the money to pay costs and expenses, even as a gift, if the advancement is made for reasons of charity or friendship and not for profit). Section 106(a) of the Federal Water Pollution Control Act, 33 U.S.C. § 1256(a), provides that EPA may grant funds to states "for the prevention, reduction, and elimination of pollution, including enforcement directly or through appropriate State law enforcement officers or agencies." The regulations define "enforcement" to include "litigation support activities." 40 C.F.R. § 35.1513-

(8). A statutorily authorized government grant intended to further the purposes of a valid statute does not constitute "maintenance" by the United States. Cf. *Mitchell v. Mitchell Truck Line, Inc.*, 286 F.2d 721, 727 (5th Cir. 1961) (Secretary of Labor's solicitation of minimum wage complaints pursuant to statutory scheme not "barratrous").

4. The captain was ultimately tried and convicted on a charge of violating 33 U.S.C. § 1321(b)(5) in connection with the dumping of the oil. 456 F.Supp. at 1333 n.9.

5. Two hermits—Hermit One and the Dogman—lived in the West Mangrove area at the time of trial, the Dogman being so called because of his large collection of canine acquaintances. Neither hermit claimed any legal interest in the property. Various local topographical features were identified in court by reference to these two eponymous individuals.

A massive cleanup operation, coordinated by the United States Coast Guard and several Commonwealth agencies, commenced on the morning of March 19. Cleanup crews, hampered to some extent by variable winds that blew oil back and forth across the bay, used booms to attempt to contain oil floating on the surface. Much of this oil was pumped out, either directly from the water or from large holes dug in the beach into which oil was channeled by the cleanup crews. By March 29, approximately 755,000 gallons of oil, or about half the amount spilled, had been recovered. On several occasions during the cleanup, oil was driven by winds and currents into the eastern edge of the bay in an area known as East Mangrove. This thin layer of oil was difficult to remove, but, according to the district court's findings, it caused little or no harm to the East Mangrove forest.

By April, cleanup activities had switched from large-scale removal of oil to small-scale activities such as manual beach cleanup and bailing of oil from tidal pockets with buckets and small boats. Large amounts of contaminated sands—totalling about 4,500 cubic yards—were removed from the beach area by bulldozer and by hand. At the end of April, the major remaining cleanup efforts were halted, and all further efforts were discontinued after September 24. Despite the cleanup, oil continued to be present in Bahia Sucia, especially in the stand of mangroves on the west side of the bay.

One of plaintiffs' expert witnesses, Dr. Ariel Lugo Garces, a wetlands specialist, testified that the ecological functions of a mangrove forest such as that at Bahia Sucia included: (1) protecting the shoreline from erosion, storms, tides, and high winds; (2) providing a habitat for wildlife, especially birds; (3) providing a protected breeding ground for fish and shellfish; and (4) acting as a food source for aquatic creatures of all

kinds. Dr. Roger D. Anderson, a marine biologist who testified for defendants, agreed with Dr. Lugo that tropical mangroves are an important link in the food chain that supports fisheries and other marine resources.

The district court described the Bahia Sucia mangroves as follows:

"The mangrove that borders on the ocean fringe throughout Bahia Sucia is a species referred to as red mangrove (*Rhizophora mangle*). This mangrove has both main and prop roots, in which are located lenticels or pores for gas exchange. These lenticels facilitate root respiration. Various epibenthic species such as tree oysters, snails, crabs, sponges and molluscs dwelled in these root systems. In the waters surrounding these roots, communities of fish, shrimp and similar floating or swimming organisms thrived. The bottom around the roots was inhabited by various benthic infauna. The bottom near the red mangrove was covered with both turtle grass and manatee grass

Further inland from the fringe, as the interstitial salinity rises, the red mangrove is supplanted by the black mangrove (*Avicennia nitida*). This mangrove inhabits a zone systematically flooded by the tide, and rather than prop roots, it has fingerlike breathing tubes (called pneumatophores) which rise from the ground to above high water level. This area provided a habitat principally for crustaceans such as crabs and barnacles, and algae grazing snails, bees and reptiles. There were also benthic infaunal communities similar in nature to those in the bottom surrounding the red mangrove fringe."

456) F.Supp. at 1338 (footnotes omitted).<sup>6</sup> The district court noted that the configura-

live just above the surface of the sediment, whether in or out of the water. While defendants have questioned the accuracy of this terminology on technical grounds, we believe the intended meaning of these terms is clear

6. In the district court, the terms "benthic infauna" and "infaunal creatures" were used to describe creatures such as worms or clams living in or under the sediment beneath the mangroves. The term "epibenthic" was used to describe creatures such as shrimp or crabs that



tion of Bahia Sucia, together with the prevailing winds and currents, made the bay a natural trap for floating debris, including small quantities of petroleum and tar.<sup>7</sup> Nevertheless, the court found that, at the time of the ZOE COLOCOTRONI oil spill, "Bahia Sucia was a healthy, functioning estuarial ecosystem, typical of those found in the Southern coast of Puerto Rico and similar tropical environments." 456 F.Supp. at 1339.

#### A.

The Commonwealth of Puerto Rico and the EQB instituted the present action on March 19, 1973, invoking the admiralty jurisdiction of the district court. A six-week trial, addressed solely to damages, commenced on November 7, 1977.<sup>8</sup> Plaintiffs first introduced testimony by expert witnesses on the impact of the oil spill on Bahia Sucia, the toxic effects of the oil, and the extent to which oil was still present four years after the spill. Other experts then presented proposals for restoring the area and testified to the costs that would be involved. Rafael Cruz Perez, an engineer, presented a proposal to remove and replace a total of 164,600 square meters (approximately 40 acres) of oil-contaminated sediments in the West Mangrove and East Mangrove areas to a depth of one meter. While the details of the Cruz Perez plan were somewhat sketchy, the geographic areas to be affected by the plan apparently consisted of the following. Of the 40 acres of contaminated sediments to be removed, about 15 acres were on the west side of the bay in the vicinity of West Mangrove and about 25 acres were on the east side in the vicinity of East Mangrove. Of the 15 acres

on the west side, about 3.5 acres contained mangroves, approximately half of which were alive notwithstanding the polluted sediments. Of the 25 acres to be removed on the east side, about 16.5 acres contained mangroves. Cruz Perez thus estimated his plan for removal of 40 acres of contaminated sediments would necessarily entail the clearing of some 20 acres of existing mangroves. Furthermore, Cruz Perez testified, three additional acres of mangroves in uncontaminated areas would have to be cleared to provide access for heavy machinery.<sup>9</sup> An engineering report submitted by Gabriel Fuentes, a contractor, estimated the cost of removing the sediments and mangroves to be \$7,176,363.71. Charles Pennock, a San Juan nurseryman, submitted an estimate of \$559,500 for the replanting of 23 acres of mangroves from container-grown plants (approximately 5,500 trees per acre) and a five-year maintenance plan.

Dr. Roger J. Zimmerman, a marine biologist from the University of Puerto Rico, testified concerning a study he conducted in late 1976 and early 1977 comparing the number of living organisms found at Bahia Sucia with the number found in a comparable control area. Dr. Zimmerman's study established no significant differences in number or type of organisms—either plants or animals—in the seagrass beds or on the prop roots of the mangroves. The study did, however, show a substantial disparity in the number of organisms living on or under the sediments. In particular, Dr. Zimmerman stated that the number of molluscs (e. g., clams, snails) in the Bahia Sucia area was very small in comparison to the control area. On the other hand, samples

enough in the record, and we will use them in the same fashion as the district court.

7. Indeed, the literal English translation of Bahia Sucia is "dirty bay."
8. On the first day of trial, the district court judge and counsel for the parties made an on-site visual inspection of the Bahia Sucia shoreline.
9. Cruz Perez testified that he made his calculations working from aerial photographs and from on-site observations. Cruz Perez's study

showed the size of the various impacted areas in numbers of square meters. We have translated these figures into numbers of acres for ease of reference. According to Cruz Perez's figures, there were a total of about 12 acres of mangroves in the West Mangrove area, of which about half were living mangroves in unaffected sediments. The figures suggest there were also about 2.5 acres of dead mangroves not impacted by oil. For a further discussion of the significance of these numbers, see note 25 *infra*.

taken in Bahia Sucia found a far larger number of polychaete worms, especially a genus known as capitella which often proliferates in areas of acute environmental distress.

Dr. Zimmerman also testified that, subsequent to this first survey, a second study was undertaken at the behest of the Environmental Quality Board. This study, again relying on core samples taken in Bahia Sucia and at a control site, concentrated on the sediments, where the first survey had found the greatest impact from the oil. Dr. Zimmerman stated that the surveyors took their samples primarily from the vicinity of a small lagoon in the West Mangrove area where previous studies and visual observation indicated the oil was heavily concentrated. This study revealed a marked difference between the two sites in the numbers of infaunal and epibenthic creatures, according to Dr. Zimmerman.

Dr. Ariel Lugo Garces, the wetlands expert, testified to studies he had made indicating the presence of oil in the mangrove sediments correlated with dead or dying mangrove trees. The mangroves would not grow back, Dr. Lugo said, as long as the oil remained in the sediments. Dr. Lugo also presented a compilation, prepared by him, of the data gathered by the other Bahia Sucia surveyors, summarizing the extent of damage to twelve different components of the Bahia Sucia ecosystem. Dr. Lugo stated that he considered his figures conservative, since little data was available on many other environmental components.

Finally, Dr. Philip E. Sorenson, an economist specializing in natural resources, discussed the economic theory that shippers of oil should be required to bear such external social costs as oil spill damages in order to prevent underpricing of their product. "If the producers and consumers of oil are able to conduct their affairs in such a way as to transfer to society a large part of the real cost of producing and consuming their product," Dr. Sorenson said, "we'll be in an inefficient economic situation: one in which

the market price of the commodity will be less than the full social cost of producing it." Dr. Sorenson also presented a summary of plaintiff's claims for damages, including *inter alia* the Commonwealth's uncontested claim for cleanup expenses of \$78,108.89, the \$7.5 million for sediment removal and mangrove replanting, and Dr. Sorenson's own estimate of \$5,526,583 as the replacement value of the invertebrate organisms killed by the oil spill.

Dr. Sorenson testified he arrived at the latter figure by way of the following calculations. Dr. Lugo's report had compiled the results of earlier studies together with the second Zimmerman survey to provide a table of environmental harms. Concentrating only on the figures from the Zimmerman study, Dr. Sorenson extrapolated the differences in number of organisms found in the ten-centimeter core samples over a square meter area to determine the net difference in creatures per square meter. Since six samples were taken at each of the four "stations" in Bahia Sucia and in the control area, he determined this involved multiplying the results of each set of six samples by 21.22. Results from one of the four stations, where more animals were found at Bahia Sucia than at the control area, were not included. The net difference was calculated to be 1,138 creatures per square meter. This figure in turn yielded the sum of 4,605,486 creatures per acre, and a total of 92,109,720 creatures of the 20 acres of mangroves allegedly impacted by oil. Dr. Sorenson testified that he took the 20-acre figure from "the survey and the map created by Mr. Cruz Perez" and that the 20 acres included a substantial area in East Mangrove.

To arrive at an estimate of damages, Dr. Sorenson testified he consulted catalogs from biological supply houses. From these catalogs he determined that "[m]any of these species sell at prices ranging from \$1 to \$4.50" and "that no animal on the list sold for less than 10 cents."<sup>10</sup> Dr. Sorenson

10. Dr. Sorenson did not testify that the biological supply houses actually procured specimens at Bahia Sucia or that the Bahia Sucia animals were marketable through such outlets. He

only stated that creatures similar to those killed could be replaced by purchasing them from the catalogs.



assigned an average replacement value to each creature, regardless of species, of six cents. Multiplying 92,109,720 times .06 resulted in an estimate of \$5,526,583 as the replacement value of the organisms "missing" from the Bahia Sucia sediments. Dr. Sorenson also estimated the cost of a ten-year scientific monitoring program at \$1,393,200. His total estimate of the damages was thus \$14,733,755.60, consisting of \$7,176,363.71 for mangrove and sediment removal, \$559,500 for mangrove replanting, \$5,526,583 for the replacement value of organisms, \$1,393,200 for monitoring, and \$78,108.89 for cleanup costs.

B.

Plaintiffs' witnesses were thoroughly cross-examined by defendants' counsel. In addition, defendants presented considerable expert testimony of their own. The primary thrust of this testimony was that the oil originally present in Bahia Sucia had "weathered" through the action of wind, waves, sunlight and the elements and was no longer having major toxic effects on the environment. Defendants' experts also testified that some of the damaged mangroves were victims of pre-existing high salinity in West Mangrove rather than oil pollution. Further testimony indicated that, in the opinion of defendants' experts, there were substantial signs of natural regeneration among the mangroves. Dr. Edward S. Gillfillan testified, for example, that he expected the area to be restored by natural processes within ten to fifteen years, if not less. He estimated the size of the area of "continuing damage" in West Mangrove at two and a half to three acres.

Defendants also offered alternative restoration or reforestation programs of their own that were less extensive or less costly than plaintiffs' proposals. Dr. Howard Teas, a biologist, testified that, in his opinion, it would be possible, though not necessarily desirable, to remove oil from the sediments without destroying existing vegeta-

tion by using "an airlift or vacuum such as divers use in unearthing treasure ships." A preferable alternative, Dr. Teas said, would be to offset damage to the oil-impacted mangroves by replanting trees at a nearby location where the mangrove forest had existed several years before. This proposal would not carry with it the same risk of totally destroying the environment in the contaminated areas in order to save it, Dr. Teas said. He suggested that construction of a canal system to provide sufficient "flushing" action would permit reforestation of the area west of Bahia Sucia and north of the Cabo Rojo lighthouse where excess salinity had apparently killed the mangroves. Dr. Teas testified that the cost of replanting 15 acres of mangroves through methods with which he was familiar would be approximately \$75,000 (\$5,000 per acre), and that the cost of a ten-year monitoring program would be about \$200,000.

Dr. Roger D. Anderson, a marine biologist testifying for defendants, attacked Dr. Sorenson's theory of replacement value as the measure of damages for small, commercially valueless invertebrate animals. Dr. Anderson offered as an alternative his own methodology, based on studies conducted in Georgia. Citing work done by some of plaintiffs' experts as well as other scientists, Dr. Anderson estimated the value of an acre of tropical mangrove swamp to be \$50,000, based on a complex analysis of the potential significance of such land to food supply, energy supply, fisheries, wood products, aesthetics, recreation and similar factors. From his analysis of other evidence produced at trial, Dr. Anderson testified he considered about three acres of the West Mangrove area to be a total loss, thus producing a damage figure of \$150,000. He stated, however, that his estimate of \$50,000 was a "yardstick" which could be applied to any number of acres of mangroves that plaintiffs could show had been substantially damaged. Dr. Anderson pointed out that plaintiffs' expert Dr. Lugo had written a paper, on which Dr. Anderson



partly relied, putting a more conservative valuation of \$35,000 to \$40,000 per acre on the mangroves of Bahia Sucia.

Dr. Anderson also offered to testify in behalf of defendants' proposal that, as an alternative to massive replanting in the West Mangrove area, reforestation of the Cabo Rojo peninsula could be attempted. He stated that he was familiar with this technique of alternate-site restoration, and that it had been used in several states as a condition for permitting activities that would result in destruction of certain areas of marshland. Dr. Anderson's testimony on this point was excluded on grounds of irrelevancy. "I am involved here, solely, with establishing a dollar amount of damages," the court said. "[W]hether as an alternate remedy in the settlement, the restoration of other mangroves, or of these mangroves . . . could be proposed is outside the scope of this case; unless I am shown something to the contrary."

Finally, defendants presented testimony by David R. Stith, a marine contractor with experience in oil spill cleanup operations, including the Bahia Sucia cleanup. Stith testified he had prepared an estimate of the cost of removing the oil-contaminated sediment from 2.6 to 2.9 acres of the West Mangrove area using a suction device mounted on a floating barge. His estimate for this work totaled \$396,859. Stith also offered to testify he had estimated the cost of constructing a channel system as proposed by Dr. Teas for replanting at the Cabo Rojo lighthouse. This estimate was \$152,310. As with Dr. Anderson's, the district court excluded his testimony as irrelevant since it did not concern the damaged area. The total of defendants' proposed remedial measures was just under \$1 million.

### C.

The district court made the following findings on the issue of damages:

"1. Plaintiffs' proven claim of damage to marine organisms covers an approxi-

mate area of about 20 acres in and around the West Mangrove. The surveys conducted by Plaintiffs reliably establish that there was a decline of approximately 4,605,486 organisms per acre as a direct result of the oil spill. This means that 92,109,720 marine animals were killed by the COLOCOTRONI oil spill. The uncontradicted evidence establishes that there is a ready market with reference to biological supply laboratories, thus allowing a reliable calculation of the cost of replacing these organisms.<sup>42</sup> The lowest possi-

<sup>42</sup>As explained previously, the affected flora and fauna were part of a trust held for the people by the Commonwealth of Puerto Rico. See, *Lacoste v. Department of Conservation*, 263 U.S. 545, 549, 44 S.Ct. 186, 68 L.Ed. 437 (1924); *Geer v. Connecticut*, [161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793], *supra*. Perforce, the Commonwealth must have the ability to have the corpus of said public trust reimbursed for the diminution attributable to the wrongdoers. *State Dept. of Environmental Protection v. Jersey Central Power & Light Co.*, *supra*, [124 N.J.Super. 97, 308 A.2d 671], at 673-674. We recognize that no market value, in the sense of loss of market profits, can be ascribed to the biological components of the Bahia Sucia ecosystem. The Court will thus refer to market cost as the most reliable evidence of the quantum of damages actually sustained, i. e., what is required to make the Plaintiffs whole. This will compromise the cost of restoring the affected areas to the condition in which they were before the occurrences. See *Feather River Lumber Co. v. United States*, 30 F.2d 642, 644 (C.A. 9, 1929)."

ble replacement cost figure is \$.06 per animal, with many species selling from \$1.00 to \$4.50 per individual. Accepting the lowest replacement cost, and attaching damages only to the lost marine animals in the West Mangrove area, we find the damages caused by Defendants to amount to \$5,526,583.20.

2. The evidence is overwhelming to the effect that the sediments in and around the West Mangrove continue to be impregnated with oil. The solutions proposed by Plaintiffs to this problem are unacceptable in that they would bring about the total destruction of this environment without any real guarantee of ultimate success. Furthermore, there is substantial scientific evidence to the effect that much of the undesirable effects

of the oil in the sediments will be corrected in time by the weathering processes of nature. The most affected spots in the West Mangrove cover an area of approximately 23 acres. It is the Court's opinion that these areas can best be reestablished by the intensive planting of mangrove and restoration of this area to its condition before the oil spill. The evidence shows that the planting of mangrove runs at about \$16,500 per acre, thus bringing the cost of replanting 23 acres to \$379,500. The evidence further demonstrates that the planting will require a five year monitoring and fertilizing program which will cost \$36,000 per year or \$180,000 for the five years. The total damages thus suffered by Plaintiffs by reason of the pollution of the mangrove in the West Mangrove amount to \$559,500.

3. Plaintiffs incurred in cleanup costs in the amount of \$78,108.89 which were not reimbursed from any source, and they are entitled to recover said damages from Defendants.

456 F.Supp. 1327, 1344-45 & n.42 (D.P.R. 1978).

The judgment of the district court was entered August 22, 1978. During the pendency of their appeal from this judgment, defendants filed a motion for relief from judgment pursuant to Fed.R.Civ.P. 60(b)<sup>11</sup> and for correction of the record pursuant to Fed.R.Civ.P. 60(a). These motions were denied in the district court by order dated August 10, 1979. Defendants' appeal from this order has been consolidated with the pending appeal of the original judgment.<sup>12</sup>

11. See *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39 (1st Cir. 1979).

12. In light of our disposition of this case, we do not reach defendants' appeal from the district court's denial of their Rule 60 motions. On remand, defendants are free to resubmit to the district court such of the evidence supporting their Rule 60 motions as is relevant to the issues remaining to be decided.

13. The Limitation of Liability Act of 1851, 46 U.S.C. § 183, provides that in the event of an accident "incurred without the privity or

## II.

Defendants first contend the district court abused its discretion by striking their pleadings on the issue of liability and their petition for exoneration from and limitation of liability.<sup>13</sup> Defendants argue that this sanction—which amounted to a default judgment on the issue—left open only the question of whether the penalty was an unreasonably harsh penalty for trial misconduct they may have committed.

The district court acted pursuant to Fed. R.Civ.P. 37(b), which provides that where a party has failed to obey a discovery order, the court "may make such orders in regard to the failure as are just, and among others the following:

"(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; . . . " (Emphasis added.)

The Supreme Court has stated that the appropriate standard of review for orders of this nature "is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action;

knowledge" of the vessel owner, the liability of the owner for property damage "shall not exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." Defendants petitioned pursuant to 46 U.S.C. § 185 to have their liability limited to \$650,000—the amount deposited with the court as security for the vessel. For a discussion of the Act as it relates to oil pollution litigation, see *Mendelsohn & Fidell, Liability for Oil Pollution—United States Law*, 10 J.Mar.L. & Com. 475, 475-477 (1979).



it is whether the District Court abused its discretion in so doing." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780, 49 L.Ed.2d 747 (1975) (per curiam); see also *Luis C. Forteza e Hijos, Inc. v. Mills*, 534 F.2d 415, 419 (1st Cir.1976). The question is whether the district court's findings "are fully supported by the record." 427 U.S. at 642, 96 S.Ct. at 2780.

In the present case, the district court found that defendants had exhibited "bad faith and a callous disregard of their responsibilities in this litigation." Defendants' conduct, which the district court characterized as "an affront to this Court's dignity," was found to have severely prejudiced plaintiffs' preparation of their case as well as the court's attempts to ensure that the trial proceeded as scheduled. These conclusions were based on the following facts, which appear in the record.

On June 7, 1977, the magistrate convened a status conference at which it was agreed by all parties that discovery in this long-pending case would be completed by August 1 in contemplation of a September 7 pre-trial conference and a November 7 trial date. Depositions of the defendant corporations were scheduled to be taken in Puerto Rico on July 5, 6 and 7. A further status conference was slated for August 17. Depositions were duly noticed on June 7.

On July 5, 1977, without prior notice, defendants' corporate officials failed to appear for the scheduled deposition sessions. At plaintiffs' request, the magistrate convened an in-chambers conference the same day to consider what response to make. At that meeting, counsel for defendants stated that, contrary to the earlier agreement, his clients were only willing to be deposed in England in August. The court ordered defendants' counsel to ascertain by July 11 whether his clients would be amenable to appearing in Puerto Rico for depositions during the week of July 26. A second magistrate's hearing was set for July 11, at

which time counsel for plaintiffs, if they so desired, were to move for sanctions and attorneys' fees.<sup>14</sup>

On July 11, 1977, the court was informed that the parties had agreed to reschedule the aborted depositions for August 3, 4 and 5, 1977, and that they would be conducted in Puerto Rico. The magistrate's hearing was cancelled and two days later the district court extended the discovery deadline to August 31, indicating that no further alterations in the pretrial schedule would be allowed. At the request of the United States, the depositions scheduled for August 3, 4 and 5 were eventually moved, with the consent of all parties, to August 17, 18 and 19. Appropriate notices were served August 10, and the court gave formal approval to the change on August 15.

On August 16, counsel for defendants, A. Santiago Villalonga, phoned counsel for the Commonwealth of Puerto Rico to inform him that defendants' witnesses did not intend to appear the next day. The witnesses' appearances would be superfluous, he said, because defendants intended to admit liability. This concession was repeated to the magistrate on the 17th of August by Francisco Bruno, who was substituting for Santiago as defendants' counsel at the status conference previously slated for that date. Santiago, Bruno asserted that the admission of liability obviated the need for further depositions.

On August 18, counsel for the United States moved, among others, the question of defendants' admission of liability extended to a waiver of defendants' petition to limit liability to the value of the vessel and cargo. When defendants' substitute counsel was unable to provide a clear answer, the magistrate ordered defendants to file a written admission of liability within fifteen days. The magistrate also agreed to reschedule the pre-trial conference from September 7 to October 25 and confirmed that the trial—now thought to be limited to the damages issue—would still commence on November 7.

14. Such a motion was in fact made, and on July 29, 1977, the court ordered defendants to pay \$467.25 to the United States and \$750 to the

Commonwealth of Puerto Rico and the EQB. No appeal was taken from that order.



Defendants did not file a written admission of liability within fifteen days, as ordered, nor did they file any paper explaining their behavior. When the magistrate learned that no admission had been filed, he ordered a Some Disposition Conference for October 7, 1977 to determine the present status of the matter. At the conference, defendants' counsel stated, for the first time, that the August 17 admission of liability was neither authorized by all the defendant companies nor unlimited as to amount. Rather, said Santiago, the admission was intended to extend only to the amount of the bond for the vessel—\$650,000. The magistrate thereupon ordered each defendant either to admit liability without limit as to amount—except for the limits of applicable insurance policies—by October 14, or to produce witnesses for deposition on October 17.<sup>15</sup> Defendants were explicitly warned that failure to comply with this order could result in the striking of their pleadings and of the petition for limitation of liability.

On October 14, 1977, instead of admitting liability, defendants moved for a postponement for one week of the depositions set for October 17, and a rescheduling of the pre-trial conference slated for October 25. On October 17, plaintiffs moved the court to strike defendants' pleadings on liability, and a hearing before the magistrate was held the same day. After reviewing the

facts recited above in detail,<sup>16</sup> the magistrate recommended that defendants' pleadings on liability be stricken, or in the alternative that defendants pay \$21,000 to the affected parties plus \$500 for each day trial would be delayed by postponing the depositions, originally scheduled for July 5, to October 24. Following a hearing on October 20, the district court adopted the magistrate's recommendation that defendants' pleadings, and their petition for limitation of liability, be stricken.

[2] We believe the record supports the district court's finding that defendants' conduct was inexcusably recalcitrant and that it materially prejudiced plaintiffs' trial preparation and the court's legitimate efforts to keep this protracted lawsuit moving forward. The fulcrum upon which this course of conduct turned was defendants' attempt at the August 17 status conference to avert the scheduled depositions by purporting to admit liability so as to make the depositions unnecessary. Had plaintiffs known the admission of liability was not meant to exceed the \$650,000 already deposited in court, they plainly would not have acceded to the cancelling of the depositions. All the parties clearly understood that the "privity and knowledge" of the owners would be a major issue when plaintiffs sought to break defendants' petition for limitation of liability. The manifest pur-

15. Defendants now contend they misunderstood this order and believed the depositions were to be taken October 19. The record contradicts this assertion, however, as defendants' own contemporaneous submissions, with one exception, make reference to the October 17 date, and this is the date which appears plainly in the court's written order.

16. Though the magistrate did not explicitly cite earlier conduct of the defendants, plaintiffs assert that defendants' earlier conduct also evidenced their bad faith attitude toward the discovery process. On June 20, 1973, at the outset of the litigation, the court denied a motion by Vicente M. Ydrach, a San Juan attorney representing the West of England firms, to quash a notice of deposition and subpoena duces tecum issued June 5. Despite an order directing Ydrach to comply with the subpoena by June 23, he appeared at his deposition and refused to answer questions or produce docu-

ments on the ground of attorney-client privilege. Defendant West of England—Luxembourg was subsequently ordered to deposit all subpoenaed documents with the court so that the magistrate could separate those that were discoverable from those that were privileged. The magistrate's report was issued March 21, 1974. West of England filed eight motions for extension before finally submitting its objections to the magistrate's report on October 11, 1974. On September 17, 1975, the district court, adopting the magistrate's report, ordered West of England to produce the discoverable documents. The order was not obeyed. Plaintiffs moved for sanctions. After a hearing, the district court on November 7 repeated its order to West of England, noting that failure to comply within ten days would result in all pleadings and defenses being stricken, all motions being denied, and a default judgment being entered. This order apparently was obeyed.

pose of the depositions scheduled for July 5, and later for August 17, was to explore the question of privity, and to try to establish defendants' knowledge of various alleged defects in the ZOE COLOCOTRONE's navigational and safety equipment. If defendants intended to admit liability only within the limits of 46 U.S.C. § 183, even though they did not so state, then their assertion that further depositions would be unnecessary was highly misleading. plaintiffs sought to break defendants' petition for limitation of liability. The manifest purpose of the depositions scheduled for July 5, and later for August 17, was to explore the question of privity, and to try to establish defendants' knowledge of various alleged defects in the ZOE COLOCOTRONE's navigational and safety equipment. If defendants intended to admit liability only within the limits of 46 U.S.C. § 183, even though they did not so state, then their assertion that further depositions would be unnecessary was highly misleading. It had the effect of lulling plaintiffs into a false sense that the issue of liability was settled, at the same time the approaching trial date made it increasingly unlikely that sufficient time would be available later for full discovery to be conducted.

Nothing in defendants' conduct subsequent to August 17 in any way cured or mitigated the misleading effect of their purported admission of liability. Order to produce a written admission of liability, spelling out the details of their concession, within fifteen days, defendants made no formal response. Ordered again, following the Some Disposition Conference, either to admit liability in writing or to produce witnesses for deposition, defendants did neither, but instead at the last moment requested yet another delay. As we said under similar circumstances in affirming the dismissal of a case for want of prosecution, "There comes a point when the question arises who is running the court-counsel, or the judge. To this there can be but one answer." *Higuera v. Pueblo International, Inc.*, 585 F.2d 555, 557 (1st Cir. 1978).

Defendants insist the district court exceeded its discretion in striking their plead-

ings and preventing their defenses from becoming considered on the merits. They point out that the enforcement of procedural rules through punitive default judgments may offend the standards of due process. See *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958); *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897). But the district court's response here was not purely punitive—or "mere punishment" in the words of *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351, 29 S.Ct. 370, 380, 53 L.Ed. 530 (1909); its actions bore a direct and reasonable relation to the prejudice defendants' irresponsible conduct had already created. See 4A Moore's Federal Practice ¶ 37.03[2.-1] at 37-56. Whether defendants planned all along to limit their unqualified admission of liability, or whether this idea arose as an afterthought, they gained a considerable strategic advantage by their misrepresentations. The district court could protect plaintiffs only by either further delaying trial or by holding defendants to their counsel's original unqualified admission of liability. The latter course, which the court adopted, was somewhat analogous to the imposing of an equitable estoppel. In the circumstances we see no violation of due process nor any abuse of the court's discretion. See *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-51, 29 S.Ct. 370, 379-80, 53 L.Ed. 530 (1909); *Luis C. Forteza e Hijos, Inc. v. Mills*, 534 F.2d 415, 419 (1st Cir.1976); cf. Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 Harv.L.Rev. 1033, 1044-45 (1978).

### III.

Defendants next argue that the district court's attitude toward them was "poisoned" by the court's unwarranted reliance on depositions of the crew and master of the ZOE COLOCOTRONE to make unnecessary findings on the issue of liability, see 456 F.Supp. at 1333-36. Defendants con-



tend that the depositions, which were taken immediately after the vessel docked in Puerto Rico, were not properly introduced as evidence, and that they represented an attempt by the crew and captain to shift blame for the accident from themselves to the owners. Moreover, defendants argue, it was unnecessary for the court to make any findings on liability once it had stricken defendants' pleadings. The only purpose served by such findings, according to defendants, was to prejudice the court on the issue of damages.

[3, 4] We agree that the findings on liability were redundant. It would have been enough if the allegations in the complaint pertaining to liability had been taken as established. The depositions, moreover, had been received only in support of plaintiffs' claim for punitive damages, which was thereafter abandoned. But we are not persuaded that the court's consideration of extraneous liability matters caused undue prejudice or prevented it from fairly deciding the damages issue. As we sustain the court's striking of defendants' pleadings, nothing more favorable to defendants could have been found than was found on the issue of liability, and we do not think the record displays a judicial attitude that was "poisoned" against the defendants with respect to the issues that remained.<sup>17</sup>

#### IV.

[5] The West of England defendants, insurers of the ZOE COLOCOTRONI, argue

17. Defendants challenge one further aspect of the district court's findings. Based on the depositions and other exhibits of the crew and master, the court found that the owners knowingly and negligently permitted the ZOE COLOCOTRONI to depart Venezuela in an unseaworthy condition. In their brief, defendants assert that the standard marine insurance contract exempts the insurer from the duty to cover losses engendered by the owners' knowing use of an unseaworthy vessel. Defendants apparently have reference to Rule 30(b)(ii) of the "Rules and List of Correspondents" of West of England, which provides:

"Notwithstanding anything contained in Rule 15 or any other agreement between the Association and an insured Owner the insurance afforded by the Association shall not extend

the district court erred in asserting personal jurisdiction over them. The insurers maintain they are outside the reach of the District Court of the District of Puerto Rico because they have no office, sell no insurance, and purportedly transact no business in Puerto Rico. To sustain in personam jurisdiction over a foreign corporation, the court must find both that personal jurisdiction is authorized by the local statute and that the exercise of such jurisdiction does not violate the due process requirement that the nonresident defendant have certain "minimum contacts" with the forum state.

See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289, 100 S.Ct. 563, 62 L.Ed.2d 490 (1980); *Shoe Co. v. Washington*, 326 U.S. 173, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). Contacts must be such that the exercise of jurisdiction comports with "traditions of fair play and substantial justice." *Id.*, quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940).

[6] Plaintiffs advanced two theories in the district court to justify in personam jurisdiction over West of England. First, plaintiffs argued that documents obtained from West of England's local law firm—Hartzell, Ydrach, Mellado, Santiago, Perez & Novas of San Juan, Puerto Rico (hereinafter Hartzell)—demonstrated that the Hartzell firm was actually West of England's "managing or general agent" in Puerto Rico, such that the firm was impliedly authorized to accept service of proc-

to liabilities, costs or expenses attributable to the willful misconduct of the insured Owner or his Managers." (Emphasis added.)

The insurers' argument is that it is inconsistent to hold them liable in light of the district court's findings as to the owners' degree of fault.

For purposes of this litigation, which involved no cross-claims between the insurers and the owners, it is enough to say that all the defendants' pleadings on liability were stricken—including the insurers' defenses based on the terms and conditions of the insurance contract. As we have herein upheld the striking of the pleadings, defendant insurers were properly barred from raising this defense against plaintiffs.



ess on West of England's behalf. See Fed. R.Civ.P. 4(d)(3); 2 Moore's Federal Practice ¶4.12, 4.22[1]. These documents consisted primarily of files of matters handled for defendants by Hartzell, pamphlets listing Hartzell as "correspondent" for defendants, and instructions issued to Hartzell on its duties as a correspondent. The files showed that Hartzell had, among other things, arranged on behalf of West of England and various insured owners for the burial of a deceased Egyptian sailor with appropriate religious observances, for the repatriation by air of several other sailors, and for numerous surveys and other investigations in connection with possible claims for damage or injury. The district court ruled, however, that these activities by Hartzell were so "substantially intertwined with Hartzell's primary professional functions" as defendants' retained law firm that it could not hold Hartzell to be a "managing or general agent" for purposes of accepting service of process on Hartzell's client.

Plaintiffs' second argument was related to the first, but had a narrower focus. Federal Rule of Civil Procedure 4(e) provides that, constitutional limitations aside, personal jurisdiction may be asserted over a nonresident defendant in the district court to the extent permitted by the long-arm statute of the state in which the court is sitting. See 2 Moore's Federal Practice ¶4.01[1]. Puerto Rico's long-arm statute is expressed in Rule 4.7 of the Puerto Rico Rules of Civil Procedure which provides, in pertinent part,

"(a) Where the person to be served is not within Puerto Rico, the General Court of Justice of Puerto Rico shall have personal jurisdiction over said nonresident as if he were a resident of the Commonwealth of Puerto Rico, if the action or claim arises as a result of the following:

(1) Such person or his agent carries out business transactions within Puerto Rico."

32 L.P.R.A., App. II, R. 4.7. Rule 4.7 "permits the exercise of jurisdiction to the full extent of constitutional authority," limited only by the due process analysis of *Internation-*

*Shoe* and succeeding cases. *Vencedor Manufacturing Co., Inc. v. Gougler Industries, Inc.*, 557 F.2d 886, 889 (1st Cir.1977). Plaintiffs argued below that West of England's business contacts with Puerto Rico—in particular, its regular writing of insurance covering vessels like the ZOE COLOCOTRONI, which visited Puerto Rico and operated within Puerto Rican waters—satisfied both the statutory and constitutional tests. The district court agreed.

We think this conclusion is correct. The essential constitutional question is whether West of England "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). The record makes clear that West of England did precisely that. The Hartzell files revealed numerous instances in which ships insured by West of England were involved in incidents giving rise to claims or potential claims while the ships were present in Puerto Rican waters. In each of these instances, West of England's local correspondent Hartzell was instructed to take actions to forestall claims, to provide services for the shipowners, or to prepare for any eventual litigation. West of England advertised to insured shipowners the fact that such services would be available through its local Puerto Rican correspondent. The contracts of insurance contained no provision preventing any ship from calling on Puerto Rico, or limiting coverage in the event it did. Not only do we know that vessels mentioned in the Hartzell files visited Puerto Rico, it stands to reason that many other West-insured vessels also did so, as the Hartzell files would name only vessels on which claims or other noteworthy incidents occurred. While West of England was not engaged in selling insurance in Puerto Rico, its retention of the Hartzell law firm to perform services for insured owners and vessels in Puerto Rico demonstrates that West of England plainly expected its worldwide business of insuring maritime risks to embrace the territorial waters of Puerto Rico with some regularity.

Cite as 628 F.2d 652 (1980)

In certain ways, this case poses less difficulty than *American & Foreign Insurance Association [AFIA] v. Commonwealth Insurance Co.*, 575 F.2d 980 (1st Cir.1978), where we upheld the Puerto Rico district court's jurisdiction over two nonresident insurance companies operating out of Columbia. The district court in *AFIA* found that the insurance policy in issue covered a large volume of bottles regularly shipped from Columbia to Puerto Rico, and that one of these bottles injured plaintiff when it exploded. As the nonresident insurers knew from the terms of the policy both the volume of bottles being shipped and their destination, we held that the "companies' undertaking to insure a substantial subject of insurance in Puerto Rico was 'voluntary in [a] meaningful sense.'" *Id.* at 982, quoting *Vencedor Manufacturing Co., Inc. v. Gougler Industries, Inc.*, 557 F.2d 886, 891 (1st Cir.1977). There was no indication in *AFIA* that the insurance companies provided any substantial services to the insured bottler in Puerto Rico or that the insurers' contacts with Puerto Rico extended beyond this one series of transactions.

To be sure, as *West of England* points out, the record in the present case, does not indicate any explicit undertaking by *West of England* to insure vessels within Puerto Rican waters. But this fact, standing alone, does not suffice to distinguish the *American & Foreign Insurance* case. *West of England* plainly knew that vessels it insured would call on Puerto Rico from time to time, and it made no apparent effort to halt or limit this practice. In fact, by advertising the name of its local correspondent in San Juan, *West of England* affirmatively encouraged such commerce. This is not a case of a single isolated and unpreventable appearance of an insured vessel in Puerto Rican waters; the record shows such appearances were a readily foreseeable part of the normal course of business.

*West of England* contends, however, that its ability to foresee that insured vessels would enter Puerto Rican territorial waters does not, without more, satisfy the "minimum contacts" test of jurisdiction. The

Supreme Court has recently stated that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 566, 62 L.Ed.2d 490 (1980). In *Woodson*, plaintiffs brought a products liability action in Oklahoma against the regional distributor and the retailer of an automobile sold in New York but involved in an Oklahoma accident. The Court held Oklahoma's assertion of jurisdiction over the two New York corporations to be a violation of due process, since their only connection with Oklahoma was the fortuity that the car they sold passed through the state after it had left their hands.

"The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State," the Court said. "Rather, it is that the defendant's conduct and connection with the forum is such that he should reasonably anticipate being haled into court there." *Id.* at 297, 100 S.Ct. at 567. The reason for this distinction, according to the Court, is the need to permit "potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.*

*Woodson* is distinguishable from the present case on two grounds. First, this is not a case of mere foreseeability, without more, that a single insured vessel would wander into Puerto Rico by happenstance. Plaintiffs established that vessels insured by *West of England* frequented Puerto Rico regularly over a period of years, and that they were provided with insurance-related services while there. *West of England* was unavoidably aware that it was responsible to cover losses arising from a substantial subject of insurance regularly present in Puerto Rico, a direct action jurisdiction. Second, the seller of a product such as the automobile in *Woodson* ordinarily has no control over where the buyer takes the product after it is sold. If the mere fortuity of the presence of the seller's product in another jurisdiction subjected the seller to



suit in that forum, the seller "would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel." *Id.* at 296, 100 S.Ct. at 566. By contrast, an insurer such as West of England has the power through its contracts of insurance meaningfully to influence the course taken by insured vessels. By limiting coverage to specified jurisdictions, West of England could be reasonably certain it would not be haled into court in an undesired forum. In other words, an insurer is not at the mercy of the insured owner's unilateral choice of destination in the same way a seller of chattels is at the mercy of the buyer.

[7] Where, as here, the insurer has the means available to structure its primary conduct so as to control the area within which it will be subject to direct action, where it is undoubtedly aware that the objects of its policies are regularly present in a particular jurisdiction, and where it not only does not act to curtail such presence but actively promotes it by providing contractual services in the jurisdiction, we hold that such an insurer is amenable to personal jurisdiction in the forum.<sup>18</sup>

#### V.

We now turn from procedural matters to the extremely difficult substantive issues concerning damages. Defendants challenge: (A) the so-called "standing" of Puerto Rico and the EQB to recover damages for environmental injury; (B) the district court's failure to limit damages by commercial or market value standards; and (C) the approach and data relied upon by the court in assessing damages.

18. The result we reach is further buttressed by the Supreme Court's occasional suggestions that the test for measuring minimum contacts for insurance companies may be somewhat less stringent than for other nonresident corporations because of the forum state's public policy interest in promoting effective redress for injuries. See *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957); cf. *Hanson v. Denckla*, 357 U.S. 235, 252, 78 S.Ct. 1228, 1239, 2 L.Ed.2d

#### A.

We turn first to the issue of plaintiffs' right to bring this lawsuit. The district court held that the Commonwealth had "standing" to recover for damages to natural resources, namely the mangrove trees and the various species of marine creatures living in and around them, on the theory that the Commonwealth was the "trustee of the public trust in these resources" and had an interest in them as *parens patriae*. 456 F.Supp. at 1337; see *Maryland v. Amerada Hess Corp.*, 350 F.Supp. 1060 (D.Md.1972); *Maine v. M/V Tamano*, 357 F.Supp. 1097 (D.Me.1973); *In re Steuart Transportation Co.*, 495 F.Supp. 38 (E.D.Va.1980). The court also ruled that the Environmental Quality Board had standing to proceed as co-plaintiff seeking similar relief under a state statute authorizing the EQB to bring damages actions for environmental injuries. 456 F.Supp. at 1337; 12 L.P.R.A. § 1131 (29).

[8] While the parties and the district court speak in terms of "standing," we think the question is more properly whether plaintiffs have stated a cognizable cause of action.<sup>19</sup> Defendants concede that Puerto Rico, as owner of the real property primarily affected by the oil spill, see 48 U.S.C. § 749, would, like any private landowner, have a cause of action in admiralty to recover whatever damages it could prove under conventional principles for its private economic loss as measured by diminution of market value in the coastal land. See 46 U.S.C. § 740. The Commonwealth made no attempt to show such damages, however. It seeks relief instead under an asserted right to recover as a governmental entity on behalf of its people for the loss of living

1283 (1958). Here the maritime accident resulted in injury to Puerto Rico's coastal environment, and plaintiffs represented this forum-related interest.

19. Plaintiffs' Article III standing is not challenged here, since, assuming plaintiffs have a valid cause of action, they clearly are the proper parties to raise it. See *Davis v. Passman*, 442 U.S. 228, 239 & n.18, 99 S.Ct. 2264, 2273-4 & n.18, 60 L.Ed.2d 846 (1979).



natural resources on the land such as trees and animals.<sup>20</sup>

Defendants contend that Puerto Rico's assertion of a recoverable interest in wildlife and other living natural resources is undercut by a line of Supreme Court cases culminating in *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). See also *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284, 97 S.Ct. 1740, 1751, 52 L.Ed.2d 304 (1977); *Toomer v. Witsell*, 334 U.S. 385, 402 & n.37, 68 S.Ct. 1156, 1165 & n.37, 92 L.Ed. 1460 (1948); *Missouri v. Holland*, 252 U.S. 416, 434, 40 S.Ct. 382, 383, 64 L.Ed. 641 (1920); cf. *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896). In *Hughes*, the Court formally overruled *Geer v. Connecticut*, invalidating on Commerce Clause grounds a state ban on interstate transportation of wildlife lawfully caught in the state and completing the long erosion of *Geer's* theory of state ownership of wildlife. The court recognized, however, that states retain an important interest in the regulation and conservation of wildlife and natural resources. "[T]he general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th Century legal fiction of state ownership." 441 U.S. at 335-36, 99 S.Ct. at 1736. Later, the Court said, "We consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens." *Id.* at 337, 99 S.Ct. at 1737.

20. We note at this point several questions which are not presented in this case, and on which we express no opinion. First, since the lands in question were all owned by Puerto Rico, we need not decide whether or in what circumstances a state might have a cause of action for environmental harm to privately owned land. Second, since the living natural resources in issue here were all attached more or less permanently to the land, we also do not decide whether any cause of action would accrue, and if so what remedies would be available, where more transitory forms of wildlife such as birds or fish were damaged. Third, this case does not present the issue of overlapping state and federal causes of action. While

[9] Plaintiffs argue that a state regulatory interest in wildlife and other living resources, expressed metaphorically in the state's status as "public trustee" of its natural resources, is sufficient in itself to support an action for damages to those resources. See, e.g., *Maryland v. Amerada Hess Corp.*, 350 F.Supp. 1060, 1066-67 (D.Md.1972). Defendants reply that, absent a proprietary interest in the resource actually damaged, a state's unexercised regulatory authority over wildlife will not support a proper cause of action. See, e.g., *Commonwealth v. Agway, Inc.*, 210 Pa.Super. 150, 232 A.2d 69 (1967). We see no need to decide this difficult question in the present case. Here the Commonwealth of Puerto Rico, exercising its undisputed authority to protect and conserve its natural environment, has by statute authorized one of its agencies to maintain actions of this sort. Under the statute, 12 L.P.R.A. § 1131(29), co-plaintiff Environmental Quality Board has, among others, the following duties, powers and functions:

"(29) To bring, represented by the Secretary of Justice, by the Board's attorneys, or by a private attorney contracted for such purpose, civil actions for damages in any court of Puerto Rico or the United States of America to recover the total value of the damages caused to the environment and/or natural resources upon committing any violation of this chapter and its regulations. The amount of any judgment collected to such effect shall be covered into the Special Account of the Board on Environmental Quality."

the Federal Clean Water Act of 1977 specifically stated that it did not preempt the imposition by a state of "any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State," 33 U.S.C. § 1321(o)(2), a problem of double recovery might be raised under some circumstances. Here, however, the United States made no claim for environmental damage (at the time this case arose there was no federal statute authorizing such an action) and asserted no legal interest in the affected lands. The interplay of the state cause of action asserted here with the federal remedial legislation discussed *infra* is an issue we therefore leave for another day.

We read this statute both as creating a cause of action of the type described by its terms and as designating the EQB as the proper party to bring such an action. We see nothing in *Hughes v. Oklahoma* or in the federal Constitution to prohibit such legislation. Whatever might be the case in the absence of such a local statute, we think that where the Commonwealth of Puerto Rico has thus legislatively authorized the bringing of suits for environmental damages, and has earmarked funds so recovered to a special fund, such an action must be construed as taking the place of any implied common law action the Commonwealth as trustee, might have brought. Any other construction would invite the risk of double recovery and lead to confusion as to the rights of the two state plaintiffs in their identical or nearly identical actions. It is unnecessary, therefore, for us to consider whether, had the legislature of Puerto Rico not delegated to the EQB the right to maintain such suits, the Commonwealth would have an inherent right to bring them itself.

