

**SJR**

**25**

<TARGET><BILL>SJR 25</BILL><SUBJECT>SJR  
25</SUBJECT><COMM>SJUD28</COMM></TARGET>

State of Alaska  
Department of Law

**David W. Márquez**  
Attorney General  
P.O. Box 110300  
Juneau, Alaska 99811-0001  
**NEWS RELEASE**



Press Contact: Mark Morones

**907-269-6393**  
**FAX: 907-269-6305**  
[www.law.state.ak.us](http://www.law.state.ak.us)

*Protecting Alaska's Future*

FOR IMMEDIATE RELEASE: August 31, 2006

**Alaska Department of Law and U.S. Department of Justice Submit Demand Letter to ExxonMobil for \$92 Million Pursuant to the EVOS Settlement Reopener Provision**

(Anchorage) – Attorney General David Márquez announced today that the State of Alaska, Department of Law and the U.S. Department of Justice submitted a letter to ExxonMobil Corporation demanding payment of \$92,240,982 pursuant to the reopener provisions of the October 1991 settlement involving the Exxon Valdez oil spill.

In an earlier letter dated May 31, 2006 the two governments presented ExxonMobil with a *Comprehensive Plan for Habitat Restoration Project Pursuant to Reopener for Unknown Injury* ("Comprehensive Plan"), estimated to cost this amount, to address certain remaining injuries from the oil spill.

"We believe the Comprehensive Plan satisfies the requirements of the reopener provision and is built upon a foundation and commitment to sound science," said Márquez.

The 1991 settlement contained a reopener provision that would allow the state and federal government to make an additional claim up to \$100 million for specific restoration projects provided that the governments establish that:

1. a population, habitat, or species has suffered a substantial and continuing loss or decline in the spill area;
2. the loss or decline is attributable to the spill; and
3. the loss or decline could not have been known nor reasonably anticipated by any of the federal or state trustees from information available to them when the settlement was signed in 1991.

Prior to submitting the Comprehensive Plan representatives for both governments held a series of public meetings in Alaska communities around the spill area to share information regarding impacts to the area, to outline the mechanics for submitting a claim under the reopener, and to solicit public comments. "This effort was important in implementing our decision to assert a claim under the reopener provision," said Márquez.

The demand letter was mailed to ExxonMobil today. "We will wait to see how ExxonMobil responds to this demand in order to determine how we will proceed in our future legal efforts," said Márquez. The Comprehensive Plan is available online at: <http://www.law.state.ak.us>.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
EXXON CORPORATION, et al.,	)	
	)	No. 3:91-cv-0082-HRH
Defendants.	)	
_____	)	
STATE OF ALASKA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
EXXON CORPORATION, et al.,	)	
	)	No. 3:91-cv-0083-HRH
Defendants.	)	
_____	)	

O R D E R

Exxon Motion to Enforce Consent Decree

The Exxon defendants ("Exxon") move the court for an order enforcing the consent decree entered in these cases on October 9, 1991.<sup>1</sup> The identical decree was entered in both cases.<sup>2</sup> Exxon has

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<sup>1</sup>Motion to Enforce Consent Decree; Docket No. 368 in United States v. Exxon Corp., No. 3:91-cv-0082, and Docket No. 309 in Alaska v. Exxon Corp., No. 3:91-cv-0083. Subsequent docketing references will be to the record in No. 3:91-cv-0082, with references (continued...)

filed an identical motion in both cases. The United States and the State of Alaska (herein collectively referred to as the "Governments") have responded separately;<sup>3</sup> however, the responses are for all practical purposes identical, as are the Exxon's reply memoranda.<sup>4</sup> Oral argument was requested and has been heard.

On March 24, 1989, the Exxon Valdez ran aground on Bligh Reef in Prince William Sound, Alaska. Some 11 million gallons of crude oil spilled into the sound. Winds and currents carried this oil throughout the western two-thirds of Prince William Sound and into the Gulf of Alaska as far as the Kenai Peninsula, Cook Inlet, the Alaska Peninsula, and Kodiak Island. A massive response effort was undertaken by Exxon under the supervision of a federal on-scene coordinator and state on-scene coordinator. This "cleanup phase of

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<sup>1</sup>(...continued)  
to documents in No. 3:91-cv-0083 only as necessary. Page references within the consent decree are to the CM/ECF page numbers of the document as filed in United States v. Exxon Corp., No. 3:91-cv-0082 (see Exhibit A to Declaration of Douglas J. Serdahely in Support of Exxon Motion to Enforce Consent Decree, Docket No. 369).

<sup>2</sup>Agreement and Consent Decree, Docket No. 369-1 in United States v. Exxon Corp., No. 3:91-cv-0082. Where previous filings have been made a part of the briefing on Exxon's motions, as is the case with the consent decree, current CM/ECF docket references are employed. Because of the age of the cases, older documents are not readily available in the CM/ECF system, but must be accessed through one (or even two) older docketing systems; however, the numbering sequence for docket entries on the two cases is consistent.

<sup>3</sup>Opposition to Motion to Enforce Consent Decree, Docket No. 373 in United States v. Exxon Corp., No. 3:91-cv-0082, and Docket No. 313 in Alaska v. Exxon Corp., No. 3:91-cv-0083.

<sup>4</sup>Reply in Support of Motion to Enforce Consent Decree, Docket No. 384 in United States v. Exxon Corp., No. 3:91-cv-0082, and Docket No. 315 in Alaska v. Exxon Corp., No. 3:91-cv-0083.

the response" was deemed to be "concluded" on June 10, 1992, by the federal on-scene coordinator.<sup>5</sup>

As the initial oil spill response efforts began to wind down, three related civil lawsuits were filed in this court on March 13, 1991. The first suit, United States v. Alaska, No. 3:91-cv-0081, grew out of a disagreement between the United States and the State of Alaska with respect to their respective shares of compensation for natural resource damages resulting from the oil spill. The Governments' litigation was terminated by the entry of a memorandum of agreement and consent decree on August 29, 1991.<sup>6</sup> This agreement and decree led to the creation of a co-trusteeship arrangement by which the Governments would jointly undertake collection and use of all natural resource damages recoveries. The co-trustees have received from Exxon \$900 million as a consequence of the consent decree more fully described below, and have administered those funds pursuant to the memorandum of agreement.

The Governments' separate actions (the two above-styled cases) against the Exxon defendants were resolved by a single consent decree which the court approved October 8, 1991.<sup>7</sup> The consent decree resolved all claims as to all parties, and the court "retain[ed] jurisdiction of this matter for the purpose of entering such further orders, direction, or relief as may be appropriate for the construction, implementation, or enforcement of this Agree-

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<sup>5</sup>Docket No. 369-10.

<sup>6</sup>Docket No. 385-3.

<sup>7</sup>Agreement and Consent Decree at 30, Docket No. 369-1.

ment.”<sup>8</sup> The following portions of the consent decree are relevant to Exxon’s motion for enforcement of the consent decree.

