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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 later degree of preparedness. (Note: DEC is currently happy with state of Alyeska's Contingency Plan).

Alaska State Legislature

House of Representatives



Official Business

P.O. Box V
State Capitol, Rm. 216
Juneau, Alaska 99811
(907) 463-3718

House Special Committee on the Exxon Valdez Oil Spill Claims Settlement April 19, 1991

M E M O R A N D U M

TO: Members, House Special Committee on the
Exxon Valdez Oil Spill Claims Settlement

FROM: Pat Williams *Pat*
Committee Secretary

SUBJECT: Minutes of Committee Meetings

Enclosed for your information is a copy of the draft minutes for the following meeting.

April 3, 1991

Copies to:

Andy Hemenway
Juneau LIO
Anchorage LIO (Heidi)
Fairbanks LIO

HOUSE SPECIAL COMMITTEE ON THE
EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT
April 3, 1991
12:00 p.m.

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MEMBERS PRESENT

Rep. Max Gruenberg, Chairman
Rep. Dave Donley, Vice Chairman (arrived 12:45 p.m.)
Rep. Cliff Davidson
Rep. Bill Hudson
Rep. Gene Kubina
Rep. Mike Navarre (arrived 12:25 p.m.)
Rep. Gail Phillips

MEMBERS ABSENT

Rep. Ramona Barnes
Rep. Fran Ulmer

OTHER REPRESENTATIVES PRESENT

Rep. David Finkelstein
Rep. Pat Carney
Rep. Mark Boyer

COMMITTEE AGENDA

- I. Committee Announcements
- II. Testimony of Attorney General Charles Cole

Handouts

Tentative Committee Meeting Schedule

WITNESS REGISTER

Charles E. Cole
Attorney General
State of Alaska
P. O. Box K
Juneau, AK 99811
Phone: 465-3600

ACTION NARRATIVE

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Number 000

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Chairman Gruenberg called the meeting to order at 12:35 p.m. in the House Resources Committee Room. The Chairman noted the members in attendance. Also in attendance were Andy Hemenway, staff attorney, Gregg Erickson, economic consultant to the Committee, and committee secretary Pat Williams.

I COMMITTEE ANNOUNCEMENTS

Committee Handouts

The Chairman announced that the handouts in front of the members consists of an Oil Spill Chronology, a proposed meeting schedule, drafts of two letters, one being sent to Judge Holland and the other being sent to the federal government attorneys (DeMonaco) from Chairman Gruenberg and a letter to Attorney General Thornberg from Congress (Congressmen Hertel and Studds, dated March 26). In addition, staff will distribute copies of an Attorney General's opinion concerning the authority of the Governor to enter into the Exxon Valdez settlement. These are attached to the minutes.

Chairman Gruenberg welcomed Attorney General Cole to the meeting and asked him to proceed with an overview and history of the Exxon settlement.

Mr. Cole described the background surrounding the decision on the part of the administration to work jointly with the federal government to settle the claims settlement. This included many meetings with the United States Department of Justice and other federal agencies and Exxon representatives. He felt that Exxon would have preferred to have the federal and state governments taking different courses of action, because they could then get the two governments in a crossfire.

Mr. Cole said the biggest issues were (1) the amount of money Exxon would pay; (2) the period of time over which they would pay it; (3) the provisions for a re-opener clause, and the maximum amount for which Exxon would be liable under the terms of the reopener clause. Early on there were discussions about the release of Alyeska.

Representatives Davidson, and Carney arrived at the meeting.

The Chairman directed the Committee's attention to the MASTER LIST OF ISSUES for the CONSENT DECREE (9 pages, rev. 3/29). The Committee will proceed down the list and direct marked questions to the Attorney General.

Number 300

Rep. Navarre asked the Attorney General to explain how the \$1.1 billion figure was arrived at. What did the Governor base the number on? Mr. Cole replied that he thinks the Governor had a strong intuitive feeling about where the settlement ought to come

strong intuitive feeling about where the settlement ought to come out. He said he accepted the Governor's intuitive judgment, and never spoke to him about it.

Rep. Navarre then asked if Mr. Cole analyzed the spill settlement data and the numbers that are attributed there, i.e., whether or not \$1.1 billion is a proper settlement figure. Was the Governor thinking that the amount would settle the state's share or the federal and state share together? Mr. Cole replied that he believes the Governor was thinking that the amount would cover both the state and federal claims.

Rep. Navarre asked if the Governor spoke with anyone in the federal government before he came up with those numbers. Mr. Cole replied "not to my knowledge."

Rep. Finkelstein arrived (12:55 p.m.)

Number 340

Chairman Gruenberg, following up on Rep. Navarre's question, asked if Mr. Cole knew whether any of the figure contemplated would be considered a fine, or was the fine supposed to be in addition to the figure? Also, was the figure intended to include any reopener? Mr. Cole said he didn't think that when the Governor mentioned that figure he thought about provisions for reopener. He is not certain whether he considered the fine as being within that number. He is not sure whether the Governor contemplated resolution of the criminal case within that maximum financial figure.

Chairman Gruenberg asked if there was any written or taped record of the negotiations. Mr. Cole replied "no."

Chairman Gruenberg noted that these documents appear to be fairly similar to other settlements that have been entered into between the federal government and oil companies. Who drafted the consent decree? Mr. Cole said he does not think it could be said that a single person drafted the document. There was participation during the drafting process by the Departments of Justice and law; largely and specifically Barbara Herman, Greg Tillery, Assistant Attorney Generals in the Oil Spill Section and Jo Donohue. There obviously was some involvement by Exxon lawyers. But, the principal "scribner" was the representative from the Department of Justice, Bill Brighton.

Chairman Gruenberg asked if Mr. Brighton used as a model any of these previous settlement agreements. Mr. Cole stated that he does not have actual knowledge, but he is reasonably certain that he did avail himself of materials used in other clean water actions.

Number 388

Rep. Kubina remarked that he would like to compliment Exxon on their skill in negotiating a good settlement for themselves. He said he, as a representative of Prince William Sound, is concerned about the State allowing Prince William Sound to be held hostage by the State's refusal to release the scientific data. Mr. Cole replied that "If you think that way, then you should immediately approve this settlement."

Rep. Kubina pointed out that the scientists and the people of the villages don't know what the results are of the studies. How can we vote for it without that information coming to us? He stated that they (legislators) had some private hearings on that information; but, in his opinion, they didn't get any information in those hearings that really let them know what the effects of the oil was in that area.

Mr. Cole replied that he is firmly convinced that this settlement is in the best interests of the State and the Prince William Sound communities. He said it has nothing to do with whether he publicly released the data so it can be used in the prosecution of claims against the State. He said the decision to put his name on this document was a very informed one, represented by nearly 40 years of trial practice in Alaska. He stated he wanted to see the people of the State be able to take advantage of the restoration of resources before such a long period elapsed that there really wasn't any point in trying to restore them. He added that this represented a lot of hard bargaining with Exxon, and there was a lot of resistance to putting in the provision that the Legislature must approve the document.

Number 456

Rep. Navarre wanted to know whether the Legislature has any ability to negate the agreement. Mr. Cole replied that the Governor has clearly announced that if the Legislature does not approve the Consent Decree, the State will not proceed, and will withdraw from the settlement.

Rep. Kubina remarked that many people in the communities feel like they have been closed out of the negotiations and the results of the scientific data. Why does Mr. Cole feel so strongly that this is the best way for Prince William Sound to be restored? Mr. Cole replied that the basic issue is: Is it in the best interests of the State? Mr. Cole believed it was. He added that whether or not it is in the best interests of the State does not turn exclusively on the scientific data.

Number 494

Continuing, Mr. Cole said that in mid-January 1990, the State had spent at that time 18 months in the prosecution of its claims, which were broadly-based claims. At that time the State had spent

about \$20 million in prosecution of those claims. Also, at that time the federal government had not filed any claims against Exxon. In some ways one might say the State was 18 to 20 months ahead of the federal government in the prosecution of the civil claims. Mr. Cole said he thinks it is fair to say that if one looks at other similar cases it might take from 8 to 12 years to complete litigation. For example, the Dinkum Sands case has been in litigation for 13 years, and is not yet resolved.

Number 526

Rep. Donley arrived at the meeting at 1:10 p.m.

Mr. Cole said we should also bear in mind that by the time the case had gone through the Superior Court and Supreme Court, the likelihood of error in the record would be great because of the number and complexity of the issues. It would be almost impossible for a judge to try the case without error. There is a high percentage of reversal in cases in the Alaska Supreme Court which do not involve issues anywhere near as complex as this, or in an area of the law that is as unsettled as this.

Mr. Cole said another thing to consider is the expense to the State to prosecute the case. It could run \$12 to \$15 million per year. Over a period of six years, that would be \$90 million. He stressed that this area of the law is wholly unsettled. There have been only two or three cases dealing with the Clean Water Act. There are very few judicial or statutory roadmaps to follow. In addition, Exxon is almost an "institutional litigant." It can carry on this litigation almost indefinitely.

Mr. Cole remarked that he has been evaluating litigation for 40 years, and it is one thing he does well. To quote him, "You can look it up."

Rep. Kubina said he felt from the beginning that a settlement was the best way to go; however, he feels some of the terms of the settlement present problems. Mr. Cole, in explaining his views, stated that the real problem in the case from the State standpoint is "what natural resource damages does the State have the right to recover under the Clean Water Act or any private common law doctrine of a public resource trustee, separate and apart from the federal government?" This is the issue that had to be addressed before any evaluation of how much the state could be expected to recover. And, there are some very major problems.

TAPE 7, SIDE B
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One of the problems, for example, are the sea otters, which we know were damaged. The question is: Can the state recover for damage to the sea otters under the Marine Mammal Protection Act, or does

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tactically proceed with its litigation against Exxon without the federal government at its elbow? You know what Exxon would say. Exxon would say during the course of litigation when the state's witness is on the stand: "Object to that evidence. That recovery is held by the federal government under the Marine Mammals Protection Act." A similar problem arises concerning the loss of eagles, which is covered under the federal Bald and Golden Eagle Protection Act. Can the state recover for damage to the eagle population? Can the state recover for damage to the migratory waterfowl under the Migratory Bird Protection Act? It is a legal problem.

Further examples followed, and Mr. Cole read from the federal regulations under 40 CFR 300.605. At this time, the Chairman, quoting Mae West, interrupted Mr. Cole to say "I get your drift."

Mr. Cole then continued to give examples of the Secretary's trusteeship. In conclusion, Mr. Cole said as one evaluates how much we could recover, they had to evaluate the elements of recovery the state would be entitled to receive. If we had gone our own route, we would be faced with Exxon's objection to every one of these elements of recovery, saying those elements of the recovery are held by the federal government.

Rep. Kubina asked if the federal regulations stated that we need to keep our scientific data secret. Do we have to take the side of someone we are suing against the people of our state? He acknowledged that the settlement was complicated and there would be great problems in taking it to court; however, how do we help the citizens of Alaska through this settlement?

Mr. Cole replied that the only way restoration money would be made available to affected citizens would be if this settlement was approved. If the case is litigated, it would probably take ten years in court, and there would not be \$700 million available in the next ten years, and the people would suffer. He added that, hopefully, some resources would be restored naturally.

(Representative Navarre left the meeting at 1:30)

Representative Hudson said he appreciated the Attorney General's comments, but there are still lots of questions about the settlement for which the committee does not have answers.

Mr. Cole said that they (the administration) negotiated to get the maximum amount of money they could -- It is the art of the possible.

Representative Davidson wanted to know who drafted the agreements. Mr. Cole replied that he has probably read each agreement himself at least thirty times, and he knows each of the lawyers from the Oil Spill Section in Anchorage read them. He said he personally

Oil Spill Section in Anchorage read them. He said he personally cleaned up a lot of the language and spent a lot of time reviewing the agreements. The Exxon people also read the documents, and asked for changes, some of which we acceded to and some not.

Rep. Finkelstein inquired about the disclosure of information. Although he could understand the Attorney General's position, he felt it was reasonable that state residents wanted disclosure of all information on the settlement. Mr. Cole replied that the state gets sued several times a day by its residents. In the course of defending against those claims, the state pays money, and generates a "work product", comprised of expert opinion and legal research. Under the rules of civil procedure, we're entitled certain of those work products and materials. The State does that in every litigation it's involved in. He says he sees no reason that this case is different other than the fact that more state residents are suing the state than usual, from any other case with respect to opening up its work product. He said they will release information to the extent they can under the Rules of Civil Procedure.

Following up, Rep. Finkelstein said they passed legislation last year that would allow open access to information. His reading of that legislation is that this information (the scientific information) should be made public. He felt that someone could get access to it if they pursued the matter.

Mr. Cole said he is not saying it is unreasonable. However, he feels it is his statutory obligation under law to preserve and protect the state's legal rights and he is simply following the law, in his view.

Chairman Gruenberg said he understood the Attorney General has agreed to review the records to back up the \$72 million figure related to past State expenditures. Is that correct? Mr. Cole stated that he would get a report on that to the committee, perhaps by tomorrow.

Rep. Hudson asked if Mr. Cole thought it helped or hurt when the Governor announced the target figure. Mr. Cole said he felt it helped. Rep. Hudson observed that normally, one doesn't release the dollar amount early on during or before actual negotiations have begun.

Mr. Cole said he thought the art of settlement is to present in advance a figure that gets attention but does not drive the other party away from the table. That easily could have happened here. He said he thought they got Exxon's attention, but did not drive them away.

Chairman Gruenberg said he would like to go through the list of written questions. He asked if the state could still sue Exxon for violation of state criminal laws. Mr. Cole replied "yes." He

added that it does not intend to do so.

Chairman Gruenberg asked how long the statute of limitations would run on that. Mr. Cole said he did not know, but he told Exxon in writing that the state has no intention of suing criminally.

Chairman Gruenberg wanted to know if that would be binding on this and future administrations. Mr. Cole replied that it was a representation made in good faith. However, if he is relieved of his position, some other attorney general may want to change the state's representation.

In answer to Chairman Gruenberg's question, Mr. Cole stated that a representation was made by him as attorney general to Exxon that the state did not intend to sue Exxon. As long as he is the Attorney General, the State does not intend to sue.

Rep. Kubina asked when Mr. Cole gave those assurances to Exxon. Mr. Cole replied he did so before the settlement was signed.

Rep. Kubina remarked that newspaper articles indicate that the figure of \$1.2 billion was arrived at quite early in the negotiation process. Is that accurate? Mr. Cole said that is reasonably accurate. The first issue they addressed was: How much money is Exxon willing to pay?

Chairman Gruenberg read Question No. 3 which relates to paragraph 3 on page 3 of the Consent Decree:

"The Parties recognize that the payments called for in this Agreement are in addition to those described above. . ."

The Chairman asked if that phrase means that for purposes of the Consent Decree, the amounts recovered are not subject to Clean Water Act limitations.

Mr. Cole replied "no."

Chairman Gruenberg referred to Question No. 5 on the MASTER LIST OF ISSUES:

"Why are the natural resources damages of the state not separated from the natural resource damages of the federal government?"

Mr. Cole said that was because it was impossible to segregate those resource damages. The advantage to that joint arrangement is that we will avoid possible litigation over which government owns which resource. He said the State wanted to avoid that, and we did.

Rep. Hudson asked about natural resource damage standards and the

rights of municipalities to sue. Mr. Cole replied that this is a difficult legal question; however, third parties, including municipalities are free to pursue their claims against Exxon.

Chairman Gruenberg asked if all recoveries would have to come under the Clean Water Act. Mr. Cole replied, "no." He said recovery would not have to be entirely under the Clean Water Act. However this settlement is entirely under the Clean Water Act.

Rep. Phillips asked why the state chose to settle under the Clean Water Act. Was that most beneficial to the state? Mr. Cole replied "yes." He said the major element resulting from the spill is damage to natural resources of the area. We have some possible claims for lost revenues, but major damage is to natural resources.

As a matter of law the holders of those resources are the State and Federal governments. The problem is how to make the maximum recovery to restore those damages. He said it is his view that it is most effective to proceed under the Clean Water Act to avoid problems of a hassle with the federal government over who owns what rights. Under the arrangement in the settlement, the federal government agrees that the state has an equal voice in recovery and expenditures of the funds. It is one of the singular successes of this settlement. We have veto power over federal actions.

Rep. Kubina asked if there was any consideration given to this as a way of circumventing the legislative appropriation process. Mr. Cole replied "NO." He added that there are provisions in this agreement stating that the legislature must approve the settlement. This provision is something he fought very hard for.

Rep. Carney asked if Mr. Cole had a dollar estimate of the financial losses to fishermen in the communities. In reply, Mr. Cole posed the question: "Do fishermen hold rights to recover of does the state?" He added that it is a difficult economic problem.

Rep. Carney felt that there was a potential liability to these people who have suffered economic losses. He asked if they could sue the state. Mr. Cole Exxon may have already paid some of those private claims. He said fishermen have their own rights to sue and we hope they are successful.

Rep. Hudson pointed out that the issue of third party claims may extend beyond Alaska, Puget Sound fishermen for example.

Rep. Kubina said he would like to hear how Mr. Cole believes the state can facilitate helping Alaska citizens in settling the entire issue. Mr. Cole replied that they (third party claimants) should dismiss the claims against the state. It is the single best means to do that.

Chairman Gruenberg posed a question that he said was prepared by staff: Are Clean Water Act recoveries limited in terms of so many

will ask the question at a later time.

ADJOURNMENT

The Chairman adjourned the meeting at 2:05 p.m.

ATTACHMENTS TO MINUTES

Oil Spill Litigation Chronology (April 2, 1991)

Draft letter dated April 3 from Gruenberg to Judge Holland

Draft letter dated April 3 from Gruenberg to Charles DeMonaco

Letter from Congressmen Hertel and Studds to Dick Thornburgh, dated
March 26, 1991

Attorney General's Opinion dated April 2, 1991 re Authority of
Governor and Attorney General to Enter into Exxon Valdez
Settlement Agreement

April 17, 1991

M E M O R A N D U M

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

FROM: Chip Thoma

SUBJECT: Dropping of Felony Counts

I spoke with Mr. Richard Stewart at the break today about the felony charges. I told him I was disturbed that in the "Government's Memorandum in Aid of Sentencing" that the entire Introduction and Factual Background sections, pps. 1-6, related directly to the felony charges having to do with crew competency and safety violations by Exxon management; yet on P. 22 the government simply states that ". . .the decision (to drop charges). . .is one committed to the discretion of the prosecutors."

I related to him my concern that without the felonies pursued, the ability to reform these serious management flaws that compromise crew safety and competence are lost. He said he fully understood my position. I then related that the state's brief before the NTSB and subsequent testimony by Frank Iarossi regarding the monitoring of Joseph Hazelwood showed that large gaps in monitoring occurred and that paperwork without signatures and dates were produced by Iarossi at the 7/17/89 NTSB hearing. I told him it was the State's and my contention that this paperwork was fabricated to show monitoring, however, when non did occur. He said he was interested in any information along those lines.

His final statement was that ". . .in the course of negotiations, sometimes these things get dropped."

TO: Honorable H. Russel Holland

April 10, 1991

United States District Judge
U.S. District Court
222 W. Seventh Avenue, No. 4
Anchorage, Alaska 99513

RE: A 90 - 015 CR

FR: Theodore P. Thoma

#2 Marine Way
Juneau, Alaska 99801

RE: CRIMINAL PLEA BARGAIN PROCEEDINGS

concerning EXXON CORPORATION, EXXON SHIPPING, ALYESKA SERVICES

For the record, I am a self-employed environmental lobbyist and have been closely involved in Alaska resource issues for over 20 years. As such I was a chief proponent for the re-design of the Alyeska pipeline, for an all land route through Canada, and for full environmental safeguards to protect state and national/international waters connected with the eventual marine terminal and tanker route emanating from Valdez. As you are aware, the pipeline and marine route escaped full NEPA court review as a result of Congressional action instigated by the Alaska delegation in 1973. I still believe that NEPA review would have addressed the basic environmental safety and compliance responsibilities that were the root cause of the EXXON VALDEZ disaster, and subsequent inadequate response. My direct comments follow:

- 1) I oppose the agreement to drop the FELONY criminal charges against Exxon Corporation and Exxon Shipping Company (A90-015). I strongly believe that the pursuit of these grand jury charges and probable convictions are the only way to reform the inadequate staffing and competency levels aboard U.S. tankers that service Valdez and the West Coast to Panama. From the week-long live broadcast of the National Transportation Safety Board (NTSB) hearings in the summer of 1989, it was obvious that:
 - A) Mr. Frank Iarossi, former chairman of Exxon Shipping, knowingly cut back the number of crew members aboard the EXXON VALDEZ, compromising safety, stretching the physical ability of crew to competently man this carrier of dangerous, toxic material;
 - B) That Mr. Iarossi, Exxon Shipping, and Mr. Hazelwood, the ship's master, allowed Mr. KAGAN, a known incompetent, to serve aboard the EXXON VALDEZ, against the wishes and counsel of competent crew members who knew of his mental and physical problems, and caused KAGAN to steer the vessel through dangerous, ice-choked waters, resulting in the crash of the EXXON VALDEZ and resultant spillage of 11 million gallons of oil;
 - C) That Mr. Iarossi, Exxon Shipping, and Exxon Corporation knowingly allowed Mr. Hazelwood to operate the EXXON VALDEZ without monitoring his acute alcoholism, and in fact fabricated the small amounts of paperwork in Exxon files relative to Hazelwood's condition. These two reports were without dates or signatures, yet purported to show that monitoring of Hazelwood did occur;

Consequently, I believe that counts IV & V (A90-015) should be reinstated and litigated, and actively pursued by the federal government, as these circumstances were the BASIS of state testimony before the NTSB. The agreement to bring these charges for litigation by the federal government was done in lieu of applicable state laws covering crew safety and competence.

2) Additionally, I strongly believe that the MISDEMEANOR criminal charges against Exxon Corporation and Exxon Shipping Company are being settled far too cheaply for the great, extensive damages to wildlife over a 700 mile region. It is my understanding that the ALLIED CHEMICAL case was the largest, previous U.S. settlement for environmental damages, at \$13 million. However, this was also 10% of Allied's earnings for that year. EXXON's yearly SALES are over \$100 BILLION; their reported net, yearly earnings are \$5 BILLION; and their NYSE traded stock has gone up 13 points in the last two years, at a estimated value of \$1 BILLION per point. This huge corporation is in effect being given a pittance fine by the plea-bargain, and it in no way should be viewed as a properly negotiated fine for either the extent of damages or the worth of the corporation. Also, as you may be aware, Mr. Lawrence Rawl of Exxon has repeatedly stated to the press that the fines and settlement will in no way impair or harm his company, and that all costs will be immediately passed on the consumer in pump prices. Finally, the overall terms of the settlement, payments over ten years, are an affront to Alaskans and the nation as a whole; once Mr. Rawl 'passes on the costs', consumers will in effect be paying over and over for Exxon's corporate liabilities, while the corporation makes token payments for it's environmental assault on the nation's common resources.

3) Finally, I strongly believe that civil and criminal charges, both felony and misdemeanor, against Exxon, Exxon Shipping and ALYESKA should be reinstituted and pursued by the federal and state governments, based on the complicity, culpability and liability of Exxon and the owner companies of Alyeska to secretly plan non-compliance with terms of agreements struck with the federal and state governments to immediately respond and clean up ANY spill in Prince William Sound. The documents obtained and verified by U.S. Congressman George Miller amply demonstrate that collusion on the part of Exxon and Alyeska to ignore the existing contingency plan was commonplace, and an active topic of discussion among the owner companies in 1987-88, even to the point of written, internal memos that materials, personell and marine transport were not on-hand to address but the most minor spills in Port Valdez and Valdez Arm. The June, 1988 owners meeting of Alyeska in Phoenix, Arizona, as referenced by Stanley Factor, Vice-President of Arco Marine, Inc., states clearly the Alyeska HAD NO INTENTION of responding to a spill in Prince William Sound, except with dispersents that were not on hand, with no properly fitted aircraft to utilize them. On March 24, 1989, in the early am hours, one of the first calls made by Mr. Iarossi, upon hearing of the spill in Houston, was to Southern Air Transport of Miami, for a C-5 aircraft, specially fitted for dispersent application, to be airborne, fly to New Mexico to pick up the dispersent ("ADDS PACK") and proceed to Anchorage. As the record shows, dispersent was not on-hand in Alaska, the plane was in Miami. The Valdez personell were not trained or available, the barge was empty, and whatever small booms and skimmers on-hand were buried in snow. I term these circumstances as criminal acts on the part of Alyeska and owner companies who were far more interested in tanker turn-around times and under manning than taking any responsibility for the consequences.

In summary, I trust you take these points into consideration, and I do appreciate the opportunity to comment. The Alaska Legislature is holding daily hearings on these vitally important issues, and I hope you are able to see the wisdom in recommending rejection of these present settlement terms, as a judicial officer responsible for determining the fairness of the settlement for immediate and long-term damage to national resources.

Sincerely,



Theodore P. Thoma

B. The Application of the Policy to Hazelwood

A review of Hazelwood's known dependency on alcohol starts with the "Individual Disability Report" date stamped by the Medical Department Exxon U.S.A. on May 14, 1985. Hazelwood Service Records, Exh. 5B. The President of Exxon Shipping Company testified that the Company discovered Hazelwood was undergoing or had completed an alcohol abuse program "just by chance" when an administrative manager, who was attempting to contact Hazelwood, was advised of his hospital treatment. Iarossi Tr. 921.

Exxon Shipping Company's chance encounter with the hospital which was treating Hazelwood for "drinking excessively, episodically" resulting in "familial and vocational dysfunction" (Hazelwood Service Records, Exh. 5B) suggests most strongly that Hazelwood was not intending to come forward voluntarily to his employer to take advantage of the rehabilitation program then offered by the Company.^{29/} Indeed, the timing of the "notification" to Exxon Shipping Company (i.e., after Hazelwood was entered into the rehabilitation program) indicates that Hazelwood was attempting to avoid advising his employer of his condition.

The ESC Policy states that employees who acknowledge their dependency and are willing to undergo rehabilitation will

^{29/} Exxon's Employee Health Advisory Program (EHAP) set out in Exhibit 5J was not in existence in 1985 although an informal employee assistance program was in operation and applied to Hazelwood at this time. Iarossi Tr. 921-922. Indeed, Hazelwood received certain benefits during the period of his sick leave. Hazelwood Service Records, Exh. 5B, p. 117.

be offered the opportunity to do so free of fear of Company sanction. The Policy goes on to state that, if an employee request for rehabilitation is made after the discovery of a violation of the Policy, the Company may take disciplinary action, including termination. In other words, the opportunity for paid rehabilitation is lost under such circumstances. ESC Alcohol and Drug Use Policy, Exh. 5H, p. 2.

It is ESC policy to encourage employees to step forward and affirmatively seek help before a violation occurs.^{30/} However, there is no evidence that ESC questioned why Hazelwood had not come to it prior to secretly seeking treatment for his alcohol dependency. If, as the President of Exxon Shipping Company claims, Exxon Shipping Company has taken a tough stand on alcohol abuse (Iarossi Tr. 917), it would have been both reasonable and advisable for the Company to carefully question Hazelwood, who holds the highest ocean-going position within the Company, about his reasons for not confiding in the Company. If Hazelwood was called to Company headquarters in Houston, or if any senior manager directly conferred with Hazelwood about his problem, President Iarossi was unaware of it. Iarossi Tr. 924.^{31/}

^{30/} The process by which an individual voluntarily acknowledges alcoholic dependency is the first step on the often difficult road to rehabilitation. Individuals who are not prepared to admit their dependency are poor candidates for rehabilitation.

^{31/} It is reasonable to assume that Mr. Iarossi would have sought to uncover the basic facts about Hazelwood's alcohol dependency and the reactions of ESC to the discovery prior to testifying at the Board's well-publicized hearing.

In any event, the Exxon Shipping Company devised a system by which it apparently hoped it could monitor the activities of Hazelwood to insure compliance with the Company's Policy and to insure his continued participation with Alcoholics Anonymous, as recommended by Hazelwood's physician and as required by ESC. Hazelwood's Service Records, Exh. 5B; Iarossi Tr. 924, 926. However, the monitoring system devised by ESC was totally ineffectual and was doomed to failure at the very outset as ESC should have known. The supervisory system consisted of scheduled meetings with Hazelwood by two supervisors (the Fleet Manager and the Ship Group Coordinator) upon the return of Hazelwood's ship to the lower forty-eight states, usually in Long Beach or San Francisco. Iarossi Tr. 924, 927-928. No attempt was ever made by ESC to visit Hazelwood while he was in Valdez. Iarossi Tr. 927. Nor was there any attempt to verify whether Hazelwood continued to abstain from drinking during the six months of the year Hazelwood was off duty or to verify whether he attended the required AA meetings. Iarossi Tr. 926.^{12/}

Although Iarossi attempted to take credit for having consistently monitored Hazelwood "right up to his last voyage," the Company did so under a flawed program that caused Hazelwood to be observed by his supervisors (on a schedule known to Hazelwood) only 12 days out of 365 days a year. The opportunities to use deception or guile on the part of Hazelwood were legion.

^{12/} Hazelwood's schedule called for him to be at sea for six months and off duty for six months. Iarossi Tr. 927.

Indeed, the monitoring system was so ineffective that the fact that Hazelwood had his driver's license revoked because of a "DWI" (driving while intoxicated) conviction in New Hampshire in August of 1985 went completely undetected. So, too, did the revocation of Hazelwood's New York driver's license under a reciprocity program. Human Performance Factual Report, Exh. 2B, p. 5.

Not only did ESC design a "monitoring system" which could be easily defeated because of its uniformity and regularity, but ESC also failed to exercise any of the random monitoring and testing techniques expressly called for in ESC's formal Alcohol and Drug Policy. ESC policy provides that the Company has the discretion to conduct unannounced alcohol and drug searches of vessels in operation when the use of alcohol or drugs could create an unsafe condition, or when there is reasonable cause to suspect such substances may be present. ESC Alcohol and Drug Policy, Exh. 5H, p. 3. Although a random search of Hazelwood's quarters could have been conducted under this provision, no such random search was ever performed. Iarossi Tr. 928.

Formal ESC policy also provides that the Company may require employees to submit to medical evaluation or other testing where reasonable cause exists to suspect substance misuse. ESC Alcohol and Drug Policy, Exh. 5H. Although Mr. Iarossi dismissed the notion that ESC had cause to test Hazelwood (Iarossi Tr. 958), Hazelwood's prior history of alcohol abuse could have and should have been considered cause under the policy. Mr.

Iarossi's interpretation of the policy would unreasonably preclude ESC from testing Hazelwood or any other confirmed alcoholic employee, under the terms of the program.

With further regard to ESC's formal policy, the top company official in charge of its enforcement, Mr. Iarossi, failed to correctly understand its key provisions. One such provision states that an employee can be relieved of his or her duties if there are "observable physical signs of impairment," which include, among other signs, the smell of alcohol on the breath. Iarossi testified that, in addition to having the smell of alcohol on an employee's breath, the employee would also have to be found unfit for duty, before he or she could be relieved of duty. Iarossi Tr. 965-966. In fact, the Policy clearly states that:

In such instances [where observable physical signs of alcohol use are present] or where there is other reason to believe an employee's unfitness for work results from the use of alcohol or drugs, the employee should immediately be relieved of his or her duties. (Emphasis added.)

This provision is written in the disjunctive and states precisely that physical signs of use of alcohol (such as the smell of alcohol on the breath) are grounds for being relieved of duty irrespective of the employee's fitness for duty.

Perhaps the single most significant deficiency of the ESC Alcohol and Drug Policy, is that it totally fails to accommodate the situation where the problem individual is the ship's Master. Mr. Iarossi admits that the post-rehabilitation supervision of a Master is "more difficult." Iarossi, Tr. 1000.

While Hazelwood may indeed have believed himself to be the single most scrutinized ESC employee (Iarossi Tr. 997), the monitoring system's architecture permitted him to easily avoid detection.

Iarossi testified that the two Hazelwood monitors talked to other crew members in an attempt to corroborate Hazelwood's statements regarding his abstinence from alcohol. Iarossi Tr. 947. However, ESC has no formalized method of protecting crew members from possible retribution if they were to bypass the Master and report directly to senior management about some aspect of the Master's conduct or behavior. Id. Captain Deppe, with several years of Master experience on the line for ESC, rejected the notion that crew members would pass on to management derogatory information about a Master:

I can't imagine too many people who report over their immediate supervisor to someone else.

Deppe Tr. 1092. Deppe also stated that a crew member will not go around the chain of command:

. . . unless there is either a special relationship [to someone in senior management] or unless there is some protection mechanism set up. . .

Deppe Tr. 1093.

Deppe conceded there is no such protection system and that in this case, the surveillance techniques employed by ESC failed to detect the alcohol problem plaguing Hazelwood. Deppe Tr. 1095.

In short, the monitoring system ESC designed to insure Hazelwood was competent to hold a command position was flawed in two fundamental respects: first, it was incapable of detecting

any deviation of Hazelwood from required behavior, either on or off duty; and, second, no system existed which would allow a subordinate of Hazelwood to notify management of inappropriate behavior.^{33/}

The general ESC Policy was flawed in other significant respects. Clearly loaded for the question asked of him, Mr. Iarossi testified at the hearing that ESC had aggressively carried out a policy of random alcohol and drug searches on board its ocean-going vessels. Iarossi stated that thirty shipboard searches (a few based on suspicion, but the majority randomly selected) were conducted over a span of six and one-half years. Iarossi Tr. 917-918, 960. Iarossi also testified that 55 individuals were disciplined for violations of the Alcohol and Drug Policy and that 34 of the 55 employees were terminated, although five of these cases were arbitrated and the Company was ordered to rehire the employees in question. Iarossi Tr. 919.