Defendants assert, as a sort of last ditch rebuttal to this line of argument, that the present action is not authorized under section 1131(29), because plaintiff EQB failed to allege in the complaint "any violation of this chapter and its regulations." This assertion is erroneous. In the third amended complaint, plaintiff specifically alleged a violation of 24 L.P.R.A. § 595, which provides:

"It shall be unlawful for any person, directly or indirectly, to throw, discharge, pour, or dump, or permit to be thrown, discharged, poured or dumped into the waters, any organic or inorganic matter capable of polluting or of leading to the pollution of said waters in such manner as to place them out of the minimum standards of purity that the Secretary of Health may establish under section 599 of this title."

This statute is explicitly made a part of Title 12, chapter 121 by 12 L.P.R.A. § 1132(b). The "minimum standards of purity" referred to in section 595 have been promulgated, and they make clear that any unauthorized discharge of petroleum into the waters—including the territorial waters—

of Puerto Rico is considered unlawful. See P.R. Rules & Regulations, Title 24, § 598-5. Defendants' challenge to the right of the EQB to maintain this action is thus without merit.

[10, 11] Equally unavailing would be any argument that this state statutory action is not cognizable in admiralty. An oil spill on the navigable waters is a breach of federal maritime law. *Maryland v. Amerada Hess Corp.*, 350 F.Supp. 1060, 1065 (D.Md.1972); *American Waterways Operators, Inc. v. Askew*, 335 F.Supp. 1241, 1247 (M.D.Fla.1971) (three-judge court), *rev'd on other grounds*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1973); *California v. S. S. Bou-nemouth*, 307 F.Supp. 922, 926 (D.Cal. 1969). Where the injury occurs in the territorial waters of a state, the general rule is that admiralty will give "broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction." *Just v. Chambers*, 312 U.S. 383, 391, 61 S.Ct. 687, 693, 85 L.Ed. 903 (1941). See also *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-74, 79 S.Ct. 468, 480-81, 3 L.Ed.2d 368 (1959). Defendants do not argue, nor could they, that this action runs counter to the essential features of federal jurisdiction. See *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 325, 36 L.Ed.2d 280 (1973).

#### B.

[12] Defendants next argue the district court erred in failing to apply the common law "diminution in value" rule in calculating damages. Under the traditional rule, the measure of damages for tortious injury to real property is the difference in the commercial or market value of the property before and after the event causing injury. See *Restatement (Second) of Torts* § 925(1)(a) (1979). Where the property can be restored to its original condition for a sum less than the diminution in value, however, the cost of restoration may be substi-



tuted as a measure of damages. See, e. g., *Big Rock Mountain Corp. v. Stearns-Roger Corp.*, 388 F.2d 165, 168-69 (8th Cir. 1968). Defendants introduced evidence at trial tending to show that the market value of comparable property in the vicinity of Bahia Sucia was less than \$5,000 per acre, based on recent sales. Thus, defendants contend, damages here could not have exceeded \$5,000 per affected acre even if the land were shown to have lost all value.

[13] We believe that defendants have misconceived the character of the remedy created by section 1131. The EQB is not concerned with any loss in the market or other commercial value of the Commonwealth's land. In point of fact, the EQB concedes the land has no significant commercial or market value. The claim, rather, is for the injury—broadly conceived—that has been caused to the natural environment by the spilled oil. The question before us is not whether in a typical land damage case a claim of this sort could be successfully advanced—we assume it could not—but rather whether Puerto Rico's statute empowering the EQB to proceed in cases such as this envisions the awarding of damages on a different basis than would have been traditionally allowed.

The district court found that the once flourishing natural environment of the West Mangrove had been seriously damaged by the oil, to the point where some of the underlying sediments were no longer capable of supporting any but the most primitive forms of organic life, such as worms. The Puerto Rico statute authorizing this action specifically empowers the EQB to recover "the total value of the damages caused to the environment and/or natural resources" upon a violation of the anti-pollution provisions. 12 L.P.R.A. § 1131(29) (emphasis added). Implicit in this choice of language, we think, is a determination not to restrict the state to ordinary market damages. Many unspoiled natural areas of considerable ecological value have little or no commercial or market value. Indeed, to the extent such areas have a commercial value, it is logical to

assume they will not long remain unspoiled, absent some governmental or philanthropic protection. A strict application of the diminution in value rule would deny the state any right to recover meaningful damages for harm to such areas, and would frustrate appropriate measures to restore or rehabilitate the environment.

This perception is confirmed by the course of recent federal legislation in the area of oil pollution. The Clean Water Act of 1972 provided that the United States could recover, up to certain pre-set limits, the costs it incurred in cleaning up after an oil spill, but made no explicit reference to environmental damages. Pub.L.No. 92-500, 92d Cong., 2d Sess. § 311, 86 Stat. 816 (1972), codified at 33 U.S.C. § 1321(f) (1976). The Clean Water Act Amendments of 1977 significantly expanded the scope of a vessel owner's potential liability. In particular, the federal government and the states were authorized to recover "costs or expenses incurred . . . in the restoration or replacement of natural resources damages or destroyed as a result of a discharge of oil or a hazardous substance." 33 U.S.C. § 1321(f)(4). Recoverable removal costs were defined as including the expense "of such . . . actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches." *Id.* § 1321(a)(8). The liability provision concluded:

"The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal government, or the State government."

*Id.* § 1321(f)(5).

Similarly, in the Outer Continental Shelf Lands Act Amendments of 1978, Congress provided that the government could recover damages for economic loss arising out of an



oil spill, including "injury to, or destruction of, natural resources," 43 U.S.C. § 1813(a)(2)(C), and "loss of use of natural resources," *id.* § 1813(a)(2)(D). The Submerged Lands Act, which forms the basis for the Outer Continental Shelf Lands Act, see 43 U.S.C. § 1811(9), defines "natural resources" as including, "without limiting the generality thereof, oil, gas, and other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life." 43 U.S.C. § 1301(e). While the latter acts do not, by their terms, apply to Puerto Rico, see 43 U.S.C. § 1301(g), like the Clean Water Act they do give some indication that Congress has determined that it is desirable to provide for environmental damages apart from the commercial loss, ordinarily measured by a market value yardstick, suffered by landowners and/or exploiters of natural resources. This perception is reinforced by the section of the OCS Lands Act which provides that sums the state recovers "shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of . . . the State, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources." 43 U.S.C. § 1813(b)(3).

[14] Especially in light of this recent federal statutory activity, we think that limitation of recovery to those damages recoverable under the common law "diminution in value" rule would be inconsistent with the manifest intent of Puerto Rico's environmental statute. In enacting section 1131, Puerto Rico obviously meant to sanction the difficult, but perhaps not impossible, task of putting a price tag on resources whose value cannot always be measured by the rules of the market place. Although the diminution rule is appropriate in most

contexts,<sup>21</sup> and may indeed be appropriate in certain cases under section 1131, *see infra*, it does not measure the loss which the statute seeks to redress in a context such as the present. No market exists in which Puerto Rico can readily replace what it has lost. The loss is not only to certain plant and animal life but, perhaps more importantly, to the capacity of the now polluted segments of the environment to regenerate and sustain such life for some time into the future. That the Commonwealth did not intend, and perhaps was unable, to exploit these life forms, and the coastal areas which supported them, for commercial purposes should not prevent a damages remedy in the face of the clearly stated legislative intent to compensate for "the total value of the damages caused to the environment and/or natural resources." 12 L.P.R.A. § 1131(29). In recent times, mankind has become increasingly aware that the planet's resources are finite and that portions of the land and sea which at first glance seem useless, like salt marshes, barrier reefs, and other coastal areas, often contribute insubtle but critical ways to an environment capable of supporting both human life and the other forms of life on which we all depend. The Puerto Rico statute is obviously aimed at providing a damages remedy with sufficient scope to compensate for, and deter, the destruction of such resources; and while we can see many problems in fashioning such a remedy, we see no reason to try to frustrate that endeavor. We therefore do not limit damages herein to the loss of market value of the real estate affected.

### C.

We turn now to whether the damages awarded by the district court were appropriate. To review the court's award, we must ascertain what a fair and equitable

21. The diminution rule has itself been limited in cases where the property has a special value to the injured party that is not reflected in its market value. See, e.g., *Rector, Wardens and Vestry of St. Christopher's Episcopal Church v. C. S. McCrossan, Inc.*, 308 Minn. 143, 235 N.W.2d 609 (Minn.1975) (and cases cited there-

in); Restatement (Second) of Torts § 929(1)(a) and comment b (1979). The principles later discussed as being applicable in cases like this one, such as attempting to ascertain the reasonable cost of restoration, are thus not so completely removed from traditional valuation theory as might, at first blush, appear.

damages measure would be in these circumstances, and, to that end, it will be helpful to examine the remedial provisions in recent similar federal statutes. There is a strong emphasis in Congressional oil pollution enactments on the concept of restoration. As discussed earlier, the 1977 Clean Water Act amendments provided that the state's representative, acting as public trustee, could "recover for the costs of replacing or restoring [natural] resources." 33 U.S.C. § 1321(f)(5). In accordance with the trust analogy, the statute provided: "Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies . . . ." *Id.* The legislative history further elaborates this standard:

"New subsection (f)(4) and (5) make governmental expenses in connection with damage to or destruction of natural resources a cost of removal which can be recovered from the owner or operator of the discharged source under section 311. For those resources which can be restored or rehabilitated, the measure of liability is the reasonable costs actually incurred by Federal or State authorities in replacing the resources or otherwise mitigating the damage. Where the damaged or destroyed resource is irreplaceable (as an endangered species or an entire fishery), the measure of liability is the reasonable cost of acquiring resources to offset the loss."

House Conf. Rpt. No. 95-830, 95th Cong., 1st Sess. 92, reprinted in [1977] U.S. Code Cong. & Admin. News, pp. 4424, 4467.

22. See note 20 *supra*. As we stated earlier, our holding is limited to circumstances such as these where the sovereign seeking to recover has an ownership interest in the real property where the environmental damage occurred.

23. "The technology available to remove oil and to restock plant and animal communities is very limited at present, and development of such a technology would be a long-range undertaking . . . . In most instances, the recovery of an ecosystem after an oil spill would occur, if at all, only through the slow processes of natural regeneration."

[15] Borrowing from the suggestion provided by this federal legislation, we think the appropriate primary standard for determining damages in a case such as this<sup>22</sup> is the cost reasonably to be incurred by the sovereign or its designated agency to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is feasible without grossly disproportionate expenditures. The focus in determining such a remedy should be on the steps a reasonable and prudent sovereign or agency would take to mitigate the harm done by the pollution, with attention to such factors as technical feasibility, harmful side effects, compatibility with or duplication of such regeneration as is naturally to be expected, and the extent to which efforts beyond a certain point would become either redundant or disproportionately expensive. Admittedly, such a remedy cannot be calculated with the degree of certainty usually possible when the issue is, for example, damages on a commercial contract. On the other hand, a district court can surely calculate damages under the foregoing standard with as much or more certainty and accuracy as a jury determining damages for pain and suffering or mental anguish.

[16, 17] There may be circumstances where direct restoration of the affected area is either physically impossible or so disproportionately expensive that it would not be reasonable to undertake such a remedy.<sup>23</sup> Some other measure of damages might be reasonable in such cases, at least where the process of natural regeneration will be too slow to ensure restoration within a reasonable period. The legislative history

Wood, *Requiring Polluters to Pay for Aquatic Natural Resources Destroyed by Oil Pollution*, 8 Nat. Res. Lawyer 545, 598 (1976). If natural regeneration is likely to occur within a reasonable period, it is conceivable in some cases that this will be enough. Whether to award damages based on the cost of hastening restoration by artificial means will depend on a weighing of factors such as the feasibility and cost of the restoration plan, how long natural regeneration will take, how certain it is to occur, and how serious are the effects of a temporary absence of the damaged resources. There will doubtless be other factors we cannot now foresee.



of the Clean Water Act amendments, quoted above, suggests as one possibility "the reasonable cost of acquiring resources to offset the loss." *Id.* Alternatives might include acquisition of comparable lands for public parks or, as suggested by defendants below, reforestation of a similar proximate site where the presence of oil would not pose the same hazard to ultimate success. As with the remedy of restoration, the damages awarded for such alternative measures should be reasonable and not grossly disproportionate to the harm caused and the ecological values involved. The ultimate purpose of any such remedy should be to protect the public interest in a healthy, functioning environment, and not to provide a windfall to the public treasury.<sup>24</sup> In emphasizing the above measures, we do not mean to rule out others in appropriate circumstances. There may indeed be cases where traditional commercial valuation rules will afford the best yardstick, as where there is a market in which the damaged resource could have been sold that reflects its actual value. Much must necessarily be left to the discretion of courts, especially before a body of precedent has arisen.

[18] But while the district court's discretion is extensive, we are unable to agree with the approach taken by the court here in placing a value on the damaged resources. Plaintiffs presented two principal theories of damages to the court. The first theory was somewhat analogous to the pri-

24. Other reasonable and scientifically credible means of estimating damages in circumstances where complete restoration is not possible may exist. Defendants presented testimony by Dr. Roger Anderson, for example, suggesting that there is some scientific basis for the placing of a dollar value on commercially nonvaluable property such as marshland by estimating the contributions such land makes to other valuable activities like fisheries or recreation. Moreover, a bill currently pending in Congress—the so-called Superfund Bill—would, if enacted, expand the capacity of the federal and state governments to recover damages for natural resources injured by oil or other hazardous substances. Damages would not be limited to restoration and related replacement costs, but would also include a dollar value based on "assessment" of the damage to the environ-

ment. Such an assessment would in turn be based on methodologies to be developed through rulemaking by three federal agencies: the Environmental Protection Agency, the Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration. See S. 2083, 95th Cong., 2d Sess. § 5(e) (1973). For a more complete discussion of this proposed legislation, see DuBey & Fidell, *The Assessment of Pollution Damage to Aquatic Resources: Alternatives to the Trial Model*, 19 Santa Clara L.Rev. 641, 674-80 (1979). Since many of these methodologies are in their infancy, see Note, *Assessment of Civil Monetary Penalties for Water Pollution: A Proposal for Shifting the Burden of Proof Regarding Damages*, 30 Hastings L.J. 651, 674-79 (1979), we wish neither to endorse nor rule out altogether their use in appropriate cases.

[19,20] Plaintiffs' second theory, which the court accepted, focused on the supposed replacement value of the living creatures—the epibenthic and infaunal animals—alleged to have been permanently destroyed or damaged by the oil spill. Plaintiffs repeatedly disavowed any connection between this theory and an actual restoration plan. In other words, plaintiffs did not represent that they proposed to purchase 92 million invertebrate animals for actual introduction into the sediments, (which, being contaminated with oil, would hardly support them), but rather wished to use the alleged replacement value of these animals as a yardstick for estimating the quantum of harm caused to the Commonwealth. This theory



Cite as 628 F.2d 652 (1980)

has no apparent analog in the standards for measuring environmental damages we have discussed above. To be sure, the federal statutes from which we have borrowed speak in places of replacement as a part of the appropriate recovery. See, e. g., 33 U.S.C. § 1321(f)(5). But we believe these references, in context, should be interpreted as meaning replacement as a component in a practicable plan for actual restoration. Thus, for example, if a state were seeking to restore a damaged area of forest, a portion of the damages sought might be allocated to replacement of wild birds or game animals or such other creatures as would not be expected to regenerate naturally within a relatively finite period of time even with appropriate restoration. This is a far different matter from permitting the state to recover money damages for the loss of small, commercially valueless creatures which assertedly would perish if returned to the oil-soaked sands, yet probably would replenish themselves naturally if and when restoration—either artificial or natural—took place.

The case primarily relied upon by the district court to support its grant of damages for replacement value is not to the contrary. In *Feather River Lumber Co. v. United States*, 30 F.2d 642 (9th Cir. 1929), the United States brought an action seeking damages for a public forest allegedly destroyed when defendant negligently started a forest fire and permitted it to spread onto public land. The government's chief witness, a Forestry Service official, stated that he calculated the extent of the fire damage by counting the damaged and undamaged trees on one-tenth acre sample plots located at intervals throughout the 4,000 acre area. The official separated his estimates into two categories, merchantable timber, as to which there was a present market value based on local stumpage prices, and young timber, as to which there

was only the possibility of future market value. The Ninth Circuit held that this method was proper as a means of estimating the extent of damage and that, as to the merchantable timber, "the measure of damages was the [market] value of the trees." *Id.* at 644. The court also held,

"As to young growth, while the measure of damages in such a case is ordinarily the difference in the value of the land before and after the fire, here, there being no law to authorize the sale of the lands injured by the fire, the trial court admitted such evidence as was available to show the damage actually sustained, that is to say, what was required to make the government whole, and this, we think, might properly include the cost of restoring the land to the condition in which it was before the fire."

*Id.* We think the quoted passage makes clear that the Ninth Circuit did not contemplate a purely abstract recovery such as that proposed here, where the theoretical "loss" was worked out in terms of what it would cost to buy thousands of creatures which, as a practical matter, would never be brought in such a manner and could not be expected to survive if returned to their damaged habitat. Rather, the Ninth Circuit was simply willing to permit the government to recover its actual and reasonable expected restoration costs based on the cost of replanting, a perfectly feasible and reasonable course of action in that case. Thus, leaving aside the question whether plaintiffs' evidence was sufficient to establish that 92 million creatures were destroyed and that six cents represented an appropriate replacement cost estimate, we are unable to endorse the theory of damages in support of which this evidence was advanced. We thus hold that it was error to award \$5,526,583.20 for the replacement value of the destroyed organisms.<sup>25</sup>

25. Plaintiffs also offered a third claim for damages, which the district court accepted. This claim involved the estimate of \$559,500 as the cost of replanting 23 acres with container-grown mangrove trees. Within the context of the evidence presented, and the other rulings made by the district court, we are unable to

understand its acceptance of this component of the damages. First, plaintiffs' experts clearly testified that the 23 areas included mangroves in both East Mangrove and West Mangrove, with the larger area being in the east. See, e. g., note 9 *supra*. In light of the district court's finding that there was no significant damage in

## D.

[21] We come finally to the disposition of this case. Defendants argue that, having rejected plaintiffs' damages theories, we should reverse the district court's judgment, except as to the Commonwealth's undisputed cleanup costs. While this is superficially an attractive course, we do not think the matter is quite so simple. To say that the law on this question is unsettled is vastly to understate the situation. The parties in this lawsuit, and we ourselves, have ventured far into uncharted waters. We do not think plaintiffs could reasonably have been expected to anticipate where this journey would take us. Though we have affirmed the district court's rejection of the Commonwealth's original, rather grandiose restoration plan, we believe the EQB should still have an opportunity to show, if it can, that some lesser steps are feasible that would have a beneficial effect on the West Mangrove ecosystem without excessive destruction of existing natural resources or disproportionate cost. The costs projected for the carrying out of such reasonable lesser steps would be an appropriate award of damages to the EQB. Plaintiffs may wish, at the same time, to reopen the question of alternative-site restoration, as to which the district court initially declined to take evidence, although we hasten to add that we do not now rule on whether the concept of alternative site restoration would make sense in this case as a measure of damages. We therefore, remand the case to the district court with instructions to reopen the record for further evidence on the issue of damages in line with our discussion of the principles governing recovery in cases of this sort.

Defendants cannot successfully claim that this disposition will prejudice their rights appreciably. Defendants themselves introduced evidence at the first trial on

East Mangrove, it is not clear why replanting of mangroves on that site was necessary at all. Furthermore, plaintiffs' experts also testified that the mangrove trees in the West Mangrove were dead or dying because of the presence of oil in the sediments. Replanting new trees in this same oil-soaked environment seems pointless if no attempt is to be made to counteract

damages seeking to establish that restoration projects less extensive and less costly than plaintiffs' were possible. Had the district court accepted these proposals in lieu of plaintiffs', defendants would have had a potential liability of up to \$1 million. We do not mean to suggest that plaintiffs are necessarily entitled to recover this, or any other, specific amount. Nor do we put any limits on defendants' right to contest any proposals put forward by the plaintiffs, or to offer counterproposals. In essence, while the court and the parties are entitled to rely on the record already developed to the extent they wish to do so, we think the record should be reopened on the issue of damages, with a renewed evidentiary hearing to be conducted in light of the standards for measuring such damages we have announced today. While we regret the necessity this will entail for further delay in this already protracted litigation, we trust that the district court, with the good faith assistance of the parties, will be able to carry out further proceedings without unreasonable delay.

To avoid any question that might be raised, see *O'Shea v. United States*, 491 F.2d 774, 778-80 (1st Cir. 1974), we note that we can see no reason why this case should not go back to the same district judge, who already possesses considerable familiarity with it.

*Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.*



the effects of the oil. As we are remanding the case in any event, we think this award should be vacated pending a redetermination of the extent of the damage in West Mangrove and a further submission by plaintiffs integrating this proposal into a more reasonable plan, or set of alternative plans, for restoring the area.

- THE <sup>1988</sup> MARTINEZ SETTLEMENT MAY BE SMALLER, BUT IT'S BETTER THAN EXXON BECAUSE:

① IT INCLUDES ALL THE LOCAL GOVERNMENTS;

② OVER  $\frac{1}{2}$  THE MONEY IS earmarked FOR HABITAT PROTECTION (WETLANDS ACQUISITION); AND,

③ THE LOCAL INPUT INTO HOW THE MONEY IS SPENT IS MUCH BETTER THAN EXXON (6 BUREAUCRATS WHO ARE UNACCOUNTABLE - CAN'T BE SUEED).

... ~~NOT~~ ~~CIRCULATE~~



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# \$10 million oil spill settlement: How best to spend it

## Public input sought at two hearings

By Marie Felde  
The Tribune

Bay Area residents Thursday can participate in a \$10.8 million environmental shopping spree aimed at countering damage done to wetlands and wildlife by the extensive Shell Oil Co. oil spill in Martinez in 1988.

Shell Oil agreed to provide the money to a natural resources public trust to buy wetlands as part of nearly \$20 million it spent to settle 15 damage claims brought against it for allowing 400,000 gallons of crude oil to escape a holding tank.

The settlement was the largest of its kind in U.S. history. Now, the six trustees representing various local, state and federal agencies are deciding how to spend the money.

The public is invited to offer suggestions on how the money will be used.

The meetings will be held Thursday from 2 p.m. to 4 p.m. at Martinez City Hall and from 7 p.m. to 9 p.m. at Benicia City Hall. In addition, written sugges-

tions will be accepted through March 1.

The general objective is to offset damage to natural resources caused by the April 1988 spill. Oil that blackened many acres of wetlands flowed into Carquinez Strait and spread to Suisun Bay and San Pablo Bay.

The trustees have given priority to buying the land nearest damaged areas. Acquisitions that would not require rigorous management and those that protect habitat for endangered species are also sought.

The overall array of projects is to balance both wetlands needs and benefit fish and wildlife in the area.

For more information, call the California Environmental Trust, 543-1855.

Among the agencies represented on the committee are the U.S. Fish and Wildlife Service, the California Lands Commissions, the East Bay Regional Park District and the San Francisco Bay Conservation and Development Commission.



Shell Oil workers in 1988 spent weeks cleaning up crude oil that leaked from a holding tank.

Tribune file photo

## MEMORANDUM OF AGREEMENT

Whereas, the United States and the State of California (the "State") are trustees for natural resources damaged by the Shell oil spill (the "Oil Spill"); and

Whereas, the National Contingency Plan, 40 C.F.R. section 300.74(c), and section 311 of the Clean Water Act, 33 U.S.C. section 1321, require that federal and state trustees cooperate with each other in carrying out their responsibilities for protecting natural resources;

Whereas, the U.S. Fish and Wildlife Service has the authority under the Fish and Wildlife Coordination Act, 16 U.S.C. section 661 and 43 C.F.R. Part 11 to enter this agreement on behalf of the U.S. Department of the Interior as trustee for natural resources damaged by the spill;

Now, therefore, the United States and the State have determined that the following procedures for disbursement and management of the funds received for natural resource damages will best enable them, as trustees, to restore, rehabilitate and acquire the equivalent of the natural resources damaged by the Oil Spill.

### **I. THE COMMITTEE.**

A "Committee" shall be established as follows:

A. Composition. The Committee shall be composed of:

1. The United States Department of the Interior, by and through the United States Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration, acting as the natural resources trustees for the United States;

2. The Department of Fish and Game and the State Lands

Commission, acting as the natural resources trustees for the State;

3. The East Bay Regional Park District; and

4. The San Francisco Bay Conservation and Development Commission, acting on behalf of the public in the San Francisco Bay Area and on behalf of the Commission's membership, which includes representatives from federal, state and local agencies.

To insure continuity in the Committee's work, each agency represented on the Committee shall designate a permanent representative from its staff to serve on the Committee. Each agency shall also designate alternate representative(s).

B. Decisionmaking. The trustees for the natural resources damaged, the United States and the State, shall have co-equal authority in all decisions, and no decision shall be made that does not have the approval of both the United States and the State. If necessary, the trustees may establish mechanisms by which disputes may be resolved.

C. Duties and Authority. The Committee shall have final authority to disburse the money contained in the Trustees Fund referred to in section IV(A)(1) of the Consent Decree and to make all necessary decisions for the management and administration of the projects for which money has been disbursed from the Trustees Fund. The Committee may take whatever actions that the Committee in its discretion determines are necessary to effectuate the purposes of the Consent Decree and the Natural Resource Objectives described in section II of this Memorandum of Agreement ("MOA"). It is expected that the Committee will take the following actions to accomplish these



**purposes:**

1. Supervise the administration of the Trustees Fund and disburse money where necessary from the Trustees Fund;
2. Select one or more agencies or organizations (the "Facilitating Agency or Agencies") that, on the behalf of and at the direction of the Committee, may:
  - a. inventory land suitable for acquisition pursuant to the Natural Resource Objectives described in section II of this MOA;
  - b. negotiate for and purchase such land;
  - c. transfer ownership of such land to other public agencies;
  - d. plan for and carry out appropriate wetlands restoration projects;
  - e. contract with consultants to provide technical services to the Committee as described in Section IV of this MOA; and
  - f. take other necessary actions as requested by the Committee.

The Facilitating Agency or Agencies selected by the Committee pursuant to this paragraph shall be a public agency or agencies, unless the Committee determines that a private, non-profit organization would better achieve the Natural Resource Objectives. If the Committee determines that a private, non-profit organization should be selected as a Facilitating Agency, the Committee shall designate one of its agency members to enter into one or more contracts with a private, non-profit organization to act as a Facilitating Agency. The contract

shall set forth the duties of the Facilitating Agency and shall specify the costs of the private, non-profit organization to act as a Facilitating Agency. The costs of the contract and reasonable administrative costs to enter into such contract shall be paid from the Trustees Fund;

3. Review inventories of land acquisition sites and guide the Facilitating Agency or Agencies in negotiations to acquire the sites;

4. Authorize the Facilitating Agency or Agencies to acquire lands on terms acceptable to the Committee;

5. Select one or more public agencies to hold title to the lands acquired by the Committee and, where necessary, attach conditions to the acquiring agency's ownership that would insure the accomplishment of the Natural Resource Objectives;

6. Review and approve leases or other operating agreements between the public agency holding title to any acquired lands and the public agency to whom management responsibility is proposed to be transferred;

7. Create, review, and approve plans for the restoration and management of the acquired lands;

8. Provide funds to other public agencies for the acquisition, creation, and restoration of wetlands where the wetlands would not be acquired, created or restored but for the contribution from the Trustees Fund and where the Committee receives assurances (through a memorandum of understanding or other device) that the acquisition, creation or restoration of the wetlands would be consistent with the Natural Resource Objectives;

9. Convene meetings of the Technical Advisory Committee described in section III, and receive the advice of the Technical Advisory Committee;

10. Prepare and issue public reports from time to time disclosing the work of the Committee;

11. Pay administrative costs that the Committee determines are reasonable and necessary;

12. Establish rules to govern and facilitate the work of the Committee as necessary.

## II. NATURAL RESOURCE OBJECTIVES.

The Committee will be guided by the primary objectives of restoring, rehabilitating and acquiring the equivalent of the natural resources adversely affected by the Oil Spill (the "Natural Resource Objectives"). The Committee will seek to accomplish these objectives in the following manner:

The primary means by which the Committee will seek to accomplish the Natural Resource Objectives is through the acquisition, creation, restoration, or enhancement of wetlands in the area of the Oil Spill. In determining which projects to pursue, the Committee's primary consideration shall be the "feasibility" of the proposed site. For purposes of this Memorandum of Agreement, "feasibility" means the physical suitability of the site for the creation or restoration of valuable and productive wetlands habitat, taking into account the economic cost of acquisition, restoration and management of the habitat in comparison to the cost of developing other wetlands sites in the area of the Oil Spill. In evaluating the physical suitability of the proposed wetlands, the Committee may



consider not just the intrinsic capability of the site to support natural resources, but the usefulness of the site in combination with proximate existing wetlands habitat, the location of the site in relation to existing development, and the site's level of protection from development provided under law. The Committee may acquire land adjacent or near to wetlands habitat where the Committee deems it necessary to accomplish the Natural Resource Objectives. The Committee shall attempt to establish a relatively equal number of acres of wetlands in Solano and Contra Costa Counties, as long as such an allocation would be "feasible," as described above. The Committee may coordinate its acquisition and restoration activities with other agencies involved in the acquisition and management of wetlands habitat. The Committee's decisions regarding the acquisition, creation, restoration and management of wetlands habitat shall take into account the habitat's values for supporting fisheries, particularly striped bass.

The Committee retains final discretion to determine which wetlands projects best carry out the Natural Resource Objectives. It is the goal of the Committee to create, restore, or enhance 1000 acres of wetlands. In undertaking this goal the Committee shall give fair consideration to funding the wetlands restoration project that is currently being developed by the California Department of Parks and Recreation at the Benicia State Recreation Area. In addition to its goal of establishing 1000 acres of new wetlands, the Committee shall give special consideration to the following two projects if they are "feasible", as described above:

1. The enhancement of wetland habitat values at Shell Marsh and the acquisition of a buffer strip around Shell Marsh;
2. The establishment of an appropriate program to study the restoration of the state-listed rare plant Mason's lilaeopsis which was impacted by the Oil Spill.

### III. TECHNICAL ADVISORY COMMITTEE.

A. Composition. A committee known as the Technical Advisory Committee shall be established. The following agencies have the right to have a representative on and to participate in the activities of the Technical Advisory Committee:

1. The U.S. Fish and Wildlife Service;
  2. The U.S. Environmental Protection Agency;
  3. The Department of the Navy;
  4. The National Oceanic and Atmospheric Administration;
  5. The Regional Water Quality Control Board, San Francisco Bay Region;
  6. The California Department of Fish and Game;
  7. The State Lands Commission;
  8. The San Francisco Bay Conservation and Development Commission;
  9. The California Department of Parks and Recreation;
  10. Solano County;
  11. Contra Costa County;
  12. The City of Benicia;
  13. The City of Martinez;
  14. The East Bay Regional Park District.
- The Technical Advisory Committee may invite

representatives of other public agencies and members of the public to its meetings when, in the sole judgment of the Committee, public disclosure of the Committee's work would not prejudice the effectiveness of the Committee or the Technical Advisory Committee. With the approval of the Committee, the Technical Advisory Committee may also invite technical consultants to its meetings.

B. Duties. The Technical Advisory Committee shall meet from time to time at the request of the Committee to review, guide, and comment upon the work of the Committee. The Technical Advisory Committee may advise the Committee in any of the following areas:

1. The inventory of land acquisition sites and priorities for acquisition;
2. Negotiations and purchases of specific sites, including the feasibility of acquiring the site under the standard set out in the Natural Resource Objectives;
3. The selection of public agencies to own and manage acquired lands;
4. Plans for creating, restoring and maintaining wetlands habitat;
5. Any other area where the Committee determines that the Technical Advisory Committee could provide useful advice.

#### IV. TECHNICAL SERVICES.

To assist the Committee in carrying out the Natural Resource Objectives described in section II of this Memorandum of Agreement, the Committee may determine that it needs technical advisors. These advisors may provide the following



**services:**

A. Provide the Committee with logistical support and coordination;

B. Provide project design and technical review;

C. Organize and prepare for Committee meetings;

D. Advise the Committee during Committee meetings;

E. Provide for quality control of chemical analyses;

F. Assist in mitigation site selection and detailed designs;

G. Develop mitigation success monitoring criteria;

H. Monitor for mitigation success through data and report view and by field inspections;

I. Provide analysis and quarterly reports understandable in layperson terms;

J. Provide analysis and summary report understandable in layperson's terms;

K. Assist in the preparation of periodic press releases;

L. Provide other technical advice to the Committee and the Technical Advisory Committee as requested.

To obtain technical services, the Committee may direct a Facilitating Agency to enter into one or more contracts with professional consultants that the Committee determines are best qualified to provide services to the Committee. The total cost of the contracts, including the administrative costs of the Facilitating Agency, shall not exceed \$500,000. The costs of the contracts shall be paid from the Trustees Fund.

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V. GENERAL.

A. This MOA may be amended by agreement of the trustees where the trustees determine an amendment is necessary to accomplish the Natural Resource Objectives.

B. This MOA terminates seven years from the date of entry of the Consent Decree, except that it may be extended by agreement of the trustees.

C. Upon completion of the Committee's work, any unexpended and unobligated money remaining in the Trustees Fund shall be paid into the Fish and Wildlife Pollution Cleanup and Abatement Account of the Fish and Game Preservation Fund, California Fish and Game Code section 12017.

D. No member of the Committee, the Technical Advisory Committee or a Facilitating Agency, where such Facilitating Agency is a public agency, shall be compensated from the Trustees Fund for his/her services provided pursuant to this MOA.

E. Nothing in this MOA shall be construed as obligating the United States or the State, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

F. During the performance of this MOA, the parties will not discriminate against any person because of race, color, religion, sex or national origin.

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## APPENDIX

Pursuant to the Consent Decree, studies have been funded for improving future response strategies to oil spills to ensure better restoration and rehabilitation of natural resources affected by such spills. In order to ensure that the experts carrying out the following studies have access to all available information, Shell agrees to provide the following experts all biological and chemical studies and underlying data performed to date relating to the Oil Spill upon entry of the Consent Decree. The studies, the methods for implementing and reviewing the studies, and the experts retained to perform the studies are as follows:

### A. Studies.

(1) A study to assess the rate of recovery of intertidal vegetation associated with various oil spill response techniques.

This study will provide increased information about which response techniques and procedures are most effective in cleaning up a spill like the Shell Oil Spill.

The focus of the study will be on the intertidal wetland marshes affected by the spill. Building on current studies conducted by Shell Oil Company, the study will monitor the erosion rates of all the vegetated shoreline adversely affected by the spill and compare vegetation recovery rates where different response techniques were used. The study will provide better information for future purposes regarding the most effective corrective actions to clean up oil and to restore and rehabilitate impacted areas.



1 To carry out this study, the California Department of  
2 Justice will extend its current contract with RPI International,  
3 Inc., and in particular with Dr. Jaqueline Michel, in an amount  
4 not to exceed \$210,000. RPI will subcontract part of this study  
5 to Dr. Terry Huffman of Huffman and Associates, who was retained  
6 as a consultant to the affected governments soon after the Shell  
7 Oil Spill occurred.

8 The contract will be administered by the California  
9 Department of Justice. Study managers for the contract will be  
10 technical personnel designated by the U.S. Fish and Wildlife  
11 Service (USFWS) and the California Department of Fish and Game  
12 (CDFG) who will provide substantive review, criticism and  
13 guidance for the study.

14 (2) A study to examine the changes in the composition  
15 and concentration of San Joaquin Valley (SJV) crude oil in  
16 estuarine and coastal habitats.

17 The purpose of this study is to examine the changes in  
18 composition and concentration of SJV crude oil spilled in  
19 intertidal and subtidal habitats in order to better evaluate the  
20 best methods to restore and rehabilitate these resources. This  
21 study will be coordinated with the vegetation study results  
22 described above to provide a better understanding of the  
23 recovery of typical coastal and estuarine environments from  
24 crude oil spills.

25 The study will build on the results of current studies  
26 conducted by Shell Oil Company and will have three specific  
27 tasks: (a) to conduct an oil weathering study of SJV crude oil  
28 in intertidal and subtidal sediments contaminated by the such

1 oil; (b) to correlate the persistence of SJV crude oil in  
2 sediments with different cleanup techniques in the wetland  
3 areas; and (c) to conduct sediment toxicity studies of  
4 intertidal and subtidal sediments contaminated by SJV crude oil.  
5 The technical reports generated by this study will provide  
6 increased information to better assess the potential effects of  
7 SJV crude oil spilled in estuarine and coastal environments.

8 To carry out this study, the California Department of  
9 Justice will contract with A.D. Little, and in particular with  
10 Dr. Paul Boehm, to continue Dr. Boehm's initial weathering  
11 studies of this oil in an amount not to exceed \$357,000.

12 The contract will be administered by the California  
13 Department of Justice. Study managers will be technical  
14 personnel designated by the USFWS and the CDFG who will provide  
15 substantive review, criticism and guidance for the study.

16 (3) A contingent valuation study to measure natural  
17 resource values relevant to California oil spills.

18 The purpose of this study is to apply state-of-the-art  
19 economic measurement techniques to better develop use and non-  
20 use values that humans place on offshore, coastal and estuarine  
21 natural resources damaged by oil spills occurring in California.  
22 The study would utilize the contingent valuation approach and  
23 the skills of several disciplines, including economics,  
24 sociology and survey research. The study would require the  
25 development of a survey instrument, the implementation of a  
26 field survey, and analysis of survey data and would take about  
27 one year to accomplish. The information derived from the study  
28 will assist federal, state and local governments in assessing

1 damages to natural resources from future California oil spills  
2 and in land use planning management and regulation of such  
3 natural resources.

4 To carry out this study, the California Department of  
5 Justice will extend its current contract with Dr. Michael  
6 Hanemann in an amount not to exceed \$645,000. Dr. Hanemann will  
7 subcontract part of this study to Drs. Richard Carson, Robert  
8 Mitchell, Thomas Wegge, Stanley Presser, John Loomis and Paul  
9 Ruud.

10 The contract will be administered by the California  
11 Department of Justice. Study managers will be technical  
12 personnel designated by the USFWS and the CDFG who will provide  
13 substantive review, criticism and guidance for the study.

14 B. Review of Studies and Final Report.

15 A small group of experts in the fields of the vegetation  
16 and oil studies described above will be formed to assist in  
17 review of such studies, in development of a Final Report based  
18 upon the conclusion of those studies and in dissemination of  
19 information to the spill response community. This "peer review  
20 group" will be responsible for providing detailed evaluations of  
21 the study plans and annual review of all study results. It will  
22 make recommendations on any necessary changes to the study  
23 plans, the duration of each study element, and the termination  
24 of each study element. RPI, aided by the contractors for the  
25 vegetation and oil studies, by the peer review group and the  
26 study managers will also be responsible for periodically  
27 disseminating study data to the spill response community through  
28 appropriate means such as meetings. At the conclusion of these



1 two studies, the contractors for the vegetation and oil studies  
2 aided by the peer review group, RPI and the study managers will  
3 develop a final report and arrange for its distribution.

4 To establish and coordinate this peer review group, the  
5 California Department of Justice will contract with RPI  
6 International, Inc., and in particular with Dr. Jaqueline  
7 Michel, in an amount not to exceed \$100,000. The contract will  
8 be administered by the California Department of Justice.

9 C. Experts.

10 The experts performing the above-described contracts  
11 were retained because of their unique qualifications in the area  
12 of their respective expertise. All of them are currently  
13 retained as consultants to the parties to the litigation and are  
14 uniquely familiar with the particular facts and circumstances of  
15 the Shell Oil Spill. Therefore, retention of these experts to  
16 perform and review the studies will entail the minimum  
17 expenditure of time and money and be most cost effective to the  
18 public and to the parties. Such experts will also provide  
19 critical continuity of knowledge and analysis of the Oil Spill  
20 events.

21 It is the intent of the parties that the experts will  
22 perform and continue the studies, using additional persons as  
23 deemed necessary, so long as is practicable. Their contracts  
24 may be terminated in the event that they do not meet the  
25 standards of their contracts.

26 D. Termination.

27 Upon completion of the contracts described in this  
28 Appendix, the California Department of Justice shall pay into

1 the Trustees Fund any unexpended and unobligated funds remaining  
2 in the Studies Fund.  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD W. WIEKING  
CLERK U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA; STATE OF CALIFORNIA EX REL. DEPARTMENT OF FISH AND GAME, STATE LANDS COMMISSION, DEPARTMENT OF PARKS AND RECREATION, REGIONAL WATER QUALITY CONTROL BOARD FOR THE SAN FRANCISCO BAY REGION, SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION; PEOPLE OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTIES OF CONTRA COSTA AND SOLANO; CONTRA COSTA COUNTY; SOLANO COUNTY; CITY OF BENICIA; CITY OF MARTINEZ; and EAST BAY REGIONAL PARK DISTRICT;

Plaintiffs,

v.

SHELL OIL COMPANY,

Defendant.

CONSENT DECREE

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1 I. GENERAL PROVISIONS

2 A. On or about April 22 through 23, 1988, Defendant  
3 Shell Oil Company ("Shell") discharged crude oil from its oil  
4 manufacturing complex in Martinez, California ("the Complex")  
5 onto lands and into waters, including wetlands, surrounding the  
6 Complex when a pipe connection in an oil holding tank (Tank No.  
7 1256) broke and oil escaped through a drainage valve that had  
8 been left open ("the Oil Spill").

9 B. Plaintiffs have alleged that at least 432,264  
10 gallons of crude oil were spilled, inundating Shell Marsh and  
11 Peyton Slough and entering the Carquinez Strait and Suisun Bay.  
12 The exact amount of oil spilled is disputed.

13 C. Plaintiffs have alleged that the Oil Spill  
14 resulted from a roof drain failure and that Shell left open the  
15 drainage valve, proximately causing substantial damage to the  
16 environment and natural resources of the San Francisco Bay/Delta  
17 Estuary.

18 D. Plaintiff, United States of America ("United  
19 States"), on behalf of the U. S. Department of Commerce, the  
20 U.S. Department of the Interior, and the U.S. Department of the  
21 Navy, has alleged civil claims for damages to natural resources  
22 under the trusteeship of the United States pursuant to section  
23 311(f) of the Clean Water Act, 33 U.S.C. section 1321(f); and,  
24 on behalf of the U.S. Environmental Protection Agency, has  
25 alleged claims for penalties pursuant to sections 309 and 311(j)  
26 of the Clean Water Act, 33 U.S.C. sections 1319 and 1321(j).  
27 The United States has also alleged claims for costs incurred in  
28 conjunction with the Oil Spill under section 311(f) of the Clean

1 Water Act, 33 U.S.C. section 1321(f).

2 E. Plaintiff, State of California ex rel. Department  
3 of Fish and Game, State Lands Commission, Regional Water Quality  
4 Control Board for the San Francisco Bay Region, Department of  
5 Parks and Recreation and San Francisco Bay Conservation and  
6 Development Commission ("State"), has alleged civil claims for  
7 damages to natural resources under the trusteeship of the State  
8 and for penalties under the Clean Water Act, 33 U.S.C. section  
9 1251, et seq.; California Fish and Game Code sections 2014,  
10 5655, 12015, and 12016; California Harbors and Navigation Code  
11 section 151; California Water Code sections 13304, 13350, and  
12 13385; California Public Resources Code section 29610;  
13 California Government Code section 66641.5; and trespass,  
14 negligence, nuisance and common law natural resource damages.  
15 The State has also alleged claims for costs incurred in  
16 conjunction with the Oil Spill.

17 F. Plaintiff, the People of the State of California  
18 in and for the Counties of Contra Costa and Solano and on behalf  
19 of the California Department of Health Services, has alleged  
20 civil claims for relief under California Health and Safety Code  
21 Section 25189 and California Business and Professions Code  
22 Section 17200 and seeks recovery of costs and penalties.

23 G. Plaintiffs, the Cities of Benicia and Martinez,  
24 have alleged civil claims for relief for trespass, negligence  
25 and nuisance, and seek recovery of costs and damages.

26 H. Plaintiff, East Bay Regional Park District, has  
27 alleged civil claims for relief for natural resource damages,  
28 trespass and nuisance and seeks recovery of costs and damages.



1 I. Defendant, Shell Oil Company, is a corporation  
2 incorporated under the laws of Delaware. Shell owns and  
3 operates the Complex where the Oil Spill occurred.

4 J. The United States Environmental Protection Agency  
5 ("EPA") has served on Shell a Notice of Violation ("NOV"),  
6 pursuant to 40 C.F.R. section 114.4, alleging that Shell has  
7 violated certain oil spill prevention regulations set forth at  
8 40 C.F.R. Part 112 that are applicable to the Complex. The NOV,  
9 attached as Exhibit 1, initiates an administrative action  
10 pursuant to 40 C.F.R. Part 114 and Clean Water Act  
11 section 311(j), 33 U.S.C. section 1321(j), and 40 C.F.R. Part  
12 114 and proposes the assessment of civil penalties. Shell  
13 agrees that EPA has jurisdiction to institute this  
14 administrative action, and EPA and Shell agree to compromise the  
15 aforementioned administrative action by this Consent Decree.

16 K. A resolution of the parties' disputes would  
17 require costly and protracted litigation. The parties consider  
18 resolution of this dispute without litigation to be in the best  
19 interests of the public.

20 L. Prior to taking any testimony, Shell and  
21 Plaintiffs have agreed to making this Consent Decree. Shell and  
22 Plaintiffs agree that this Consent Decree is filed in settlement  
23 of this litigation and the administrative proceeding described  
24 in paragraph J above and in consideration for the covenants not  
25 to sue described in section V below. This Consent Decree is  
26 entered into without any admission as to liability for any  
27 purpose, in good faith to avoid further protracted litigation  
28 relating to Plaintiffs' claims arising from the Oil Spill as

described in section V and to serve the public interest.

M. Except as provided in section II.A of this Consent Decree, Shell denies any and all legal and equitable liability under any federal, state, or local statute, regulation, ordinance, or common law for any fines, penalties, response costs, damages or claims caused by or arising out of the Oil Spill; Shell does not admit liability for any purpose or admit any issues of fact or law or any responsibility for the alleged release of crude oil or any alleged hazardous constituent thereof into the environment by entering into this Consent Decree or by taking any action in accordance with this Consent Decree.

## II. JURISDICTION, VENUE AND SERVICE OF PROCESS

A. This Court has jurisdiction over the parties and the subject matter of this Consent Decree pursuant to 28 U.S.C. sections 1331 and 1345, and sections 309 and 311 of the Clean Water Act, 33 U.S.C. sections 1319 and 1321. This Court also has jurisdiction over the subject matter of the pendant State law claims in this action. Venue is proper in this Court pursuant to 28 U.S.C sections 1391(b) and (c). The Complaint, filed concurrently with the lodging of this Consent Decree, states claims upon which relief may be granted against Shell. Shell waives all objections to the Court's jurisdiction to enter or enforce this Consent Decree, as well as venue and service of summons.

B. Shell agrees that service of notice or any legal process on it for any purpose under this Consent Decree, including its enforcement, may be made by mailing a copy by

1 first class mail to the attorneys below:

2 Keith Howard  
3 Cooper, White & Cooper  
4 1333 N. California Blvd.  
Suite 450  
Walnut Creek, CA 94596

5 Victoria Kincke  
6 Shell Oil Company  
7 Chemical Legal Department  
One Shell Plaza  
P.O. Box 2463  
Houston, TX 77252

8 **III. PARTIES BOUND**

9 This Consent Decree shall apply to and be binding upon  
10 the signatories, their agents, successors and assigns.

11 **IV. RELIEF**

12 A. On the date of lodging of this Consent Decree,  
13 Shell agrees to pay the total sum of nineteen million, seven  
14 hundred fifty thousand dollars (\$19,750,000.00) by check made  
15 payable to California Department of Justice, Litigation Deposits  
16 Fund, an interest bearing account, and hand delivered to John D.  
17 Fennelly, Office of the Attorney General, 1515 S Street, South  
18 Building, Fifth Floor, Sacramento, CA. Upon entry of this  
19 Consent Decree by the Court, the principal and interest thereon  
20 shall be disbursed from the Litigation Deposits Fund by the  
21 California Department of Justice in the following manner.