By the consent decree, Exxon committed itself to “continue clean-up work” as directed by the respective state and federal on-scene coordinators.<sup>9</sup> However, paragraph 11(b) of the consent decree provides in pertinent part that:

(b) Upon Final Approval, Exxon shall have no further obligations with respect to clean-up of the Oil Spill except as set forth in this Agreement and in addition Exxon shall be entitled to a credit, to be applied to the next payment due from Exxon to the Governments, as provided in subparagraph 8(b), for all Expenditures incurred by Exxon for clean-up work pursuant to directions of the [on-scene coordinators].<sup>[10]</sup>

In due course, the consent decree became final and binding on the parties.

By the terms of the consent decree, the Governments expressly released Exxon from claims for natural resource damages,

provided, however, that nothing in this Agreement shall affect or impair the following:

(a) claims by either Government to enforce this Agreement, including without limitation Exxon’s agreement to make additional payments as set forth in Paragraphs 17-19....<sup>[11]</sup>

At the heart of the arguments made in the motions and responses before the court is paragraph 17 of the consent decree

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<sup>8</sup>Agreement and Consent Decree at 29, Docket No. 369-1.

<sup>9</sup>Agreement and Consent Decree at 11, Docket No. 369-1.

<sup>10</sup>Agreement and Consent Decree at 12, Docket No. 369-1.

<sup>11</sup>Agreement and Consent Decree at 14-15, Docket No. 369-1.

which is entitled "Reopener for Unknown Injury".<sup>12</sup> The reopener provides:

17. Notwithstanding any other provision of this Agreement, between September 1, 2002, and September 1, 2006, Exxon shall pay to the Governments such additional sums as are required for the performance of restoration projects in Prince William Sound and other areas affected by the Oil Spill to restore one or more populations, habitats, or species which, as a result of the Oil Spill, have suffered a substantial loss or substantial decline in the areas affected by the Oil Spill, provided, however, that for a restoration project to qualify for payment under this paragraph the project must meet the following requirements:

(a) the cost of a restoration project must not be grossly disproportionate to the magnitude of the benefits anticipated from the remediation; and

(b) the injury to the affected population, habitat, or species could not reasonably have been known nor could it reasonably have been anticipated by any Trustee from any information in the possession of or reasonably available to any Trustee on the Effective Date.<sup>[13]</sup>

On May 31, 2006, the Governments delivered to Exxon, pursuant to the reopener provision of the consent decree, their "Comprehensive Plan for Habitat Restoration."<sup>14</sup> On August 31, 2006, the Governments delivered to Exxon their demand for payment of the estimated cost of implementing the plan: \$92,240,982.00.<sup>15</sup> The

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<sup>12</sup>Agreement and Consent Decree at 18, Docket No. 369-1.

<sup>13</sup>Agreement and Consent Decree at 18-19, Docket No. 369-1.

<sup>14</sup>Declaration of Kimberly A. Trust at 2, Docket No. 373-1; and Attachment A, Comprehensive Plan for Habitat Restoration, Docket No. 373-1 at 6.

<sup>15</sup>Docket No. 369-4.

parties entered into a tolling agreement as to any applicable period of limitations so that they might engage in discussions and exchange scientific information. The tolling agreement was terminated June 25, 2010, by Exxon based upon perceived difficulties with the exchange of information from the Governments to Exxon.<sup>16</sup> The motions now before the court followed in August 2011. Not before the court is any claim by the Governments for enforcement of the reopener based upon their demand for payment.

Is Exxon's Motion to Enforce Consent Decree  
Premature or Not Ripe?

The Governments' responses contend that Exxon's motions to enforce the consent decree are premature because the Governments have only taken the threshold step of submitting a plan and a demand for payment to Exxon. The Governments point out that they have not yet filed a request with the court for enforcement of the reopener provision of the consent decree. They observe that the court has heretofore emphasized that a possible claim under the reopener belongs to the Governments which are still evaluating the merits of their plan and demand for payment.

The instant motions call upon the court to interpret the reopener provision of the consent decree. Exxon contends that the Governments may not use the reopener to require further cleanup work or compensation for such work inasmuch as the consent decree expressly releases Exxon from cleanup obligations. Exxon contends that the Governments' plan contemplates additional cleanup work,

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<sup>16</sup>Docket No. 385-2.

not restoration work. Acknowledging that the Governments are still evaluating their plan, Exxon in substance argues that the Governments are limited by the plan which they presented in May 2006, and that it simply calls for more cleanup work even though the cleanup work was concluded in June of 1992.

The court concludes that Exxon's motions are indeed premature. Exxon's motions certainly suggest that there is a difference of opinion between it and the Governments as regards interpretation of the consent decree. The court has expressly retained jurisdiction for purposes of the construction and enforcement of the consent decree. However, the instant motions call upon the court to, in essence, render an advisory opinion on an interpretation disagreement with respect to a claim that has not yet been put before the court. Indeed, it may be that after further evaluation of its demand upon Exxon, the Governments could decide not to pursue the matter. In that event, the matter which Exxon would have the court decide would be moot.

Moreover, unless and until a formal claim is presented to the court by the Governments, the court has no way of knowing precisely what the Governments will claim. If a claim is presented, it could conceivably be constructed in a fashion which avoids the issue that Exxon would have the court decide. In other words, the interpretation analysis may be different, depending upon how the Governments present their claim - if they present a claim.

The Governments also contend that the matter which Exxon would raise through its motions is not ripe for disposition. Ripeness

doctrine does not really apply in this situation. Exxon and the Governments are not engaged in any administrative proceedings. The decision which the Governments must make is a unilateral one, based upon the facts which they are able to develop that may support a claim under the reopener provision of the consent decree.

Exxon replies to the Governments' foregoing arguments, contending that it will suffer hardship if the court were to decline to entertain their motions at this time. The court perceives no undue hardship flowing from its decision to stay its hand unless and until the Governments present a claim for enforcement of the reopener clause. The possibility of a reopener claim has been "on the table" since the consent decree was finalized. The Governments presented a plan and made a demand upon Exxon under the reopener clause at the last possible time for doing so, but that is precisely what the consent decree contemplated as a possibility.

That the possibility of a reopener claim has dragged on for so long is in part a consequence of the tolling arrangement to which Exxon agreed. The court and the public would like to see this matter resolved, but aside from the uncertainty of whether or not a claim will ever be presented, Exxon presently suffers no particular harm. Its business is not in any fashion disrupted or impeded because of the uncertainty of a claim by the Governments. Exxon does not have to devote any time or resources to this matter unless it chooses to do so. In that regard, the court urges the parties to quickly resolve this matter themselves if they are able to do so; but at this juncture, it really is up to the Governments to

decide what they are going to do, and simply waiting out the Government imposes no particular hardship on Exxon.

The motions to enforce the consent decree are denied.

DATED at Anchorage, Alaska, this 15th day of February, 2012.