The Sea Carrier Initiative Search Guidelines (Exh. 5I), representing an agreement between ESC and the U. S. Customs Service, provided for searches of Exxon Shipping Company vessels in foreign trade (such as Panama) and likewise resulted in vessel searches. Iarossi Tr. 919.

While the State of Alaska has no reason to question the technical veracity of these statements by Mr. Iarossi, they con-

^{33/} Aside from the whistle-blower protection issue, the confidential nature of the rehabilitation program (Iarossi Tr. 1009-1010) precluded subordinates from knowing of the problem and supplying management with information regarding Hazelwood's observable rehabilitation efforts.

trast sharply with the hearing testimony of the EXXON VALDEZ crew members. Five officers or unlicensed personnel were asked whether they had ever been searched while going aboard their assigned vessels or had experienced a ship-wide search for alcohol or drugs. All responded in the negative. The officers and crew testifying have been employed by ESC, cumulatively, over a span of 38 years--and yet, not a single employee could testify that their ships, their quarters or their person had ever been subjected to a search called by ESC.^{34/}

The dangers associated with substance abuse cannot be imparted to safety-related personnel by the mere sending of a form letter to their residences, as was done by ESC. Iarossi Tr. 968. The battle to control the ravages of alcohol and drug abuse must be fought every day. On this front, the policy of ESC was merely to react to situations as they became known to it or to cause ineffective searches to be made, although never in a manner to uncover alcohol or drug abuse of the single most important crew member and the one to whom ESC entrusts the safety of the

^{34/} See testimony of the following crew members:

<u>Name</u>	<u>Years Employed by Exxon</u>	<u>Search Performed</u>
Jerzy Glowacki	19 years	No--Tr. 870- 871
Robert Kagan	15 years	No--Tr. 348
Maureen Jones	1.5 years	No--Tr. 311
Paul Radtke	1.5 years	No--Tr. 277- 278
Harry Claar	1 year	No--Tr. 224

crew, the ship, the cargo and the environment--the Master. Exxon Shipping Company's failure to carry out a forceful, or even a marginally adequate, alcohol and drug abuse effort, or to effectively monitor Hazelwood after May 1985 for alcoholic recidivism, contributed to the probable cause of the accident.

C. Hazelwood's Judgment Was Impaired by
Alcohol Before and After the Grounding

The failure of Exxon Shipping Company to properly monitor the activities of Hazelwood resulted in Hazelwood being able to engage in uncontrolled intake of alcoholic beverages only hours before the departure of the EXXON VALDEZ at 2121 on March 23, 1989. The physical evidence clearly indicates that approximately ten hours after the grounding of the ship, Hazelwood's blood alcohol concentration was .061%. Back-calculating to the time of the grounding, Hazelwood's blood alcohol concentration percentage was estimated to have been .22%. While it is possible that Hazelwood may have consumed alcoholic beverages between the time the ship left Valdez and the grounding, or, between the time of the grounding and the time blood was taken from him at approximately 1050 on March 24, the weight of the evidence is to the contrary. First, with the exception of two empty Mousy beer bottles, there is no physical evidence that Hazelwood consumed any other alcoholic beverages while on board the ship. Second, there is considerable direct testimony that Hazelwood had several rounds of drinks while in Valdez on the afternoon and evening of March 23, 1989. Third, knowing Coast Guard officers would be coming on board the vessel (they arrived

M E M O R A N D U M

TO: Special House Committee on
Exxon Valdez Settlement

FROM: Chip Thoma

DATE: April 16, 1991

RE: Federal Felony Charges proposed to be dropped
under settlement

Here is some background on helmsman KAGAN and violations of vessel manning standards aboard the Exxon Valdez, which eventually were the basis of federal grand jury indictments against Exxon.

BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

In the Matter of the Investigation of the	:	
Accident Involving the Grounding of the	:	Docket No.
Tankership EXXON VALDEZ in Prince William	:	DCA 89 MM 040
Sound, Alaska, on March 24, 1989	:	

**PROPOSED PROBABLE CAUSE, FINDINGS
AND RECOMMENDATIONS OF THE STATE OF ALASKA**

Comments with respect to this document should be addressed to:

Robert E. LeResche
Oil Spill Coordinator
STATE OF ALASKA
124 West 5th Street
Juneau, Alaska 99811
(907) 465-2062

July 17, 1989

an average knowledge of ship handling characteristics. In a somewhat later review (for the period December 11, 1987 through January 12, 1988), Cousins was rated by Hazelwood as having excellent navigational skills and only an average knowledge of ship handling characteristics. Id.

C. Robert M. Kagan - AB

Robert M. Kagan is 46 years old and has been employed by the Exxon Shipping Company for thirteen years. ESC produced nine "Employee Evaluation and Development" forms for Kagan, each covering one- to two-month periods from February 1986 through February 1989. The evaluation forms uniformly characterize Kagan as capable of satisfactorily performing more menial shipboard tasks (tank cleaning, painting), but as having difficulty in executing seaman-related jobs which call for a higher degree of technical knowledge. Kagan Service Records, Exh. 5D. Kagan consistently required a good deal of supervision. Kagan was reported as having a short attention span and tending to easily get bogged down in trivial matters, even to the point of compromising safety. The last evaluation of Kagan's performance (for the period January 20, 1989 through February 14, 1989) stated that even though Kagan was sailing as an AB, he needed to improve his overall performance and he "lacks the necessary skills to do the AB's job." This evaluation also noted that Kagan required too much supervision to be a productive crew member. Despite this negative evaluation, ESC permitted Kagan to continue to serve as an AB. Consequently, on March 24, Kagan was

on watch as helmsman while the EXXON VALDEZ was in the ice-laden and confined waters, even though Kagan was "nervous" at the prospect of being the helmsman in Prince William Sound. LeCain Tr. 775-776.

D. Maureen C. Jones - AB

Maureen Jones is 24 years old and has been employed by the Exxon Shipping Company since September 1987. She is a graduate of the Maine Maritime Academy. ESC produced eight evaluations of Jones which uniformly rate her as a capable and competent AB who generally exceeds the requirements of the position. Jones Service Records, Exh. 5E. From the evaluations provided, it appears Jones was an energetic member of the crew who was interested in advancing to Mate and higher. In her effort to achieve advancement, Jones was eager to take on overtime tasks. It appears that Jones' interest in a career at sea and in advancing to higher positions strongly influenced those officers who evaluated her.

Other EXXON VALDEZ officers possessed various licenses as set forth in Exhibit 2B. This Exhibit indicates that the Board investigators would be reviewing Coast Guard and Merchant Mariners' documents to assess the level of experience of the ABs. As of the date of this submission, the State has not received any such further NTSB analysis.

Alyeska did not perform its duties consistent with the plan on the morning of the grounding. This failure of performance was not the result of any weakness in the State approved plan. Mr. Kelso testified that, with the benefit of hindsight, no changes to the Contingency Plan would have rectified the mistakes made by Alyeska in its negligent performance under the plan. Kelso Tr. 1169.

VIII. VESSEL MANNING STANDARDS

A. Coast Guard Manning Level Statutes and Requirements

One of the significant issues raised by the grounding of the EXXON VALDEZ concerns the manning levels of tanker vessels. The EXXON VALDEZ had issued to it a U. S. Coast Guard Certificate of Inspection which required a minimum of fourteen officers and crew (fifteen if a radioman was required by FCC regulation),^{47/} excluding stewards. The EXXON VALDEZ was required to and did carry a radioman. In addition, two stewards and two oilers were on the journey from Valdez on March 23, 1989, for a crew of twenty.

Section 3309 of Title 46 of the United States Code requires the Coast Guard to issue tank vessels Certificates of Inspection, the terms and conditions of which must be observed by the ship operators. Among the limitations to be placed in the Certificate of Inspection are minimum manning levels. 46 U.S.C. § 8101-8105; 46 C.F.R. § 15.101-15.915. The Coast Guard regula-

^{47/} The FCC requires a licensed radioman when the vessel is over 300 gross tons.

tions do not specify, and the Coast Guard has not established, standards of manning levels for merchant ships. 46 C.F.R. § 15.501-525; § 15.801-915; Grady/Barton/Steen Interview, Exh. 10E, p. 1. According to the Coast Guard, the manning levels established for each ship are determined on a case-by-case basis. The "minimum crew level" specified in the Certificate of Inspection is defined by the Coast Guard as the crew complement that cannot be further reduced and still provide for the safe operation of the vessel. Id.

The specific job-by-job manning level guidelines are set forth in 46 C.F.R. § 15.801 et seq. A vessel the size and displacement of the EXXON VALDEZ is required to have one master, §15.805, three licensed mates, §15.810(a)(1) and a chief engineer, §15.820(a)(1). The Coast Guard determines the overall manning requirements by setting the number of assistant engineers and able seamen, based on (1) the size and type of vessel, (2) the installed equipment, (3) the proposed routes of operation, (4) the cargo carried, (5) the type of service of the vessel, (6) the degree of automation, (7) the use of labor saving devices, and (8) the organizational structure of the vessel. 46 C.F.R. § 15.501(b), § 15.825, § 15.840. Additionally, the FCC requires vessels over 300 gross tons, such as the EXXON VALDEZ, to have a licensed radio operator. 47 U.S.C. § 353, 47 C.F.R. 80.159(b).

Any deviation from the manning levels set forth in a vessel's Certificate of Inspection renders the vessel without legal authorization to operate. 46 U.S.C. § 8101(d), 46 C.F.R.

§ 15.515(a). To effect a change in the manning level, requests must be made by the master or agent of the vessel to the Coast Guard pursuant to 46 C.F.R. § 15.505, and such changes, once approved, must be endorsed on the Certificate of Inspection by the Coast Guard. 46 C.F.R. § 31.15-1(a).

B. Establishment of Manning Levels for
the EXXON VALDEZ

Exhibit 10G contains a series of correspondence and memoranda relating to the ESC request to the Coast Guard to reduce the manning levels for both the EXXON VALDEZ and its sister ship the EXXON LONG BEACH. The culmination of this correspondence is a copy of a USCG letter dated May 27, 1988, to Paul Myers of ESC, issuing amended Certificates of Inspection authorizing reduced manning levels and the operation of unattended engine rooms. Reduced Manning Correspondence, Exh. 10G, p. 21-22. The authorizing letter also approves Exxon's proposal to implement a Maintenance Department on both vessels. Although this Coast Guard approval is granted by letter dated May 27, 1988, the Certificate of Inspection for the EXXON VALDEZ reproduced in Exhibit 3A is dated November 18, 1988. It cannot be determined from the record what, if any other, manning level changes were made to the Certificates of Inspection in the period from May to November. The Certificates of Inspection set out in Exhibit 3A reflect the operation of a Maintenance Department, although, according to the Third Mate, the Maintenance Department had been disbanded for approximately one year prior to the grounding. Cousins Tr. 25. ESC's failure to adhere to its Cer-

tificate of Inspection is a violation of 46 U.S.C. § 3309.

The Coast Guard's approval of reduced manning levels for the EXXON VALDEZ was the product of bureaucratic misdirection. It appears from Exhibit 10G that the Coast Guard inadvertently issued to the EXXON VALDEZ a reduced manning Certificate of Inspection without first having properly completed the standard Coast Guard review process. The process requires approval of the local Coast Guard field office (Officer in Charge of Marine Inspection (OCMI)) and the Coast Guard Merchant Vessel Personnel Branch (MVP). Grady/Barton/Steen Interview, Exh. 10E, p. 2; Flyntz Tr. 1025. In the case of the EXXON VALDEZ, the MVP was never initially asked to review the decision of the OCMI to reduce the EXXON VALDEZ manning levels, which had been inadvertently authorized by the OCMI. Vessel Manning Correspondence, Exh. 10G, p. 13. Consequently, the Coast Guard, which was in the process of evaluating ESC's request to reduce the manning level of the EXXON LONG BEACH, advised Exxon that its determination on the EXXON LONG BEACH would control both vessels. Id. ESC apparently agreed with this approach and submitted additional documents supporting its request for reduced manning levels of the EXXON VALDEZ and EXXON LONG BEACH, Id., pp. 15-18. This additional data appeared to satisfy the Coast Guard, which ultimately issued amended Certificates of Inspection to both vessels. Id.

C. The Exxon Shipping Company Approach
to Manning Levels

The reduction in the manning levels of the EXXON VALDEZ is consistent with the policy of ESC to reduce manning on all its major vessels to minimum levels and to utilize its licensed and unlicensed crew in as flexible a manner as possible and as a cost savings device. Iarossi Tr. 892-894.

In a paper titled "Surrendering the Memories" dated June 1988, Mr. Iarossi stated that it is ESC's policy to reduce by the year 1990 its standard crew complement to sixteen on its fully automated diesel powered vessels (such as the EXXON VALDEZ), down from twenty in 1984.^{48/} While Iarossi notes that other ships, mostly foreign flag ships, have successfully operated at such low crew levels, the paper makes little mention of considerations of ship safety or crew fatigue. By focusing the crew manning debate solely on the issue of economics, ESC does a disservice to the public.

The lengths to which ESC has gone in pursuit of its economic goal of crew reduction are recorded in several other manning-related documents. These documents reflect the fact that Exxon pursued a demanning and crew flexibility strategy designed to maximize cost savings. It as well appears that the decisional criteria employed by the Coast Guard in analyzing demanning re-

^{48/} The State of Alaska requested this and other manning-related documents accompany the record in this investigation. See letter of Robert E. LeResche to L. A. Colucciello dated June 9, 1989, copies (with enclosures) of which were served on all parties.

quests does not include crew fatigue, except for a cursory analysis of crew overtime records. Grady/Barton/Steen Interview, Exh. 10E, p. 1.

ESC was apparently all too aware of the weight the Coast Guard placed on ship overtime levels. As a result, ESC, by internal direction, instructed its masters to manipulate overtime levels to reduce them to "zero" so as to better justify to the Coast Guard the elimination of all unlicensed crew from the Engine Department.

Three internal Exxon memoranda, all from S. W. McRobbie to various ESC ship masters, orders the masters to purposefully reduce overtime in order to satisfy Coast Guard overtime concerns. In one memo, McRobbie states:

When the Engine Department shifts to day work, it is imperative that Engine Department unlicensed overtime be essentially nonexistent. . . .

because:

. . .the UMS [unmanned engine room status] diesel ships have already had their initial demanning requests denied due to the volume of unlicensed engine room overtime, regardless of type.

ESC Memoranda from S. W. McRobbie, undated.

In another memo, McRobbie states:

Yet in order to establish the type of overtime pattern which will demonstrate to the U.S.C.G. that the vessel can be safely operated without the QMED ratings, you must strive to control the amount and type of overtime used by these routings.

ESC Memorandum from S. W. McRobbie to Captain/EXXON BAYTOWN, October 25, 1988. In yet another memo, McRobbie states:

Whereas your vessel is earmarked for . . . UMS approvals. . . and QMED demanning when the UMS is achieved, we need to immediately begin closely allocating and managing all Engine Department overtime.

The goal is to closely control all operational overtime and extra manpower which will have a direct bearing on how the Coast Guard will assess manpower requirements for safely operating as a UMS vessel.

This heavy-handed attempt to manipulate the facts regarding manning levels is indicative of ESC's cavalier approach to manning levels.

ESC's deliberate manipulation of overtime records for the purpose of gaining Coast Guard approval has fortunately been counteracted. According to the senior staff of the Coast Guard Office of Vessel Manning, it has gone to the extraordinary lengths of requiring ESC masters and chief engineers to warrant to the Coast Guard that overtime records submitted as demanning justification are, in fact, "representative" of normal overtime activity and not an artificially low level as ordered by management. Grady/Barton/Steen Interview, Exh. 10E, p. 4. The NTSB should recommend that the Coast Guard review any decisions authorizing lower manning levels or unmanned engine room status to insure the data supplied by ESC was not manipulated solely to gain Coast Guard approval of its cost-savings requests.

Other serious allegations have recently been pressed by Exxon's Seamen's Union regarding both Exxon demanning strategies and Coast Guard approval procedures as reflected in Union documents which Alaska by its letter dated June 7, 1989 requested accompany the record. While Alaska has no desire to inject it-

self or the Board into any industrial dispute, the Union's letter dated March 7, 1989, raises issues the NTSB has wisely agreed to address in the interest of safe shipping.

The NTSB Interviews of John Hillman and John Spencer, two of the six members of the Board of Governors of the Exxon's Seamen's Union, raise a host of manning and safety issues. For example, Hillman makes a strong case that Exxon manipulated overtime records solely to justify the ESC's demanning requests. Hillman Tr. 14-19. Hillman and Spencer also explain that, by making officers part of management, Exxon has made officer overtime impossible to document, and that work previously performed by unlicensed personnel (often on overtime) is now being accomplished by officers with no overtime being recorded. Hillman Tr. 12-13; Spencer Tr. 10. Hillman notes also that, in addition to the almost daily overtime Exxon's crews are asked to work, ESC has extended their tour of duty from 60 days to 90 and 100 days, thereby further exacerbating the crew fatigue factor. Hillman Tr. 22,39. Hillman testified that ESC has refused to come to terms with the Union because of its insistence that the Union agree to demanning levels the Union believes are inherently unsafe. Hillman Tr. 40-41. Hillman also raised a new issue involving a recent change in ESC procedure, which requires that while in port or during lightering operations a minimum crew of eight--four officers and four unlicensed (two of which must be ABs)--must remain onboard the vessel in case of emergency. With a reduced complement of AB's, and given routine watch standing

requirements, this new ESC directive requires the AB's be on board or on watch, thereby further compounding the crew fatigue factor. Hillman suggests, with considerable logic, that this new directive is indicative of the need for increased manning levels. Hillman Tr. 48-49.

Alaska believes it to be in the public interest and the national interest that the U. S. tanker fleet be properly crewed and that manning levels not be based solely on owner/operator cost or competitive considerations, as Exxon approaches the issue.

D. The Relationship Between Manning Levels and Safety

The question of crew manning level is not just an economic issue. It is obviously inextricably interrelated with the core concept of shipping safety. If manning levels are pushed to unreasonably low levels, then crew workloads increase, as does crew fatigue. Inattentive or exhausted crew members do not work at peak efficiency. The Coast Guard, recognizing this fact, has underwritten a study of safety and its relationship to reduced manning levels. The Study is titled "Shipboard Crew, Fatigue, Safety and Reduced Manning." Grady/Barton/Steen Interview, Exh. 10E, p. 4. The interview summary stated that the findings of this and another study titled "Effect of Smaller Crews on Maritime Safety" will be incorporated in the Coast Guard reduced manning decision process "in the future." Id. In other words, at least up until now, the decisional criteria used by the Coast Guard to approve reduced manning requests placed more emphasis on

the availability of automation and labor-saving devices (46 CFR § 15.501(b); § 15.825 and § 15.840) than on basic safety considerations.

E. Crew Duty Time Limitations

Although they appear to be mainly honored by ESC in the breach, the Congress has established limits on the time officers and crew can continuously be on duty or at work. As these rules relate to the EXXON VALDEZ, they provide that:

- (A) An owner, operator or master may not permit an officer to take charge of the deck watch on a vessel when leaving or immediately after leaving port if the officer has not been off duty for at least six hours within twelve hours immediately before the time of leaving.
- (B) A licensed individual or a seaman may not be required to work more than eight hours in one day except when needed for
 - (1) maneuvering, shifting the berth of, mooring or unmooring the vessel;
 - (2) performing work necessary for the safety of the vessel, its crew or cargo;
 - (3) saving life on board another vessel in jeopardy;
 - (4) performing fire, lifeboat, or other drills in port or at sea

Captain Deppe was asked how ESC insured adherence to the law requiring at least six hours of rest for watch officers within the twelve hours prior to getting underway. Incredibly he responded that "We [ESC] don't have any program to give six hours of rest to any deck officer before we get underway." Deppe Tr. 1096. Yet, Mr. Flyntz, Assistant Chief of Merchant Vessel Personnel for the Coast Guard, testified that the Coast Guard relies

on the statutory rest provision to insure that crews are not fatigued prior to the vessel getting underway. Flyntz Tr. 1066. There is no evidence in the record concerning the systems or programs Exxon has in place regarding the other statutory crew duty limits. It is difficult for the State to understand how ESC can dispatch its tanker fleet with so little regard for the law or for the alertness and readiness of its crews.

The crew of the EXXON VALDEZ who were interviewed during the field investigation or questioned at the hearing regarding their work schedules provide some insight into the ineffectiveness of Exxon's management of the crew duty time statutes. Appendix D is Alaska's reconstruction of the length of time the critical deck crew were at work or at rest during the 24-hour period prior to the grounding. This analysis reveals that Cousins had only three and a half hours rest in the twelve hours prior to departing Valdez in contravention of 46 U.S.C. § 8104(a). Cousins may also have had less rest than he testified to at the hearing. Accordingly to John Spencer, Cousins was observed by one of the EXXON VALDEZ pumpmen as having "pounded the deck" all afternoon on March 23 thereby contradicting Cousins' claim that he was resting in his quarters from 1330 to 1700. Spencer Tr. 7-10. Of the other crew members, Kagan, the 0000-0400 helmsman, worked ten and a half hours on March 23. Jones, the 0000-0400 lookout, put in an over eleven-hour day of work on March 23 and Chief Mate Kunkel worked nine hours and forty-five minutes on March 23 before turning in at 2200.

Unfortunately, the record does not permit Alaska to determine the work schedule of the crew prior to the arrival in Valdez. However, from the information available to the State, it appears that Exxon paid little, if any, attention to the issue of crew fatigue and alertness, all to the detriment of the citizens of the State of Alaska.

F. ESC Proposed Revisions to Federal Law
Regulating Minimum Manning Levels

ESC has been in the forefront of an effort to amend various crew-manning level statutes, which, if adopted, would authorize reduced manning levels and loosen crew scheduling rules. On January 20, 1988, Frank Iarossi co-signed and circulated a paper containing proposed major modifications to the statutes controlling vessel manning requirements.^{49/} Among the proposals was the repeal of Congressionally imposed rules limiting

- (a) crossover between deck and maintenance departments
- (b) licensing of dual purpose officers
- (c) officer rest periods prior to departure from port.

In addition, Iarossi suggested the repeal of all requirements for a minimum number of licensed officers based on the vessel's gross tonnage.

The justification offered for these changes in manning was the need for improved efficiency and to insure that ESC is

^{49/} This document is within the package of documents the State by its letter dated June 9, 1989 requested the NTSB include in the record and permit the parties to refer to in their respective submissions.

competitive with foreign flag vessels. No recognition is given in this paper to safety concerns or to the link between safety and crew size. This ESC cosponsored document is consistent with the Company's several attempts to reduce shipboard manning levels in the name of competition, even though ECS's tankers in the Valdez trade are statutorily protected from foreign flag competition. 46 U.S.C. § 883.^{50/} ESC's advocacy for these statutory changes is consistent with its apparent disregard for the consequences of a catastrophic event such as the grounding of a heavily laden tanker vessel.

IX. THE UNITED STATES COAST GUARD VESSEL TRAFFIC SERVICE

The Vessel Traffic Service (VTS), operated by the U. S. Coast Guard, is a vessel movement system established by the Ports and Waterways Safety Act of 1972. 33 U.S.C. §§ 1221-1236. The Trans-Alaska Pipeline Authorization Act 43, U.S.C. § 1651-1655, amended the Ports and Waterways Safety Act to require the Coast Guard to establish and operate a vessel traffic service in Prince William Sound. The requirement for such a system was created by the need to move North Slope crude oil from Valdez to the lower 48 states by tank vessels transporting on an average daily basis 2 million barrels (84,000,000 gallons) of crude oil through ecologically sensitive Prince William Sound. The Congress wisely wished to insure that the movement of such large quantities of oil would be safely conducted. VTS Factual Report, Exh 2C, p. 3.

^{50/} Pursuant to Jones Act exemptions, a small number of foreign flag vessels, averaging one per week, call on Valdez. McCall Tr. 1291.

April 18, 1991

M E M O R A N D U M

TO: Max Gruenberg, Chairman
House Special Committee on
Exxon Valdez Oil Spill
Settlement Agreement

FROM: Chip Thoma

SUBJECT: Final NTSB Report, June 1990

These excerpts from the NTSB report give credence to the contention that failures on the part of Exxon and Exxon Shipping management contributed directly to grounding of the Exxon Valdez.

The Executive Summary (p. v.) under "Probable Cause" details some of these failings, while the excerpts give specific information on:

- 1) the background and rating of Joseph Hazelwood (p.28)
- 2) lack of Exxon monitoring of the Master (p.32)
- 3) workload of the third mate (p.34)
- 4) background on Helmsman Kagan (p.35)
- 5) manning on the Exxon Valdez (p.137)
- 6) continued increases on crew workloads (p.140)
- 7) safety conclusions (p.141)
- 8) Alyeska response to spill (p.144)
- 9) contingency plans (p.146)
- 10) dispersants (p.147)
- 11) conclusions (p.166)
- 12) probable cause, recommendations (p.170)

NATIONAL TRANSPORTATION SAFETY BOARD

MARINE ACCIDENT REPORT

**GROUNDING OF
THE U.S. TANKSHIP EXXON VALDEZ
ON BLIGH REEF, PRINCE WILLIAM SOUND
NEAR VALDEZ, ALASKA
MARCH 24, 1989**



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About 0009, on March 24, 1989, the U.S. Tankship EXXON VALDEZ, loaded with about 1,263,000 barrels of crude oil, grounded on Bligh Reef in Prince William Sound, near Valdez, Alaska. At the time of the grounding, the vessel was under the navigational control of the third mate. There were no injuries, but about 258,000 barrels of cargo were spilled when eight cargo tanks ruptured, resulting in catastrophic damage to the environment. Damage to the vessel was estimated at \$25 million, the cost of the lost cargo was estimated at \$3.4 million, and the cost of the cleanup of the spilled oil during 1989 was about \$1.85 billion.

The safety issues discussed in the report are:

- (1) The adequacy of the navigation watch on the EXXON VALDEZ on the night of the grounding;
- (2) The role of human factors, including fatigue and alcohol abuse, in this accident;
- (3) Coast Guard and Exxon Shipping Company manning standards and Exxon's procedures for determining manning levels for tankships;
- (4) Exxon Shipping Company's drug/alcohol testing and rehabilitation program;
- (5) Coast Guard regulations and procedures for drug/alcohol testing aboard commercial vessels;
- (6) The role of the Coast Guard Vessel Traffic Service at Valdez; and
- (7) Oil spill contingency planning and initial response to this accident.

Recommendations concerning these issues were made to the U.S. Coast Guard, the U.S. Environmental Protection Agency, the U.S. Geological Survey, the Exxon Shipping Company and other tankship companies carrying North Slope crude oil from Port Valdez, the State of Alaska, the Alyeska Pipeline Service Company, and the Alaska Regional Response Team.

Probable Cause

The National Transportation Safety Board determines that the probable cause of the grounding of the EXXON VALDEZ was the failure of the third mate to properly maneuver the vessel because of fatigue and excessive workload; the failure of the master to provide a proper navigation watch because of impairment from alcohol; the failure of Exxon Shipping Company to provide a fit master and a rested and sufficient crew for the EXXON VALDEZ; the lack of an effective Vessel Traffic Service because of inadequate equipment and manning levels, inadequate personnel training, and deficient management oversight; and the lack of effective pilotage services.

\$3.4 million. Exxon expended approximately \$1.85 billion on cleanup operations in 1989.

Crew Information

Master.--Personnel records provided by Exxon show that the master of the EXXON VALDEZ, age 42, received a Bachelor of Science degree in Marine Transportation from the State University of New York Maritime College in May 1968. At that time he also received a Federal license, which qualified him to serve as a third mate of steam and motor vessels of any tonnage upon oceans.

He was employed by Humble Oil and Refining Co. (the predecessor company of Exxon Shipping Company) as a third mate on June 10, 1968. During his career with Humble/Exxon, he took numerous marine courses sponsored by Exxon. He upgraded his license to second mate in 1971, to chief mate in 1973, and to master in 1977, making him eligible for promotion to the level of the respective licenses. He obtained a Federal pilotage endorsement to his master's license for Prince William Sound between Cape Hinchinbrook and Rocky Point in Alaska in 1987. He was promoted to second mate in 1978, to chief mate in 1979, to relieving master in early 1979, and to master in 1980.

Since his promotion to master, he had served on nine tankships with no breaks in service except for authorized leave periods. He had served as the alternate master on the EXXON VALDEZ since 1987 and had worked in the Alaskan trade for about 10 years (during this period, the master made well over 100 round trips through Prince William Sound).

Submissions by Exxon provided a seriatim ranking of the master in comparison with other Exxon masters from 1981 to 1988. These rankings are as follows:

Year		Rating/group size	Percentile (100 equals the highest possible ranking)
1988	23/38	39	
	1987	24/29	17
	1986	35/37	5
	1985	35/37	5
	1984	24/34	26
	1983	29/33	12
	1982	35/39	10
	1981	25/36	36

Each year's ranking was for the performance period of the previous year. The EXXON VALDEZ in the West Coast Fleet and the EXXON GALVESTON in the Gulf Coast Fleet were selected as the best performing vessels in 1987. In 1988 the EXXON VALDEZ was the sole winner of this award. The master was one of

In addition to the employment history shown in Exxon and Coast Guard records, the master told Safety Board investigators that he had served as a lightering superintendent in the Gulf of Mexico for about 3 1/2 months and had acquired additional seagoing experience in the Esso foreign flag fleet.

Additional employment information on the master is contained in appendix C.

About 13 hours before the accident, the master, accompanied by the chief engineer and the radio electronics officer, went ashore while the EXXON VALDEZ was loading cargo at the Alyeska Marine Terminal. The Alyeska security logbook shows that they departed the terminal gate at 1059. They were met by the ship's agent, who drove them to the agent's office at Alaska Maritime Agencies, Inc., in Valdez. The agent's supervisor recalled that the three men arrived shortly after 1100 and that the master and chief engineer conducted routine ship's business in a meeting that lasted about 45 minutes. The agent informed investigators that the master seemed "more relaxed" than when she had seen him on previous trips. She explained by saying that she had worked with the master for 8 to 10 years. After the meeting, the pilot who had conducted the inbound transit of the vessel to Valdez picked up the three men at the agent's office in his automobile and drove them to a nearby restaurant, where the four had lunch together. The chief engineer said that they spent about 1 1/2 hours at the restaurant. The chief engineer and the radio electronics officer told investigators that the master and pilot had nonalcoholic beverages with their lunch. However, the master told the Coast Guard investigating officer that he had had a beer at lunch.

After lunch, the pilot drove the three men to a small shopping center, and the three separated to run personal errands. The three men had agreed to meet again at a town bar later in the afternoon. Safety Board investigators located a gift store where the master had ordered flowers sent to his family. The owner of the gift shop recalled having a pleasant conversation with the master and stated that he did not appear to have been drinking. The chief engineer recalled walking to several newsstands, looking unsuccessfully for a newspaper, and then going to the bar, arriving alone about 1600. He said that the master arrived about a half hour after he did. However, the master told the Coast Guard investigator that he arrived at the bar about 1500. The radio electronics officer said that when he arrived at the bar about 1630, the master and chief engineer were already there. According to the radio electronics officer, they played darts with local residents and otherwise enjoyed themselves while each purchased one or more rounds of drinks. The radio electronics officer said that he drank beer while the master was drinking a "clear" beverage and the chief engineer was drinking gin and tonic. The chief engineer told Safety Board investigators that he had three gin and tonics and that he did not recall how much the master had.

The chief engineer said the three men left the bar about 1900 and returned to the restaurant where they had had lunch. They ordered two pizzas to take back to the ship and then went next door to an adjacent bar to await

he believed the master had a vodka while they waited. The said that about 1930 their pizza order was ready and they called a cab to return to the ship.

According to the cab driver who transported them back to the Alyeska terminal, a fourth person from an ARCO tanker joined them in the cab for the trip to the terminal. He said that no one in the group appeared to be "under the influence of alcohol." The security log at the terminal gate showed that the cab arrived there at 2024. Terminal security officers stated that all persons arriving in cabs were required to check in to the office and walk through a metal detector and that they did not believe any of the men arriving at that time were intoxicated. The cab was permitted to proceed to the dock without delay.

The chief engineer said that they had expected the vessel to depart later in the evening and were surprised that it was ready to get under way. He also said that during the afternoon, the master had discussed the presence of ice in the traffic lanes and was considering delaying departure until daylight.

According to the radio electronics officer, the three men boarded the ship together. The ship's agent was aboard the vessel in the wheelhouse when the master arrived. She said that she met with him there to discuss cargo and ship's fuel. She said that he was in a good mood and did not appear to be intoxicated, although his eyes were watery. The agent and the master agreed that they would talk further on the VHF/FM radio to confirm cargo quantities after the vessel got under way.