22 1. The sum of eleven million, five hundred eighty-  
23 eight thousand dollars (\$11,588,000.00) plus all interest  
24 accumulated on the money in the Litigation Deposits Fund  
25 described in Section IV.A, less any administrative costs, shall  
26 be paid as follows for alleged natural resource damages:

27  
28



1           a. The sum of ten million, eight hundred thirty-  
2 eight thousand dollars (\$10, 838,000.00) plus all the interest  
3 accrued on the money in the Litigation Deposits Fund described  
4 in Section IV.A, less any administrative costs, shall be  
5 disbursed pursuant to the Clean Water Act, 33 U.S.C. Section  
6 1321(f), to the Department of Justice, State of California for  
7 deposit in the California Department of Justice, Special  
8 Deposits Fund into an account to be determined, hereafter  
9 referred to as the "Trustees Fund." The purpose of this fund  
10 shall be to compensate the Trustees for the United States and  
11 the State of California for alleged damages to natural  
12 resources. The Trustees shall administer and disburse the money  
13 in the Trustees Fund in accordance with the Memorandum of  
14 Agreement attached as Exhibit 2.

15           b. The sum of seven hundred fifty thousand  
16 dollars (\$750,000.00) shall be disbursed to the Department of  
17 Fish and Game pursuant to Fish and Game Code section 12017 for  
18 purposes such as cleanup and abatement of oil spills, projects  
19 devoted to the preservation of California plants, wildlife and  
20 fisheries, land acquisition and land improvements and species  
21 propagation projects. Payment shall be made payable to "Fish  
22 and Wildlife Pollution Cleanup and Abatement Account, Fish and  
23 Game Preservation Fund" and delivered by mail to Department of  
24 Fish and Game Fiscal Division, c/o Marie Reed, P.O. Box 944209,  
25 Sacramento, CA 94244-2090.

26           2. The sum of one million, three hundred twelve  
27 thousand dollars (\$1,312,000.00) shall be disbursed to the  
28 Department of Justice, State of California, for deposit in the

1 California Department of Justice, Special Deposits Fund into an  
2 account to be determined, hereafter referred to as the "Studies  
3 Fund." The purpose of the Studies Fund shall be to conduct  
4 studies pertaining to the Oil Spill as set forth in Appendix A,  
5 attached and incorporated by reference.

6 3. The sum of five hundred thousand dollars  
7 (\$500,000.00) shall be disbursed to the United States, the State  
8 of California, and the County of Contra Costa for reimbursement  
9 of costs. Said sum shall be apportioned and made payable as  
10 follows:

11 a. The sum of ninety-three thousand dollars  
12 (\$93,000.00) shall be made payable to "U.S. Department of the  
13 Interior" and delivered by mail to the Office of the Solicitor,  
14 P.O. Box 36064, 450 Golden Gate Avenue, San Francisco, CA 94102.

15 b. The sum of three hundred and fifty-seven  
16 thousand dollars (\$357,000.00) shall be paid to the State of  
17 California as follows:

18 i. The sum of one hundred ninety three  
19 thousand, two hundred and twenty-nine dollars and sixty-eight  
20 cents (\$193,229.68) shall be made payable to the "Fish and  
21 Wildlife Pollution Cleanup and Abatement Account, Fish and Game  
22 Preservation Fund" and delivered by mail to Department of Fish  
23 and Game Fiscal Division, c/o Marie Reed, P.O. Box 944209,  
24 Sacramento, CA 94244-2090;

25 ii. The sum of sixty-two thousand, three  
26 hundred fifty-two dollars and sixty-seven cents (\$62,352.67)  
27 shall be made payable to "State Water Pollution Cleanup and  
28 Abatement Account, State Water Quality Control Fund" and

1 delivered by mail to William R. Attwater, Chief Counsel, State  
2 Water Resources Control Board, 901 P Street, P.O. Box 100,  
3 Sacramento, CA 95801;

4           iii. The sum of twenty thousand, one  
5 hundred twenty-five dollars and eighty-eight cents (\$20,125.88)  
6 shall be made payable to "California Department of Parks and  
7 Recreation" and delivered by mail to Richard E. Felty, Regional  
8 Director, California Department of Parks and Recreation, Central  
9 Coast Region, 2211 Garden Road, Monterey, CA 93940;

10           iv. The sum of nine thousand five hundred  
11 sixteen dollars and fifty-three cents (\$9,516.53) shall be made  
12 payable to the "Bay Fill Cleanup and Abatement Fund" and  
13 delivered by mail to San Francisco Bay Conservation and  
14 Development Commission, c/o Russell Abramson, 30 Van Ness  
15 Avenue, Suite 2011, San Francisco, CA 94102;

16           v. The sum of twelve thousand dollars  
17 (\$12,000.00) shall be made payable to "State Lands Commission"  
18 and delivered by mail to Robert C. Hight, Chief Counsel, State  
19 Lands Commission, 1807 13th Street, Sacramento, CA 95814;

20           vi. The sum of fifty-nine thousand, seven  
21 hundred seventy-five dollars and twenty-four cents (\$59,775.24)  
22 shall be made payable to "California Department of Justice," and  
23 delivered by mail to Sara J. Russell, Deputy Attorney General,  
24 Office of the California Attorney General, 350 McAllister  
25 Street, Suite 6000, San Francisco, CA 94102. This money shall  
26 be used only to defray expenses incurred by the Attorney General  
27 in the implementation of this Consent Decree and otherwise to  
28 defray expenses incurred by the Attorney General in his capacity



1 as legal counsel to State agencies responsible for enforcing  
2 laws and programs for the protection of the State's environment,  
3 natural resources and lands. Such expenses may include, but are  
4 not limited to, reimbursement of the cost of expert consultants,  
5 temporary employees, equipment and supplies. The Attorney  
6 General shall segregate this money in a separate account which  
7 shall be jointly administered by the Natural Resources Section  
8 and the Land Law Section in the Public Rights Division of the  
9 California Department of Justice;

10 c. The sum of fifty thousand dollars  
11 (\$50,000.00), for Contra Costa County, shall be made payable and  
12 delivered by mail to Huffman and Associates, Inc., 69 Aztec  
13 Street, San Francisco, CA 94110, as payment of professional  
14 consultant expenses.

15 4. The sum of six hundred thousand dollars  
16 (\$600,000.00) shall be disbursed to the City of Benicia as  
17 alleged damages. Payment in the amount of six hundred thousand  
18 dollars (\$600,000.00) shall be made payable to the "City of  
19 Benicia, c/o Finance Director" and shall be delivered by mail to  
20 the City of Benicia Finance Department, 250 East L Street,  
21 Benicia, California 94510.

22 a. Three hundred fifty thousand dollars  
23 (\$350,000.00) of this money shall be used for the following  
24 projects in the following amounts:

25 i. The sum of seventy-five thousand  
26 dollars (\$75,000.00) shall be utilized to reconstruct,  
27 rehabilitate and enlarge the 9th Street Fishing Pier.

28 ii. The sum of two hundred seventy-five

1 thousand dollars (\$275,000.00) shall be utilized to construct  
2 two marsh overlooks at the ends of First Street and Second  
3 Street.

4 The City of Benicia shall segregate this money in a  
5 separate account which may be utilized only for these above-  
6 mentioned projects. Should either, or both, of these projects  
7 become infeasible, or should monies remain after the completion  
8 of these projects, the City Council of the City of Benicia shall  
9 have the right to re-program these monies for other projects  
10 within the City of Benicia as long as such projects enhance,  
11 mitigate or restore the areas or natural resources affected or  
12 impacted by the Oil Spill.

13 b. Two hundred fifty thousand dollars  
14 (\$250,000.00) of this money shall go to the City of Benicia  
15 general fund.

16 5. The sum of one hundred and fifty thousand dollars  
17 (\$150,000.00) shall be disbursed to the County of Solano,  
18 payable to the "Office of the District Attorney" and delivered  
19 by mail to the Office of the District Attorney, 600 Union  
20 Avenue, Fairfield, CA 94533, for the specific purpose of  
21 enabling the Solano County Office of Emergency Services and the  
22 Solano County District Attorney Environmental Crime Unit to  
23 purchase computer hardware and software and communications  
24 equipment so as to enable said County to be adequately prepared  
25 in the event of future oil spill disasters on its coast and to  
26 provide said County with the necessary emergency response  
27 capability. The District Attorney shall segregate this money in

a separate account which may be utilized only for the above-

1 stated purposes.

2           6. The sum of seven hundred fifty thousand dollars  
3 (\$750,000.00) shall be disbursed to the City of Martinez. This  
4 amount compensates the City of Martinez and the County of Contra  
5 Costa for alleged damages. Payment in the amount of seven  
6 hundred fifty thousand dollars (\$750,000.00) shall be made  
7 payable to the "City of Martinez, c/o Finance Director" and  
8 shall be delivered by mail to the City of Martinez Finance  
9 Department, 525 Henrietta Street, Martinez, California 94553.

10           a. Five hundred thousand dollars (\$500,000.00)  
11 of this money shall be administered by the City of Martinez and  
12 utilized for a joint project of the City of Martinez and Contra  
13 Costa County to enhance and rehabilitate the Martinez fishing  
14 pier and to construct a landscaped walkway plaza area connecting  
15 the Martinez fishing pier to the Italian Fisherman Monument.  
16 The City of Martinez shall segregate these monies in a separate  
17 account which may be utilized only for the above identified  
18 project. Should this project become infeasible, or should  
19 monies remain after the completion of this project, the City  
20 Council of the City of Martinez shall have the right to re-  
21 program these monies for other projects after consultation with  
22 Contra Costa County. The City Council of the City of Martinez  
23 may only utilize these monies for projects which enhance,  
24 mitigate or restore the areas or natural resources affected or  
25 impacted by the Oil Spill.

26           b. Two hundred fifty thousand dollars  
27 (\$250,000.00) of this money shall go to the City of Martinez  
28 general fund.



1           7.    The sum of two hundred thousand dollars  
2 (\$200,000.00) shall be disbursed to the East Bay Regional Park  
3 District as alleged damages. Payment shall be made payable to  
4 the "East Bay Regional Park District" and delivered by mail to  
5 the East Bay Regional Park District, 11500 Skyline Boulevard,  
6 Oakland, CA 94619-2443.

7           8.    The sum of two million dollars (\$2,000,000.00)  
8 shall be disbursed to the United States as penalties for the  
9 Defendant's alleged violations of the spill prevention  
10 regulations found at 40 C.F.R. Part 112. Payment shall be made  
11 payable to the "Treasurer of the United States" and delivered by  
12 mail to the United States Attorney for the Northern District of  
13 California. A copy of the check and letter tendering such check  
14 shall be mailed to Office of Regional Counsel, Water Branch  
15 Chief, U.S.E.P.A. Region 9, 215 Fremont Street, San Francisco,  
16 CA 94105, and to the Chief, Environmental Enforcement Section,  
17 Land and Natural Resources Division, United States Department of  
18 Justice, P.O. Box 7611, Ben Franklin Station, Washington D.C.  
19 20044.

20           9.    The sum of fifty thousand dollars (\$50,000.00)  
21 shall be disbursed to the United States as penalties for the  
22 Defendant's alleged violations of its NPDES Permit No. CA005789  
23 at the Complex. Payment shall be made payable to the "Treasurer  
24 of the United States" and delivered by mail to the United States  
25 Attorney for the Northern District of California. A copy of the  
26 check and letter tendering such check shall be mailed to Office  
27 of Regional Counsel, Water Branch Chief, U.S.E.P.A. Region 9,  
28 215 Fremont Street, San Francisco, CA 94105, and to the Chief,

1 Environmental Enforcement Section, Land and Natural Resources  
2 Division, United States Department of Justice, P.O. Box 7611,  
3 Ben Franklin Station, Washington D.C. 20044.

4 10. The sum of two million, one hundred thousand  
5 dollars (\$2,100,000.00) shall be disbursed as penalties to the  
6 State of California for alleged statutory violations. Payment  
7 shall be made payable to "State Water Pollution Cleanup and  
8 Abatement Account, State Water Quality Control Fund" and  
9 delivered to William R. Attwater, Chief Counsel, State Water  
10 Resources Control Board, 901 P Street, P.O. Box 100, Sacramento,  
11 CA 95801.

12 11. The sum of two hundred fifty thousand dollars  
13 (\$250,000.00) shall be disbursed to the County of Contra Costa  
14 as penalties for alleged violations of Business and Professions  
15 Code Section 17206 arising out of the Oil Spill. Payment shall  
16 be made payable to "Treasurer, Contra Costa County" and  
17 delivered to the Contra Costa County District Attorneys Office,  
18 Special Operations Division, P.O. Box 670, Martinez, CA 94553.

19 12. The sum of two hundred fifty thousand dollars  
20 (\$250,000.00) shall be disbursed to the County of Solano as  
21 penalties for alleged violations of Business and Professions  
22 Code Section 17206 arising out of the Oil Spill. Payment shall  
23 be made payable to "County of Solano, c/o Office of the District  
24 Attorney" and delivered to the Office of the District Attorney,  
25 600 Union Avenue, Fairfield, CA 94533.

26 B. Except as provided in sections VII and IX, below,  
27 Shell hereby waives any and all rights or claims to the money  
28 described in section IV.A of this Consent Decree. Further,

1 Shell waives any and all rights to object to the implementation  
2 of the Consent Decree, including, but not limited to, the  
3 disbursement of such money and any decisions relating to  
4 implementation.

5 V. COVENANTS NOT TO SUE

6 A. The covenants set forth in paragraphs B-I below  
7 shall take effect only upon entry of this Consent Decree and  
8 payment in full of all amounts set forth in Section IV  
9 according to the terms and conditions of that section.

10 B. The United States covenants not to sue Shell for:

11 1. Civil violations of the spill prevention  
12 regulations at 40 C.F.R. Part 112 which occurred at the Complex  
13 prior to November 1, 1988;

14 2. Civil claims for costs and natural resource  
15 damages under 33 U.S.C. section 1321(f) arising from the Oil  
16 Spill;

17 3. Civil claims for violations of NPDES Permit  
18 No. CA005789 pursuant to section 301 of the Clean Water Act, 33  
19 U.S.C. section 1319(d), caused by the Oil Spill;

20 4. Civil claims pursuant to 16 U.S.C. section  
21 1540(a) for violations of 16 U.S.C. section 1538(a) arising from  
22 the Oil Spill;

23 5. Civil damages to the Navy for trespass on the  
24 Naval Weapons Facility, Concord, California, caused by the Oil  
25 Spill;

26 6. Civil damages to the Navy for nuisance to the  
27 Navy caused by the Oil Spill.

28 C. The State covenants not to sue Shell for any and



1 all civil claims, demands, causes of action, penalties and  
2 damages, known or unknown, suspected or unsuspected which the  
3 State, on behalf of the State agencies described in Section I.E  
4 above, has or may have against Shell based upon or arising out  
5 of the Oil Spill.

6 D. The City of Benicia covenants not to sue Shell for  
7 civil damages and costs for trespass, negligence and nuisance  
8 resulting from the Oil Spill.

9 E. The City of Martinez covenants not to sue Shell  
10 for civil damages and costs for trespass, negligence and  
11 nuisance resulting from the Oil Spill.

12 F. The East Bay Regional Park District covenants not  
13 to sue Shell for civil and natural resource damages and costs  
14 for trespass and nuisance resulting from the Oil Spill.

15 G. The County of Contra Costa covenants not to sue  
16 Shell for violations of the Hazardous Waste Control Act, the  
17 Unlawful Business Practice Act and damages and costs for  
18 trespass and nuisance resulting from the Oil Spill.

19 H. The County of Solano covenants not to sue Shell  
20 for violations of the Hazardous Waste Control Act, the Unlawful  
21 Business Practice Act and damages and costs for trespass and  
22 nuisance resulting from the Oil Spill.

23 I. The People of the State of California covenant not  
24 to proceed criminally against Shell for alleged violations  
25 arising from the Oil Spill of the following statutes and  
26 regulations:

27 1. California Fish and Game Code sections 5650,  
28 12000 and 12002;

2. California Water Code section 13387;
3. California Government Code section 66632(j);
4. California Public Resources Code section 6303.1;
5. California Health and Safety Code sections 25189.5 and 25191;
6. California Penal Code sections 372 and 602;
7. Title 14, California Code of Regulations, sections 4305, 4306 and 4307.

VI. RESERVATION OF RIGHTS

A. Each Plaintiff expressly reserves its right to initiate judicial or administrative actions against Shell for any matter not expressly covered by the covenants not to sue between that Plaintiff and Shell.

B. Nothing in this Consent Decree is intended by the parties or shall be construed as a waiver by any Plaintiff of its right to institute an action against Shell to compel compliance with this Consent Decree.

VII. PRE-LODGING OBLIGATIONS

Upon execution of this Consent Decree by Shell, Shell agrees to be bound to the terms of the decree and may not revoke acceptance unless the named representatives of Plaintiffs have not signed the decree within sixty (60) days from the date of final signature by Shell's representative(s).

VIII. PUBLIC COMMENT AND ENTRY OF CONSENT DECREE

The signatories to this Consent Decree agree that there will be a forty-five (45) day public comment period and that they will follow the procedures set forth at 28 C.F.R.

1 section 50.7 prior to moving the court to enter this Consent  
2 Decree. Plaintiffs reserve the right to withdraw their consent  
3 to this Consent Decree if Plaintiffs determine that comments  
4 received during the comment period disclose facts or  
5 considerations indicating that the Consent Decree is unlawful or  
6 inadequate to protect the public interest. Plaintiffs will not  
7 move the Court to enter this Consent Decree until the public  
8 comment period has expired and will only submit the Consent  
9 Decree for entry if, in their determination, comments received  
10 during the comment period do not disclose facts or  
11 considerations indicating that the Consent Decree is unlawful or  
12 inadequate to protect the public interest.

13 IX. CONDITIONS FOR RETURN OF MONEY TO SHELL

14 A. Money paid by Shell into the Fund described in  
15 section IV.A shall remain in such Fund and continue to accrue  
16 interest for the benefit of Plaintiffs until entry of this  
17 Consent Decree unless one of the following occurs:

18 1. Plaintiffs comply with the requirements of  
19 this section and notify Shell that they intend to resolve the  
20 matter through litigation; or

21 2. Shell complies with the requirements of this  
22 section and notifies the Plaintiffs that it intends to resolve  
23 the matter through litigation.

24 If the event described in either subsection A.1 or A.2  
25 occurs, Shell may withdraw the principal and accrued interest in  
26 the Fund, less any administrative fees owing to the agent of  
27 such Fund.

28 B. Within one hundred eighty-three (183) days



1 following the close of the comment period described in section  
2 VIII, Plaintiffs may file a motion for entry of this Consent  
3 Decree. Should comments received during the comment period  
4 disclose facts or considerations, in Plaintiffs' determination,  
5 indicating that the Consent Decree is unlawful or inadequate to  
6 protect the public interest, the parties shall use this one  
7 hundred eighty-three (183) day period for negotiations regarding  
8 modifications to this Consent Decree. Such period may be  
9 extended by agreement of all parties. If Plaintiffs do not file  
10 a motion for entry within one hundred eighty-three (183) days,  
11 or any longer period to which all parties have agreed, Shell may  
12 withdraw the principal and accrued interest from the Fund  
13 provided for in section IV.A, less any administrative fees owing  
14 to the agent of such Fund.

15 C. If the Court refuses to grant Plaintiffs' motion  
16 for entry of this Consent Decree, including any modifications  
17 made pursuant to section IX.B to which all parties have agreed,  
18 the parties shall utilize the period of one hundred and eighty-  
19 three (183) days from the date of the Court's denial of  
20 Plaintiffs' motion in which to negotiate a consent decree that  
21 addresses all concerns raised by the Court. The one hundred  
22 eighty-three (183) day period may be extended by agreement of  
23 all parties. If Plaintiffs do not file a motion for entry of  
24 this Consent decree within said one hundred eighty-three (183)  
25 day period or any longer period to which all parties have  
26 agreed, Shell may withdraw the principal and accrued interest  
27 from the Fund described in section IV.A the principal and  
28 accrued interest, less any administrative fees owing to the

1 agent of such Fund. However, Shell may not withdraw such money  
2 if any party has filed an appeal to any Court order denying the  
3 motion to enter. If such appeal is withdrawn or the Appellate  
4 Court enters an order other than one instructing this District  
5 Court to enter the Consent Decree, the parties shall have a  
6 period of ninety (90) days to negotiate a consent decree. If  
7 Plaintiffs have not moved for entry within that time period,  
8 Shell may withdraw the principal and accrued interest from the  
9 Fund described in section IV.A, less any administrative fees  
10 owing to the agent of such Fund.

11 D. If Shell withdraws the money from the Fund  
12 described in section IV.A pursuant to section IX.B or IX.C,  
13 Shell shall notify each Plaintiff in writing. Each Plaintiff  
14 shall have sixty (60) days from the receipt of such notice in  
15 which to amend the Complaint and/or Notice of Violation filed  
16 concurrently with lodging of this Consent Decree or to dismiss  
17 the Complaint and file in another forum. Service of an amended  
18 or new complaint(s) or expiration of this sixty (60) day period,  
19 whichever comes sooner, shall trigger the time limits for  
20 pleadings responsive to a complaint in the forum in which such  
21 amended Complaint or new Complaint is filed. Shell expressly  
22 agrees to waive any rights it may have to a statute of  
23 limitations or laches defense to a new Notice of Violation, an  
24 amended Complaint or to any new Complaint served pursuant to  
25 section IX.D.

26 X. TERMINATION

27 When the funds described in section IV.A are disbursed  
28 in accordance with section IV, Plaintiffs shall notify the Court

1 that this Consent Decree is terminated.

2 XI. REPRESENTATIVES

3 Each undersigned representative of the parties to this  
4 Consent Decree certifies that he or she is fully authorized to  
5 enter into the terms and conditions of this Consent Decree and  
6 to execute and legally bind such party to this document.

7 XII. COUNTERPARTS

8 This Consent Decree may be executed in any number of  
9 counterparts and each executed counterpart shall have the same  
10 force and effect as an original instrument.

11 XIII. HEADINGS

12 The headings in this Consent Decree are inserted for  
13 convenience only and are not intended to be a part of or to  
14 affect the meaning or interpretation of the Consent Decree.

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## SHELL OIL COMPANY

Dated:

November 22, 1957.

R. Lopez

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3 position, contrary to the requirements of section

4 112.7(e)(2)(iii) of the regulations, 40 C.F.R. § 112.7(e)(2)(iii)  
5 and the SPCC Plan; and

6 b. records required to be maintained by section 112.7(e)(8)  
7 of the regulations, 40 C.F.R. § 112.7(e)(8), were either missing  
8 or incomplete.

9 4. Shell violated the Oil Pollution Prevention Regulations by  
10 failing to amend and implement its SPCC Plan within six months  
11 after a change in the facility design, construction, operation or  
12 maintenance which materially affects the facility's potential for  
13 the discharge of oil into or upon the navigable waters of the  
14 United States or adjoining shore lines as required by section  
15 112.5(a) of the regulations, 40 C.F.R. § 112.5(a).

16 a. In October 1984, construction of two new oil holding  
17 tanks and alteration of the drainage systems was complete and the  
18 tanks were put into operation. The new drainage system allowed  
19 drainage from the levee areas around the tanks to go directly  
20 through an outfall to Peyton Slough without first passing through  
21 the facility's water treatment plant, thus materially affecting  
22 the facility's potential for discharging oil into or upon the  
23 navigable waters of the United States. Shell failed to amend its  
24 SPCC Plan until October 1986, fully two years after the changes  
25 at the facility; and  
26



1        b. The SPCC Plan amended in October 1986 pursuant to  
2 section 112.5(b), 40 C.F.R. § 112.5(b) was itself inadequate as  
3 it failed to accurately describe the modifications to the  
4 drainage system.

5                                    PROPOSED CIVIL PENALTY

6        Pursuant to Section 311(j) of the Clean Water Act, 33 U.S.C.  
7 § 1321(j)(2), and the regulations promulgated thereunder, 40  
8 C.F.R. Parts 112 and 114, the maximum penalty that may be  
9 assessed is not to exceed \$5,000 for each day such violation  
10 continues. In view of the above, the United States Environmental  
11 Protection Agency ("EPA") proposes to assess a civil penalty of  
12 two million dollars, (\$2,000,000.00). Payment may be made by  
13 check payable to "Treasurer of the United States of America" and  
14 remitted to:

15                                   EPA, Region IX  
16                                   Regional Hearing Clerk  
                                 P.O. Box 360863M  
                                 Pittsburgh, PA 15251

17        A copy of the check shall be sent to:

18                                   Office of Regional Counsel  
19                                   EPA Region IX  
20                                   215 Fremont Street  
                                 San Francisco, CA 94105

21                                   OPPORTUNITY TO REQUEST A HEARING

22        You have the right to request a hearing on these violations  
23 and the proposed penalty assessment. The hearing will be open to  
24 the public and will be conducted in accordance with Part 114 of  
25 Title 40 of the Code of Federal Regulations. 40 C.F.R. Part 114.  
26        You have the right to be represented by counsel at any stage of

1 these proceedings. In order to obtain a hearing, you must submit  
2 a written request, signed by you or on your behalf by a duly  
3 authorized officer, director, agent or attorney, within thirty  
4 (30) days of the receipt of the Notice of Violation. The request  
5 for hearing shall be in accordance with the requirements of  
6 section 114 and shall: (1) state the name and address of the  
7 person requesting the hearing; (2) state with particularity the  
8 issues to be raised by such person at the hearing; and (3)  
9 include a copy of the Notice of Violation. Address any request  
10 for hearing to:

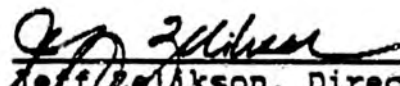
11 Regional Hearing Clerk  
12 EPA, Region IX  
215 Fremont Street  
San Francisco, CA 94105

13 SETTLEMENT CONFERENCE

14 Whether or not you request a hearing, you have the right to  
15 present written explanation, information or any materials in  
16 answer to the charges or in mitigation of the penalty. You may  
17 confer informally with EPA concerning the alleged violations or  
18 the amount of the proposed penalty. A request for an informal  
19 conference does not stay the thirty (30) day period during which  
20 you must submit a written request for a hearing. You have the  
21 right to be represented by counsel at any such informal hearing.  
22 EPA has the authority to modify the amount of the proposed  
23 penalty to reflect any settlement agreement reached with you at  
24 any conference. EPA encourages all parties against whom a civil  
25 penalty is proposed to be assessed to pursue the possibilities of  
26 settlement as a result of informal conferences. Any such

1 settlement shall be finalized by the issuance of a written  
2 Consent Agreement signed by both parties and a written Order  
3 signed by the Director of the Waste Management Division pursuant  
4 to a delegation from the Regional Administrator, EPA, Region IX,  
5 or by means of a Consent Decree. The issuance of such Consent  
6 Agreement or Consent Decree shall constitute a waiver of your  
7 right to request a hearing on any matter stipulated to therein.  
8

9 Dated: Nov. 27, 1989

  
Jeff Zelickson, Director  
Hazardous Waste Management  
Division



1  
2 CERTIFICATE OF SERVICE

3 I certify that on the date noted below, I sent by first  
4 class mail, postage prepaid, a copy of the foregoing "Notice of  
5 Violation, Complaint, and Notice of Opportunity for Hearing" to  
6 the following persons at the addresses listed below:

7 Victoria J. Kincke  
8 Shell Oil Company  
9 Chemical Legal Department  
10 One Shell Plaza  
11 P.O. Box 2403  
Houston, TX 77252

12 Keith Howard  
13 Cooper, White and Cooper  
14 1333 N. California Blvd., Suite 450  
15 Walnut Creek, CA 94596

16 I further certify that on the same date below, I hand  
17 delivered an original of the above document to the following per-  
18 son at the address listed below:

19 Regional Hearing Clerk  
20 U.S. EPA, Region 9  
21 215 Fremont Street  
22 San Francisco, CA 94105

23 Date: 11/27/89

24 Laurie Kermish  
25 Laurie Kermish  
26 Assistant Regional Counsel  
27 Office of Regional Counsel  
28 U.S. EPA, Region 9  
215 Fremont Street  
San Francisco, CA 94105

State of California

Department of Justice

2101 Webster Street  
Oakland, CA 94612-3049**Memorandum**

Pete Bontadelli, Director, DFG

Date : April 10, 1990

Steve Richie, Executive Officer, RWQCB

Henry Agonia, Director, Parks &amp; Rec. Dept. File No.

Charles Warren, Executive Officer, SLC

Alan Pendleton, Executive Officer, BCDC

Telephone: ATSS (8) 561-0845

John Fennelly, Chief, Accounting - AG's Office

(415) 464-0845

SARA J. RUSSELL, Deputy Attorney General

From : Office of the Attorney General - Oakland

Subject : *Shell Oil Spill***RECEIVED**  
APR 11 1990SAN FRANCISCO BAY CONSERVATION  
& DEVELOPMENT COMMISSION

I am pleased to inform you that Judge Legge of the federal district court in San Francisco (Northern District) signed the Shell Oil Spill Consent Decree on March 26, 1990. Judgment was entered on April 6, 1990. Attached for your records is a filed copy of the Consent Decree.

With entry of judgment by the court, the relief set forth in the Decree can now be obtained. Briefly, this means that the various sums on pages 5-14 can be disbursed by the AG's Accounting Office and the two accounts referred to on pages 6-7 can be established in the Special Deposits Fund (the "Trustees Fund" and the "Studies Fund").

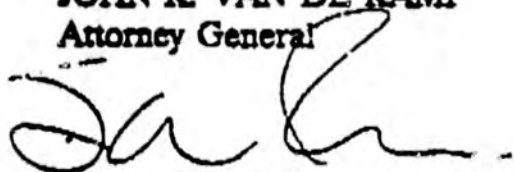
Once the sum of \$10,838,000.00 plus all interest accrued on the money in the Litigation Deposits Fund is deposited into the Trustees Fund, the trustees can begin to disburse the monies to restore, rehabilitate and acquire the equivalent of the natural resources damaged by the spill as contemplated in the Memorandum of Agreement attached to the Consent Decree as Exhibit 2. This office, in coordination with the U.S. Department of Justice and the local government attorneys, will shortly schedule a meeting of the trustees and other members of the Trustee Committee so that their work can begin. It is expected that the meeting will take place in Oakland on May 15, 1990.

Also, the studies outlined in Appendix A to the Consent Decree can now begin as the contracts have all been entered into (the contracts were contingent on entry of the Consent Decree). The monies to pay the contractors will be disbursed from the Studies Fund which will be administered by the Accounting Office of the AG's Office.

Pete Bontadelli, Director, DFG  
April 10, 1990  
Page 2.

If you have any questions or comments, please feel free to call me at (415) 464-0845,  
8-561-0845.

JOHN K. VAN DE KAMP  
Attorney General



SARA J. RUSSELL  
Deputy Attorney General

SJR:lk

cc w/ encl:

Andrea Ordin  
R. H. Connett  
Rod Walston  
N. Greg Taylor  
Dennis Eagan  
Mike Herlache  
Mike Rugg  
Bill Castle  
Larry Espinoza  
Gene Toffoli  
Joan Ferreira  
Casey Buchter  
Mike Drennan  
Gary Grimm  
Dave Plummer  
Jane Sekelsky  
Bill Travis,

Jacqui Michel  
Paul Boehm  
Terry Huffman  
Michael Haneman  
Pat Peterson  
Joe Barbieri  
Mike Neville  
Jackie Means



Fish and Game  
DONALD L. LOLLOCK  
PETE PHILLIPS, Alternate  
California State Lands Commission  
DAVE PLUMMER, Treasurer  
JANE SEKELSKY, Alternate  
National Oceanic and  
Atmospheric Administration  
JAMES R. BYBEE  
CHRIS MOBLEY, Alternate  
U. S. Fish and Wildlife Service  
WAYNES. WHITE

ALAN R. PENDLETON, Alternate  
East Bay Regional Park District  
ROBERT E. DOYLE, Vice Chairman  
KEN BURGER, Alternate

September 5, 1990

William E. Fippin  
Accounting Administrator  
California Department of Justice  
Administrative Services Division  
1515 K Street, Second Floor  
Sacramento, CA 95814

Dear Bill:

At today's meeting of our trustee committee, we decided to retain the California Environmental Trust to provide a wide range of managerial, technical, and administrative assistance to our committee. The committee authorized an initial contract of up to \$25,000 for the CET's services between now and the end of 1990. The committee also authorized BCDC to prepare and administer the contract with the CET on behalf of the committee.

To allow BCDC to enter into this contract, please transfer or otherwise encumber \$25,000 from the Shell trustee fund to BCDC. Please contact BCDC's assistant executive director Russell Abramson (ATSS 597-3686) to arrange the details of this transfer. BCDC will then use the transferred funds to reimburse the cost of CET's services under the contract.

BCDC will incur some limited administrative expenses in preparing and administering the CET contract. I will authorize you to reimburse BCDC for these expenses directly from the trustee fund under my authority to authorize up to \$5,000 for administrative services. I may also be authorizing you to pay for the services that are provided by the CET over the next several directly from the trustee fund if BCDC experiences unexpected delays in getting its contract with CET finalized and approved.

In keeping with the trustee committee's decision on June 19, 1990, because this authorization to release money from the trustee fund involves more than \$5,000, this letter of direction to you is countersigned by the committee vice chairman.



WILLIAM TRAVIS  
Chairman

ROBERT E. DOYLE  
Vice Chairman

cc: Russell Abramson  
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ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILE 8672  
1923 SCOMM 76: HOUSE SPEC. COMM. EXXON VALDEZ OIL SPILL. 1991-92 140

# Exxon-Valdez Settlement Largest Ever

NOAA LEGISLATIVE AFFAIRS

Mar 13, 91 13:25 No. 014 P. 06

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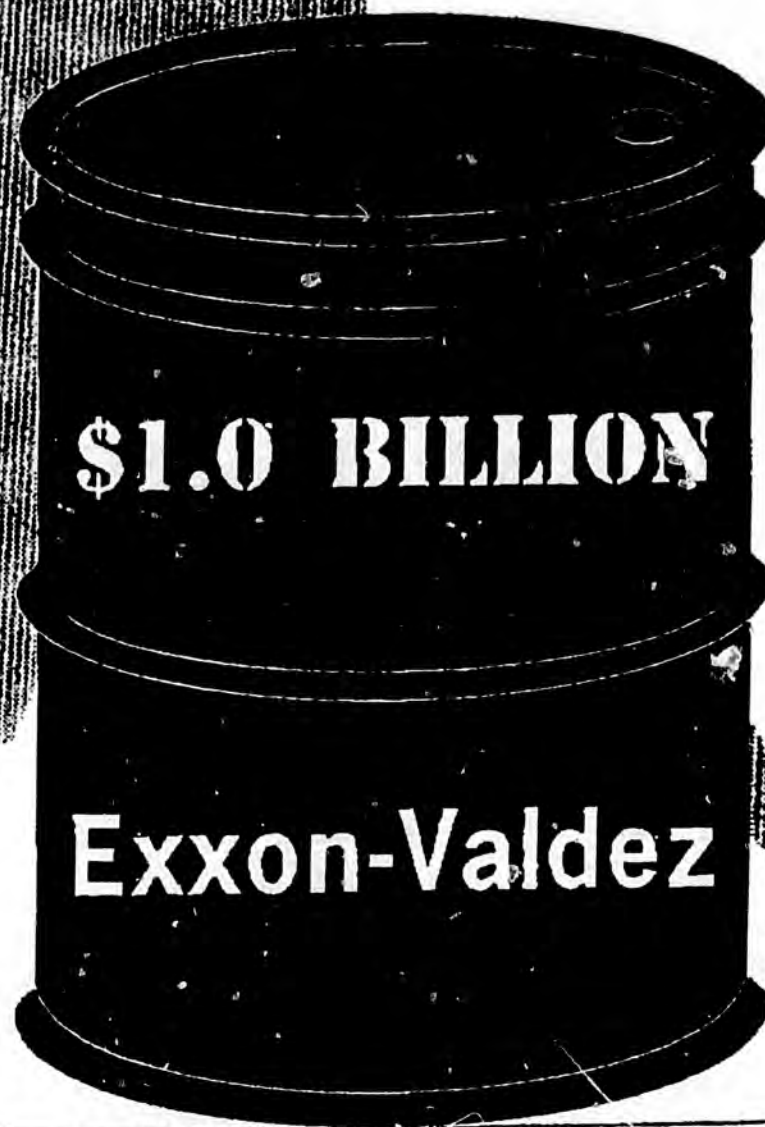
**San Francisco Bay • 1988**

**\$19.7 MILLION**



**\$1.0 BILLION**

**Exxon-Valdez**





# OPPOSITION GROWS OVER VALDEZ PACT

## Lawmakers and Alaskans Ask That \$1 Billion Settlement for Exxon Be Rejected

By KEITH SCHNEIDER

Special to The New York Times

WASHINGTON, April 22 — Prompted by new studies on the damage to Prince William Sound and annoyed that scientific and economic information is being kept secret, lawmakers, environmental groups and many Alaskans are raising increasing objections to the \$1.1 billion civil and criminal settlement of the Exxon Valdez oil spill.

In hearings this month held by a state House committee, hundreds of fishermen and native Alaskan villagers urged the panel to reject the proposed settlement, contending that \$1 billion was neither enough money to pay for damage to the environment from the spill nor a severe penalty for the Exxon Corporation.

The House committee and a separate panel of the state Senate met in Juneau today to consider the comments and decide whether to recommend accepting the settlement arising from the 11-million-gallon spill on March 14, 1989. After the panels decide, the issue will go to the full Legislature.

### Opponents in Washington

Opponents of the settlement include Representative George Miller, a California Democrat who is acting chairman of the House Interior Committee. He has asked Federal District Judge H. Russel Holland in Alaska to reject the agreement made with Exxon to settle criminal violations.

Four other House Democrats last week urged the judge to postpone a decision on the settlement until scientific and economic studies on the condition of Prince William Sound are made public.

National environmental groups today also withdrew their earlier support, and officials from native Alaskan villages are pressing a court case in Federal District Court here aimed at scuttling the pact.

By far the largest settlement ever for damage caused by an environmental disaster, the agreement between the Justice Department, Alaska and Exxon calls for the company to pay up to \$1 billion over the next 14 years to reimburse the state and Federal governments for scientific studies and environmental restoration projects. The pact also calls on Exxon and its shipping subsidiary to plead guilty to four criminal violations of environmental law and pay a fine of \$100 million.

Lawyers for the Justice Department and the Alaska Attorney General, Charles E. Cole, have warned that any changes in the agreement could lead to its collapse. In an interview today, Mr. Cole said that more Alaskans now ap-

peared to oppose the agreement, but he said support for the pact is also strong in the state. A poll by an independent company commissioned by the Governor last week showed Alaskans supported the agreement by a ratio of two to one, Mr. Cole said.

"What's happened is that as more people understand the settlement, they realize that \$1 billion paid out over a decade is not enough to make up for the damages caused by the oil spill," Representative Miller said. "The people in Alaska have every right to be concerned."

Mr. Miller complained this month in two letters to Judge Holland that the

## A deal on oil spill damage may be in jeopardy.

agreement immunizes the Alyeska Pipeline Service Company, the owner of the Trans-Alaska pipeline and the Valdez oil terminal, from prosecution by the Government. Alyeska is owned by Exxon and seven other companies.

He said the protection for Alyeska was not in the public interest because documents his staff uncovered show the company knew it was unable to respond to a major oil spill, but misrepresented its abilities in documents it filed with the state.

### Studies Remain Secret

Opponents are also angry at scientific studies on damage to Prince William Sound, and economic studies that show how much the damage will cost, remain secret.

Earlier this month, the National Oceanic and Atmospheric Administration released a summary of 58 scientific studies that said the oil spill killed hundreds of thousands of birds, thousands of otters and caused extensive damage to shorelines and tidal zones that will persist for years. Economists under contract to the state and the Fed-

eral Government said in interviews that they calculated in separate reports that the value of the damage was \$3 billion to \$5 billion.

Fishermen in Prince William Sound and Representative Gerry E. Studds, a Massachusetts Democrat who is chairman of a House Merchant Marine and Fisheries subcommittee, have asked Judge Holland to delay ruling on the settlement until the studies are made public.

### 'It's Made People Really Mad'

"This is the big thing that caught everybody's attention," said Marilyn Leland, executive director of Cordova District Fishermen United, an association in Cordova, Alaska. "The state decides it is going to withhold the damage assessment data. We're the ones who bought this information the state says we can't get. We can't tell if the settlement is worth it because we don't know what the damages are. It's made people really mad."

Mr. Studds added: "The Federal and state governments and Exxon are essentially asking us to take on faith the fact this is a fair settlement. I hope it is. I would hate to see some of the procedures used in this case repeated elsewhere."

Native Alaskan villages are also seeking to bar the settlement in a District Court here. In February, the villagers filed suit against the Government seeking to prevent the settlement from being signed. Lawyers for the native groups said the settlement would prevent the villagers from gaining damages from Exxon. District Judge Stanley Sporkin agreed to review the settlement and a hearing on the suit is scheduled for next Monday.

Exxon said through a spokesman today that it would not respond to questions about the settlement. Amy Casner, a spokeswoman for the Justice Department, said, "We'll be addressing the court Wednesday and anything more we have to say we'll say there."

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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THE NATIVE VILLAGE OF  
CHENEGA BAY, et al.,

Plaintiffs,

v.

MANUEL LUJAN, JR., et al.,

Defendants.

Civil Action No. 91-0483 SS

CHENEGA CORPORATION, et al.,

Plaintiffs,

v.

MANUEL LUJAN, JR., et al.,

Defendants.

Civil Action No. 91-0484 SS

MOTION FOR REFORMATION AND STAY  
OF IMPLEMENTATION OF SETTLEMENT  
AND REQUEST FOR ORAL HEARING

Plaintiffs The Native Villages of Chenega Bay, Port Graham, English Bay, Larsen Bay and Karluk (the "Alaska Native Class"), by their undersigned counsel, hereby move for reformation and stay of implementation of the settlement between the United States, the State of Alaska, Exxon Corporation, Exxon Shipping Company and Exxon Pipeline Company in connection with natural resource damages claims arising from the Exxon Valdez oil spill.

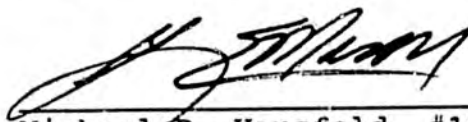
In support of its motion, the Alaska Native Class states that the Defendants United States and State of Alaska have failed

to adhere to representations given to the Court that the settlement would not impair plaintiffs' right to subsistence and their ability to prosecute fully their lawsuits against Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company and Alyeska Pipeline Service Company.

This motion is based upon the annexed Memorandum In Support Of Motion For Reformation And Stay Of Implementation Of Settlement.

Pursuant to Local Rule 108(f), the Alaska Native Class requests an oral hearing on this motion.

Respectfully submitted,



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DATED: April 16, 1991  
Washington, D.C.



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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MEMORANDUM IN SUPPORT OF MOTION FOR  
REFORMATION AND STAY OF IMPLEMENTATION OF SETTLEMENT

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## I. INTRODUCTION

On March 12, 1991, the United States and the State of Alaska settled their claims for natural resource damages against Exxon Corporation, Exxon Shipping Company and Exxon Pipeline Company (collectively, "Exxon"). The settlement has three components. First, the State and the United States entered into an Agreement and Consent Decree ("Agreement") with Exxon whereby the governments would receive payments totalling \$900,000,000 for settlement of civil claims for damages to natural resources caused by the Exxon Valdez oil spill. Second, the United States and the State entered into a separate settlement in connection with natural resource damages, embodied in a proposed Memorandum of Agreement and Consent Decree ("MOA").<sup>1</sup> Third, the United States entered into a Plea Agreement with Exxon Corporation and Exxon Shipping Company whereby the defendants were fined \$100 million.<sup>2</sup>

Plaintiffs The Native Villages of Chenega Bay, Port Graham, English Bay, Larsen Bay and Karluk (hereinafter referred to as "Alaska Native Class," "Alaska Natives," or "Native Villages") do not bring this Motion to upset the settlements between the United States, Alaska and Exxon. The Alaska Native Class seeks only to ensure that the proposed settlement, as reduced to writing in the

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<sup>1</sup>The Agreement and the MOA are attached to federal defendants' Motion To Transfer as Exh. 3 and 5, respectively.

<sup>2</sup>The Plea Agreement is attached hereto as Exh. A.

Agreement and MOA,<sup>3</sup> does not conflict with or contradict the rights of the Alaska Natives to subsistence.<sup>4</sup>

## II. PROCEDURAL BACKGROUND

On March 5, 1991, the Alaska Native Class filed suit seeking to enjoin the defendants from entering into any agreement with Exxon and Alyeska Pipeline Service Company resolving civil claims arising from the Exxon Valdez oil spill. The suit sought to enjoin defendants from in any way encumbering or disposing of the Alaska Natives' claims arising from the oil spill.<sup>5</sup> On March 7, 1991, the Alaska Natives filed an amended complaint which made clear that the plaintiffs in this matter are the Alaska Native Class certified by the Superior Court for the State of Alaska by Judge Brian Shortell on February 14, 1991, in Pretrial Order No. 22, Exxon Valdez Exxon Valdez Oil Spill Litigation, Case No. 3AN-89-25333 Civil (Consolidated) (Alaska Sup. Ct.) (see ¶16 of

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<sup>3</sup>The Alaska Native Class will submit this Memorandum as a public comment to both the Agreement and the MOA in accordance with 56 Fed. Reg. 11,636 (Mar. 19, 1991) and 56 Fed. Reg. 11,642 (Mar. 19, 1991).

<sup>4</sup>As used herein, the word "subsistence" refers to the hunting, fishing and gathering-based culture upon which the Alaska Native Class has survived for thousands of years.

<sup>5</sup>On March 6, 1991, Plaintiffs Chenega Corporation and other native corporations ("Native Corporations") filed suit seeking the same preliminary injunctive relief. This Motion, however, is made solely on behalf of the Alaska Native Class.

Amended Complaint).<sup>6</sup>

On March 11, 1991, Judge Sporkin granted the Alaska Natives' motion for a temporary restraining order. On March 12, 1991, the Court dissolved the temporary restraining order and denied plaintiffs' motions for a preliminary injunction. The Court based its decision upon the defendants' representation that "resolution of [the United States'] natural resource damages should not impair rights or claims of third parties," which the Court took to mean that:

after the settlement agreement has been executed, the plaintiffs will be able to prosecute fully the suits they have initiated against Exxon and Alyeska just as if no settlement agreement existed [and] that Exxon and Alyeska may be liable to the plaintiffs for damages to natural resources and/or lands they have an interest in, even if it is claimed the same natural resource and/or lands are covered by the settlement agreement among the defendants and Exxon and Alyeska.

March 12 Order at 2. The Court retained jurisdiction over this litigation "to ensure that the defendants' representations are carried out so that plaintiffs' rights are protected." Id. at 3.

Now that the settlement has been reduced to writing, it is evident that the United States and Alaska's settlement with Exxon and the United States and Alaska's settlement with each other do impair the rights of the Alaska Natives and their ability to litigate or settle their claims. The language of the settlement papers, when read as a whole, violates the defendants'

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<sup>6</sup>The District Court for the District of Alaska has decided not to certify any classes at this time and has directed all action to first proceed as claims against the Trans-Alaska Pipeline System Liability Fund.



representations. The papers are replete with language that will most certainly be relied upon by Exxon to argue denial of the Alaska Native Class's right to damages to their subsistence way of life based on the natural resource devastation wrought by the oil spill. Accordingly, the Court should order reformation of the settlement agreement and stay its implementation.

### III. ARGUMENT

The proposed settlement impairs the rights of the Alaska Native Class in at least four ways. First, the Agreement is inconsistent with and contradictory to the rights of the Alaska Native Class to recover subsistence natural resource damages. Second, the Plea Agreement impairs the Alaska Native Class and denies it of an opportunity for necessary and immediate restitution. Third, the Agreement, even if considered to be neutral on its face, significantly impairs the rights of the Alaska Native Class by permitting a partial settlement of an indivisible injury and thereby, in practical terms, "binds everybody and [leaves] these people . . . out in the cold." Transcript of Status Call (Mar. 12, 1991), at 35. Fourth, and finally, the settlement impairs the rights of the Alaska Natives to be treated as a co-equal to the United States and Alaska with respect to natural resources.