/s/ H. Russel Holland  
United States District Judge



# Department of Justice



## STATE OF ALASKA DEPARTMENT OF LAW

FOR IMMEDIATE RELEASE  
THURSDAY, JUNE 1, 2006  
[WWW.USDOJ.GOV](http://WWW.USDOJ.GOV)

ENRD  
(202) 514-2007  
TDD (202) 514-1888

### **FACT SHEET:** **EXXON VALDEZ OIL SPILL REOPENER PROVISION**

#### *Joint Federal and State Restoration Plan Under the Reopener for Unknown Injury Provision of the Exxon Valdez Oil Spill Settlement Agreement*

The United States and the State of Alaska today submitted to ExxonMobil Corporation a detailed plan for a proposed restoration project intended to restore habitat in the area affected by the 1989 *Exxon Valdez* oil spill. Today's restoration plan was submitted in accord with the requirements of a set of provisions known as the "Reopener for Unknown Injury" in the consent decree which settled the governments' civil claims against Exxon Corporation (now ExxonMobil), the Exxon Shipping Company and the Exxon Pipeline Company arising from the spill. The project focuses on removing much of the oil that remains in the environment in a form that is potentially harmful to natural resources and disruptive of human activities. The federal and state trustees have been committed to exercising the Reopener provision if the current science supports the requirements of the Reopener. This action is the culmination of an extensive assessment by the governments of the scientific and legal bases for potential claims under the Reopener.

#### **The Reopener Provision:**

- At the time of the settlement, Exxon agreed to pay the governments \$900 million in installments for costs and for natural resource damages known or reasonably anticipated at the time of the settlement. The settlement also included a unique provision allowing the federal and state trustees to seek up to \$100 million in additional monies for damages satisfying the following criteria:
  - A substantial loss or decline in one or more populations, habitats, or species in the area of the spill;
  - Resulting from the spill;
  - Where the loss or decline was unknown and could not reasonably have been anticipated by the governments;
  - One or more projects that would help restore the injured population, habitat or species; and
  - Whose costs are not grossly disproportionate to its (or their) benefits.

- Any demand under the Reopener must be asserted no later than September 1, 2006, and the governments must provide detailed plans for any requested restoration project to Exxon at least 90 days before submitting the demand—by June 2, 2006.

### **The Proposed Plan:**

- The proposed project has two major objectives: (1) to determine the locations, approximate amounts, and chemical states of all significant residual deposits of oil from the spill in the spill area; (2) to accelerate the natural processes of degradation and dispersal of the lingering oil, or otherwise restore the oiled sites, to the greatest extent scientifically appropriate taking into account such factors as the size and distribution of lingering oil patches, conditions at the oiled sites, affected natural resources or human uses, and the relative benefits and costs (including potential adverse effects) of active remediation. The plan expressly calls for public participation and outreach at key stages of the process.
- The ultimate cost of the project depends upon such factors as how many oiled sites require remediation and the remediation approach selected. It is currently estimated to cost approximately \$92 million.

### **Background on the Exxon Valdez Oil Spill:**

- The *Exxon Valdez* oil tanker ran aground on Bligh Reef in Prince William Sound, Alaska in the early morning hours of March 24, 1989. An estimated eleven million gallons of crude oil were spilled and ultimately oiled approximately 1,750 kilometers of shoreline within the Gulf of Alaska. The oil had devastating effects on marine wildlife and other natural resources in the spill area and disrupted the lives of residents of the spill area for many years.
- The harm caused by the spill was extensive. According to government scientist estimates, approximately 250,000 marine birds died from direct exposure to the oil, along with approximately 2,800 sea otters and numerous harbor seals. Shellfish such as clams and mussels and the other animals and plants that make up intertidal communities suffered heavily both from the spill and from some of the cleanup measures. Two pods of killer whales had extraordinarily high losses in the two years after the Spill, with oil exposure a strongly suspect factor. Studies regarding the effects of the spill on many of these species have been and continue to be conducted under the original agreement.

### **The Government Settlements:**

- On Oct. 8, 1991, the U.S. District Court in Anchorage accepted guilty pleas by Exxon Corporation and Exxon Shipping Company to federal environmental crimes and also approved a civil settlement resolving claims for past cleanup costs and natural resources

damages with the federal government and Alaska. The criminal plea agreement called for a \$150 million fine, of which \$125 million was remitted, and the payment of \$100 million in restitution, divided equally between the United States and the State. The civil settlement required Exxon to pay \$900 million to both governments over ten years. That money has been and continues to be used for both short-term and long-term restoration projects in Prince William Sound and the Gulf of Alaska, as well as extensive research on the resources. The purpose of those monies is to rehabilitate and restore the resources known at the time of the settlements to have been injured.

- The Trustee Council (formed by the Departments of the Interior, Agriculture, the National Oceanic and Atmospheric Administration and the state of Alaska) adopted a formal Restoration Plan for the civil settlement proceeds in 1994, after an extensive public process. As of 2004, the Trustee Council has remaining \$145 million after expenditures for a wide variety of restoration activities, research and monitoring of injured resources, and acquisition and protection of habitat, and damage assessment activities.
- Today's submission of a plan to ExxonMobil is the first step in exercising the Reopener provision of the consent decree.

**Next Steps:**

- The Reopener allows ExxonMobil 90 days after submission of the proposed restoration plan before it is required to pay or respond. This provision ensures a period for negotiations to settle a Reopener claim without litigation.

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## Mother Jones

# Exxon Aims to Bail on Payments for Valdez Damage

*Court filings show Exxon trying to avoid additional payments for the massive 1989 spill.*

By [Kate Sheppard](#) | Thu Oct. 13, 2011 5:34 AM GMT

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It's been more than 22 years since the Exxon Valdez dumped 10 million gallons of crude into Alaska's Prince William Sound, but you don't have to look very hard to find [lingering impacts](#) [1] from the spill. You can actually still find oil on the shore there, the fisheries are still struggling, and some bird species haven't recovered. But now Exxon is saying it won't pay up, despite an agreement to cover those additional cleanup costs.

Five years ago, the US government asked Exxon for money to continue the cleanup effort there. In its latest court filing, Exxon appears to be trying to shirk its obligation to pay for additional damages. In its filing to the US District Court in Alaska on September 30, the company argues that the agreement it reached with the government only covers "restoration" work—not additional "clean-up."

Before we get further into the details, a quick recap: In 1991, Exxon struck a deal with the government to pay just \$900 million in damages over 10 years for cleanup costs. The deal allowed the government to reopen the case, if it could prove that there were remaining problems that had not been adequately addressed. That "reopener" clause only extended until September 2006. So when that date rolled around and there was still evidence of that habitat and species were directly impacted by the spill, the Department of Justice and the State of Alaska filed a claim asking Exxon for an additional \$92 million payment.

Exxon has so far rebuffed their claim. In the [company's latest court filing](#) [2], it argues that the original agreement "makes clear that the parties limited the Reopener to 'restoration projects,' that 'restoration' is something separate from and in addition to 'clean-up.'" The agreement, the company argues, "ended Exxon's further obligations for 'clean-up' once and for all."

