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DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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MEMORANDUM

April 17, 1991

SUBJECT: Use of money in the "470" fund for litigation
(Work Order No. 7-1234)

TO: Senator Dick Eliason, Chair
Senate Special Committee on the Exxon Valdez Oil Spill
Claims Settlement

FROM: Tamara Brandt Cook *TBC*
Director

You have asked whether money in the Oil and Hazardous Substance Release Response Fund ("470" fund) may be used to cover the costs of litigation involving the Exxon Valdez oil spill. The commissioner of environmental conservation is authorized to use money in the fund under AS 46.08.040(a) for the purposes listed in that subsection. One of the purposes listed would clearly permit the commissioner to make some money available for litigation efforts. Under paragraph (5) the commissioner is authorized to use money from the fund to

recover the cost to the state or to a municipality of a containment and cleanup resulting from the release or threatened release of oil or a hazardous substance. . .

In addition, paragraph (7) may provide the commissioner some authority to use money for litigation expenses to collect damages to the environment if there is some expectation that money recovered will be used for restoration.

It must be stressed, however, that the various statutes dealing with uses that may be made of money in the fund apply to the executive branch. There is nothing that purports to limit the legislature's power to appropriate from the fund for any purpose. Even if there were, it is unlikely that such statutorily imposed limitation would be held by a court to effectively curtail the legislature's constitutional power of the purse. Therefore, the legislature may appropriate money from the "470" fund to cover litigation expenses incurred as a result of the oil spill or for any other public purpose it chooses. Such an appropriation would, of course, be subject to the governor's veto power.

Senator Dick Eliason

April 17, 1991

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With respect to the \$.05 per barrel con surcharge, suspension of the surcharge is based upon a determination of the amount collected from the surcharge through a calendar quarter minus the amount expended from the "470" fund. If the difference equals or exceeds \$50,000,000, the surcharge is suspended. (AS 43.55.230) Appropriations from the fund should qualify as amounts "expended," as well as expenditures made by the executive branch under AS 46.08.040. Since appropriations from the fund have the effect of depleting it, the surcharge will tend to remain in place if the legislature begins to tap into the fund directly through its appropriation power.

Under AS 43.55.240, if the legislature fails to appropriate revenue from the surcharge to the "470" fund or the governor vetoes the appropriation so that it does not become law, it is possible that the surcharge will not be imposed during a fiscal year. But nothing, other than the governor's veto, prevents the legislature from appropriating surcharge revenue to the fund and then appropriating it back out again, even though this will have the effect of keeping the surcharge in place when the \$50,000,000 cap might have otherwise been reached.

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Department of Commerce

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**U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration**

**NATIONAL OCEAN SERVICE
OFFICE OF OCEANOGRAPHY AND MARINE ASSESSMENT
OCEAN ASSESSMENTS DIVISION
ROCKVILLE, MARYLAND 20852**

8 April 1991

MEMORANDUM FOR: NOAA/GC Thomas A. Campbell
Washington Policy Group
Trustee Council

FROM:

Douglas A. Wolfe
Robert B. Spies
Donald C. Malins

SUBJECT:

RECOMMENDATIONS RELATED TO REVIEW AND
RELEASE OF NRDA DATA AND TO PUBLICATION OF
EXXON VALDEZ ASSESSMENT RESULTS

We want to share with you our collective concerns about recent efforts and activities to place for public access all available, quality-assured NRDA data into the Oil Spill Public Information Center in Anchorage as soon as possible. Our view is that the release of "data" (whether quality-assured or not) without accompanying interpretive reports will raise a series of conflicting interpretations from various interested parties. The controversy ensuing from such releases and counterclaims would be regrettable and could erode support for the NRDA process. In addition, we believe that publicly available interpretive analyses of the NRDA data performed by the NRDA Project Managers, and that the reports and manuscripts should undergo peer review prior to formal publication.