A. The Language of The Agreement Is Inconsistent With  
And Contradictory To The Rights Of The Alaska Natives

The language of the Agreement appears to be drafted to afford Exxon every opportunity to argue that no one other than the United States and Alaska has a right to recover for damages to natural resources. In the Introduction section of the Agreement, the parties make clear that the United States and Alaska are the sole entities having any natural resource rights:

The United States and the State represent that it is their legal position that only officials of the United States . . . and state officials . . . are entitled to act on behalf of the public as trustees of Natural Resources to recover damages for injury to Natural Resources arising from the Oil Spill under Section 311(f) of the Clean Water Act, 33 U.S.C. § 1321 (f).

Agreement, Introduction, at 3 (emphasis added). Such claims of exclusivity directly undermine the very right of the Alaska Native Class to protect their way of life and the natural resources upon which their existence depends.<sup>7</sup> The language has

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<sup>7</sup>The actual language of Section 311(f)(5) does not use the limiting word only or otherwise expressly state that entities other than the United States can never act as trustees for natural resources. Section 311(f)(5) provides that the "President, or the authorized representative of any state, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resource."

It is thus no surprise that in Paragraph 13(c) the drafters of the Agreement state that:

. . . nothing in this Agreement shall affect or impair. . . the rights and obligations, if any, of legal entities or persons other than the Governments who are holders of any present right, title, or interest in land or other property interest affected by the Oil Spill.

been apparently inserted at the outset of the Agreement with the forethought that its qualifying nature will eliminate all competing and complimentary claims for natural resource injury caused by the Exxon Valdez oil spill.

Paragraph 32 of the Agreement, rather than adopt clear language protective of plaintiffs' rights as suggested by the Court, contains only a half-hearted assurance that "[n]othing in this Agreement . . . is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement." Agreement, ¶32, at 24. This is precisely the kind of "wishy-washy" language the Court cautioned the United States to avoid. Transcript of Status Call (Mar. 12, 1991), at 8. Were the defendants not attempting to whittle away at plaintiffs' claims, they would have stated that the Agreement shall not affect the legal claims of the Alaska Native Class.

Paragraph 13, the sole provision purporting to protect the rights of the Alaska Natives, affords no meaningful protection. The paragraph provides that:

. . . nothing in this Agreement, shall affect or impair . . .  
. the rights and obligation, if any, of Alaska Native villages to act as trustees for the purpose of asserting and compromising claims for injury to, destruction of, or loss

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Agreement, ¶13(c), at 15. The word "present" is used intentionally in this provision to provide Exxon with an argument that the Natives have no claim to damages to natural resources that are not in existence at this time, such as subsistence damages caused by injuries to future generations of marine life (and that similarly the Native Corporations cannot bring claims in the future on lands which have been selected but not transferred pursuant to the Native lands selection program, 43 C.F.R. subpart 2650).



of natural resources, if any, belonging to, managed by, controlled by or appertaining to such villages

Agreement, ¶ 13(b) (emphasis added). This language falls far short of the defendants' promise that the Agreement will not in any way impair the rights of the Alaska Native Class. First, as if to emphasize the Agreement's implicit position that the Alaska Natives have no right to subsistence and no claims to natural resource damage, references to the Native Villages' claims are modified by the phrase "if any."<sup>8</sup> Second, this language casts doubt upon the fact that the Alaska Natives suffered damages to natural resources used for subsistence. This is an especially untenable suggestion in light of the United States' post-settlement disclosure that the most severe damage to natural resources occurred in the subtidal habitats relied upon by the Alaska Natives for subsistence.

A summary report released by the United States on April 9, 1991, nearly one month after entering into the Agreement and two days prior to the close of the comment period on the Plea Agreement, provides overwhelming evidence that the coastal tidal zone, the region most heavily exploited for subsistence purposes, "was the most severely contaminated habitat." See "Summary Of Effects Of The Exxon Valdez Oil Spill On Natural Resources And Archaeological Resources" (Mar. 1991), at 12 (hereinafter "Summary") (Attached hereto as Exh. B). It further finds that

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<sup>8</sup>The phrase "if any" is used repeatedly throughout the settlement papers. See Agreement, ¶13(c), at 15, ¶32, at 24; MOA, ¶III.C., at 9.

intertidal organisms such as mussels, clams, certain species of fish, and fecus (the dominant intertidal plant) continue to be exposed to hydrocarbons, are less abundant, and were severely affected by the oil spill and subsequent cleanup activities. Id. at 12-13. The Summary admits that "some communities virtually or entirely ceased subsistence harvests in 1989 and have only gradually begun to resume harvests, while other communities continued some reduced level of subsistence harvest in 1989 and thereafter." Id., at 14.

Further, a study of subsistence conducted by the Alaska Department of Fish & Game, which is referenced in the Summary, concludes that "until [environmental danger] signs disappear and people are able to place confidence in their own abilities to again interpret and understand their environment, recovery from this disaster will likely remain incomplete." Fall, "Subsistence Uses of Fish and Wildlife in 15 Alutiq Villages After the Exxon Valdez Oil Spill," at 9 (Attached hereto as Exh. C) (second emphasis added).<sup>9</sup>

While acknowledging and even documenting the essential shortcoming of their natural resource settlement and Alaska Native subsistence damage, the United States and Alaska crafted an agreement which does its utmost to deny a right of recovery to

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<sup>9</sup>Studies have found that the decrease in subsistence activities had the effect of increasing hardship and stress in the villages. Continuation of this contamination raises serious questions as to the very viability and survivability of the Native subsistence way of life. See Fall, supra, at 8-9.

Alaska Natives. Accordingly, plaintiffs request the court stay execution of the settlement and order that the Agreement be reformed so that, at a minimum, the word "only" be stricken from the preface to the Agreement, the word "present" be stricken from ¶13(b) of the Agreement, the phrase "intended to affect" be replaced with "shall" in ¶32, the phrase "if any" be stricken wherever it is used in connection with plaintiffs' claims, and order such other reformation the Court deems appropriate to ensure that the settlement in no way impairs the subsistence rights and claims of the Alaska Native Class.

B. The Plea Agreement Denies The Alaska Native's An Opportunity For Immediate And Necessary Restitution

The plea provisions which allow criminal fines to remitted is intended to provide an incentive to the wrongdoer to make restitution to crime victims by permitting the United States to reduce a criminal fine if payments to victims have been made. Under the Plea Agreement, the United States has agreed to remit 50 percent of the \$100 million criminal fine imposed upon Exxon and Exxon Shipping because the defendants "have paid in excess of \$300 million to claimants allegedly injured by the oil spill." Plea Agreement, ¶III.C(c), at 7. None of these payments, however, were made upon the claims of the Alaska Natives. No restitution funds are provided for in the civil settlement.

The United States has breached its trustee obligation towards the Alaska Natives by costing them their best opportunity



for an early settlement of their own claims.<sup>10</sup> The failure to insist upon restitution to the Alaska Natives is difficult to understand given that the United States has documented that the most severe impacts were sustained to those natural resources upon which the Alaska Natives depend for their existence and it leaves the victims who most directly depend upon renewable uncontaminated natural resources for their very existence without relief. The Alaska Natives need to undertake immediate restoration of their subsistence natural resource areas. By failing to provide for immediate and necessary relief, the parties to the settlement have in effect contributed to the continued erosion of the subsistence way of life.

The failure to insist that restitution be made to the Alaska Natives before civil settlement was finalized and the criminal

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<sup>10</sup>The United States clearly has a trust responsibility towards the Alaska Natives. This has been recognized over and over both by the United States and by the State of Alaska, and is probably shown most clearly in the numerous statutes and international conventions protecting the subsistence way of life of Native Alaskans, and in the yearly programs (including fish and game programs) funded for the Natives by the United States. In reviewing many of these provisions protective of Alaska Native subsistence rights, the Federal District Court in People of Togiak v. United States, 470 F. Supp. 423, 428 (D.D.C. 1979) stated the situation clearly:

These various responsibilities impose fiduciary duties upon the United States including the duties so to regulate as to protect the subsistence resources of Indian communities and to preserve such communities as distinct cultural entities. . . .

470 F. Supp. at 428 (citations omitted); see also North Slope Borough v. Andrus, 486 F. Supp. 332, 344 (D.D.C.), aff'd, 642 F.2d 589, 612 (D.C. Cir. 1980).

penalty set directly impairs the rights and claims of the Alaska Native Class.

C. The Agreement, Even If Neutral On Its Face,  
Impairs The Rights of the Alaska Native Class

The Agreement, even if considered to be neutral on its face, significantly impairs the rights of the Alaska Native Class by permitting a partial settlement of what is, practically speaking, an indivisible natural resource injury. Contrary to this Court's warning that the document be neutral in its effect, the Alaska Natives are no longer in the same position as if the United States and Alaska had not settled their claims.

There are three entities that have a priority interest in the affected natural resources -- the United States, the State of Alaska and the Alaska Native Class. The injury to natural resources cannot be segmented. A partial settlement by two of the priority interested parties of something less than the whole of an indivisible injury clearly impacts and impairs the rights and claims of the remaining party to that injury.<sup>11</sup>

That which appears neutral on its face may in fact have a discriminatory impact. Prior to settlement the alignment of the United States and the State of Alaska with the Alaska Natives on the issue of natural resource damages gave greater strength to

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<sup>11</sup>That the injury is indivisible is perhaps best evidenced by the MOA, under which the federal and state governments forego their own disagreements over their respective shares in favor of a joint management regime.

the ability of each to prove, in combination, the fact, nature and extent of that injury. The benefits of this synergism were evidenced by the undertakings of the United States and Alaska regarding basic scientific evaluations which included the identification of subsistence natural resource injury. With a partial settlement by the United States and Alaska alone, these benefits are lost and the conduct of future necessary evaluations is now in question.<sup>12</sup>

The settlement of natural resource claims by the United States and Alaska, without the Alaska Natives, leaves the Alaska Native Class in the position of facing Exxon and Alyeska alone on this issue. The isolation is compounded by the position that settlement has created with respect to Exxon and Alyeska. The prevailing attitude is that the governments' natural resource settlement has put this issue to rest for all parties. It is now virtually guaranteed that the Alaska Native Class's natural resource claims will not be resolved by anything short of full litigation.

The adverse impact of this partial settlement can best be viewed if the agreement were analyzed as an attempted class settlement. Suppose, for example, that a subset of a class in an antitrust price fixing conspiracy attempted to settle the injury caused by the conspiracy for their interests alone. In a

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<sup>12</sup>The MOA anticipates that the manner in which monies received by Exxon are spent will be the subject of dispute. It is doubtful that in the tug-of-war between these governments either will respond to the needs of the Alaska Native Class.



traditional settlement of this type of injury, no court would permit any subset of the class to settle for either the entire injury or anything less than the whole injury and no class counsel would permit such segmentation of the injury. This does not mean that the amount offered to the interests of the subsets of the class is automatic or inadequate. What it does mean is that the remaining with similar interests in the same injury, should be afforded an opportunity to settle on a proportionate basis for itself.

Here, the United States and the State of Alaska were able to settle for less than the whole injury only because there was no court, prior to the filing of this action, which had jurisdiction over both of these entities. Recognizing this void, the federal and state governments were able to settle out what was essentially a class claim without the inclusion of all similarly situated class members.

In the absence of an opportunity to settle on a proportionate basis for itself, the rights of the remaining subset of the class -- the Alaska Natives -- are impaired by the other class members' settlement. To rectify this impairment, the settlement should be stayed pending negotiations and the allocation of some portion of the settlement fund to the Alaska Native Class for restoration and rehabilitation of natural resources appertaining to the class.

D. The Settlement Impairs The Rights Of The Alaska  
Natives As A Co-Equal With The United States  
And Alaska With Respect To Natural Resources

The MCA is intended to provide a "framework" for "the state and federal trustees to cooperate with each other in carrying out their responsibilities for natural resources." MOA, at 2. In establishing this framework, the defendants looked to a variety of environmental laws: Section 107 of CERCLA, 42 U.S.C. §9607; the National Contingency Plan, 40 C.F.R. §300.615(a); and the Natural Resource Damage Assessment Regulations, 43 C.F.R. §11.32(a)(1)(ii). Interestingly, each of these sources of law contemplates that Indian tribes, like the Native Villages, may act as co-trustees for natural resources. See 42 U.S.C. §9607(f)(1) (Indian tribes have an interest in natural resource appertaining to them); 40 C.F.R. §§300.610, .615 (designating Indian tribes as trustees for natural resources appertaining to such Indian tribes and stating that where there are multiple trustees because of coexisting contingent natural resources they should coordinate a ~~assessment~~ in carrying out these responsibilities); 43 C.F.R. ~~§11.32(a)(1)(ii)~~ (prior to developing an assessment plan "authorized ~~assessments~~ from . . . Indian tribes are encouraged to cooperate and coordinate any assessments that involve coexisting and contiguous natural resources or concurrent jurisdictions").

The legal framework relied upon by the defendants in reaching an agreement would have readily accommodated inclusion

of the Native Villages as a co-trustee. By failing to include the Native Villages in the MOA, defendants have left plaintiffs without any mechanism through which to coordinate with defendants for the assessment and restoration of natural resources used for subsistence.

The MOA does not provide the Native Villages with any assurances that any portion of the settlement fund (or for that matter the monies which will be paid by Exxon to the United States as criminal penalties) will be used to assess the Native Villages injuries or to restore, replace, rehabilitate or enhance those natural resources used by them for subsistence purposes. Indeed, simple cost-benefit analysis suggests that the limited funds available will go towards highly-visible projects, such as restoration of beaches in popular national parks, and not towards the low-profile restoration programs sought by the Alaska Natives.

Further, the MOA does not contemplate any coordination with the Native Villages in the event that they do, upon settlement or judgment, receive payments from Exxon or Alyeska for damages caused to natural resources appertaining to them.

The failure of the MOA to treat the Native Villages as co-trustees, either from the Agreement's effective date or at any time in the future, impairs their right to recover damages to natural resources used for subsistence, for it unnecessarily places obstacles in the way of full resource recovery. The Court should therefore stay the Agreement pending the inclusion of



provisions for the coordination of the Native Villages as a co-trustee.

CONCLUSION

For all of the foregoing reasons, Plaintiffs Alaska Native Class requests that the Court stay implementation of the Agreement and the MOA for 90 days, order that the Alaska Native Class, through its counsel, be included in further settlement negotiations so that all claims to natural resource damages can be settled efficiently and equitably, and order that such reformation of the settlement papers be made as deemed appropriate.

Respectfully submitted,



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Dated: April 16, 1991  
Washington, D.C.

04/11/88 1:22 PM mail 2/22/88

# \$10 million oil spill settlement: How best to spend it

## Public input sought at two hearings

By Marie Felde  
The Tribune

Bay Area residents Thursday can participate in a \$10.8 million environmental shopping spree aimed at countering damage done to wetlands and wildlife by the extensive Shell Oil Co. oil spill in Martinez in 1988.

Shell Oil agreed to provide the money to a natural resources public trust to buy wetlands as part of nearly \$20 million it spent to settle 15 damage claims brought against it for allowing 400,000 gallons of crude oil to escape a holding tank.

The settlement was the largest of its kind in U.S. history. Now, the six trustees representing various local, state and federal agencies are deciding how to spend the money.

The public is invited to offer suggestions on how the money will be used.

The meetings will be held Thursday from 2 p.m. to 4 p.m. at Martinez City Hall and from 7 p.m. to 9 p.m. at Benicia City Hall. In addition, written sugges-

tions will be accepted through March 1.

The general objective is to offset damage to natural resources caused by the April 1988 spill. Oil that blackened many acres of wetlands flowed into Carquinez Strait and spread to Suisun Bay and San Pablo Bay.

The trustees have given priority to buying the land nearest damaged areas. Acquisitions that would not require rigorous management and those that protect habitat for endangered species are also sought.

The overall array of projects is to balance both wetlands needs and benefit fish and wildlife in the area.

For more information, call the California Environmental Trust, 543-1855.

Among the agencies represented on the committee are the U.S. Fish and Wildlife Service, the California Lands Commissions, the East Bay Regional Park District and the San Francisco Bay Conservation and Development Commission.



Shell Oil workers in 1988 spent weeks cleaning up crude oil that leaked from a holding tank.

Tribune file photo



## MEMORANDUM OF AGREEMENT

Whereas, the United States and the State of California (the "State") are trustees for natural resources damaged by the Shell oil spill (the "Oil Spill"); and

Whereas, the National Contingency Plan, 40 C.F.R. section 300.74(c), and section 311 of the Clean Water Act, 33 U.S.C. section 1321, require that federal and state trustees cooperate with each other in carrying out their responsibilities for protecting natural resources;

Whereas, the U.S. Fish and Wildlife Service has the authority under the Fish and Wildlife Coordination Act, 16 U.S.C. section 661 and 43 C.F.R. Part 11 to enter this agreement on behalf of the U.S. Department of the Interior as trustee for natural resources damaged by the spill;

Now, therefore, the United States and the State have determined that the following procedures for disbursement and management of the funds received for natural resource damages will best enable them, as trustees, to restore, rehabilitate and acquire the equivalent of the natural resources damaged by the Oil Spill.

### **I. THE COMMITTEE.**

A "Committee" shall be established as follows:

A. Composition. The Committee shall be composed of:

1. The United States Department of the Interior, by and through the United States Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration, acting as the natural resources trustees for the United States;

2. The Department of Fish and Game and the State Lands

Commission, acting as the natural resources trustees for the State;

3. The East Bay Regional Park District; and

4. The San Francisco Bay Conservation and Development Commission, acting on behalf of the public in the San Francisco Bay Area and on behalf of the Commission's membership, which includes representatives from federal, state and local agencies.

To insure continuity in the Committee's work, each agency represented on the Committee shall designate a permanent representative from its staff to serve on the Committee. Each agency shall also designate alternate representative(s).

B. Decisionmaking. The trustees for the natural resources damaged, the United States and the State, shall have co-equal authority in all decisions, and no decision shall be made that does not have the approval of both the United States and the State. If necessary, the trustees may establish mechanisms by which disputes may be resolved.

C. Duties and Authority. The Committee shall have final authority to disburse the money contained in the Trustees Fund referred to in section IV(A)(1) of the Consent Decree and to make all necessary decisions for the management and administration of the projects for which money has been disbursed from the Trustees Fund. The Committee may take whatever actions that the Committee in its discretion determines are necessary to effectuate the purposes of the Consent Decree and the Natural Resource Objectives described in section II of this Memorandum of Agreement ("MOA"). It is expected that the Committee will take the following actions to accomplish these

purposes:

1. Supervise the administration of the Trustees Fund and disburse money where necessary from the Trustees Fund;
2. Select one or more agencies or organizations (the "Facilitating Agency or Agencies") that, on the behalf of and at the direction of the Committee, may:
  - a. inventory land suitable for acquisition pursuant to the Natural Resource Objectives described in section II of this MOA;
  - b. negotiate for and purchase such land;
  - c. transfer ownership of such land to other public agencies;
  - d. plan for and carry out appropriate wetlands restoration projects;
  - e. contract with consultants to provide technical services to the Committee as described in Section IV of this MOA; and
  - f. take other necessary actions as requested by the Committee.

The Facilitating Agency or Agencies selected by the Committee pursuant to this paragraph shall be a public agency or agencies, unless the Committee determines that a private, non-profit organization would better achieve the Natural Resource Objectives. If the Committee determines that a private, non-profit organization should be selected as a Facilitating Agency, the Committee shall designate one of its agency members to enter into one or more contracts with a private, non-profit organization to act as a Facilitating Agency. The contract



shall set forth the duties of the Facilitating Agency and shall specify the costs of the private, non-profit organization to act as a Facilitating Agency. The costs of the contract and reasonable administrative costs to enter into such contract shall be paid from the Trustees Fund;

3. Review inventories of land acquisition sites and guide the Facilitating Agency or Agencies in negotiations to acquire the sites;

4. Authorize the Facilitating Agency or Agencies to acquire lands on terms acceptable to the Committee;

5. Select one or more public agencies to hold title to the lands acquired by the Committee and, where necessary, attach conditions to the acquiring agency's ownership that would insure the accomplishment of the Natural Resource Objectives;

6. Review and approve leases or other operating agreements between the public agency holding title to any acquired lands and the public agency to whom management responsibility is proposed to be transferred;

7. Create, review, and approve plans for the restoration and management of the acquired lands;

8. Provide funds to other public agencies for the acquisition, creation, and restoration of wetlands where the wetlands would not be acquired, created or restored but for the contribution from the Trustees Fund and where the Committee receives assurances (through a memorandum of understanding or other device) that the acquisition, creation or restoration of the wetlands would be consistent with the Natural Resource Objectives;

9. Convene meetings of the Technical Advisory Committee described in section III, and receive the advice of the Technical Advisory Committee;

10. Prepare and issue public reports from time to time disclosing the work of the Committee;

11. Pay administrative costs that the Committee determines are reasonable and necessary;

12. Establish rules to govern and facilitate the work of the Committee as necessary.

## II. NATURAL RESOURCE OBJECTIVES.

The Committee will be guided by the primary objectives of restoring, rehabilitating and acquiring the equivalent of the natural resources adversely affected by the Oil Spill (the "Natural Resource Objectives"). The Committee will seek to accomplish these objectives in the following manner:

The primary means by which the Committee will seek to accomplish the Natural Resource Objectives is through the acquisition, creation, restoration, or enhancement of wetlands in the area of the Oil Spill. In determining which projects to pursue, the Committee's primary consideration shall be the "feasibility" of the proposed site. For purposes of this Memorandum of Agreement, "feasibility" means the physical suitability of the site for the creation or restoration of valuable and productive wetlands habitat, taking into account the economic cost of acquisition, restoration and management of the habitat in comparison to the cost of developing other wetlands sites in the area of the Oil Spill. In evaluating the physical suitability of the proposed wetlands, the Committee may

consider not just the intrinsic capability of the site to support natural resources, but the usefulness of the site in combination with proximate existing wetlands habitat, the location of the site in relation to existing development, and the site's level of protection from development provided under law. The Committee may acquire land adjacent or near to wetlands habitat where the Committee deems it necessary to accomplish the Natural Resource Objectives. The Committee shall attempt to establish a relatively equal number of acres of wetlands in Solano and Contra Costa Counties, as long as such an allocation would be "feasible," as described above. The Committee may coordinate its acquisition and restoration activities with other agencies involved in the acquisition and management of wetlands habitat. The Committee's decisions regarding the acquisition, creation, restoration and management of wetlands habitat shall take into account the habitat's values for supporting fisheries, particularly striped bass.

The Committee retains final discretion to determine which wetlands projects best carry out the Natural Resource Objectives. It is the goal of the Committee to create, restore, or enhance 1000 acres of wetlands. In undertaking this goal the Committee shall give fair consideration to funding the wetlands restoration project that is currently being developed by the California Department of Parks and Recreation at the Benicia State Recreation Area. In addition to its goal of establishing 1000 acres of new wetlands, the Committee shall give special consideration to the following two projects if they are "feasible", as described above:



1. The enhancement of wetland habitat values at Shell Marsh and the acquisition of a buffer strip around Shell Marsh;
2. The establishment of an appropriate program to study the restoration of the state-listed rare plant Mason's lilaeopsis which was impacted by the Oil Spill.

### III. TECHNICAL ADVISORY COMMITTEE.

A. Composition. A committee known as the Technical Advisory Committee shall be established. The following agencies have the right to have a representative on and to participate in the activities of the Technical Advisory Committee:

1. The U.S. Fish and Wildlife Service;
  2. The U.S. Environmental Protection Agency;
  3. The Department of the Navy;
  4. The National Oceanic and Atmospheric Administration;
  5. The Regional Water Quality Control Board, San Francisco Bay Region;
  6. The California Department of Fish and Game;
  7. The State Lands Commission;
  8. The San Francisco Bay Conservation and Development Commission;
  9. The California Department of Parks and Recreation;
  10. Solano County;
  11. Contra Costa County;
  12. The City of Benicia;
  13. The City of Martinez;
  14. The East Bay Regional Park District.
- The Technical Advisory Committee may invite

representatives of other public agencies and members of the public to its meetings when, in the sole judgment of the Committee, public disclosure of the Committee's work would not prejudice the effectiveness of the Committee or the Technical Advisory Committee. With the approval of the Committee, the Technical Advisory Committee may also invite technical consultants to its meetings.

B. Duties. The Technical Advisory Committee shall meet from time to time at the request of the Committee to review, guide, and comment upon the work of the Committee. The Technical Advisory Committee may advise the Committee in any of the following areas:

1. The inventory of land acquisition sites and priorities for acquisition;
2. Negotiations and purchases of specific sites, including the feasibility of acquiring the site under the standard set out in the Natural Resource Objectives;
3. The selection of public agencies to own and manage acquired lands;
4. Plans for creating, restoring and maintaining wetlands habitat;
5. Any other area where the Committee determines that the Technical Advisory Committee could provide useful advice.

#### IV. TECHNICAL SERVICES.

To assist the Committee in carrying out the Natural Resource Objectives described in section II of this Memorandum of Agreement, the Committee may determine that it needs technical advisors. These advisors may provide the following

**services:**

A. Provide the Committee with logistical support and coordination;

B. Provide project design and technical review;

C. Organize and prepare for Committee meetings;

D. Advise the Committee during Committee meetings;

E. Provide for quality control of chemical analyses;

F. Assist in mitigation site selection and detailed designs;

G. Develop mitigation success monitoring criteria;

H. Monitor for mitigation success through data and report view and by field inspections;

I. Provide analysis and quarterly reports understandable in layperson terms;

J. Provide analysis and summary report understandable in layperson's terms;

K. Assist in the preparation of periodic press releases;

L. Provide other technical advice to the Committee and the Technical Advisory Committee as requested.

To obtain technical services, the Committee may direct a Facilitating Agency to enter into one or more contracts with professional consultants that the Committee determines are best qualified to provide services to the Committee. The total cost of the contracts, including the administrative costs of the Facilitating Agency, shall not exceed \$500,000. The costs of the contracts shall be paid from the Trustees Fund.

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**V. GENERAL.**

A. This MOA may be amended by agreement of the trustees where the trustees determine an amendment is necessary to accomplish the Natural Resource Objectives.

B. This MOA terminates seven years from the date of entry of the Consent Decree, except that it may be extended by agreement of the trustees.

C. Upon completion of the Committee's work, any unexpended and unobligated money remaining in the Trustees Fund shall be paid into the Fish and Wildlife Pollution Cleanup and Abatement Account of the Fish and Game Preservation Fund, California Fish and Game Code section 12017.

D. No member of the Committee, the Technical Advisory Committee or a Facilitating Agency, where such Facilitating Agency is a public agency, shall be compensated from the Trustees Fund for his/her services provided pursuant to this MOA.

E. Nothing in this MOA shall be construed as obligating the United States or the State, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

F. During the performance of this MOA, the parties will not discriminate against any person because of race, color, religion, sex or national origin.

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APPENDIX

Pursuant to the Consent Decree, studies have been funded for improving future response strategies to oil spills to ensure better restoration and rehabilitation of natural resources affected by such spills. In order to ensure that the experts carrying out the following studies have access to all available information, Shell agrees to provide the following experts all biological and chemical studies and underlying data performed to date relating to the Oil Spill upon entry of the Consent Decree. The studies, the methods for implementing and reviewing the studies, and the experts retained to perform the studies are as follows:

A. Studies.

(1) A study to assess the rate of recovery of intertidal vegetation associated with various oil spill response techniques.

This study will provide increased information about which response techniques and procedures are most effective in cleaning up a spill like the Shell Oil Spill.

The focus of the study will be on the intertidal wetland marshes affected by the spill. Building on current studies conducted by Shell Oil Company, the study will monitor the erosion rates of all the vegetated shoreline adversely affected by the spill and compare vegetation recovery rates where different response techniques were used. The study will provide better information for future purposes regarding the most effective corrective actions to clean up oil and to restore and rehabilitate impacted areas.

1 To carry out this study, the California Department of  
2 Justice will extend its current contract with RPI International,  
3 Inc., and in particular with Dr. Jacqueline Michel, in an amount  
4 not to exceed \$210,000. RPI will subcontract part of this study  
5 to Dr. Terry Huffman of Huffman and Associates, who was retained  
6 as a consultant to the affected governments soon after the Shell  
7 Oil Spill occurred.

8 The contract will be administered by the California  
9 Department of Justice. Study managers for the contract will be  
10 technical personnel designated by the U.S. Fish and Wildlife  
11 Service (USFWS) and the California Department of Fish and Game  
12 (CDFG) who will provide substantive review, criticism and  
13 guidance for the study.

14 (2) A study to examine the changes in the composition  
15 and concentration of San Joaquin Valley (SJV) crude oil in  
16 estuarine and coastal habitats.

17 The purpose of this study is to examine the changes in  
18 composition and concentration of SJV crude oil spilled in  
19 intertidal and subtidal habitats in order to better evaluate the  
20 best methods to restore and rehabilitate these resources. This  
21 study will be coordinated with the vegetation study results  
22 described above to provide a better understanding of the  
23 recovery of typical coastal and estuarine environments from  
24 crude oil spills.

25 The study will build on the results of current studies  
26 conducted by Shell Oil Company and will have three specific  
27 tasks: (a) to conduct an oil weathering study of SJV crude oil  
28 in intertidal and subtidal sediments contaminated by the such



1 oil; (b) to correlate the persistence of SJV crude oil in  
2 sediments with different cleanup techniques in the wetland  
3 areas; and (c) to conduct sediment toxicity studies of  
4 intertidal and subtidal sediments contaminated by SJV crude oil.  
5 The technical reports generated by this study will provide  
6 increased information to better assess the potential effects of  
7 SJV crude oil spilled in estuarine and coastal environments.

8 To carry out this study, the California Department of  
9 Justice will contract with A.D. Little, and in particular with  
10 Dr. Paul Boehm, to continue Dr. Boehm's initial weathering  
11 studies of this oil in an amount not to exceed \$357,000.

12 The contract will be administered by the California  
13 Department of Justice. Study managers will be technical  
14 personnel designated by the USFWS and the CDFG who will provide  
15 substantive review, criticism and guidance for the study.

16 (3) A contingent valuation study to measure natural  
17 resource values relevant to California oil spills.

18 The purpose of this study is to apply state-of-the-art  
19 economic measurement techniques to better develop use and non-  
20 use values that humans place on offshore, coastal and estuarine  
21 natural resources damaged by oil spills occurring in California.  
22 The study would utilize the contingent valuation approach and  
23 the skills of several disciplines, including economics,  
24 sociology and survey research. The study would require the  
25 development of a survey instrument, the implementation of a  
26 field survey, and analysis of survey data and would take about  
27 one year to accomplish. The information derived from the study  
28 will assist federal, state and local governments in assessing

1 damages to natural resources from future California oil spills  
2 and in land use planning management and regulation of such  
3 natural resources.

4 To carry out this study, the California Department of  
5 Justice will extend its current contract with Dr. Michael  
6 Hanemann in an amount not to exceed \$645,000. Dr. Hanemann will  
7 subcontract part of this study to Drs. Richard Carson, Robert  
8 Mitchell, Thomas Wegge, Stanley Presser, John Loomis and Paul  
9 Ruud.

10 The contract will be administered by the California  
11 Department of Justice. Study managers will be technical  
12 personnel designated by the USFWS and the CDFG who will provide  
13 substantive review, criticism and guidance for the study.

14 B. Review of Studies and Final Report.

15 A small group of experts in the fields of the vegetation  
16 and oil studies described above will be formed to assist in  
17 review of such studies, in development of a Final Report based  
18 upon the conclusion of those studies and in dissemination of  
19 information to the spill response community. This "peer review  
20 group" will be responsible for providing detailed evaluations of  
21 the study plans and annual review of all study results. It will  
22 make recommendations on any necessary changes to the study  
23 plans, the duration of each study element, and the termination  
24 of each study element. RPI, aided by the contractors for the  
25 vegetation and oil studies, by the peer review group and the  
26 study managers will also be responsible for periodically  
27 disseminating study data to the spill response community through  
28 appropriate means such as meetings. At the conclusion of these

1 two studies, the contractors for the vegetation and oil studies  
2 aided by the peer review group, RPI and the study managers will  
3 develop a final report and arrange for its distribution.

4 To establish and coordinate this peer review group, the  
5 California Department of Justice will contract with RPI  
6 International, Inc., and in particular with Dr. Jaqueline  
7 Michel, in an amount not to exceed \$100,000. The contract will  
8 be administered by the California Department of Justice.

9 C. Experts.

10 The experts performing the above-described contracts  
11 were retained because of their unique qualifications in the area  
12 of their respective expertise. All of them are currently  
13 retained as consultants to the parties to the litigation and are  
14 uniquely familiar with the particular facts and circumstances of  
15 the Shell Oil Spill. Therefore, retention of these experts to  
16 perform and review the studies will entail the minimum  
17 expenditure of time and money and be most cost effective to the  
18 public and to the parties. Such experts will also provide  
19 critical continuity of knowledge and analysis of the Oil Spill  
20 events.

21 It is the intent of the parties that the experts will  
22 perform and continue the studies, using additional persons as  
23 deemed necessary, so long as is practicable. Their contracts  
24 may be terminated in the event that they do not meet the  
25 standards of their contracts.

26 D. Termination.

27 Upon completion of the contracts described in this  
28 Appendix, the California Department of Justice shall pay into



1 the Trustees Fund any unexpended and unobligated funds remaining  
2 in the Studies Fund.  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD W. WIEKING  
CLERK U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA; STATE OF CALIFORNIA EX REL. DEPARTMENT OF FISH AND GAME, STATE LANDS COMMISSION, DEPARTMENT OF PARKS AND RECREATION, REGIONAL WATER QUALITY CONTROL BOARD FOR THE SAN FRANCISCO BAY REGION, SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION; PEOPLE OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTIES OF CONTRA COSTA AND SOLANO; CONTRA COSTA COUNTY; SOLANO COUNTY; CITY OF BENICIA; CITY OF MARTINEZ; and EAST BAY REGIONAL PARK DISTRICT;

Plaintiffs,

v.

SHELL OIL COMPANY,

Defendant.

CAE

CONSENT DECREE

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1 I. GENERAL PROVISIONS

2 A. On or about April 22 through 23, 1988, Defendant  
3 Shell Oil Company ("Shell") discharged crude oil from its oil  
4 manufacturing complex in Martinez, California ("the Complex")  
5 onto lands and into waters, including wetlands, surrounding the  
6 Complex when a pipe connection in an oil holding tank (Tank No.  
7 1256) broke and oil escaped through a drainage valve that had  
8 been left open ("the Oil Spill").

9 B. Plaintiffs have alleged that at least 432,264  
10 gallons of crude oil were spilled, inundating Shell Marsh and  
11 Peyton Slough and entering the Carquinez Strait and Suisun Bay.  
12 The exact amount of oil spilled is disputed.

13 C. Plaintiffs have alleged that the Oil Spill  
14 resulted from a roof drain failure and that Shell left open the  
15 drainage valve, proximately causing substantial damage to the  
16 environment and natural resources of the San Francisco Bay/Delta  
17 Estuary.

18 D. Plaintiff, United States of America ("United  
19 States"), on behalf of the U. S. Department of Commerce, the  
20 U.S. Department of the Interior, and the U.S. Department of the  
21 Navy, has alleged civil claims for damages to natural resources  
22 under the trusteeship of the United States pursuant to section  
23 311(f) of the Clean Water Act, 33 U.S.C. section 1321(f); and,  
24 on behalf of the U.S. Environmental Protection Agency, has  
25 alleged claims for penalties pursuant to sections 309 and 311(j)  
26 of the Clean Water Act, 33 U.S.C. sections 1319 and 1321(j).  
27 The United States has also alleged claims for costs incurred in  
28 conjunction with the Oil Spill under section 311(f) of the Clean

1 Water Act, 33 U.S.C. section 1321(f).

2 E. Plaintiff, State of California ex rel. Department  
3 of Fish and Game, State Lands Commission, Regional Water Quality  
4 Control Board for the San Francisco Bay Region, Department of  
5 Parks and Recreation and San Francisco Bay Conservation and  
6 Development Commission ("State"), has alleged civil claims for  
7 damages to natural resources under the trusteeship of the State  
8 and for penalties under the Clean Water Act, 33 U.S.C. section  
9 1251, et seq.; California Fish and Game Code sections 2014,  
10 5655, 12015, and 12016; California Harbors and Navigation Code  
11 section 151; California Water Code sections 13304, 13350, and  
12 13385; California Public Resources Code section 29610;  
13 California Government Code section 66641.5; and trespass,  
14 negligence, nuisance and common law natural resource damages.  
15 The State has also alleged claims for costs incurred in  
16 conjunction with the Oil Spill.

17 F. Plaintiff, the People of the State of California  
18 in and for the Counties of Contra Costa and Solano and on behalf  
19 of the California Department of Health Services, has alleged  
20 civil claims for relief under California Health and Safety Code  
21 Section 25189 and California Business and Professions Code  
22 Section 17200 and seeks recovery of costs and penalties.

23 G. Plaintiffs, the Cities of Benicia and Martinez,  
24 have alleged civil claims for relief for trespass, negligence  
25 and nuisance, and seek recovery of costs and damages.

26 H. Plaintiff, East Bay Regional Park District, has  
27 alleged civil claims for relief for natural resource damages,  
28 trespass and nuisance and seeks recovery of costs and damages.

1 I. Defendant, Shell Oil Company, is a corporation  
2 incorporated under the laws of Delaware. Shell owns and  
3 operates the Complex where the Oil Spill occurred.

4 J. The United States Environmental Protection Agency  
5 ("EPA") has served on Shell a Notice of Violation ("NOV"),  
6 pursuant to 40 C.F.R. section 114.4, alleging that Shell has  
7 violated certain oil spill prevention regulations set forth at  
8 40 C.F.R. Part 112 that are applicable to the Complex. The NOV,  
9 attached as Exhibit 1, initiates an administrative action  
10 pursuant to 40 C.F.R. Part 114 and Clean Water Act  
11 section 311(j), 33 U.S.C. section 1321(j), and 40 C.F.R. Part  
12 114 and proposes the assessment of civil penalties. Shell  
13 agrees that EPA has jurisdiction to institute this  
14 administrative action, and EPA and Shell agree to compromise the  
15 aforementioned administrative action by this Consent Decree.

16 K. A resolution of the parties' disputes would  
17 require costly and protracted litigation. The parties consider  
18 resolution of this dispute without litigation to be in the best  
19 interests of the public.

20 L. Prior to taking any testimony, Shell and  
21 Plaintiffs have agreed to making this Consent Decree. Shell and  
22 Plaintiffs agree that this Consent Decree is filed in settlement  
23 of this litigation and the administrative proceeding described  
24 in paragraph J above and in consideration for the covenants not  
25 to sue described in section V below. This Consent Decree is  
26 entered into without any admission as to liability for any  
27 purpose, in good faith to avoid further protracted litigation  
28 relating to Plaintiffs' claims arising from the Oil Spill as



described in section V and to serve the public interest.

M. Except as provided in section II.A of this Consent Decree, Shell denies any and all legal and equitable liability under any federal, state, or local statute, regulation, ordinance, or common law for any fines, penalties, response costs, damages or claims caused by or arising out of the Oil Spill; Shell does not admit liability for any purpose or admit any issues of fact or law or any responsibility for the alleged release of crude oil or any alleged hazardous constituent thereof into the environment by entering into this Consent Decree or by taking any action in accordance with this Consent Decree.

## II. JURISDICTION, VENUE AND SERVICE OF PROCESS

A. This Court has jurisdiction over the parties and the subject matter of this Consent Decree pursuant to 28 U.S.C. sections 1331 and 1345, and sections 309 and 311 of the Clean Water Act, 33 U.S.C. sections 1319 and 1321. This Court also has jurisdiction over the subject matter of the pendant State law claims in this action. Venue is proper in this Court pursuant to 28 U.S.C sections 1391(b) and (c). The Complaint, filed concurrently with the lodging of this Consent Decree, states claims upon which relief may be granted against Shell. Shell waives all objections to the Court's jurisdiction to enter or enforce this Consent Decree, as well as venue and service of summons.

B. Shell agrees that service of notice or any legal process on it for any purpose under this Consent Decree, including its enforcement, may be made by mailing a copy by

1 first class mail to the attorneys below:

2 Keith Howard  
3 Cooper, White & Cooper  
4 1333 N. California Blvd.  
Suite 450  
Walnut Creek, CA 94596

5 Victoria Kincke  
6 Shell Oil Company  
7 Chemical Legal Department  
One Shell Plaza  
P.O. Box 2463  
Houston, TX 77252

8 **III. PARTIES BOUND**

9 This Consent Decree shall apply to and be binding upon  
10 the signatories, their agents, successors and assigns.

11 **IV. RELIEF**

12 A. On the date of lodging of this Consent Decree,  
13 Shell agrees to pay the total sum of nineteen million, seven  
14 hundred fifty thousand dollars (\$19,750,000.00) by check made  
15 payable to California Department of Justice, Litigation Deposits  
16 Fund, an interest bearing account, and hand delivered to John D.  
17 Fennelly, Office of the Attorney General, 1515 S Street, South  
18 Building, Fifth Floor, Sacramento, CA. Upon entry of this  
19 Consent Decree by the Court, the principal and interest thereon  
20 shall be disbursed from the Litigation Deposits Fund by the  
21 California Department of Justice in the following manner.

22 1. The sum of eleven million, five hundred eighty-  
23 eight thousand dollars (\$11,588,000.00) plus all interest  
24 accumulated on the money in the Litigation Deposits Fund  
25 described in Section IV.A, less any administrative costs, shall  
26 be paid as follows for alleged natural resource damages:  
27  
28

1           a. The sum of ten million, eight hundred thirty-  
2 eight thousand dollars (\$10, 838,000.00) plus all the interest  
3 accrued on the money in the Litigation Deposits Fund described  
4 in Section IV.A, less any administrative costs, shall be  
5 disbursed pursuant to the Clean Water Act, 33 U.S.C. Section  
6 1321(f), to the Department of Justice, State of California for  
7 deposit in the California Department of Justice, Special  
8 Deposits Fund into an account to be determined, hereafter  
9 referred to as the "Trustees Fund." The purpose of this fund  
10 shall be to compensate the Trustees for the United States and  
11 the State of California for alleged damages to natural  
12 resources. The Trustees shall administer and disburse the money  
13 in the Trustees Fund in accordance with the Memorandum of  
14 Agreement attached as Exhibit 2.

15           b. The sum of seven hundred fifty thousand  
16 dollars (\$750,000.00) shall be disbursed to the Department of  
17 Fish and Game pursuant to Fish and Game Code section 12017 for  
18 purposes such as cleanup and abatement of oil spills, projects  
19 devoted to the preservation of California plants, wildlife and  
20 fisheries, land acquisition and land improvements and species  
21 propagation projects. Payment shall be made payable to "Fish  
22 and Wildlife Pollution Cleanup and Abatement Account, Fish and  
23 Game Preservation Fund" and delivered by mail to Department of  
24 Fish and Game Fiscal Division, c/o Maria Reed, P.O. Box 944209,  
25 Sacramento, CA 94244-2090.

26           2. The sum of one million, three hundred twelve  
27 thousand dollars (\$1,312,000.00) shall be disbursed to the  
28 Department of Justice, State of California, for deposit in the



1 California Department of Justice, Special Deposits Fund into an  
2 account to be determined, hereafter referred to as the "Studies  
3 Fund." The purpose of the Studies Fund shall be to conduct  
4 studies pertaining to the Oil Spill as set forth in Appendix A,  
5 attached and incorporated by reference.

6 3. The sum of five hundred thousand dollars  
7 (\$500,000.00) shall be disbursed to the United States, the State  
8 of California, and the County of Contra Costa for reimbursement  
9 of costs. Said sum shall be apportioned and made payable as  
10 follows:

11 a. The sum of ninety-three thousand dollars  
12 (\$93,000.00) shall be made payable to "U.S. Department of the  
13 Interior" and delivered by mail to the Office of the Solicitor,  
14 P.O. Box 36064, 450 Golden Gate Avenue, San Francisco, CA 94102.

15 b. The sum of three hundred and fifty-seven  
16 thousand dollars (\$357,000.00) shall be paid to the State of  
17 California as follows:

18 i. The sum of one hundred ninety three  
19 thousand, two hundred and twenty-nine dollars and sixty-eight  
20 cents (\$193,229.68) shall be made payable to the "Fish and  
21 Wildlife Pollution Cleanup and Abatement Account, Fish and Game  
22 Preservation Fund" and delivered by mail to Department of Fish  
23 and Game Fiscal Division, c/o Marie Reed, P.O. Box 944209,  
24 Sacramento, CA 94244-2090;

25 ii. The sum of sixty-two thousand, three  
26 hundred fifty-two dollars and sixty-seven cents (\$62,352.67)  
27 shall be made payable to "State Water Pollution Cleanup and  
28 Abatement Account, State Water Quality Control Fund" and

1 delivered by mail to William R. Attwater, Chief Counsel, State  
2 Water Resources Control Board, 901 P Street, P.O. Box 100,  
3 Sacramento, CA 95801;

4           iii. The sum of twenty thousand, one  
5 hundred twenty-five dollars and eighty-eight cents (\$20,125.88)  
6 shall be made payable to "California Department of Parks and  
7 Recreation" and delivered by mail to Richard E. Felty, Regional  
8 Director, California Department of Parks and Recreation, Central  
9 Coast Region, 2211 Garden Road, Monterey, CA 93940;

10           iv. The sum of nine thousand five hundred  
11 sixteen dollars and fifty-three cents (\$9,516.53) shall be made  
12 payable to the "Bay Fill Cleanup and Abatement Fund" and  
13 delivered by mail to San Francisco Bay Conservation and  
14 Development Commission, c/o Russell Abramson, 30 Van Ness  
15 Avenue, Suite 2011, San Francisco, CA 94102;

16           v. The sum of twelve thousand dollars  
17 (\$12,000.00) shall be made payable to "State Lands Commission"  
18 and delivered by mail to Robert C. Hight, Chief Counsel, State  
19 Lands Commission, 1807 13th Street, Sacramento, CA 95814;

20           vi. The sum of fifty-nine thousand, seven  
21 hundred seventy-five dollars and twenty-four cents (\$59,775.24)  
22 shall be made payable to "California Department of Justice," and  
23 delivered by mail to Sara J. Russell, Deputy Attorney General,  
24 Office of the California Attorney General, 350 McAllister  
25 Street, Suite 6000, San Francisco, CA 94102. This money shall  
26 be used only to defray expenses incurred by the Attorney General  
27 in the implementation of this Consent Decree and otherwise to  
28 defray expenses incurred by the Attorney General in his capacity

1 as legal counsel to State agencies responsible for enforcing  
2 laws and programs for the protection of the State's environment,  
3 natural resources and lands. Such expenses may include, but are  
4 not limited to, reimbursement of the cost of expert consultants,  
5 temporary employees, equipment and supplies. The Attorney  
6 General shall segregate this money in a separate account which  
7 shall be jointly administered by the Natural Resources Section  
8 and the Land Law Section in the Public Rights Division of the  
9 California Department of Justice;

10 c. The sum of fifty thousand dollars  
11 (\$50,000.00), for Contra Costa County, shall be made payable and  
12 delivered by mail to Huffman and Associates, Inc., 69 Aztec  
13 Street, San Francisco, CA 94110, as payment of professional  
14 consultant expenses.

15 4. The sum of six hundred thousand dollars  
16 (\$600,000.00) shall be disbursed to the City of Benicia as  
17 alleged damages. Payment in the amount of six hundred thousand  
18 dollars (\$600,000.00) shall be made payable to the "City of  
19 Benicia, c/o Finance Director" and shall be delivered by mail to  
20 the City of Benicia Finance Department, 250 East L Street,  
21 Benicia, California 94510.

22 a. Three hundred fifty thousand dollars  
23 (\$350,000.00) of this money shall be used for the following  
24 projects in the following amounts:

25 i. The sum of seventy-five thousand  
26 dollars (\$75,000.00) shall be utilized to reconstruct,  
27 rehabilitate and enlarge the 9th Street Fishing Pier.

28 ii. The sum of two hundred seventy-five



1 thousand dollars (\$275,000.00) shall be utilized to construct  
2 two marsh overlooks at the ends of First Street and Second  
3 Street.

4 The City of Benicia shall segregate this money in a  
5 separate account which may be utilized only for these above-  
6 mentioned projects. Should either, or both, of these projects  
7 become infeasible, or should monies remain after the completion  
8 of these projects, the City Council of the City of Benicia shall  
9 have the right to re-program these monies for other projects  
10 within the City of Benicia as long as such projects enhance,  
11 mitigate or restore the areas or natural resources affected or  
12 impacted by the Oil Spill.