Meanwhile, the US Department of Justice doesn't seem all that concerned about making Exxon pay up anytime soon. The [department's own filing](#) [3] to the court argues that it's premature for Exxon to argue about whether or not they have to cover a specific type of restoration project, because scientists are still studying the situation anyway. The filing does note, however, that government officials have found that oil in the Sound has "been

degrading at a far slower rate than was anticipated at the time the Parties entered into the Consent Decree and had remained toxic and available to natural resources, such as sea otters and harlequin ducks which use these intertidal habitats." In other words, there are still problems up there that need to be addressed, and that will cost money.

Rick Steiner, a retired University of Alaska marine biologist who spent 14 years working in the Prince William Sound, has filed his own brief in the case, hoping to push DOJ to actually make Exxon pay up. But, he says, the agreement was "a sweetheart deal from day one," setting the price for Exxon relatively low and making it difficult, from the start, for the government to seek additional payment. "It's absolutely maddening," Steiner says. "None of the parties, US or Exxon, has the public interest in mind."

A DOJ spokesman declined to comment because the court case is ongoing. But for Steiner—and probably many others—the Exxon situation raises questions about how serious the DOJ will be when it comes time to make BP pay up for the most recent catastrophic spill.

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**Source URL:** <http://www.motherjones.com/blue-marble/2011/10/will-exxon-have-pay-ongoing-valdez-damage>

**Links:**

- [1] <http://motherjones.com/blue-marble/2009/03/exxon-valdez-plus-20-years-minus-half-million-birds>
- [2] <https://www.documentcloud.org/documents/256219-10-10-11-exxon-motion.html>
- [3] <https://www.documentcloud.org/documents/256218-10-10-11-doj-lingering-oil-claim-1.html>

February 26, 2014

via email: Sen.Berta.Gardner@akleg.gov

Honorable Senator Berta Gardner  
Senate District H  
State Capitol Bldg. Rm. 417  
Juneau, AK 99801

**RE: endorsement of SJR25**

Dear Senator Gardner,

I want to thank you for introducing SJR 25, urging the state and federal administrations to initiate court action to collect the long-overdue "Reopener for Unknown Injury" claim submitted to Exxon in 2006 for unanticipated *Exxon Valdez* oil spill damages.

As you may know, I have been involved with the Exxon Valdez oil spill for the past 25 years, as I served as the University of Alaska's marine advisor for the Prince William Sound region, based in Cordova, from 1983 - 1996. More recently, I have followed the "Reopener for Unknown Injury" claim submitted by the governments. This was a critical provision in the 1991 settlement, securing public and court approval. It was, and remains, a legal obligation between the parties, including the State of Alaska.

The unanticipated injuries documented by the governments are abundantly clear, and they have presented a restoration plan to remediate lingering oil in beach sediments of the region.

At the urging of the 2006 Alaska Legislature, the Murkowski administration presented Exxon with a demand for payment of \$92 million in 2006. Astonishingly, Exxon simply refused to pay it.

It is truly disappointing to many Alaskans that Exxon has refused to honor its 1991 commitment, but it is even more disappointing that the state and federal government have not initiated court action to collect the long-overdue payment from Exxon, nor have they initiated the lingering oil restoration plan as promised in 2006.

Steiner 2-26-14

Page 2.

Every day that goes by without remediating lingering, toxic *Exxon Valdez* oil, unnecessarily exposes the Alaska coastal ecosystem to additional injury.

In all honesty, many Alaskans are bewildered by the lack of action of the parties to this agreement—Exxon, the State of Alaska, and the U.S. government. This is a disgrace and embarrassment to all involved.

If Alaska wishes to be seen as a place where oil development is done *responsibly*, then such *responsibility* must include an obligation to follow through on legal agreements to remedy spill damage, such as the *Exxon Valdez* Reopener.

Yet today, none of the parties have lived up to their obligations on this. To many, this calls into serious question the sincerity of the state's assertions regarding its commitment to "responsible oil development." I don't need to tell you what such doubt may mean nationally to Alaska's oil development agenda.

As you know, the 25<sup>th</sup> anniversary of the *Exxon Valdez* spill is approaching, and there will be considerable media attention again to the spill, to the oil industry, and to Alaska. What the Alaska Legislature does, or does not do, regarding SJR25 will without doubt, be important and newsworthy.

**I strongly support SJR25, and urge the full Legislature to approve it as soon as possible.**

Sincerely, (via electronic signature)

Richard Steiner, Professor (University of Alaska, ret.)

Oasis Earth

Box 666, 9138 Arlon St., A3

Anchorage, AK 99507

[Richard.g.steiner@gmail.com](mailto:Richard.g.steiner@gmail.com)

907-360-4503



U.S. Department of Justice

Environment and Natural Resources Division

WDB: 90-5-1-1-3343/1

Assistant Attorney General  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

Telephone (202) 514-2701  
Facsimile (202) 514-0557

August 31, 2006

VIA facsimile and Federal Express

Mr. Charles W. Matthews, Esq.  
General Counsel  
Exxon Mobil Corporation  
5959 Las Colinas Blvd  
Irving, TX 75039  
Fax: (972) 444-1464

Mr. Michael F. Smith, Esq.  
Chief Attorney, Environment  
Exxon Mobil Corporation  
800 Bell Street, Suite 1841-J  
Houston, Texas 77002  
Fax: (713) 656-3948

Mr. W.E. Jenkins  
Office of the President  
SeaRiver Maritime Financial Holdings, Inc.  
800 Bell Street, 4<sup>th</sup> Floor  
Houston, Texas 77002-7497  
Fax: (713) 656-2325

Mr. Henry Hubble  
Vice President Investor Relations and Secretary  
Office of the Secretary  
Exxon Mobil Corporation  
5959 Las Colinas Blvd.  
Irving, TX 75039  
Fax: (972) 444-1199

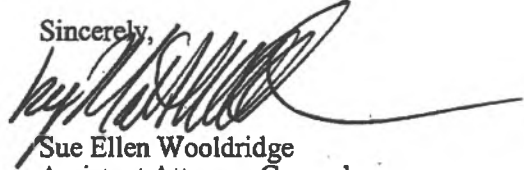
RE: Demand for Cost of Restoration Under Reopener for Unknown Injury in United States v. Exxon Corporation, et al., Nos. 3:91-0082 & 3:91-0083 (D. Alaska)

Dear Sirs:

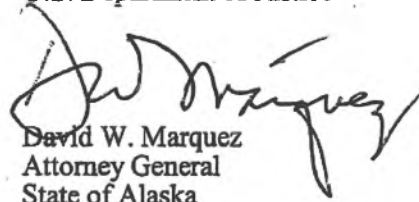
Pursuant to the "Reopener for Unknown Injury" provisions of the Agreement and Consent Decree entered October 9, 1991 in United States v. Exxon Corporation et al. and in State of Alaska v. Exxon Corporation et al., Nos. 3:91-0082 and 3:91-0083 (D. Alaska), the United States and the State of Alaska ("Governments") demand payment by Exxon Mobil Corporation and SeaRiver Maritime Financial Holdings, Inc. (collectively "ExxonMobil") of \$92,240,982.00. That amount is the estimated cost of implementing the *Comprehensive Plan For Habitat Restoration Project Pursuant to Reopener For Unknown Injury* ("Comprehensive Plan"), which the Governments presented to ExxonMobil with our May 31, 2006 letter to you. The United States' demand is made on behalf of the United States Departments of Agriculture, Commerce (through the National Oceanic and Atmospheric Administration), and the Interior.