The pilot conducting the outbound transit from the Alyeska terminal told Safety Board investigators that he smelled alcohol on the master's breath when the master returned to the ship from Valdez. However, it was his impression that the master's behavior and speech were unimpaired. The pilot said that the master left the bridge after they had gotten under way and remained away until the pilot called him shortly before disembarking at Rocky Point. The pilot said that the master returned to the wheelhouse soon after the call, and he estimated that the master had been gone for about 1 1/2 hours. The pilot stated that he again smelled alcohol on the master's breath, but the master's speech and behavior gave no indication of impairment.

Both the XO and the SIO of the MSO who boarded the vessel after the accident about 0335, smelled alcohol on the master's breath when they met with him on the bridge. The investigating officer described the odor as the very strong smell of "stale" alcohol. In response to a question about the smell of alcohol, the master explained to the investigating officer that he drank two Moussy beers (.05 percent alcohol) after returning to the vessel from Valdez. The investigating officer reported finding two empty Moussy beer bottles in a wastebasket in the master's stateroom.

conduct the testing. However, when the trooper arrived about 0630, he had no equipment to conduct any testing or to collect urine specimens for subsequent testing. The XO again called the CO to request someone to conduct the testing. During a later telephone conversation, the CO suggested that the XO check with the master to ascertain if the vessel carried any equipment for collecting toxicological samples. About 1000, the Coast Guard officers learned that kits for obtaining toxicological samples were on board the vessel, and urine specimens were obtained soon thereafter from the third mate and the two ABs on watch when the grounding occurred. The master also was asked to provide a urine specimen at this time, but he said he was unable to urinate.

Meanwhile, ashore, a Coast Guard medical technician from Anchorage, Alaska, who had been conducting an inspection of health records of the MSO, was located at the airport about 0830 and instructed to proceed to the vessel to take blood and urine samples. About 1030, the Coast Guard medical technician boarded the vessel to obtain blood samples for toxicological testing. The master was selected to provide the first blood sample. At this time the master also provided a urine specimen. Blood samples also were taken from the third mate and the two ABs. At this time it was discovered that the urine specimen earlier provided by the AB on lookout was not sealed correctly, and she provided a second specimen.

The results of the toxicological testing by Chem West Laboratories, Inc., of Sacramento, California, of the samples collected on March 24, 1989, are shown in the following table:

Table 3.--Toxicological testing results

<u>Position</u>	<u>Blood</u>		<u>Urine</u>	
	<u>Time</u>	<u>% Ethanol</u>	<u>Time</u>	<u>% Ethanol</u>
Master	1050	0.061	1000 ¹³	0.094
Third Mate	1100	0	1000	0
Lookout	1140	0	1145	0
Helmsman	1115	0	1000	0

Portions of the blood and urine specimens provided by the master were sent to the Center for Human Toxicology (CHT) for an independent ethanol analysis. The CHT measurement showed the blood contained 0.06 percent ethanol and the urine contained 0.1 percent.

¹³ Although the sample container was marked 1000, the urine specimen probably was taken about 1050.

Investigator's findings. Individual Disability Report, signed by the attending physician and dated April 16, 1985, showed that the master was admitted to a hospital on April 2, 1985, and "remains in residence at the present time." The report stated: "He is a 38 yo W/M who has been depressed and demoralized; he's been drinking excessively, episodically, which resulted in familial and vocational dysfunction." A treatment program was suggested that included a recommendation that he be given a leave of absence to get involved in Alcoholics Anonymous (AA), psychotherapy, and aftercare. The report indicates his first day of disability was April 1, 1985. Further documents show that the master was on sick leave from April 1, 1985, through May 15, 1985, and that disability was terminated on May 16, 1985, at which time he was placed on leave of absence for 90 days starting on May 16, 1985. Exxon did not provide documentation to indicate when he was granted sick leave or what followup monitoring was provided. ✓

The master had made no claims for medical care or health services with the Exxon health care contractor during the last year of his employment before the accident.

The president of the Exxon Shipping Company testified that a fleet manager and a ship group coordinator were given the responsibility to follow up on the master after he was returned to duty following his hospitalization in 1985. According to this testimony, the followup consisted of visits by the ship group coordinator to the master's vessel in the west coast ports of San Francisco and Long Beach about every 2 weeks. The president testified, "I think he [the master] felt he was the most scrutinized employee in our company. I think he felt a little uncomfortable with it."

Early in the investigation, an Exxon representative said the company could find no documents covering this followup period. Exxon later provided documents that included a memorandum dated June 27, 1988, initialed by the master's shoreside supervisor at the time, regarding the master's performance. In this memorandum, the master was complimented for his professional expertise, leadership, and interdepartmental cooperation. Exxon also provided an unsigned and undated document that discussed the supervision of the master during his rehabilitation from October 1985 to April 1987. This document was developed from memory, after the accident, by a former shoreside supervisor of the master. The frequency of the visits and the outcome of these visits were not detailed in the document, except for a statement that no evidence of alcohol use by the master could be found and that it was concluded that he was "clean." ✓

The Safety Board made a 50-State search of the National Driver Register (NDR) to investigate the master's driving record. This check revealed that the master had one "driving while intoxicated" (DWI) conviction in Huntington, New York, in 1985, and a second DWI conviction in Conway, New Hampshire, in 1988. The police report for the first DWI conviction showed

driveway of his residence and reported that the master smelled strongly of alcoholic beverage, was unsteady on his feet, and that his speech was slurred. The master refused to take a Breathalyzer test. The master's second DWI conviction, on September 15, 1988, resulted from his being stopped for driving 44 mph in a 30 mph zone. The reporting officer reported that he smelled strongly of alcoholic beverage, had difficulty getting his driver's license out of his wallet, and was unsteady on his feet. The master submitted to a Breathalyzer test that gave a blood alcohol level of 0.19 percent.

The chief engineer and the radio electronics officer stated that the master was going through divorce proceedings at the time of the accident. ✓ The radio electronics officer on the EXXON VALDEZ stated that the master appeared to undergo noticeable changes in mood.

The radio electronics officer said that he witnessed the master drinking alcohol on board the EXXON VALDEZ during the last voyage of the vessel at the end of February 1989. The master had called him about a design for a ship's T-shirt, and in the course of the conversation, the master asked him to come to the lounge to "destroy a bottle." When the radio electronics officer arrived, the third mate was already there and the master removed a bottle or a flask from his jacket. Soon thereafter, the master sent the third mate to the galley for some ice, and the radio electronics officer went to bring some orange juice to the lounge. He said that the chief mate came into the lounge while the drinking was going on but did not participate. According to the radio electronics officer's recollection, the incident took place in the morning or early afternoon. The radio electronics officer said that one or two other persons were in the lounge watching a concert video, but he could not recall who they were. He said that the bottle was placed on the deck while he, the master, and the third mate watched the video. He did not recall tasting alcohol in any beverage he drank during the incident. He said the contents of the bottle were clear. It was his impression that the master had been drinking before he was called to the lounge, but no one appeared to be intoxicated during or after the incident.

Third Mate.--The third mate told Safety Board investigators that he had begun sailing in 1977 on National Oceanic and Atmospheric Administration (NOAA) vessels as an ordinary seaman after having worked several years as a shipfitter and a hull inspector. He said that he had served 3 years on NOAA vessels and in 1980 had begun sailing with Exxon as an AB. Coast Guard records for his sea duty with Exxon show that he worked as an unlicensed seaman from December 1980 to January 1987, principally as an AB. The third mate said he had attended a Page Navigation School course in New Orleans to prepare for the third mate's license examination. He obtained a third mate's license in March 1986. Since January 1987, he had served as third mate on five Exxon vessels with no breaks in service of more than 3 1/2 months. He told investigators that he had made six round trips to the port of Valdez with the current master and had served one previous tour on the EXXON VALDEZ. Company records show that he joined the vessel on February 20, 1989. He

Exxon provided four performance appraisals for the third mate to the Safety Board. The lowest rating given to the third mate was in 1986 while he was serving as an AB on the EXXON JAMESTOWN; it was "above normal" in the rating category of "Steers In Confined Waters." The same rating category was "outstanding" on two earlier appraisals of his service on the EXXON NORTH SLOPE. The third mate's overall performance as an AB was rated as "outstanding" on three of the Exxon performance appraisals.

In one performance appraisal as a third mate, his "overall effectiveness" had been evaluated as "high," one rating below "outstanding." The two lowest ratings he received as a third mate were given to him while he was on the EXXON JAMESTOWN in 1987 and contained the following comments: "performs adequately" in the rating categories of "seeks advice or guidance at the appropriate time and informs supervisor when appropriate" and "demonstrates thorough knowledge of ship and its handling characteristics." In a summary of employee weaknesses, the evaluator wrote, "He [third mate] seems reluctant or uncomfortable in keeping his superior posted on his progress and/or problems in assigned tasks."

During the third mate's initial interview by the Coast Guard investigating officer, he stated that he began work on March 23, 1989, at 0800, had a "cat nap" at 1330, relieved the chief mate for supper and worked thereafter until the grounding. He testified that he had been on watch when the EXXON VALDEZ approached the terminal dock on the day preceding the accident. The third mate said that after his watch ended, he had a brief conversation with the chief mate about how he [the chief mate] "starts up the cargo." He also testified that he had gotten to sleep at 0100 and was called at 0720 for his watch on the morning of March 23. ✓

The crew on the EXXON VALDEZ did not normally break sea watches while they were transferring cargo or ballast. Since the chief mate oversaw cargo handling operations, the second mate and the third mate stood watch extra hours to enable the chief mate to rest. The second mate said that in addition to relieving the chief mate, the two mates tried to "cover one another when needed." The second mate told Safety Board investigators that on this trip to Valdez, the two mates began their extended watches at midnight on March 23. He indicated to Safety Board investigators on board the vessel on March 26, 1989, that he and the third mate essentially stood watches 6 hours on and 6 hours off during cargo operations.

The third mate testified that he went to the engineroom to conduct a "salinity test" after lunch on March 23 and then went to his room for a nap between 1300 and 1350. According to the testimony of an Exxon Seaman's Union officer, it was "common practice for the mates off watch to assist in the cargo operations." The pumpman told Safety Board investigators that he had seen the third mate walking forward on the main deck early during the afternoon watch on the day preceding the accident.

remained on the bridge until he was relieved by the chief mate, probably sometime prior to 1900. The third mate was next reported by an AB as standing by at his usual location at the aft mooring lines during undocking about 2100. The third mate then returned to the pilot house about 2150 to relieve the chief mate. He said that he relieved the chief mate early because the chief mate had been up for a long time and needed rest. The pumpman who met and talked briefly with the third mate immediately before he returned to the bridge stated that the third mate appeared to be fatigued. Another AB also told Safety Board investigators that he had heard on the night of the grounding that the second mate was tired and this explained why the third mate had remained on watch after midnight. The third mate remained on duty until sometime after the Coast Guard boarding officers arrived about 0335.

Helmsman.--Coast Guard records show that the AB serving as helmsman when the grounding occurred had obtained his first seaman's document in 1965. Between 1965 and 1970, he had acquired only 25 days of documented marine work, all of which was in the steward's department for Boatel, Inc., an offshore catering company. The helmsman had no further documented shipping time until he began working for Exxon in April 1975. He initially worked in the steward's department on Exxon vessels for about 1 year and then began working regularly as an ordinary seaman. He obtained a lifeboatman endorsement in April 1980 and an unlimited AB rating in October 1981. Coast Guard records indicated that he had worked each year without remarkable breaks in service except in 1978 and 1987, when he sailed 1 month and 1 1/2 months, respectively. Since joining Exxon, he had served on 19 vessels, including the EXXON VALDEZ. ✓

Since acquiring his AB rating, the helmsman had acquired about 7 1/2 months of documented time as an AB, according to Coast Guard records. Those records show that the helmsman had worked primarily as an ordinary seaman and in other unrated positions. On January 18, 1989, he was assigned to the EXXON VALDEZ as an AB.

Exxon provided seven performance appraisals for the helmsman from February 1986 to August 1988. No performance appraisal for the helmsman referred to an AB-specific job classification, and for the corresponding periods in Coast Guard records he was shown as an ordinary seaman. Five performance appraisals were for the position of maintenance seaman,¹⁴ one was

¹⁴Maintenance seaman is a designation for a crewman having cross responsibilities in deck, engine, and steward's departments.

evaluation from the deck, engine, and steward's departments. In May 1986, he received ratings from a chief mate with whom he had worked on two vessels successively. This evaluator indicated a "cannot rate" for the "steers in confined waters" category and commented that the helmsman "needs to practice [helmsmanship] before sailing AB." The chief mate listed the helmsman's strengths as "a hard worker who was thorough in cleanup operations" but stated "[the helmsman] must prove himself capable [of an AB's position] by steering in confined waters ... and other skills required of an AB." A chief mate on the EXXON NEW ORLEANS rated the helmsman as a "normal" overall performer but commented that "[he] must concentrate more on the task at hand." In 1987, the helmsman's performance appraisal on the EXXON CHARLESTON included an "above normal" for the category "steers in confined waters" with the comment, "steers well to pilot's orders." The chief mate commented that "[he] is not ready at this time to sail as AB." In January 1988, the first assistant engineer on the EXXON BALTIMORE rated him less than the midpoint for overall performance, "needs improvement." The helmsman noted on the same performance appraisal that his ambition was to "sail on my AB's papers and/or obtain my oiler's endorsement and sail in the engine department." The helmsman also received a performance appraisal for his duties in the steward's department on the EXXON BALTIMORE and was given an overall assessment of "generally meets requirements," a midpoint rating. In August 1988, the helmsman received a performance appraisal for his maintenance duties in the engine department on the EXXON BALTIMORE and was rated with an overall assessment of "generally meets requirements."

The helmsman indicated that from March 17 through March 23 he had experienced a normal routine at sea, adhering to 4-hour watches with the customary 8 hours off. The helmsman indicated that he usually slept from about 0400 until called some time after 1100 in time for lunch before his afternoon watch. After the watch, he remained awake to eat supper about 1700 and then returned to his room to sleep about 1800 until called at 2320 for the next morning watch. He indicated that on March 23, he obtained his usual sleep between the morning watch and an unusually early call for lunch at about 1030. He then worked from noon to about 1600 loading cargo, ate supper, and went to bed. The helmsman indicated that he assisted during the undocking from the terminal from about 2000 until 2200. He indicated that he returned to his room for a nap until called for watch at 2320. The helmsman declined most voluntary opportunities to work in excess of 8 hours a day.

¹⁵An entry-level position in the engineering department on board a merchant ship. A wiper assists in the performance of general work in the engine room and is so named because he is commonly occupied in cleaning machinery, etc.

Issue rules specifying zero (no alcohol) as the blood alcohol concentration for private sector employees in safety sensitive positions in all transportation modes and for Federal employees in safety sensitive positions. (Class II, Priority Action) (I-89-12)

The DOT has not responded to these recommendations and they are still classified as "Open--Await Response." The Safety Board believes that the EXXON VALDEZ accident demonstrates the continuing need for action on these recommendations; accordingly, they are reiterated.

Manning on the EXXON VALDEZ

The EXXON VALDEZ was operated with a reduced crew complement. Evidence indicated that watchkeeping safeguards on the EXXON VALDEZ had been compromised because of the manning level. The number of unlicensed crewmembers in the deck department was not sufficient to provide uninterrupted lookout capability when other routine deck-department duties arose. When one AB was required to serve as helmsman, the remaining ABs on duty had to cover all work and lookout responsibilities unless an AB from another watch was "turned to" on overtime. Moreover, when a lookout was required for long transits through congested waterways, no other qualified persons on duty were available to relieve that crewmember for breaks. As a result, on the EXXON VALDEZ, the lookout position routinely went unattended when the AB was called for other tasks or took a break. ✓

The Exxon Seamen's Union officials testified during depositions that the sea passages for voyages between Alaska and California were not long enough for conducting necessary maintenance or permitting thorough crew rest between the around-the-clock demands of cargo handling in port. When the current minimum crew requirements were established for the EXXON VALDEZ, the vessel had been scheduled for the Valdez-Panamanian trade. But that trade was discontinued after December 1988, and the EXXON VALDEZ then began operating regularly between Valdez and ports in California. ✓

According to company and union officials, crewmembers in addition to those required by the COI were regularly assigned to the EXXON VALDEZ. The minimum crew for the EXXON VALDEZ required by the Coast Guard was 15, including the master, and the company regularly assigned 4 additional unlicensed crewmembers to the vessel. Two of these crewmembers were QMEDs; one performed pumpman's duties and the other performed maintenance. These additional crewmembers, specifically the two QMEDs, showed the company's awareness of manpower needs in addition to those recognized by the Coast Guard. The other two additional seamen regularly assigned to the EXXON VALDEZ were members of the steward's department and prepared meals for the crew. A third unlicensed engine department crewmember was aboard when the vessel was grounded but apparently was riding for only that one trip. The Safety Board believes that the additional crewmembers regularly assigned to the EXXON VALDEZ engineering department were needed to perform essential work and that the number of crewmembers required by the Coast Guard was not adequate. ✓

The mates on the EXXON VALDEZ were usually fatigued after cargo handling operations in Valdez, and the vessel usually put to sea with a fatigued crew. ✓ Although the EXXON VALDEZ had cargo handling automation, the equipment did not eliminate the need for deck officers to spend many hours on cargo watches. The Safety Board is concerned that the manning and working conditions producing fatigue on the EXXON VALDEZ are likely to exist on other U.S. tankships that carry three mates and/or have reduced manning.

Compliance with Exxon Shipping Company procedures that require two officers on the bridge during maneuvering may have provided sufficient sharing of the workload to prevent the grounding of the EXXON VALDEZ. However, the Safety Board is reluctant to endorse the routine use of two officers, who may not have had adequate rest, as a means of obtaining a sufficient number of personnel for a navigation watch. The Safety Board contends that manning levels aboard ships should incorporate realistic expectations for human endurance and fallibilities so that the amount of work required for peak periods, such as cargo handling in port and tank cleaning at sea, can be accomplished without debilitating fatigue.

Reduced Crews

Coast Guard Manning Practices.--The investigation reviewed relevant Coast Guard practices and standards for setting reduced-crew minimum manning levels for inspected vessels. The regulatory agency is admittedly under conflicting pressures from ship owners, operators, and labor unions. ✓ Long-standing manning practices are being replaced with more economically advantageous ones, and current manning appears to be at or near the limits for individual workloads. Although these circumstances explain some of the criticism of Coast Guard manning decisions and the manning review process, the Coast Guard's limited perspective for justifying reduced crews may be the primary shortcoming. The trend toward reducing crew complements has been based principally on labor-saving shipboard equipment and equipment reliability, which serve to reduce workload at sea primarily in the engine room. However, in establishing reduced manning levels, the Coast Guard gave practically no thought to the work load in port. This omission is serious because tankship crews are required to perform much more demanding work in port than at sea, and this work leads to fatigued crews taking their ships to sea. Also, having fatigued crewmen in charge of cargo transfer operations increases the risk of a catastrophic accidental release of the cargo in port that could result in fire/explosion, as well as pollution.

The Safety Board believes that the Coast Guard must promptly implement ✓ manning safeguards that directly address crew working conditions in port, as well as at sea. If additional authority is needed, the Coast Guard should seek such authority. These safeguards should incorporate verifiable man-hour requirements for cargo handling in port and for all vessel operations, including tank cleaning, at sea. The safeguards should directly address risk factors associated with fatigue, low morale, and other consequences of longer work hours. The safeguards must also address the consequences of the social isolation that results from lower manning levels and longer tours of sea duty. The Safety Board believes that human

capacities and limitations require no less attention in the manning process than the shipboard equipment criterion.

The Safety Board is particularly interested in the outcome of two research efforts sponsored by the Coast Guard that are intended to examine variables in human factors on reduced-crew vessels. One project, which is being conducted by the Marine Board at the National Academy of Sciences, has used input from vessel operators and marine labor unions to obtain information about existing workloads and working conditions. The Safety Board believes it is important that the Coast Guard evaluate different viewpoints in order to assess the current safety of manning and to develop guidelines to ensure that future manning levels are appropriate to the work load. Similarly, the Safety Board recognizes the interest that the Coast Guard and MARAD have shown in the fatigue factor in their companion project for manning vessels with smaller crews.

Although Coast Guard officers stated that the review process for manning decisions used a "worse case" criterion, there is no evidence of this consideration in documentation related to the manning of the EXXON VALDEZ or EXXON LONG BEACH. Nor is there any evidence that the Coast Guard considered the fact that crewmen may be fatigued from in-port work or additional work owing to tank cleaning or to machinery breakdown. The Safety Board believes that the Coast Guard should re-examine minimum manning practices and establish amended standards using the same care given to other safety standards for vessels. For example, calculations to obtain structural standards acceptable to the Coast Guard are normally predicated on the vessel being in adverse loading conditions and, in some cases, the most adverse conditions possible. Even if it can be argued that the vessel will seldom operate in those adverse conditions, standards based on less rigorous loading criteria are generally considered inadequate. The Safety Board urges the Coast Guard to exercise comparable rigor for manning standards and to set minimum manning requirements that provide safe vessel operation for all foreseeable operating circumstances.

The equipment currently installed for deck-department operation may not reduce manpower needs to the extent projected in the reduced manning requests. With the exception of cargo tank sounding automation, remotely controlled cargo tank valves, and newer equipment that required less maintenance than older equipment, no substantial labor-saving devices were on board the EXXON VALDEZ. In fact, crewmembers on Exxon vessels normally verified manually the operation of all automated sounding and cargo tank valve positions. Since reduced manning of vessels means fewer people on board to do about the same amount of work as was previously done by larger crew complements, the Safety Board views future verification of the assumed lower workload for deck-department personnel as important. Thus, the Coast Guard should develop procedures to more accurately gauge the manning requirements for modern tankships that also take into account human performance needs such as adequate rest, relief from isolation owing to smaller crews, and less time in port.

Exxon Shipping Company Practices.--The Safety Board identified several general operating practices of the Exxon Shipping Company pertaining to

reduced crews that prompted concern. First, no evidence indicated that the company had policies or procedures intended to compensate for the risks involved in having smaller crews on its vessels. For example, Exxon had no program to ensure that mates complied with the requirement in U.S.C. 8401(a) that they have 6 hours of off-duty time in 12 hours before taking charge of the navigation watch. Aside from one introductory reduced-crew manning conference, officers received no specific supervisory training in recognizing fatigue in subordinates or in understanding the debilitating effects of fatigue on themselves or on their subordinates.

Finally, Exxon Shipping Company policy was to manipulate overtime records relevant to crew workload for vessels assigned to at least one "ship group coordinator" in order to support periodic unmanned status for engine rooms and thus to permit reducing crew size. Payment of overtime for officers on all Exxon vessels had been discontinued several years earlier, and during the investigation, no company method was identified that was designed to monitor officers' work in excess of 8 hours daily. Aside from concern about the morale problem created by the loss of direct compensation for time worked, the Safety Board is concerned that unrecorded overtime was not reflected in the work load data used by Coast Guard personnel who evaluated reduced-manning requests. Also, this investigation uncovered evidence that deck officers were used to do maintenance and other work previously done by unlicensed crew who had since been eliminated from service on the vessels.

Because of the Exxon Shipping Company memoranda that directed officers to minimize reports of equipment maintenance and overtime, the minimum manning requirements on Exxon Shipping Company vessels may have been based upon incomplete and inaccurate information. Assuming that the recipients of the memoranda complied with the directive, their maintenance and overtime records would not be representative of actual crew work loads. In addition, the Coast Guard had probably agreed to minimum manning reductions using the same deficient information for its evaluations and consequently may have underestimated crew workloads on all reduced-crew Exxon Shipping Company vessels.

Exxon submitted graphs to the Safety Board that showed a favorable comparison between lower manning levels and casualty and personal injury statistics. The Safety Board does not consider these comparisons useful evidence of safe vessel operation. Gross measurements, such as the number of oil spills per vessel or injuries per million man-hours over a 15-year interval, do not provide sufficient information for causal inferences about any safeguards on these vessels. The evaluations did not provide information on safety programs in effect, composition of crew complements, crew overtime, length of crewmember tours, equipment installed on the vessels, or other variables from which the effects of lower manning on safety may be methodically deduced.

The Safety Board is also concerned that Exxon has continued to increase crew work load in its fleet even after the grounding of the EXXON VALDEZ. A recent company directive, issued after the grounding, required manning of periodically unmanned machinery spaces while vessels are in inland

waterways. Since engineering crew complements were reduced on these vessels because the machinery spaces were said to no longer require monitoring, the reestablishment of watchstanding without replacing the deleted engineers and QMEDs places an additional workload on the number of engineers retained. In another directive issued after the grounding, the company restricted off-duty crewmembers to their vessels when cargo handling operations are in progress. The apparent intent of requiring off-duty crewmembers to remain on board was to ensure the availability of enough manpower for cargo-related incidents or other emergencies. These measures may show a necessary concern for engineroom and cargo safety, but they impose additional burdens on crewmembers without compensating for the human factors involved. As a result, the Safety Board is concerned that Exxon's measures may not adequately provide for the safety of personnel, the vessel, or the environment. ✓

Evidence also indicated that the Exxon Shipping Company planned to further reduce the crew size and to lower crew qualifications for most vessels in its operating fleet. The company was planning to eliminate the current position of the radio electronics officer by assigning communication and maintenance duties to the master and engineers, respectively. The company also planned to institute a separate maintenance department of unlicensed seamen having duties across deck, engine, and steward's departments. Implementation of such a department would have weakened the navigation watch by enabling a minimally manned vessel to operate with a complement of only four ABs and two ordinary seaman instead of six ABs. According to the Coast Guard, implementation of the new department was delayed only by the Exxon Seamen's Union. In the interim, the Coast Guard issued a directive requiring that the company retain six certified ABs on each vessel. The maintenance department concept under which ordinary seamen are employed to perform maintenance is reasonable, but its implementation should not lead to a reduction in the number of ABs. Six ABs, two per watch, are needed for an underway navigation watch in order to provide two qualified helmsman so that the helm can be relieved, thereby reducing the possibility of having a fatigued seaman steering. ✓

The Safety Board considers the reduced manning practices of the Exxon Shipping Company generally incautious and without apparent justification from the standpoint of safety. The financial advantage derived from eliminating officers and crew from each vessel does not seem to justify incurring the foreseeable risks of serious accidents.⁹⁰ Regarding company manning practices that related to the EXXON VALDEZ, the Safety Board does not believe that the Exxon Shipping Company showed sufficient regard for the known debilitations that occur as a result of crewmember fatigue. Furthermore, the Safety Board could find no reasonable explanation for the following: the absence of company programs to ensure that crewmembers observed hours-of-service regulations; the lack of procedures to ensure that at least one rested deck officer, in addition to the master, was available for watch at departure; the practice of rating a crewmember's performance in part according to willingness to work overtime, thus giving an incentive to work ✓

⁹⁰ The cost of cleanup is expected to exceed \$2 billion.

an excessive number of hours; and the indiscriminate increase in work loads and standby time throughout the fleet before and after the grounding of the EXXON VALDEZ.

Fatigue in Transportation Safety

In a letter dated May 12, 1989, to the Secretary of Transportation, the Safety Board expressed its concerns about the far-reaching effects of fatigue, sleepiness, sleep disorders, and circadian factors in transportation system safety. The Board further stated that:

poor scheduling of work and rest time continues to affect the performance of operating personnel in virtually all modes of transportation. Safety Board experience also indicates that most employees and supervisors in the transportation industry do not receive training on the problems associated with work and rest schedules and the effects such schedules have on safety and performance. Additionally, proper living habits, including attention to exercise, diet, and rest, are important to good health. However, many transportation operating personnel may not adequately appreciate the importance of these habits in relationship to their fitness for duty and their susceptibility to fatigue in the face of their irregular and often unpredictable work/rest patterns. Therefore, the Safety Board believes there is a need to develop and disseminate educational materials that will assist transportation employees in adapting living habits appropriate to their work/rest patterns.

Furthermore, it appears that, with minor exceptions, neither management nor the labor segments of the transportation industry properly considers the adverse effects of irregular and unpredictable cycles of work and rest on its vehicle-operating personnel. Although some private research has been conducted on this safety issue, the Safety Board is unaware of any systematic activity by the DOT to address the safety concerns of inadequate work and rest scheduling in any of the transportation modes.

Since 1972, the Safety Board has issued about 39 safety recommendations to transportation modal administrations, operators, and associations concerning fatigue, duty time, and hours of service. Collectively, these recommendations addressed most aspects of the fatigue and fitness-for-duty issues, but they constitute uncoordinated and piecemeal efforts directed to various government and industry segments of the transportation community. The Safety Board is aware of the March 1989 DOT report entitled "Transportation-Related Sleep Research," which was prepared in response to a request by

the U.S. Senate Committee on Appropriations and which describes current departmental activities in this field. This report provides an overview of current diverse activities by various departmental administrations regarding the role of fatigue, sleep disorders, and sleepiness in their respective modes. However, the Board believes a review of the report also indicates a need for more overall planning, direction, and control of these activities to assure that they are administered as a coordinated, effective program that will provide the best possible safety benefits for the entire transportation community.

Based on its experience in accident investigation, the Safety Board believes it is time for an aggressive Federal program to address the problems of fatigue and sleep issues in transportation safety. Such a program should include a coordinated research effort, an extensive educational effort directed toward all segments of the transportation industry, and a systematic review and improvement of regulations governing hours of service across all transportation modes.

Therefore, the National Transportation Safety Board recommends that the DOT:

Expedite a coordinated research program on the effects of fatigue, sleepiness, sleep disorders, and circadian factors on transportation system safety. (Class II, Priority Action) (I-89-1)

Develop and disseminate educational material for transportation industry personnel and management regarding shift work; work and rest schedules; and proper regimens of health, diet, and rest. (Class II, Priority Action) (I-89-2)

Review and upgrade regulations governing hours of service for all transportation modes to assure that they are consistent and that they incorporate the results of the latest research on fatigue and sleep issues. (Class III, Longer-Term Action) (I-89-3)

These recommendations are currently classified as "Open--Acceptable Action." The Safety Board believes that these safety recommendations are pertinent to the EXXON VALDEZ accident and reiterates them to the Secretary of Transportation.

Response Activities During the First 24 Hours

Coast Guard Response Activities.--At 0027 on March 24, 1989, the Coast Guard VTC at Valdez was advised by the master of the EXXON VALDEZ that his

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vessel was aground and leaking oil. About 10 minutes later, the CO and XO of the Coast Guard MSO in Valdez arrived at the VTC and activated the COTP Prince William Sound Pollution Action Plan, and the CO assumed responsibility as the OSC. Soon after arriving, they notified the Alyeska Terminal's marine operations watchstander, the local ADEC representative, and the Seventeenth Coast Guard District Office staff of the accident. The CO also advised the Alyeska Terminal watchstander to send its pollution contingency barge to Bligh Reef. The XO and SIO were sent to the vessel to initiate the casualty and pollution investigations and to determine the extent of the oil spill. The CO of the MSO expected that the spill would be classed as a "major" oil spill (in excess of 100,000 gallons, about 2,380 barrels) because the vessel was a large tanker and had grounded on a rocky reef. At 0249, he asked for assistance from the PACAREA Strike Team. He believed that asking for assistance from the strike team was a prudent action because it has the additional manpower, expertise, and equipment needed to supplement the local response to a major oil spill.

The CO, as Federal OSC for the oil spill, followed proper procedures in initiating Coast Guard actions in response to the report of the spill. Because Alyeska was responsible for cleaning up oil spilled at its Terminal and from ships that carry North Slope crude oil and had successfully cleaned up oil spills from ships carrying such crude oil in the past, the Federal OSC, in accordance with the NCP and RCP, assumed his customary duties: investigating the accident and oil spill, assessing the situation, monitoring the removal actions, and providing guidance and assistance as necessary for the cleanup activities. During the first 24 hours, Alyeska employed company personnel and local workers, ordered additional workers, and was using or had ordered all cleanup equipment available in the area to be delivered to the Terminal or the EXXON VALDEZ. If the OSC had taken over the cleanup during the first 24 hours, he would have had to employ the same people and contract for the same equipment that Alyeska was using at the time. His work load would have expanded considerably because he would not only have been directing the cleanup but also increasing his record keeping and contracting responsibilities. Such an action would not have enhanced the cleanup effort already under way; it would only have changed who was directing and paying for cleanup actions. The Safety Board believes that it was unwarranted for the Federal OSC to assume cleanup responsibility from Alyeska during the first 24-hour period after the spill for the following reasons: all equipment in the area was being used, other equipment was being mobilized or ordered into the area by Alyeska and Exxon, and the only change in cleanup actions would have been who paid directly for the cleanup.

Alyeska's Response Activities.--The contingency barge was not loaded with oil spill response equipment as had been the Terminal's practice in the past and the expectation of the ADEC. However, the Alyeska Contingency Plan, which had been approved by ADEC, did not specify that response equipment had to be kept on board the barge at all times. The barge had been used in response to a pollution incident in early January 1989, and its equipment had been offloaded so that it and the barge could be cleaned. The barge had also been damaged above the waterline during a storm in February 1989, and reloading of the response equipment had been delayed to allow for repairs. Alyeska had not thought it necessary to inform the ADEC that the

barge was not loaded with equipment because the barge could still be loaded and used in an emergency.