13 b. Two hundred fifty thousand dollars  
14 (\$250,000.00) of this money shall go to the City of Benicia  
15 general fund.

16 5. The sum of one hundred and fifty thousand dollars  
17 (\$150,000.00) shall be disbursed to the County of Solano,  
18 payable to the "Office of the District Attorney" and delivered  
19 by mail to the Office of the District Attorney, 600 Union  
20 Avenue, Fairfield, CA 94533, for the specific purpose of  
21 enabling the Solano County Office of Emergency Services and the  
22 Solano County District Attorney Environmental Crime Unit to  
23 purchase computer hardware and software and communications  
24 equipment so as to enable said County to be adequately prepared  
25 in the event of future oil spill disasters on its coast and to  
26 provide said County with the necessary emergency response  
27 capability. The District Attorney shall segregate this money in

1 stated purposes.

2           6. The sum of seven hundred fifty thousand dollars  
3 (\$750,000.00) shall be disbursed to the City of Martinez. This  
4 amount compensates the City of Martinez and the County of Contra  
5 Costa for alleged damages. Payment in the amount of seven  
6 hundred fifty thousand dollars (\$750,000.00) shall be made  
7 payable to the "City of Martinez, c/o Finance Director" and  
8 shall be delivered by mail to the City of Martinez Finance  
9 Department, 525 Henrietta Street, Martinez, California 94553.

10           a. Five hundred thousand dollars (\$500,000.00)  
11 of this money shall be administered by the City of Martinez and  
12 utilized for a joint project of the City of Martinez and Contra  
13 Costa County to enhance and rehabilitate the Martinez fishing  
14 pier and to construct a landscaped walkway plaza area connecting  
15 the Martinez fishing pier to the Italian Fisherman Monument.  
16 The City of Martinez shall segregate these monies in a separate  
17 account which may be utilized only for the above identified  
18 project. Should this project become infeasible, or should  
19 monies remain after the completion of this project, the City  
20 Council of the City of Martinez shall have the right to re-  
21 program these monies for other projects after consultation with  
22 Contra Costa County. The City Council of the City of Martinez  
23 may only utilize these monies for projects which enhance,  
24 mitigate or restore the areas or natural resources affected or  
25 impacted by the Oil Spill.

26           b. Two hundred fifty thousand dollars  
27 (\$250,000.00) of this money shall go to the City of Martinez  
28 general fund.

1           7.    The sum of two hundred thousand dollars  
2   (\$200,000.00) shall be disbursed to the East Bay Regional Park  
3   District as alleged damages. Payment shall be made payable to  
4   the "East Bay Regional Park District" and delivered by mail to  
5   the East Bay Regional Park District, 11500 Skyline Boulevard,  
6   Oakland, CA 94619-2443.

7           8.    The sum of two million dollars (\$2,000,000.00)  
8   shall be disbursed to the United States as penalties for the  
9   Defendant's alleged violations of the spill prevention  
10  regulations found at 40 C.F.R. Part 112. Payment shall be made  
11  payable to the "Treasurer of the United States" and delivered by  
12  mail to the United States Attorney for the Northern District of  
13  California. A copy of the check and letter tendering such check  
14  shall be mailed to Office of Regional Counsel, Water Branch  
15  Chief, U.S.E.P.A. Region 9, 215 Fremont Street, San Francisco,  
16  CA 94105, and to the Chief, Environmental Enforcement Section,  
17  Land and Natural Resources Division, United States Department of  
18  Justice, P.O. Box 7611, Ben Franklin Station, Washington D.C.  
19  20044.

20          9.    The sum of fifty thousand dollars (\$50,000.00)  
21  shall be disbursed to the United States as penalties for the  
22  Defendant's alleged violations of its NPDES Permit No. CA005789  
23  at the Complex. Payment shall be made payable to the "Treasurer  
24  of the United States" and delivered by mail to the United States  
25  Attorney for the Northern District of California. A copy of the  
26  check and letter tendering such check shall be mailed to Office  
27  of Regional Counsel, Water Branch Chief, U.S.E.P.A. Region 9,  
28  215 Fremont Street, San Francisco, CA 94105, and to the Chief,



1 Environmental Enforcement Section, Land and Natural Resources  
2 Division, United States Department of Justice, P.O. Box 7611,  
3 Ben Franklin Station, Washington D.C. 20044.

4 10. The sum of two million, one hundred thousand  
5 dollars (\$2,100,000.00) shall be disbursed as penalties to the  
6 State of California for alleged statutory violations. Payment  
7 shall be made payable to "State Water Pollution Cleanup and  
8 Abatement Account, State Water Quality Control Fund" and  
9 delivered to William R. Attwater, Chief Counsel, State Water  
10 Resources Control Board, 901 P Street, P.O. Box 100, Sacramento,  
11 CA 95801.

12 11. The sum of two hundred fifty thousand dollars  
13 (\$250,000.00) shall be disbursed to the County of Contra Costa  
14 as penalties for alleged violations of Business and Professions  
15 Code Section 17206 arising out of the Oil Spill. Payment shall  
16 be made payable to "Treasurer, Contra Costa County" and  
17 delivered to the Contra Costa County District Attorneys Office,  
18 Special Operations Division, P.O. Box 670, Martinez, CA 94553.

19 12. The sum of two hundred fifty thousand dollars  
20 (\$250,000.00) shall be disbursed to the County of Solano as  
21 penalties for alleged violations of Business and Professions  
22 Code Section 17206 arising out of the Oil Spill. Payment shall  
23 be made payable to "County of Solano, c/o Office of the District  
24 Attorney" and delivered to the Office of the District Attorney,  
25 600 Union Avenue, Fairfield, CA 94533.

26 B. Except as provided in sections VII and IX, below,  
27 Shell hereby waives any and all rights or claims to the money  
28 described in section IV.A of this Consent Decree. Further,

1 Shell waives any and all rights to object to the implementation  
2 of the Consent Decree, including, but not limited to, the  
3 disbursement of such money and any decisions relating to  
4 implementation.

5 V. COVENANTS NOT TO SUE

6 A. The covenants set forth in paragraphs B-I below  
7 shall take effect only upon entry of this Consent Decree and  
8 payment in full of all amounts set forth in Section IV  
9 according to the terms and conditions of that section.

10 B. The United States covenants not to sue Shell for:

11 1. Civil violations of the spill prevention  
12 regulations at 40 C.F.R. Part 112 which occurred at the Complex  
13 prior to November 1, 1988;

14 2. Civil claims for costs and natural resource  
15 damages under 33 U.S.C. section 1321(f) arising from the Oil  
16 Spill;

17 3. Civil claims for violations of NPDES Permit  
18 No. CA005789 pursuant to section 301 of the Clean Water Act, 33  
19 U.S.C. section 1319(d), caused by the Oil Spill;

20 4. Civil claims pursuant to 16 U.S.C. section  
21 1540(a) for violations of 16 U.S.C. section 1538(a) arising from  
22 the Oil Spill;

23 5. Civil damages to the Navy for trespass on the  
24 Naval Weapons Facility, Concord, California, caused by the Oil  
25 Spill;

26 6. Civil damages to the Navy for nuisance to the  
27 Navy caused by the Oil Spill.

28 C. The State covenants not to sue Shell for any and

1 all civil claims, demands, causes of action, penalties and  
2 damages, known or unknown, suspected or unsuspected which the  
3 State, on behalf of the State agencies described in Section I.E  
4 above, has or may have against Shell based upon or arising out  
5 of the Oil Spill.

6 D. The City of Benicia covenants not to sue Shell for  
7 civil damages and costs for trespass, negligence and nuisance  
8 resulting from the Oil Spill.

9 E. The City of Martinez covenants not to sue Shell  
10 for civil damages and costs for trespass, negligence and  
11 nuisance resulting from the Oil Spill.

12 F. The East Bay Regional Park District covenants not  
13 to sue Shell for civil and natural resource damages and costs  
14 for trespass and nuisance resulting from the Oil Spill.

15 G. The County of Contra Costa covenants not to sue  
16 Shell for violations of the Hazardous Waste Control Act, the  
17 Unlawful Business Practice Act and damages and costs for  
18 trespass and nuisance resulting from the Oil Spill.

19 H. The County of Solano covenants not to sue Shell  
20 for violations of the Hazardous Waste Control Act, the Unlawful  
21 Business Practice Act and damages and costs for trespass and  
22 nuisance resulting from the Oil Spill.

23 I. The People of the State of California covenant not  
24 to proceed criminally against Shell for alleged violations  
25 arising from the Oil Spill of the following statutes and  
26 regulations:

27 1. California Fish and Game Code sections 5650,  
28 12000 and 12002;



2. California Water Code section 13387;
3. California Government Code section 66632(j);
4. California Public Resources Code section 6303.1;
5. California Health and Safety Code sections 25189.5 and 25191;
6. California Penal Code sections 372 and 602;
7. Title 14, California Code of Regulations, sections 4305, 4306 and 4307.

VI. RESERVATION OF RIGHTS

A. Each Plaintiff expressly reserves its right to initiate judicial or administrative actions against Shell for any matter not expressly covered by the covenants not to sue between that Plaintiff and Shell.

B. Nothing in this Consent Decree is intended by the parties or shall be construed as a waiver by any Plaintiff of its right to institute an action against Shell to compel compliance with this Consent Decree.

VII. PRE-LODGING OBLIGATIONS

Upon execution of this Consent Decree by Shell, Shell agrees to be bound to the terms of the decree and may not revoke acceptance unless the named representatives of Plaintiffs have not signed the decree within sixty (60) days from the date of final signature by Shell's representative(s).

VIII. PUBLIC COMMENT AND ENTRY OF CONSENT DECREE

The signatories to this Consent Decree agree that there will be a forty-five (45) day public comment period and that they will follow the procedures set forth at 28 C.F.R.

1 section 50.7 prior to moving the court to enter this Consent  
2 Decree. Plaintiffs reserve the right to withdraw their consent  
3 to this Consent Decree if Plaintiffs determine that comments  
4 received during the comment period disclose facts or  
5 considerations indicating that the Consent Decree is unlawful or  
6 inadequate to protect the public interest. Plaintiffs will not  
7 move the Court to enter this Consent Decree until the public  
8 comment period has expired and will only submit the Consent  
9 Decree for entry if, in their determination, comments received  
10 during the comment period do not disclose facts or  
11 considerations indicating that the Consent Decree is unlawful or  
12 inadequate to protect the public interest.

13 IX. CONDITIONS FOR RETURN OF MONEY TO SHELL

14 A. Money paid by Shell into the Fund described in  
15 section IV.A shall remain in such Fund and continue to accrue  
16 interest for the benefit of Plaintiffs until entry of this  
17 Consent Decree unless one of the following occurs:

18 1. Plaintiffs comply with the requirements of  
19 this section and notify Shell that they intend to resolve the  
20 matter through litigation; or

21 2. Shell complies with the requirements of this  
22 section and notifies the Plaintiffs that it intends to resolve  
23 the matter through litigation.

24 If the event described in either subsection A.1 or A.2  
25 occurs, Shell may withdraw the principal and accrued interest in  
26 the Fund, less any administrative fees owing to the agent of  
27 such Fund.

28 B. Within one hundred eighty-three (183) days

1 following the close of the comment period described in section  
2 VIII, Plaintiffs may file a motion for entry of this Consent  
3 Decree. Should comments received during the comment period  
4 disclose facts or considerations, in Plaintiffs' determination,  
5 indicating that the Consent Decree is unlawful or inadequate to  
6 protect the public interest, the parties shall use this one  
7 hundred eighty-three (183) day period for negotiations regarding  
8 modifications to this Consent Decree. Such period may be  
9 extended by agreement of all parties. If Plaintiffs do not file  
10 a motion for entry within one hundred eighty-three (183) days,  
11 or any longer period to which all parties have agreed, Shell may  
12 withdraw the principal and accrued interest from the Fund  
13 provided for in section IV.A, less any administrative fees owing  
14 to the agent of such Fund.

15 C. If the Court refuses to grant Plaintiffs' motion  
16 for entry of this Consent Decree, including any modifications  
17 made pursuant to section IX.B to which all parties have agreed,  
18 the parties shall utilize the period of one hundred and eighty-  
19 three (183) days from the date of the Court's denial of  
20 Plaintiffs' motion in which to negotiate a consent decree that  
21 addresses all concerns raised by the Court. The one hundred  
22 eighty-three (183) day period may be extended by agreement of  
23 all parties. If Plaintiffs do not file a motion for entry of  
24 this Consent decree within said one hundred eighty-three (183)  
25 day period or any longer period to which all parties have  
26 agreed, Shell may withdraw the principal and accrued interest  
27 from the Fund described in section IV.A the principal and  
28 accrued interest, less any administrative fees owing to the



1 agent of such Fund. However, Shell may not withdraw such money  
2 if any party has filed an appeal to any Court order denying the  
3 motion to enter. If such appeal is withdrawn or the Appellate  
4 Court enters an order other than one instructing this District  
5 Court to enter the Consent Decree, the parties shall have a  
6 period of ninety (90) days to negotiate a consent decree. If  
7 Plaintiffs have not moved for entry within that time period,  
8 Shell may withdraw the principal and accrued interest from the  
9 Fund described in section IV.A, less any administrative fees  
10 owing to the agent of such Fund.

11 D. If Shell withdraws the money from the Fund  
12 described in section IV.A pursuant to section IX.B or IX.C,  
13 Shell shall notify each Plaintiff in writing. Each Plaintiff  
14 shall have sixty (60) days from the receipt of such notice in  
15 which to amend the Complaint and/or Notice of Violation filed  
16 concurrently with lodging of this Consent Decree or to dismiss  
17 the Complaint and file in another forum. Service of an amended  
18 or new complaint(s) or expiration of this sixty (60) day period,  
19 whichever comes sooner, shall trigger the time limits for  
20 pleadings responsive to a complaint in the forum in which such  
21 amended Complaint or new Complaint is filed. Shell expressly  
22 agrees to waive any rights it may have to a statute of  
23 limitations or laches defense to a new Notice of Violation, an  
24 amended Complaint or to any new Complaint served pursuant to  
25 section IX.D.

26 X. TERMINATION

27 When the funds described in section IV.A are disbursed  
28 in accordance with section IV, Plaintiffs shall notify the Court

1 that this Consent Decree is terminated.

2 XI. REPRESENTATIVES

3 Each undersigned representative of the parties to this  
4 Consent Decree certifies that he or she is fully authorized to  
5 enter into the terms and conditions of this Consent Decree and  
6 to execute and legally bind such party to this document.

7 XII. COUNTERPARTS

8 This Consent Decree may be executed in any number of  
9 counterparts and each executed counterpart shall have the same  
10 force and effect as an original instrument.

11 XIII. HEADINGS

12 The headings in this Consent Decree are inserted for  
13 convenience only and are not intended to be a part of or to  
14 affect the meaning or interpretation of the Consent Decree.

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## SHELL OIL COMPANY

Dated: November 22, 1989.

R. Lopez

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FILED

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY 27  
REGION IX

SPECIAL

N. J. J. J. J.

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY,

Complainant,

v.

SHELL OIL COMPANY,

Respondent.

SPCC IX-90-01

NOTICE OF VIOLATION,  
COMPLAINT, AND NOTICE OF  
OPPORTUNITY FOR HEARING

NOTICE OF VIOLATION

1. This is notification of violations of the Oil Pollution Prevention Regulations, 40 C.F.R. Part 112, promulgated pursuant to Section 311(j) of the Clean Water Act, 33 U.S.C. § 1321(j).

2. Shell Oil Company ("Shell") owns or operates a non-transportation related onshore facility in Martinez, California engaged in storage or distribution of oil and oil products, which due to its location, could reasonably be expected to discharge oil in harmful quantities, as defined in Part 110 of Title 40 of the Code of Federal Regulations, into or upon the navigable waters of the United States or adjoining shorelines.

3. Shell violated the Oil Pollution Prevention Regulations by failing to fully implement a Spill Prevention Control and Countermeasures ("SPCC") Plan in accordance with section 112.7, 40 C.F.R. § 112.7, as required by section 112.3(a), 40 C.F.R. § 112.3(a), in that:

EXHIBIT 1

3 position, contrary to the requirements of section

4 112.7(e)(2)(iii) of the regulations, 40 C.F.R. § 112.7(e)(2)(iii)  
5 and the SPCC Plan; and

6 b. records required to be maintained by section 112.7(e)(8)  
7 of the regulations, 40 C.F.R. § 112.7(e)(8), were either missing  
8 or incomplete.

9 4. Shell violated the Oil Pollution Prevention Regulations by  
10 failing to amend and implement its SPCC Plan within six months  
11 after a change in the facility design, construction, operation or  
12 maintenance which materially affects the facility's potential for  
13 the discharge of oil into or upon the navigable waters of the  
14 United States or adjoining shore lines as required by section  
15 112.5(a) of the regulations, 40 C.F.R. § 112.5(a).

16 a. In October 1984, construction of two new oil holding  
17 tanks and alteration of the drainage systems was complete and the  
18 tanks were put into operation. The new drainage system allowed  
19 drainage from the levee areas around the tanks to go directly  
20 through an outfall to Peyton Slough without first passing through  
21 the facility's water treatment plant, thus materially affecting  
22 the facility's potential for discharging oil into or upon the  
23 navigable waters of the United States. Shell failed to amend its  
24 SPCC Plan until October 1986, fully two years after the changes  
25 at the facility; and  
26

1 b. The SPCC Plan amended in October 1986 pursuant to  
2 section 112.5(b), 40 C.F.R. § 112.5(b) was itself inadequate as  
3 it failed to accurately describe the modifications to the  
4 drainage system.

5 PROPOSED CIVIL PENALTY

6 Pursuant to Section 311(j) of the Clean Water Act, 33 U.S.C.  
7 § 1321(j)(2), and the regulations promulgated thereunder, 40  
8 C.F.R. Parts 112 and 114, the maximum penalty that may be  
9 assessed is not to exceed \$5,000 for each day such violation  
10 continues. In view of the above, the United States Environmental  
11 Protection Agency ("EPA") proposes to assess a civil penalty of  
12 two million dollars, (\$2,000,000.00). Payment may be made by  
13 check payable to "Treasurer of the United States of America" and  
14 remitted to:

15 EPA, Region IX  
16 Regional Hearing Clerk  
17 P.O. Box 360863M  
Pittsburgh, PA 15251

18 A copy of the check shall be sent to:

19 Office of Regional Counsel  
20 EPA Region IX  
21 215 Fremont Street  
San Francisco, CA 94105

22 OPPORTUNITY TO REQUEST A HEARING

23 You have the right to request a hearing on these violations  
24 and the proposed penalty assessment. The hearing will be open to  
25 the public and will be conducted in accordance with Part 114 of  
26 Title 40 of the Code of Federal Regulations. 40 C.F.R. Part 114.  
You have the right to be represented by counsel at any stage of



1 these proceedings. In order to obtain a hearing, you must submit  
2 a written request, signed by you or on your behalf by a duly  
3 authorized officer, director, agent or attorney, within thirty  
4 (30) days of the receipt of the Notice of Violation. The request  
5 for hearing shall be in accordance with the requirements of  
6 section 114 and shall: (1) state the name and address of the  
7 person requesting the hearing; (2) state with particularity the  
8 issues to be raised by such person at the hearing; and (3)  
9 include a copy of the Notice of Violation. Address any request  
10 for hearing to:

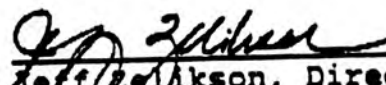
11 Regional Hearing Clerk  
12 EPA, Region IX  
215 Fremont Street  
San Francisco, CA 94105

13 SETTLEMENT CONFERENCE

14 Whether or not you request a hearing, you have the right to  
15 present written explanation, information or any materials in  
16 answer to the charges or in mitigation of the penalty. You may  
17 confer informally with EPA concerning the alleged violations or  
18 the amount of the proposed penalty. A request for an informal  
19 conference does not stay the thirty (30) day period during which  
20 you must submit a written request for a hearing. You have the  
21 right to be represented by counsel at any such informal hearing.  
22 EPA has the authority to modify the amount of the proposed  
23 penalty to reflect any settlement agreement reached with you at  
24 any conference. EPA encourages all parties against whom a civil  
25 penalty is proposed to be assessed to pursue the possibilities of  
26 settlement as a result of informal conferences. Any such

1 settlement shall be finalized by the issuance of a written  
2 Consent Agreement signed by both parties and a written Order  
3 signed by the Director of the Waste Management Division pursuant  
4 to a delegation from the Regional Administrator, EPA, Region IX,  
5 or by means of a Consent Decree. The issuance of such Consent  
6 Agreement or Consent Decree shall constitute a waiver of your  
7 right to request a hearing on any matter stipulated to therein.

8  
9 Dated: Nov. 27, 1989

  
Jeff Zelikson, Director  
Hazardous Waste Management  
Division

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CERTIFICATE OF SERVICE

I certify that on the date noted below, I sent by first class mail, postage prepaid, a copy of the foregoing "Notice of Violation, Complaint, and Notice of Opportunity for Hearing" to the following persons at the addresses listed below:

Victoria J. Kincke  
Shell Oil Company  
Chemical Legal Department  
One Shell Plaza  
P.O. Box 2463  
Houston, TX 77252

Keith Howard  
Cooper, White and Cooper  
1333 N. California Blvd., Suite 450  
Walnut Creek, CA 94596

I further certify that on the same date below, I hand delivered an original of the above document to the following person at the address listed below:

Regional Hearing Clerk  
U.S. EPA, Region 9  
215 Fremont Street  
San Francisco, CA 94105

Date: 11/27/89

Laurie Kermish  
Laurie Kermish  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. EPA, Region 9  
215 Fremont Street  
San Francisco, CA 94105



State of California

Department of Justice  
2101 Webster Street  
Oakland, CA 94612-3049**Memorandum**

To : Pete Bontadelli, Director, DFG  
Steve Richie, Executive Officer, RWQCB  
Henry Agonia, Director, Parks & Rec. Dept. File No.  
Charles Warren, Executive Officer, SLC  
Alan Pendleton, Executive Officer, BCDC Telephone: ATSS (8) 561-0845  
John Fennelly, Chief, Accounting - AG's Office (415) 464-0845

Date : April 10, 1990

From : SARA J. RUSSELL, Deputy Attorney General  
Office of the Attorney General - Oakland

**RECEIVED**  
APR 11 1990

Subject : *Shell Oil Spill*

SAN FRANCISCO BAY CONSERVATION  
& DEVELOPMENT COMMISSION

I am pleased to inform you that Judge Legge of the federal district court in San Francisco (Northern District) signed the Shell Oil Spill Consent Decree on March 26, 1990. Judgment was entered on April 6, 1990. Attached for your records is a filed copy of the Consent Decree.

With entry of judgment by the court, the relief set forth in the Decree can now be obtained. Briefly, this means that the various sums on pages 5-14 can be disbursed by the AG's Accounting Office and the two accounts referred to on pages 6-7 can be established in the Special Deposits Fund (the "Trustees Fund" and the "Studies Fund").

Once the sum of \$10,838,000.00 plus all interest accrued on the money in the Litigation Deposits Fund is deposited into the Trustees Fund, the trustees can begin to disburse the monies to restore, rehabilitate and acquire the equivalent of the natural resources damaged by the spill as contemplated in the Memorandum of Agreement attached to the Consent Decree as Exhibit 2. This office, in coordination with the U.S. Department of Justice and the local government attorneys, will shortly schedule a meeting of the trustees and other members of the Trustee Committee so that their work can begin. It is expected that the meeting will take place in Oakland on May 15, 1990.

Also, the studies outlined in Appendix A to the Consent Decree can now begin as the contracts have all been entered into (the contracts were contingent on entry of the Consent Decree). The monies to pay the contractors will be disbursed from the Studies Fund which will be administered by the Accounting Office of the AG's Office.

Pete Bontadelli, Director, DFG

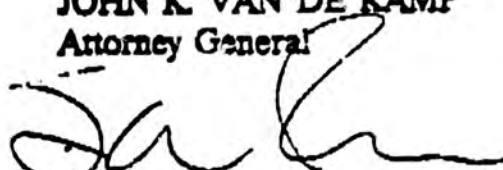
April 10, 1990

Page 2.

If you have any questions or comments, please feel free to call me at (415) 464-0845, 8-561-0845.

JOHN K. VAN DE KAMP

Attorney General



SARA J. RUSSELL

Deputy Attorney General

SJR:lk

cc w/ encl:

Andrea Ordine  
R. H. Connett  
Rod Walston  
N. Greg Taylor  
Dennis Eagan  
Mike Herlache  
Mike Rugg  
Bill Castle  
Larry Espinoza  
Gene Toffoli  
Jean Ferreira  
Casey Buchter  
Mike Drennan  
Gary Grimm  
Dave Plummer  
Jane Sekelsky  
Bill Travis,

Jacqui Michel  
Paul Boehm  
Terry Huffman  
Michael Haneman  
Pat Peterson  
Joe Barbieri  
Mike Neville  
Jackie Means

Fish and Game

DONALD L. LOLLOCK  
PETER PHILLIPS, Alternate

California State Lands Commission  
DAVE PLUMMER, Treasurer  
JANE SEIGELSKY, Alternate

National Oceanic and  
Atmospheric Administration  
JAMES R. BYBEE  
CHRIS MOBLEY, Alternate

U. S. Fish and Wildlife Service  
WAYNES WHITE

ALAN R. FENDLETON, Alternate

East Bay Regional Park District  
ROBERT E. DOYLE, Vice Chairman  
KEN BURGER, Alternate

September 5, 1990

William E. Fippin  
Accounting Administrator  
California Department of Justice  
Administrative Services Division  
1515 K Street, Second Floor  
Sacramento, CA 95814

Dear Bill:

At today's meeting of our trustee committee, we decided to retain the California Environmental Trust to provide a wide range of managerial, technical, and administrative assistance to our committee. The committee authorized an initial contract of up to \$25,000 for the CET's services between now and the end of 1990. The committee also authorized BCDC to prepare and administer the contract with the CET on behalf of the committee.

To allow BCDC to enter into this contract, please transfer or otherwise encumber \$25,000 from the Shell trustee fund to BCDC. Please contact BCDC's assistant executive director Russell Abramson (ATSS 597-3686) to arrange the details of this transfer. BCDC will then use the transferred funds to reimburse the cost of CET's services under the contract.

BCDC will incur some limited administrative expenses in preparing and administering the CET contract. I will authorize you to reimburse BCDC for these expenses directly from the trustee fund under my authority to authorize up to \$5,000 for administrative services. I may also be authorizing you to pay for the services that are provided by the CET over the next several directly from the trustee fund if BCDC experiences unexpected delays in getting its contract with CET finalized and approved.

In keeping with the trustee committee's decision on June 19, 1990, because this authorization to release money from the trustee fund involves more than \$5,000, this letter of direction to you is countersigned by the committee vice chairman.



WILLIAM TRAVIS  
Chairman

ROBERT E. DOYLE  
Vice Chairman

cc: Russell Abramson  
Joseph E. Bodovitz, CET

c/o San Francisco Bay Conservation and Development Commission  
Thirty Van Ness Avenue • Suite 2011 • San Francisco, CA 94102 • (415) 557-3686



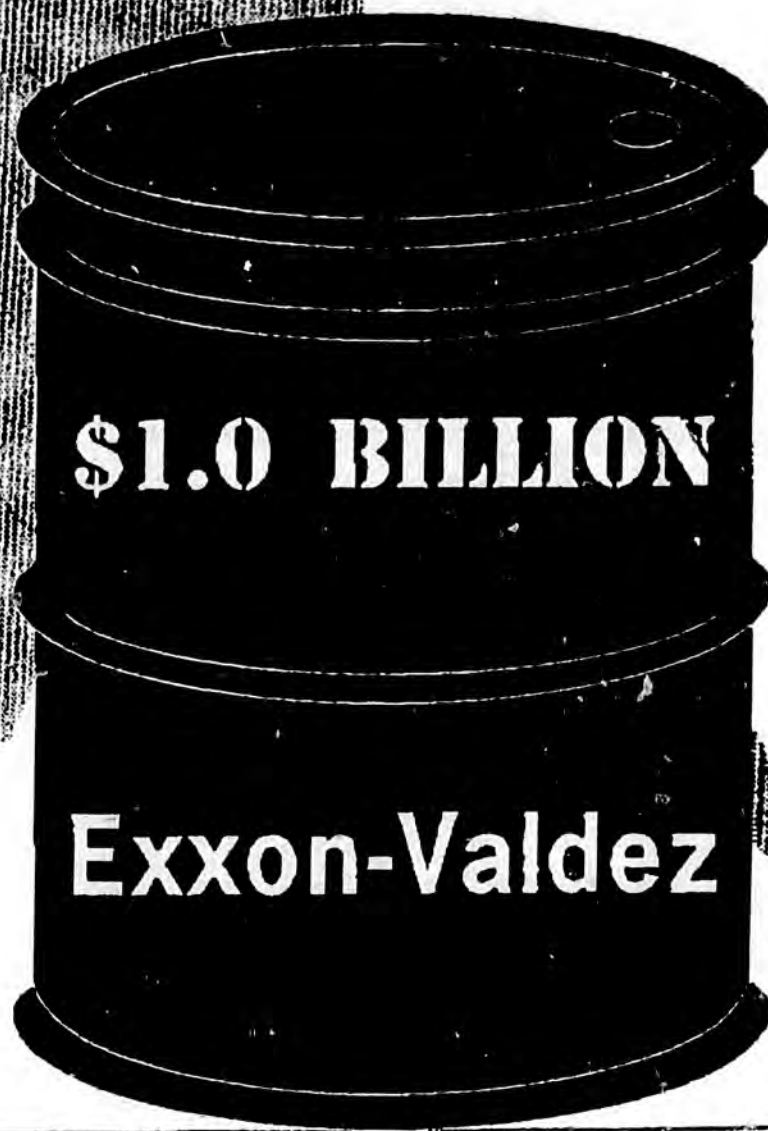
# Exxon-Valdez Settlement Largest Ever

NOAA LEGISLATIVE AFFAIRS

Mar 13, 91 13:25 No. 014 P. 06

**Shell-Martinez**  
San Francisco Bay • 1988

**\$19.7 MILLION**



# OPPOSITION GROWS OVER VALDEZ PACT

## Lawmakers and Alaskans Ask That \$1 Billion Settlement for Exxon Be Rejected

By KEITH SCHNEIDER

Special to The New York Times

WASHINGTON, April 22 — Prompted by new studies on the damage to Prince William Sound and annoyed that scientific and economic information is being kept secret, lawmakers, environmental groups and many Alaskans are raising increasing objections to the \$1.1 billion civil and criminal settlement of the Exxon Valdez oil spill.

In hearings this month held by a state House committee, hundreds of fishermen and native Alaskan villagers urged the panel to reject the proposed settlement, contending that \$1 billion was neither enough money to pay for damage to the environment from the spill nor a severe penalty for the Exxon Corporation.

The House committee and a separate panel of the state Senate met in Juneau today to consider the comments and decide whether to recommend accepting the settlement arising from the 11-million-gallon spill on March 14, 1989. After the panels decide, the issue will go to the full Legislature.

### Opponents in Washington

Opponents of the settlement include Representative George Miller, a California Democrat who is acting chairman of the House Interior Committee. He has asked Federal District Judge H. Russel Holland in Alaska to reject the agreement made with Exxon to settle criminal violations.

Four other House Democrats last week urged the judge to postpone a decision on the settlement until scientific and economic studies on the condition of Prince William Sound are made public.

National environmental groups today also withdrew their earlier support, and officials from native Alaskan villages are pressing a court case in Federal District Court here aimed at scuttling the pact.

By far the largest settlement ever for damage caused by an environmental disaster, the agreement between the Justice Department, Alaska and Exxon calls for the company to pay up to \$1 billion over the next 14 years to reimburse the state and Federal governments for scientific studies and environmental restoration projects. The pact also calls on Exxon and its shipping subsidiary to plead guilty to four criminal violations of environmental law and pay a fine of \$100 million.

Lawyers for the Justice Department and the Alaska Attorney General, Charles E. Cole, have warned that any changes in the agreement could lead to its collapse. In an interview today, Mr. Cole said that more Alaskans now ap-

peared to oppose the agreement, but he said support for the pact is also strong in the state. A poll by an independent company commissioned by the Governor last week showed Alaskans supported the agreement by a ratio of two to one, Mr. Cole said.

"What's happened is that as more people understand the settlement, they realize that \$1 billion paid out over a decade is not enough to make up for the damages caused by the oil spill," Representative Miller said. "The people in Alaska have every reason to be concerned."

Mr. Miller complained this month in two letters to Judge Holland that the

## A deal on oil spill damage may be in jeopardy:

agreement immunizes the Alyeska Pipeline Service Company, the owner of the Trans-Alaska pipeline and the Valdez oil terminal, from prosecution by the Government. Alyeska is owned by Exxon and seven other companies.

He said the protection for Alyeska was not in the public interest because documents his staff uncovered show the company knew it was unable to respond to a major oil spill, but misrepresented its abilities in documents it filed with the state.

### Studies Remain Secret

Opponents are also angry that scientific studies on damage to Prince William Sound, and economic studies that show how much the damage will cost, remain secret.

Earlier this month, the National Oceanic and Atmospheric Administration released a summary of 58 scientific studies that said the oil spill killed hundreds of thousands of birds, thousands of otters and caused extensive damage to shorelines and tidal zones that will persist for years. Economists under contract to the state and the Fed-

eral Government said in interviews that they calculated in separate reports that the value of the damage was \$3 billion to \$5 billion.

Fishermen in Prince William Sound and Representative Gerry E. Studds, a Massachusetts Democrat who is chairman of a House Merchant Marine and Fisheries subcommittee, have asked Judge Holland to delay ruling on the settlement until the studies are made public.

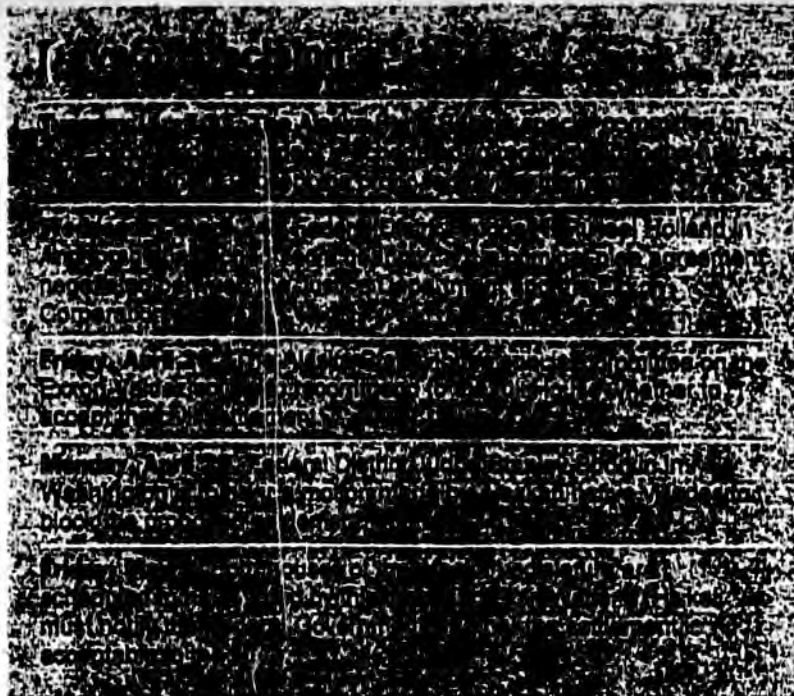
### 'It's Made People Really Mad'

"This is the big thing that caught everybody's attention," said Marilyn Leland, executive director of Cordova District Fishermen United, an association in Cordova, Alaska. "The state decides it is going to withhold the damage assessment data. We're the ones who bought this information the state says we can't get. We can't tell if the settlement is worth it because we don't know what the damages are. It's made people really mad."

Mr. Studds added: "The Federal and state governments and Exxon are essentially asking us to take on faith the fact this is a fair settlement. I hope it is. I would hate to see some of the procedures used in this case repeated elsewhere."

Native Alaskan villages are also seeking to bar the settlement in a District Court here. In February, the villagers filed suit against the Government seeking to prevent the settlement from being signed. Lawyers for the native groups said the settlement would prevent the villagers from gaining damages from Exxon. District Judge Stanley Sporkin agreed to review the settlement and a hearing on the suit is scheduled for next Monday.

Exxon said through a spokesman today that it would not respond to questions about the settlement. Amy Casner, a spokeswoman for the Justice Department, said, "We'll be addressing the court Wednesday and anything more we have to say we'll say there."



company or national banking association has a combined capital and surplus of at least \$15,000,000.00; common stocks, preferred stocks, preferred stock or debt instruments convertible into common stock, of companies whose primary business is located in the United States or Canada; open or closed end mutual funds or investment companies whose assets meet the criteria in subparagraph (B)(1) above and whose primary investment objectives are consistent with those of the Trust. The use of covered call or put options will be permitted.

(C) Administration --

(1) Additions to Trust

The Trustees may accept property in addition to the initial cash contribution of the Settlor, whether real, personal, or mixed, by way of gift, bequest, or devise from any person, firm, trust, or corporation, to be held, administered and disposed of in accordance with and pursuant to the provisions of this Declaration, but no gift, bequest or devise of additional property shall be accepted if it is conditioned or limited in such manner as shall in the opinion of the Trustees jeopardize the Federal income tax exemption of this Trust pursuant to section 501(c)(3) of the Internal Revenue Code of 1954, as amended, or its status as other than a private foundation under section 509(a)(3) of said Code.

(2) Operational Prohibitions

Income or principal derived from contributions by corporations shall be distributed by the Trustees for use solely within the United States or its possessions. No part



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of the net earnings of this Trust shall inure or be payable to or for the benefit of any private shareholder or individual, except that the Trust shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Paragraph II hereof. No substantial part of the activities of this Trust shall be the carrying on of propaganda, or otherwise attempting to influence legislation. No part of the activities of this Trust shall be the participation in, or intervention in (including the publication or distribution of statements) any political campaign on behalf of any candidate for public office, or in any litigation other than litigation directly related to the administration of the Trust.

(3) Duration

This Trust shall continue in perpetuity.

(4) Charitable Corporation

The Settlor authorizes and empowers the Trustees to form and organize a nonprofit corporation limited to the uses and purposes provided for in this Declaration. Such corporation may be organized under the laws of any State or under the laws of the United States. Such corporation, when organized, shall have power to administer and control the affairs and property and to carry out the uses, objectives and purposes of this Trust. Upon the creation and organization of such corporation, the Trustees are authorized and empowered to convey, transfer and deliver to such corporation all the property and assets to which this Trust may be or become entitled. The charter, bylaws, and

other provisions for the organization and management of such corporation and its affairs and property shall be such as the Trustees shall determine, consistent with the provisions of this paragraph.

(5) General

In extension and not in limitation of the common law and statutory powers of trustees and other powers granted in this Declaration of Trust, the Trustees shall have the following discretionary powers:

(a) To invest and reinvest additional principal and income therefrom as provided in Article IV(B).

(b) To sell, lease, or exchange any personal, mixed, or real property, at public auction or by private contract, for such consideration and on such terms as to credit or otherwise, and to make such contracts and enter into such undertakings relating to the trust property, as they consider advisable, whether or not such leases or contracts may extend beyond the duration of the trust.

(c) To borrow money for such periods, at such rates of interest, and upon such terms as the Trustees consider advisable, and as security for such loans to mortgage or pledge any real or personal property with or without power of sale; to acquire or hold any real or personal property, subject to any mortgage or pledge on or of property acquired or held by this Trust.

(d) To execute and deliver deeds, assignments, transfers, mortgages, pledges, leases, covenants, contracts, promissory

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notes, releases, and other instruments, sealed or unsealed, incident to any transaction in which they engage.

(e) To vote, to give proxies, to participate in the reorganization, merger or consolidation of any concern, or in the sale, lease, disposition, or distribution of its assets; to join with other security holders in acting through a committee, depositary, voting trustees, or otherwise, and in this connection to delegate authority to such committee, depositary, or trustees and to deposit securities with them or transfer securities to them; to pay assessments levied on securities or to exercise subscription rights in respect of securities.

(f) To employ a bank or trust company as custodian of any funds or securities and to delegate to it such powers as they deem appropriate; to hold trust property without indication of fiduciary capacity but only in the name of a registered nominee, provided the trust property is at all times identified as such on the books of the trust; to keep any or all of the trust property or funds in any place or places in the United States of America; to employ clerks, accountants, investment counsel, investment agents, and any special services, and to pay the reasonable compensation and expenses of all such services in addition to the compensation of the Trustees.

V. Amendment: This Declaration of Trust may be amended at any time or times by written instrument or instruments signed and sealed by the Trustees, and acknowledged by all of the Trustees. No amendment shall authorize the Trustees to change the provisions of Paragraphs II, III, or IV, without the express written



consent of the Settlor and the non-federal parties to the litigation referred to in Paragraph 1, or to administer this Trust in any manner or for any purpose contrary to the provisions of section 501(c)(3) of the Internal Revenue Code of 1954, as amended. An amendment of the provisions of this Paragraph (or any amendment to it) shall be valid only if and to the extent that such amendment further restricts the Trustees' amending power. All instruments amending this Declaration shall be noted upon or kept attached to the executed original of this Declaration held by the Trustees.

VI. Miscellaneous:

(1) No Trustee of this Trust shall be required to furnish any bond or surety. None of them shall be responsible or liable for the acts or omissions of any other of the trustees or of a custodian, agent, depository or counsel selected with reasonable care.

(2) The Trustees serving under this Declaration are authorized to pay to themselves amounts for reasonable expenses incurred in the administration of this Trust, but in no event shall any Trustee receive any other compensation from the income or principal of this Trust.

(3) Any person may rely on a copy, certified by a notary public, of the executed original of this Declaration held by the Trustees, and of any of the notations on it and writings attached to it, as fully as he might rely on the original documents themselves. Any such person may rely fully on any statements of fact certified by anyone who appears from such original

documents or from such certified copy to be a Trustee under this Declaration. No one dealing with the Trustees need inquire concerning the validity of anything the Trustees purport to do. No one dealing with the Trustees need see to the application of anything paid or transferred to or upon the order of the Trustees.

VII. Prohibited Activities: Notwithstanding any other provision of this Declaration, the Trust shall not carry on any activity not permitted to be carried on (a) by a trust exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding provision of any subsequent Federal tax law), and (b) by a trust contributions to which are deductible under section 170(c)(2) of the Internal Revenue Code of 1954 (or the corresponding provision of any subsequent Federal tax law).

VIII. Dissolution: In the event of the dissolution or final liquidation of the Trust, none of the property of the Trust nor any proceeds thereof shall be distributed to or divided among any of the trustees or officers of the Trust or inure to the benefit of any individual. After all liabilities and obligations of the Trust have been paid, satisfied and discharged, or adequate provisions made therefor, all remaining property and assets of the Trust shall be distributed to one or more organizations which shall comply with all of the following conditions:

A. Such organization shall be organized and operated exclusively for charitable purposes with one of its principal objectives being the preservation of the environment;

ACE 460440

B. Transfers of property to such organization shall, to the extent then permitted under the statutes of the United States, be exempt from Federal gift, succession, inheritance, estate or death taxes (by whatever name called);

C. Such organization shall be exempt from Federal income taxation by reason of section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding provision of any subsequent Federal tax law); and

D. Contributions to such organization shall be deductible by reason of section 170(e)(2) of the Internal Revenue Code of 1954 (or the corresponding provision of any subsequent Federal tax law).

IX. Substitution of Supported Organization: In the event that either the State of Nebraska or the National Wildlife Federation, or both, shall dissolve or become an organization not described in Sections 170(b)(1)(A) and 509(a)(1) or (2) of the Internal Revenue Code (as those provisions may subsequently be amended), the Trustees hereof shall designate a substitute organization for purposes of Paragraph II hereof. Any such designated substitute supported organization shall meet the requirements of Paragraph VIII, subparagraphs A through D, and, in addition, shall be described in Section 509(a)(1) or (2) of the Internal Revenue Code (as that provision may subsequently be amended).

X. Construction of Trust: As this Declaration is made in connection with and as a part of the settlement of the litigation referred to in Paragraph I, any party to that litigation may, in



accordance with the final order of the Court in that litigation, by appropriate notice, petition the Court for resolution of any questions arising out of or concerning this Declaration, including, without limitation, the construction or administration of the Trust, its termination, the distribution of its income and assets, or the determination of the person or organization authorized to designate a Trustee or whether someone has been designated a Trustee. This Trust shall be governed by the laws of the State of Nebraska and the provisions of the Internal Revenue Code of 1954 as amended.

BASIN ELECTRIC POWER COOPERATIVE,  
INC.,

(SEAL)

By \_\_\_\_\_  
President

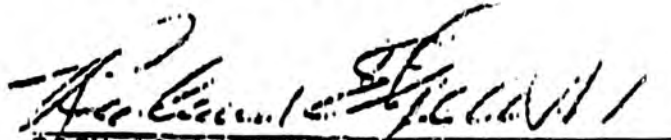
ATTEST:

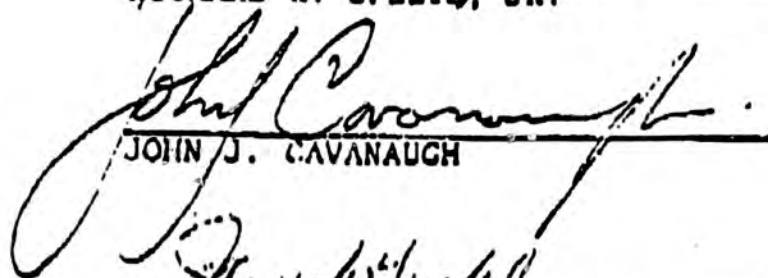
\_\_\_\_\_  
Secretary

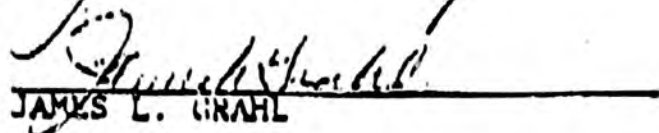
CERTIFICATION

We, the undersigned, do hereby certify that we are the duly designated and acting Trustees of The Platte River Whooping Crane Critical Habitat Maintenance Trust; that the foregoing Trust Declaration is a true, correct, and complete copy of the original Trust Declaration, as amended by all amendments to said Trust Declaration which have been duly adopted by the Trustees of said Trust at any time from the establishment of said Trust to the date hereof; and that we, and each of us individually, do hereby adopt said Trust Declaration.

DATED as of the 15th day of February, 1982.

  
RICHARD E. SPELTS, JR.

  
JOHN J. CAVANAUGH

  
JAMES L. GRAHL

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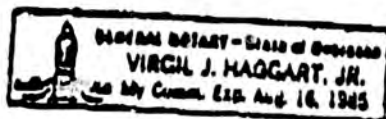
P. 17

STATE OF NEBRASKA     )  
                              ) ss.:  
COUNTY OF HALL        )

On this 15th day of February, 1982, before me, a notary public in and for said county and state, personally came RICHARD E. SPELTS, JR., JOHN J. CAVANAUGH, and JAMES L. GRAIL, known to me to be the identical persons whose signatures are affixed to the foregoing Certification as Trustees of The Platte River Whooping Crane Critical Habitat Maintenance Trust; and they acknowledge the execution of said Certification to be their voluntary act and deed.

WITNESS my hand and notarial seal the date last above written.

  
\_\_\_\_\_  
Notary Public

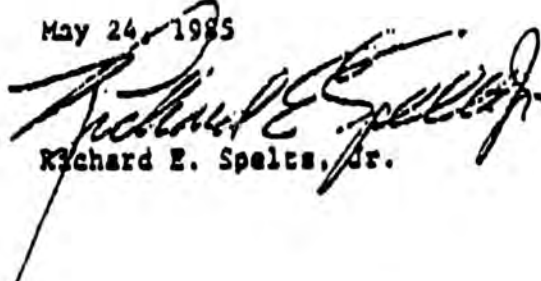




## RE: POLICY CONCERNING OVERHEAD ON CONTRACTS

The Platte River Whooping Crane Critical Habitat Maintenance Trust is a private nonprofit conservation organization concerned with the maintenance and rehabilitation of migratory bird habitat along the Platte and North Platte Rivers in central and western Nebraska. The Trust, through its management, scientific research and educational efforts is dedicated to preserving and maintaining the natural environment of the Platte River Ecosystem. Because the Trust is a nonprofit organization and is operating to preserve natural resources for public benefit, the Trustees of the Platte River Whooping Crane Critical Habitat Maintenance Trust have adopted a general policy not to pay overhead costs on any contracts the Trust may let to Universities or other agencies as part of its research, management and educational programs.

