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COMMENTS OF
ALASKA CENTER FOR THE ENVIRONMENT
DEFENDERS OF WILDLIFE
GREENPEACE
NATIONAL AUDUBON SOCIETY
NATURAL RESOURCES DEFENSE COUNCIL
NORTHERN ALASKA ENVIRONMENTAL CENTER
PRINCE WILLIAM SOUND CONSERVATION ALLIANCE
SIERRA CLUB
TRUSTEES FOR ALASKA

ON THE
MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES
AND THE STATE OF ALASKA
CONCERNING THE EXXON VALDEZ OIL SPILL

Prepared by:

Sarah Chasis
Robert Adler
Senior Attorneys
Natural Resources Defense Council

Eric Jorgensen
Managing Attorney
Sierra Club Legal Defense Fund

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The following environmental organization submit these comments on the Memorandum of Agreement (MOA) between the federal and state government in response to the request for written comments appearing in the Federal Register (56 FR 11642, March 19, 1991): Alaska Center for the Environment, Defenders of Wildlife, Greenpeace, National Audubon Society, Natural Resources Defense Council, Northern Alaska Environmental Center, Prince William Sound Conservation Alliance, Sierra Club and Trustees for Alaska.¹ This MOA resolves claims of the two parties and outlines very generally how the settlement money received from Exxon will be managed jointly by the federal and state trustees, with all decisions concerning the use of the funds (except for certain allowed expenses) being made by unanimous agreement. The MOA states that the public will be given meaningful opportunities to participate in the restoration process without giving any specifics and invites public comment regarding the nature and extent of appropriate public involvement.

Following are the environmental groups' suggestions for meaningful public participation in the injury assessment and restoration process and other comments on the MOA.

We believe that a more detailed commitment to meaningful public participation should be made in the MOA before the agreement

1. These groups are also submitting comments on the Proposed Settlement. These comments are incorporated herein by reference.

becomes final and the specification of these procedures should not be left to some uncertain time in the future.

I. PUBLIC PARTICIPATION IN THE INJURY ASSESSMENT AND RESTORATION PROCESS

The MOA provides that the Trustees shall establish procedures providing for meaningful public participation in the injury assessment and restoration process, which may include establishment of a public advisory group. See IV.A.4.

We propose that public participation not be limited to an advisory role only. We would like to see public members with voting power on the Trustee Council itself. The Chair and Vice-Chair of the public advisory committee could serve as the public representatives. This would ensure that the recommendations of the Advisory Committee were given real weight and would broaden the perspective of the decision-makers beyond that of government agencies. It would enhance public confidence in the decision-making process.

Attached to these comments is a proposal for a public advisory committee. [Attachment 1.] Components of this proposal include: a broad range of representation from the interests adversely affected by the spill; no representative from any oil company or oil company consortium on the grounds that those responsible in any way for the spill (i.e., Exxon, Alyeska or companies with an interest in Alyeska) should not have any say in how the

settlement money is spent; the responsibility to develop and propose a comprehensive program each year for restoration which the Trustees must review and decide upon; a small independently paid staff for the Advisory Group to give it the capability and independence to have a meaningful role in the process; coverage of members' travel expenses and a reasonable per diem to enable full and effective participation by all members.

However, neither the creation of such a public advisory committee nor broad public participation in the injury assessment or restoration planning process can be meaningful unless the data on natural resource damage gathered to date and the results from ongoing natural resource damage assessment studies are made public. How can the public have a meaningful role in advising regarding future studies or appropriate restoration projects without knowing the nature and extent of harm suffered by different species and habitats, the predicted extent of future harm and the success or lack thereof of restoration projects. This need for public disclosure is the overriding and persistent issue in this whole process.

Another key component of meaningful public participation is ensuring that requests for public comment on damage assessment studies and proposed restoration projects are made early enough in the process that the comments received can affect the design and conduct of the studies and projects; also that sufficient

detail about the proposed studies and projects is provided to enable meaningful comment. The damage assessment process conducted to date has been severely deficient in both respects.² These deficiencies must be remedied as soon as possible.

Finally, if the Trustees are serious about meaningful public participation, they should provide the public with the opportunity to comment on the proposed public participation process before such process is finalized and incorporate that process into the MOA itself.

Under Para. IV.A.5., an agreement is to be reached by the Trustees on an organizational structure for decisionmaking under the MOA within 90 days from the date of the agreement. We also recommend that this structure be included in the MOA itself and the public be given opportunity to comment on this structure before it is finalized.

II. OTHER COMMENTS ON THE MOA

The MOA requires that all decisions relating to use of the settlement money for injury assessment, restoration or other uses be made by unanimous agreement of the Trustees (three state and three federal). Para. IV.A.1. We question the workability of this arrangement and believe it will be extremely cumbersome,

2. See NRDC Comments on 1989 and 1990 State/Federal Natural Resource Damage Assessment Plans.

giving one agency the ability to block all decisions, and will result in innovative but important projects going unfunded. Essentially the lowest common denominator will prevail.

The only recourse provided under the MOA, should there be a lack of agreement among Trustees, is litigation. Para. IV.A.3. However, no standard is set for judicial review. What criteria will the court be asked to employ in resolving any dispute?

Additionally, how will EPA's role as lead agency for longterm restoration of Prince William Sound be fulfilled if it is not even a Trustee and is not capable in any way of implementing the restoration plan it develops.

The environmental groups request that before either the President or the Governor transfers trustee status from one agency to another, there be opportunity for public comment. Obviously, such transfer could have a major impact on decisionmaking under the MOA and therefore the public should have input into such a decision.