When it became apparent that the EXXON VALDEZ could not be moved safely off Bligh Reef in its damaged condition, the Federal OSC assigned a high priority to lightering the EXXON VALDEZ, and Alyeska and Exxon prepared for the lightering of the vessel. Exxon had to request lightering hoses and fittings from tankships at anchor near Bligh Reef and hired a small freighter in the area to collect and deliver the equipment to the EXXON VALDEZ. Lightering of a damaged or stranded tanker was covered in the Alyeska contingency plan, and the plan included a list of some of the equipment needed for the process. Large ship fenders for mooring the EXXON VALDEZ and the lightering vessel together had to be found in Valdez, and other lightering equipment had to be located and gathered from various storage areas at the Terminal, requiring additional time to load the barge. The extra effort and time necessary to locate and collect sufficient lightering equipment demonstrated a lack of preparation on the part of Alyeska and the need to have such equipment readily available. ✓

On the night of the spill, poor weather conditions, darkness, and the gathering of extra cleanup equipment, including lightering equipment, prolonged the loading of the Alyeska contingency barge. Had another contingency barge been preloaded with lightering equipment, locating, collecting, and gathering the equipment would not have been necessary and the cleanup supervisors could have used the additional time to plan other cleanup activities. These actions increased the time needed to load and prepare the barge for towing from the 2.5 hours provided in the plan to 10 hours. It took another 5 hours to tow the barge to the EXXON VALDEZ, which was about 28 miles from the Terminal. The Alyeska contingency plan's 200,000-barrel oil spill scenario, which was predicated on daylight and summer weather conditions, allowed a total of 5 hours for preparation and towing of the barge to a spill site about 30 miles from the Terminal. This timetable can only be met if the barge is already loaded. If the contingency barge had been preloaded with its cleanup equipment and had left the dock as soon as the tug PATHFINDER received orders to proceed to the EXXON VALDEZ, the barge could have been at Bligh Reef within the 5 hours prescribed in the Alyeska contingency plan. The Safety Board believes that the almost 10 additional hours needed to load, prepare, and tow the barge to the site constituted an unwarranted delay that could have been avoided if the barge had been loaded. The 10-hour loss had no material impact on the cleanup because of the size of the spill. However, had the spill been more manageable, the opportunity for quick response would have been lost. Even though the 10-hour delay did not make a difference in this spill, the delay might have been significant under other conditions.

Because every spill is different in size and location, a variety of cleanup equipment is required. Equipment stored on one barge may be adequate for a small spill, while larger spills may require additional equipment that must be loaded on two or more barges. An accident may also necessitate the use of lightering equipment, as was the case in this spill. To save time in gathering and loading response equipment and to allow cleanup supervisors to use their time for other activities, such equipment should be preloaded on

barges and ready for deployment. Thus, Alyeska should be prepared beforehand with barges loaded with different levels of cleanup equipment so that the response to an accident is not delayed by the need to load or unload equipment.

The cost of an additional barge or barges with equipment aboard, compared to the value of the oil on board a tankship and the large volume of oil transported from the Alyeska Terminal in Valdez, should more than justify the need for additional barges loaded with cleanup and response equipment. Moreover, the equipment on the barges should be placed in protective containers, and the loaded barges should be moored under shelters to protect them from the detrimental effects of weather. The Safety Board believes that barges should be loaded with different levels of oil spill cleanup equipment and lightering equipment and that the barges should be ready at all times for immediate deployment to the scene of a spill.

State of Alaska's Activities.--ADEC also established an emergency response center in Valdez that was fully operational by the evening of the day of the spill. It planned to monitor, assess, and oversee the cleanup response from the response center. During the first day of the spill, ADEC was concerned that Alyeska had not deployed cleanup equipment to the scene as provided for in the Alyeska contingency plan. The State wanted to make sure that the Federal OSC would intervene early in the response process and take over the cleanup if the responsible parties did not do what was expected in a timely and effective manner. A letter was drafted by the ADEC for the State representative to the RRT. Although the letter mentioned the State's concerns, it was not conveyed to the RRT during the first day. ADEC was following the requirements of its contingency plan to assess, monitor, and oversee spill cleanup activities.

Contingency Plans.--Not covered in the Alyeska contingency plans was a procedure for the transfer of cleanup responsibility from Alyeska to the shipping company that was responsible for the oil spill because it came from one of that company's vessels. A procedure for transferring cleanup responsibility should be developed by Alyeska and the individual shipping companies loading oil at the Valdez Terminal so that there will be continuity in the cleanup work and so that the transfer can be fully monitored by the Coast Guard and the State of Alaska. Because of the remote location of Valdez and the time it takes for a shipping company's oil spill response personnel to arrive on the scene, Alyeska should continue to be the initial responder to oil spills from vessels carrying oil from the Valdez Terminal in Prince William Sound. The vessel's parent company should have an organization or plan to respond effectively so that it can relieve Alyeska of long-term cleanup responsibility within a reasonably short period of time. After being relieved, Alyeska should remain on the scene to support the responsible company by providing continuity to the cleanup activity, local knowledge, and advice. ✓

ARCO Marine had conducted a simulated oil spill drill in 1988, during which ARCO relieved Alyeska. The Coast Guard, ADEC, and local government officials participated in the drill. ARCO was the only company that had a State-approved plan that included procedures for relieving Alyeska of

cleanup responsibilities. As a result of this drill, the OSC apparently assumed that Alyeska and Exxon would follow similar procedures. Alyeska and Exxon did not have any State-approved procedures for relieving Alyeska of cleanup responsibilities, probably because Alaska had not required any such procedures. Exxon had submitted proposed oil spill cleanup plans on two previous occasions, but the State had returned the plans to Exxon because, according to the State, they were not required. Alyeska stated that it had an understanding with Exxon that Exxon would assume cleanup responsibilities for a major spill, but the understanding was not written into Alyeska procedures. Exxon announced soon after it was advised of the spill that it would assume cleanup responsibility, supporting the contention that such an arrangement had existed with Alyeska. After Exxon received notice of the spill, the president of Exxon Shipping Company activated the Exxon-wide spill response teams, and he and his staff proceeded to Valdez to take over the cleanup responsibilities from Alyeska. They arrived on the afternoon of the accident day, but they did not relieve Alyeska immediately, although Exxon was taking action to assume responsibility for the cleanup. Companies shipping oil from the Alyeska Terminal at Valdez should amend their individual plans to include procedures for assuming cleanup responsibility for major oil spills from Alyeska and have the individual plans approved by the State. It is possible that some companies may not be fully capable of assuming responsibility quickly. Each company's response capability and procedures should be listed in the Alyeska contingency plan. Following State approval of a company's plan, it should be included in the Alyeska contingency plan for Prince William Sound.

Use of Dispersants.--The Alaska RCP addresses the use of oil dispersants in the State. It provides a decision matrix and a description of the biological effects of dispersants in the water but no guidance or information about the conditions under which the application of dispersants is effective. Wind and sea conditions and the length of time that the oil has been on the water when dispersants are applied alter their effectiveness. Such information about dispersant application should be included in the Alaska RCP and other contingency plans so that proper dispersant procedures are readily available. An OSC would then know when to use dispersants and would not waste time using them when they would not be effective. On the afternoon of the spill, a test was conducted using dispersants when the sea was calm. However, calm sea conditions are not conducive to the effective use of dispersants, which must mix with the oil in order to cause it to break into droplets and disperse into the water column. If the OSC had had guidelines in the RCP that described the wind and sea conditions necessary for effective use of dispersants, a test application would have been unnecessary.

The company contracted by Alyeska needed more than 3 hours to prepare a helicopter with a 300-gallon spray bucket to conduct a dispersant test application, which was done about 18 hours after the spill was reported. Air-deliverable dispersant system (ADDS) packs for fixed-wing aircraft were not available in Valdez and had to be ordered from storage sites in Alaska and the continental United States. The Alyeska plan states that aircraft capable of applying dispersants are to be available in 9 to 17 hours. However, the aircraft and ADDS packs were not available for use during the

first 24 hours after the spill occurred. If dispersants are to be used on an oil spill, especially in such a remote area as Valdez, the delivery system must be readily available and stored on or near the Terminal. The Safety Board believes that if dispersants continue to be regarded as an oil spill response option, ADDS packs and other dispersant application equipment should be stored in Valdez and ready for immediate use and that appropriate aircraft or vessels should be available on short notice.

In-Situ Burning--The Alaska RCP and the Alyeska plans also mention in-situ burning of oil as an approved alternative to mechanical cleanup, but the plans provide no guidance about how to proceed with in-situ burning or about possible results of burning, such as smoke or oil and tar residue. The use of in-situ burning is at the discretion of the OSC, with guidance from the RRT. Thus, the OSC is in the difficult position of being able to authorize certain methods--dispersant use and in-situ burning--but only after consulting and seeking advice from the RRT. The RRT may provide some information and agree to the use of a particular method, but the final decision is the OSC's. At times, the OSC may not be able to contact the RRT, or the RRT may not provide clear guidance. Such problems may result in delays that could render the application of dispersants useless and in-situ burning ineffectual. The OSC could also make an incorrect decision because of the lack of sufficient guidance or information, but incorrect action probably would not be as harmful as no action while awaiting a consensus from the RRT. In any case, the OSC's decisions will probably be second guessed during and after the cleanup because the results may not be acceptable to all parties. The cleanup party may think there was a delay in authorizing a certain procedure; the environmentalists may believe the physical environment was damaged or fish and wildlife were destroyed; fishermen may think their livelihood was threatened; the State may regard the impact on its environment, revenue, or tourism as negative; or the RRT may think its guidance was interpreted incorrectly. OSCs need more than advice from a committee. They need guidance in writing, before a spill occurs, from the NCP and the RCP about the use of dispersant chemicals and in-situ burning so that their decisions can be based on accepted procedures.

During the first 24 hours after the spill, Exxon applied to the RRT to conduct in-situ burning of the spilled oil. The RRT recommended approval if the OSC was satisfied that the burning could be done without degrading other cleanup efforts. In addition, the State had to issue a burn permit. "Approval to open burn" was issued by the ADEC on the same day, March 24, but the permit was not sent to Exxon until the next day. Even though the permit was not received until the next day, neither Alyeska nor Exxon was prepared to burn oil on the first day of the spill because neither one had a fire- or burn-proof boom on hand. The boom had to be shipped in from the North Slope and Seattle. Had the boom been immediately available and a burn permit issued earlier, this method of cleanup could have been used on heavy concentrations of oil before the wind and currents spread the oil so far that effective containment was not possible.

The burn permit stated: "Exxon has the responsibility to ensure smoke from their burning does not impact public health or violate Air Quality Standards. Following the limits of this permit does not relieve Exxon of

been fitted with a double hull, the risk of oil spills owing to collision or grounding would have been significantly reduced.

The United States has taken unilateral action and will require U.S. flag and foreign flag tank vessels entering U.S. waters to have double hulls. Although this action will not afford total protection of the U.S. coastline from accidental oil spills in international waters off the U.S. coast, it will protect U.S. coastal waters from oil spills as a result of groundings and collisions in U.S. waters. Since a large percentage of the world's tank vessels operate in U.S. waters, this action by the United States will probably promote double-hull construction of many new foreign flag tank vessels so that these vessels can be used in the U.S. market. This action by the United States may also lead to international requirements for double hulls or unilateral action by other countries.⁹²

CONCLUSIONS

Findings

1. The master's decision to depart from the Traffic Separation Scheme to avoid ice was probably reasonable, even though it required a heading toward shoal water.
2. Navigating the EXXON VALDEZ between the ice field and Bligh Reef required a diligent, competent navigation watch capable of conning the vessel, watching for ice, and fixing the vessel's position frequently; hence, two officers were required on the bridge--one with conning and shiphandling experience to conn the vessel and one to fix the vessel's position frequently--to navigate the vessel safely.
3. The master's decision to leave the third mate in charge of the navigation watch was contrary to Federal regulations and Exxon policy and was improper given the course of the vessel, the uncertain extent of the ice conditions, the proximity of a dangerous reef and the fact that the third mate did not have the required pilotage endorsement. ✓
4. The master's judgment was impaired by alcohol during the critical period the vessel was transiting Valdez Arm.
5. The performance of the third mate was deficient, probably because of fatigue, when he assumed supervision of the navigation watch from the master about 2350. ✓
6. The third mate's failure to turn the vessel at the proper time and with sufficient rudder probably was the result of his excessive workload and fatigued condition, which caused him to lose awareness of the location of Bligh Reef. ✓

⁹²Finland has already implemented an oil protection fee in order to minimize the number of single-bottom tank vessels in its waters.

7. The vessel was in the red sector of Busby Island Light for several minutes before grounding, which afforded a warning of the reef that apparently was not noticed by the third mate or the lookout.
8. There were no rested deck officers on the EXXON VALDEZ available to stand the navigation watch when the vessel departed from the Alyeska Terminal. ✓
9. Many conditions conducive to producing crew fatigue on the EXXON VALDEZ exist on other Exxon Shipping Company vessels because many are three-mate vessels and because the company has pursued reduced manning procedures. ✓
10. The Exxon Shipping Company did not adequately monitor the master for alcohol abuse after his alcohol rehabilitation program. ✓
11. Exxon Shipping Company did not have a sufficient program to identify, remove from service, if necessary, and provide treatment for employees who had chemical dependency problems.
12. Exxon Shipping Company manning policies do not adequately consider the increase in workload caused by reduced manning. ✓
13. The Exxon Shipping Company had incentives and work requirements that could be conducive to fatigue. ✓
14. The Exxon Shipping Company had manipulated shipboard reporting of crew overtime information that was to be submitted to the Coast Guard for its assessments of workloads on some tankships.
15. The Coast Guard was unduly narrow in its perspective when it evaluated reduced manning requests for the EXXON VALDEZ; it based manning reductions primarily on the assumption that shipboard hardware and equipment might reduce the workload at sea but did not consider the heavier workload associated with cargo operations in port and the frequency of such operations.
16. The Coast Guard was not adequately prepared to implement the requirement to obtain toxicology samples from mariners involved in marine accidents.
17. Department of Transportation regulations for postaccident/incident drug testing of employees in safety-sensitive positions are not adequate.
18. Drug testing of Vessel Traffic Center watchstanders was not conducted in a timely manner in accordance with Department of Transportation directives.
19. The Coast Guard needs to have access to National Driver Register information and other information regarding alcohol-related traffic offenses committed by licensed maritime officers in order to better determine a merchant mariner's fitness to hold a Federal license.

20. The Alyeska Pipeline Service Company failed to meet the expected response-time objective of its approved spill plan because it failed to have an oil spill cleanup barge loaded and ready for deployment. ✓
21. The Alyeska Pipeline Service Company should have, at a minimum, a second barge that is loaded with additional cleanup and lightering equipment so that cleanup equipment will be ready for immediate deployment at all times. ✓
22. The National Oil and Hazardous Substance Pollution Contingency Plan and Alaska Regional Oil and Hazardous Substances Pollution Contingency Plan both lack adequate guidance for On-Scene Commanders about the use of dispersants and in-situ burning.
23. Requiring the On-Scene Commander to confer with the Regional Response Team before using dispersants or in-situ burning needlessly delays the use of these methods and complicates the decision process.
24. There was no evidence that the Federal Government (Coast Guard) or any other organization would have been capable of increasing the efforts under way during the first 24 hours after the spill.
25. The Alyeska Pipeline Service Company contingency plans lacked procedures that would allow individual companies transporting oil from the Valdez Terminal in Prince William Sound to relieve Alyeska of cleanup responsibilities in a manner that would prevent interruption. ✓
26. The Alyeska Pipeline Service Company plan should include guidelines that describe the wind and sea conditions under which different types of skimmers, dispersants, and in-situ burning can be used most effectively for North Slope crude oil. ✓
27. Ice in Valdez Arm is a significant hazard to navigation and requires closer monitoring and reporting.
28. The limited supervision of the Vessel Traffic Center probably contributed to the commanding officer's and operations officer's lack of awareness that tankships were departing from the traffic separation scheme to avoid ice and were passing close to Bligh Reef.
29. The Vessel Traffic Service radar was operating satisfactorily, and the detection range of the radar was not significantly reduced by weather or sea conditions while the EXXON VALDEZ was transiting Valdez Arm.
30. The Vessel Traffic Center lost radar contact with the EXXON VALDEZ about 7.7 miles from the radar site, which is about 5.5 miles from the northern part of Bligh Reef, because the Center's watchstander did not use a higher range scale and not because of any limitation or malfunction of the radar. Had he used a higher range scale, the vessel probably could have been tracked as far as the site of the grounding, but no firm policy required that he do so.

31. The monitoring of vessels in Valdez Arm was left to the discretion of the Vessel Traffic Center watchstander because the senior watchstander decided to allow the Center's watchstanders to monitor instead of plot the positions of vessels transiting Valdez Arm.
32. A firm policy requiring the Vessel Traffic Center to plot tankships transiting the full length of Valdez Arm could have alerted the commanding officer of the Marine Safety Office to the fact that tankships were departing from the traffic separation scheme in the vicinity of Bligh Reef to avoid ice.
33. Monitoring the EXXON VALDEZ' by radar as it transited Valdez Arm would have revealed to the Vessel Traffic Center watchstander that the vessel had changed course to 180°, had departed the vessel traffic separation scheme, and was headed for shoal water east of Bligh Reef.
34. A query or warning from the Vessel Traffic Center might have alerted the third mate to the impending danger from Bligh Reef.
35. Ice reports issued by the Vessel Traffic Center frequently are neither sufficiently timely nor sufficiently accurate to enable masters to ascertain before leaving Port Valdez the ice conditions that will be encountered in Valdez Arm.
36. The policy adopted by the Coast Guard about 1985 to discontinue independent collection of ice information and statistics about vessel deviations from the traffic separation scheme probably contributed to the commanding officer and the operations officer not knowing that ice was causing vessels to depart from the traffic lanes and pass close to Bligh Reef.
37. A radar site near Bligh Reef would enable the Vessel Traffic Center to obtain current information on ice in Valdez Arm and to reliably track vessels in Valdez Arm.
38. The communication and microwave systems for the Vessel Traffic Service, Prince William Sound, were not reliable owing to age, the scarcity of proper replacement parts, and improvised repairs.
39. The Coast Guard has not maintained an effective vessel traffic service in Prince William Sound.
40. Although moving the pilot station to Rocky Point was apparently based on a consideration for pilot safety, the move also resulted in a reduction in pilotage services past Bligh Reef, where local knowledge is needed.
41. Moving the pilot station to a position south of Bligh Reef enhanced navigation safety by ensuring the presence of an officer with local knowledge of the area on the bridge of each vessel transiting Valdez Arm past Bligh Reef.

42. Former COTP Order 1-80, which included requirements for two officers on the bridge and for plotting and position reporting by vessels, contributed to navigation safety.
43. Current monitoring of the amount and size of ice being calved from the Columbia Glacier is inadequate for the safety of tankships transiting Prince William Sound.
44. The EXXON VALDEZ met all U.S. and international segregated-ballast regulations.
45. Current standards for segregated ballast and cargo tank size do not provide sufficient protection against oil spills caused by groundings or collisions.
46. If the EXXON VALDEZ had been fitted with an 11-foot double bottom (based on the 1/15 of the beam criterion), the resulting oil spill would have been small, and possibly eliminated. ✓
47. Double bottoms on all U.S. and foreign tank vessels (tankships and barges) that enter U.S. waters and have a capacity of more than 20,000 deadweight tons would minimize oil pollution in U.S. waters caused by groundings. ✓

Probable Cause

The National Transportation Safety Board determines that the probable cause of the grounding of the EXXON VALDEZ was the failure of the third mate to properly maneuver the vessel because of fatigue and excessive workload; the failure of the master to provide a proper navigation watch because of impairment from alcohol; the failure of Exxon Shipping Company to provide a fit master and a rested and sufficient crew for the EXXON VALDEZ; the lack of an effective Vessel Traffic Service because of inadequate equipment and manning levels, inadequate personnel training, and deficient management oversight; and the lack of effective pilotage services.

RECOMMENDATIONS

As a result of its investigation, the National Transportation Safety Board made the following recommendations:

--to the Exxon Shipping Company and all shipping companies operating in Prince William Sound:

Eliminate personnel policies, including performance appraisal criteria, that encourage marine employees to work long hours without concern for debilitating fatigue and commensurate reduction in safety of vessel operations. (Class II, Priority Action) (M-90-26) ✓

Implement manning policies that prevent excessively long working hours for crewmembers during cargo handling operations. (Class II, Priority Action) (M-90-27) ✓

Institute a written policy forbidding deck officers to share navigation and cargo watch duties on a 6-hours-on, 6-hours-off basis, except in emergencies. (Class II, Priority Action) (M-90-28) ✓

Require that two licensed watch officers be present to conn and navigate vessels in Prince William Sound. (Class II, Priority Action) (M-90-29) ✓

Implement an alcohol/drug program for seagoing employees that prevents such personnel from returning to sea until their alcohol/drug dependency problem is under control. (Class II, Priority Action) (M-90-30)

Train persons who monitor the alcohol/drug rehabilitation program in the recognition of recidivism after treatment, in the utilization of appropriate professional referrals, and in the interpersonal skills necessary for competent rehabilitation supervision. (Class II, Priority Action) (M-90-31)

--to the Coast Guard:

Develop a means for rigorous enforcement of 46 U.S.C.8104(a) to ensure that officers on watch during departures from ports have had at least 6 hours of off-duty time in the previous 12 hours. (Class II, Priority Action) (M-90-32)

Expedite the study programs to establish manning levels and safeguards based on human factors, as well as on shipboard hardware and equipment, and incorporate the findings into the manning review process. (Class II, Priority Action) (M-90-33)

Establish manning standards to ensure that crew complements reflect all expected shipboard operating situations and that procedures are in place for dealing with unusually high workloads at sea, such as tank cleaning, and with cargo handling operations in port. (Class II, Priority Action) (M-90-34)

Seek authority for access to the National Driver Register and other driving records and make use of the information from these sources to prevent any person with a drug and/or alcohol problem from holding a merchant marine license. (Class II, Priority Action) (M-90-35)

Adopt a permanent policy to plot all vessels participating in the Valdez Vessel Traffic System between the pilot station south of Bligh Reef, or as near the pilot station as possible, and their berths in Port Valdez. (Class II, Priority Action) (M-90-36)

Increase the manning level at the Marine Safety Office, Valdez, Alaska, to provide the following: enough watchstanders to plot all participating vessels between the pilot station south of Bligh Reef and their berths in Port Valdez; an officer-in-charge of the Vessel Traffic System who will have time to manage and supervise the system effectively; and sufficient additional officers to staff a duty officer watch with officers capable of monitoring and supervising vessel traffic watchstanders outside normal working hours. (Class II, Priority Action) (M-90-37)

Install an additional radar site as close to Bligh Reef as feasible to enable the Vessel Traffic Center to accurately monitor and plot all participating vessels and ice in the area of Valdez Arm from Busby Island to the pilot station south of Bligh Reef. (Class II, Priority Action) (M-90-38)

Initiate procedures to collect information on ice conditions in Valdez Arm so that all participating vessels receive accurate and timely ice reports before departing port and so that all supervisory personnel associated with the Valdez Traffic System are cognizant of ice conditions in Valdez Arm. (Class II, Priority Action) (M-90-39)

Improve the communications system operated by the Marine Safety Office in Valdez, Alaska. (Class II, Priority Action) (M-90-40)

Improve the microwave system operated by the Marine Safety Office in Valdez, Alaska. (Class II, Priority Action) (M-90-41)

Limit any proposed reduction in Federal pilotage to that part of Prince William Sound from the entrance outside Cape Hinchinbrook to the current pilot station at latitude 69°49'N, longitude 174° 01'W, which is south of Bligh Reef, thus ensuring that Federal pilots will be required between the entrance to Valdez Arm south of Bligh Reef and the berths in Port Valdez. (Class II, Priority Action) (M-90-42)

Incorporate into the Vessel Traffic Service regulations for all vessels the provisions of former COTP Order 1-80

(except the requirement for daylight transit), including the requirements about vessel condition, crews, navigation equipment, and publications, as well as the requirement that a licensed officer in addition to the licensed officer on watch be available to plot the vessel's position. (Class II, Priority Action) (M-90-43)

--to the Environmental Protection Agency:

Develop guidance in the National Contingency Plan for Regional Response Teams and On-Scene Coordinators about dispersant use. (Class II, Priority Action) (M-90-44)

Develop guidance for Regional Response Teams and On-Scene Coordinators about in-situ burning of oil and include the guidance in the National Contingency Plan. (Class II, Priority Action) (M-90-45)

Develop procedures that would eliminate the need for the On-Scene Coordinator to obtain burn permits from a State after the Regional Response Team has agreed that the spilled oil can be burned in situ. (Class II, Priority Action) (M-90-46)

Develop guidance for Regional Response Teams that enables them to establish the minimum amount of cleanup equipment that must be immediately available to initiate a cleanup response. (Class II, Priority Action) (M-90-47)

--to the Alaska Regional Response Team:

Develop clearer guidance for dispersant use in order to eliminate the need for a dispersant test before dispersants are used on an oil spill and include that information in the Alaska Regional Contingency Plan. (Class II, Priority Action) (M-90-48)

Develop guidelines and procedures for in-situ burning of oil, identify the range of wind and sea conditions for which in-situ burning of oil can be used effectively, and incorporate that information into the Alaska Regional Contingency Plan. (Class II, Priority Action) (M-90-49)

--to the State of Alaska:

Require that the oil spill contingency barge or barges at the Alyeska Pipeline Service Company Terminal at Valdez be loaded at all times with the response equipment specified in the plan. If a barge is unloaded and unavailable for immediate deployment, require that a replacement barge be provided and loaded with the

equipment specified in the plan. (Class II, Priority Action) (M-90-50)

Require that the companies loading oil at the Alyeska Pipeline Service Company Terminal in Valdez provide a plan for assuming cleanup responsibility from Alyeska Pipeline Service Company in the event of a major oil spill or potential major oil spill of more than 100,000 gallons. (Class II, Priority Action) (M-90-51)

Develop and require minimum levels of mechanical oil spill cleanup equipment, fire- or burn-proof boom, air-deployable dispersant system packs, and other dispersant application equipment to be stockpiled and immediately available at the Alyeska Pipeline Service Company's Valdez Terminal. (Class II, Priority Action) (M-90-52)

--to Alyeska Pipeline Service Company:

Provide at its Valdez terminal two or more oil spill contingency barges that are loaded with pollution-response cleanup equipment, lightering equipment, and fire- or burn-proof booms that are maintained and ready for immediate deployment, thus facilitating an effective response to different spill conditions. (Class II, Priority Action) (M-90-53)

Identify the range of wind and sea conditions for which dispersants can be used effectively and incorporate that information into company contingency plans. (Class II, Priority Action) (M-90-54)

In conjunction with each of the companies that load oil at its terminal in Valdez, develop a plan or procedures for relieving Alyeska Pipeline Service Company of primary cleanup responsibility in the event of a major oil spill or potential major oil spill of more than 100,000 gallons and include the procedures in its contingency plan after they have been approved by the State of Alaska. (Class II, Priority Action) (M-90-55)

In its company contingency plans, list also the companies that do not have a plan for relieving Alyeska Pipeline Service Company of cleanup responsibility. (Class II, Priority Action) (M-90-56) ✓

Store air-deployable dispersant system packs and other dispersant application equipment at its Valdez Terminal, as agreed upon with the State of Alaska, for use with fixed wing aircraft, or helicopters, or vessels. (Class II, Priority Action) (M-90-57) ✓

Store fire- or burn-proof booms at its Valdez Terminal, as agreed upon with the State of Alaska, and include procedures for their use in the company's oil spill contingency plan. (Class II, Priority Action) (M-90-58)

--to the US Geological Survey:

Intensify efforts to monitor the state of the Columbia Glacier, particularly to identify the amount of ice calving from the glacier and any changes in the rate that might affect the number and size of icebergs emanating from the glacier, and make this information available to agencies, such as the U.S. Coast Guard, tasked with assuring the safety of shipping into and out of Valdez Harbor. (Class II, Priority Action) (M-90-59)

Also, the Safety Board reiterated the following safety recommendations:

--to the Department of Transportation:

I-89-1

Expedite a coordinated research program on the effects of fatigue, sleepiness, sleep disorders, and circadian factors on transportation system safety.

I-89-2

Develop and disseminate educational material for transportation industry personnel and management regarding shift work; work and rest schedules; and proper regimens of health, diet, and rest.

I-89-3

Review and upgrade regulations governing hours of service for all transportation modes to assure that they are consistent and that they incorporate the results of the latest research on fatigue and sleep issues.

I-89-4

Develop postaccident and postincident testing regulations that are separate from the pre-employment, random, and reasonable suspicion testing regulations in all modal agencies.

APPLICABLE TO ALL COURTS: 18 USC § 3511(c)
which allows fine up to twice the pecuniary
loss

I. Violation of 33 USC Sec. 1311(a) / 1311(c)(1)
Negligent Discharge of a pollutant into
navigable waters {33 USC § 1311(a)}
Misdemeanor

{33 USC 1319(c)} Max penalty = \$25,000 per day of violation;
imprisonment to 1 yr.

II Violation of 33 USC § 407, 411
Unlawful discharge of refuse into navigable
waters, without a permit {33 USC § 407}

Misdemeanor

Max. penalty = \$2,500, 1 yr in prison {33 USC § 411}

III Violation of 16 USC § 703, 707(a); 50 CFR 21.11
Killing a migratory bird {§ 705} without a permit
Misdemeanor: Max penalty = \$500 / Six months {§ 711}

IV Violation of 33 USC § 1232(b)(1), 33 CFR 164.11(b)
~~Knowingly without permit~~
~~that~~ ~~knowingly~~ ~~discharge~~ ~~into~~ ~~navigable~~ ~~waters~~
~~competent for the discharge (directly or indirectly)~~
~~movement of the vessel~~ [required by

33 CFR 164.11(a)]

~~Misdemeanor~~: Max penalty \$50,000, 5 years
(33 USC 1232(b)(1))

V Violation of 46 USC 3718(b); 46 CFR 35.05-20
~~Knowingly without permit~~

~~discharge of oil or other hazardous material~~
~~into navigable waters~~

~~for the purpose of~~ [required by 46 CFR 35.05-20]

~~per 46 USC 3718(b): Max~~
penalty = \$50,000 + 5 years

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 97-117, see 1981 U.S. Code Cong. and Adm. News, p. 2629.

Library References

Health and Environment § 25.7(1).
C.J.S. Health and Environment §§ 106, 125.

§ 1299. State certification of projects

Whenever the Governor of a State which has been delegated sufficient authority to administer the construction grant program under this subchapter in that State certifies to the Administrator that a grant application meets applicable requirements of Federal and State law for assistance under this subchapter, the Administrator shall approve or disapprove such application within 45 days of the date of receipt of such application. If the Administrator does not approve or disapprove such application within 45 days of receipt, the application shall be deemed approved. If the Administrator disapproves such application the Administrator shall state in writing the reasons for such disapproval. Any grant approved or deemed approved under this section shall be subject to amounts provided in appropriation Acts.

(June 30, 1948, c. 758, Title II, § 219, as added Dec. 29, 1981, Pub.L. 97-117, § 20, 95 Stat. 1631.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 97-117, see 1981 U.S. Code Cong. and Adm. News, p. 2629.

Library References

Health and Environment § 25.7(10).
C.J.S. Health and Environment §§ 106, 107, 133.

SUBCHAPTER III—STANDARDS AND ENFORCEMENT

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub.L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in

Historical and Statutory Notes

1987 Amendment, Subsec. (c), Pub.L. 100-4, § 206(d), substituted "1990" for "1985".

Legislative History. For legislative history and purpose of Pub.L. 100-4, see 1987 U.S. Code Cong. and Adm. News, p. 3.

§ 1292. Definitions**Notes of Decisions**

Replacement wetlands 2
Treatment works 1

2. Replacement wetlands

Environmental Protection Agency had authority to award county sanitation district grant under Clean Water Act for building of artificial wetlands

to compensate for loss of natural wetlands as result of construction of solids processing and disposal facility at waste water treatment plant, where federal and state agencies involved in construction determined that district had to build artificial wetlands to compensate for loss of natural wetlands. *Sacramento Regional County Sanitation Dist. v. Thomas*, E.D. Cal. 1987, 668 F.Supp. 1427.

§ 1293a. Contained spoil disposal facilities

[See main volume for text of (a) to (i)]

(j) Period for Depositing Dredged Materials

The Secretary of the Army, acting through the Chief of Engineers, is authorized to continue to deposit dredged materials into a contained spoil disposal facility constructed under this section until the Secretary determines that such facility is no longer needed for such purpose or that such facility is completely full.

(k) Study and Monitoring Program**(1) Study**

The Secretary of the Army, acting through the Chief of Engineers, shall conduct a study of the materials disposed of in contained spoil disposal facilities constructed under this section for the purpose of determining whether or not toxic pollutants are present in such facilities and for the purpose of determining the concentration levels of each of such pollutants in such facilities.

(2) Report

Not later than 1 year after November 17, 1988, the Secretary shall transmit to Congress a report on the results of the study conducted under paragraph (1).

(3) Inspection and monitoring program

The Secretary shall conduct a program to inspect and monitor contained spoil disposal facilities constructed under this section for the purpose of determining whether or not toxic pollutants are leaking from such facilities.

(4) Toxic pollutant defined

For purposes of this subsection, the term "toxic pollutant" means those toxic pollutants referred to in sections 1311(b)(2)(C) and 1311(b)(2)(D) of this title and such other pollutants as the Secretary, in consultation with the Administrator of the Environmental Protection Agency, determines are appropriate based on their effects on human health and the environment.