May 24, 1985

  
Richard E. Spelts, Jr.

ATTACHMENT IV

Foundation Name -

Hudson River Foundation for Science and Environmental Research, Inc.

Form -

Incorporated pursuant to the laws of the State of New York and qualified under applicable federal and state law to accept contributions on a tax deductible basis as, if possible, a public and not a private foundation.

Board of Trustees -

Initially ten distinguished persons independent of government as agreed by the signatory parties to the Agreement. Board members will serve three years with initial terms staggered. Board would appoint new members to fill vacated or expired terms. Persons may be reappointed without limitation. Board members shall serve without compensation but reasonable expenses may be paid.

General Purpose of Foundation -  
As stated in Certificate of Incorporation

To sponsor scientific, economic and public policy research on matters of environmental, ecological and public health concern and to publish the results of such research.

Hudson River Fund Established  
Under the Hudson River  
Settlement Agreement

Initial Amount:

\$12,000,000 to be contributed by the Utilities.

Restrictions:

a) the funds and income can be used solely for scientific, ecological and related public policy research on issues and matters of concern to the Hudson River, its tributaries, and its drainage basin with emphasis given, but not limited to, mitigating fishery impacts caused by power plants, providing information needed to manage the fishery resources of the Hudson River, under-

standing the factors related to abundance and structure of fish population, and gaining knowledge of the condition of the Hudson River ecosystem.

b) that such grants from the restricted fund can be made solely upon recommendation of a panel established as set out below (referred to hereinafter respectively as the "Hudson River Fund" and the "Hudson River Panel").

c) the monies in the Hudson River Fund shall be entrusted for investment management to one or more banks or trust companies of high repute doing business in the State of New York or insurance companies.

Hudson River Panel -

Composition:

Seventeen persons, nine of whom must have scientific backgrounds, nominated as follows:

- o Nominated by Regional Director of EPA - two persons, one of whom must have a scientific background;
- o Nominated by New York State Commissioner of Environmental Conservation - two persons, one of whom must have a scientific background;
- o Nominated collectively by the utilities signatory to the settlement - two persons, one of whom must have a scientific background;
- o Nominated by the Hudson River Fishermen's Association, Inc. - two persons, neither of whom need have a scientific background;



- o Nominated collectively by Scenic Hudson, Inc., and Natural Resources Defense Council, Inc. - two persons, one of whom must have a scientific background;
- o Nominated by the Attorney General of the State of New York - two persons, one of whom must have a scientific background;
- o Nominated by the Foundation Board of Trustees - five persons, four of whom must have scientific backgrounds and one of whom must have an involvement in commercial fishing.

**Term:**

Two years and three years staggered on initial appointment as designated by the nominating party. Three years thereafter. Persons may be reappointed without limitation.

**Compensation:**

The Board may pay reasonable compensation and expenses to panel members who are not otherwise compensated for their time, efforts or expenses as Hudson River Panel members.

**Chairman of Panel:**

Named by the Board of Trustees from those nominated as above.

**Panel Decision on Grants:**

Grants and allocation of funds from the Hudson River Fund shall be made solely upon recommendation by the Hudson River Panel, by majority vote of the Panel. i.e., nine votes.

**Other Qualifications:**

No person may serve on both the Board and the Hudson River Panel.

**Changes in Panel Composition:**

In the event that one of the agencies or organizations appointing persons to the Hudson River Panel ceases to exist, allows its appointments to lapse for a significant period or advises the Board it no longer will participate, the Board of Trustees will substitute a new agency or organization of similar activities and program to nominate Hudson River Panel members, or if that cannot be satisfactorily accomplished, the Board shall appoint the missing Hudson River Panel members.

**Board Action on Grants:**

a) Each year the Board shall authorize a budget stating the amount of money available to support research and grants to be approved by the Hudson River Panel.

b) In any event, if the Hudson River Panel recommends grants, the Board shall authorize such grants up to 90% of the net income of the Hudson River Fund for that year;

c) Board may review awards recommended by the Hudson River Panel solely to assure fiscal responsibility.

**Other Functions of Panel:**

a) Develop annually a comprehensive scope of interests and scientific work;

b) Request review and advice concerning proposals or comprehensive scope of interests and scientific work, as desired, by scientists and other authorities not members of the Panel. Panel may authorize payment of reasonable fees and costs for such work out of its annual budget.

Staff and Other Expenses -

The Board shall, with consultation of Hudson River Panel, be authorized to expend funds for an administrator and for such other personnel and expenses as the Board deems necessary for the Hudson River Panel, Hudson River Fund, and Hudson River Foundation. In the event that the Hudson River Foundation receives grants or funds for purposes other than the Hudson River Fund, then general administrative expenses of the Hudson River Foundation shall be allocated on a pro rata basis as between the grants.

Initial Establishment of Program - During the first year after receipt of the restricted grant, the Hudson River Panel with Board assistance shall sponsor a conference meetings and/or panels as in their judgment shall be desirable, to obtain from scientists, science administrations, and other persons otherwise qualified by reason of experience and involvement in Hudson River issues, recommendations on a scope of interests, scientific priorities and initial goals for the Hudson River Panel and Fund.



BYLAWS  
OF  
VIRGINIA ENVIRONMENTAL ENDOWMENT

## ARTICLE I

Officers

Section 1. Qualifications and Terms of Office. The officers of the corporation shall be a President, one or more Vice Presidents, a Secretary and a Treasurer. The President shall be a director of the corporation. Any two or more offices may be held by the same person, except the offices of President and Secretary. Officers shall be elected annually at the annual meeting of directors for terms of office expiring at the next succeeding annual meeting of directors. Any officer may be removed by the Board of Directors at any time with or without cause, but only by a vote of not less than two-thirds of the number of directors then in office, at a meeting held pursuant to not less than ten (10) days' prior written notice stating that a purpose of such meeting is to consider and act upon removal of such officer. Vacancies in any office, however occurring, shall be filled by the Board of Directors.

Section 2. President. The President shall be the chief executive officer of the corporation, in general charge of its affairs in the ordinary course of its activities. He shall preside at all meetings of directors, and shall have all authority and duties provided the chief executive officer of a

corporation by law, including but not limited to authority to execute notes, bonds, contracts and other instruments on behalf of the corporation, and such additional authority and duties as may be prescribed from time to time by the Board of Directors.

Section 3. Vice Presidents. The Vice President or, in the event there is more than one Vice President, the Senior Vice President, shall exercise the authority and duties of the President during the President's absence or inability to act. Action taken by a Vice President in the performance of the duties of the President shall be conclusive evidence of the absence or inability to act of the President at the time such action was taken. Vice Presidents shall have such other authority and duties as may be provided by law or assigned from time to time by the President or by the Board of Directors.

Section 4. Secretary. The Secretary shall keep accurate records of the acts and proceedings of all meetings of the Board of Directors. He shall give all notices required by law or by these bylaws. He shall have general charge of the corporate books and records and of the corporate seal, and he shall affix the seal to any lawfully executed instrument requiring it. He shall have general charge of the records of the corporation, shall sign such instruments as may require his signature, and in general shall perform all duties incident to the office of Secretary and such other duties as may be assigned to him from time to time by the President or by the Board of Directors.

Section 5. Treasurer. The Treasurer shall receive, collect, deposit and disburse all funds belonging, contributed or due to the corporation and shall have custody of the same under the direction of the Board of Directors. He shall keep full and accurate accounts of the finances of the corporation. The Treasurer shall in general perform all duties incident to his office and such other duties as may be assigned to him from time to time by the President or by the Board of Directors.

## ARTICLE II

### Directors

Section 1. Directors. The Board of Directors shall consist of seven persons. Such number may be increased or decreased from time to time only by amendment of the articles of incorporation of the corporation, but it shall never be less than three nor more than seven.

Section 2. Authority. The Board of Directors shall have and exercise all the usual powers of directors and shall govern and direct the affairs of the corporation.

The Board of Directors shall have the sole authority to direct the disbursement of any and all funds of the corporation in accordance with the purposes set out in Article II of the Articles of Incorporation of Virginia Environmental Endowment. The Board members shall not be entitled to compensation for their services hereunder but shall be entitled to reimbursement for their reasonable expenses and for expenses incurred on behalf of the corporation.



The Board of Directors shall have authority to contract with such persons or organizations as it deems advisable for the overall management of the corporation's programs and projects, including the selection of appropriate entities to carry out such programs or projects.

### ARTICLE III

#### Meetings

Section 1. Annual Meeting. The annual meeting of directors shall be held on the first Monday in March of each year, beginning with the year 1977.

Section 2. Time and Place; Notice. Meetings shall be held at such times and places as may be designated by action of the Board of Directors. Except as otherwise provided by law or by these bylaws, notice of meetings need not be in writing, and the purpose of any meeting need not be specified in the notice.

Section 3. Quorum. A majority of the number of directors in office shall constitute a quorum for the transaction of business at meetings of the Board of Directors and except as otherwise provided by law or these bylaws, a majority vote of those present at a meeting at which a quorum is present shall constitute proper action by the Board.

Section 4. Special Meetings. Special meetings of the Board of Directors may be called by the President or at the request of not fewer than two Board members.

## ARTICLE IV

Committees

Section 1. Technical Advisory Committee. The Board of Directors may, in its discretion, establish a Technical Advisory Committee representing governmental and private interests who, at such times as called upon, will advise the Board members concerning the technical and scientific aspects of research projects, remedial efforts and other programs under consideration by the Board of Directors. Nominations for membership on any such Technical Advisory Committee shall be requested from the Governor of Virginia or his designees, the United States Environmental Protection Agency, The United States Army Corps of Engineers and Allied Chemical Corporation. Notwithstanding such nominations, the Board of Directors may make such appointments as it deems appropriate to have a broad, well balanced Technical Advisory Committee.

Section 2. Other Committees. Such other special committees as the Board of Directors shall consider necessary may be created, staffed and dissolved by such Board from time to time.

ARTICLE V

Seal

The seal of the corporation shall be flat-faced circular die of which there may be any number of counterparts with the word "SEAL" and the name of the corporation engraved thereon.

ARTICLE VI

Amendments

These bylaws may be amended, repealed or altered (except as provided in Article II, Section 1 as to the number of directors) in whole or in part by the vote of a majority of the directors in office but only if written notice containing the text of the proposed amendment shall have been given all directors at least ten (10) days prior to the meeting at which such amendment is to be voted upon.





The Endowment came about in a unique way: by court order. In 1977 Allied Chemical Corporation was fined \$13.2 million for polluting the James River with Kepone. Instead of automatically requiring Allied to pay this fine, Judge Robert R. Merhige Jr. encouraged Allied to develop a way for the funds to be used to benefit the people of Virginia. As a result, Allied proposed that it make a voluntary contribution of \$8 million to start an environmental fund for Virginia. Judge Merhige responded favorably to this suggestion and reduced Allied's fine by the same amount.

In 1981, the Endowment received a \$1 million fund paid by the FMC Corporation as a result of a guilty plea agreement in a federal felony prosecution. These funds support projects related to water quality in the Kanawha River and Ohio River Valleys.

Pursuant to the terms of a consent decree, the Endowment has been designated to receive \$193,599 from settlement funds paid by the Bethlehem Steel Corporation. These funds will be used to encourage the public in the Chesapeake Bay region to participate in NPDES permit proceedings and to support projects related to the effects of toxic substances on the Bay's water quality.

Thus the judicial system has been instrumental in finding constructive, innovative ways of helping to protect the environment.

ARTICLES OF INCORPORATION OF  
VIRGINIA ENVIRONMENTAL ENDOWMENT

A Virginia Non-Stock Corporation

ARTICLE I. Name. The name of the corporation is  
VIRGINIA ENVIRONMENTAL ENDOWMENT

ARTICLE II. Purposes. The corporation is not organized for profit but is organized exclusively for the promotion of social welfare of the people of the Commonwealth of Virginia.

The purpose of the corporation is to fund scientific research projects and to implement remedial efforts and other scientific programs and measures (including financial and economic assistance in the form of loans or otherwise at such terms and interest as the Board of Directors in its sole discretion shall deem appropriate) designed to alleviate the effects of Kepone upon the environment and upon those whose livelihoods have been affected thereby. "The Board of Directors may use funds to improve and enhance the quality of the environment in and about the Commonwealth of Virginia. The Board of Directors shall choose such projects, remedial efforts and programs as, in its sole discretion, shall be of the greatest benefit to the citizens

of Virginia. A substantial portion of the funds of the Endowment should, in the final discretion of the Board of Directors, be directed to implementing those programs which research shows to be the most promising.

ARTICLE III. Powers. The corporation shall have the power to do all things, which are not contrary to, or prohibited by law or these Articles, necessary and proper to achieve the aforesaid purposes. The assets of the corporation shall be held, administered, applied and disposed of only in accordance with the purposes of the corporation. .

No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to, its directors, officers or other private persons; provided, however, the corporation shall be authorized (i) to pay compensation (and to pay or reimburse expenses, including reasonable advances for expenses anticipated in the immediate future) for the performance of personal services which are reasonable and necessary to carry out the purposes stated in ARTICLE II hereof if such compensation (or payment or reimbursement) is not excessive, and (ii) to make payments and distributions in furtherance of the purposes set forth in Article II hereof. Notwithstanding any other provision of these Articles, the corporation shall not carry on any activities not permitted to be carried on by a corporation exempt from federal income tax under Section 501(c)(4) of



the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue law), and it may seek to influence legislation to promote its general purposes to the extent permitted under such Section.

ARTICLE IV. Members. The corporation shall have no members.

ARTICLE V. Registered office and agent. The address of the initial registered office of the corporation is 830 East Main Street, Richmond, Virginia 23212, which is in the City of Richmond, Virginia. Its initial registered agent, whose business address is the same as the registered office of the corporation, is George L. Yowell, who is a resident of Virginia and a director of the corporation.

VI. Board of Directors. The management of the affairs of the corporation shall be vested in its Board of Directors.

(A) Initial Board of Directors. The initial Board of Directors shall consist of three directors whose names and business addresses are as follows:

George L. Yowell, 830 East Main Street, Richmond, Virginia 23212;

Frances A. Lewis, 2601 Monument Avenue, Richmond, Virginia 23220; and

Sydney Lewis, Route 3, Ashland, Virginia.

Such directors shall serve until the first annual meeting of the Board of Directors. Thereafter, the Board of Directors shall consist of distinguished private citizens, to be named by the Honorable Robert R. Merhige, Jr., Judge of the United States District Court for the Eastern District of Virginia, Richmond Division; provided, however, no past or present officer, director or employee of Allied Chemical Corporation shall be eligible to serve on the Board of Directors. Such vacancies as may arise from time to time shall be filled by said judge.

In the event of circumstances precluding said judge from acting to fill such vacancies within thirty days, they shall be filled by the Chief Judge of the United States District Court for the Eastern District of Virginia.

ARTICLE VII. Indemnification. Each director and officer shall be indemnified by the corporation against liabilities, fines, penalties and claims imposed upon or asserted against him (including amounts paid in settlement) by reason of having been such a director or officer, whether or not then continuing so to be, and against all expenses (including counsel fees) reasonably incurred by him in connection therewith, except in relation to matters as to which he shall have been finally adjudged to be liable by reason of having been guilty of gross negligence or

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willful misconduct in the performance of his duty as such director or officer. In the event of any other judgment against such director or officer or in the event of a settlement, the indemnification shall be made only if the corporation shall be advised, in case none of the persons involved shall be or have been a director of the corporation, by the Board of Directors, and otherwise by independent counsel to be appointed by the Board of Directors, that in its or his opinion such director or officer was not guilty of gross negligence or willful misconduct in the performance of his duty, and, in the event of a settlement, that such settlement was, or if still to be made is, in the best interests of the corporation. If the determination is to be made by the Board of Directors, it may rely, as to all questions of law, on the advice of independent counsel. Every reference herein to director or officer shall include every director or officer or former director or officer of the corporation and every person who may have served at its request as a director or officer of another corporation in which the corporation owns shares of stock or of which it is a creditor or, in the case of a non-stock corporation, to which the corporation contributes and, in all of such cases, his executors and administrators. The right of indemnification hereby provided shall not be exclusive of any other rights



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to which any director or officer may be entitled.

Dated: February 1, 1977.

 - Incorporator  
Richmond, Virginia

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,  
STATE OF NEW YORK and THOMAS  
JORLING, New York State Commis-  
sioner of Environmental Conser-  
vation, as New York Trustee of  
Natural Resources, STATE OF NEW  
JERSEY and SCOTT WEINER, New  
Jersey Commissioner of the  
Department of Environmental  
Protection, as New Jersey Trustee  
of Natural Resources, and THE  
CITY OF NEW YORK,

Plaintiffs,

-against-

EXXON CORPORATION,

Defendant.

CV-91-1003

KORMA

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CONSENT ORDER

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WHEREAS, the parties to this Consent Order agree that settlement of the claims in this case against Exxon is in the public interest and that entry of this Consent Order is the most appropriate means to resolve the matters covered herein;

WHEREAS, Exxon Corporation ("Exxon"), through a division, Exxon Company, U.S.A., is the owner and operator of an Inter-Refinery Pipeline ("IRPL") for the transfer of petroleum and petroleum products between the Exxon Bayway Refinery ("Bayway"), located in Linden, New Jersey and the Exxon Bayonne Plant and Terminal ("Bayonne Plant"), located in Bayonne, New Jersey, which pipeline runs in part beneath the Arthur Kill, a body of water separating the State of New Jersey from the State of New York;

WHEREAS, a spill of No. 2 fuel oil ("Spill") occurred from the IRPL on or about January 1-2, 1990;

WHEREAS, No. 2 fuel oil from the Spill entered into the waters of the State of New Jersey and the State of New York and reached the shorelines of both states and property owned by the United States, the States of New York and New Jersey, the City of Elizabeth and the City of New York;

WHEREAS, the United States of America and the Department of Commerce through the National Oceanic and Atmospheric Administration ("NOAA"), and the Department of the Interior, the State of New Jersey and Scott Weiner, Commissioner of the Department of Environmental Protection (hereinafter referred to jointly as the "State of New Jersey"), the State of New York and Thomas C. Jerling, Commissioner of the New York State Department

of Environmental Conservation (hereinafter referred to jointly as the "State of New York") are trustees for, and the City of New York and the City of Elizabeth are owners of, certain natural resources damaged by the Spill;

WHEREAS, the United States of America on behalf of the Department of Commerce through the National Oceanic and Atmospheric Administration, and the Department of the Interior and the Environmental Protection Agency (hereinafter referred to jointly as the "United States") and the State of New York, the City of New York and the State of New Jersey filed a complaint on March 20, 1991, alleging that, by reason of the Spill, Exxon is responsible for the Spill and liable for all cleanup, removal and monitoring costs incurred, all costs of studying both the short-term and long-term effects upon the natural resources, and damages to the natural resources owned, controlled, managed by, held in trust by, appertaining to, or otherwise controlled by the Governments, and all penalties and fines pursuant to the Federal Water Pollution Control Act, the New York Navigation Law, the New York Environmental Conservation Law, the common law of nuisance, and other provisions of statutory and common law:

WHEREAS, the State of New Jersey has instituted a lawsuit entitled State of New Jersey, Department of Environmental Protection v. Exxon Corporation, a Corporation of the State of New Jersey, also d/b/a Exxon Company, U.S.A., Superior Court of New Jersey, Law Division, Union County, Docket No. UMN-L-0387-90, alleging that Exxon is responsible for the Spill and seeking all

cleanup, removal and monitoring costs incurred, all costs of studying both the short and long term effects to the natural resources and environment of the State of New Jersey and all environmental damage costs, including, but not limited to, restoring and/or replacing the state's damaged natural resources and all damages suffered by the citizens of New Jersey for loss of use of these resources;

WHEREAS, the City of Elisabeth has also instituted a lawsuit entitled City of Elisabeth, a Municipal Corporation of the State of New Jersey v. Exxon Corporation, a Corporation of the State of New Jersey, d/b/a Exxon Company, U.S.A., Superior Court of New Jersey, Law Division, Union County, Docket No. UMN-L-0560-90, alleging that Exxon is responsible for the spill and seeking judgment for damages, indemnification for costs of future economic and environmental treatment and surveillance and keeping open claims which may arise by virtue of future economic and environmental conditions resulting from the spill, which suit has been consolidated into the action entitled State of New Jersey, Department of Environmental Protection v. Exxon Corporation, a Corporation of the State of New Jersey, also d/b/a Exxon Company, U.S.A. and City of Elisabeth, a Municipal Corporation of the State of New Jersey v. Exxon Corporation, a Corporation of the State of New Jersey, also d/b/a Exxon Company, U.S.A., Superior Court of New Jersey, Law Division, Union County, Docket No. UMN-L-0387-90;



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WHEREAS, pursuant to the Order of Judge Edward W. Beglin, Jr., Superior Court of New Jersey, dated October 10, 1990, a mediator, Eric R. Max, has been appointed to facilitate a settlement of the consolidated action;

WHEREAS, the City of New York has instituted an action in the Supreme Court of the State of New York, Richmond County, entitled The City of New York and Carlos M. Rivera, as Fire Commissioner of the City of New York v. Exxon Corporation, Index No. 0396/90, alleging that Exxon is responsible pursuant to the New York State Navigation Law, the New York City Hazardous Substance Emergency Response Law, the New York City Fire Code and common law theories of fraud, nuisance, negligence and trespass for the spill and injury caused by it and is seeking cleanup, removal, and monitoring costs, economic, consequential, property and punitive damages, penalties and injunctive relief arising out of the spill;

WHEREAS, pursuant to the Order dated September 18, 1990 of Justice Louis Sangiorgio, Supreme Court, Richmond County, the same mediator has been appointed to facilitate a settlement of the aforesaid litigation commenced by the City of New York;

WHEREAS, the United States of America, acting through the Department of Justice, the Office of the United States Attorney for the Eastern District of New York, NOAA, the Department of the Interior, and the Environmental Protection Agency, and the State of New York, acting through the office of the State Attorney General and the New York State Department of Environmental

Conservation ("NYSDEC"), have attended and participated in mediation sessions conducted pursuant to the mediation orders;

WHEREAS, it is understood that prior to any reopening of the IRPL, Exxon shall obtain from the City of New York a revocable consent to maintain and use certain tunnels and pipelines in Staten Island, identified in a revocable consent given on or about July 19, 1973 to Exxon Corporation;

WHEREAS, Exxon participated in the Bi-State Oil Industry Working Group and, as a member of the audit subcommittee, among others, has agreed that internal audits as reviewed by outside auditors of individual facilities' petroleum transfer operations, including Bayway's, may occur and the facility specific report which results therefrom should be made available to the Governments through NJDEP and NYSDEC.

WHEREAS, Exxon certifies that on March 2, 1990, Exxon voluntarily suspended its tanker and barge operations at Bayway and the Bayonne Plant pending a comprehensive evaluation of marine operations at these facilities; on March 3, 1990, a team drawn from Exxon's worldwide technical resources, supplemented by outside consultants, began a Marine Operations Study (the "MOS") to develop recommendations which, when implemented, would promote the interests of safety and environmental protection; the scope of the MOS included all marine and related terminaling operations from the beginning of inbound maneuvering of tankers and barges to the conclusion of outbound maneuvering; and based on the MOS recommendations, Exxon has voluntarily undertaken the specific

action steps, among others, which are identified in Exhibit A hereto, an update of which will be furnished to the Governments one year after entry of the Consent Order; and normal marine operations resumed at Bayway and the Bayonne Plant on June 11, 1990;

WHEREAS, Exxon certifies that to date it has incurred total costs of approximately ten million dollars (\$10,000,000) in conducting the MOS and implementing its recommendations; and for 1991, Exxon anticipates additional costs in excess of fifteen million dollars (\$15,000,000) resulting from implementation of the MOS, including capital expenditures of at least six million dollars (\$6,000,000) for continued work on capital projects being undertaken as a result of the MOS recommendations;

WHEREAS, Exxon has complied with the New Jersey Spill Compensation and Control Act directive and paid \$661,250.00 to the Governments to conduct a study by the Governments of the effects of the Spill;

WHEREAS, Exxon has undertaken clean-up activities under United States Coast Guard supervision, which activities Exxon certifies cost approximately eighteen million dollars (\$18,000,000), and has undertaken and will undertake, through participation with the Governments as set forth in the attached Memorandum of Agreement and this Consent Order, appropriate actions necessary to restore and replace the natural resources which have been damaged as a result of the Spill;



WHEREAS, Exxon intends to enter a plea of guilty to a crime of negligent violation under Section 309(c)(1) of the Federal Water Pollution Control Act, 33 U.S.C. Section 1319(c)(1) in the United States District Court for the District of New Jersey and make payments totalling five million dollars (\$5,000,000) as specified in the agreements connected with that action;

NOW THEREFORE, it is hereby ordered, adjudged and decreed, and agreed among the parties:

**I. JURISDICTION**

The Court has jurisdiction over the subject matter and over the parties to this action pursuant to 28 U.S.C. Sections 1331, 1332, 1343, 1367 and 33 U.S.C. Sections 1319 and 1321. This Court also has jurisdiction over the subject matter of the pendent state law claims in this action. Venue is proper in this Court pursuant to 28 U.S.C. Sections 1391(b) and (c).

**II. DEFINITIONS**

A. "Natural Resources" shall have the meaning provided in Section 101(16) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601(16).

B. "Governments" shall mean the United States, the State of New York, the City of New York, the State of New Jersey, and the City of Elizabeth.

**III. PARTIES BOUND**

This Consent Order shall apply to and be binding upon and inure to the benefit of the signatories, their present and former officers, directors, trustees, shareholders, agents,

representatives, employees, subsidiaries and affiliates, as well as their heirs, executors, administrators, successors and assigns. Unless otherwise expressly provided elsewhere herein, upon approval and entry of this Consent Order by the Court, the Consent Order shall become effective and constitute a final judgment between and among the governments and Exxon.

#### **IV. PAYMENT**

A. Upon entry of this Consent Order, Exxon shall be obligated to pay the sum of Ten Million Dollars (\$10,000,000) as follows:

1. \$1,500,000 on entry of this Consent Order; of which no more than two hundred fifty thousand (\$250,000) (the precise amount to be verified by an accounting) is to be paid directly to the City of Elizabeth for its response costs and no more than two hundred thousand (\$200,000) (the precise amount to be verified by an accounting), is to be paid directly to the City of New York for its response costs;
2. \$3,000,000 on the first anniversary of the lodging of this Consent Order; three hundred thousand dollars (\$300,000) of which will be paid directly to the City of Elizabeth for improvements to its waterfront park area;
3. \$3,000,000 on the second anniversary of the lodging of this Consent Order;

4. \$833,333 on the third anniversary of the lodging of this Consent Order;
5. \$833,333 on the fourth anniversary of the lodging of this Consent Order; and
6. \$833,334 on the fifth anniversary of the lodging of this Consent Order.

B. The above payments, except as otherwise specified above, shall be used by the Governments for (i) the acquisition of fee title of, or conservation easements on, lands or other property interests including tidal and intertidal wetlands within the New York/New Jersey Harbor and related ecosystems including the Arthur Kill in restoration or replacement of natural resources that have been damaged as a result of the Spill; (ii) the restoration (including the establishment, maintenance and provision of public access) and protection of lands including tidal and intertidal wetlands acquired with such payments, and adjacent lands and wetlands, impacted by the Spill, and other lands including tidal and intertidal wetlands in the New York/New Jersey Harbor and related ecosystems including the Arthur Kill; and (iii) performance of studies in the New York/New Jersey Harbor and related ecosystems including the Arthur Kill.

**C. Funds to Be Paid to Court Registry**

1. Because the Governments' jurisdiction of the injured natural resources is overlapping and the monies recovered are jointly held by the Governments, except as otherwise set forth in Paragraph IV. A, above, no



determination has been made as to the expenditures of monies by any individual government. Accordingly, payments made by Exxon, except as otherwise provided, shall be deposited in the Registry of the Court, United States District Court for the Eastern District of New York.

2. Except as otherwise provided herein in Paragraph IV. A and B, each payment required by this Consent Order shall be made to the Clerk, United States District Court for the Eastern District of New York. Each such payment shall include on its face a statement that it is a payment pursuant to the Consent Order in 91 CV \_\_\_\_\_. Exxon shall cause copies of each such payment and of any transmittal letter accompanying such payments to be sent to the Governments at the addresses set out in Paragraph IV.

3. The Registry of the Court shall receive and hold payments in interest-bearing instruments or in an interest bearing account or in such other manner as the Court shall order. All funds and all interest accrued thereon in the Registry Account shall be held in the name of the "Clerk, United States District Court" for the benefit of the Governments. Upon application by the Governments, as provided for in the Memorandum of Agreement appended hereto as Exhibit B, monies in the

Registry Account shall be disbursed by further order of this Court.

**D. Interest and Penalties for Late Payments**

1. If any payment required of Exxon by Paragraph IV of this Consent Order is not made by the specified date, Exxon shall be liable to the Governments for interest on the overdue amount from the time payment was due until full payment is made at the higher of (a) the rate established by the United States Department of the Treasury under 31 U.S.C. section 3717 and 4 C.F.R. section 102.13 or (b) the prime rate plus 4 percent.

2. If any payment is not made by the date specified, Exxon shall also pay to the Registry Account stipulated penalties in the following amounts for each day the payment is late:

| <u>DAY(S) OF DELAY</u> | <u>PENALTY</u>  |
|------------------------|-----------------|
| 1-5                    | \$1,500 per day |
| 6-30                   | \$3,000 per day |
| Beyond 31 days         | \$5,000 per day |

3. Interest and penalties under this paragraph shall be in addition to any other remedies or sanctions that may be available to the Governments on account of Exxon's failure to comply with the terms of this Consent Order.

**V. REOPENING THE IRPL**

A. Should Exxon determine to reopen the IRPL, Exxon shall undertake a study or studies to determine the extent of any work that may be required to reopen the IRPL or to modify procedures or equipment prior to the recommencement of IRPL operations. Within thirty (30) days of completion of any report of such study prepared by or on behalf of Exxon which addresses findings and/or recommendations of said study concerning the IRPL, Exxon shall send a copy of the report by certified mail to each of the Governments at the addresses designated in Paragraph IV hereof.

B. If Exxon decides to reopen the IRPL, it shall provide written notice by certified mail to the Governments not less than 90 days prior to reopening. Said notice shall state the date Exxon plans to reopen the IRPL and shall specify that portion(s) of the IRPL to be reopened.

C. Not later than thirty (30) days prior to any reopening of the IRPL, Exxon shall: (1) provide the Governments with a written description of the IRPL and its location, sizes, service (i.e., product carried), flow rates, and pressure (the "Major Operating Characteristics"), including a description of the leak detection system, operating and maintenance procedures, and measures taken to reduce the risk of future external damage to the IRPL; (2) provide the Governments with a copy of any application for operation of the IRPL which has been or will be submitted to the United States Department of Transportation ("DOT"); (3) provide a reasonable opportunity for a tour of the



IRPL facilities for a total of not more than 25 representatives from the Governments during which operation of the IRPL and leak detection equipment and procedures will be explained; and (4) send to each of the Governments a notice designating the position, location and telephone number of an employee of Exxon to be available to respond to inquiries from the Governments concerning the IRPL. Exxon shall timely notify the Governments of any change in the position, location or telephone number of said designated employee.

D. Exxon will inform the Governments in writing of any significant change in the Major Operating Characteristics within thirty (30) days of the institution of such change.

E. It is understood that any reopening of the IRPL shall be subject to such regulation by DOT as may be provided for by the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. §§ 2001-2014, or regulations promulgated pursuant thereto. However, neither this Consent Order nor any proceeding taken hereunder shall be construed as or deemed to be evidence or an admission or concession by Exxon of any jurisdiction of any of the Governments over the IRPL or of any authority of any of the Governments to restrict, regulate or authorize use of the IRPL, which is expressly denied by Exxon. None of the provisions of this Consent Order, nor evidence of any negotiations or proceedings in furtherance of the compromise and settlement herein, shall be offered or received in any action or proceeding as an admission or concession that any of the Governments has or

lacks any jurisdiction over, or any authority to restrict, regulate or authorize use of, the IRPL.

F. Until such time as DOT issues an order governing the operation of the IRPL, Exxon agrees that, prior to the reopening of the IRPL, it will (1) develop a new written IRPL operation and maintenance manual, which will include procedures for monitoring pressure during start-up, transfer and shutdown, and for responding to potential leaks during any part of the IRPL operation; (2) develop a formal training program for all IRPL operators and linewalkers consistent with the foregoing operation and maintenance manual; (3) to ensure reliable leak detection of the IRPL, repair or replace the existing leak detection system; (4) develop measures to reduce the risk of future external damage to the IRPL; (5) pressure test the IRPL consistent with any applicable regulation and governmental requirements. Upon the issuance of a DOT order, these requirements will be superseded by the terms of such order.

#### **VI. MARINE OPERATIONS TRAINING**

A. Exxon shall, within one year of the entry of the Consent Order, at its sole expense, provide one-day training sessions concerning its marine operations, including without limitation, lightering and dockside transfer operations, communication system use and marine operation spill prevention, to four groups consisting of twenty-five (25) persons each, to be designated by the Governments. The training shall be at times and places mutually agreed to by Exxon and the Governments.

B. Exxon shall provide one, one-day training session annually for five years, to a group of twenty-five (25) persons to be jointly designated by the Governments in the care and handling of waterfowl and other birds exposed to petroleum spills.

#### VII. DATA DISCLOSURE

Exxon and the appropriate agencies of the Governments shall exchange scientific data as set forth in Exhibit C with respect to the spill, to promote scientific study of the environment, subject to any agreement between a party and its consultant regarding the consultant's right of initial publication. The data disclosed shall be made available as soon as practicable. Such data, at the discretion of the producing party, shall not include any material which would disclose opinion work product or communications between the client and counsel or advice of counsel. No data made available by any Government or by Exxon pursuant to this paragraph shall be admissible in evidence against the party making available that data, or otherwise used against the party making available that data, in any lawsuit or other proceeding; however, any Government or Exxon shall not be precluded from using the same data for any purpose if it is obtained through other means, including but not limited to discovery or court order. The data disclosed by Exxon and the Governments pursuant to this paragraph is subject to claims of attorney work product and other privileges. Disclosure of data pursuant to this paragraph by Exxon or the Governments shall not



be deemed a waiver of attorney work product or any other privilege. The Governments and Exxon agree not to assert or otherwise allege in any litigation or proceeding that the Governments or Exxon waived the work product or any other privilege as a result of the disclosure of data pursuant to this paragraph.

**VIII. PUBLIC COMMENT**

There will be a thirty (30) day public comment period consistent with the procedures set forth in 28 C.F.R. section 90.7, prior to moving the Court to enter this Consent Order.

**IX. EFFECTIVENESS OF CONSENT ORDER**

If this Consent Order does not become effective for any reason, this Consent Order shall be null and void for all purposes and of no further force and effect, and any and all sums paid by Exxon hereunder shall be refunded to Exxon forthwith together with all interest thereon.

**X. RELEASE OF CLAIMS**

A. Effective upon entry of this Consent Order, each of the Governments releases Exxon, its present and former officers, directors, trustees, shareholders, agents, representatives, employees, subsidiaries and affiliates, as well as the heirs, executors, administrators, successors and assigns of any of them, from any and all claims by the Governments, whether legal, equitable or statutory, including without limitation any and all claims under the Federal Water Pollution Act, 33 U.S.C. §§1251 et seq.; the New York Navigation Law; the New York City Fire Code,

N.Y.C. Admin. Code; the New Jersey Spill Compensation and Control Act, N.J.S.A. 22:10-23.11 et seq.; and the Municipal Code of the City of Elizabeth; and all implementing regulations, and under common law, that arise out of or are based on, or would in the future arise out of or be based on: (i) any of the matters alleged in the Complaints served or filed in this action and each of the state court actions described above; (ii) any matter, except verified outstanding obligations to the Coast Guard to pay for equipment, personnel, and materiel, relating to the spill; and (iii) any matter relating to the operation of the IRPL, in connection with the spill, including its leak detection system. As more particularly set forth in Paragraph V.B, this Release of Claims does not limit or waive any right the Governments may have to seek to enjoin operation of the IRPL nor is this Release of Claims a concession by EXXON that the Governments have any jurisdiction over or any right to enjoin the operation of the IRPL.

B. Notwithstanding any other provision of this Consent Order, the release of claims shall not apply to failure by EXXON to satisfy the requirements of this Consent Order.

C. Effective upon entry of this Consent Order, EXXON releases each of the Governments, their agencies, employees and agents from any and all claims by EXXON whether legal, equitable or statutory, including without limitation any and all claims under common law, that arise out of or are based on, or could in

the future arise out of or be based on any matter relating to the Spill.

**XI. DISMISSAL OF ACTIONS WITH PREJUDICE**

Upon entry of this Consent Order, each of the claims for relief in this action is, and each of the causes of action in each of the state court actions described shall be dismissed with prejudice and without costs or disbursements to any party. The Signatories agree that they will enter into and execute all stipulations of Dismissal, with prejudice, necessary to implement the resolution of all controversies between them arising out of the Spill.

**XII. DISCLAIMER OF LIABILITY**

A. Neither entry of this Consent Order nor any action in accordance with this Consent Order shall constitute an admission of liability under any federal, state or local statute, regulation, ordinance, or common law for any fines, penalties, response costs, damages or claims or an admission of any issue of fact or law or of responsibility for the Spill by Exxon, its present or former officers, directors, trustees, shareholders, agents, representatives, employees, subsidiaries or affiliates.

B. The parties further agree that none of the provisions of this Consent Order, nor evidence of any negotiations or proceedings in pursuance thereof, shall be offered or received in evidence in this action or any other action or proceeding by any party for any purpose, except for enforcement of this Consent Order.



**XIII. RESERVATION OF RIGHTS**

Notwithstanding any other provisions of this Consent Order:

A. This Consent Order is not intended to in any way affect the interpretation or enforcement of, or modify or supersede any existing or future license or consent Exxon may now have or in the future obtain to install or operate the IRPL on lands owned or held in trust for the people by the Governments.

B. The Governments reserve all rights they may have to regulate the IRPL and Exxon's oil transfer operations. This Consent Order shall in no way limit those rights and in no way limits any rights the Governments may have to require or impose conditions upon Exxon's installation or operation of the IRPL on lands owned or held in trust for the people by the Governments.

C. This Consent Order does not constitute a settlement or waiver of any right acquired by subrogation or implied indemnification by any oil spill compensation fund which entitles any such fund to bring an action for reimbursement of claims arising from the spill which such fund has acquired. Exxon may assert all defenses and remedies available to it, including failure by the Governments to comply with requirements of the applicable statutes and regulations in any forum. The Governments represent that, to their knowledge, after diligent inquiry, no claims arising out of or related to the spill have been made by any person upon any oil spill compensation fund as of the date of the execution of this Consent Order.

D. Nothing in this Consent Order shall constitute or be construed as a release by Exxon of any claim or cause of action against any person or other entity not a signatory to this Consent Order for any liability it may have arising out of or relating to the Spill.

**XIV. RETENTION OF JURISDICTION BY THE COURT**

The Court shall retain jurisdiction of this matter for the purpose of entering such further orders, direction, or relief as may be appropriate, including any construction of the terms, or implementation or enforcement of this Consent Order.

**XV. DELIVERY OF NOTICES/STUDIES/DOCUMENTS**

All notices, studies, reports, or other documents required to be delivered to representatives of the Governments or Exxon, shall be sent by certified mail, return receipt requested, to the individuals at the addresses set forth below:

**FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:**

Charles Hoffmann, Assistant Branch Chief  
Water, Grants & General Law Branch  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region II  
26 Federal Plaza  
New York, New York 10007

**FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION:**

Marguarite Maters  
Office of General Counsel  
Northeast Region  
National Oceanic and Atmospheric  
Administration  
One Blackburn Drive  
Gloucester, Massachusetts 01930

**FOR THE DEPARTMENT OF THE INTERIOR:**

Mark Barash  
Office of Regional Solicitor  
Department of Interior  
Suite 612  
One Gateway Center  
Newton Corner, Mass 02158

**FOR THE STATE OF NEW YORK:**

Gordon J. Johnson  
Deputy Bureau Chief  
New York State Dept of Law  
Environmental Protection Bureau  
120 Broadway  
New York, New York 10271

Carol Ash  
Regional Director, Region II  
New York State Department of  
Environmental Conservation  
47-40 Twenty First Street  
Long Island City, New York 11101

**FOR THE STATE OF NEW JERSEY:**

Kenneth W. Elvell  
Deputy Attorney General  
Division of Law  
Hughes Justice Complex  
CN 112  
Trenton, New Jersey 08623

Wayne Kovitz, Chief  
Bureau of Compliance and Technical Services  
Hazardous Waste Enforcement Element  
CN 028  
401 East State Street  
Fifth Floor  
Trenton, N.J. 08625-0028

Paul Hauge  
New Jersey Department of Environmental Protection  
Division of Science and Research  
CN 409  
401 East State Street  
First Floor  
Trenton, N.J. 08625-0409



**FOR THE CITY OF NEW YORK:**

Nancy Lawson, General Counsel  
New York City Department of  
Environmental Protection  
One Center Street  
New York, New York 10007

Marc Matsil, Director  
Natural Resource Group  
Department of Parks and Recreation  
The Arsenal North  
1234 Fifth Avenue  
New York, New York 10029

Peter H. Lehner, Director  
Environmental Prosecution Unit  
New York City Law Department  
100 Church Street  
New York, New York 10007

**FOR THE CITY OF ELIZABETH:**

John W. Surney, Director  
Health, Welfare & Housing  
City of Elizabeth  
50 Winfield Scott Plaza  
Elizabeth, New Jersey 07201-2462

**FOR EXXON CORPORATION:**

Donald D. Esch  
c/o Exxon Company, U.S.A.  
1400 Park Avenue  
Linden, New Jersey 07036

**XVI. COMPLIANCE WITH LAWS AND REGULATIONS**

The Consent Order shall not be construed in any way to relieve Exxon from the obligation to comply with any applicable federal, state, or local law or regulation.

**XVII. REPRESENTATIVES**

Each undersigned representative of the parties to this Consent Order certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Order and to execute and legally bind such party to this document.

**XVIII. COUNTERPARTS**

This Consent Order may be executed in any number of counterparts and each executed counterpart shall have the same force and effect as an original instrument.

**XIX. HEADINGS**

The headings in this Consent Order are inserted for convenience only and are not intended to be a part of or to affect the meaning or interpretation of the Consent Order.

SO ORDERED THIS \_\_\_\_\_ day of \_\_\_\_\_ 1991.

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United States District Judge  
Eastern District of New York



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,  
STATE OF NEW YORK and THOMAS C.  
JORLING, New York State Commis-  
sioner of Environmental Conserva-  
tion, as New York Trustee of  
Natural Resources, STATE  
OF NEW JERSEY and SCOTT  
WEINER, New Jersey Commissioner  
of the Department of Environ-  
mental Protection, as New  
Jersey Trustee of Natural  
Resources, and THE CITY  
OF NEW YORK,

Plaintiffs,

-against-

EXXON CORPORATION,

Defendant.

**CY-91-1003**  
91 CIV **EDMAN, J.**

The United States of America, the States of New York  
and New Jersey, New York State Commissioner of Environmental  
Conservation Thomas C. Jorling, as New York State Trustee of  
Natural Resources, New Jersey Commissioner of Environmental  
Protection Scott Weiner, as New Jersey Natural Resource Trustee,  
and the City of New York, by the undersigned, hereby allege on  
information and belief:

**NATURE OF THE ACTION**

1. This is a civil action arising as a result of an  
unlawful discharge of oil (the "Spill") in the Arthur Kill from  
defendant Exxon Corporation's Bayway/Bayonne Inter-Refinery Pipe-



line ("IRPL"). Plaintiffs, the United States of America, the States of New York and New Jersey, the State natural resource trustees, and the City of New York seek damages and other relief in connection with the Spill.

#### **JURISDICTION AND VENUE**

2. This Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1332, 1345, and 1367, and Sections 309 and 311 of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §§ 1319 and 1321. This Court also has pendent jurisdiction over the subject matter of the State law claims in this action.

3. Venue is appropriate in the Eastern District of New York pursuant to 28 U.S.C. § 1391(b) and (c).

#### **PARTIES**

4. Defendant Exxon Corporation ("Exxon") is a corporation incorporated under the laws of the State of New Jersey. Its principal place of business is Houston, Texas. Exxon conducts business in the States of New York and New Jersey. Exxon Company, U.S.A., is a division of Exxon Corporation responsible for its oil and gas operations in the United States. Exxon, directly and through Exxon Company, U.S.A., owns and operates the IRPL for the transfer of petroleum products between the Exxon Bayway refinery in Linden, New Jersey ("the Bayway plant") and the Exxon Bayonne plant in Bayonne, New Jersey ("the Bayonne plant") via Staten Island, New York.

5. The United States of America ("United States") files this action pursuant to Sections 309 and 311 of the FWPCA, 33 U.S.C. §§ 1319 and 1321. On behalf of the U.S. Department of Commerce, the U.S. Department of the Interior, the United States seeks recovery for damages to natural resources under the trusteeship of the aforementioned departments of the United States caused by the spill. On behalf of the U.S. Environmental Protection Agency, the United States seeks recovery of penalties and injunctive relief against Exxon because of the spill. The United States also seeks recovery for recovery of costs incurred in connection with the spill.

6. The State of New York, as a body politic and sovereign entity, brings this action on behalf of itself and as Parans Patriae, trustee, guardian and representative on behalf of all residents and citizens of the State of New York, and as the owner and trustee of the natural resources of the State of New York. The Attorney General of the State of New York is an "authorized representative of the State" within the meaning of the FWPCA, 33 U.S.C. § 1321(f)(5). Thomas C. Jorling ("the Trustee"), Commissioner of the New York State Department of Environmental Conservation, is the designated trustee of natural resources pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. § 9607(f)(2), and is an "authorized representative of the State" within the meaning of Section 311 of

the FWPCA, 33 U.S.C. § 1321(f)(5).

7. The State of New Jersey, as a body politic and sovereign entity, brings this action on behalf of itself and as parens patriae, trustee, guardian and representative on behalf of all residents and citizens of the State of New Jersey, and as the owner and trustee of the natural resources of the State of New Jersey. Scott Weiner, the Commissioner of the New Jersey Department of Environmental Protection ("NJDEP") which is a principal Department in the Executive Branch of the Government of the State of New Jersey, N.J.S.A. 13:1D-1, is an "authorized representative of the State" within the meaning of Section 111 of the FWPCA, 33 U.S.C. § 1321(f)(5). NJDEP is charged by statute with protecting the environment and the public health and preventing pollution of the environment of New Jersey. This includes authority to initiate complaints of pollution of the environment and institute legal proceedings for the prevention of pollution of the environment. N.J.S.A. 13:1D-9e. Scott Weiner brings this action in his official position as Commissioner of NJDEP.

8. The City of New York (the "City"), a municipal corporation existing under the laws of the State of New York, brings this action for relief for trespass, negligence, and nuisance, and seeks recovery of damages and costs.

#### FACTS

9. Exxon transfers petroleum products between the



Bayway plant and the Bayonne plant through the IRPL which runs from Bayway plant, under the Arthur Kill, across Staten Island, New York, under Kill Van Kull/Newark Bay and to the Bayonne plant.

10. On or about 4:00 p.m. on January 1, 1990, Exxon commenced a transfer of No. 2 heating oil from the Bayway plant to the Bayonne plant via the IRPL.

11. The IRPL ruptured approximately 150 feet from the New Jersey shore underneath the Arthur Kill and began to discharge oil into the Arthur Kill at approximately 10:00 p.m. that night.

12. Despite instrument indications of a leak and automatic shutdowns of pumping, Exxon continued pumping and restarted the pumping of oil through the IRPL after automatic shutdowns on several occasions between 10:00 p.m. until 4:30 a.m. on January 1 and 2, 1990, at which time active pumping of oil ceased.