The release of the NRDA planning documents (detailed study plans and interim project reports) should not, in most cases, be a problem as long as they are clearly identified as interim planning documents that: a) are based on incomplete data; b) have not undergone peer review; and c) contain interpretations subject to revision. The raw data that were available to the Project Managers and taken into consideration at the time they drafted those reports could also be appended and made available with the same caveats. Additional data generated more recently, however, should NOT be archived in the repository for public access until such time as the Project Managers have had the opportunity to review, analyze and interpret those data. This concern applies very strongly to the hydrocarbon analytical data collected under project Technical Services No. 2. Large amounts of these data have become available only after the last



interim reports were written, and in many cases, the Project Managers have not yet had an opportunity to review the data, much less develop interpretive reports. In most cases, the Project Managers are still waiting for additional data before they can reasonably undertake their detailed data analyses and interpretations.

We are also concerned that without coordinated direction, the very large base of information (both scientific and economic) developed about the EXXON VALDEZ spill (easily the best-studied spill in human history to date) might be released and published in a haphazard and diffuse manner, resulting in a product not easily accessible either to the scientific community or to the interested public. The current push for release of available data to the Public Information Center could stimulate Project Managers to rush incomplete results towards publication in the most accessible publication outlets. While our principal investigators should definitely be encouraged to publish their results as early as possible in peer-reviewed scientific journals, this process should be driven by the maturation and analysis of logical units of data and the development of significant interpretations and conclusions.

An attractive mechanism for public release of information would be for the Trustees (perhaps in cooperation with Exxon) to sponsor a major symposium for the presentation of EVOS results, and to publish, in one place, a comprehensive collection of scientific papers related to the spill. The sponsors could install an acceptable mechanism for peer review of all papers. The proceedings could be published through an existing scientific journal, or could take the form of a separate, high quality volume (such as that published by the French *Centre National pour l'Exploitation des Oceans* for the *Amoco Cadiz* spill). This approach would motivate the investigators to analyze and publish their results on a rigorous schedule, ensure that a large block of EVOS information (from all possible sources) becomes accessible in one place, and provide a uniform standard for quality control on the publication. A logical and practical time frame for this symposium would be during spring of 1992 (providing ample time for analysis of Oil-Year 3 results). The team of Wolfe, Spies, and Malins possesses considerable experience in the organization and conduct of such symposia and the publication of high quality proceedings. With NOAA's support, we could undertake this activity, working through the existing structure of the Management Team to notify the Project Managers and request their participation. Planning must start very soon, however, if this approach and schedule are to be implemented.

cc: C.N. Ehler

STATE OF ALASKA

AUDIT DIVISION
P.O. BOX W
JUNEAU, ALASKA 99811-3300

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

MEMORANDUM

TO: Representative Max Gruenberg, Chair
House Special Committee on the *Exxon Valdez*
Oil Spill Claims Settlement

Representative Kay Brown, Chair
House DEC Budget Subcommittee

FROM: Randy S. Welker *Randy*
Legislative Auditor

DATE: April 18, 1991

SUBJECT: Information Regarding Expenditures Covered by the Memorandum of Agreement between the State, the Federal Government, and Exxon.

This memorandum has been prepared in response to your request regarding information on state expenditures involved in responding to the *Exxon Valdez* oil spill. In order to respond to your questions, we reviewed the Memorandum of Agreement (MOA) between Exxon and the State and federal governments.

We were able to obtain expenditure information compiled by Peterson and Associates that appears to have been the basis for the \$72 million cost recovery amount included in the MOA. Due primarily to time constraints, we are not able to provide you with total assurance regarding the reasonableness of the MOA's cost recovery provisions.

The expenditure information used in the development of the MOA's \$72 million ceiling is comprehensive. From our cursory review of the Peterson and Associates information, and discussions with a Peterson and Associates representative and agency staff of the significantly involved departments, we believe that the \$72 million amount in the MOA appears to reasonably represent the oil spill response, assessment, and litigation costs incurred by the State through December 31, 1990.

Using the Peterson and Associates information, compiled from the State's accounting system, we have developed the following information. We also offer some observations and concerns that we have regarding cost recovery under the terms of the MOA.

COST REIMBURSEMENT

Section V. B of the MOA allows the State to receive up to \$72 million for "reimbursement of allowed expenses," incurred through December 31, 1990. The section further allows the State to receive reimbursement of "response and cleanup costs incurred after December 31, 1990."

From the detailed listing of expenditures prepared by Peterson and Associates, we developed the following table summarizing expenditures by agency through December 31, 1990.