As indicated in our May 31, 2006 letter, the Governments are interested in exploring any resolution of this matter that provides for implementation of the Comprehensive Plan. If ExxonMobil wishes to discuss the Governments' demand, please contact Bill Brighton (202-514-2244) and Gina Belt (907-271-3456) of the Department of Justice's Environmental Enforcement Section and Craig Tillery (907-269-5201), Deputy Attorney General for the State of Alaska.

Sincerely,



Sue Ellen Wooldridge  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice



David W. Marquez  
Attorney General  
State of Alaska

cc: Mr. John E. Seddelmeyer, Esq.  
Assistant General Counsel  
Exxon Mobil Corporation  
5959 Las Colinas Boulevard  
Irving, TX 75039  
Fax: (972) 444-1435

Mr. Douglas J. Serdahely, Esq.  
Patton Boggs LLP  
601 West 5th Avenue, Suite 700  
Anchorage, Alaska 99501  
Fax: (907) 263-6345

Mr. John Daum, Esq.  
O'Melveny & Meyers LLP  
400 South Hope Street  
Los Angeles, CA 90071-2899  
Fax: (213) 430-6407



<b>Oil Spill Facts</b>	<b>Habitat Protection</b>	<b>Restoration Projects</b>	<b>Status of Restoration</b>
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## OIL SPILL FACTS

## Restoration Plan

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The Trustee Council adopted a **Restoration Plan** for the civil settlement funds in 1994 after an extensive public process. More than 2,000 people participated in the meetings or sent in written comments.

### Reimbursements:

As part of the settlement agreement, \$173.2 million went to reimburse the federal and state governments were reimbursed for costs incurred conducting spill response, damage assessment, and litigation. Another \$39.9 million went to reimburse Exxon for cleanup work that took place after the civil settlement was reached.

The remaining funds were dedicated to implementation of the Restoration Plan, which consisted of four parts, described below.

Summaries of annual spending can be found at: [www.evostc.state.ak.us/index.cfm?FA=pubs.annualStatus](http://www.evostc.state.ak.us/index.cfm?FA=pubs.annualStatus)

### Research, Monitoring, & General Restoration:

Surveys and other monitoring of fish and wildlife in the spill region provide basic information to determine population trends, productivity, and health. Research increases our knowledge about the biological needs of individual species and how each contributes to the Gulf of Alaska ecosystem. Research also provides new information and better tools for effective management of fish and wildlife populations.

General Restoration includes projects to protect archaeological resources, improve subsistence resources, enhance salmon streams, reduce marine pollution, and restore damaged habitats.

Additional information on Research, Monitoring and Restoration can be found at: [www.evostc.state.ak.us/index.cfm?FA=projects.home](http://www.evostc.state.ak.us/index.cfm?FA=projects.home) and [www.evostc.state.ak.us/index.cfm?FA=status.home](http://www.evostc.state.ak.us/index.cfm?FA=status.home)

The Council's Annual Workplans can be found at: [www.evostc.state.ak.us/index.cfm?FA=pubs.annualWork](http://www.evostc.state.ak.us/index.cfm?FA=pubs.annualWork)

### Restoration Reserve:

This savings account was established in recognition that full recovery from the oil spill would not occur for decades. The investment fund supports long-term restoration activities after the final payment from Exxon was received.

Additional information on Research, Monitoring and Restoration can be found at: [www.evostc.state.ak.us/index.cfm?FA=projects.home](http://www.evostc.state.ak.us/index.cfm?FA=projects.home) and [www.evostc.state.ak.us/index.cfm?FA=status.home](http://www.evostc.state.ak.us/index.cfm?FA=status.home)

The Council's Annual Workplans can be found at: [www.evostc.state.ak.us/index.cfm?FA=pubs.annualWork](http://www.evostc.state.ak.us/index.cfm?FA=pubs.annualWork)

### Habitat Protection:

Protection of habitat helps prevent additional injury to species due to intrusive development or loss of habitat. The Trustee Council accomplishes this by providing funds to government agencies to acquire title or conservation easements on land important for its restoration value.

Information on the Council's Habitat program can be found at: [www.evostc.state.ak.us/index.cfm?FA=protection.home](http://www.evostc.state.ak.us/index.cfm?FA=protection.home)

### Public Information, Science Management & Administration:

This component of the budget includes management of the annual work plan and habitat programs, scientific oversight of research, monitoring and restoration projects, agency coordination, and overall administrative costs. It also includes the cost of public meetings, newsletters, and other means of disseminating information to the public such as this website.

The Council's Annual Workplans can be found at: [www.evostc.state.ak.us/index.cfm?FA=pubs.annualWork](http://www.evostc.state.ak.us/index.cfm?FA=pubs.annualWork)

Information on the Council's Public Advisory Committee can be found at: [www.evostc.state.ak.us/index.cfm?FA=aboutUs.pac](http://www.evostc.state.ak.us/index.cfm?FA=aboutUs.pac)

Exxon Valdez Oil Spill Trustee Council | [dfg.evostc.restoration@alaska.gov](mailto:dfg.evostc.restoration@alaska.gov) | Postal Address: 4210 University Drive Anchorage, AK 99508-4626  
 | Physical Address: Grace Hall, 4230 University Drive, Ste. 230 | Anchorage, AK 99508-4650 |  
 Phone: (907) 278-8012 | Fax: (907) 276-7178 | Toll-Free: (800) 478-7745 | Office Hours: Mon through Fri, 8am-4:30pm  
 ARLIS | Alaska Resources Library & Information Services | [reference@arlls.org](mailto:reference@arlls.org) | UAA Library Building | Phone: (907) 272-7547  
 Restoring the resources injured by the Exxon Valdez oil spill and understanding environmental change in the Northern Gulf of Alaska.

# ALASKA STATE LEGISLATURE

JUNEAU  
STATE CAPITOL BLDG. RM 417  
JUNEAU, AK 99801-1182  
PHONE (907) 465-4930  
ALASKASENATEDEMS.COM/GARDNER



ANCHORAGE  
716 W. 4<sup>TH</sup> AVENUE  
ANCHORAGE, AK 99501  
PHONE (907) 269-0174  
FACEBOOK.COM/BERTAGARDNER

SENATOR BERTA GARDNER  
*SENATE DISTRICT H*

## Sponsor Statement SJR 25

SJR 25 urges the Alaska Department of Law and the US Department of Justice to take court action to collect from Exxon the delinquent \$92 million oil spill "Reopener for Unknown Injury" claim submitted by the Murkowski Administration in 2006.