(As amended Pub.L. 100-676, § 24, Nov. 17, 1988, 102 Stat. 4027.)

Historical and Statutory Notes

1988 Amendment, Subsec. (j), Pub.L. 100-676, § 24(a), added subsec. (j).

Subsec. (k), Pub.L. 100-676, § 24(b), added subsec. (k).

SUBCHAPTER III—STANDARDS AND ENFORCEMENT**§ 1311. Effluent limitations**

[See main volume for text of (a)]

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

[See main volume for text of (1) to (2)(B)]

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-80 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

[See main volume for text of (c) to (e)]

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants**(1) General authority**

The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F) of this section) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications

A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

Note 4

from their mines, Environmental Protection Agency's failure to require biological monitoring was not arbitrary and capricious, since this chapter gave Environmental Protection Agency discretion to require such monitoring, and petitioner challenging validity of permits made no effort to show why action under Environmental Protection Agency was an abuse of that discretion. *Webb v. Gorsuch*, C.A.4, 1983, 699 F.2d 157.

Environmental Protection Agency, in determining monitoring requirements to be contained in National Pollutant Discharge Elimination System permit granted to steel company, and in setting separate requirements for each effluent outfall, appropriately considered nature of discharges and their impact on receiving stream; variability of discharges; volume of water discharged; and present monitoring practices of steel company. *U.S. Steel Corp. v. Train*, C.A.III.1977, 556 F.2d 822.

If preconditions for application of requirement of this section that the Administrator

require the owner or operator of any point source to sample the effluent and monitor and report on the operation of the facility do exist, Administrator has a nondiscretionary obligation to require monitoring and reports. *Environmental Defense Fund, Inc. v. Costle*, D.C.N.Y.1977, 439 F.Supp. 980.

5. Sampling of effluents

This chapter authorized the Environmental Protection Agency to sample oil refiner's untreated waste water. *Mobil Oil Corp. v. U.S. E.P.A.*, C.A.III.1983, 716 F.2d 1187, certiorari denied 104 S.Ct. 2363, 80 L.Ed.2d 835.

6. Necessity of order

Discharger cannot be in violation of provisions of this section directing Administrator to require owner or operator of any point source to maintain records, sample effluents, and provide other information unless such an order has in fact been issued. *Committee for Consideration of Jones Falls Sewage System v. Train*, D.C.Md.1974, 375 F.Supp. 1148, affirmed 539 F.2d 1006.

§ 1319. Enforcement

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon

request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State or in a permit issued under section 1344 of this title by a State, shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(d) Civil penalties

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed \$10,000 per day of such violation.

(e) State liability for judgments and expenses

Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

(f) Wrongful introduction of pollutants into treatment works

Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter.

(June 30, 1948, c. 758, Title III, § 309, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 859, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 54(b), 55, 56, 67(c)(2), 91 Stat. 1591, 1592, 1606.)

Historical Note

1977 Amendment. Subsec. (a)(1). Pub.L. 95-217, §§ 55(a), 67(c)(2)(A), substituted "1318, 1328, or 1345 of this title" for "or 1318 of this title", and "1342 or 1344 of this title" for "1342 of this title".

Subsec. (a)(2). Pub.L. 95-217, § 56(a), substituted "except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation" for "the Administrator shall enforce any permit condition or limitation".

Subsec. (a)(3). Pub.L. 95-217, §§ 55(b), 67(c)(2)(B), substituted "1318, 1328, or 1345 of this title" for "or 1318 of this title", added "or in a permit issued under section 1344 of this title by a State" following "in a permit issued under section 1342 of this title by him or by a State".

Subsec. (a)(4). Pub.L. 95-217, § 56(b), struck out provision that any order issued under this subsection had to be by personal service and had to state with reasonable specificity the nature of the violation and a time for compliance, not to exceed thirty days, which the Administrator determined to be reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. See section subsec. (a)(5) of this section.

Subsecs. (a)(5), (6). Pub.L. 95-217, § 56(c), added pars. (5) and (6).

Subsec. (c)(1). Pub.L. 95-217, § 67(c)(2)(C), substituted "by a State or in a permit issued under section 1344 of this title by a State, shall be punished" for "by a State, shall be punished".

14. Most questions

Environmental Defense Fund, Inc. v. Costle, 636 F.2d 1229 (main volume) certiorari denied 104 S.Ct. 2668, 467 U.S. 1219, 81 L.Ed.2d 373, rehearing denied 104 S.Ct. 3573, 468 U.S. 1204, 82 L.Ed.2d 872.

15. Settlement agreement—Generally

National Ass'n of Metal Finishers v. E.P.A., 719 F.2d 624 (main volume) reversed 105 S.Ct. 1102, 470 U.S. 116, 84 L.Ed.2d 90.

Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (main volume) certiorari denied 104 S.Ct. 2668, 467 U.S. 1219, 81 L.Ed.2d 373,

rehearing denied 104 S.Ct. 3573, 468 U.S. 1204, 82 L.Ed.2d 872.

Environmental Defense Fund, Inc. v. Costle, 636 F.2d 1229 (main volume) certiorari denied 104 S.Ct. 2668, 467 U.S. 1219, 81 L.Ed.2d 373, rehearing denied 104 S.Ct. 3573, 468 U.S. 1204, 82 L.Ed.2d 872.

16. — Notes

Environmental Defense Fund, Inc. v. Costle, 636 F.2d 1229 (main volume) 205 U.S.App.D.C. 101 certiorari denied 104 S.Ct. 2668, 467 U.S. 1219, 81 L.Ed.2d 373, rehearing denied 104 S.Ct. 3573, 468 U.S. 1204, 82 L.Ed.2d 872.

§ 1318. Records and reports; inspections

(a) Maintenance; monitoring equipment; entry; access to information

Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 (relating to State permit programs), 1345, and 1364 of this title—

[See main volume for text of (A)]

(B) the Administrator or his authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of his credentials—

[See main volume for text of (i) and (ii)]

(b) Availability to public; trade secrets exception; penalty for disclosure of confidential information

Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18. Any authorized representative of the Administrator (including an authorized contractor acting as a representative of the Administrator) who knowingly or willfully publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information which is required to be considered confidential under this subsection shall be fined not more than \$1,000 or imprisoned not more than 1 year, or both. Nothing in this subsection shall prohibit the Administrator or an authorized representative of the Administrator (including any authorized contractor acting as a representative of the Administrator) from disclosing records, reports, or information to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.

[See main volume for text of (c)]

(d) Access by Congress

Notwithstanding any limitation contained in this section or any other provision of law, all information reported to or otherwise obtained by the Administrator (or any representative of the Administrator) under this chapter shall be made

available, upon written request of any duly authorized committee of Congress, to such committee.

(All amended Feb. 4, 1987, Pub.L. 100-4, Title III, § 810, Title IV, § 406(d)(1), 101 Stat. 41, 78.)

Historical and Statutory Notes

1987 Amendment. Subsec. (a)(4). Pub.L. 100-4, § 406(d)(1), in provision preceding subpar. (A) substituted "1343, and 1364" for "and 1364".

Pub.L. 100-4, § 310(a)(2), in subpar. (B) inserted "(including an authorized contractor acting as a representative of the Administrator)" after "or his authorized representative".

Subsec. (b). Pub.L. 100-4, § 310(a)(1), inserted provision specifying the penalty for unauthorized disclosure of confidential information by any authorized representative of the Administrator, including an authorized contractor acting as a representative of the Administrator.

Subsec. (d). Pub.L. 100-4, § 310(b), added subsec. (d).

Legislative History. For legislative history and purpose of Pub.L. 100-4, see 1987 U.S. Code Cong. and Adm. News, p. 5.

Law Review Commentaries

Federal wetlands protection under the Clean Water Act: Regulatory ambivalence, intergovernmental tension, and a call for reform. Michael C. Blumm & D. Bernard Zaleha, 60 U.Colo.L.Rev. 695 (1989).

Warrior and the Druid—the DOD and environmental law. Michael Donnelly and James G. Van Ness, 33 Fed.Bar News 37 (1986).

Notes of Decisions

Search warrants 7

2. Access to information

Repairer of damaged automobile bumpers violated Clean Water Act by exceeding wastewater discharge limits contained in its discharge permit

§ 1319. Enforcement

[See main volume for text of (a) and (b)]

(c) Criminal penalties

(1) Negligent violations

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the

and by failing to report in various instances contents and quality of its wastewater discharges. *Sierra Club v. Simkins Industries, Inc.*, D.C.Md. 1985, 617 F.Supp. 1120, affirmed 847 F.2d 1109.

4. Monitoring and reports

Decision to require visual shoen test as method for monitoring compliance of no discharge of oil limitation was appropriate in National Pollutant Discharge Elimination System permit proceedings regarding limitations on discharge of pollutants from oil and gas operations. *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, C.A.9, 1988, 863 F.2d 1420.

National Pollution Discharge Elimination System requirement that applicant provide Environmental Protection Agency with list of any toxic pollutant which applicant currently used or manufactured as immediate or final product or byproduct was reasonable exercise of EPA's statutory authority. *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 1987, 822 F.2d 104, 261 U.S.App.D.C. 372.

5. Sampling of effluents

Mobil Oil Corp. v. U.S. E.P.A., 716 F.2d 1187 (main volume) certiorari denied 104 S.Ct. 2363, 466 U.S. 980, 80 L.Ed.2d 835.

7. Search warrants

Administrative search warrant issued pursuant to the Clean Water Act for investigation of landfill activities on landowner's property could properly provide for entry of private individuals not employed by the EPA to assist in investigation; these independent contractors qualified as "authorized representatives," for purpose of enforcement provisions of Act. *Matter of Alameda County Assessor's Parcel Nos. 537-801-2-4 and 537-850-9*, N.D.Cal.1987, 672 F.Supp. 1278.

treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than \$1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (A) of this paragraph—

(I) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(II) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(III) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(IV) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined

For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of Title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title,¹ and any person who violates any order issued by the Administrator under

subsection (a) of this section, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

[See main volume for text of (e) and (f)]

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed \$10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed \$25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II civil penalty under paragraph (1) may not exceed \$10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed \$125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interested persons

(A) Public notice

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence

Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which—

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(11) notice of an alleged violation of section 1865(a)(1) of this title has been given in accordance with section 1865(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1865(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

(7) Effect of action on compliance

No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this chapter or with the terms and conditions of any permit issued pursuant to section 1842 or 1844 of this title.

(8) Judicial review

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment—

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

(9) Collection

If any person fails to pay an assessment of a civil penalty—

(A) after the order making the assessment has become final, or

(B) after a court in an action brought under paragraph (8) has entered a final judgment in favor of the Administrator or the Secretary, as the case may be,

the Administrator or the Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

(10) Subpoenas

The Administrator or Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have

jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(11) Protection of existing procedures

Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator.

(As amended Feb. 4, 1987, Pub.L. 100-4, Title III, §§ 812, 813(a)(1), (b)(1), (c), 814(a), 101 Stat. 42, 45, 46.)

1 So in original.

Historical and Statutory Notes

References in Text. The Solid Waste Disposal Act, referred to in subsec. (c)(7) is Title II of Pub.L. 89-272, as amended generally by Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2795, which is classified generally to chapter 82 (section 6901 et seq.) of Title 42, The Public Health and Welfare. Section 3001 of the Solid Waste Disposal Act is classified to section 6921 of Title 42. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of Title 42 and Tables.

1987 Amendment. Subsec. (c)(1). Pub.L. 100-4, § 312, struck out provision that the violation be willful and reference to a violation of a condition in a permit issued under section 1344 of this title and inserted reference to sections 1328 and 1345 of this title and provision relating to negligent introduction into a sewer system or into a publicly owned treatment works of any pollutant or hazardous substance as a negligent violation.

Subsec. (c)(2). Pub.L. 100-4, § 312, added par. (2) and redesignated former par. (2) as (4).

Subsec. (c)(3). Pub.L. 100-4, § 312, added par. (3) and redesignated former par. (3) as (6).

Subsec. (c)(4). Pub.L. 100-4, § 312, redesignated former par. (2) as (4), and in par. (4) as so redesignated, provided that the false statement, representation, or certification be material, that any falsification or tampering be done knowingly, that imprisonment for a first conviction be increased to two years from six months, and that the penalty for a conviction after the first conviction be a fine of not more than \$20,000 per day of violation, or imprisonment of not more than 4 years, or both.

Subsec. (c)(5). Pub.L. 100-4, § 312, added par. (5).

Subsec. (c)(6). Pub.L. 100-4, § 312, redesignated former par. (3) as (6).

Subsec. (c)(7). Pub.L. 100-4, § 312, added par. (7).

Subsec. (d). Pub.L. 100-4, § 313(a)(1), (b)(1), (c), inserted "or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title," after "section 1344 of this title by a State," "\$25,000 per day for each violation," for "\$10,000 per day of such violation," and provision specifying factors to consider in determining the penalty amount.

Subsec. (g). Pub.L. 100-4, § 314(a), added subsec. (g).

Savings Provision. Section 313(a)(2) of Pub.L. 100-4 provided that: "No State shall be required

before July 1, 1988, to modify a permit program approved or submitted under section 402 of the Federal Water Pollution Control Act [section 1342 of this title] as a result of the amendment made by paragraph (1) [amending subsec. (d) of this section by inserting reference to requirements imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title]."

Increased Penalties Not Required Under State Programs. Section 313(b)(2) of Pub.L. 100-4 provided that: "The Federal Water Pollution Control Act [this chapter] shall not be construed as requiring a State to have a civil penalty for violations described in section 309(d) of such Act [subsec. (d) of this section] which has the same monetary amount as the civil penalty established by such section, as amended by paragraph (1) [amending subsec. (d) of this section by increasing the penalty to \$25,000]. Nothing in this paragraph shall affect the Administrator's authority to establish or adjust by regulation a minimum acceptable State civil penalty."

Legislative History. For legislative history and purpose of Pub.L. 100-4, see 1987 U.S. Code Cong. and Adm. News, p. 5.

Law Review Commentaries

Citizen-suit provisions under the Federal Water Pollution Control Act: Are remedies available for past violations? Comment, 19 Conn.L.Rev. 589 (1987).

Criminal sanctions under federal and state environmental statutes. Richard H. Allan, 14 Ecology L.Q. 117 (1987).

Dubols v. Thomas: The nature of the Environmental Protection Agency administrator's investigatory and enforcement duties under the Federal Water Pollution Control Act. Note, 10 J. Energy L. & Policy 119 (1989).

Federal wetlands protection under the Clean Water Act: Regulatory ambivalence, intergovernmental tension, and a call for reform. Michael C. Blumm & D. Bernard Zaleha, 60 U.Colo.L.Rev. 695 (1989).

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation: Its implications for citizen suits under the Clean Water Act. Note, 16 Ecology L.Q. 571 (1989).

Warrior and the Druid—the DOD and environmental law. Michael Donnelly and James G. Van Ness, 33 Fed.Bar News 37 (1986).

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conducting further fill or excavation and to require defendants to restore canals to their original depth and width and to plug and fill other canals constructed by defendants. *U.S. v. Sexton Cove Estate, Inc.*, C.A.Fla.1976, 526 F.2d 1293.

75. Estoppel

Where Army Corps of Engineers, which issued permit for construction of dike showing that top dike elevation was to be 235 feet above mean sea level, did not object to height of dike until 1973, five years after it was completed, where dike as constructed did not constitute in any significant way an obstruction to flow or capacity of river or to navigation, where marina owners who constructed dike had spent considerable sums on construction, maintenance and operation of dike, and where owners' marina would not even be functionally viable if dike height were at elevation 235, the equities were with marina owners, and Government was estopped to assert height violation and would be denied injunctive relief sought against marina owners. *U.S. v. Bailey*, D.C.Ark.1979, 467 F.Supp. 925.

Even if estoppel applies to prevent United States from enforcing a statute, neither equitable estoppel nor laches precluded injunctive relief, under this section as regards private developer's work on tidal canals where Army Corps of Engineers' regulation in effect at time of subject activity provided that plans for excavation or fill in navigable waters must be recommended by the Chief of Engineers, that a letter of application must show that the structure is not likely to injure the navigable capacity of any public navigable waters and regulations required that certain information be furnished in connection with any work which might affect navigable capacity of the waterway. *U.S. v. Sexton Cove Estates, Inc.*, D.C.Fla.1975, 389 F.Supp. 602.

76. Limitations

Michigan period of limitations, M.C.L.A. § 600.5839(1), for actions to recover damages for injury to property did not apply to United States' action under this chapter for removal or cost of removal of sewer line, which was allegedly constructed across creek at insufficient depth to permit navigation, regardless of whether period was one of limitations or of repose. *U.S. v. Burton*, D.C.Mich.1984, 580 F.Supp. 660.

77. Res judicata

The acquittal of a defendant indicted under this section (as originally enacted) for creating an obstruction in navigable stream, in violation of section 403 of this title, is not a

bar to a subsequent suit in equity brought by the United States under this section against the same defendant to compel the removal of such obstruction, the issues and measure of proof required in the two proceedings not being the same. *U.S. v. Donaldson-Schultz Co.*, Va.1906, 148 F. 581, 79 C.C.A. 403.

78. Burden of proof

Burden on plaintiff, in civil action for preliminary and permanent injunctive relief against coal corporation to cause cessation of alleged continuing discharges of blackwaters into waters under federal protection, was to show irreparable injury to some degree, giving due accord to fact that considerations to be given public interests practically lessened the burden; these considerations, however, did not eliminate the requirement of showing some element of irreparable injury. *U.S. v. Kentland-Elkhorn Coal Corp.*, D.C.Ky.1973, 353 F.Supp. 451.

79. Questions of fact

When proceedings are instituted, it becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream. *U.S. v. Rio Grande Dam, etc., Co.*, N.M.1899, 19 S.Ct. 770, 174 U.S. 690, 43 L.Ed. 1136.

80. Damages

While the Corps of Engineers has the authority to initiate criminal proceedings resulting in fines or imprisonment and may sue civilly for removal of structures which have been erected in violation of section 403 of this title, Corps does not have authority to compensate parties injured by such illegal activities. *Potomac River Ass'n, Inc. v. Lundberg Maryland Seamanship School, Inc.*, D.C.Md.1975, 402 F.Supp. 344.

81. Issues reviewable

Since the duty of the United States to its own citizens, to preserve the navigability of the Rio Grande River, is as great as any arising out of a treaty with Mexico, the court, on a bill by the United States to enjoin the erection of a dam in such river, will not consider the question whether the erection of such dam would be a violation of the treaty. *U.S. v. Rio Grande Dam, etc., Co.*, N.M.1899, 19 S.Ct. 770, 174 U.S. 690, 43 L.Ed. 1136.

82. Contempt

Where city's misuse of riparian property owned by city resulted in creation of a shoal in navigable channel of river, District Court could have issued injunction directing city to

remove the shoal, and could have held city in civil contempt for disobedience. *U.S. v. Perma Paving Co.*, C.A.N.Y.1964, 332 F.2d 754.

83. Remand

A decree dismissing a suit by the United States, under Act Sept. 19, 1890, c. 907, § 10, 26 Stat. 454, superseded in part, to enjoin the creation of an obstruction of a navigable stream, will be reversed in the exercise of the power, on an appeal in equity, to render such a decree as under all the circumstances may

seem proper, and the cause will be remanded for further hearing, where material evidence is absent from the record because of the action of the trial court in not giving sufficient time to the government to prepare its case for the inquiry directed on a prior appeal to be made on the question whether the navigability of the stream would be substantially diminished by the creation of such obstruction. *U.S. v. Rio Grande Dam & Irrigation Co.*, N.M.1902, 22 S.Ct. 428, 184 U.S. 416, 46 L.Ed. 619.

§ 407. Deposit of refuse in navigable waters generally

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful. (Mar. 3, 1899, c. 425, § 13, 30 Stat. 1152.)

Historical Note

Prior Provisions. This section and sections 408, 411, and 412 of this title, superseded Act Aug. 18, 1894, c. 299, §§ 6, 7, 8, 28 Stat. 363, which prohibited the depositing of refuse in navigable waters for the improvement of which money had been appropriated, and the injury to sea walls and other works built by the Government, and prescribed penalties for violations, including penalties against masters, etc., and vessels.

Section also superseded Act Sept. 19, 1890, c. 907, § 6, 26 Stat. 453, which prohibited obstructing navigation by deposits of refuse, etc., in navigable waters.

Change of Name. The Department of War was designated the Department of the Army and the title of the Secretary of War was changed to Secretary of the Army by section 205(a) of Act July 26, 1947, c. 343, Title II, 61 Stat. 501. Section 205(a) of Act July 26, 1947, was repealed by section 53 of Act Aug.

Note 4

104, 42 Am.Rep. 584; Collins v. Howard, 1889, 18 A. 794, 65 N.H. 190; Connecticut River Lumber Co. v. Olcott Falls Co., 1889, 21 A. 1090, 65 N.H. 290, 13 L.R.A. 826; Morgan v. King, 1866, 35 N.Y. 454, 91 Am. Dec. 58; Weise v. Smith, 1869, 3 Or. 445, 8 Am.Rep. 621; Felger v. Robinson, 1869, 3 Or. 455; Shaw v. Oswego Iron Co., 1882, 10 Or. 371, 45 Am.Rep. 146; Haines v. Hall, 1888, 20 P. 831, 17 Or. 165; Stuart v. Clark's Lessee, 1852, 32 Tenn. 9, 2 Swan 9, 58 Am.Dec. 49; Gaston v. Mace, 1889, 10 S.E. 60, 33 W.Va. 14, 25 Am.St.Rep. 848, 5 L.R.A. 392; Whisler v. Wilkinson, 1868, 22 Wis. 572; Sellers v. Union Lumbering Co., 1876, 39 Wis. 525; Olson v. Merrill, 1877, 42 Wis. 203; Stevens Point Boom Co. v. Reilly, 1878, 44 Wis. 295; Falls Mfg. Co. v. Oconto River Imp. Co., 1894, 58 N.W. 257, 87 Wis. 134.

§ 411. Penalty for wrongful deposit of refuse; use of or injury to harbor improvements, and obstruction of navigable waters generally

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

(Mar. 3, 1899, c. 425, § 16, 30 Stat. 1153.)

Historical Note

Codification. Section is part of section 16 of Act Mar. 3, 1899. The balance of such section, relating to liability of masters, pilots, and so forth and of vessels engaged in violations, is set out as section 412 of this title.

Cross References

Duty of United States attorneys and other federal officers in enforcement of this section, see section 413 of this title.
Flood control of Mississippi River, section as applicable, see section 702i of this title.
Liability of masters, pilots, vessels, etc., engaged in violations of sections 407, 408 and 409 of this title, punishment pursuant to this section, see section 412 of this title.
Misdemeanor defined, see section 1 of Title 18, Crimes and Criminal Procedure.
New York Harbor, provisions for protection of unaffected by this section, see section 418 of this title.
Regulations governing dumping into navigable waters, see section 419 of this title.

West's Federal Forms

Sentence and fine, see § 7531 et seq.

Code of Federal Regulations

Interference with or damage to aids to navigation, see 33 CFR 70.01-1 et seq.

Library References

Navigable Waters ¶27.
C.J.S. Navigable Waters §§ 52-54.

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This section is within the constitutional power of Congress. The *Scow* No. 9, D.C. Mass.1907, 152 F. 548.

2. Power of Congress

This section was enacted in the exercise of the police power of the Government. *Scow* No. 36, Mass.1906, 144 F. 932, 75 C.C.A. 572.

3. Exclusive nature of section

Remedies and procedures specified in this chapter for enforcement of section 409 of this title rendering it unlawful to carelessly sink vessel in navigable channel are not intended to be exclusive in case of a negligent or careless sinking of vessel. *Wyandotte Transp. Co. v. U.S.*, La.1967, 88 S.Ct. 379, 389 U.S. 191, 19 L.Ed.2d 407.

4. Mandatory nature of penalty

Penalty which can be imposed under this section for violation of section 409 of this title requiring removal of vessel sunken in navigable waters is mandatory only in an in rem

1. Constitutionality

This section was not invalid as encroachment of admiralty and maritime jurisdiction. *The Gansfjord*, D.C.La.1928, 25 F.2d 736.

Library References

Game 3/4, 5 to 10.
States 3 to 6.
United States 82, 85, 88.

C.J.S. Game §§ 7, 9 to 18.
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C.J.S. United States §§ 122, 123, 134.

§ 702. Importation of eggs of game birds for propagation

The Secretary of the Interior shall have the power to authorize the importation of eggs of game birds for purposes of propagation, and he shall prescribe all necessary rules and regulations governing the importation of eggs of said birds for such purposes.

(June 3, 1902, c. 983, 32 Stat. 285; 1939 Reorg. Plan No. II, § 4(f), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433.)

Historical Note

Transfer of Functions. Transfer of functions of Secretary of Agriculture to Secretary of the Interior by Reorg. Plan No. II of 1939, see Transfer of Functions note set out under section 701 of this title.

SUBCHAPTER II—MIGRATORY BIRD TREATY

Cross References

Availability of appropriations for administration and enforcement of sections 703 to 708, 710, and 711 of this title, see section 668d of this title.

Conservation of fauna and flora of Antarctica—

Application for permits with respect to protected native birds, see section 2404 of this title.

Civil penalties and convictions not to preclude application of sections 703 to 708, 710, and 711 of this title, see sections 2407 and 2408 of this title.

Hunting permitted under prescribed rules and regulations—

Cape Hatteras National Seashore Recreational Area, see section 459a-1 of this title.

Migratory waterfowl and other wildlife refuge in California, see section 695b of this title.

Public and Native lands of Alaska, subsistence management and use provisions not to modify or repeal sections 703 to 708, 710, and 711 of this title, see section 3125 of this title.

Tule Lake National Wildlife Refuge, sump level regulations to accommodate waterfowl management needs, see section 695p of this title.

§ 703. Taking, killing, or possessing migratory birds unlawful

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for

shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, and the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972.

(July 3, 1918, c. 128, § 2, 40 Stat. 755; June 20, 1936, c. 634, § 3, 49 Stat. 1556; June 1, 1974, Pub.L. 93-300, § 1, 88 Stat. 190.)

Historical Note

1974 Amendment. Pub.L. 93-300 substituted "any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof" for "any part, nest, or egg of any such birds", and included the convention between the United States and the Government of Japan concluded March 4, 1972.

1936 Amendment. Act June 20, 1936 made changes in phraseology.

Effective Date of 1974 Amendment. Section 3 of Pub.L. 93-300 provided that: "The amendments made by this Act [to this section] shall take effect on the date on which the President proclaims the exchange of ratifications of the convention between the United States and the Government of Japan for the protection of migratory birds and birds in

danger of extinction, and their environment, concluded March 4, 1972, or on the date of the enactment of this Act [June 1, 1974], whichever date is later."

Effective Date of 1936 Amendment. Section 1 of Act June 20, 1936, provided that the amendment of this section and sections 704, 705, 707, 708 and the addition of section 709a of this title by that Act, should become effective as of the day on which the President should proclaim the exchange of ratifications of the convention between the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, or on June 20, 1936, "whichever date is later". Such proclamation was made on June 30, 1937.

Appropriation. Authorization of appropriation, see section 709a of this title.

Federal Jury Practice and Instructions

Liability of corporation, see § 64.08 and Notes thereunder.

Code of Federal Regulations

Hunting, generally, see 50 CFR 32.1 et seq.

Migratory bird hunting, see 50 CFR 20.1 et seq.

Library References

Game 7.
C.J.S. Game §§ 1, 5.

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of the Interior as federal game agent and served as deputy federal game agent without pay was not an "employee" of Department within this section. *U.S. v. Verret*, D.C.La. 1969, 302 F.Supp. 492.

3. Searches—Generally

Where federal agents had kept fields under surveillance because of suspected baiting in violation of this subchapter governing hunting of migratory game birds, agents' recording of names of persons coming out of a field and visually observing their clothing did not constitute a "search". *McDowell v. U.S.*, C.A.S.D.1967, 383 F.2d 599.

4. — Reasonableness

Even if shack on hunting club property were a protected place, search by game wardens who, after entering to inspect property, found a hunter in possession of illegal number of birds and then entered trapper's shack where fowl were visible and seized untagged ducks, was not unreasonable. *U.S. v. Greenhead, Inc.*, D.C.Cal.1966, 256 F.Supp. 890.

5. — Warrantless searches

Since it was proper to delay arrest of defendant for offering for sale and selling two American flamingos until completion of the sale and transfer of possession of the flamingos, there was no need for the officers to obtain a search warrant. *U.S. v. Drake*, C.A.Colo.1981, 655 F.2d 1025.

Where search of automobile by special enforcement agents of Department of the Interior was not incidental to arrest or to seizure of contraband, and was made without warrant, it was without authority under this section and could not be sustained for probable cause. *Aiuppa v. U.S.*, C.A.Kan.1964, 338 F.2d 146.

Louisiana game agents who heard shotgun blast coming from direction of a light, observed automobile coming from field where light was seen, stopped automobile and, upon doing so, observed two shotguns and a headlight in back seat had probable cause to believe that L.S.A.-R.S. 56-124(8) had been violated and when, pursuant to L.S.A.-R.S. 56-108, they searched automobile without warrant, search did not violate U.S.C.A. Const.Amend. 4, and 45 freshly-killed coots found in search of automobile were admissible in prosecution for violation of this subchapter. *U.S. v. Verret*, D.C.La.1969, 302 F.Supp. 492.

Federal Fish and Wildlife Service agents who followed defendant in accordance with federal regulations to determine why he was in restricted area, one of whom detected odor

of marijuana coming from large bags strapped to defendant's motorcycle and upon cutting open one of bags found substance subsequently determined to be marijuana, made lawful search, and agents had sufficient information to establish probable cause to believe that felony had been committed and that defendant had committed it. *State v. Goldberg*, 1975, 540 P.2d 674, 112 Ariz. 202.

6. Immunity from suit

Official conduct of federal game wardens in making inspection and seizure of game bird storage records and improperly tagged birds was immune from suit, even if conducted in manner unwarranted by circumstances. *Hughes v. Johnson*, C.A.Cal.1962, 305 F.2d 67.

7. Presumptions

Presumption existed that game wardens' inspection of premises of owners engaged in business of cold storage of game birds of hunters and seizure of business records were within scope of wardens' official duty and owners were required to be specific in their charge of impropriety. *Hughes v. Johnson*, C.A.Cal.1962, 305 F.2d 67.

8. Suppression of evidence

Fact that undercover agents of Fish and Wildlife Service delayed execution of warrant to arrest defendant for offering for sale and selling two American flamingos in order to complete the purchase and strengthen the case against defendant did not entitle defendant to a motion to suppress the flamingos as evidence, as the evidence obtained by such delay could have been lawfully secured without the arrest warrant. *U.S. v. Drake*, C.A.Colo.1981, 655 F.2d 1025.

Where motion to suppress was made pursuant to rule 41, Federal Rules of Criminal Procedure, Title 18, and followed prescribed form, it was sufficient to challenge lawfulness of seizure though it did not specifically invoke this section which impliedly withheld from special enforcement agents power to make warrantless search on probable cause. *Aiuppa v. U.S.*, C.A.Kan.1964, 338 F.2d 146.

Mere fact that game wardens had not been given permission to enter hunting club property did not require suppression of illegally possessed birds found. *U.S. v. Greenhead, Inc.*, D.C.Cal.1966, 256 F.Supp. 890.

9. Forfeiture of property

Since arrest of defendant for offering for sale and selling two American flamingos and the taking of the birds were proper, order requiring the return of the flamingos to defendant could not stand, as this section re-

quires that protected birds be forfeited to the United States upon conviction of the offender, and as even if defendant was not convicted under the indictment, if the birds were found

to be "possessed contrary to the provisions this subchapter" they would be forfeited to the United States. *U.S. v. Drake*, C.A.Colo. 1981, 655 F.2d 1025.

§ 707. Violations and penalties; forfeitures

(a) Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$500 or be imprisoned not more than six months, or both.

(b) Whoever, in violation of this subchapter, shall—

(1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or

(2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than \$2,000 or imprisoned not more than two years, or both.

(c) All guns, traps, nets and other equipment, vessels, vehicles, and other means of transportation used by any person when engaged in pursuing, hunting, taking, trapping, ensnaring, capturing, killing, or attempting to take, capture, or kill any migratory bird in violation of this subchapter with the intent to offer for sale, or sell, or offer for barter, or barter such bird in violation of this subchapter shall be forfeited to the United States and may be seized and held pending the prosecution of any person arrested for violating this subchapter and upon conviction for such violation, such forfeiture shall be adjudicated as a penalty in addition to any other provided for violation of this subchapter. Such forfeited property shall be disposed of and accounted for by, and under the authority of, the Secretary of the Interior.

(July 3, 1918, c. 128, § 6, 40 Stat. 756; June 20, 1936, c. 634, § 2, 49 Stat. 1556; Sept. 8, 1960, Pub.L. 86-732, 74 Stat. 866.)

Historical Note

1960 Amendment. Pub.L. 86-732 designated existing provisions as subsec. (a), inserted "Except as otherwise provided in this section" therein, and added subsecs. (b) and (c).