DEPARTMENT	Estimated Recorded Expenditures (thousands)		Remaining Expenditures or Costs (thousands)
Administration	3,591.0		3,103.0
Commerce and Economic Development	627.0	499.0	128.0
Community and Regional Affairs	1,429.0	40.0	1,389.0
Environmental Conservation	38,652.0	24,621.0	14,031.0
Fish and Game	23,467.0	6,440.0	17,027.0
Governor's Office	1,345.0	730.0	615.0
Health and Social Services	827.0	7.0	820.0
Labor	895.0	273.0	622.0
Law	17,342.0	0.0	17,342.0
Military and Veterans' Affairs	949.0	653.0	296.0
Natural Resources	2,989.0	1,341.0	1,648.0
Public Safety	334.0	18.0	316.0
Transportation and Public Facilities	1,131.0	1,013.0	118.0
University of Alaska	439.0	53.0	386.0
TOTALS	94,017.0	36,176.0	57,841.0
NON-CASH EXPENDITURE ADDED IN MOA TOTALS:			
Overhead (4,600.0)/Financing (3,900.0) Estimates			8,500.0
Damage Assessment Obligations (costs incurred but not paid by 12/31/90)			3,100.0
Litigation Obligations (costs incurred but not paid by 12/31/90)			2,500.0
Total Expenditures used to set MOA Cost Recovery Cap			71,941.0

The table on the following pages highlights the major, but not all, components of each department's costs and includes our observations.

DEPARTMENT (Total Expended)/ COMPONENT DESCRIPTION	COMPONENT AMOUNT (thousands)	COMMENTS
ADMINISTRATION (3,591.0): Valdez Oil Spill Commission Telecommunications	952.0 2,200.0	The Telecommunication costs may be understated. We reviewed information as of 8/15/90 that showed expenditures of 3,300.0 primarily for two projects: Prince William Sound microwave system (2,091.0) and a non-microwave system for the South Kenai/Kodiak link (1,206.0).
COMMERCE AND ECONOMIC DEVELOPMENT (627.0): Alaska Seafood Marketing Institute (ASMI) Weigh Stations	475.0 130.0	ASMI received 800.0 directly from Exxon. Actual expenditures were somewhat greater than reflected here, however it is immaterial as any costs are paid from funds already received, with a net zero effect on nonreimbursed costs.
COMMUNITY AND REGIONAL AFFAIRS (1,429.0): Community Assistance Grants	1,173.0	Grants were awarded on a competitive/needs based evaluation. Eighteen grants were awarded ranging from 2.3 to Port Lions for equipment repair to 684.0 to Kodiak for a Social/Economic Study.
ENVIRONMENTAL CONSERVATION (38,652.0): Personal Services Travel Contractual Equipment	14,000.0 2,218.0 20,000.0 1,000.0	The oil spill drastically impacted DEC. Personal services included significant overtime, project new hires, and back-fills for employees assigned to the spill. We are more confident in the accounting section at DEC than most of the impacted departments. However, we will verify that further with a detailed financial review for FY 90.
FISH AND GAME (23,476.0): Personal Services Travel Contractual	10,350.0 1,000.0 8,455.0	The majority of the department's work dealt with impact assessment studies on a wide variety of fish and wildlife species. The department fiscal staff believes the total recorded expenditures adequately cover costs incurred.
GOVERNOR'S OFFICE (1,345.0): Oil Spill Coordination Office	995.0	
HEALTH AND SOCIAL SERVICES (827.0): Substance Abuse Grants Mental Health and DD Grants	522.0 231.0	
Labor (895.0): OSHA/Inspections/Job Service Training Spill Workers in Safety Compliance	325.0 174.0	
LAW (17,342.0): Legal Expenses Experts and Consultants	11,400.0 4,682.0	According to the department, the total amount recorded plus the 2,500.0 litigation obligation will cover costs through 12/31/90. It is estimated an additional 4,000.0 will be needed for 1991 costs.
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(Continued) DEPARTMENT (Total Expended)/ COMPONENT DESCRIPTION	COMPONENT AMOUNT (thousands)	COMMENTS
MILITARY AND VETERANS' AFFAIRS (949.0):		Significant initial response effort from the Division of Emergency Services.
NATURAL RESOURCES (2,989.0): Personal Services Equipment	2,000.0 600.0	Most personal services costs were for temporary project hires for oil spill response. Fiscal staff is confident total covers costs incurred.
PUBLIC SAFETY (334.0): Increased Enforcement Two Enforcement Vessels	100.0 142.0	Personal services costs for overtime/sea pay for troopers and Fish and Wildlife vessel crew for increased enforcement. Little, if any, regular compensation for permanent employees is included.
TRANSPORTATION AND PUBLIC FACILITIES (1,131.0): MV Aurora MV Bartlett	488.0 46.0	MV Aurora provided floating lodging for oil spill workers.