In the historic 1991 settlement of the State of Alaska and U.S. Government claims against Exxon for the 1989 Exxon Valdez oil spill, Exxon agreed to pay \$900 million in civil damages, \$100 million in criminal restitution, and a \$25 million criminal fine. Additionally, the Agreement and Consent Decree provided for a "Reopener for Unknown Injury" under which Exxon would pay up to \$100 million in the future for injuries unknown and unanticipated at the time of the settlement.

In 2006, the Murkowski Administration, at the urging of the Alaska Legislature, collaborated with the Bush administration to develop a restoration plan for unknown injuries, and presented a demand for payment to Exxon for \$92 million. Exxon rejected the claim and refused to honor its obligations as set forth in the 1991 agreement.

Meanwhile, state and federal studies confirm that a substantial amount of Exxon Valdez oil remains on beaches in substrates and the oil is nearly as toxic as it was the first few weeks after the spill. Birds, fish and mammals in the region continue to be affected.

Although the State of Alaska has continued to study lingering oil injuries, it has yet to begin work to remediate lingering oil, as promised in 2006, nor has it taken Exxon to court to collect the long-overdue claim.

On June 25<sup>th</sup>, 2010 Exxon unilaterally suspended the tolling agreement among the parties, under which the statute of limitations had been temporarily suspended. This action started the clock ticking, with potentially a 6-year limit. Therefore, we must pursue our claim in court before June 25<sup>th</sup>, 2016 or lose it forever.

After 25 years, it is time to give Alaskans closure on this issue. I look forward to your support on this resolution.



# Department of Justice



## STATE OF ALASKA DEPARTMENT OF LAW

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**UNITED STATES AND THE STATE OF ALASKA SEEKING ADDITIONAL FUNDS  
FROM EXXONMOBIL FOR CONTINUING NATURAL RESOURCE DAMAGES  
CAUSED BY 1989 OIL SPILL**

WASHINGTON, D.C. – In accordance with the “Reopener” provision of the 1991 civil settlement with the Exxon Corporation, the U.S. Department of Justice and the Alaska Department of Law today presented the company with a proposed plan to restore shorelines in Prince William Sound and the Gulf of Alaska that still contain oil from the 1989 *Exxon Valdez* oil spill. The State of Alaska and three federal agencies whose trust resources were injured by the spill—the U.S. Departments of Agriculture, Commerce, and the Interior—have estimated the project to cost approximately \$92 million over the course of several years. The additional funding is being sought under the “Reopener for Unknown Injury” provision of the 1991 civil settlement which required Exxon to pay \$900 million in damages at the time.

The need for this project arises from a series of studies undertaken since 2001 that document the presence of residual oil from the 1989 spill within the intertidal zone of beaches in the oil spill area. At the time of the settlement, it was not anticipated that this oil would remain toxic and continue to impact natural resources in the oil spill area. The proposed project includes identifying all locations with significant amounts of lingering oil and using advanced bioremediation techniques and other technologies to remove the larger patches. The governments are inviting ExxonMobil to work with them cooperatively to develop and implement this comprehensive project to remove the oil.

“By sending our plan in accordance with the Reopener provision, we are aggressively seeking to restore natural resource damages unforeseen at the time of the 1991 settlement,” said Sue Ellen Wooldridge, Assistant Attorney General for the Justice Department’s Environment and Natural Resources Division. “Our goal throughout this process has been to pursue all scientifically and legally appropriate means of restoration. Our proposed plan is grounded in the best and most current science available, while steadfastly adhering to the requirements of the consent decree.”

Alaska Attorney General David Marquez said, “The State of Alaska has been engaged in a thorough analysis of potential claims under the Reopener provision for the last seven years. In exercising the Reopener we have been bound by the terms of the consent decree and the

application of sound science. After extensive review it is clear that populations and habitat within the oil spill area have suffered substantial and unanticipated injuries that are attributable to the *Exxon Valdez* oil spill.” Attorney General Marquez added, “A couple of months ago we held a series of public meetings in oil spill area communities to talk to the public about the Reopener and ask for their ideas on unanticipated injuries and how to address them. We received many thoughtful responses. To the extent those ideas do not appear in the restoration plan presented to ExxonMobil today, it is my intention to be guided by this information in making decisions in my capacity as a trustee on the *Exxon Valdez* Oil Spill Trustee Council.”

“The historic 1991 settlement provided much-needed funding to Alaska and to the federal government for restoration, and we have made significant progress in that effort,” said Lynn Scarlett, Deputy Secretary of the Department of the Interior. “But we have also discovered additional injuries caused by the spill that were not apparent at the time the case was first settled, and these problems must be addressed. The Department of the Interior strongly supports today’s efforts so that we can restore injured resources in Prince William Sound and the Gulf of Alaska.”

“Natural resources of Prince William Sound, located within the Chugach National Forest, sustained heavy impacts from the *Exxon Valdez* spill. An ongoing commitment to restore these injured lands and resources will greatly benefit the ecosystem and marine life they support,” said Mark Rey, Undersecretary of the Department of Agriculture. “Both Alaska residents and nonresidents use this area extensively for subsistence, recreation, sport hunting and fishing activities. Removal of lingering subsurface oil, which remains bioavailable and toxic seventeen years after the spill, is a necessary step in the effort to restore this environment.”

“NOAA is particularly concerned with the quantity and toxicity of the residual oil, its impact upon intertidal communities, and its significance for future spill response actions in sub-arctic environments,” said Jim Walpole, NOAA General Counsel.

The proposed project focuses on determining the locations, approximate amounts, and chemical states of all significant residual deposits of oil from the spill in the spill area, and upon seeking to accelerate the natural processes of degradation and dispersal of the lingering oil.

The governments are asserting that there is a substantial loss of habitat from relatively fresh oil that has persisted in the subsurface of certain intertidal areas since the spill. This loss manifests itself in two principal ways: (1) Predators that feed in the intertidal, primarily harlequin ducks and sea otters, show reduced survival rates in oiled versus unoiled areas or appear to be avoiding certain locations with relatively extensive lingering oil; (2) Subsistence users reasonably avoid harvesting in oiled areas (and in areas they believe may be oiled) because of concerns over contamination of shellfish or gear. The governments assert that the current science supports the position that the continuing bioavailability and toxicity of the lingering oil could not reasonably have been anticipated.

In further developing and implementing the restoration plan, the governments will continue to be committed to providing public review and allowing participation to ensure that the public is fully informed and that its concerns are taken into account.

On March 24, 1989, the *Exxon Valdez* oil tanker ran aground on Bligh Reef in Prince William Sound. The resulting spill of approximately 11 million gallons of crude oil ultimately contaminated nearly 1,750 kilometers of the Alaska shoreline with crude oil, including those of a national forest, three national parks, four national wildlife refuges, five state parks, four state critical habitat areas and a state game sanctuary.