1936 Amendment. Act June 20, 1936 substituted "conventions" for "convention".

Effective Date of 1936 Amendment. Amendment by Act June 20, 1936 effective

June 30, 1937, see section 1 of Act June 20, 1936, set out as an Effective Date of 1936 Amendment note under section 703 of this title.

Legislative History. For legislative history and purpose of Pub.L. 86-732, see 1960 U.S. Code Cong. and Adm. News, p. 3459.

West's Federal Forms

Sentence and fine, see § 7531 et seq.

Code of Federal Regulations

Seizure and forfeiture procedures, 50 CFR 12.1 et seq.

4 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1 of this title and Tables.

§ 698e. Protection of significant historical assets for Timucuan Ecological and Historic Preserve

The Secretary, with the consent of the owners thereof, may acquire by donation or purchase with donated funds the following properties or sites of significant historic interest in Duval County, Florida:

- (1) Spanish sixteenth century forts San Gabriel and San Estaban.
- (2) Spanish eighteenth century fort Dos Hermanas.
- (3) English eighteenth century forts at Saint Johns Bluff and Fort George Island.
- (4) Spanish sixteenth and seventeenth century mission San Juan del Puerto.
- (5) Site of the American Revolutionary War battle of Thomas Creek.
- (6) The Zephaniah Kingsley plantation, with its eighteenth and nineteenth century buildings.
- (7) The Spanish American War fortification on Saint Johns Bluff.
- (8) The confederate fort known as the Yellow Bluff Fort State Historic Site.

(Pub.L. 100-249, Title II, § 202, Feb. 16, 1988, 102 Stat. 14.)

§ 698p. Integrated administration and interpretation for Timucuan Ecological and Historic Preserve

Any properties of historic interest acquired under section 698o of this title shall become part of the Preserve established under section 698n of this title. The Secretary shall administer such properties in accordance with a plan that integrates the administration and interpretation of the ecological values of the Preserve and the historical values of the sites so acquired and the historical features of Fort Caroline. Such administration and interpretation shall be conducted through the facilities and staff of Fort Caroline National Memorial consistent with section 2 of the Act of September 21, 1950 (64 Stat. 897).

(Pub.L. 100-249, Title II, § 203, Feb. 16, 1988, 102 Stat. 15.)

Historical and Statutory Notes

References in Text. Section 2 of Act September 21, 1950, referred to in text, is section 2 of Act

Sept. 21, 1950, c. 973, 64 Stat. 897, which was not classified to the Code.

CHAPTER 7—PROTECTION OF MIGRATORY GAME AND INSECTIVOROUS BIRDS

SUBCHAPTER III—MIGRATORY BIRD CONSERVATION

Sec. 715k-5. Acquisition of lands.

Law Review Commentaries

Comment, of birds and men: The Migratory Bird Treaty Act. Comment, 26 Idaho L.Rev. 371 (1990).

The Migratory Bird Treaty Act—Protecting wildlife on our national refuges. 26 Nat. Resources J. 609 (1986).

SUBCHAPTER II—MIGRATORY BIRD TREATY

§ 703. Taking, killing, or possessing migratory birds unlawful

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive

for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or in part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972 and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

(As amended Dec. 13, 1989, Pub.L. 101-233, § 15, 103 Stat. 1977.)

Historical and Statutory Notes

1989 Amendment. Pub.L. 101-233 added reference to the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

Legislative History. For legislative history and purpose of Pub.L. 101-233, see 1989 U.S. Code Cong. and Adm. News, p. 1437.

Law Review Commentaries

Developing law of land use planning on the federal lands. George Cameron Coggins, 61 U.Colo.L.Rev. 307 (1990).

Notes of Decisions

Defenses 20a
Notice 21a

8. Birds within section

White-winged dove was "migratory bird" within meaning of statute that proscribes taking or attempting to take any migratory bird by aid of baiting or on or over any baited area. U.S. v. Anguiera, D.Puerto Rico 1990, 744 F.Supp. 36.

10. Hunting—Generally

Humane Soc. of U.S. v. Watt, 551 F.Supp. 1310 [main volume] affirmed 713 F.2d 865, 230 U.S. App.D.C. 71.

11. — Bag or kill limitations

Information charging defendant with unlawfully "possessing" more than daily bag limit of doves in violation of federal law supported conviction, even though magistrate found that defendant "killed" doves all on same day, in that killing birds was necessary antecedent to possession of them. U.S. v. Carson, C.A.10 (Kan.) 1985, 762 F.2d 833, on remand 614 F.Supp. 507, affirmed 793 F.2d 1141, certiorari denied 107 S.Ct. 315, 479 U.S. 914, 93 L.Ed.2d 289.

12. — Baiting or luring

Fish and Wildlife Service agent, who allegedly told defendant that bona fide livestock feeding operations were exempt from baiting regulation and then determined that corn scattered in field as feed constituted baiting and allowed number of Canadian geese to be killed or wounded in field before citing defendant, did not entrap defendant, in that defendant's own statements and actions prior to the citation indicated clear predisposition

to violate the baiting regulation. U.S. v. Manning, C.A.8 (S.D.) 1986, 787 F.2d 431.

Uncontradicted evidence that corn was in one of the ponds on which defendants were hunting ducks within ten days prior to date on which defendant's hunting activities occurred and that corn remained in an adjacent pond on that date was sufficient to support finding that defendants were shooting over a "baited area," thereby supporting their convictions of taking or attempting to take waterfowl by aid of bait. U.S. v. Chandler, C.A.Va. 1985, 753 F.2d 360.

Sufficient evidence showed that defendants took at least one migratory bird on or over area that had been baited; evidence showed that defendants strategically positioned themselves to wait of baited area so that, no matter how far away they stood, eastbound migratory doves necessarily had to fly over them to reach bait. U.S. v. Anguiera, D.Puerto Rico 1990, 744 F.Supp. 36.

14. — Seasonal limitations

Humane Soc. of U.S. v. Watt, 551 F.Supp. 1310 [main volume] affirmed 713 F.2d 865, 230 U.S. App.D.C. 71.

20. Knowledge or intent

U.S. v. Catlett, 747 F.2d 1102 [main volume] certiorari denied 105 S.Ct. 2153, 471 U.S. 1074, 85 L.Ed.2d 509.

Neither the text nor history of the Migratory Bird Treaty Act provides basis from which to infer intent requirement as an element of criminal liability absent specific provision in Act. U.S. v. Engler, C.A.3 (Pa.) 1986, 806 F.2d 425, certiorari denied 107 S.Ct. 1900, 481 U.S. 1019, 95 L.Ed.2d 506.

Statute prohibiting taking of migratory birds was not unconstitutionally overbroad as applied to defendant who claimed that trapping of great horned owls was necessary to protect his property; statute did not forbid owner from defending his property but rather required him to seek assistance of government official who could be expected to act in public interest. U.S. v. Darst, D.Kan. 1989, 726 F.Supp. 286.

The Migratory Bird Treaty Act was unconstitutionally vague as applied to a defendant whose application of a mixture of registered pesticides resulted in death of a flock of geese; defendant was strictly liable under statute even though he had not applied pesticides in a reckless manner and even though he and other area farmers had

used the pesticides in the past with no problems. *U.S. v. Rollins, D.Idaho 1989, 706 F.Supp. 742.*

20a. Defenses

Property owner had no unconditional or absolute right to kill federally protected birds in defense of his property. *U.S. v. Darst, D.Kan. 1989, 726 F.Supp. 286.*

21a. Notice

Violation notice charging defendants with taking or attempting to take waterfowl by aid of bait gave adequate notice of charge to defendants, notwithstanding that it may have created some ambiguity as to which of two alternative factual means of committing the offense Government was alleging defendants had employed, as defendants' remedy was to seek a bill of particulars to clarify the specific factual theory or theories upon which Government was proceeding. *U.S. v. Chandler, C.A. Va. 1985, 733 F.2d 360.*

§ 704. Determination as to when and how migratory birds may be taken, killed, or possessed

Notes of Decisions

8. Regulations and validity of regulations

Environmental Protection Agency's continued registration of strychnine rodenticide for above-ground use resulted in impermissible "taking" of birds protected by Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act where incidental poisoning of protected birds caused by their ingestion of rodenticide had not been authorized by prior approval of Secretary of Interior.

§ 707. Violations and penalties; forfeitures

[See main volume for text of (a)]

(b) Whoever, in violation of this subchapter, shall knowingly—

[See main volume for text of (1) and (2); (c)]

(As amended Pub.L. 99-645, Title V, § 501, Nov. 10, 1986, 100 Stat. 8590.)

Historical and Statutory Notes

1986 Amendment. Subsec. (b). Pub.L. 99-645, § 501, substituted "shall knowingly" for "shall" in provisions preceding par. (1).

Legislative History. For legislative history and purpose of Pub.L. 99-645, see 1986 U.S. Code Cong. and Adm. News, p. 6113.

Notes of Decisions

1. Constitutionality

Capture and sale of species protected by Migratory Bird Treaty Act was not conduct that was wholly passive, but more closely resembled conduct that reasonable person would not be surprised to learn was not innocent so that strict liability provisions of Act, imposing criminal li-

24. Weight and sufficiency of evidence

Evidence that defendants were raising ducks on property, that ducks were unaffected by close proximity of defendants or agents of United States Fish and Wildlife Service, together with expert testimony concerning advantages of using live decoys as opposed to artificial ducks was sufficient to support finding that ducks were "tame" so as to sustain convictions of defendants for killing game birds while using live birds as decoys in violation of Migratory Bird Treaty Act. *U.S. v. Mebane, C.A.4 (N.C.) 1988, 839 F.2d 230.*

Evidence supported verdict that defendant was guilty of aiding and abetting hunters in taking Canadian geese, which were migratory birds, over a baited area; Fish and Wildlife Service agent discovered scattered corn in field under defendant's control after finding no corn in same field two days earlier, and defendant stated to agent that hunters had been shooting geese from bluff pits near baited area. *U.S. v. Manning, C.A.8 (S.D.) 1986, 787 F.2d 431.*

Defenders of Wildlife v. Administrator, E.P.A., D.Minn. 1988, 688 F.Supp. 1334.

13. Seasonal or time restrictions

Decision of Fish and Wildlife Service to set January 13, rather than January 31, as closing date of Mississippi duck hunting season, based on declining status of mallards and substantial impact caused by late hunting seasons, was neither arbitrary nor capricious. Department of Wildlife Conservation of State of Miss. v. Jantzen, D.C. Miss. 1985, 621 F.Supp. 838.

bility without requirement of scienter, did not offend requirements of due process; declining to follow *United States v. Wulff*, 758 F.2d 1121 (6th Cir.); *United States v. St. Pierre*, 578 F.Supp. 1424 (W.D.S.D.). *U.S. v. Engler, C.A.3 (Pa.) 1986, 806 F.2d 425*, certiorari denied 107 S.Ct. 1900, 481 U.S. 1019, 95 L.Ed.2d 506.

Felony provision of Migratory Bird Treaty Act, which makes sale of migratory bird parts a felony but does not require proof of scienter, violates due process, since crime was one not known to common law, precluding reading of scienter requirement into statute, since maximum penalty of two years' imprisonment or fine of \$2,000 is severe, and since felony conviction irreparably damages reputation. *U.S. v. Wulff, C.A.6 (Mich.) 1985, 758 F.2d 1121.*

CONSERVATION

CONSERVATION

§ 712. Treaty and convention implementing regulations; seasonal taking of migratory birds for essential needs of indigenous Alaskans to preserve and maintain stocks of the birds; protection and conservation of the birds

Notes of Decisions

Construction with other laws 1/2
Jurisdiction 3

Treaty and regulation in conflict 2

1/2. Construction with other laws

Migratory Bird Treaty Act was not superseded in Alaska by 1925 Alaska Game Law. Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Dunkle, C.A.9 (Alaska) 1987, 829 F.2d 933, certiorari denied 108 S.Ct. 1290, 99 L.Ed.2d 501.

2. Treaty and regulation in conflict

Cooperative agreements entered into by Fish and Wildlife Service governing subsistence hunting of migratory birds in Alaska were invalid to

extent they conflicted with treaties entered into under Migratory Bird Treaty Act. Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Dunkle, C.A.9 (Alaska) 1987, 829 F.2d 933, certiorari denied 108 S.Ct. 1290, 99 L.Ed.2d 501.

3. Jurisdiction

Court of Appeals had jurisdiction to consider wildlife conservation fund's claim that Fish and Wildlife Service violated Migratory Bird Treaty Act by entering into cooperative agreements permitting subsistence hunting of migratory birds by Alaskan Natives. Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Dunkle, C.A.9 (Alaska) 1987, 829 F.2d 933, certiorari denied 108 S.Ct. 1290, 99 L.Ed.2d 501.

SUBCHAPTER III—MIGRATORY BIRD CONSERVATION

§ 715a. Migratory Bird Conservation Commission; creation; composition; duties; approval of areas of land and water recommended for purchase or rental

A commission to be known as the Migratory Bird Conservation Commission, consisting of the Secretary of the Interior, as chairman, the Administrator of the Environmental Protection Agency, the Secretary of Agriculture and two Members of the Senate, to be selected by the President of the Senate, and two Members of the House of Representatives to be selected by the Speaker, is created and authorized to consider and pass upon any area of land, water, or land and water that may be recommended by the Secretary of the Interior for purchase or rental under this subchapter, and to fix the price or prices at which such area may be purchased or rented; and no purchase or rental shall be made of any such area until it has been duly approved for purchase or rental by said commission. Any Member of the House of Representatives who is a member of the commission, if reelected to the succeeding Congress, may serve on the commission notwithstanding the expiration of a Congress. Any vacancy on the commission shall be filled in the same manner as the original appointment. The ranking officer of the branch or department of a State to which is committed the administration of its game laws, or his authorized representative, and in a State having no such branch or department, the governor thereof, or his authorized representative, shall be a member ex officio of said commission for the purpose of considering and voting on all questions relating to the acquisition, under this subchapter, of areas in his State. For purposes of this subchapter, the purchase or rental of any area of land, water, or land and water includes the purchase or rental of any interest in any such area of land, water, or land and water.

(As amended Dec. 13, 1989, Pub.L. 101-233, § 13, 103 Stat. 1977.)

Historical and Statutory Notes

1989 Amendment. Pub.L. 101-233 substituted "the Administrator of the Environmental Protection Agency," for "the Secretary of Transportation."

Legislative History. For legislative history and purpose of Pub.L. 101-233, see 1989 U.S. Code Cong. and Adm. News, p. 1437.

§ 715e. Examination of title; easements and reservations

Notes of Decisions

Approval of title by Attorney General 1
Environmental impact statement 2

2. Environmental impact statement

Clear language of lease of lake by state to United States Fish and Wildlife Service, as well as prior conduct and statements of parties, granted

§ 21.1

- Sec.
21.45 Depredation order for depredating purple gallinules in Louisiana.
21.46 Depredation order for depredating scrub jays and Steller's jays in Washington and Oregon.

AUTHORITY: Pub. L. 95-616, 92 Stat. 3112 (16 U.S.C. 712(2)).

SOURCE: 39 FR 1178, Jan. 4, 1974, unless otherwise noted.

Subpart A—Introduction

§ 21.1 Purpose of regulations.

The regulations contained in this part supplement the general permit regulations of part 13 of this subchapter with respect to permits for the taking, possession, transportation, sale, purchase, barter, importation, exportation, and banding or marking of migratory birds. This part also provides certain exceptions to permit requirements for public, scientific, or educational institutions, and establishes depredation orders which provide limited exceptions to the Migratory Bird Treaty Act (16 U.S.C. 703-712).

[54 FR 38150, Sept. 14, 1989]

§ 21.2 Scope of regulations.

(a) Migratory birds, their parts, nests, or eggs, lawfully acquired prior to the effective date of Federal protection under the Migratory Bird Treaty Act (16 U.S.C. 703-712) may be possessed or transported without a permit, but may not be imported, exported, purchased, sold, bartered, or offered for purchase, sale or barter, and all shipments of such birds must be marked as provided by part 14 of this subchapter. *Provide*, no exemption from any statute or regulation shall accrue to any offspring of such migratory birds.

(b) This part 21, except for § 21.22 (banding or marking permits), does not apply to the bald eagle (*Haliaeetus leucocephalus*) or the golden eagle (*Aquila chrysaetos*) for which regulations are provided in part 22 of this subchapter.

(c) The provisions of this part are in addition to, and are not in lieu of other regulations of this subchapter B which may require a permit or prescribe additional restrictions or conditions for the importation, exportation,

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and interstate transportation of wildlife (see also part 13).

[39 FR 1178, Jan. 4, 1974, as amended at 40 FR 42680, Aug. 24, 1981]

§ 21.3 Definitions.

In addition to definitions contained in part 10 of this chapter, and unless the context requires otherwise, as used in this part:

Bred in captivity or *captive-bred* refers to raptors, including eggs, hatched in captivity from parents that mated or otherwise transferred gametes in captivity.

Captivity means that a live raptor is held in a controlled environment that is intensively manipulated by man for the purpose of producing raptors of selected species, and that has boundaries designed to prevent raptors, eggs or gametes of the selected species from entering or leaving the controlled environment. General characteristics of captivity may include, but are not limited to, artificial housing, waste removal, health care, protection from predators, and artificially supplied food.

Falconry means the sport of taking quarry by means of a trained raptor.

Raptor means a live migratory bird of the Order *Falconiformes* or the Order *Strigiformes*, other than a bald eagle (*Haliaeetus leucocephalus*) or a golden eagle (*Aquila chrysaetos*).

[48 FR 31607, July 8, 1983]

§ 21.4 Information collection requirements.

(a) The information collection requirements contained within this part 21 have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned Clearance Number 1018-0022. This information is being collected to provide information necessary to evaluate permit applications. This information will be used to review permit applications and make decisions, according to criteria established in the Migratory Bird Treaty Act, 16 U.S.C. 703-712 and the regulations promulgated thereunder on the issuance, suspension, revocation, or denial of permits. The obligation to respond is required in order to obtain or retain a permit.

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(b) The public reporting burden for these reporting requirements is estimated to vary from 15 minutes to 4 hours per response, with an average of 0.803 hours per response, including time for reviewing instructions, gathering and maintaining data, and completing and reviewing the forms. Comments regarding the burden estimate or any other aspect of these reporting requirements should be directed to the Service Information Collection Clearance Officer, MS-224 ARLSQ, Fish and Wildlife Service, Washington, DC 20240, or the Office of Management and Budget, Paperwork Reduction Project (1018-0022), Washington, DC 20503.

[54 FR 38151, Sept. 14, 1989]

Subpart B—General Requirements and Exceptions

§ 21.11 General permit requirements.

No person shall take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase or barter, any migratory bird, or the parts, nests, or eggs of such bird except as may be permitted under the terms of a valid permit issued pursuant to the provisions of this part and part 13, or as permitted by regulations in this part or part 20 (the hunting regulations).

[54 FR 38151, Sept. 14, 1989]

§ 21.12 General exceptions to permit requirements.

The following exceptions to the permit requirement are allowed.

(a) Employees of the Department of the Interior authorized to enforce the provisions of the Migratory Bird Treaty Act of July 3, 1918, as amended (16 Stat. 755; 16 U.S.C. 703-711), may, without a permit, take or otherwise acquire, hold in custody, transport, and dispose of migratory birds or their parts, nests, or eggs as necessary in performing their official duties.

(b) State game departments, municipal game farms or parks, and public museums, public zoological parks, accredited institutional members of the American Association of Zoological Parks and Aquariums (AAZPA) and public scientific or educational institu-

tions may acquire by gift or purchase, possess, transport, and by gift or sale dispose of lawfully acquired migratory birds or their progeny, parts, nests, or eggs without a permit: *Provided*, That such birds may be acquired only from persons authorized by this paragraph or by a permit issued pursuant to this part to possess and dispose of such birds, or from Federal or State game authorities by the gift of seized, condemned, or sick or injured birds. Any such birds, acquired without a permit, and any progeny therefrom may be disposed of only to persons authorized by this paragraph to acquire such birds without a permit. Any person exercising a privilege granted by this paragraph must keep accurate records of such operations showing the species and number of birds acquired, possessed, and disposed of; the names and addresses of the persons from whom such birds were acquired or to whom such birds were donated or sold; and the dates of such transactions. Records shall be maintained or reproducible in English on a calendar year basis and shall be retained for a period of five (5) years following the end of the calendar year covered by the records.

[39 FR 1178, Jan. 4, 1974, as amended at 50 FR 8638, Mar. 4, 1985; 54 FR 38151, Sept. 14, 1989]

§ 21.13 Permit exceptions for captive-reared mallard ducks.

Captive-reared and properly marked mallard ducks, alive or dead, or their eggs may be acquired, possessed, sold, traded, donated, transported, and disposed of by any person without a permit, subject to the following conditions, restrictions, and requirements:

(a) Nothing in this section shall be construed to permit the taking of live mallard ducks or their eggs from the wild.

(b) All mallard ducks possessed in captivity, without a permit, shall have been physically marked by at least one of the following methods prior to 6 weeks of age and all such ducks hatched, reared, and retained in captivity thereafter shall be so marked prior to reaching 6 weeks of age.

Navigation safety regulations, see 33 CFR 164.01 et seq.
Regulated navigation areas and limited access areas, see 33 CFR 165.1 et seq.
Traffic management, see 33 CFR 161.101 et seq.

1231a. Towing Safety Advisory Committee

(a) Establishment; membership

There is established a Towing Safety Advisory Committee (hereinafter referred to as the "Committee"). The Committee shall consist of sixteen members with particular expertise, knowledge, and experience regarding shallow-draft inland and coastal waterway navigation and towing safety as follows:

- (1) seven members from the barge and towing industry, reflecting a regional geographic balance;
- (2) one member from the offshore mineral and oil supply vessel industry; and
- (3) two members from each of the following—
 - (A) port districts, authorities, or terminal operators;
 - (B) maritime labor;
 - (C) shippers (of whom at least one shall be engaged in the shipment of oil or hazardous materials by barge); and
 - (D) the general public.

(b) Appointments; Chairman, Vice Chairman, and observers; publication in Federal Register

The Secretary of the department in which the Coast Guard is operating (hereinafter referred to as the "Secretary") shall appoint the members of the Committee. The Secretary shall designate one of the members of the Committee as the Chairman and one of the members as the Vice Chairman. The Vice Chairman shall act as Chairman in the absence or incapacity of, or in the event of a vacancy in the office of, the Chairman. The Secretary may request the Secretary of the Army and the Secretary of Commerce to each designate a representative to participate as an observer on the Committee. The Secretary shall, not less often than once a year, publish notice in the Federal Register for solicitation of nominations for membership on the Committee.

(c) Functions; meetings; public proceedings and records; disclosures to Congress

The Committee shall advise, consult with, and make recommendations to the Secretary on matters relating to shallow-draft inland and coastal waterway navigation and towing safety. Any advice or recommendation made by the Committee to the Secretary shall reflect the independent judgment of the Committee on the matter concerned. The Secretary shall consult with the Committee before taking any significant action affecting shallow-draft inland and coastal waterway navigation and towing safety. The Committee shall meet at the call of the Secretary, but in any event not less than once during each calendar year. All proceedings of the Committee shall be open to the public, and a record of the proceedings shall be made available for public inspection. The Committee is authorized to make available to

Congress any information, advice, and recommendations which the Committee is authorized to give to the Secretary.

(d) Compensation and travel expenses; administrative services; personnel; authorization of appropriations

Members of the Committee who are not officers or employees of the United States shall serve without pay and members of the Committee who are officers or employees of the United States shall receive no additional pay on account of their service on the Committee. While away from their homes or regular places of business, members of the Committee may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of Title 5. The Secretary shall furnish to the Committee an executive secretary and such secretarial, clerical, and other services as are considered necessary for the conduct of its business. There are authorized to be appropriated such sums as may be necessary to implement the provisions of this subsection.

(e) Termination

Unless extended by subsequent Act of Congress, the Committee shall terminate on September 30, 1990.

(Pub.L. 96-380, Oct. 6, 1980, 94 Stat. 1521; Pub.L. 97-322, Title I, § 118(d), Oct. 15, 1982, 96 Stat. 1587; Pub.L. 98-557, § 16(a), Oct. 30, 1984, 98 Stat. 2866.)

Historical Note

Codification. Section was not enacted as part of the Ports and Waterways Safety Act which comprises this chapter.

1984 Amendment. Subsec. (e). Pub.L. 98-557 substituted reference to Sept. 30, 1990, for reference to five years from Oct. 6, 1980.

1982 Amendment. Subsec. (b). Pub.L. 97-322, § 118(d)(1), required the Secretary, not less often than once a year, to publish notice in the Federal Register for solicitation of nominations for membership on the Committee.

Subsec. (c). Pub.L. 97-322, § 118(d)(2), authorized the Committee to make available to Congress any information, advice, and recommendations which the Committee is authorized to give to the Secretary.

Subsec. (d). Pub.L. 97-322, § 118(d)(3), inserted introductory provisions respecting compensation and travel expenses of members of the Committee.

Legislative History. For legislative history and purpose of Pub.L. 97-322, see 1982 U.S. Code Cong. and Adm. News, p. 3138. See, also, Pub.L. 98-557, 1984 U.S. Code Cong. and Adm. News, p. 4831.

§ 1232. Enforcement provisions

(a) Civil penalty

(1) Any person who is found by the Secretary, after notice and an opportunity for a hearing, to have violated this chapter or a regulation issued hereunder shall be liable to the United States for a civil penalty, not to exceed \$25,000 for each violation. Each day of a continuing violation shall constitute a separate violation. The amount of such civil penalty shall be assessed by the Secretary, or his designee, by written notice. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any

history of prior offenses, ability to pay, and such other matters as justice may require.

(2) The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which has been imposed under this section.

(3) If any person fails to pay an assessment of a civil penalty after it has become final, the Secretary may refer the matter to the Attorney General of the United States, for collection in any appropriate district court of the United States.

(b) Criminal penalty

(1) Any person who willfully and knowingly violates this chapter or any regulation issued hereunder shall be fined not more than \$50,000 for each violation or imprisoned for not more than five years, or both.

(2) Any person who, in the willfull and knowing violation of this chapter or of any regulation issued hereunder, uses a dangerous weapon, or engages in conduct that causes bodily injury or fear of imminent bodily injury to any officer authorized to enforce the provisions of this chapter or the regulations issued hereunder, shall, in lieu of the penalties prescribed in paragraph (1), be fined not more than \$100,000, or imprisoned for not more than ten years, or both.

(c) In rem liability

Any vessel subject to the provisions of this chapter, which is used in violation of this chapter, or any regulations issued hereunder, shall be liable in rem for any civil penalty assessed pursuant to subsection (a) of this section and may be proceeded against in the United States district court for any district in which such vessel may be found.

(d) Injunction

The United States district courts shall have jurisdiction to restrain violations of this chapter or of regulations issued hereunder, for cause shown.

(e) Denial of entry

Except as provided in section 1228 of this title, the Secretary may, subject to recognized principles of international law, deny entry into the navigable waters of the United States or to any port or place under the jurisdiction of the United States to any vessel not in compliance with the provisions of this chapter or the regulations issued hereunder.

(f) Withholding of clearance

The Secretary of the Treasury shall withhold or revoke, at the request of the Secretary, the clearance, required by section 91 of Title 46, of any vessel, the owner or operator of which is subject to any of the penalties in this section. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to the Secretary.

(Pub.L. 92-340, § 13, as added Pub.L. 95-474, § 2, Oct. 17, 1978, 92 Stat. 1478.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 95-474, see 1978 U.S. Code Cong. and Adm. News, p. 3270.

Cross References

Authority of Secretary under port and tanker safety program unaffected by ship pollution provisions, see section 1911 of this title.

West's Federal Forms

Jurisdiction and venue in district courts, matters pertaining to, see § 1003 et seq.
Preliminary injunctions and temporary restraining orders, matters pertaining to, see § 5271 et seq.
Sentence and fine, see § 7531 et seq.

Notes of Decisions

1. **Private right of action**
Congress did not intend that plaintiffs be permitted to bring private enforcement actions under this chapter. *Patentas v. U. S.*, C.A.Pa.1982, 687 F.2d 707.

§ 1233. Regulations as to regattas or marine parades

The Commandant of the Coast Guard is authorized and empowered in his discretion to issue from time to time regulations, not contrary to law, to promote the safety of life on navigable waters during regattas or marine parades.

(Apr. 28, 1908, c. 151, § 1, 35 Stat. 69; Mar. 4, 1913, c. 141, § 1, 37 Stat. 736; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097.)

Historical Note

Codification. Section was not enacted as part of the Ports and Waterways Safety Act which comprises this chapter.

Section was formerly classified to section 454 of Title 46, Shipping.

Transfer of Functions. The Coast Guard was transferred to the Department of Transportation, and all functions, powers, and duties relating to the Coast Guard of the Secretary of the Treasury and of other officers and offices of the Department of the Treasury were transferred to the Secretary of Transportation by Pub.L. 89-670, § 6(b)(1), Oct. 15, 1966, 80 Stat. 938. Section 6(b)(2) of Pub.L. 89-670, however, provided that notwithstanding such transfer of functions, the Coast Guard shall operate as part of the Navy in time of war or when the President directs as provided in section 3 of Title 14, Coast Guard. See section 108 of Title 49, Transportation.

For transfer of functions of other officers, employees, and agencies of the Department of the Treasury, with certain exceptions, to the

Secretary of the Treasury with power to delegate, see Reorg. Plan No. 26 of 1950, §§ 1, 2, eff. July 31, 1950, 15 F.R. 4935, 64 Stat. 1280, 1281, set out in Appendix 1 to Title 5, Government Organization and Employees. Functions of the Coast Guard, and the Commandant of the Coast Guard, were excepted from transfer when the Coast Guard is operating as part of the Navy under sections 1 and 3 of Title 14.

"Commandant of the Coast Guard" was substituted for "Secretary of Commerce" on authority of sections 101 to 104 of Reorg. Plan No. 3 of 1946, set out in Appendix 1 to Title 5, Government Organization and Employees.

Upon incorporation into the Code, the words "Secretary of Commerce" were substituted for "Secretary of Commerce and Labor" to conform to Act Mar. 4, 1913, which provided that the Secretary of Commerce and Labor should be called the Secretary of Commerce.

§ 162.270

(f) Dredges working in the prosecution of the work shall not obstruct the channel unnecessarily.

(g) The dredge will slack lines running across the channel from the dredge on the passing side, for passing vessels, when notified by signal, with whistle or horn.

(h) The position of anchors of the dredge shall be marked by buoys plainly visible to passing vessels.

§ 162.270 Restricted areas in vicinity of Maritime Administration Reserve Fleets.

(a) The regulations in this section shall govern the use and navigation of waters in the vicinity of the following National Defense Reserve Fleets of the Maritime Administration, Department of Transportation:

(1) James River Reserve Fleet, Fort Eustis, Virginia.

(2) Beaumont Reserve Fleet, Neches River near Beaumont, Texas.

(3) Suisun Bay Reserve Fleet near Benicia, California.

(b) No vessels or other watercraft, except those owned or controlled by the United States Government, shall cruise or anchor between Reserve Fleet units within 500 feet of the end vessels in each Reserve Fleet unit, or within 500 feet of the extreme units of the fleets, unless specific permission of do so has first been granted in each case by the enforcing agency.

(c) The regulations in this section shall be enforced by the respective Fleet Superintendents and such agencies as they may designate.

[CGD 75-082, 42 FR 51759, Sept. 29, 1977, as amended by CGD 86-053, 51 FR 43742, Dec. 4, 1986]

PART 163—TOWING OF BARGES

Sec.

163.01 Application.

163.05 Tows of seagoing barges within inland waters.

163.20 Bunching of tows.

AUTHORITY: 33 U.S.C. 180, 30 Stat. 90; 49 CFR 1.46(c)(2); 28 Stat. 647, 33 U.S.C. 258; 49 CFR 1.46(c)(3); sec. 4233 R.S., 33 U.S.C. 322.

33 CFR Ch. I (7-1-90 Edition)

§ 163.01 Application.

(a) The regulations in this part apply to vessels navigating the harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal, the Red River of the North, the Mississippi River and its tributaries above Huey P. Long Bridge, and that part of the Atchafalaya River above its junction with the Plaquemine-Morgan City alternate waterway.

(b) Seagoing barges and their towing vessels shall be subject to the requirements in this part under the provisions of section 14 of the Act of May 28, 1908, as amended (sec. 14, 35 Stat. 428, as amended; 33 U.S.C. 152). Under the provisions of section 15 of the Act of May 28, 1908, as amended (sec. 15, 35 Stat. 429; 33 U.S.C. 153), the penalty for use of an unlawful towline shall be an action against the master of the towing vessel seeking the suspension or revocation of his license.

[CGFR 60-61, 25 FR 9045, Sept. 21, 1960, as amended by CGFR 66-59, 31 FR 13647, Oct. 22, 1966. Redesignated by CGD 81-017, 46 FR 28154, May 26, 1981]

§ 163.05 Tows of seagoing barges within inland waters.

(a) The tows of seagoing barges when navigating the inland waters of the United States shall be limited in length to five vessels, including the towing vessel or vessels.

[CGFR 60-61, 25 FR 9045, Sept. 21, 1960. Redesignated by CGD 81-017, 46 FR 28154, May 26, 1981]

§ 163.20 Bunching of tows.

(a) In all cases where tows can be bunched, it should be done.