Almost half of the State expenditures were made with 470 funds

Of the \$94 million in expenditures, it has been estimated that more than \$46.7 million has been spent out of the Oil and Hazardous Substance Response Fund (OHSRF), also known as "470 Funds." According to a draft of an internal audit report prepared by the Department of Environmental Conservation, the expenditures from the fund, broken down by agency, are:

EXPENDITURES BY DEPARTMENT FROM THE OIL AND HAZARDOUS SUBSTANCE RESPONSE FUND	Estimated Recorded Expenditures (thousands)
Administration	2,281.0
Environmental Conservation	32,889.0
Fish and Game	7,095.0
Governor's Office	275.0
Labor	272.0
Law	92.0
Military and Veterans' Affairs	60.0
Natural Resources	1,529.0
Transportation and Public Facilities	786.0
University of Alaska	59.0
Other	1,400.0
Total	46,738.0

According to the information compiled by Peterson and Associates, the Department of Fish and Game has received \$5.7 million in reimbursements from the Federal CERCLA process. As of December 31, 1990, Exxon had reimbursed \$30 million to the State's Oil and Hazardous Substance Response Fund (OHSRF). Given these reimbursements, total "out-of-pocket expenditures," broken down by "funding source," are as follows.

Expenditures by "Funding Source"	Expenditures (thousands)
General Fund	41,100.0
CERCLA Reimbursement to General Fund	5,700.0
EXXON Reimbursement to the Oil and Hazardous Substance Response Fund	30,000.0
EXXON Reimbursement to Alaska Seafood Marketing Institute	500.0
Unreimbursed Oil and Hazardous Substance Response Fund Expenditures	16,700.0
Total "Out-of-Pocket" Expenditures by State	94,000.0

OBSERVATIONS AND QUESTIONS

1. What requirements, if any, must the State meet to receive recovery? - It is our understanding that the cost recovery totals listed in the MOA are to settle all expenditure claims still pending before Exxon, in addition to reimbursing the State for expenditures not yet submitted. According to a January 4, 1991 summary, \$49.7 million in state expenditures had been submitted to Exxon. Of this amount Exxon had paid just over \$30 million, was still considering \$4.4 million, and had rejected \$14.8 million in submitted claims. As suggested by the summary of expenditures submitted to Exxon already, a significant part of the \$72 million recovery amount contemplated in the MOA has previously been rejected for reimbursement. Does the cost recovery amount allowed for in the MOA supersede earlier decisions by Exxon officials not to reimburse the State for some of the costs claimed? Does the use of the phrase "allowed expenses" in the MOA imply that the State's expenditures must meet some specific criteria or requirement prior to being eligible for reimbursement?

We have been informally advised by Legal Services Director Tam Cook that the agreement is silent about any specific criteria for "allowed" expenditures. She commented that this possibly could be an issue subject to further discussion and negotiation between the State and Exxon. However, Ms. Cook also reported that Attorney General Cole testified before the Committee that the reimbursement would be paid without further audit or scrutiny by Exxon. We suggest that the Committee get a clear understanding of any further review and approvals to which these expenditures may be subjected.

2. Ownership of assets and other personal property - From the outset of the cost reimbursement process, Exxon had told the State that any durable goods and equipment purchased by the State and reimbursed by Exxon belonged to the company after the oil spill activity was finished. The summary of expenditures that make up the MOA's \$72 million recovery cap, lists over \$4 million in equipment bought by the State. Additionally, more than \$11 million was paid by Exxon directly to vendors. This amount may also include payment for equipment used by the State.