Para. V.B. provides that \$134 million will be used to reimburse prior expenses of the Trustees and this money will be paid over a five-year period. V.B. We understand these payments will be front-loaded: \$45 million, \$40 million, \$40 million, \$5 million and \$5 million. We strongly urge that this recoupment of costs

be deferred until the later years of the settlement to maximize the money available for restoration early on. Also, how will this money be used? Will it go into the Federal and State Treasuries or will it be used for purposes related to the oil spill? We strongly urge that it be used to enhance the Trustees' activities with respect to the spill.

Para. VI (Science Studies) states that the Trustees will continue to work cooperatively to conduct all appropriate scientific studies relating to the oil spill. We would like to see an explicit commitment by the Trustees in the MOA to conduct scientific studies to assess the longterm, chronic effects of the spill. If the governments are to recoup the \$100 million from Exxon under the reopener provision, the studies must continue. Such studies also are important not only to a full understanding of the impacts of the this spill, but also because this is a unique opportunity to thoroughly study and assess the longterm effects of a major spill -- something that has never been done effectively. Such studies should help inform a variety of public policy decisions about whether and where to drill for oil.

Why should there be a sunset provision pursuant to which the agreement will automatically terminate in sixteen years? Isn't is possible that there will be a need for longterm research and restoration after that date?

III. INDEPENDENT ENDOWMENT/FOUNDATION

As part of the proposed settlement, the environmental community would like to see the creation of an independent not-for-profit foundation with a board of eminent and respected individuals to oversee the expenditure of at least a portion of the funds received from Exxon. Such a foundation would ensure that decisions about how the Exxon money was spent would be made by highly qualified and respected individuals, in an atmosphere insulated from political pressures and divisive turf battles. The foundation would be established and run as an endowed permanent fund. As such, it would provide a lasting and permanent legacy for Prince William Sound and Alaska. Its purpose would be to assure that long term research, restoration and acquisition work was performed to benefit Prince William Sound and other areas affected by the spill.

The foundation would have serving on its board eminent and respected scientists, named representatives of conservation groups, community leaders, Alaskan Natives and others. Individuals of the calibre of former Alaska Governor Jay Hammond, former Interior Secretary Stewart Udall, and former EPA Administrator Russell Train would be considered for Board membership. The integrity, expertise and credentials of these individuals would be of the highest order.

The endowment for such a foundation should be sizable so as to

ensure a lasting and meaningful contribution to Prince William Sound and Alaska. We suggest that a minimum of ten percent of the settlement money be placed in such a foundation. This amount could be placed into the foundation at the rate of ten percent of the annual installments received from Exxon.

The model of an independent ongoing foundation, created as part of the government's settlement of a case against polluters, has worked very well in other contexts: the Virginia Environmental Endowment which was created when the Kepone case in the James River, Virginia was settled; and the Hudson River Foundation created as a part of the settlement of a series of power plant cases on the Hudson River. Both foundations are making important ongoing contributions to the Chesapeake Bay and the Hudson River.

Prince William Sound specifically and Alaska generally can benefit from the creation of a similar permanent entity as the result of this settlement.

ATTACHMENT 1

A PROPOSAL FOR A PUBLIC ADVISORY COMMITTEE

Introduction

This memorandum proposes a structure and membership for an advisory committee that could be formed as part of the proposed Exxon Valdez settlement.

Members

We feel it is important to list categories of interests, not specific groups.

The categories we suggest¹:

- Environmental groups
 - national
 - Alaska
 - Prince William Sound
- Fishing groups
 - commercial
 - sport
- Recreational interests
 - low impact (kayaking, hiking, etc.)
 - tourism
- Natives
 - [non-profit (subsistence) only]
 - Chugach/PWS
 - Kodiak/Kenai
- Elected representatives of oiled communities
- Archeological/cultural/historical
 - [professional representation]
- Scientific
 - [outside scientists only, i.e., not permanent government employees; also should have no contracts, etc. with Exxon, Alyeska, and Alyeska owner companies]
 - Alaska scientist(s) with PWS focus
 - scientist(s) who studies Alaska environment
 - scientist(s) with relevant experience

¹ Where more than one subcategory is listed, we are suggesting that there be at least one representative for each subcategory.

Mechanics of Advisory Committee

Our goal is to devise a process which will allow the advisory committee meaningful participation in the work of the trust. As part of this, we feel it is important to make the committee as independent and as well-supported as possible.

We suggest that:

- the committee have a small, paid staff and these staff members will not be employees of the trustees' respective agencies;
- the committee members will have their expenses paid and will have a per diem;
- the committee will meet bi-monthly and in consultation with their staff and with government agency professionals² will propose an annual workplan/spending plan for the trust; this plan will include a reasonable list of options from which the trustees would choose (trustees would have to choose options only from this list, however);
- the staff should include a public participation expert and a scheme of adequate public participation should be guaranteed;
- the committee would be chaired by a distinguished public citizen (for example, Jay Hammond or Russell Train) and members of the committee would be chosen by the groups/organizations/individuals that make up the specific categories of interests listed above³; private mediators/facilitators could be used to aid in this selection process.

² This would include the following agencies' professional staffs: Alaska: F&G, DEC, DNR; US: EPA, NOAA (NMFS), USFS, USF&WS, NPS.

³ The parties involved in the Exxon Valdez oil spill litigation who are included in these suggested categories could be consulted as part of this selection process.