(b) Tows navigating in the North and East Rivers of New York must be bunched above a line drawn between Robbins Reef Light and Owls Head Brooklyn, but the quarantine anchorage and the north entrance to Ambrose Channel shall be avoided in the process of bunching tows.

(c) Tows must be bunched above the mouth of the Schuylkill River, Pa.

[CGFR 60-61, 25 FR 9045, Sept. 21, 1960, as amended by CGFR 64-21, 29 FR 5733, Apr. 1, 1964]

Coast Guard, DOT

30, 1964. Redesignated by CGD 81-017, 46 FR 28154, May 26, 1981]

PART 164—NAVIGATION SAFETY REGULATIONS

Sec.

164.01 Applicability.

164.02 Applicability exception for foreign vessels.

164.03 Incorporation by reference.

164.11 Navigation underway: General.

164.19 Requirements for vessels at anchor.

164.25 Tests before entering or getting underway.

164.30 Charts, publications, and equipment: General.

164.33 Charts and publications.

164.35 Equipment: All vessels.

164.37 Equipment: Vessels of 10,000 gross tons or more.

164.38 Automatic radar plotting aids (ARPA).

164.39 Steering gear: Tankers.

164.40 Devices to indicate speed and distance.

164.41 Electronic position fixing devices.

164.42 Rate of turn indicator.

164.51 Deviations from rules: Emergency.

164.53 Deviations from rules and reporting: Non-operating equipment.

164.55 Deviations from rules: Continuing operation or period of time.

164.61 Marine casualty reporting and record retention.

AUTHORITY: 33 U.S.C. 1223, 46 U.S.C. 3703.

Sec. 164.61 also issued under 46 U.S.C. 6101; 49 CFR 1.46 (n).

§ 164.01 Applicability.

(a) This part (except as specifically limited herein) applies to each self-propelled vessel of 1600 or more gross tons (except foreign vessels described in § 164.02) when it is operating in the navigable waters of the United States except the St. Lawrence Seaway.

[CGD 83-004, 49 FR 43466, Oct. 29, 1984]

164.02 Applicability exception for foreign vessels.

(d) This part (including §§ 164.38 and 164.39) does not apply to vessels that:

(1) Are not destined for, or departing from, a port or place subject to the jurisdiction of the United States; and

(2) Are in:

(i) Innocent passage through the territorial sea of the United States; or

§ 164.

(ii) Transit through navigable waters of the United States which form part of an international strait.

[CGD 77-063, 44 FR 66530, Nov. 19, 1979, as amended by CGD 79-148, 45 FR 54039, Aug. 14, 1980]

§ 164.03 Incorporation by reference.

(a) Certain materials are incorporated by reference into this part with the approval of the Director of the Federal Register. The Office of the Federal Register publishes a table, "Materials Approved for Incorporation by Reference," which appears in the Findings Aids section of this volume. In that table is found the date of the edition approved, citations to the particular sections of this part where the material is incorporated, addresses where the material is available, and the date of the approval by the Director of the Federal Register. To enforce any edition other than the one listed in the table, notice of the change must be published in the FEDERAL REGISTER and the material made available. An approved material is on file at the Office of the Federal Register, Washington, DC 20408 and at Room 440 U.S. Coast Guard Headquarters, 210 Second St. S.W., Washington, D.C.

(b) The materials approved for incorporation by reference in this part are: Radio Technical Commission for Marine Services (RTCM) Paper 12-78 DO-100 dated 12/20/77.

[CGD 81-081, 47 FR 58244, Dec. 30, 1982]

§ 164.11 Navigation underway: General.

The owner, master, or person in charge of each vessel underway shall ensure that:

(a) The wheelhouse is constantly manned by persons who:

(1) Direct and control the movement of the vessel; and

(2) Fix the vessel's position;

(b) Each person performing a duty described in paragraph (a) of this section is competent to perform the duty;

(c) The position of the vessel at each fix is plotted on a chart of the area and the person directing the movement of the vessel is informed of the vessel's position;

(d) Electronic and other navigational equipment, external fixed aids to navigation, geographic reference points, and hydrographic contours are used when fixing the vessel's position;

(e) Buoys alone are not used to fix the vessel's position;

NOTE: Buoys are aids to navigation placed in approximate positions to alert the mariner to hazards to navigation or to indicate the orientation of a channel. Buoys may not maintain an exact position because strong or varying currents, heavy seas, ice, and collisions with vessels can move or sink them or set them adrift. Although buoys may corroborate a position fixed by other means, buoys cannot be used to fix a position; however, if no other aids are available, buoys alone may be used to establish an estimated position.

(f) The danger of each closing visual or each closing radar contact is evaluated and the person directing the movement of the vessel knows the evaluation;

(g) Rudder orders are executed as given;

(h) Engine speed and direction orders are executed as given;

(i) Magnetic variation and deviation and gyrocompass errors are known and correctly applied by the person directing the movement of the vessel;

(j) A person whom he has determined is competent to steer the vessel is in the wheelhouse at all times;¹

(k) If a pilot other than a member of the vessel's crew is employed, the pilot is informed of the draft, maneuvering characteristics, and peculiarities of the vessel and of any abnormal circumstances on the vessel that may affect its safe navigation.

(l) Current velocity and direction for the area to be transited are known by the person directing the movement of the vessel;

(m) Predicted set and drift are known by the person directing movement of the vessel;

(n) Tidal state for the area to be transited is known by the person directing movement of the vessel;

(o) The vessel's anchors are ready for letting go;

¹See also 46 U.S.C. 672, which requires an able seaman at the wheel on U.S. vessels of 100 gross tons or more in narrow or crowded waters or during low visibility.

(p) The person directing the movement of the vessel sets the vessel's speed with consideration for:

(1) The prevailing visibility and weather conditions;

(2) The proximity of the vessel to fixed shore and marine structures;

(3) The tendency of the vessel underway to squat and suffer impairment of maneuverability when there is small underkeel clearance;

(4) The comparative proportions of the vessel and the channel;

(5) The density of marine traffic;

(6) The damage that might be caused by the vessel's wake;

(7) The strength and direction of the current; and

(8) Any local vessel speed limit;

(q) The tests required by § 164.25 are made and recorded in the vessel's log; and

(r) The equipment required by this part is maintained in operable condition.

(s) Upon entering U.S. waters, the steering wheel or lever on the navigating bridge is operated to determine if the steering equipment is operating properly under manual control, unless the vessel has been steered under manual control from the navigating bridge within the preceding 2 hours, except when operating on the Great Lakes and their connecting and tributary waters.

(t) At least two of the steering gear power units on the vessel are in operation when such units are capable of simultaneous operation, except when operating on the Great Lakes and their connecting and tributary waters.

[CGD 74-77, 42 FR 5956, Jan. 31, 1977, as amended by CGD 83-004, 49 FR 43466, Oct. 29, 1984]

§ 164.19 Requirements for vessels at anchor.

The master or person in charge of each vessel that is anchored shall ensure that:

(a) A proper anchor watch is maintained;

(b) Procedures are followed to detect a dragging anchor; and

(c) Whenever weather, tide, or current conditions are likely to cause the vessel's anchor to drag, action is taken

to ensure the safety of the vessel, structures, and other vessels, such as being ready to veer chain, let go a second anchor, or get underway using the vessel's own propulsion or tug assistance.

[CGD 74-77, 42 FR 5956, Jan. 31, 1977]

§ 164.25 Tests before entering or getting underway.

(a) Except as provided in paragraphs (b) and (c) of this section no person may cause a vessel to enter into or get underway on the navigable waters of the United States unless no more than 12 hours before entering or getting underway, the following equipment has been tested:

(1) Primary and secondary steering gear. The test procedure includes a visual inspection of the steering gear and its connecting linkage, and, where applicable, the operation of the following:

(i) Each remote steering gear control system.

(ii) Each steering position located on the navigating bridge.

(iii) The main steering gear from the alternative power supply, if installed.

(iv) Each rudder angle indicator in relation to the actual position of the rudder.

(v) Each remote steering gear control system power failure alarm.

(vi) Each remote steering gear power unit failure alarm.

(vii) The full movement of the rudder to the required capabilities of the steering gear.

(2) All internal vessel control communications and vessel control alarms.

(3) Standby or emergency generator, for as long as necessary to show proper functioning, including steady state temperature and pressure readings.

(4) Storage batteries for emergency lighting and power systems in vessel control and propulsion machinery spaces.

(5) Main propulsion machinery, ahead and astern.

(b) Vessels navigating on the Great Lakes and their connecting and tributary waters, having once completed the test requirements of this subpart, are considered to remain in compli-

ance until arriving at the next port of call on the Great Lakes.

(c) Vessels entering the Great Lakes from the St. Lawrence Seaway are considered to be in compliance with this sub-part if the required tests are conducted preparatory to or during the passage of the St. Lawrence Seaway or within one hour of passing Wolfe Island.

(d) No vessel may enter, or be operated on the navigable waters of the United States unless the emergency steering drill described below has been conducted within 48 hours prior to entry and logged in the vessel logbook, unless the drill is conducted and logged on a regular basis at least once every three months. This drill must include at a minimum the following:

(1) Operation of the main steering gear from within the steering gear compartment.

(2) Operation of the means of communications between the navigating bridge and the steering compartment.

(3) Operation of the alternative power supply for the steering gear if the vessel is so equipped.

(92 Stat. 1471 (33 U.S.C. 1221 et seq.); 49 CFR 1.46(n)(4))

[CGD 77-183, 45 FR 18925, Mar. 24, 1980, as amended by CGD 83-004, 49 FR 43466, Oct. 29, 1984]

§ 164.30 Charts, publications, and equipment: General.

No person may operate or cause the operation of a vessel unless the vessel has the marine charts, publications, and equipment as required by §§ 164.33 through 164.41 of this part.

[CGD 82-055, 48 FR 44535, Sept. 29, 1983]

§ 164.33 Charts and publications.

(a) Each vessel must have the following:

(1) Marine charts of the area to be transited, published by the National Ocean Service, U.S. Army Corps of Engineers, or a river authority that—

(i) Are of a large enough scale and have enough detail to make safe navigation of the area possible; and

(ii) Are currently corrected.

(2) For the area to be transited, a currently corrected copy of, or applica-

(6) requirements for communication and prearrival messages.

(Pub.L. 98-89, Aug. 26, 1983, 97 Stat. 526.)

Historical and Statutory Notes

Effective Date. Section 2(g)(2) of Pub.L. 98-89, Aug. 26, 1983, 97 Stat. 599, provided that: "Section 3715(a) of title 46 [subsec. (a) of this section] (as enacted by section 1 of this Act) is effective on the day after the effective date of the

regulations prescribed by the Secretary under section 3715(b) of title 46 [subsec. (b) of this section]." [Regulations effective Apr. 26, 1984, see 49 F.R. 11170, Mar. 26, 1984.]

§ 3716. Tank washings

(a) A vessel may not transfer cargo in a port or place subject to the jurisdiction of the United States if, before arriving, the vessel has discharged tank washings containing oil or hazardous material in preparation for loading at that port or place in violation of the laws of the United States or in a manner or quantities inconsistent with a treaty to which the United States is a party.

(b) The Secretary shall establish effective control and supervisory measures to carry out this section.

(Pub.L. 98-89, Aug. 26, 1983, 97 Stat. 527.)

§ 3717. Marine safety information system

(a) The Secretary shall establish a marine safety information system that shall contain information about each vessel to which this chapter applies that operates on the navigable waters of the United States, or that transfers oil or hazardous material in a port or place under the jurisdiction of the United States. In acquiring this information, the Secretary shall make full use of publicly available information. The Secretary may by regulation require the vessel to provide information that the Secretary considers necessary to carry out this subsection, including—

- (1) the name of each person with an ownership interest in the vessel;
- (2) details of compliance with the financial responsibility requirements of applicable laws or regulations;
- (3) registration information, including all changes in the name of the vessel;
- (4) the history of marine casualties and serious repair problems of the vessel; and
- (5) a record of all inspections and examinations of a vessel conducted under section 3714 of this title.

(b) On written request from the Secretary, the head of each department, agency, or instrumentality of the United States Govern-

ment shall provide available information that the Secretary considers necessary to confirm the information received under subsection (a) of this section.

(Pub.L. 98-89, Aug. 26, 1983, 97 Stat. 527.)

§ 3718. Penalties

(a)(1) A person violating this chapter or a regulation prescribed under this chapter is liable to the United States Government for a civil penalty of not more than \$25,000. Each day of a continuing violation is a separate violation.

(2) Each vessel to which this chapter applies that is operated in violation of this chapter or a regulation prescribed under this chapter is liable in rem for a civil penalty under this subsection.

(b) A person willfully and knowingly violating this chapter or a regulation prescribed under this chapter shall be fined not more than \$50,000, imprisoned for not more than 5 years, or both.

(c) Instead of the penalties provided by subsection (b) of this section, a person willfully and knowingly violating this chapter or a regulation prescribed under this chapter, and using a dangerous weapon, or engaging in conduct that causes bodily injury or fear of imminent bodily injury to an official authorized to enforce this chapter or a regulation prescribed under this chapter, shall be fined not more than \$100,000, imprisoned for not more than 10 years, or both.

(d) The district courts of the United States have jurisdiction to restrain a violation of this chapter or a regulation prescribed under this chapter.

(e) At the request of the Secretary, the Secretary of the Treasury shall withhold or revoke the clearance required by section 4197 of the Revised Statutes (46 App.U.S.C. 91) of a vessel the owner or operator of which is subject to a penalty under this section. Clearance may be granted on filing a bond or other surety satisfactory to the Secretary.

(Pub.L. 98-89, Aug. 26, 1983, 97 Stat. 527.)

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Bonds and undertakings, see §§ 1521 to 1524.

Jurisdiction and venue in district courts, matters pertaining to, see § 1003 et seq.

Preliminary injunctions and temporary restraining orders, matters pertaining to, see § 5271 et seq.

Sentence and fine, see § 7531 et seq.

easily confused with that for approved life preservers.

§ 35.03-20 Shipboard inspections—TB/ALL.

(a) Each work vest shall be subject to examination by a marine inspector to determine its serviceability. If found to be satisfactory, it may be continued in service, but shall not be stamped by a marine inspector with a Coast Guard stamp. If a work vest is found not to be in a serviceable condition, then such work vest shall be removed from the vessel. If a work vest is beyond repair, it shall be destroyed or mutilated in the presence of a marine inspector so as to prevent its continued use as a work vest.

§ 35.03-25 Additional requirements for hybrid work vests.

(a) In addition to the other requirements in this subpart, commercial hybrid PFD's must be—

(1) Used, stowed, and maintained in accordance with the procedures set out in the manual required for these devices by § 160.077-29 of this chapter and any limitation(s) marked on them; and

(2) Of the same or similar design and have the same method of operation as each other hybrid PFD carried on board.

[CGD 78-174A, 51 FR 4350, Feb. 4, 1986; 51 FR 15497, Apr. 24, 1986]

Subpart 35.05—Officers and Crews

§ 35.05-1 Licensed officers and crews of tankships—T/ALL.

No tankship of the United States shall be navigated unless she shall have in her service and on board such complement of licensed officers and crew, including certificated lifeboatmen and certificated tankermen where required by the regulations in this subchapter, separately stated, as called for in her certificate of inspection.

§ 35.05-5 [Reserved]

§ 35.05-10 [Reserved]

§ 35.05-15 Watchman for a tank vessel—TB/ALL.

(a) *Manned tank vessel.* At least one member of the crew of a manned tank vessel shall be on board at all times except when the vessel is gas free or is moored at a dock or terminal at which watchman service is provided.

(b) *Unmanned barge.* (1) A strict watch of each unmanned barge in tow must be maintained from the towing vessel while underway.

(2) When a barge is moored and contains more oil than the normal cln-gage and unpumpable bilge or sump residues, the barge must be kept under surveillance by a person responsible for the security of the barge and for keeping unauthorized persons off the barge.

(3) When a barge is moored and contains no oil but is not gas free:

(i) It must be maintained under surveillance as required in paragraph (b)(2) of this section; or

(ii) All cargo tank hatches must be clearly marked in not less than three inch lettering "Danger—Keep Out," and all hatch covers must be closed and dogged down in such a way that the hatch cannot be opened by the use of bare hands alone.

[CGFR 65-50, 30 FR 16704, Dec. 30, 1965, as amended by CGD 80-009, 48 FR 36459, Aug. 11, 1983]

§ 35.05-20 Physical condition of crew—TB/ALL.

No person shall be engaged as a member of the crew on a tank vessel if he is known by the employer to be physically or mentally incapable of performing the duties assigned him.

§ 35.05-25 Illness, alcohol, drugs—TB/ALL.

(a) No person, known by the individual in charge of a tank vessel to be under the influence of liquor or other stimulant, or to be ill to such an extent as to unfit him for any particular service on the tank vessel, shall be allowed to perform such service while in such condition.

(b) When a member of the crew of a tank vessel which is loading bulk cargo of Grade A, B, or C arrives at the gangway and is observed to be in an intoxicated condition, he shall not be permitted to board the vessel without escort.

Subpart 35.07—Logbook Entries

§ 35.07-1 Application—TB/ALL.

(a) Except as specifically noted, the provisions of this subpart shall apply to all tank vessels.

§ 35.07-5 Logbooks and records—TB/ALL.

(a) *General—TB/ALL.* Under various statutes or by regulations in this subchapter, specified tank vessels shall have certain logbooks or records, and, when the occasion arises, it is the duty of the master or person in charge to place therein specific entries as required by law or regulations in this subchapter.

(b) *Official Logbook—TB/OC.* R.S. 4290, as amended (46 U.S.C. 201), states: "Every vessel making voyages from a port in the United States to any foreign port, or, being of the burden of 75 tons or upward, from a port on the Atlantic to a port on the Pacific, or vice versa, shall have an Official Logbook; * * *." This Official Logbook is furnished gratuitously to masters of United States' flag vessels by the Coast Guard, as Form CG-706B or CG-706C, depending upon the number of persons employed as crew. There is printed in the first several pages of this Official Logbook various acts of Congress relating to logbooks and the entries required to be made therein. When a voyage is completed, or after a specified period of time is completed, the Official Logbooks with required entries therein shall be filed with the Officer in Charge, Marine Inspection, at or nearest the port where the vessel may be.

(c) *Logs or records—TB/ALL.* For vessels other than those required to have Official Logbooks by R.S. 4290, the owners, operators, and/or masters are to supply their own logs or records in any form desired, which will be considered to take the place of the Official Logbooks and may be used for the

purpose of making entries therein as required by law or regulations in this subchapter. Such logs or records are not filed with the Officer in Charge, Marine Inspection, but shall be kept available for review by a marine inspector for a period of one year after the date to which the records refer, except for separate records of tests and inspections of firefighting equipment which shall be maintained with the vessels' logs for the period of validity of the vessels' certificate of inspection.

§ 35.07-10 Actions required to be logged—TB/ALL.

(a) *General—TB/ALL.* The actions and observations noted in this section shall be entered in the Official Logbook or in logs or records considered to take place of the Official Logbooks. This section contains no requirements which are not made in specific laws or in other regulations in this subchapter, the items being merely grouped together for convenience.

(b) *Entries—T/ALL.* Entries shall be made in the logs of tankships with respect to the following:

(1) Fire and lifeboat drills. Weekly. See § 35.10-5.

(2) Electric power-operated lifeboat winches. Once in each three months. See § 35.10-7.

(3) Draft and load line marks. For tankships of 150 gross tons and over, prior to leaving port for ocean, coastwise, and Great Lakes voyages only. See 46 U.S.C., sections 85e and 88e, and § 35.20-5.

(4) Steering gear tests. Prior to departure, or for tank ships on voyages of less than 48 hours duration or tankships operating on lakes, bays, sounds and rivers, once every week. See § 35.20-10.

(5) Fuel oil data. Upon receipt of fuel oil on board to be used as fuel. See § 35.25-10.

(6) Line-throwing appliances. Once every three months. See § 35.10-1(c).

(7) Inspections and tests of firefighting equipment. Once every year. See § 31.10-18 of this subchapter.

(8) Operation and inspection of the emergency lighting and power sys-

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

MAR 27 1990

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By [Signature] Deputy

UNITED STATES OF AMERICA,

Plaintiff

v.

EXXON CORPORATION

and

EXXON SHIPPING COMPANY,

Defendants

SUPERSEDING
INDICTMENT

Criminal No. A90-015

Count I: Clean Water Act
Vio. 33 U.S.C. §§ 1311(a),
1319(c)(1)

Count II: Refuse Act
Vio. 33 U.S.C. §§ 407, 411

Count III: Migratory Bird
Treaty Act

Vio. 16 U.S.C. §§ 703,
707(a)

Count IV: Ports and Waterways
Safety Act

Vio. 33 U.S.C. § 1232(b)(1)
Count V: Dangerous Cargo Act
Vio. 46 U.S.C. § 3718(b)

COUNT ONE

The grand jury charges that:

1. Defendant EXXON CORPORATION is a corporation incorporated under the laws of the State of New Jersey.
2. Defendant EXXON SHIPPING COMPANY is a corporation incorporated under the laws of the State of Delaware. At all times pertinent to this indictment, EXXON CORPORATION was the sole shareholder of EXXON SHIPPING COMPANY, and EXXON SHIPPING COMPANY had a single director who reported to Exxon USA, a division of EXXON CORPORATION.
3. EXXON SHIPPING COMPANY was incorporated in 1973.

Superseding
INDICTMENT

In 1982, EXXON SHIPPING COMPANY took over the functions of the Marine Department of Exxon USA, the primary purpose of which was to transport petroleum products for Exxon USA. EXXON CORPORATION or its affiliates were the source of all of EXXON SHIPPING COMPANY's initial assets and personnel, and EXXON CORPORATION continued to be the primary source of capital for EXXON SHIPPING COMPANY at all times pertinent to this indictment.

4. At all times pertinent to this indictment, EXXON SHIPPING COMPANY operated oil tankers for the benefit of EXXON CORPORATION; one such tanker was the Exxon Valdez. EXXON CORPORATION guaranteed the debt issued by EXXON SHIPPING COMPANY to build the Exxon Valdez.

5. At all times pertinent to this indictment, EXXON SHIPPING COMPANY's headquarters were in Houston, Texas, in the same building that housed the headquarters of Exxon Company USA. EXXON CORPORATION provided all of the computer, medical, accounting, administrative, and legal services used by EXXON SHIPPING COMPANY. EXXON CORPORATION set policies for EXXON SHIPPING COMPANY regarding capital expenditures, personnel, employee compensation, alcohol abuse, and contracting.

6. At all times pertinent to this indictment, the president of EXXON SHIPPING COMPANY reported to a vice-president of Exxon Company USA. All major investments by EXXON SHIPPING COMPANY were subject to the approval of EXXON CORPORATION.

7. At all times pertinent to this indictment, EXXON SHIPPING COMPANY was acting for the benefit of EXXON CORPORATION, and within the scope of authority granted it by EXXON

CORPORATION.

8. At all times pertinent to this indictment, EXXON SHIPPING COMPANY employed "able seamen" and officers aboard the Exxon Valdez who were responsible for the operation, direction, and control of the Exxon Valdez.

9. On March 23, 1989, at approximately 9:20 p.m., the Exxon Valdez departed from the Port of Valdez, Alaska carrying 53 million gallons of crude oil owned by EXXON CORPORATION, bound for an EXXON CORPORATION facility in Long Beach, California.

10. On March 23, 1989, shortly before midnight, the Exxon Valdez deviated from the designated shipping lanes in Prince William Sound. These lanes are used by ships entering or leaving the Port of Valdez, Alaska, and establish a route for the passage of ships.

11. After the Exxon Valdez deviated from the designated shipping lanes, the master left the ship's bridge. The ship then proceeded under the direction of an officer who lacked the required Coast Guard certification for pilotage in Prince William Sound, and a helmsman who was known by EXXON SHIPPING COMPANY to be incompetent at performing his assigned duties.

12. On March 24, 1989, shortly after midnight, the Exxon Valdez ran aground on Bligh Reef, a well-known and well-marked navigational hazard, and discharged more than ten million gallons of crude oil into Prince William Sound.

13. From March 24, 1989 through November 9, 1989, crude oil that discharged from the Exxon Valdez migrated more

than 700 miles from Bligh Reef, contaminating the waters and shorelines of Prince William Sound, the Gulf of Alaska, Kenai Fjords National Park, the Katmai National Park and Preserve, the Aniakchak National Monument and Preserve, the Alaska Peninsula National Wildlife Refuge, the Alaska Maritime National Wildlife Refuge, the Becharof National Wildlife Refuge, the Kodiak National Wildlife Refuge, the lower Kenai Peninsula, the Barren Islands, Kodiak Island, Shelikof Strait, and other parts of the Alaska Peninsula, causing the death of more than 36,000 migratory birds, including more than 100 bald eagles, and numerous other varieties of wildlife.

14. On March 24, 1989, in the District of Alaska, and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY did negligently cause pollutants, namely more than ten million gallons of crude oil, to be discharged from a point source, namely the tank vessel Exxon Valdez, into Prince William Sound, a navigable water of the United States, without a permit, all of which is in violation of and contrary to Title 33, United States Code, Sections 1311(a) and 1319(c)(1).

COUNT TWO

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. On March 24, 1989, in the District of Alaska and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY unlawfully did throw, discharge and deposit, and did cause, suffer and procure to be thrown, discharged and deposited, refuse matter, namely more than ten million gallons of crude oil, from a ship, namely the Exxon Valdez, into Prince William Sound, a navigable water of the United States, without a permit, all in violation of and contrary to Title 33, United States Code, Sections 407 and 411.

COUNT THREE

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. From on or about March 24, 1989 to on or about September 25, 1989, in the District of Alaska and elsewhere, the defendants EXXON CORPORATION and EXXON SHIPPING COMPANY, without being permitted to do so as required by law, did kill migratory birds, all in violation of and contrary to Title 16, United States Code, Sections 703 and 707(a) and Title 50, Code of Federal Regulations, Section 21.11.

COUNT FOUR

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. On March 23 and March 24, 1989, in the District of Alaska and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY did willfully and knowingly violate a regulation prescribed under Title 33, United States Code, Chapter 25, in that defendants, being the owners of the tank vessel Exxon Valdez, and the master of the Exxon Valdez, acting as the agent of the defendants, did willfully and knowingly fail to ensure that the wheelhouse of the Exxon Valdez, while underway, was constantly manned by persons who directed and controlled the movement of the vessel, each of whom was competent to perform that duty, all in violation of and contrary to Title 33, United States Code, Section 1232(b)(1), and Title 33, Code of Federal Regulations, Section 164.11(b).

COUNT FIVE

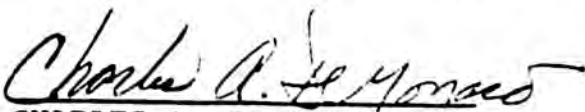
The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.
2. On March 23 and March 24, 1989, in the District of Alaska and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY did willfully and knowingly violate a regulation prescribed under Title 46, United States Code, Chapter 37, in that defendants did employ and cause persons to be engaged on the crew of the tank vessel Exxon Valdez, knowing such persons to be physically and mentally incapable of performing the duties assigned them, all in violation of Title 46, United States Code, Section 3718(b), and Title 46, Code of Federal Regulations, Section 35.05-20.

A true bill,


Foreperson


MARK R. DAVIS
Acting United States Attorney


CHARLES A. De MONACO
Assistant Chief
Environmental Crimes Section
U.S. Department of Justice

U.S. rejects prosecution of Alyeska

Justice: Decision best for public

By DAVID WHITNEY
Daily News reporter

WASHINGTON — The Justice Department said this week it decided not to prosecute Alyeska Pipeline Service Co. for making false statements about its ability to respond to oil spills in Alaska's Prince William Sound because exempting the company from criminal charges was "in the best interests of the public."

The Justice Department was responding to a suggestion last week from Rep. George Miller, D-California, that Alyeska face criminal charges because it didn't keep its cleanup promises when the Exxon Valdez ran aground two years ago and spilled about 10.8 million gallons of North Slope



crude. Alyeska has been broadly criticized for not having sufficient equipment in working order available to respond to the spill as it had promised in its oil-spill contingency plans.

Instead of pursuing a case against Alyeska, the Justice Department agreed last month to include a non-prosecution pledge in its \$1 billion settlement with Exxon Corp. The department said that was partly because the most it could have gotten

Please see Page B-3, ALYESKA

Officers arrest murder suspect

ALYESKA: Justice Department rejects prosecution

Continued from Page B-1

out of the pipeline company was a criminal conviction and a \$500,000 fine.

Alyeska, which owns and operates the 800-mile trans-Alaska pipeline and the tanker terminal at Valdez, is owned by seven oil companies, including Exxon.

The Justice Department's disclosure was contained in a memorandum submitted Tuesday to U.S. District Judge H. Russel Holland in Anchorage, before whom the criminal plea bargain with Exxon is pending.

Under the settlement agreements, Exxon will pay \$100 million in criminal fines and restitution for fouling the Sound and another \$900 million to resolve separate state and federal natural-resources damage claims.

for its deal with Exxon, which included harsh penalties for just punishment and deterrence and promotion of respect for the law.

"It is difficult to understand how granting Alyeska and its owner companies immunity from criminal prosecution can conceivably promote respect for the law or meet any of the other sentencing criteria," Miller wrote.

Miller's earlier letter to Holland was last week, when he urged that the judge reject the settlement because it immunizes Alyeska from any federal action. Miller provided internal memos showing the pipeline company knew it could not handle a spill in the Sound and that its owners committee had decided at a January 1988 meeting in Phoenix, Ariz., that it wouldn't promptly respond to spills outside of Valdez Narrows leading into the oil port.

Miller cited the Justice Department's justifications

The Justice Department immediately contacted Miller after his letter was filed with the court last week asking about the material he cited.

Alyeska has denied the material has any relevance to the 1989 oil spill. Isaac, Alyeska's press aide, has said the memo referred to ongoing preparations for submitting a 1990 contingency plan to the state. She said Thursday that Alyeska would have a detailed response to Miller's accusations today.

The Justice Department said it elected not to bring false-statement charges against Alyeska "after carefully weighing" its evidence, the risk of going to trial and other factors.

Among these other factors was that the maximum fine it could get from an Alyeska conviction was \$500,000 and "the unprecedented criminal fines and guilty pleas the government would obtain from Exxon."

I. Payment Terms

A. Amount

<u>Civil</u>	<u>Criminal</u>	<u>Total</u>
\$700 million	\$500 million	\$1.2 billion

B. Schedule

1. W/in 90 days: \$100 m. civil, \$500 m. criminal
2. W/in 1 year thereafter: \$600 million civil

C. Other changes and details

1. The civil settlement will be paid as under the present Consent Decree, that is:
\$72 million to State as reimbursement
\$62 million to feds as reimbursement
Cleanup, etc. deducted as in the present agreement; balance to Trust Fund
2. The criminal payments will be:
\$100 million fine to feds
\$100 million restitution to State
\$300 million restitution to Trust Fund
3. Delete reopener clause
4. Exxon agrees not to take a State tax deduction

II. Payment Mechanism

A. Dedicated Fund issue

Severability clause: Exxon must pay even if the Trust Fund is later determined to be an unconstitutional dedicated fund.

B. Appropriations issues

The process must be constitutional:

1. Appropriations into the Trust Fund must be approved by the legislature.
2. Appropriations from the Trust Fund must also be approved by the legislature.

III. Trust Fund Operations/Public Input

- A. Two members of legislature, appointed by presiding officers, to be ex officio non-voting members of trustee board.
- B. Funding decisions to be made w/ public input through broad-based Citizens Advisory Board (legislature must appropriate as stated above).
- C. Subject to Open Meetings Act & Public Records Act.
- D. Subject to GAO & Leg. Budget & Audit oversight and audit.
- E. Establish procedures per rule-making provisions of Alaska Administrative Procedures Act.

IV. Release of Scientific and Economic Data to the Public

- A. Release of information to be subject of separate agreement between legislature and administration.
- B. State may withhold information only if it obtains an in camera protective order by showing:
 - (1) information is privileged pursuant to Public Records Act and Civil Rules of Procedure; and
 - (2) information would materially and substantially harm State's case in pending litigation.

V. Miscellaneous

- A. Clarify status of archaeological claims.
- B. Clarify ambiguity of Paragraph 13 relating to third party claims
- C. Language to be included in Consent Decree requiring the parties to enter good faith negotiations regarding settlement of third party claims and seek to establish procedures for dispute resolution.

7 David Hall

Valdez

PWS Conservation Alliance

don't have enough info to assess settlement
want broader based representation on T&E's

11
26
17
28
95 + 9 = 104

8 Chuck Tokmoff (see also #1 Seward)

Pres Chenega Corp

Chv Chenega IRA

+ on B $\frac{1}{2}$ Pt Graham + English Bay

9 Paul Kompkoff, Sr

~~Chenega~~ Chenega Bay (see #3 Seward)

10 Tim Martin

Anchorage

more oil spilled when ignited

11 Ted Rayner

Anchorage

more oil beneath the surface

12 Verena Gill

opposes settlement

retire the record - no logging

13 Jeff Parker, Esq.

atty speaks on B $\frac{1}{2}$ of T & S - against settlement
needs damages experts

Dr Carson

Dr Mitchell

Dr Hammond

Dr Cobb

do not put locational parameters on when
the P is to be spent.

14 Stan Wolff

Anch.