Is Exxon going to continue to insist on the return of the numerous computers, filing cabinets, boats, and telecommunications equipment paid for by the company? If so, a significant effort will be required to inventory, centralize, and value this property, which may require future appropriations from the legislature. It may be in the State's best interest to compensate Exxon for the current diminished value of the equipment.

3. Audit Access to Restoration Funding - In a March 18, 1991 overview memorandum, the Division of Legal Services raised the issue of audit access to the expenditures of the trustees. The memorandum rhetorically asks who, if anyone, will perform audits of the trustees' expenditures? We concur that audit access should be clarified. Due to the unique relationship between the state and federal governments in administering these funds, some provision should be made that clearly gives the Legislative Auditor access, on behalf of the State, to expenditures of the trustees.

In summary, we believe that the \$72 million amount appears reasonable. Additionally, the overhead and financing amount of \$8.5 million is not based on identified expenditures, but on estimates. Therefore, we believe there may be some "cushion" in this number to cover costs not identified as of December 31, 1990.

We hope this memorandum provides some insight into the make-up of the \$72 million ceiling in the MOA. If you need further clarification or detail please contact me at 465-3830.

cc: Representative Ron Larson, Chairman
Legislative Budget and Audit Committee

Members of the Legislative Budget
and Audit Committee

Members of the Senate Special Committee on the
Exxon Valdez Oil Spill Claims Settlement

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**POTENTIAL APPROACH TO SETTLEMENT WITH ALYESKA ASSUMING
RELEASE OF NATURAL RESOURCE DAMAGE CLAIM PURSUANT TO
THE EXXON SETTLEMENT AGREEMENT**

1. Counts in State Complaint involving Alyeska/Owner Companies:

- a. Count I - Negligent or Intentional Failure to Contain or Clean Up
- b. Count III - Negligent or Intentional Misrepresentation
- c. Count VII - Breach of State Right of Way (ROW) Lease
- d. Count VIII - Public Nuisance
- e. Count IX - Private Nuisance
- f. Count XII - Restoration Costs under AS 46.03.780
- g. Count XV - Civil Penalty Under AS 46.03.760(a)
- h. Count XVI - Emotional Distress
- i. Count XVII - Punitive Damages

Note: Count XII (Restoration Costs) is subject to the release. Whether the nuisance actions are covered by the scope of the release is an open question. No theory under AS 46.03.760(a) (Count XV) was ever developed against Alyeska.

2. Remaining Damage Claims to Pursue Against Alyeska:

- a. Past damage assessment, response costs and attorney's fees to the extent that the total amount incurred exceeds the \$72.0 million dollar cap established by the Exxon Settlement Agreement (ESA).
- b. Future response costs and Exxon clean up credit. The State might be able to construct an argument that either or both of these amounts deducted from the amount otherwise available from the settlement monies for restoration should be compensated by Alyeska as effectively unreimbursed expenditures.

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- c. **Future Litigation Costs:** Includes costs of DOL Civil Section, outside counsel and experts not reimbursed by Exxon. Depends on position taken by private plaintiffs and whether or not a quick settlement with Alyeska is obtainable.
 - d. **Lost oil revenues from taxes and royalties arising out of TAPS shut down due to failure to contain clean up.**
 - e. **Lost fish tax revenues from Fisheries Business Tax, AS 43.75, from Salmon Enhancement Tax, AS 43.76 and Seafood Marketing Assessment, AS 16.51.160.**
 - f. **Punitive Damages.** Difficult to assess merits of case given stage of discovery. Best case relates to Alyeska's woeful state of preparedness at time of spill and its lackadaisical response during first days of the spill.
3. **Other Remedies Arguably Available Against Alyeska:**
- a. **Indemnification Responsibility of Alyeska pursuant to Paragraph 13 of State ROW Lease:** Still may be a bargaining chip especially, since indemnification of third party claims was not a part of the ESA.
 - b. **Injunctive Relief:** Impose requirements for more clean up or ~~higher~~ ^{greater} degree of preparedness. (Note: DEC is currently happy with state of Alyeska's Contingency Plan).