13. Exxon discharged at least 567,000 gallons of No. 2 heating oil from the IRPL into the waters of the States of New York and New Jersey and the City of New York including wetlands in and around the Arthur Kill during January 1-2, 1990.

14. The discharged oil from the IRPL washed onto the shores, inter alia, along the Arthur Kill, Kill Van Kull, and Newark Bay, and onto the shores of Prall's Island, the Isle of Meadows, Shooter's Island, and other places in Staten Island, New

York and the shores of New Jersey and caused, and continues to cause, injury to natural resources in the New York/New Jersey Harbor. The discharge of oil from the IRPL resulted in and caused damage to the waters of the United States, the State of New York, the State of New Jersey, and the City, to the aquatic life therein, to crab habitats, finfish nurseries, and to lands and beaches adjacent thereto, both public and private, waterfowl, finfish, crustaceans and other fauna which feed and rely upon the impacted areas for survival, and the destruction and contamination of vegetation and microorganisms which form the basis of the food chains and habitats for all flora and fauna within the ecosystem, and otherwise damaged the natural resources held in trust by the United States and States for the benefit of their citizens and property owned by New York City.

15. New York City is the owner of Prall's Island, portions of Shooter's Island, Isle of Meadows, and large areas of Staten Island which were impacted directly and indirectly by the spill. New York State is the owner of portions of Staten Island which were impacted directly and indirectly by the spill.

16. Exxon does not have a permit from the United States, State of New York or the State of New Jersey allowing the discharge of oil from the IRPL within the waters of the States.

17. As a result of the discharge of oil from the IRPL, transit by vessels in the Arthur Kill and neighboring waters of the State of New York and State of New Jersey was made unsafe and

ceased, and such waterways were closed.

18. As a further result of the discharge, the Arthur Kill was closed to all ship and barge traffic, during which time the City's barges transporting garbage were required to travel around Staten Island and approach the Fresh Kills Landfill from the south, thereby increasing the City's garbage transportation costs.

19. The United States, the State of New York, the State of New Jersey, and the City have incurred costs in responding to the discharge of oil to monitor, remove, mitigate, and remedy the discharge, and have incurred and will continue to incur costs to restore, rehabilitate and acquire the equivalent of the injured natural resources of the United States and States.

**FIRST CAUSE OF ACTION**  
**(United States, States, and Trustees)**

20. The IRPL is an onshore facility within the meaning of FWPCA § 311(a)(10), 33 U.S.C. § 1321(a)(10).

21. Exxon is an owner and operator of the IRPL within the meaning of FWPCA § 311(a)(6), 33 U.S.C. § 1321(a)(6).

22. The Spill was an unpermitted discharge of oil into the waters of the United States, the adjoining shorelines, and/or the waters of the contiguous zone in harmful quantities within the meaning of FWPCA § 311(b)(3), 33 U.S.C. § 1321(b)(3), and the federal regulation implementing that provision, 40 C.F.R. § 110.3.



23. Pursuant to FWPCA §§ 311(f)(2)-(5), 33 U.S.C. §§ 1321(f)(2)-(5), Exxon is liable to the United States, States of New York and New Jersey, and the natural resource trustees for actual costs incurred relating to the removal of such oil under FWPCA §§ 311(c) and 311(f)(4), 33 U.S.C. §§ 1321(c) and 1321(f)(4). Such actual costs include, but are not limited to, all response costs, and any costs or expenses for the restoration or replacement of natural resources damaged or destroyed as a result of the Oil Spill or the acquisition of resources equivalent to those damaged by the Oil Spill.

**SECOND CAUSE OF ACTION  
(New York State and City)**

24. The Spill and resulting damage were brought about through defendant's negligence in, among other things, restarting the flow of oil through the IRPL without investigating the cause of the automatic shutdown of the IRPL operation.

25. Defendant knew or should have known that the transfer of oil could, in the event of a rupture of the IRPL, cause harm, and owes a duty to the State of New York and the City of New York that the transportation of oil through the IRPL will be performed safely and without the discharge of oil, and that in the event of any discharge, to mitigate and minimize the quantity of oil discharged and to abate such discharge and any consequential effects, and through negligence or recklessness failed to perform that duty.

26. By permitting the discharge of oil, defendant is liable to the State of New York and the City of New York for all injuries incurred by defendant's negligence or recklessness, including but not limited to cleanup costs, consequential damages, and injuries to the State's natural resources and the State's and City's land and property.

**THIRD CAUSE OF ACTION**  
**(New York State, N.Y. trustee and City)**

27. By discharging oil into the waters of the State of New York and the City of New York, defendant has created and/or maintained, or has contributed to the creation or maintenance of a public nuisance, resulting in harm and threat of harm.

28. Defendant is liable to the State of New York, its natural resource trustee, and the City of New York for the abatement of the public nuisance, and for all damages, including cleanup costs, economic and consequential damages, and damages to the natural resources of the States of New York and the lands and property of the City, resulting from such public nuisance.

**FOURTH CAUSE OF ACTION**  
**(United States)**

29. FWPCA §301(a), 33 U.S.C. §1311(a), prohibits any person from discharging pollutants into waters of the United States unless the discharge is authorized by and in compliance with, inter alia, the terms and conditions of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to FWPCA §402, 33 U.S.C. § 1342.

30. Exxon is a person within the meaning of FWPCA § 502(5), 33 U.S.C. § 1362(5).

31. During the Spill Exxon discharged pollutants, within the meaning of FWPCA § 502(6), 33 U.S.C. § 1362(6), from the IRPL into the Arthur Kill and surrounding wetlands which are navigable waters of the United States within the meaning of FWPCA § 502(7), 33 U.S.C. § 1362(7).

32. During the Spill pollutants were discharged from Exxon's IRPL through a point source within the meaning of FWPCA § 502(14), 33 U.S.C. § 1362(14).

33. Pursuant to FWPCA § 309(d), 33 U.S.C. § 1319(d), defendant is liable to the United States for civil penalties of up to \$25,000.00 per day for each violation of FWPCA § 301(a), 33 U.S.C. § 1311(a).

**FIFTH CAUSE OF ACTION  
(New York State)**

34. The New York State Navigation Law, § 173, prohibits the discharge of oil into the waters of the State of New York without a permit.

35. By discharging oil into the waters of the State of New York defendant is liable for penalties as set forth in New York Navigation Law, § 192.

**SIXTH CAUSE OF ACTION  
(New York State)**

36. Defendant is strictly liable for all damages sustained and to be sustained to the land, waters, beaches, fish,



Wildlife, vegetation, other biota, and other natural resources of the State of New York, resulting from the discharge of oil into the waters of the State of New York, for all costs incurred by the State of New York in removing, mitigating, and remedying the discharge of oil and restoring the natural resources, and for all other direct and indirect damages pursuant to New York Navigation Law, § 181.

**SEVENTH CAUSE OF ACTION  
(New York State)**

37. By discharging oil into the waters of the State of New York, defendant has violated New York's general prohibition against pollution as set forth in NY ECL § 17-0501 and is liable for penalties as set forth in NY ECL § 71-1929.

**EIGHTH CAUSE OF ACTION  
(New York State)**

38. By discharging oil into the waters of the State of New York, defendant has violated New York's prohibition against pollution of waters of a marine district as set forth in NY ECL § 17-0503 and is liable for penalties as set forth in NY ECL § 71-1929.

**NINTH CAUSE OF ACTION  
(New York State)**

39. By discharging oil into the waters of the State of New York without a valid permit pursuant to the New York State pollution discharge elimination system (SPDES), defendant has violated NY ECL § 17-0505 and is liable for penalties as set

forth in NY ECL § 71-1929.

**TENTH CAUSE OF ACTION  
(New Jersey State)**

40. By virtue of the foregoing, defendant is liable pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11u, for civil penalties of \$50,000 for each violation and for each day that the violation continues.

41. By virtue of the foregoing, defendant is liable pursuant to the Water Pollution Control Act, 58:10A-10 to plaintiff for civil penalties of \$50,000 for each violation and for each day that the violation continues.

**ELEVENTH CAUSE OF ACTION  
(New York City)**

42. No. 2 oil is a "hazardous substance" within the meaning of the New York City Hazardous Substance Response Law.

43. The release of no. 2 oil from the IRPL into the Arthur Kill and the waters and lands of the State of New York and City presented an immediate and substantial danger to the environment.

44. Pursuant to the New York City Hazardous Substance Response Law, defendant is strictly liable to the City for all the City's cleanup costs and costs of mitigation measures.

**TWELFTH CAUSE OF ACTION  
(New York City)**

45. The transfer of oil through the IRPL is an abnormally dangerous activity.

46. By causing or permitting the discharge of oil, Exxon is strictly liable to the City for all cleanup costs incurred by the City, and all direct and indirect damages to the City resulting from the discharge of oil.

**THIRTEENTH CAUSE OF ACTION  
(New York City)**

47. The discharge of oil and its washing ashore onto properties owned by the City unreasonably interfered with the City's use and enjoyment of its property by fouling its beaches, marshes and waters, hindering its efforts to encourage wildlife and disrupting City operations, thus creating a private nuisance and causing the injuries stated above.

48. Exxon negligently or recklessly caused or permitted the discharge of oil into the Arthur Kill, and is thus liable to the City for all injuries incurred by the City resulting from the private nuisance, including but not limited to cleanup costs, consequential damages, and injuries to the City's properties.

**FOURTEENTH CAUSE OF ACTION  
(New York City)**

49. The discharge of oil into the Arthur Kill and the washing ashore of oil onto Staten Island and other islands owned by the City without any right of entry constitutes a continuing unauthorized intrusion and a continuing trespass onto the City's property, causing the injuries stated above.

50. Exxon negligently or recklessly caused or



permitted the discharge of oil, and is thus is liable to the City for all injuries incurred by the City caused by the trespass.

**FIFTEENTH CAUSE OF ACTION  
(New York City)**

51. On or about December 30, 1970, the City Board of Estimate granted to Humble Oil & Refining Company, a predecessor corporation to Exxon, a revocable consent, to continue to maintain and use three tunnels in Staten Island containing the IRPL.

52. The revocable consent provided that it "in no case shall extend beyond July 28, 1979 and thereupon all rights of the grantee . . . by virtue of this consent, shall cease and determine."

53. Exxon intentionally continued to operate the IRPL beyond July 28, 1979 without an extension or renewal of the consent, which constitutes continuing trespass for which Exxon is liable to the City for damages in excess of payments made by Exxon to the City for use of the tunnel from July 28, 1979 to the present.

**SIXTEENTH CAUSE OF ACTION  
(New York City)**

54. Defendant is strictly liable for all damages sustained and to be sustained to the properties and other interests of the City resulting from the discharge of oil, for all costs incurred by the City in removing, mitigating, and remedying the discharge of oil and restoring its properties and other interests, and for all other direct and indirect damages

pursuant to New York Navigation Law, § 181.

WHEREFORE, plaintiffs respectfully request that this Court:

1. As to the First Cause of Action, find Exxon liable to the United States, States of New York and New Jersey, and the natural resource trustees for the costs incurred relating to the removal of oil, including, but not limited to, any costs or expenses for the restoration or replacement of natural resources damaged or destroyed as a result of the discharge of oil, enforcement and natural resource damage assessment costs, all consequential damages, and all other damages, including natural resource damages, and order the defendant to pay all such removal costs and damages, together with prejudgment and post-judgment interest.

2. As to the Second Cause of Action, find Exxon liable to the State of New York and the City of New York for the costs incurred relating to the removal of oil, including, but not limited to, any costs or expenses for the restoration or replacement of natural resources or properties damaged or destroyed as a result of the discharge of oil, enforcement and natural resource damage assessment costs, damages to property owned by plaintiffs, all consequential damages, and all other damages, including natural resource damages, and order the defendant to pay all such removal costs and damages, together with prejudgment and post-judgment interest.

3. As to the Third Cause of Action, find Exxon liable for the abatement of the public nuisance and liable to the State of New York, its natural resource trustees, and the City of New York, for all damages, including natural resource damages, resulting from such nuisance.

4. As to the Fourth Cause of Action, find Exxon liable to the United States for penalties as set forth by statute.

5. As to the Fifth, Seventh, Eighth, and Ninth Causes of Action, find Exxon liable to the State of New York for penalties as set forth by statute.

6. As to the Sixth Cause of Action, find Exxon liable to the State of New York for all damages, including natural resource damages, and all other direct and indirect damages, resulting from the discharge of oil.

7. As to the Tenth Cause of Action, find Exxon liable to the State of New Jersey for penalties as set forth by statute.

8. As to the Eleventh, Twelfth, Thirteenth, Fourteenth, and Sixteenth Causes of Action, find Exxon liable to the City of New York for all cleanup costs, costs of mitigation measures, and damages incurred as a result of injuries to the City's properties.

9. As to the Fifteenth Cause of Action, find Exxon liable to the City of New York for damages for trespass of the IRPL.



10. As to all causes of actions and all plaintiffs,  
grant such other and further just and proper relief.

Respectfully Submitted,



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MEMORANDUM OF AGREEMENT  
CONCERNING NATURAL RESOURCE DAMAGES IN THE MATTER OF  
United States, et al., v. Exxon Corporation  
CIV. A. No.

AMONG

THE UNITED STATES OF AMERICA,  
THE STATE OF NEW YORK, STATE OF NEW JERSEY,  
CITY OF NEW YORK AND CITY OF ELIZABETH

WHEREAS, the United States of America, acting by and through the National Oceanic and Atmospheric Administration of the United States Department of Commerce, and the United States Department of the Interior, the State of New Jersey and the State of New York are trustees for natural resources, and the City of New York and the City of Elizabeth (collectively, the "Governments") are owners of certain natural resources and other interests damaged by a spill occurring on or about January 1-2, 1990 (the "Spill") from the Inter-Refinery Pipe Line ("IRPL") owned and operated by Exxon which runs beneath the Arthur Kill and a portion of the greater New York/New Jersey Harbor;

WHEREAS, the Federal Water Pollution Control Act, 33 U.S.C. § 1321 and the National Contingency Plan, at 40 C.F.R. Sections 300.16(a) and 300.615(c)(4), require that sums recovered from the Spill shall be used by the trustees to restore, rehabilitate, and require the equivalent of injured natural resources and further provides that natural resource trustees should cooperate with each other in carrying out their responsibilities for protecting natural resources and expresses a policy that governments should coordinate and cooperate in protecting natural resources;

WHEREAS, since the Spill, Exxon has compiled scientific data concerning the environmental condition of the Arthur Kill and other portions of the greater New Jersey/New York Harbor (The "Harbor"), and has acquired knowledge concerning the Harbor ecosystem and the wildlife inhabiting the Harbor;

WHEREAS, since the Spill, Exxon has made efforts to identify tracts of land in the Harbor area that may be appropriate for acquisition and/or management by one or more of the Governments with funds to be paid by Exxon pursuant to the Consent Order to be entered in the action entitled United States of America, et al. v. Exxon Corporation, filed in the U.S. District Court for the Eastern District of District of New York (91 CV \_\_\_\_);

WHEREAS Exxon intends to have a continuing presence and to continue the conduct of its operations in the New York/New Jersey Harbor, and will make payment of funds to the Governments pursuant to the Consent Order, and has expressed an interest in the Natural Resource Objectives set forth herein;

WHEREAS, the Governments have determined that the voluntary participation of Exxon in the process of identifying tracts of land to replace natural resources damaged by the Spill would be useful and beneficial to the public interest;

NOW, THEREFORE, the Governments have determined that, consistent with the objectives of the National Contingency Plan, the Clean Water Act, and the terms of the Consent Order, the following Natural Resource Objectives and procedures for disbursement and management of the funds received by the Governments are hereby adopted:



## **I. NATURAL RESOURCE OBJECTIVES**

The Natural Resource Objectives of this Memorandum of Agreement ("MOA") are to promote the restoration of the waters, wetlands, fish and wildlife habitat and sanctuaries in the New York/New Jersey Harbor and related ecosystems including the Arthur Kill and the "Harbor Herons" area described in The Harbor Herons Report released by The Trust for Public Land in conjunction with the New York City Audubon Society.

## **II. JOINT USE OF NATURAL RESOURCE DAMAGE RECOVERY**

A. **Trusteeship/Government Interests.** The trustees recognize that each of them has trusteeship over natural resources in the New York/New Jersey Harbor Environment and that the scopes of their respective trusteeships overlap. The Governments recognize that the City of New York and City of Elizabeth have an interest in and ownership of certain natural resources and other interests damaged by the Spill.

B. **Joint Use of Natural Resource Damage Recovery.** The Governments agree that the sums received into the Registry Account, as defined below, pursuant to the Consent Order and any interest thereon, shall be used for: (i) the acquisition of fee title of, or conservation easements on, lands or other property interests including tidal and intertidal wetlands within the New York/New Jersey Harbor and related ecosystems including the Arthur Kill in restoration or replacement of natural resources that have been damaged as a result of the Spill; (ii) the restoration (including the establishment, maintenance and provision of public access) and protection of lands including

tidal and intertidal wetlands acquired with such payments, and adjacent lands and wetlands, impacted by the spill, and other lands including tidal and intertidal wetlands in the New York/New Jersey Harbor and related ecosystems including the Arthur Kill; and (iii) performance of studies in the New York/New Jersey Harbor and related ecosystems including the Arthur Kill.

C. Registry Account. The Governments agree that the sums received pursuant to the Consent Order and any interest thereon, in the matter of U.S. v. Exxon, will be held in an account administered by the Registry of Court of the United States District Court for the Eastern District of New York in accordance with Rule 67 of the Federal Rules of Civil Procedure ("Registry Account"). Disbursements from the Registry Account to carry out the purposes of this NOA shall be made by the Clerk of the Court only upon application to the Court on behalf of the appropriate voting Governments in accordance with Paragraph III.B. The Governments agree that disbursement of any monies from the Registry Account may be directed in whole or in part to a specific account or repository of any Government or individual Trustee if such Government or Trustee will be responsible for carrying out specific projects or tasks under this NOA.

D. Funding. The funds deposited in the registry Account shall be devoted to the purchase of land, land management and other purposes consistent with the Natural Resource Objectives set forth in Paragraph I and shall be allocated as follows:

1. Sixty four percent shall be allocated for expenditures in the State of New York including any purchase of Shooters Island pursuant to Paragraph III.D.3.b)

2. Thirty six percent shall be allocated for expenditure in the State of New Jersey. The \$300,000 paid to the City of Elizabeth, New Jersey pursuant to Paragraph IV.A.2 of the Consent Order shall be considered an expenditure to benefit the State of New Jersey, is in addition to any payments made from the Registry Account to the State of New Jersey and is not subject to the allocation described in this Paragraph. Expenditures made by New Jersey shall be subject to New Jersey appropriations law and other applicable New Jersey laws.

3. Termination of Registry Account, Validity of MOA and Allocation of Monies. If the Registry Account must terminate or if this MOA is declared invalid by a Court of competent jurisdiction, disposition of any unobligated sums and any interest earned thereon in the Registry Account shall be determined by further agreement of the Governments or, if an agreement cannot be reached, upon application by a party to this MOA to the United States District Court (E.D.N.Y.), by allocation of such recoveries and interest by the Court. In making a fair and reasonable allocation of these monies among the Governments, the Court shall consider primarily the need to achieve, to the maximum extent practicable, the Natural Resource Objectives of this MOA and shall further consider the overlapping jurisdictions of the federal and state trustees and interests of the City of New York and the provisions of this MOA at Paragraph IV.D which



set forth the geographic allocation of monies. The City of Elizabeth shall receive no recovery from funds in the Court Registry.

F. Coordination of Governments After Allocation. In the event an allocation of natural resource damage and other damage recoveries is made under Paragraph E of this Section, the Governments expressly agree that they will continue to coordinate their activities to the greatest extent practicable consistent with the Natural Resource Objectives set forth in Paragraph I and the provisions regarding Decisionmaking by Committee Members in Paragraph III.B.

### III. THE COMMITTEE

A. Committee Representatives. In order to provide for the proper, efficient and timely disposition of funds paid pursuant to the Consent Order, a Committee is hereby established, consisting of one representative from each of the following:

1. The Under secretary for Oceans and Atmosphere, Administrator of the National Oceanic and Atmospheric Administration, acting on behalf of the Secretary of Commerce;
2. The Secretary of the United States Department of the Interior;
3. The State of New York;
4. The State of New Jersey;
5. The City of New York, New York; and
6. The City of Elizabeth, New Jersey.

Each Committee Representative shall designate an alternate representative in his or her absence. The Governments, at their discretion, may have non-voting, ex-officio representatives attend Committee meetings.

B. Decisionmaking by Committee Members. Except as otherwise provided herein, any action taken by the Committee must be approved by the unanimous consent of the voting Committee members. With respect to actions proposed to be undertaken with funds allocated for expenditure in the State of New Jersey pursuant to Paragraph II.D, only the federal trustee representatives, the New Jersey trustee representative and the City of Elizabeth representative shall be voting Committee members. However, the City of Elizabeth shall be a voting member of the Committee only with respect to actions proposed to be undertaken within its city limits. With respect to actions proposed to be undertaken with funds allocated for expenditure in the State of New York pursuant to Paragraph II.D, only the federal trustee representatives, the New York trustee representative and the City of New York representative shall be voting Committee members.

C. Dispute Resolution by the Committee. If any proposed action by Committee representatives does not receive the required consent of a voting trustee or city representative, the representatives initially shall attempt to achieve agreement through discussion and negotiation. In the event agreement cannot be reached, the matter may be presented to any non-voting Committee members or ex-officio representatives of the Committee

for advice or a recommended decision. Such recommended decision shall be advisory only. If the required consent still cannot be reached, the Committee shall elevate the matter to the appropriate federal and state trustees and city officials for decision or further instruction. The appropriate federal and state trustees and city officials may establish or agree upon other mechanisms, consistent with the provisions of this MOA, by which disputes may be resolved.

**D. Duties and Authority.** The Committee shall coordinate and authorize all activities and matters under this MOA except as otherwise set forth herein. The Committee's duties and authority, except as otherwise set forth in the MOA, shall include, but not be limited to, the following:

1. The authority to make all decisions and to take any actions that are reasonably necessary to carry out the purposes of this MOA.

2. Consistent with the Natural Resource Objectives, the authority to make all decisions relating to the use of any sums recovered pursuant to the Consent Order and any interest earned thereon; provided that no money may be expended for any purpose without first obtaining the consent of all members of the Committee as specifically set forth in Paragraph III.B. The Committee may pay administrative expenses of the Governments necessary to perform the work of the Committee, such as reasonable and necessary travel expenses, reproduction costs, and other necessary and reasonable out-of-pocket expenses computed at actual cost to the Governments, except that (1) salaries of





(i) plan for and carry out appropriate scientific studies or environmental projects;

(ii) contract as required with consultants or others to provide technical services to the Committee as described in Section V of this MOA, or to otherwise carry out the objectives of this MOA; and

b. Accept voluntary services of organizations including Exxon, members of the Safe Harbor Coalition and other environmental groups, and professionals as it deems appropriate or desirable;

c. Review inventories of land acquisition sites;

d. Establish such committees as it deems necessary and appropriate including, but not limited to, a technical advisory committee; and

e. Prepare and issue public reports from time to time disclosing the work of the Committee.

F. Administrative Committee Representative. The Committee shall designate, if appropriate, one or more Administrative Committee Representatives ("ACR"). The responsibilities of the ACR may include:

1. scheduling of meetings of the Committee and the Technical Advisory Committee and preparation of agendas for those meetings and the recording of all actions taken at such meetings;
2. acting as a central contact for the Committee and the Technical Advisory Committee;
3. maintenance of all records and relevant documents

received or generated by the Committee or the Technical Advisory Committee; and

4. such other duties as are agreed upon by the Committee.

F. Advisors. A representative from the Safe Harbor Coalition and Exxon shall be advisors to the Committee, and may attend meetings and participate in the work of the Committee, except when a Committee Representative determines, in his or her discretion, that attendance or participation of either or both is not appropriate.

#### IV. THE NEW YORK/NEW JERSEY HARBOR TECHNICAL ADVISORY COMMITTEE

A. Composition. The Committee may establish a committee known as the New York/New Jersey Harbor Technical Advisory Committee ("Technical Advisory Committee"). The Governments each may designate up to three (3) members from their respective Federal, State, or City agencies or sub-divisions to serve on the Technical Advisory Committee. The Committee may invite individuals from the public or non-government environmental organizations to serve on the Technical Advisory Committee. The Technical Advisory Committee may invite representatives of other public agencies and members of the public to its meetings when, in the sole judgment of the Committee, public disclosure of the Committee's work will not prejudice the effectiveness of the Committee or the Technical Advisory Committee.

B. Duties. At the request of the Committee, the Technical Advisory Committee may review and provide technical



comment to the Committee on proposals for acquisition of lands, natural resource restoration, management or studies. If requested, the Technical Advisory Committee may also review and comment upon work that is in progress or that has been completed under contract for the Committee to ensure its compliance with such contract.

V. TECHNICAL SERVICES

A. The Committee may determine that it needs technical advisors, consultants or other service providers to assist it in carrying out its responsibilities under this MOA. The Committee may expend reasonable sums to perform the following services if such services are necessary to accomplish the objectives of this MOA:

1. provide project design and technology review, site analysis, restoration planning or services, testing, sampling, and other services related to the implementation of a restoration plan for the New York/New Jersey Harbor; and

2. provide technical or other advice to the Committee and the Technical Advisory Committee as required to carry out the purposes of this MOA.

B. To obtain technical services, the Committee may enter into one or more contracts with professional consultants, advisors, or other service providers that the Committee determines are best qualified to provide services to the Committee.

**VI. AMENDMENT**

A. This MOA may be amended by agreement of the Governments if it is determined that an amendment is necessary or appropriate to accomplish the objectives of this MOA, or is necessary to modify the objectives of this MOA consistent with the requirements of law and any amendments thereto, or other applicable Federal or State law.

B. Any amendment of this MOA shall only be effective if it is in writing and executed by the appropriate Government representatives.

**VII. TERMINATION**

A. This MOA shall be in effect from the day of entry of the Consent Order until the Committee determines that the restoration plan or plans implemented under this MOA have been completed and funds are exhausted except that this MOA may be extended by written agreement.

B. Any Government may withdraw from this MOA, but only after efforts have been made to resolve any dispute in accordance with Paragraph II.C herein. Such withdrawal shall only be effective upon written notice to each of the Governments and the United States District Court for the Eastern District of New York. In the event any Government withdraws from this MOA, any unobligated natural resource damage recoveries in the Registry Account shall be allocated among the Governments consistent with Paragraph II.E herein.

## **EXHIBIT A**

### **Specific Action Steps**

The following specific action steps, among others, have been or are being undertaken by Exxon based on the recommendations of Exxon's Marine Operations Study. Exxon retains the right to modify any of these steps based on such additional recommendations as may be made pursuant to further evaluation by Exxon of its marine operations.

### **Bayway Facilities**

1. Inspect, repair and upgrade of loading arms. Inspection of Couplers at Steamer Dock 2 and replacement of couplers at Steamer Dock 1.
2. Improvement of instrumentation to reduce risk of barge overfill, including provision of "loading alert button" for bargeman, and of additional emergency stops for dock personnel.
3. Improvement of ship to shore communication ability, with installation of new equipment.
4. Improvement of fendering at #1 dock.
5. Improvement of sump operation at barge and steamer docks, including replacement of piping and the installation of a high level alarm.
6. Upgrading of hose operations, including replacement of all hoses to meet maximum 5-year life requirement for hose tower, and recommissioning of hose tower.
7. Engineering review and upgrading of hoses, including provisions for interim use of "special" approved asphalt hose, with planned installation of metal loading arms for asphalt service.
8. Improvement of dock lighting.
9. Testing and repair of equipment to ensure that dock facilities are in good operating order.
10. Implementation of barge berthing restrictions to reduce the possibility of barge collisions.
11. Verifying that barges have tested within past 30 days the emergency stops system for cargo discharge.



12. Pre-booming for vessels transferring cargo with flash point of greater than 100° F.
13. Provision of additional walkway grating to improve personnel access to the decks.
14. Increasing mooring safety at Steamer Dock for winchless vessels.

#### Bayway Procedures

1. Modification of coupling procedures and increasing training in those procedures.
2. Establishment of hands-on deck specific fire training for dock personnel and shift mechanics.
3. Enhancement of pre-arrival terminal/ship information exchange, including expansion of existing procedures.
4. Implementation of new procedure to disallow barges from tying up at pier knuckles.
5. Modification of barge topping off procedure.
6. Continuing enhancement of new procedures for loading of static accumulators.
7. Institution of additional safeguards, including coverage and predecking inspection for third-party tankers by Pollution and Safety Control Representatives ("PSCRs"), and having equipment and personnel on "ready standby" in case of a spill.
8. Institution of barge pre-transfer inspection and hose certification procedures with 3-year maximum hose life requirement.
9. Institution of additional training for personnel.
10. Implementation of operating guidelines to ensure safer vessel mooring.
11. Institution of procedure for barge hull inspection for obvious holes or damage in vessel hulls during the decking operation.

12. Reduction of risk of barge overfills by limiting filling height to one foot below the deck (to be discontinued for a barge upon installation of high level alarms and spill rails).

#### Bayonne Facilities

1. Improvement of instrumentation to reduce risk of barge overfill (e.g., provision of "loading alert button" for bargeman, and provision of an additional emergency stop button).
2. Improvement of ship to shore communication ability, with installation of new equipment.
3. Improvement of fendering at Pier No. 7.
4. Improvement of sump operation at the active piers, including installation of high level alarms on all non-gravity sumps.
5. Upgrading of hose operations, including replacement of all hoses to meet maximum 5-year life requirement for hose tower, and recommissioning of hose tower.
6. Engineering review and upgrading of hoses, including provisions for interim use of "special" approved asphalt hose, with planned installation of metal loading arms for asphalt service.
7. Testing and repair of equipment to ensure that dock facilities are in good operating order.
8. Pre-booming for vessels transferring all cargo with flash point of greater than 100° F.
9. Structural improvements to marine pier 6.

#### Bayonne Procedures

1. Establishment of hands-on deck specific fire training for deck personnel.
2. Enhancement of pre-arrival terminal/ship information exchange, including expansion of existing procedures.

2. Reinforce use of pier logs to enhance shift change information flow.
4. Modification of barge topping off procedures.
5. Institution of additional safeguards, including PSCR coverage and predocking inspection for third-party tankers, and having equipment and personnel on "ready standby" in case of a spill.
6. Institution of barge pretransfer inspection and hose certification procedures with 3-year maximum hose life requirement for barges and ships.
7. Institution of additional training for personnel.
8. Continuing enhancement of procedures for loading of static accumulators.
9. Implementation of operating guidelines to ensure safer vessel mooring.
10. Institution of procedure for barge hull inspection for obvious holes or damage in vessel hulls during the docking operation.
11. Reduction of risk of barge overfills by limiting filling height to one foot below the deck (to be discontinued upon installation of high level alarms and spill rails on Exxon-owned barges).
12. Institution of small craft fueling procedures to protect against tank over flows during loading operations.

**Exxon Shipping Co./**  
**Exxon Co. International ("ECI")**

1. Institution of procedures to increase quality of tugs, barges and ships using Exxon facilities.
2. Upgrading of tugs and barges, including eventual installation of high level alarms and spill rails on all Exxon-owned barges, and the employment in NY/NJ Harbor of the tug "Empire State," on which fire fighting and spill control equipment has been installed.
3. Improvement of Harbor Pilot Service by screening and approving a select high caliber group.



4. Improvement of vessel maneuvering by providing enhanced assist/escort tug requirements within NY Harbor.
5. Testing and improving the ability of PSCR's through retraining, republishing of PSCR's manual, improvement of communications with PSCR during cargo transfers, and development of procedures for PSCR inspection of all third-party vessels.
6. Improvement of lightering operations, including use of a minimum of two Yokohama-type fenders for barges with a capacity of over 40,000 barrels, and implementation of requirement that one tug remain alongside during lightering. In addition, implementation of requirement that an additional tug be required for landing lightering barges with a capacity of over 60,000 barrels against the mother vessel. Also, institution of rule that no double lightering will be permitted, and that PSCR/Master ensure mooring is adequate.

**Organization - Bayway and Bayonne**

1. Establishment of NY Harbor Marine Technical Services Organization.

**EXHIBIT C**

Documents and results from Exxon studies including but not limited to the studies described in technical presentations made at Exxon Biomedical Sciences on November 28 and 29, 1990 and including the following:

1. Digitized mapping information on vegetation, habitats, spill extent, waterfront uses, point source discharges, and spill impacts, including information on sources of mapping information, field verification, and ground truthing;
2. Literature review and bibliography;
3. Description and results of field sampling program for water, sediments, and biota (including biota sampling for tissue analyses, prey abundance studies, component of toxicity assays, and bivalve surveys), with maps of sampling locations;
4. Results of sediment chemistry and toxicity assays, including bulk chemistry, amphipod and other toxicity bioassays, and microcosm studies;
5. Description and results of all chemical analyses, and interpretation of results, including studies of levels of hydrocarbons and other compounds and fingerprinting studies;
6. Description and results of Spartina surveys and other field surveys to assess spill impacts;
7. Description and results of assessments of deaths and injuries to birds and of analyses of data collected by Manomet Bird Observatory, Exxon, or other parties on populations of colonial wading birds; and
8. Description and results of economic analyses.

**EXHIBIT C -- PAGE 2 OF 2**

Documents and results from the Governments' studies including but not limited to studies conducted pursuant to the contract between New Jersey Department of Environmental Protection and Louis Berger and Associates, Inc. for the performance of the Arthur Kill Oil Discharge Study, including the following:

1. Catalog of historical sampling programs;
2. Maps of spill extent, wetlands, and sampling locations;
3. List of shorefront land owners;
4. Digitized mapping information on wetland habitat types, wetlands boundaries, cobble, sandy, and muddy flats, open water, ownership boundaries, and sampling locations;
5. Description of sediment and benthic invertebrate sampling programs;
6. Documentation of oil-related bird deaths and injuries;
7. Technical report on results of bird studies (Parsons);
8. Summary and data from prey organism study (Burger); and
9. Results of chemical analyses, and interpretation of results.

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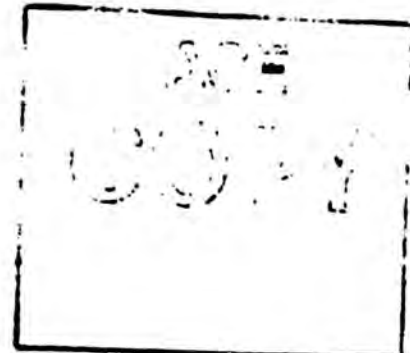
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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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NORTHERN DISTRICT OF CALIFORNIA

1 UNITED STATES OF AMERICA; STATE OF  
2 CALIFORNIA EX REL. DEPARTMENT OF FISH  
3 AND GAME, STATE LANDS COMMISSION,  
4 DEPARTMENT OF PARKS AND RECREATION,  
5 REGIONAL WATER QUALITY CONTROL BOARD  
6 FOR THE SAN FRANCISCO BAY REGION,  
7 SAN FRANCISCO BAY CONSERVATION AND  
8 DEVELOPMENT COMMISSION; PEOPLE OF THE  
9 STATE OF CALIFORNIA AND OF THE  
COUNTIES OF CONTRA COSTA AND SOLANO;  
CITY OF BENICIA; CITY OF MARTINEZ; and  
EAST BAY REGIONAL PARK DISTRICT;

Plaintiffs,

CONSENT DECREE

v.

SHELL OIL COMPANY,

Defendant.

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| XII. COUNTERPARTS-----                                | 20   |
| XIII. HEADINGS-----                                   | 20   |
| APPENDIX A. STUDIES FUND                              |      |
| EXHIBIT 1. EPA NOV                                    |      |
| EXHIBIT 2. MEMORANDUM OF AGREEMENT                    |      |



1 I. GENERAL PROVISIONS

2 A. On or about April 22 through 23, 1988, Defendant  
3 Shell Oil Company ("Shell") discharged crude oil from its oil  
4 manufacturing complex in Martinez, California ("the Complex")  
5 onto lands and into waters, including wetlands, surrounding the  
6 Complex when a pipe connection in an oil holding tank (Tank No.  
7 1256) broke and oil escaped through a drainage valve that had  
8 been left open ("the Oil Spill").

9 B. Plaintiffs have alleged that at least 432,264  
10 gallons of crude oil were spilled, inundating Shell Marsh and  
11 Peyton Slough and entering the Carquinez Strait and Suisun Bay.  
12 The exact amount of oil spilled is disputed.

13 C. Plaintiffs have alleged that the Oil Spill  
14 resulted from a roof drain failure and that Shell left open the  
15 drainage valve, proximately causing substantial damage to the  
16 environment and natural resources of the San Francisco Bay/Delta  
17 Estuary.

18 D. Plaintiff, United States of America ("United  
19 States"), on behalf of the U. S. Department of Commerce, the  
20 U.S. Department of the Interior, and the U.S. Department of the  
21 Navy, has alleged civil claims for damages to natural resources  
22 under the trusteeship of the United States pursuant to section  
23 311(f) of the Clean Water Act, 33 U.S.C. section 1321(f); and,  
24 on behalf of the U.S. Environmental Protection Agency, has  
25 alleged claims for penalties pursuant to sections 309 and 311(j)  
26 of the Clean Water Act, 33 U.S.C. sections 1319 and 1321(j).  
27 The United States has also alleged claims for costs incurred in  
28 conjunction with the Oil Spill under section 311(f) of the Clean

1 Water Act, 33 U.S.C. section 1321(f).

2 E. Plaintiff, State of California ex rel. Department  
3 of Fish and Game, State Lands Commission, Regional Water Quality  
4 Control Board for the San Francisco Bay Region, Department of  
5 Parks and Recreation and San Francisco Bay Conservation and  
6 Development Commission ("State"), has alleged civil claims for  
7 damages to natural resources under the trusteeship of the State  
8 and for penalties under the Clean Water Act, 33 U.S.C. section  
9 1251, et seq.; California Fish and Game Code sections 2014,  
10 5655, 12015, and 12016; California Harbors and Navigation Code  
11 section 151; California Water Code sections 13304, 13350, and  
12 13385; California Public Resources Code section 29610;  
13 California Government Code section 66641.5; and trespass,  
14 negligence, nuisance and common law natural resource damages.  
15 The State has also alleged claims for costs incurred in  
16 conjunction with the Oil Spill.

17 F. Plaintiff, the People of the State of California  
18 in and for the Counties of Contra Costa and Solano and on behalf  
19 of the California Department of Health Services, has alleged  
20 civil claims for relief under California Health and Safety Code  
21 Section 25189 and California Business and Professions Code  
22 Section 17200 and seeks recovery of costs and penalties.

23 G. Plaintiffs, the Cities of Benicia and Martinez,  
24 have alleged civil claims for relief for trespass, negligence  
25 and nuisance, and seek recovery of costs and damages.

26 H. Plaintiff, East Bay Regional Park District, has  
27 alleged civil claims for relief for natural resource damages,  
28 trespass and nuisance and seeks recovery of costs and damages.

1 I. Defendant, Shell Oil Company, is a corporation  
2 incorporated under the laws of Delaware. Shell owns and  
3 operates the Complex where the Oil Spill occurred.

4 J. The United States Environmental Protection Agency  
5 ("EPA") has served on Shell a Notice of Violation ("NOV"),  
6 pursuant to 40 C.F.R. section 114.4, alleging that Shell has  
7 violated certain oil spill prevention regulations set forth at  
8 40 C.F.R. Part 112 that are applicable to the Complex. The NOV,  
9 attached as Exhibit 1, initiates an administrative action  
10 pursuant to 40 C.F.R. Part 114 and Clean Water Act  
11 section 311(j), 33 U.S.C. section 1321(j), and 40 C.F.R. Part  
12 114 and proposes the assessment of civil penalties. Shell  
13 agrees that EPA has jurisdiction to institute this  
14 administrative action, and EPA and Shell agree to compromise the  
15 aforementioned administrative action by this Consent Decree.

16 K. A resolution of the parties' disputes would  
17 require costly and protracted litigation. The parties consider  
18 resolution of this dispute without litigation to be in the best  
19 interests of the public.

20 L. Prior to taking any testimony, Shell and  
21 Plaintiffs have agreed to making this Consent Decree. Shell and  
22 Plaintiffs agree that this Consent Decree is filed in settlement  
23 of this litigation and the administrative proceeding described  
24 in paragraph J above and in consideration for the covenants not  
25 to sue described in section V below. This Consent Decree is  
26 entered into without any admission as to liability for any  
27 purpose, in good faith to avoid further protracted litigation  
28 relating to Plaintiffs' claims arising from the Oil Spill as



1 described in section V and to serve the public interest.

2 M. Except as provided in section II.A of this Consent  
3 Decree, Shell denies any and all legal and equitable liability  
4 under any federal, state, or local statute, regulation,  
5 ordinance, or common law for any fines, penalties, response  
6 costs, damages or claims caused by or arising out of the Oil  
7 Spill; Shell does not admit liability for any purpose or admit  
8 any issues of fact or law or any responsibility for the alleged  
9 release of crude oil or any alleged hazardous constituent  
10 thereof into the environment by entering into this Consent  
11 Decree or by taking any action in accordance with this Consent  
12 Decree.

13 II. JURISDICTION, VENUE AND SERVICE OF PROCESS

14 A. This Court has jurisdiction over the parties and the  
15 subject matter of this Consent Decree pursuant to 28 U.S.C.  
16 sections 1331 and 1345, and sections 309 and 311 of the Clean  
17 Water Act, 33 U.S.C. sections 1319 and 1321. This Court also  
18 has jurisdiction over the subject matter of the pendant State  
19 law claims in this action. Venue is proper in this Court  
20 pursuant to 28 U.S.C sections 1391(b) and (c). The Complaint,  
21 filed concurrently with the lodging of this Consent Decree,  
22 states claims upon which relief may be granted against Shell.  
23 Shell waives all objections to the Court's jurisdiction to enter  
24 or enforce this Consent Decree, as well as venue and service of  
25 summons.

26 B. Shell agrees that service of notice or any legal  
27 process on it for any purpose under this Consent Decree,  
28 including its enforcement, may be made by mailing a copy by



1 first class mail to the attorneys below:

2 Keith Howard  
3 Cooper, White & Cooper  
4 1333 N. California Blvd.  
Suite 450  
Walnut Creek, CA 94596

5 Victoria Kincke  
6 Shell Oil Company  
7 Chemical Legal Department  
One Shell Plaza  
P.O. Box 2463  
Houston, TX 77252

8 **III. PARTIES BOUND**

9 This Consent Decree shall apply to and be binding upon  
10 the signatories, their agents, successors and assigns.

11 **IV. RELIEF**

12 A. On the date of lodging of this Consent Decree,  
13 Shell agrees to pay the total sum of nineteen million, seven  
14 hundred fifty thousand dollars (\$19,750,000.00) by check made  
15 payable to California Department of Justice, Litigation Deposits  
16 Fund, an interest bearing account, and hand delivered to John D.  
17 Fennelly, Office of the Attorney General, 1515 S Street, South  
18 Building, Fifth Floor, Sacramento, CA. Upon entry of this  
19 Consent Decree by the Court, the principal and interest thereon  
20 shall be disbursed from the Litigation Deposits Fund by the  
21 California Department of Justice in the following manner.

22 1. The sum of eleven million, five hundred eighty-  
23 eight thousand dollars (\$11,588,000.00) plus all interest  
24 accumulated on the money in the Litigation Deposits Fund  
25 described in Section IV.A, less any administrative costs, shall  
26 be paid as follows for alleged natural resource damages:  
27

28 ACE 850102

1           a. The sum of ten million, eight hundred thirty-  
2 eight thousand dollars (\$10, 838,000.00) plus all the interest  
3 accrued on the money in the Litigation Deposits Fund described  
4 in Section IV.A, less any administrative costs, shall be  
5 disbursed pursuant to the Clean Water Act, 33 U.S.C. Section  
6 1321(f), to the Department of Justice, State of California for  
7 deposit in the California Department of Justice, Special  
8 Deposits Fund into an account to be determined, hereafter  
9 referred to as the "Trustees Fund." The purpose of this fund  
10 shall be to compensate the Trustees for the United States and  
11 the State of California for alleged damages to natural  
12 resources. The Trustees shall administer and disburse the money  
13 in the Trustees Fund in accordance with the Memorandum of  
14 Agreement attached as Exhibit 2.

15           b. The sum of seven hundred fifty thousand  
16 dollars (\$750,000.00) shall be disbursed to the Department of  
17 Fish and Game pursuant to Fish and Game Code section 12017 for  
18 purposes such as cleanup and abatement of oil spills, projects  
19 devoted to the preservation of California plants, wildlife and  
20 fisheries, land acquisition and land improvements and species  
21 propagation projects. Payment shall be made payable to "Fish  
22 and Wildlife Pollution Cleanup and Abatement Account, Fish and  
23 Game Preservation Fund" and delivered by mail to Department of  
24 Fish and Game Fiscal Division, c/o Marie Reed, P.O. Box 944209,  
25 Sacramento, CA 94244-2090.

26           2. The sum of one million, three hundred twelve  
27 thousand dollars (\$1,312,000.00) shall be disbursed to the  
28 Department of Justice, State of California, for deposit in the

1 California Department of Justice, Special Deposits Fund into an  
2 account to be determined, hereafter referred to as the "Studies  
3 Fund." The purpose of the Studies Fund shall be to conduct  
4 studies pertaining to the Oil Spill as set forth in Appendix A,  
5 attached and incorporated by reference.

6 3. The sum of five hundred thousand dollars  
7 (\$500,000.00) shall be disbursed to the United States, the State  
8 of California, and the County of Contra Costa for reimbursement  
9 of costs. Said sum shall be apportioned and made payable as  
10 follows:

11 a. The sum of ninety-three thousand dollars  
12 (\$93,000.00) shall be made payable to "U.S. Department of the  
13 Interior" and delivered by mail to the Office of the Solicitor,  
14 P.O. Box 36064, 450 Golden Gate Avenue, San Francisco, CA 94102.

15 b. The sum of three hundred and fifty-seven  
16 thousand dollars (\$357,000.00) shall be paid to the State of  
17 California as follows:

18 1. The sum of one hundred ninety three  
19 thousand, two hundred and twenty-nine dollars and sixty-eight  
20 cents (\$193,229.68) shall be made payable to the "Fish and  
21 Wildlife Pollution Cleanup and Abatement Account, Fish and Game  
22 Preservation Fund" and delivered by mail to Department of Fish  
23 and Game Fiscal Division, c/c Marie Reed, P.O. Box 944209,  
24 Sacramento, CA 94244-2090;

25 ii. The sum of sixty-two thousand, three  
26 hundred fifty-two dollars and sixty-seven cents (\$62,352.67)  
27 shall be made payable to "State Water Pollution Cleanup and  
28 Abatement Account, State Water Quality Control Fund" and

1 delivered by mail to William R. Attwater, Chief Counsel, State  
2 Water Resources Control Board, 901 P Street, P.O. Box 100,  
3 Sacramento, CA 95801;

4 iii. The sum of twenty thousand, one  
5 hundred twenty-five dollars and eighty-eight cents (\$20,125.88)  
6 shall be made payable to "California Department of Parks and  
7 Recreation" and delivered by mail to Richard E. Felty, Regional  
8 Director, California Department of Parks and Recreation, Central  
9 Coast Region, 2211 Garden Road, Monterey, CA 93940;

10 iv. The sum of nine thousand five hundred  
11 sixteen dollars and fifty-three cents (\$9,516.53) shall be made  
12 payable to the "Bay Fill Cleanup and Abatement Fund" and  
13 delivered by mail to San Francisco Bay Conservation and  
14 Development Commission, c/o Russell Abramson, 30 Van Ness  
15 Avenue, Suite 2011, San Francisco, CA 94102;

16 v. The sum of twelve thousand dollars  
17 (\$12,000.00) shall be made payable to "State Lands Commission"  
18 and delivered by mail to Robert C. Hight, Chief Counsel, State  
19 Lands Commission, 1807 13th Street, Sacramento, CA 95814;

20 vi. The sum of fifty-nine thousand, seven  
21 hundred seventy-five dollars and twenty-four cents (\$59,775.24)  
22 shall be made payable to "California Department of Justice," and  
23 delivered by mail to Sara J. Russell, Deputy Attorney General,  
24 Office of the California Attorney General, 350 McAllister  
25 Street, Suite 6000, San Francisco, CA 94102. This money shall  
26 be used only to defray expenses incurred by the Attorney General  
27 in the implementation of this Consent Decree and otherwise to  
28 defray expenses incurred by the Attorney General in his capacity



1 as legal counsel to State agencies responsible for enforcing  
2 laws and programs for the protection of the State's environment,  
3 natural resources and lands. Such expenses may include, but are  
4 not limited to, reimbursement of the cost of expert consultants,  
5 temporary employees, equipment and supplies. The Attorney  
6 General shall segregate this money in a separate account which  
7 shall be jointly administered by the Natural Resources Section  
8 and the Land Law Section in the Public Rights Division of the  
9 California Department of Justice;

10 c. The sum of fifty thousand dollars  
11 (\$50,000.00), for Contra Costa County, shall be made payable and  
12 delivered by mail to Huffman and Associates, Inc., 69 Aztec  
13 Street, San Francisco, CA 94110, as payment of professional  
14 consultant expenses.