On Oct. 8, 1991, the federal district court in Anchorage approved both a plea agreement that resolved criminal charges by the United States against Exxon Corporation and Exxon Shipping Company and a civil settlement that resolved the claims of the United States and the State of Alaska against various Exxon entities for past cleanup costs and natural resources damages. The plea agreement called for a \$150 million fine, \$125 million of which was remitted, and \$100 million in restitution payments that were divided equally between the federal and state governments. The civil settlement required Exxon to pay \$900 million over ten years. That money has been and continues to be used for both short-term and long-term restoration projects in Prince William Sound and the Gulf of Alaska. The settlement also included a Reopener clause stating that Exxon may be required to pay up to an additional \$100 million for unforeseen natural resource damages caused by the spill.

A copy of the proposed plan is available at <http://www.usdoj.gov/enrd/open.html>.

###

06-340



U.S. Fish & Wildlife Service

## **Exxon Valdez Oil Spill -- Civil Settlement "Reopener"**

### **Potential Funds for Restoration of Unanticipated Injuries to Natural Resources**

#### **What is the "Reopener"?**

The 1991 agreement settling the federal and state governments' civil claims against Exxon contains a provision entitled "Reopener for Unknown Injury." Under that provision, Exxon could be required to make additional payments totaling as much as \$100 million for specific restoration projects if all of the following conditions are met:

- The governments must establish that
- (1) a population, habitat, or species has suffered a substantial and continuing loss or decline in the spill area;
  - (2) the loss or decline is attributable to the spill; and
  - (3) the loss or decline could not have been known nor reasonably anticipated by any of the federal or state trustees from information available to them when the settlement was signed in 1991.

If the answer to each of these questions is "yes," the federal and state governments must then determine that there are projects they could undertake to restore the population, habitat or species, the costs of which are not "grossly disproportionate" to the "magnitude of the benefits anticipated from the remediation."

The governments' monetary demand can not exceed the predicted cost of the specific restoration projects proposed.

#### **How will the decision be made?**

The federal and state governments will decide whether to assert a claim against Exxon under

the Reopener. In the case of the federal government, the three federal agencies whose trust resources were injured by the spill, the Department of Interior, the Department of Agriculture, and the Department of Commerce, will determine whether they have sufficient evidence to support a demand of additional monies from Exxon. If they make an affirmative decision, they will recommend that the Department of Justice make a claim on behalf of the United States. While the agencies represented on the Exxon Valdez Trustee Council have important roles in making this decision, the Council itself is not directly involved.

#### **When will the decision be made?**

The reopener option expires on September 1, 2006. If the governments decide to make a demand of Exxon, they must provide the company with detailed restoration plans, a statement of claims, and all relevant supporting information at least 90 days before September 1, 2006. If a demand is made, these materials will be provided to Exxon by June 2, 2006.

#### **What about reopening for injured services?**

The settlement with Exxon does not permit a claim brought pursuant to the reopener provisions to be based on declines in services.

#### **How much can the governments recover from Exxon?**

Under the 1991 settlement, any additional recoveries from Exxon must be based on the specific costs of restoration projects and

cannot exceed \$100 million.

**How much have the federal and state governments recovered from Exxon?**

Exxon has paid the governments the equivalent of \$900 million to settle the civil claims associated with the Exxon Valdez oil spill; a portion of that was used to reimburse the governments for cleanup costs. Under a separate settlement of federal criminal charges, the company also paid \$25 million in fines and \$100 million, divided equally between the United States and Alaska, as restitution for its criminal conduct.

**Is any of the money still left?**

Of the original \$900 million in civil recoveries, approximately \$146 million remains for new restoration projects. The money is used by the Exxon Valdez Trustee Council to fund ongoing restoration through a public process that involves the award of funds to conduct research, monitoring and general restoration; to acquire habitat; and to provide public information about, and science management and administration of, the restoration process.

**What resources were injured by the spill?**

In its 2002 *Update on Injured Resources and Services*, the Exxon Valdez Trustee Council identified the following resources and services as not having recovered from the spill: certain seabirds and sea ducks, Pacific herring and other fish, subtidal communities, clams, designated Wilderness areas, intertidal communities, Killer whales, mussels, sea otters, sediments, and services including recreation and tourism, commercial fishing, passive uses and subsistence. The following

resources were identified as “recovered”: archaeological resources, bald eagles, certain seabirds, river otters, and pink and sockeye salmon. In an effort to update the injured resource list, the Trustee Council has recently funded projects that synthesize the latest monitoring results.

**What is the current status of each of those resources?**

Information concerning the status of injured resources appears in numerous scientific studies by the governments (using their own researchers as well as those outside the governments), Exxon, and other researchers in the sixteen years since the spill. Exxon scientists have been critical of some of the results of the government-sponsored research and vice-versa. Study of the spill’s effects continues, and government officials are making as complete an assessment as possible of potential reopener claims.

**Has the government exercised a reopener before?**

No. Although many natural resource damage settlements from oil spills and other forms of environmental contamination typically include reopener provisions, such provisions have not been invoked for natural resource damages. Reopening the case against Exxon would be the first such action of its kind by either the federal government or the State of Alaska.

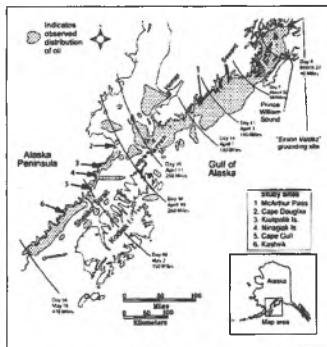
# Slightly weathered oil from the Exxon Valdez spill persists on rocky Gulf of Alaska shores after 23 years

Gail V. Irvine<sup>1</sup>, Daniel Robert K. Nelson<sup>2</sup>, La<sup>3</sup>  
<sup>1</sup>U.S. Geological Survey Alaska Science Center  
<sup>2</sup>Woods Hole Oceanographic Institution

## Introduction:

- Before the *Exxon Valdez* oil spill (EVOS) in March, 1989, oil persistence had been linked to wave exposure, with longest persistence in low wave-energy environments (e.g. mudflats, tidal marshes; Gundlach and Hayes, 1978).
- But, after EVOS, oil was found to persist on higher-energy armored shores, where a layer of cobbles or boulders overlays finer substrates.
- In 1994 we began our study of 6 Gulf of Alaska rocky beaches distant (240 – 640 km) from the spill origin, which had been contaminated by *Exxon Valdez* oil (EVO), in the form of mousse.
- Oil mousse is a viscous water-in-oil emulsion that can be transported long distances with little weathering.
- New in 2012: a) asking whether oil is leaking from the sites, and b) examining the oil with multiple chemical methods to look at weathering and confirm source.