15 4. The sum of six hundred thousand dollars  
16 (\$600,000.00) shall be disbursed to the City of Benicia as  
17 alleged damages. Payment in the amount of six hundred thousand  
18 dollars (\$600,000.00) shall be made payable to the "City of  
19 Benicia, c/o Finance Director" and shall be delivered by mail to  
20 the City of Benicia Finance Department, 250 East L Street,  
21 Benicia, California 94510.

22 a. Three hundred fifty thousand dollars  
23 (\$350,000.00) of this money shall be used for the following  
24 projects in the following amounts:

25 1. The sum of seventy-five thousand  
26 dollars (\$75,000.00) shall be utilized to reconstruct,  
27 rehabilitate and enlarge the 9th Street Fishing Pier.

28 ii. The sum of two hundred seventy-five

1 thousand dollars (\$275,000.00) shall be utilized to construct  
2 two marsh overlooks at the ends of First Street and Second  
3 Street.

4 The City of Benicia shall segregate this money in a  
5 separate account which may be utilized only for these above-  
6 mentioned projects. Should either, or both, of these projects  
7 become infeasible, or should monies remain after the completion  
8 of these projects, the City Council of the City of Benicia shall  
9 have the right to re-program these monies for other projects  
10 within the City of Benicia as long as such projects enhance,  
11 mitigate or restore the areas or natural resources affected or  
12 impacted by the Oil Spill.

13 b. Two hundred fifty thousand dollars  
14 (\$250,000.00) of this money shall go to the City of Benicia  
15 general fund.

16 5. The sum of one hundred and fifty thousand dollars  
17 (\$150,000.00) shall be disbursed to the County of Solano,  
18 payable to the "Office of the District Attorney" and delivered  
19 by mail to the Office of the District Attorney, 600 Union  
20 Avenue, Fairfield, CA 94533, for the specific purpose of  
21 enabling the Solano County Office of Emergency Services and the  
22 Solano County District Attorney Environmental Crime Unit to  
23 purchase computer hardware and software and communications  
24 equipment so as to enable said County to be adequately prepared  
25 in the event of future oil spill disasters on its coast and to  
26 provide said County with the necessary emergency response  
27 capability. The District Attorney shall segregate this money in  
28 a separate account which may be utilized only for the above-

1 stated purposes.

2 6. The sum of seven hundred fifty thousand dollars  
3 (\$750,000.00) shall be disbursed to the City of Martinez. This  
4 amount compensates the City of Martinez and the County of Contra  
5 Costa for alleged damages. Payment in the amount of seven  
6 hundred fifty thousand dollars (\$750,000.00) shall be made  
7 payable to the "City of Martinez, c/o Finance Director" and  
8 shall be delivered by mail to the City of Martinez Finance  
9 Department, 525 Henrietta Street, Martinez, California 94553.

10 a. Five hundred thousand dollars (\$500,000.00)  
11 of this money shall be administered by the City of Martinez and  
12 utilized for a joint project of the City of Martinez and Contra  
13 Costa County to enhance and rehabilitate the Martinez fishing  
14 pier and to construct a landscaped walkway plaza area connecting  
15 the Martinez fishing pier to the Italian Fisherman Monument.  
16 The City of Martinez shall segregate these monies in a separate  
17 account which may be utilized only for the above identified  
18 project. Should this project become infeasible, or should  
19 monies remain after the completion of this project, the City  
20 Council of the City of Martinez shall have the right to re-  
21 program these monies for other projects after consultation with  
22 Contra Costa County. The City Council of the City of Martinez  
23 may only utilize these monies for projects which enhance,  
24 mitigate or restore the areas or natural resources affected or  
25 impacted by the Oil Spill.

26 b. Two hundred fifty thousand dollars  
27 (\$250,000.00) of this money shall go to the City of Martinez  
28 general fund.



1           7.    The sum of two hundred thousand dollars  
2   (\$200,000.00) shall be disbursed to the East Bay Regional Park  
3   District as alleged damages. Payment shall be made payable to  
4   the "East Bay Regional Park District" and delivered by mail to  
5   the East Bay Regional Park District, 11500 Skyline Boulevard,  
6   Oakland, CA 94619-2443.

7           8.    The sum of two million dollars (\$2,000,000.00)  
8   shall be disbursed to the United States as penalties for the  
9   Defendant's alleged violations of the spill prevention  
10   regulations found at 40 C.F.R. Part 112. Payment shall be made  
11   payable to the "Treasurer of the United States" and delivered by  
12   mail to the United States Attorney for the Northern District of  
13   California. A copy of the check and letter tendering such check  
14   shall be mailed to Office of Regional Counsel, Water Branch  
15   Chief, U.S.E.P.A. Region 9, 215 Fremont Street, San Francisco,  
16   CA 94105, and to the Chief, Environmental Enforcement Section,  
17   Land and Natural Resources Division, United States Department of  
18   Justice, P.O. Box 7611, Ben Franklin Station, Washington D.C.  
19   20044.

20           9.    The sum of fifty thousand dollars (\$50,000.00)  
21   shall be disbursed to the United States as penalties for the  
22   Defendant's alleged violations of its NPDES Permit No. CA005789  
23   at the Complex. Payment shall be made payable to the "Treasurer  
24   of the United States" and delivered by mail to the United States  
25   Attorney for the Northern District of California. A copy of the  
26   check and letter tendering such check shall be mailed to Office  
27   of Regional Counsel, Water Branch Chief, U.S.E.P.A. Region 9,  
28   215 Fremont Street, San Francisco, CA 94105, and to the Chief,



1 Environmental Enforcement Section, Land and Natural Resources  
2 Division, United States Department of Justice, P.O. Box 7611,  
3 Ben Franklin Station, Washington D.C. 20044.

4 10. The sum of two million, one hundred thousand  
5 dollars (\$2,100,000.00) shall be disbursed as penalties to the  
6 State of California for alleged statutory violations. Payment  
7 shall be made payable to "State Water Pollution Cleanup and  
8 Abatement Account, State Water Quality Control Fund" and  
9 delivered to William R. Attwater, Chief Counsel, State Water  
10 Resources Control Board, 901 P Street, P.O. Box 100, Sacramento,  
11 CA 95801.

12 11. The sum of two hundred fifty thousand dollars  
13 (\$250,000.00) shall be disbursed to the County of Contra Costa  
14 as penalties for alleged violations of Business and Professions  
15 Code Section 17206 arising out of the Oil Spill. Payment shall  
16 be made payable to "Treasurer, Contra Costa County" and  
17 delivered to the Contra Costa County District Attorneys Office,  
18 Special Operations Division, P.O. Box 670, Martinez, CA 94553.

19 12. The sum of two hundred fifty thousand dollars  
20 (\$250,000.00) shall be disbursed to the County of Solano as  
21 penalties for alleged violations of Business and Professions  
22 Code Section 17206 arising out of the Oil Spill. Payment shall  
23 be made payable to "County of Solano, c/o Office of the District  
24 Attorney" and delivered to the Office of the District Attorney,  
25 600 Union Avenue, Fairfield, CA 94533.

26 B. Except as provided in sections VII and IX, below,  
27 Shell hereby waives any and all rights or claims to the money  
28 described in section IV.A of this Consent Decree. Further,

1 Shell waives any and all rights to object to the implementation  
2 of the Consent Decree, including, but not limited to, the  
3 disbursement of such money and any decisions relating to  
4 implementation.

5 V. COVENANTS NOT TO SUE

6 A. The covenants set forth in paragraphs B-I below  
7 shall take effect only upon entry of this Consent Decree and  
8 payment in full of all amounts set forth in Section IV  
9 according to the terms and conditions of that section.

10 B. The United States covenants not to sue Shell for:

11 1. Civil violations of the spill prevention  
12 regulations at 40 C.F.R. Part 112 which occurred at the Complex  
13 prior to November 1, 1988;

14 2. Civil claims for costs and natural resource  
15 damages under 33 U.S.C. section 1321(f) arising from the Oil  
16 Spill;

17 3. Civil claims for violations of NPDES Permit  
18 No. CA005789 pursuant to section 301 of the Clean Water Act, 33  
19 U.S.C. section 1319(d), caused by the Oil Spill;

20 4. Civil claims pursuant to 16 U.S.C. section  
21 1540(a) for violations of 16 U.S.C. section 1538(a) arising from  
22 the Oil Spill;

23 5. Civil damages to the Navy for trespass on the  
24 Naval Weapons Facility, Concord, California, caused by the Oil  
25 Spill;

26 6. Civil damages to the Navy for nuisance to the  
27 Navy caused by the Oil Spill.

28 C. The State covenants not to sue Shell for any and

1 all civil claims, demands, causes of action, penalties and  
2 damages, known or unknown, suspected or unsuspected which the  
3 State, on behalf of the State agencies described in Section I.E  
4 above, has or may have against Shell based upon or arising out  
5 of the Oil Spill.

6 D. The City of Benicia covenants not to sue Shell for  
7 civil damages and costs for trespass, negligence and nuisance  
8 resulting from the Oil Spill.

9 E. The City of Martinez covenants not to sue Shell  
10 for civil damages and costs for trespass, negligence and  
11 nuisance resulting from the Oil Spill.

12 F. The East Bay Regional Park District covenants not  
13 to sue Shell for civil and natural resource damages and costs  
14 for trespass and nuisance resulting from the Oil Spill.

15 G. The County of Contra Costa covenants not to sue  
16 Shell for violations of the Hazardous Waste Control Act, the  
17 Unlawful Business Practice Act and damages and costs for  
18 trespass and nuisance resulting from the Oil Spill.

19 H. The County of Solano covenants not to sue Shell  
20 for violations of the Hazardous Waste Control Act, the Unlawful  
21 Business Practice Act and damages and costs for trespass and  
22 nuisance resulting from the Oil Spill.

23 I. The People of the State of California covenant not  
24 to proceed criminally against Shell for alleged violations  
25 arising from the Oil Spill of the following statutes and  
26 regulations:

27 1. California Fish and Game Code sections 5650,  
28 12000 and 12002;

ACE 850112

2. California Water Code section 13387;
3. California Government Code section 66632(j);
4. California Public Resources Code section 6303.1;
5. California Health and Safety Code sections 25189.5 and 25191;
6. California Penal Code sections 372 and 602;
7. Title 14, California Code of Regulations, sections 4305, 4306 and 4307.

VI. RESERVATION OF RIGHTS

A. Each Plaintiff expressly reserves its right to initiate judicial or administrative actions against Shell for any matter not expressly covered by the covenants not to sue between that Plaintiff and Shell.

B. Nothing in this Consent Decree is intended by the parties or shall be construed as a waiver by any Plaintiff of its right to institute an action against Shell to compel compliance with this Consent Decree.

VII. PRE-LODGING OBLIGATIONS

Upon execution of this Consent Decree by Shell, Shell agrees to be bound to the terms of the decree and may not revoke acceptance unless the named representatives of Plaintiffs have not signed the decree within sixty (60) days from the date of final signature by Shell's representative(s).

VIII. PUBLIC COMMENT AND ENTRY OF CONSENT DECREE

The signatories to this Consent Decree agree that there will be a forty-five (45) day public comment period and that they will follow the procedures set forth at 28 C.F.R.



1 section 50.7 prior to moving the court to enter this Consent  
2 Decree. Plaintiffs reserve the right to withdraw their consent  
3 to this Consent Decree if Plaintiffs determine that comments  
4 received during the comment period disclose facts or  
5 considerations indicating that the Consent Decree is unlawful or  
6 inadequate to protect the public interest. Plaintiffs will not  
7 move the Court to enter this Consent Decree if the public  
8 comment period has expired and will only submit the Consent  
9 Decree for entry if, in their determination, comments received  
10 during the comment period do not disclose facts or  
11 considerations indicating that the Consent Decree is unlawful or  
12 inadequate to protect the public interest.

13 IX. CONDITIONS FOR RETURN OF MONEY TO SHELL

14 A. Money paid by Shell into the Fund described in  
15 section IV.A shall remain in such Fund and continue to accrue  
16 interest for the benefit of Plaintiffs until entry of this  
17 Consent Decree unless one of the following occurs:

18 1. Plaintiffs comply with the requirements of  
19 this section and notify Shell that they intend to resolve the  
20 matter through litigation; or

21 2. Shell complies with the requirements of this  
22 section and notifies the Plaintiffs that it intends to resolve  
23 the matter through litigation.

24 If the event described in either subsection A.1 or A.2  
25 occurs, Shell may withdraw the principal and accrued interest in  
26 the Fund, less any administrative fees owing to the agent of  
27 such Fund.

28 B. Within one hundred eighty-three (183) days

1 following the close of the comment period described in section  
2 VIII, Plaintiffs may file a motion for entry of this Consent  
3 Decree. Should comments received during the comment period  
4 disclose facts or considerations, in Plaintiffs' determination,  
5 indicating that the Consent Decree is unlawful or inadequate to  
6 protect the public interest, the parties shall use this one  
7 hundred eighty-three (183) day period for negotiations regarding  
8 modifications to this Consent Decree. Such period may be  
9 extended by agreement of all parties. If Plaintiffs do not file  
10 a motion for entry within one hundred eighty-three (183) days,  
11 or any longer period to which all parties have agreed, Shell may  
12 withdraw the principal and accrued interest from the Fund  
13 provided for in section IV.A, less any administrative fees owing  
14 to the agent of such Fund.

15 C. If the Court refuses to grant Plaintiffs' motion  
16 for entry of this Consent Decree, including any modifications  
17 made pursuant to section IX.B to which all parties have agreed,  
18 the parties shall utilize the period of one hundred and eighty-  
19 three (183) days from the date of the Court's denial of  
20 Plaintiffs' motion in which to negotiate a consent decree that  
21 addresses all concerns raised by the Court. The one hundred  
22 eighty-three (183) day period may be extended by agreement of  
23 all parties. If Plaintiffs do not file a motion for entry of  
24 this Consent decree within said one hundred eighty-three (183)  
25 day period or any longer period to which all parties have  
26 agreed, Shell may withdraw the principal and accrued interest  
27 from the Fund described in section IV.A the principal and  
28 accrued interest, less any administrative fees owing to the

1 agent of such Fund. However, Shell may not withdraw such money  
2 if any party has filed an appeal to any Court order denying the  
3 motion to enter. If such appeal is withdrawn or the Appellate  
4 Court enters an order other than one instructing this District  
5 Court to enter the Consent Decree, the parties shall have a  
6 period of ninety (90) days to negotiate a consent decree. If  
7 Plaintiffs have not moved for entry within that time period,  
8 Shell may withdraw the principal and accrued interest from the  
9 Fund described in section IV.A, less any administrative fees  
10 owing to the agent of such Fund.

11 D. If Shell withdraws the money from the Fund  
12 described in section IV.A pursuant to section IX.B or IX.C,  
13 Shell shall notify each Plaintiff in writing. Each Plaintiff  
14 shall have sixty (60) days from the receipt of such notice in  
15 which to amend the Complaint and/or Notice of Violation filed  
16 concurrently with lodging of this Consent Decree or to dismiss  
17 the Complaint and file in another forum. Service of an amended  
18 or new complaint(s) or expiration of this sixty (60) day period,  
19 whichever comes sooner, shall trigger the time limits for  
20 pleadings responsive to a complaint in the forum in which such  
21 amended Complaint or new Complaint is filed. Shell expressly  
22 agrees to waive any rights it may have to a statute of  
23 limitations or laches defense to a new Notice of Violation, an  
24 amended Complaint or to any new Complaint served pursuant to  
25 section IX.D.

26 X. TERMINATION

27 When the funds described in section IV.A are disbursed  
28 in accordance with section IV, Plaintiffs shall notify the Court

1 that this Consent Decree is terminated.

2 **XI. REPRESENTATIVES**

3 Each undersigned representative of the parties to this  
4 Consent Decree certifies that he or she is fully authorized to  
5 enter into the terms and conditions of this Consent Decree and  
6 to execute and legally bind such party to this document.

7 **XII. COUNTERPARTS**

8 This Consent Decree may be executed in any number of  
9 counterparts and each executed counterpart shall have the same  
10 force and effect as an original instrument.

11 **XIII. HEADINGS**

12 The headings in this Consent Decree are inserted for  
13 convenience only and are not intended to be a part of or to  
14 affect the meaning or interpretation of the Consent Decree.

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ACE 850117



SHELL OIL COMPANY

Dated: November 22, 1989.

R. Lopez

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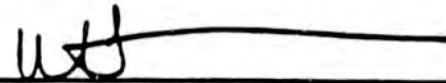
ACE 850113

UNITED STATES OF AMERICA

Dated: 11/24/89

  
RICHARD B. STEWART  
Assistant Attorney General  
Land and Natural Resources  
Division

Dated: 11/24/89

  
WALKER SMITH  
Acting Assistant Chief  
VALERIE ANN LEE  
Trial Attorney  
Environmental Enforcement Section  
U.S. Department of Justice

ACE 850119

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U.S. DEPARTMENT OF THE INTERIOR

Dated:

Nov. 28, 1989



JONATHAN DEASON

Director

Office of Environmental Project  
Review

U.S. Department of the Interior

ACE 850120

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Dated: NOV 27 1999

U.S. DEPARTMENT OF COMMERCE



THOMAS A. CAMPBELL  
General Counsel  
National Oceanic and Atmospheric  
Administration  
U.S. Department of Commerce

ACE 850121



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U.S. DEPARTMENT OF THE NAVY

Dated: 11-23-89

  
J. MARTIN ROBERTSON, Esq.  
Trial Attorney  
U.S. Department of the Navy

ACE 850122

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U.S. ENVIRONMENTAL PROTECTION  
AGENCY

Dated: 11-24-89

  
\_\_\_\_\_  
DANIEL W. MCGOVERN  
Regional Administrator  
U.S. Environmental Protection  
Agency, Region 9

ACE 850123

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U.S. ENVIRONMENTAL PROTECTION AGENCY

Dated: 11-27-89

*James M. Strock*

JAMES M. STROCK  
Assistant Administrator for Enforcement  
and Compliance Monitoring  
U.S. Environmental Protection Agency

ACE 850124

STATE OF CALIFORNIA  
DEPARTMENT OF FISH AND GAME

Dated: 11-27-89

  
PETER F. BONTADELLI  
Director 11-27-89

Approved as to form:

JOHN K. VAN DE KAMP  
Attorney General  
ROBERT H. CONNETT  
Assistant Attorney General  
SARA J. RUSSELL  
MICHAEL W. NEVILLE  
Deputy Attorneys General

  
SARA J. RUSSELL  
Deputy Attorney General

ACE

850125



STATE OF CALIFORNIA  
REGIONAL WATER QUALITY CONTROL  
BOARD FOR THE SAN FRANCISCO BAY  
REGION

Dated: 11-27-89

  
STEVEN R. RITCHIE  
Executive Officer

Approved as to form:

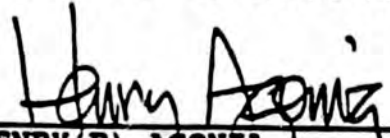
JOHN K. VAN DE KAMP  
Attorney General  
ROBERT H. CONNETT  
Assistant Attorney General  
SARA J. RUSSELL  
MICHAEL W. NEVILLE  
Deputy Attorneys General

  
SARA J. RUSSELL  
Deputy Attorney General

ACE 850126

STATE OF CALIFORNIA  
DEPARTMENT OF PARKS AND RECREATION

Dated: 11-27-89

  
HENRY R. AGONZA  
Director

Approved as to form:

JOHN K. VAN DE KAMP  
Attorney General  
ROBERT H. CONNETT  
Assistant Attorney General  
SARA J. RUSSELL  
MICHAEL W. NEVILLE  
Deputy Attorneys General

  
SARA J. RUSSELL  
Deputy Attorney General

ACE 850127

STATE OF CALIFORNIA  
STATE LANDS COMMISSION

  
CLAIRE T. DEDRICK  
Executive Officer

Dated: 11/27/89

Approved as to form:

JOHN K. VAN DE KAMP  
Attorney General  
N. GREGORY TAYLOR  
Assistant Attorney General  
PATRICIA SHEEHAN PETERSON  
Deputy Attorney General

  
PATRICIA SHEEHAN PETERSON  
Deputy Attorney General

ACE 850128

STATE OF CALIFORNIA  
SAN FRANCISCO BAY CONSERVATION  
AND DEVELOPMENT COMMISSION

Dated: 11-27-89

*Alan R. Pendleton*  
ALAN R. PENDLETON  
Executive Director

Approved as to form:

JOHN K. VAN DE KAMP  
Attorney General  
N. GREGORY TAYLOR  
Assistant Attorney General  
JOSEPH J. BARBIERI  
Deputy Attorney General

*Joseph J. Barbieri*  
JOSEPH J. BARBIERI  
Deputy Attorney General

ACE 850129



CONTRA COSTA COUNTY and  
PEOPLE OF THE STATE OF CALIFORNIA,  
IN AND FOR CONTRA COSTA COUNTY

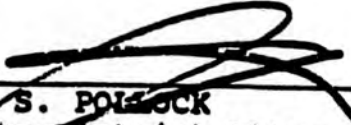
Dated: Nov 13, 1989

  
JAMES L. SEPULVEDA  
Deputy District Attorney  
Attorney for Contra Costa County

ACE 850130

SOLANO COUNTY and PEOPLE OF THE  
STATE OF CALIFORNIA, IN AND FOR  
SOLANO COUNTY

Dated: 11/14/89

  
MARK S. POLLOCK  
Deputy District Attorney  
Attorney for Solano County

ACE 850131

CITY OF BENICIA

Dated: 11-22-89

Marilyn O'Rourke  
MARILYN O'ROURKE  
Mayor

Approved as to form:

Howard Stern

HOWARD STERN  
WALTER & PISTOLE, P.C.  
Attorney for City of Benicia

ACE 850132

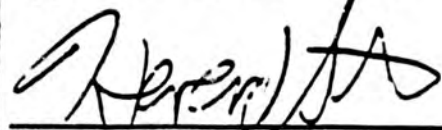
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CITY OF MARTINEZ

Dated: 11-27-89

  
MICHAEL MENESINI  
Mayor

Approved as to form:

  
HOWARD STERN  
WALTER & PISTOLE, P.C.  
Attorney for City of Martinez

ACE 850133



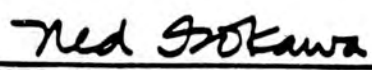
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EAST BAY REGIONAL PARK DISTRICT

DATED: November 28, 1989.

  
MARY LEE JEFFERS  
President  
Board of Directors

Approved as to form:

  
NED N. ISOKAWA  
CROSBY, HEAFEY, ROACH & MAY  
Professional Corporation  
Attorneys for East Bay  
Regional Park District

1 IT IS SO ORDERED, ADJUDGED AND DECREED.  
2

3 Dated:

4 UNITED STATES DISTRICT COURT JUDGE  
5 NORTHERN DISTRICT OF CALIFORNIA  
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ACE 850135

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APPENDIX

Pursuant to the Consent Decree, studies have been funded for improving future response strategies to oil spills to ensure better restoration and rehabilitation of natural resources affected by such spills. In order to ensure that the experts carrying out the following studies have access to all available information, Shell agrees to provide the following experts all biological and chemical studies and underlying data performed to date relating to the Oil Spill upon entry of the Consent Decree. The studies, the methods for implementing and reviewing the studies, and the experts retained to perform the studies are as follows:

A. Studies.

(1) A study to assess the rate of recovery of intertidal vegetation associated with various oil spill response techniques.

This study will provide increased information about which response techniques and procedures are most effective in cleaning up a spill like the Shell Oil Spill.

The focus of the study will be on the intertidal wetland marshes affected by the spill. Building on current studies conducted by Shell Oil Company, the study will monitor the erosion rates of all the vegetated shoreline adversely affected by the spill and compare vegetation recovery rates where different response techniques were used. The study will provide better information for future purposes regarding the most effective corrective actions to clean up oil and to restore and rehabilitate impacted areas.

ACE 850136

APPENDIX

1 To carry out this study, the California Department of  
2 Justice will extend its current contract with RPI International,  
3 Inc., and in particular with Dr. Jaqueline Michel, in an amount  
4 not to exceed \$210,000. RPI will subcontract part of this study  
5 to Dr. Terry Huffman of Huffman and Associates, who was retained  
6 as a consultant to the affected governments soon after the Shell  
7 Oil Spill occurred.

8 The contract will be administered by the California  
9 Department of Justice. Study managers for the contract will be  
10 technical personnel designated by the U.S. Fish and Wildlife  
11 Service (USFWS) and the California Department of Fish and Game  
12 (CDFG) who will provide substantive review, criticism and  
13 guidance for the study.

14 (2) A study to examine the changes in the composition  
15 and concentration of San Joaquin Valley (SJV) crude oil in  
16 estuarine and coastal habitats.

17 The purpose of this study is to examine the changes in  
18 composition and concentration of SJV crude oil spilled in  
19 intertidal and subtidal habitats in order to better evaluate the  
20 best methods to restore and rehabilitate these resources. This  
21 study will be coordinated with the vegetation study results  
22 described above to provide a better understanding of the  
23 recovery of typical coastal and estuarine environments from  
24 crude oil spills.

25 The study will build on the results of current studies  
26 conducted by Shell Oil Company and will have three specific  
27 tasks: (a) to conduct an oil weathering study of SJV crude oil  
28 in intertidal and subtidal sediments contaminated by the such



1 oil; (b) to correlate the persistence of SJV crude oil in  
2 sediments with different cleanup techniques in the wetland  
3 areas; and (c) to conduct sediment toxicity studies of  
4 intertidal and subtidal sediments contaminated by SJV crude oil.  
5 The technical reports generated by this study will provide  
6 increased information to better assess the potential effects of  
7 SJV crude oil spilled in estuarine and coastal environments.

8 To carry out this study, the California Department of  
9 Justice will contract with A.D. Little, and in particular with  
10 Dr. Paul Boehm, to continue Dr. Boehm's initial weathering  
11 studies of this oil in an amount not to exceed \$357,000.

12 The contract will be administered by the California  
13 Department of Justice. Study managers will be technical  
14 personnel designated by the USFWS and the CDFG who will provide  
15 substantive review, criticism and guidance for the study.

16 (3) A contingent valuation study to measure natural  
17 resource values relevant to California oil spills.

18 The purpose of this study is to apply state-of-the-art  
19 economic measurement techniques to better develop use and non-  
20 use values that humans place on offshore, coastal and estuarine  
21 natural resources damaged by oil spills occurring in California.  
22 The study would utilize the contingent valuation approach and  
23 the skills of several disciplines, including economics,  
24 sociology and survey research. The study would require the  
25 development of a survey instrument, the implementation of a  
26 field survey, and analysis of survey data and would take about  
27 one year to accomplish. The information derived from the study  
28 will assist federal, state and local governments in assessing

1 damages to natural resources from future California oil spills  
2 and in land use planning management and regulation of such  
3 natural resources.

4 To carry out this study, the California Department of  
5 Justice will extend its current contract with Dr. Michael  
6 Hanemann in an amount not to exceed \$645,000. Dr. Hanemann will  
7 subcontract part of this study to Drs. Richard Carson, Robert  
8 Mitchell, Thomas Wegge, Stanley Presser, John Loomis and Paul  
9 Ruud.

10 The contract will be administered by the California  
11 Department of Justice. Study managers will be technical  
12 personnel designated by the USFWS and the CDFG who will provide  
13 substantive review, criticism and guidance for the study.

14 B. Review of Studies and Final Report.

15 A small group of experts in the fields of the vegetation  
16 and oil studies described above will be formed to assist in  
17 review of such studies, in development of a Final Report based  
18 upon the conclusion of those studies and in dissemination of  
19 information to the spill response community. This "peer review  
20 group" will be responsible for providing detailed evaluations of  
21 the study plans and annual review of all study results. It will  
22 make recommendations on any necessary changes to the study  
23 plans, the duration of each study element, and the termination  
24 of each study element. RPI, aided by the contractors for the  
25 vegetation and oil studies, by the peer review group and the  
26 study managers will also be responsible for periodically  
27 disseminating study data to the spill response community through  
28 appropriate means such as meetings. At the conclusion of these

1 two studies, the contractors for the vegetation and oil studies  
2 aided by the peer review group, RPI and the study managers will  
3 develop a final report and arrange for its distribution.

4 To establish and coordinate this peer review group, the  
5 California Department of Justice will contract with RPI  
6 International, Inc., and in particular with Dr. Jaqueline  
7 Michel, in an amount not to exceed \$100,000. The contract will  
8 be administered by the California Department of Justice.

9 C. Experts.

10 The experts performing the above-described contracts  
11 were retained because of their unique qualifications in the area  
12 of their respective expertise. All of them are currently  
13 retained as consultants to the parties to the litigation and are  
14 uniquely familiar with the particular facts and circumstances of  
15 the Shell Oil Spill. Therefore, retention of these experts to  
16 perform and review the studies will entail the minimum  
17 expenditure of time and money and be most cost effective to the  
18 public and to the parties. Such experts will also provide  
19 critical continuity of knowledge and analysis of the Oil Spill  
20 events.

21 It is the intent of the parties that the experts will  
22 perform and continue the studies, using additional persons as  
23 deemed necessary, so long as is practicable. Their contracts  
24 may be terminated in the event that they do not meet the  
25 standards of their contracts.

26 D. Termination.

27 Upon completion of the contracts described in this  
28 Appendix, the California Department of Justice shall pay into

1 the Trustees Fund any unexpended and unobligated funds remaining  
2 in the Studies Fund.  
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ACE 850141



FILED

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION IX

27  
RECEIVED  
JUN 27 1990  
NATIONAL CLERK

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY,

Complainant,

v.

SHELL OIL COMPANY,

Respondent.

SPCC IX-90-01

NOTICE OF VIOLATION,  
COMPLAINT, AND NOTICE OF  
OPPORTUNITY FOR HEARING

NOTICE OF VIOLATION

1. This is notification of violations of the Oil Pollution Prevention Regulations, 40 C.F.R. Part 112, promulgated pursuant to Section 311(j) of the Clean Water Act, 33 U.S.C. § 1321(j).

2. Shell Oil Company ("Shell") owns or operates a non-transportation related onshore facility in Martinez, California engaged in storage or distribution of oil and oil products, which due to its location, could reasonably be expected to discharge oil in harmful quantities, as defined in Part 110 of Title 40 of the Code of Federal Regulations, into or upon the navigable waters of the United States or adjoining shorelines.

3. Shell violated the Oil Pollution Prevention Regulations by failing to fully implement a Spill Prevention Control and Countermeasures ("SPCC") Plan in accordance with section 112.7, 40 C.F.R. § 112.7, as required by section 112.3(a), 40 C.F.R. § 112.3(a), in that:

ACE 850142

EXHIBIT 1

1 a. the drainage valves for rainwater from the levee areas  
2 surrounding oil storage tanks were routinely left in an open  
3 position, contrary to the requirements of section  
4 112.7(e)(2)(iii) of the regulations, 40 C.F.R. § 112.7(e)(2)(iii)  
5 and the SPCC Plan; and

6 b. records required to be maintained by section 112.7(e)(8)  
7 of the regulations, 40 C.F.R. § 112.7(e)(8), were either missing  
8 or incomplete.

9 4. Shell violated the Oil Pollution Prevention Regulations by  
10 failing to amend and implement its SPCC Plan within six months  
11 after a change in the facility design, construction, operation or  
12 maintenance which materially affects the facility's potential for  
13 the discharge of oil into or upon the navigable waters of the  
14 United States or adjoining shore lines as required by section  
15 112.5(a) of the regulations, 40 C.F.R. § 112.5(a).

16 a. In October 1984, construction of two new oil holding  
17 tanks and alteration of the drainage systems was complete and the  
18 tanks were put into operation. The new drainage system allowed  
19 drainage from the levee areas around the tanks to go directly  
20 through an outfall to Peyton Slough without first passing through  
21 the facility's water treatment plant, thus materially affecting  
22 the facility's potential for discharging oil into or upon the  
23 navigable waters of the United States. Shell failed to amend its  
24 SPCC Plan until October 1986, fully two years after the changes  
25 at the facility; and  
26



1 these proceedings. In order to obtain a hearing, you must submit  
2 a written request, signed by you or on your behalf by a duly  
3 authorized officer, director, agent or attorney, within thirty  
4 (30) days of the receipt of the Notice of Violation. The request  
5 for hearing shall be in accordance with the requirements of  
6 section 114 and shall: (1) state the name and address of the  
7 person requesting the hearing; (2) state with particularity the  
8 issues to be raised by such person at the hearing; and (3)  
9 include a copy of the Notice of Violation. Address any request  
10 for hearing to:

11 Regional Hearing Clerk  
12 EPA, Region IX  
215 Fremont Street  
San Francisco, CA 94105

13 SETTLEMENT CONFERENCE

14 Whether or not you request a hearing, you have the right to  
15 present written explanation, information or any materials in  
16 answer to the charges or in mitigation of the penalty. You may  
17 confer informally with EPA concerning the alleged violations or  
18 the amount of the proposed penalty. A request for an informal  
19 conference does not stay the thirty (30) day period during which  
20 you must submit a written request for a hearing. You have the  
21 right to be represented by counsel at any such informal hearing.  
22 EPA has the authority to modify the amount of the proposed  
23 penalty to reflect any settlement agreement reached with you at  
24 any conference. EPA encourages all parties against whom a civil  
25 penalty is proposed to be assessed to pursue the possibilities of  
26 settlement as a result of informal conferences. Any such



1 settlement shall be finalized by the issuance of a written  
2 Consent Agreement signed by both parties and a written Order  
3 signed by the Director of the Waste Management Division pursuant  
4 to a delegation from the Regional Administrator, EPA, Region IX,  
5 or by means of a Consent Decree. The issuance of such Consent  
6 Agreement or Consent Decree shall constitute a waiver of your  
7 right to request a hearing on any matter stipulated to therein.  
8

9 Dated: Nov. 27, 1989

  
Jeff Zelikson, Director  
Hazardous Waste Management  
Division

1  
2 CERTIFICATE OF SERVICE

3 I certify that on the date noted below, I sent by first  
4 class mail, postage prepaid, a copy of the foregoing "Notice of  
5 Violation, Complaint, and Notice of Opportunity for Hearing" to  
the following persons at the addresses listed below:

6 Victoria J. Kincke  
7 Shell Oil Company  
8 Chemical Legal Department  
9 One Shell Plaza  
10 P.O. Box 2463  
11 Houston, TX 77252

12 Keith Howard  
13 Cooper, White and Cooper  
14 1333 N. California Blvd., Suite 450  
15 Walnut Creek, CA 94596

16 I further certify that on the same date below, I hand  
17 delivered an original of the above document to the following per-  
18 son at the address listed below:

19 Regional Hearing Clerk  
20 U.S. EPA, Region 9  
21 215 Fremont Street  
22 San Francisco, CA 94105

23 Date: 11/27/89

24 Laurie Kermish  
25 Laurie Kermish  
26 Assistant Regional Counsel  
27 Office of Regional Counsel  
28 U.S. EPA, Region 9  
215 Fremont Street  
San Francisco, CA 94105

ACE 850147

## MEMORANDUM OF AGREEMENT

Whereas, the United States and the State of California (the "State") are trustees for natural resources damaged by the Shell oil spill (the "Oil Spill"); and

Whereas, the National Contingency Plan, 40 C.F.R. section 300.74(c), and section 311 of the Clean Water Act, 33 U.S.C. section 1321, require that federal and state trustees cooperate with each other in carrying out their responsibilities for protecting natural resources;

Whereas, the U.S. Fish and Wildlife Service has the authority under the Fish and Wildlife Coordination Act, 16 U.S.C. section 661 and 43 C.F.R. Part 11 to enter this agreement on behalf of the U.S. Department of the Interior as trustee for natural resources damaged by the spill;

Now, therefore, the United States and the State have determined that the following procedures for disbursement and management of the funds received for natural resource damages will best enable them, as trustees, to restore, rehabilitate and acquire the equivalent of the natural resources damaged by the Oil Spill.

ACE 850148

### **I. THE COMMITTEE.**

A "Committee" shall be established as follows:

A. Composition. The Committee shall be composed of:

1. The United States Department of the Interior, by and through the United States Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration, acting as the natural resources trustees for the United States;

2. The Department of Fish and Game and the State Lands

EXHIBIT 2

Commission, acting as the natural resources trustees for the State;

3. The East Bay Regional Park District; and

4. The San Francisco Bay Conservation and Development Commission, acting on behalf of the public in the San Francisco Bay Area and on behalf of the Commission's membership, which includes representatives from federal, state and local agencies.

To insure continuity in the Committee's work, each agency represented on the Committee shall designate a permanent representative from its staff to serve on the Committee. Each agency shall also designate alternate representative(s).

B. Decisionmaking. The trustees for the natural resources damaged, the United States and the State, shall have co-equal authority in all decisions, and no decision shall be made that does not have the approval of both the United States and the State. If necessary, the trustees may establish mechanisms by which disputes may be resolved.

C. Duties and Authority. The Committee shall have final authority to disburse the money contained in the Trustees Fund referred to in section IV(A)(1) of the Consent Decree and to make all necessary decisions for the management and administration of the projects for which money has been disbursed from the Trustees Fund. The Committee may take whatever actions that the Committee in its discretion determines are necessary to effectuate the purposes of the Consent Decree and the Natural Resource Objectives described in section II of this Memorandum of Agreement ("MOA"). It is expected that the Committee will take the following actions to accomplish these



**purposes:**

1. Supervise the administration of the Trustees Fund and disburse money where necessary from the Trustees Fund;
2. Select one or more agencies or organizations (the "Facilitating Agency or Agencies") that, on the behalf of and at the direction of the Committee, may:
  - a. inventory land suitable for acquisition pursuant to the Natural Resource Objectives described in section II of this MOA;
  - b. negotiate for and purchase such land;
  - c. transfer ownership of such land to other public agencies;
  - d. plan for and carry out appropriate wetlands restoration projects;
  - e. contract with consultants to provide technical services to the Committee as described in Section IV of this MOA; and
  - f. take other necessary actions as requested by the Committee.

The Facilitating Agency or Agencies selected by the Committee pursuant to this paragraph shall be a public agency or agencies, unless the Committee determines that a private, non-profit organization would better achieve the Natural Resource Objectives. If the Committee determines that a private, non-profit organization should be selected as a Facilitating Agency, the Committee shall designate one of its agency members to enter into one or more contracts with a private, non-profit organization to act as a Facilitating Agency. The contract

shall set forth the duties of the Facilitating Agency and shall specify the costs of the private, non-profit organization to act as a Facilitating Agency. The costs of the contract and reasonable administrative costs to enter into such contract shall be paid from the Trustees Fund;

3. Review inventories of land acquisition sites and guide the Facilitating Agency or Agencies in negotiations to acquire the sites;

4. Authorize the Facilitating Agency or Agencies to acquire lands on terms acceptable to the Committee;

5. Select one or more public agencies to hold title to the lands acquired by the Committee and, where necessary, attach conditions to the acquiring agency's ownership that would insure the accomplishment of the Natural Resource Objectives;

6. Review and approve leases or other operating agreements between the public agency holding title to any acquired lands and the public agency to whom management responsibility is proposed to be transferred;

7. Create, review, and approve plans for the restoration and management of the acquired lands;

8. Provide funds to other public agencies for the acquisition, creation, and restoration of wetlands where the wetlands would not be acquired, created or restored but for the contribution from the Trustees Fund and where the Committee receives assurances (through a memorandum of understanding or other device) that the acquisition, creation or restoration of the wetlands would be consistent with the Natural Resource Objectives;

9. Convene meetings of the Technical Advisory Committee described in section III, and receive the advice of the Technical Advisory Committee;

10. Prepare and issue public reports from time to time disclosing the work of the Committee;

11. Pay administrative costs that the Committee determines are reasonable and necessary;

12. Establish rules to govern and facilitate the work of the Committee as necessary.

## II. NATURAL RESOURCE OBJECTIVES.

The Committee will be guided by the primary objectives of restoring, rehabilitating and acquiring the equivalent of the natural resources adversely affected by the Oil Spill (the "Natural Resource Objectives"). The Committee will seek to accomplish these objectives in the following manner:

The primary means by which the Committee will seek to accomplish the Natural Resource Objectives is through the acquisition, creation, restoration, or enhancement of wetlands in the area of the Oil Spill. In determining which projects to pursue, the Committee's primary consideration shall be the "feasibility" of the proposed site. For purposes of this Memorandum of Agreement, "feasibility" means the physical suitability of the site for the creation or restoration of valuable and productive wetlands habitat, taking into account the economic cost of acquisition, restoration and management of the habitat in comparison to the cost of developing other wetlands sites in the area of the Oil Spill. In evaluating the physical suitability of the proposed wetlands, the Committee may

consider not just the intrinsic capability of the site to support natural resources, but the usefulness of the site in combination with proximate existing wetlands habitat, the location of the site in relation to existing development, and the site's level of protection from development provided under law. The Committee may acquire land adjacent or near to wetlands habitat where the Committee deems it necessary to accomplish the Natural Resource Objectives. The Committee shall attempt to establish a relatively equal number of acres of wetlands in Solano and Contra Costa Counties, as long as such an allocation would be "feasible," as described above. The Committee may coordinate its acquisition and restoration activities with other agencies involved in the acquisition and management of wetlands habitat. The Committee's decisions regarding the acquisition, creation, restoration and management of wetlands habitat shall take into account the habitat's values for supporting fisheries, particularly striped bass.

The Committee retains final discretion to determine which wetlands projects best carry out the Natural Resource Objectives. It is the goal of the Committee to create, restore, or enhance 1000 acres of wetlands. In undertaking this goal the Committee shall give fair consideration to funding the wetlands restoration project that is currently being developed by the California Department of Parks and Recreation at the Benicia State Recreation Area. In addition to its goal of establishing 1000 acres of new wetlands, the Committee shall give special consideration to the following two projects if they are "feasible", as described above:

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1. The enhancement of wetland habitat values at Shell Marsh and the acquisition of a buffer strip around Shell Marsh;

2. The establishment of an appropriate program to study the restoration of the state-listed rare plant mason's lilaeopsis which was impacted by the Oil Spill.

### III. TECHNICAL ADVISORY COMMITTEE.

A. Composition. A committee known as the Technical Advisory Committee shall be established. The following agencies have the right to have a representative on and to participate in the activities of the Technical Advisory Committee:

1. The U.S. Fish and Wildlife Service;
  2. The U.S. Environmental Protection Agency;
  3. The Department of the Navy;
  4. The National Oceanic and Atmospheric Administration;
  5. The Regional Water Quality Control Board, San Francisco Bay Region;
  6. The California Department of Fish and Game;
  7. The State Lands Commission;
  8. The San Francisco Bay Conservation and Development Commission;
  9. The California Department of Parks and Recreation;
  10. Solano County;
  11. Contra Costa County;
  12. The City of Benicia;
  13. The City of Martinez;
  14. The East Bay Regional Park District.
- The Technical Advisory Committee may invite

representatives of other public agencies and members of the public to its meetings when, in the sole judgment of the Committee, public disclosure of the Committee's work would not prejudice the effectiveness of the Committee or the Technical Advisory Committee. With the approval of the Committee, the Technical Advisory Committee may also invite technical consultants to its meetings.

B. Duties. The Technical Advisory Committee shall meet from time to time at the request of the Committee to review, guide, and comment upon the work of the Committee. The Technical Advisory Committee may advise the Committee in any of the following areas:

1. The inventory of land acquisition sites and priorities for acquisition;
2. Negotiations and purchases of specific sites, including the feasibility of acquiring the site under the standard set out in the Natural Resource Objectives;
3. The selection of public agencies to own and manage acquired lands;
4. Plans for creating, restoring and maintaining wetlands habitat;
5. Any other area where the Committee determines that the Technical Advisory Committee could provide useful advice.

#### IV. TECHNICAL SERVICES.

To assist the Committee in carrying out the Natural Resource Objectives described in section II of this Memorandum of Agreement, the Committee may determine that it needs technical advisors. These advisors may provide the following

**services:**

- A. Provide the Committee with logistical support and coordination;
- B. Provide project design and technical review;
- C. Organize and prepare for Committee meetings;
- D. Advise the Committee during Committee meetings;
- E. Provide for quality control of chemical analyses;
- F. Assist in mitigation site selection and detailed designs;
- G. Develop mitigation success monitoring criteria;
- H. Monitor for mitigation success through data and report view and by field inspections;
- I. Provide analysis and quarterly reports understandable in layperson terms;
- J. Provide analysis and summary report understandable in layperson's terms;
- K. Assist in the preparation of periodic press releases;
- L. Provide other technical advice to the Committee and the Technical Advisory Committee as requested.

To obtain technical services, the Committee may direct a Facilitating Agency to enter into one or more contracts with professional consultants that the Committee determines are best qualified to provide services to the Committee. The total cost of the contracts, including the administrative costs of the Facilitating Agency, shall not exceed \$500,000. The costs of the contracts shall be paid from the Trustees Fund.

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**V. GENERAL.**

A. This MOA may be amended by agreement of the trustees where the trustees determine an amendment is necessary to accomplish the Natural Resource Objectives.

B. This MOA terminates seven years from the date of entry of the Consent Decree, except that it may be extended by agreement of the trustees.

C. Upon completion of the Committee's work, any unexpended and unobligated money remaining in the Trustees Fund shall be paid into the Fish and Wildlife Pollution Cleanup and Abatement Account of the Fish and Game Preservation Fund, California Fish and Game Code section 12017.

D. No member of the Committee, the Technical Advisory Committee or a Facilitating Agency, where such Facilitating Agency is a public agency, shall be compensated from the Trustees Fund for his/her services provided pursuant to this MOA.

E. Nothing in this MOA shall be construed as obligating the United States or the State, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

F. During the performance of this MOA, the parties will not discriminate against any person because of race, color, religion, sex or national origin.

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ACE 850157



STATE OF CALIFORNIA  
DEPARTMENT OF FISH AND GAME

Dated:

Peter F. Bontadelli  
Peter F. Bontadelli  
Director 11-27-89

ACE 850158

STATE OF CALIFORNIA  
STATE LANDS COMMISSION

Dated: 11-27-89

  
Claire T. Dedrick  
Executive Officer

ACE 850159

STATE OF CALIFORNIA  
SAN FRANCISCO BAY CONSERVATION  
AND DEVELOPMENT COMMISSION

Dated: 11-27-89

*Alan R. Pendleton*

Alan R. Pendleton  
Executive Director

ACE 850150

EAST BAY REGIONAL PARK DISTRICT

DATED: November 28, 1989.

*Mary Lee Jeffers*  
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MARY LEE JEFFERDS  
President  
Board of Directors



U.S. FISH AND WILDLIFE SERVICE  
U.S. DEPARTMENT OF THE INTERIOR

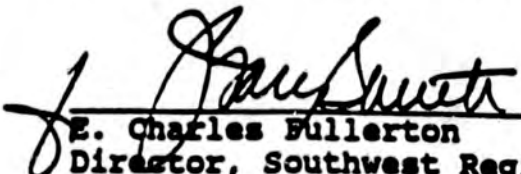
Dated: 11-27-89

  
Marvin L. Pienart  
Regional Director  
U.S. Fish and Wildlife Service,  
Region I

ACE 850162

NATIONAL OCEANIC AND ATMOSPHERIC  
ADMINISTRATION  
U.S. DEPARTMENT OF COMMERCE

Dated: 11-22-89

  
E. Charles Fullerton  
Director, Southwest Region  
National Marine Fisheries Service

ACE 850163