## Study Area



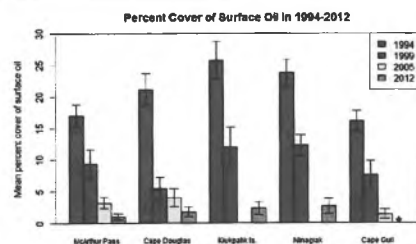
Six study sites on the Gulf of Alaska coastlines of Kenai Fjords and Katmai National Parks and Preserves were selected in 1992. Five (#2-6) are boulder-armored gravel beaches.



Photos of Cape Douglas site from above (top) and Kiukpalik site partial view (bottom).

## Questions

- Does oil still persist after 23 years at these sites?
- Is boulder stability correlated with oil persistence?
- Is oil leaking out or being released from the sites, and if so, by what mechanism, given the long-term persistence of this oil?
- Is the oil at the sites *Exxon Valdez* oil (EVO)?
- How has the oil weathered?



## Does the oil persist?

Surface oil percent cover has continued to decline over time and is now at very low levels (0-3%).

## Does the oil persist?



Subsurface oiling is measured the smaller stones between boulders. These 2012 images show dip stones and/or places they were removed

Result: subsurface oil at 4 sites has not changed for 18 years.

## How has the oil weathered?

## Is it Exxon Valdez oil?



This 3-dimensional view of the GCxGC chromatogram allows visual comparison of quantitative data on the relative abundance of the constituents of different oil samples.

Results: the 2012 samples from Cape Douglas, Kiukpalik Is., Ninaglak Is. and McArthur Pass are clearly similar to EVO and show evaporative loss of the compounds compared to EVO. However, Cape Gull and Kashvik are quite distinct. The signature at Kashvik may represent secondary contamination by a mid-range distillate, such as diesel oil. The Cape Gull sample appears highly biodegraded.

The biomarker region of a GCxGC-FID chromatogram for (a) *Exxon Valdez* crude, and 2012 site samples. Biomarkers are recalcitrant components of oil that can be used to determine the oil source.

Result: the 2012 samples from Cape Douglas, Kiukpalik Is., Ninaglak Is. and McArthur Pass are quite similar to the reference *Exxon Valdez* crude oil. The sample from Cape Gull has some different patterns in the biomarkers (abundances of hopanes and relative abundances of triaromatic steranes) that suggest that this either is not EVO, or that it has degraded significantly, in ways not anticipated. The Kashvik sample is distinctly different (Note that no oil was observed at Kashvik in 2012).

## Acknowledgments

Funding was provided primarily by the *Exxon Valdez* Oil Spill Trustee Council, with additional support from the U.S. Geological Survey (Alaska Science Center), NOAA-NMFS (Auke Bay Laboratories), the National Park Service, and Woods Hole Oceanographic Institution. We appreciate the support and contributions of T. Scott Smeltz, Carson Baughman, Carlissa Turner, Joel Cusick, Jeep Rice, Jeff Short, Carl Schoch, Billy Choate and crew of the R/V Pukuk, and numerous assistants and crews in previous years.

## References

Gundlach, E.R., Hayes, M.O., 1978. Vulnerability of coastal environments to oil spill impacts. *Marine Technology Society Journal*, 12 (4), 18-27.

# ists

H. Mann<sup>2</sup>, Mark Carls<sup>1</sup>, Christoph Aeppli<sup>1</sup>,  
 Perry Holland<sup>1</sup>, Christopher Reddy<sup>1</sup>  
<sup>1</sup>Center, University of Alaska, Fairbanks; <sup>2</sup>NOAA, Arctic Bay Labs,  
 on; <sup>3</sup>Bjerkelov Laboratory for Ocean Sciences



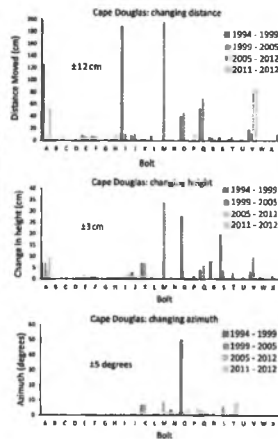
## Are the boulder armors stable?



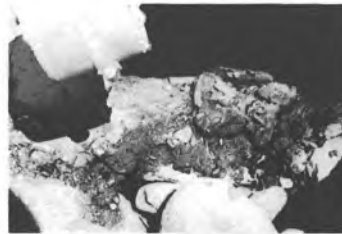
A well-integrated boulder armor near the Cape Douglas site. The stocking hat measures 22 cm across.

Boulder movements between 1994-2012 at our most exposed site, Cape Douglas (maximum fetch = 880 km). Significant movements (distance) are > 1 meter.

**Result:** there have been only 3 significant distance movements by boulders over 18 years at this site. Most changes are smaller and represent boulders rolling or shifting in place, which never completely exposes the embedded oil. Results are similar for other sites.



## Is the oil leaking out?



In 2011 and 2012, we used two methods to test whether oil constituents were being released into the water: 1) **passive samplers** (a plastic strip) inside a protective metal housing deployed at 2 sites and collected after ~ 1 month, and 2) **mussels** collected ~ 30 m from the same sites.

**Results:** ~50% of the samplers had accumulated hydrocarbons consistent with oil, and mussels in 2011 showed contamination by particulate hydrocarbons.

## Major Points

- *Exxon Valdez* oil (EVO) has persisted for 23 years on boulder-armed beaches in the Gulf of Alaska up to 500 km from the spill origin.
- In 2012, the most distant (at 640 km) site had no observable oil, and oil was much reduced at the second most distant site.
- Subsurface oil persists at unchanged levels over 18 years at the other 4 sites.
- The boulder armors have been very stable for 18 years, with no significant disruptions which could have led to loss of the subsurface oil.
- Small amounts of oil are leaking out of the sites -- probably due to frequent, small boulder movements (shifting, rolling in place).
- After 23 years oil at four of the sites remains only slightly weathered, similar to 11-day old oil
- At only one site (Cape Gull) has the oil weathered considerably; we are still evaluating this puzzle.
- Oil persistence on these beaches is probably due to a combination of initial oiling by weathering-resistant mousse and its subsequent sheltering under stable boulder armors.

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# Judge Considers Exxon Valdez Reopener Clause

By [The Associated Press](#) | November 16, 2011 - 5:59 pm

A federal judge is considering whether the state of Alaska should be allowed to collect additional money for unforeseen damages from the Exxon Valdez oil spill.

Arguments were heard Tuesday over the so-called reopener clause in the billion-dollar settlement over the 1989 spill.

That settlement capped reopener damages at \$100 million. The state has asked for \$93 million.

Arguments centered mainly on the distinction between cleanup and restoration. Exxon Mobil Corporation argued the state's request was for cleanup and that, under terms of the 1991 agreement, it's not liable for cleanup anymore. Attorneys for the state and federal governments said Exxon Mobil's protection from liability for cleanup doesn't extend to unforeseen damages.

U.S. District Judge H. Russel Holland took the matter under advisement.

VmP