Against settlement
We don't have the info in front of us

15 Karen Wood

Ak Center for the Environment

want PWS settled

don't favor settlement

1. not enough money

doesn't detect pollution enough

2 let Alysha off the hook

3 doesn't give full how it will be spent

not enough data to evaluate the settlement

- legislature needs data

- people need the data

Don't know Can't quantify the value of prevention
what type of restoration is needed?

4 Want public input in how \$ is to be spent

16 Thomas Latosh

letter

17 Tim Robertson (in Cordova)

City of Seldovia

shellfish - soft shells

18 Steve Walters

Cordova

19 Melissa Rice (see Cordova yesterday)
Cordova #12

20 Cathy Abarno - Avar
she is a scientist

21

Walt Parker
Anch

Don't accept the settlement
keep agenda open to make suggestions

22

Pamela Brodie

Anch

Sierra Club

don't accept current settlement

1. need to know the damage

(less than the 1 Billion promised)

State must release the info

state should subpoena the economists

State won't even release amt of its
claims

2 worried about makeup of Tecs. How
do they plan to spend the settlement?
Want it to go for acquisition of resources
& studies

Concerned re native shareholders

too much to reimburse cleanup costs

Reimbursement should be directed by
EXRON

23

Walt Saxon Soren

Seldovia

Seldovia oil spill response team

need to have training & equipment to respond

24

Patty Hansen

Seldovia

SOS team adm'r

need more funding for prevention &
response

25

John Kvarford Seldovia

Bd of Dir SOS

& for oil spill prevention & cleanup

26 Larry Smith Homer
Kachemak Resource Institute
doesn't like spill
not enough \$

27 Tom Johnson
Mat Su
1 Conflict of interest by Charlie Cole
2 supports disclosure of information by state
3 settlement not large enough
4 natives feel settlement ignores them. This
is wrong
5 wants Exxon to feel the settlement
\$ 10 B is enough

28 Hal Smith
Homer
1. Exxon should pay up front
2 State should release research results
3 state should not pay Exxon anything to clean
it up

29 Linda Hyde
Whittier
good we are now getting the testimony
from the public

30 Scott Walker Whittier
City Councilman Whittier
need the scientific data

31 Ken Miller Whittier
look at damage assessment grants
need information all release

32 Chris Robert Roberts, Whittier

release information

33 Pete Darcy, Whittier
pres Deckhands Ass'n
don't withhold information
\$10 billions

34 Bob Warner
Arch
wants punitive damages

35 David Vandenberg Van der Borg
As Environmental Lobby

release of studies
greater assurance of participation
in implementation of settlement
want to insure Tees
① do restoration
② coordinate w/ people in affected
areas

36 Chip Thoma
1. Very Concerned 2 felony charges
dropped
2. \$100 m penalty too small
3. doesn't like Ayasha not getting
criminally charged (George Miller)

testified
on criminal
case

Forest Service backwards + incompetent

37 Riki Ott
Oil Refin. Alliance
opposes settlement
not strong enough settlement

[she has master's in oil pollution]
PhD in heavy metals

Tec system does not inspire public confidence
no Compensated consent, too deductible
state too citizens will have to sue state
for release of data.
opposes settlement

38 Greg Seidor

Ex Dir UFR

supports negotiated settlement, but not this
one

No data to support this settlement
failure to require indemnification
of the state.

terms "restore, enhance & rehabilitate"
are vague.

39 Joe Sonnenman

Settlement not in the public interest
increases exec's power @ expense
of legislature - endorses
judiciary, too (settlement)

There must be an appropriation passed.
Look at other uses for the \$ besides putting
it back into affected areas (eg. infant deaths
statewide)

settlement may not be under CWA because
not deposited into Federal Treasury.

40 Leo A. Lard

pay all @ once
\$3 Bil.

41 Bob Van Brocklin (See Cordova #1)

reviewed maps study

several bills didn't pass because
Exxon etc said they'd negotiate the
sever - then didn't.

and Blanche
Coh →

Processors data secret.

Question on § 13C) is very important.

Need answers to question what the
settlement will do to TP rights?

[would extinguishment of TP rights
be in essence an inverse condemnation?]

→ result was a large inventory of
oil spill
poor quality fish. Yet Exxon claimed no effect
on fish price.

Need 6 mos

4/16

Henry

Attorney Gen. Cobb

Plea Agreement

(3)

Don't know why Ayesta.

He didn't see plea agreement.

later

He agreed not to prosecute Exxon @ state level

~~Chiff~~

~~Chiff~~

~~Chiff~~

~~Phillips~~

→ AS → Ask ^{the} criminal statutes

Fran

→ Ask Bailey if there ever was a decision not to prosecute by the Cooper adm'n.

"demand"

It was Exxon's idea not to do it Ayesta.

Gene

Chiff

Hudge

Ni 10

Matt Taimini

3 problems w/ settlement

1. Ayesta should not be released

2. Complete indemnification of AS by Exxon

3. State should not settle the claims where it is a T. ee.

"Trust" claim is for lost resources
non-trust claim is for reimbursement for out of pocket expenses

1. Alaska should not be released

2. Indemnification - Exxon should completely indemnify the state.

Problems w/ RP 32 13(c) + 13(b)
in light of 32

3 State as Trust
scheme developed as part of T & C relationship
It is "a public trust"

→ Delay for 6 mos w/ independent counsel
T & C protection

1. public participation beyond advisory bd.
2. audit of trust
3. open meetings of T & C

4. regulations must be subject to RPTA

Hudson
Kutvick
MAG
Hudson
VVIP
→ Fisheries Enhancement Tax should be
to Regional Agricultural
Assns

added like § 13(d) CP

Raw Fish Tax
40% - 20% state
- 20% MUR.

get
Rb
open
Kutvick
→ Can we use 40% fund for litigation
+ analyze the cab
+ potential for recovery

4/16 Heavy (pm) contd

6/21/89 Heavy letter
only "6" modem means available

his letter (doesn't know whether sent)

Asst AG Richard B Stewart
Gen Counsel ~~Norm~~ ^{Thos} Campbell - lead Tee

Asst AG Stewart
Gen Counsel Campbell

General responsibility as steward

Criminal patterned & judge said no
Rixon suggested plan agreement
US said to view crim & civil as "functionally
related", but judge said "no".

public will have input into regulatory
(Tee ship) process.

Their authority ^{to} is limited by CIOA. Could
only otherwise put Federal into US Treasury.

100 m is far greater than any other fee in evidence
Feds drafted

Wheat
Hester
Kuhner
Amarante
Horton
Halligan
Mo
Hudson
Chiff
Gibson
Mo
Sill

4/23 Greg Eubank
present value $\frac{1}{2}$ B.

value $\$3-8$ B

available $\$B$ the $\frac{1}{2}$ B settlement

3-5 B (probably on higher ^{end of} range)

Cases settled 25-40%

lower $op(25) \times 3 B =$

higher $(40) \times 8 B = 3.2 B$

pre top of present settlement $500 + 150 = \underline{650 \text{ mil}}$

plus rework state expenses.

700 mi

$\frac{700}{570}$ rework for expenses

SFPay Keppan recovery $\$50/\text{gal}$
Chewon hyper

Navarre

subs

tapes

shareholders

1. We are heading in direction of rejecting unless
- a. release of state science, subject to State est's privilege
 - b. lump sum
 - c. Committee to disburse
 - ~~d. other minor issues -~~
~~to state taxes~~
 - d. resolution of Const'l problem
 - e. Minor issues
 - tax (Sato)
 - clarify 3d Party rights
 - ~~new~~ mandatory citizens advisory board
 - Fish enhancement tax

43

EXTRA
FILE
CRIMINAL
CASE

Charles P. Flynn, Esq.
BURR, PEASE & KURTZ
810 N Street
Anchorage, AK 99501
907/276-6100

Ronald L. Olson, Esq.
Allen M. Katz, Esq.
Gregory P. Stone, Esq.
MUNGER, TOLLES & OLSON
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
213/683-9100

Attorneys for ALYESKA PIPELINE SERVICE COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

EXXON CORPORATION; EXXON SHIPPING
COMPANY; ALYESKA PIPELINE SERVICE
COMPANY; AMERADA HESS PIPELINE
CORPORATION; ARCO PIPE LINE
COMPANY; EXXON PIPELINE COMPANY;
MOBIL ALASKA PIPELINE COMPANY;
PHILLIPS ALASKA PIPELINE CORPORA-
TION; BP ALASKA PIPELINES, INC.;
UNOCAL ALASKA PIPELINE COMPANY
and the T/V EXXON VALDEZ, in rem,

Defendants.

Case No. A91-082 Civ.

RESPONSE OF ALYESKA
PIPELINE SERVICE COMPANY
TO PUBLIC COMMENTS OF
CONGRESSMAN GEORGE MILLER

BURR, PEASE
& KURTZ
A PROFESSIONAL CORPORATION
810 N STREET
ANCHORAGE, AK 99501
907/276-6100

ACE 417672

Congressman George Miller has submitted a letter to the Court, we assume as a public comment on the proposed Consent Decree. In it, he makes three principal points: (1) Alyeska Pipeline Service Company ("Alyeska") was aware that it could not prevent environmental damage if a major spill occurred in Prince William Sound, but did not disclose this fact, thereby misleading the State and other regulators; (2) Alyeska did not have the necessary equipment available at the time of the EXXON VALDEZ grounding; and (3) Alyeska had "secretly decided," prior to the EXXON VALDEZ grounding, that it would not respond to an oil spill in Prince William Sound.

We respectfully submit that Congressman Miller is wrong on each count. First, it was clearly stated in Alyeska's 1987 Oil Spill Contingency Plan ("OSCP"), and well known to the State and other regulators, that despite the best efforts of Alyeska and the ship owner, a major oil spill in Prince William Sound would result in significant environmental damage.

Second, Alyeska had available all of the equipment identified in the OSCP and responded in accordance with the OSCP. Third, as Alyeska's response to the EXXON VALDEZ grounding demonstrated, there was no decision on Alyeska's part -- secret or otherwise -- not to respond to oil spills in Prince William Sound.

It also is significant that the issues raised by Congressman Miller's letter have previously been aired and fully

BURR. PEASE
& KURTZ
A PROFESSIONAL CORPORATION
818 N STREET
NORWICH, AK 99501
907) 276-6100

considered in public hearings, including hearings conducted by the National Transportation Safety Board ("NTSB"), the Alaska Oil Spill Commission, the General Accounting Office, and Congressman Miller's own Subcommittee on Water, Power and Offshore Resources of the Committee on Interior and Insular Affairs. For example, the NTSB heard testimony by ADEC Commissioner Kelso that he felt the OSCP contemplated a cleanup of the EXXON VALDEZ oil spill within 72 hours, a position quite similar to that espoused by Congressman Miller. Yet, the NTSB flatly rejected this interpretation. The NTSB correctly observed that the OSCP stated that in the event of a major spill in Prince William Sound, a long-term cleanup of the beaches would be required.¹

1. THE LIMITATIONS ON ALYESKA'S RESPONSE
CAPABILITY WERE PLAINLY DESCRIBED AND WELL-
KNOWN TO THE REGULATORS.

It has long been known that a major oil spill in Prince William Sound could cause substantial impact on the marine environment. In the 1972 Final Environmental Impact Statement for the Proposed Trans-Alaska Pipeline ("EIS"), for example, the Department of the Interior described the consequences of a major marine oil spill as follows:

¹ National Transportation Safety Board Marine Accident Report, PB90-916405, NTSB/MAR-90/04 ("NTSB Report"), at 150.

Present state-of-the-art equipment and techniques for containing and recovering spilled oil can recover less than 20 percent of oil spilled. Thus, unless extraordinary advances in oil containment and recovery techniques occur, almost all of the oil spilled by the tanker system would constitute an adverse impact on the marine ecosystem.

EIS at 224-25.

In the OSCP, Alyeska reiterated that significant environmental effects would result from a major oil spill in Prince William Sound. For example, under conditions assumed to be ideal for cleanup purposes, Alyeska described the anticipated response to and effect of a hypothetical 4,000-barrel spill in Prince William Sound.² OSCP at 3-50 to 3-53. In this hypothetical scenario, 1/60th the size of the EXXON VALDEZ spill, Alyeska suggested that nearly seven miles of beach would be heavily oiled, that only 1,000 barrels of oil would be collected through the use of skimmers and other oil spill containment equipment, and that the cleanup operation would last for approximately two months. Id. Alyeska also indicated that the

² The portion of the OSCP describing the hypothetical 4,000-barrel spill scenario is attached hereto as Exhibit A.

cleanup efforts would require assistance from private commercial vessels, oil spill cooperatives such as Cook Inlet Response Organization ("CIRO") and Alaska Clean Seas, private oil spill response companies, dispersants contractors, and possibly the U. S. Coast Guard Pacific Strike Team. OSCP at 3-51. Alyeska stated that a crucial element of its response to this hypothetical 4,000-barrel spill would be the use of dispersants, which would require approval of the government's on-scene coordinator before application could begin. OSCP at 3-51 to 3-53. As Alyeska noted, this scenario "presumed a dispersant decision is made soon enough to make application feasible." OSCP at 3-53.

Alyeska's OSCP also described the response to a hypothetical 200,000-barrel spill in Prince William Sound.³ OSCP at 3-54 through 3-56. This hypothetical scenario was again premised on ideal conditions for oil containment and cleanup. OSCP at 3-54.⁴ Yet, as Alyeska observed in its

³ The portion of the OSCP describing this hypothetical 200,000-barrel spill is attached as Exhibit B.

⁴ The seas were assumed to be calm, the winds moderate and the weather mild. The spill was assumed to occur at 6:00 a.m. on the longest day of the year, so that maximum daylight would be available during the initial response. OSCP at 3-54. By contrast, the conditions Alyeska encountered in responding to the EXXON VALDEZ spill were much less favorable. The spill occurred in the middle of the night, the days were short, the temperature was cold, and the snow was deep. Moreover, in less than 72 hours, a severe storm struck, forcing the fleet of response vessels to seek shelter.

OSCP, even under these ideal conditions the response would require the use of private commercial vessels and third-party aircraft, and the assistance of the U. S. Coast Guard Pacific Strike Team, all oil spill contractors in the State of Alaska, local oil spill cooperatives such as CIRO and Alaska Clean Seas, the Association of Petroleum Industry Co-op Managers, the International Bird Rescue Research Organization, and others. Id. Furthermore, as Alyeska pointed out, the effectiveness of a response to such a large spill would be largely dependent on the timely and effective application of dispersants. OSCP at 3-54 through 3-56.⁵

Alyeska explained that, even under ideal conditions, all available means of response would not be able to recover most of the oil before it impacted the shorelines. OSCP at 3-56. Alyeska went on to state that a "long-term cleanup of the spill on the various beaches of Prince William Sound" would, of course, be necessary. Id. In sum, the OSCP clearly described that a hypothetical 200,000-barrel spill, even under

⁵ The on-scene coordinator for the EXXON VALDEZ spill withheld approval for the full scale application of dispersants until more than 48 hours after the spill, apparently in response to objections by State officials.

ideal cleanup conditions, would result in significant environmental impact.

Moreover, the State and other regulators were well aware of the limitations of Alyeska's OSCP and understood that a major spill in Prince William Sound would have significant adverse consequences in the marine ecosystem. Although the evidence supporting this conclusion is too voluminous to cite here, one example should suffice to rebut accusation that Alyeska misled the State into believing that it could contain 200,000 barrels within 72 hours and prevent the oil from impacting the beaches.

As part of the Alaska Oil Spill Commission's investigation of the EXXON VALDEZ oil spill, an investigator for the Commission, Allan Adasiak, interviewed Paul O'Brien. From July of 1982 until February of 1989, Mr. O'Brien was the manager in charge of ADEC's oil pollution control program. In that capacity, he was responsible for the review of all contingency plans submitted to the State. Thus, Mr. O'Brien had oversight responsibility for the State's review of Alyeska's 1987 OSCP.

Mr. O'Brien clearly understood that Alyeska's OSCP did not contemplate the capability to eliminate environmental damage from a major oil spill in Prince William Sound as he candidly stated in response to Mr. Adasiak's questions:

. . . Even in hindsight, I think it is important for people to realize that we never required nor did we ever intend to require that Alyeska have the on-site capability to deal with a catastrophic event. That is an EXXON VALDEZ type of spill. We expected them to have the ability to deal with the more common, smaller operational spills: the 10 barrel, the 100 barrel spills, not the tens of hundreds or tens of thousands of barrels.

. . .

I would not require, even now, Alyeska to have that on-site -- and I keep stressing on-site -- hardware capability to deal with a 10 million gallon spill. No, I would not. Not unless it was a decision, a policy decision made above my level. That should be the place. I would say it is a valid policy call to make as to whether you have an Alyeska with that kind of capability, but you don't, under DEC's current regulations at least, there is no requirement that they have on-site capability to deal with the catastrophic event. So, in retrospect, no, I would still not require that unless it was a policy call made at much higher levels.

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NORAGE, AK 99501
(907) 276-8100

Quite clearly, then, the State of Alaska understood, and any reader of Alyeska's OSCP should have understood, that Alyeska could not prevent environmental harm from occurring in the event of a major spill in Prince William Sound.

2. ALYESKA'S RESPONSE AND ITS EQUIPMENT
AVAILABLE FOR RESPONSE WERE IN ACCORDANCE
WITH THE OSCP.

The OSCP lists various items of oil spill response equipment that Alyeska would have available in the event of an oil spill. OSCP at 3-57. All of this equipment was available at the time of the EXXON VALDEZ grounding. See, e.g., Testimony of Theo Polasek before the Alaska Oil Spill Commission, Vol. II at 30-46 (August 31, 1989). As Mr. Polasek testified, "We had our equipment deployed, we had our boom out, and we had done what we promised to do." Id. at 41. The contention that Alyeska did not have the required equipment available at the time of the spill is incorrect.

Congressman Miller has also suggested, however, that Alyeska did not deliver its equipment to the scene of the spill as promptly as it suggested it might in one hypothetical scenario. Again, we must respectfully disagree with Congressman Miller.

As noted above, the difference between the actual event and the hypothetical scenario was, literally, the difference between night and day. It is not surprising that the actual delivery of equipment took longer under adverse conditions of winter, cold and darkness than under ideal conditions. Alyeska's performance must be judged in light of the actual circumstances, not against a hypothetical ideal.

Furthermore, in the hypothetical scenario it was assumed that there was no risk of the loss of the tanker or additional cargo and that containment would be the first priority. OSCP at 3-54. In the instant case, however, the Coast Guard and others at the scene quickly determined that the EXXON VALDEZ was potentially unstable and its remaining cargo of some 43 million gallons of oil was in jeopardy of spilling. Thus, the first priority became lightering, not containment. See, e.g., Alaska Oil Spill Commission, Vol. II at 34-35 (August 31, 1989); NTSB Report at 145.

In sum, the time required for Alyeska's response equipment to arrive on the scene was reasonable under the circumstances and consistent with the OSCP.

Furthermore, had Alyeska been able to respond more quickly, as Congressman Miller contends it should have, the consequences of the spill would not have been significantly

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(907) 276-8100

ameliorated. As the NTSB concluded, "The 10-hour loss [of time] had no material impact on the cleanup because of the size of the spill." NTSB Report at 145.

3. ALYESKA NEVER DECIDED NOT TO RESPOND TO
A MAJOR OIL SPILL IN PRINCE WILLIAM SOUND.

Congressman Miller alleges that Alyeska's owners had secretly decided in advance of the EXXON VALDEZ grounding that Alyeska would not respond to spills in Prince William Sound. This contention is most readily refuted by the fact that Alyeska did respond to the EXXON VALDEZ grounding, which of course took place in Prince William Sound. To the extent, the ARCO Marine telex attached to Congressman Miller's letter, may be read as reporting that Alyeska would not respond to spills in Prince William Sound, it is simply wrong. No such decision was ever made.

During 1988, Alyeska was re-evaluating its oil spill response capabilities in an effort to determine how best to respond -- both immediately and long-term -- to various possible types of oil spills, including a significant spill in Prince William Sound. There were many who thought then, as many think now, that the most effective response to a major spill in open water is the application of dispersants. Another factor considered in these discussions was that it was appropriate to expect the shipper, with the assistance of various

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810 N STREET
ANCHORAGE, AK 99501
071 278-6100

third parties and other oil spill response organizations, to take principal responsibility for the long-term response to a major oil spill. Indeed, both State and federal statutes imposed on the shipper the duty to clean up a spill. Moreover, the responsible State and federal regulators expected the shipper to promptly take responsibility for the long-term cleanup of a major spill, just as they had observed in Alyeska's 1988 "desk-top" drill in which it practiced the transfer of cleanup responsibility to the "spiller."⁶ It is against this setting that the material attached to Congressman Miller's letter should be read.

* * *

In sum, Alyeska's OSCP described, and the State and other regulators were plainly aware that, in the event of a major oil spill in Prince William Sound, substantial quantities of oil would impact the shoreline and environmental damage would occur. It was well understood that the cleanup of such a major incident would take an extended period of time and would require the assistance of numerous third parties and various

⁶ The EXXON VALDEZ Oil Spill -- A Report to the President from Samuel A. Skinner, Secretary, Department of Transportation, and William K. Reilly, Administrator, Environmental Protection Agency, at 13 (May 1989); Testimony of USCG Commander Steven McCall before the NTSB at 1357 (May 20, 1989).

response organizations. It was also understood that the shipper, and not Alyeska, would assume responsibility for the long-term cleanup of the spill.

Alyeska responded to the EXXON VALDEZ oil spill as rapidly and effectively as the situation permitted, and in accordance with the OSCP. Lightering to avoid the possible breakup of the vessel and an even larger spill was the first priority, and containment the second. Within 48 hours the orderly transition of responsibility from Alyeska to Exxon began, and Exxon continued the cleanup efforts initiated by Alyeska.

DATED: April 18, 1991.

BURR, PEASE & KURTZ

MUNGER, TOLLES & OLSON

Ronald L. Olson

Allen M. Katz

Gregory P. Stone

By


Charles P. Flynn

Attorneys for Defendant ALYESKA
PIPELINE SERVICE COMPANY

BURR, PEASE
& KURTZ
A PROFESSIONAL CORPORATION
810 N STREET
ANCHORAGE, AK 99501
'907) 276-6100

Assumptions

For the purposes of this scenario, the following assumptions have been made. The sea state and weather conditions are in and remain in a state conducive to oil containment and cleanup. Sea state is less than 5 feet, currents are less than 1.6 knots, waves are less than 2 feet, and visibility is equal to or greater than 2 miles.

Conditions

The simulated weather is sunny to overcast with some light rain, winds are from the southwest at eight knots, high tide is approximately 6 hours after the incident.

An outbound tanker experiences a steering casualty just prior to commencing a turn in the Valdez Narrows, northwest of Entrance Point. This simulated incident occurs on June 22, 1986, at 6:00 a.m. Within 15 minutes, the tanker goes aground on Potato Point. One wing tank is damaged and the loss of oil is approximately 2,000 barrels per hour for the first hour and 500 barrels for the next four hours. The tanker is able to transfer oil to other tanks to prevent further significant losses of oil. The tanker will move off of the shoal under its own power with tug assist with permission of the U.S. Coast Guard. It will then be moved back to the Valdez Marine Terminal where it will be berthed for offloading and inspection. Figure 306-3 is an oil spill trajectory for this scenario.

The purpose of this scenario is to illustrate how we would respond to this spill of approximately 4,000 barrels in Valdez Arm. Actually, the most likely spill volume for vessels underway in trade with the Valdez Marine Terminal during the expected 30-year operating lifetime of the Marine Terminal is 1,000 barrels. No attempt will be made to describe the circumstances responsible for the mechanical failure or the additional considerations of tanker off-loading, inspection or release from the berth for sailing to the Lower 48.

The majority of the oil impact will be at Potato Point. It will impact an area about 6,000 yards either side of the point of impact of the shoreline and will be approximately 600 yards wide. Within 24 hours, there is a slick in Valdez Arm approximately 1/4 mile wide and 2.4 miles long.

Immediate Response Action

The ship and shoreline, which is heavily oiled, will be boomed by 0900 hours and skimming operations will begin. The two mooring launches each with a Vikoma seapack and two 21-foot workboats will boom the ship and shoreline area. A reconnaissance helicopter is on site, originally our security helicopter which is relieved by an ERA helicopter with a crew out of Anchorage. A tug is on standby to assist the ship, if necessary. At the same time (0600-0900 hrs.), one 26-foot workboat and one 21-foot workboat are in the process of booming Shoup Bay.

By approximately 1100 hours, the barge has been moved into close proximity to the spill site by one of the tugs. The barge has on it various oil spill equipment including the sea skimmer, containment boom, sorbent boom, pumps, various hoses and various containers, such as barrels, bags or bladders. The sea skimmer is placed into a heavily oiled contained area next to the Vikoma boom and commences skimming oil and pumping it into the barge. The Class V and Class VII are in position to skim oil in the Vikoma seapack area, having been towed to the area by one of the tugs. One 19-foot workboat and 2 Jon boats are working in the proximity of the barge to begin washing down the beaches and picking up appropriate oil debris on the beach. The shoreline cleanup is initiated by using small pumps with approximately 50 to 100 pounds per square inch (PSI) pressure to wash down the gravelly beach and to skim the oil from the water surface. A Komara skimmer, working off of a 26-foot workboat, is picking up the oil as it is washed back into the water. At 1100 hours, the oil stops flowing from the tanker as the ship has transferred oil to prevent further loss of significant amounts of oil. By 1200 hours, Shoup Bay and Sawmill Bay have been boomed.

The appropriate government agencies will be notified immediately of the spill. It is presumed the response team will be organized. Alyeska Pipeline Service Company will make a request to apply dispersants to the spill immediately. Request for burning oil and debris along the contaminated areas of the affected shoreline will be made very soon in the response effort to the Alaska Department of Environmental Conservation. See Sections 404, 405 and 901 in the General Provisions for additional information on government relations.

Private commercial vessels from the Valdez small boat harbor would be employed to respond to the oil spill with booming and logistical support. Aircraft from our eleven on-call flight services contractors would be immediately employed to assist in the response with overflights, communication or logistical support. Oil spill cooperatives, such as (CIRO), Cook Inlet Response Organization, or Alaska Clean Seas, and private oil spill response companies would be alerted to provide a backup to our initial response. The dispersants contractors would also be alerted to prepare for movement to Valdez. As an additional contingency, we would request the U.S. Coast Guard Pacific Strike Team to prepare for assisting in the spill response.

If oil was moving differently than the predicted impact area, exclusion booming would be extended to Gold Creek or Mineral Creek. Any change to the scenario weather and/or movement of oil would necessitate exclusion booming to other possible sensitive impact areas in Port Valdez.

By approximately 1800 hours, the high tide, along with an assist from a tug, allows the ship to move off of the shoal. The ship, with the assistance of the tug, returns to the Valdez Marine Terminal and is berthed for off-loading and inspection. The ship is followed back to the berth by the Class VII with 50' of boom, assisted by the one 26-foot workboat and one 21-foot workboat to skim any additional loss of oil. At this time, a fresh crew of contractor personnel are on-scene to replace the majority of Alyeska personnel, along with a relief crew of supervisors to continue the cleanup effort throughout the night.

Preparations are being made for Day 2 operation to be continued with rotating contractor personnel, both laborers and supervisors, from oil spill cooperatives and contractors available in the Anchorage and the West Coast area. Additionally, more boats are brought into the cleanup activity to assist logistically by providing support to run supplies and oil debris to and from the Marine Terminal. Efforts continue primarily on the west shoreline to wash down the gravelly beach and to skim the oil from the water. On Day 2, dispersant approval is given to apply dispersant to the 1/4 mile wide and 2.4 mile long slick in Valdez Arm.

Dispersants

Should a large spill occur in a likely dispersant application area, Alyeska would immediately notify our aerial dispersant applicator contractor, Biegert Aviation, Inc., in Chandler, Arizona to move to Valdez and be prepared to apply dispersants. Concurrently, Alyeska would request the on-scene coordinator to approve the use of dispersants. We would also notify Conair Aviation, Ltd., in Abbotsford, British Columbia to determine its availability and earliest arrival time in Valdez. Preference would be given to the contractor who could arrive in Valdez first. If necessary, we would also contact Air Response, Inc., in Mesa, Arizona. Another alternative is the Biegert Aviation ADDS pack, which could be mounted on a Hercules aircraft and used for dispersant spraying. Again, preference is given to that contractor which could respond in the shortest amount of time. If the Valdez Airport was not available, the base of operations would be Anchorage, Alaska. Various other application equipment could be used depending on the spill size and location; see Figure 306-1.

DISPERSANT APPLICATION EQUIPMENT

EQUIPMENT TYPE	SOURCE/LOCATION	REMARKS
Aircraft - Douglas DC-4	Biegert Aviation, Inc., Chandler, Arizona	9-17 hours response time
Aircraft - Douglas DC-6B	Conair Aviation, Ltd., Abbotsford, B.C., Canada	Must go through U.S. Customs
Vessel - 34-foot workboat	CIRO Raider Cook Inlet Response Organization (CIRO), Kenai, Alaska	Hercable, 50' swath
Helo - buckets	Simplex, CIRO, Kenai, Alaska	40' swath, 300 gal. payload
Large boat spraying package	CIRO Kenai, Alaska	40' swath Need large (125-185') vessel

DISPERSANT APPLICATION EQUIPMENT

Figure 306-1

Along with those notifications, a request would be made to Cook Inlet Response Organization and the Alaska Clean Seas Cooperative to move their dispersants to Anchorage or Valdez. We would also alert the following cooperatives, and would request their dispersants, if appropriate: Clean Bay, San Francisco, California; Clean Coastal Waters, Long Beach, California; and Clean Seas, Santa Barbara, California. Depending on the magnitude of the spill, we might also notify Exxon Chemical Americas in Houston, Texas, which produces Corexit 9527, for additional material. See Figure 306-2 for a summary of highway transport times.

DISPERSANT AVAILABILITY AND TRANSPORT BY HIGHWAY			
Location	Amount	Valdez	Anchorage
Valdez	2,475 gal.	0	10 hrs.
Anchorage	8,800 gal.	10 hrs.	0
Kenai	8,840 gal.	15 hrs.	4 hrs.
Deadhorse	550 gal.	28 hrs.	24 hrs.
San Francisco, CA	5,000 gal.	5 days	6 days
Santa Barbara, CA	14,290 gal.	5 days	6 days
Long Beach, CA	4,000 gal.	6 days	7 days
Houston, TX	50,000 gal./day	6 days	7 days

DISPERSANT AVAILABILITY AND
TRANSPORT BY HIGHWAY

Figure 306-2

Assuming that the on-scene coordinator approves dispersant application, Alyeska could have a plane in Valdez prepared to spray dispersants in as little as nine hours. Average response time is estimated to be 17 hours. The variance in time depends upon the contractors' equipment availability at the time of notification. There are 45 drums of Corexit 9527 available in Valdez. It would require approximately 10 hours to transport 160 drums of Corexit 9527 from Anchorage to Valdez, and approximately 15 hours to transport another 160 drums from Kenai to Valdez. We will make the assumption that approximately 1,000 barrels of oil in the Valdez scenario are in position for dispersant spraying. It has spread to an equilibrium thickness of approximately one-tenth of a millimeter (4×10^{-3} inches) and covers approximately 386 acres. This slick would be approximately 2.4 miles long by $\frac{1}{4}$ mile wide. At a dispersant-to-oil ratio (DOR) of 1 to 20 (1:20), 386 acres would require approximately 38 barrels or 2,090 gallons of dispersant. This dispersal could be accomplished by a DC-6 with a swath width of approximately 175 feet, in 8 to 10 passes. Assuming a payload of 3,000 gallons of dispersants, it would require one sortie, with an elapsed time of approximately $1\frac{1}{2}$ hours if based in Valdez, and 2 hours if based in Anchorage. The payload is the amount of dispersant an aircraft can carry depending upon weather, fuel load and the distance the plane must fly to apply the dispersant. The dispersant-to-oil ratio is determined by the thickness of the oil on the water; and, although oil spreads to varied thicknesses, one would use the thickness that is most representative of the oil in the dispersant area.

COMMUNICATION

Communication between Alyeska boats and aircraft will be accomplished by using VHF radios. Communication from the boats to the Valdez Emergency Center will be relayed through the U.S. Coast Guard in Valdez via the Potato Point repeater and telephone. Alyeska will continue to discuss with the USCG the possibility of the Valdez Marine Terminal tying directly into the Coast Guard radio repeater system during emergencies. This will eliminate the need for telephone relay.

Backup communication can be established using an aircraft on station to relay messages from the spill site to the Valdez Marine Terminal using the VHF radios.

A third method is to use a ship positioned near the spill to relay messages from the VHF radios via the satellite ship-to-shore telephone system.

Continuing Cleanup Activity

The beaches of the impacted areas are primarily rocky walls and gravelly-type beaches. These can probably be most efficiently cleaned by low to high pressure washing while containing the oil and recovering it with skimmers in the water. We anticipate approximately 10 percent of the lost oil will be consumed by weathering and evaporation. It is estimated we will conservatively collect approximately 1,000 barrels of oil in the skimmers, which will be returned to the Terminal via the recovered oil tanks. Approximately 1,000 barrels will be dispersed. Approximately 1,600 barrels will be deposited on the beaches with approximately 1,500 barrels of that recovered by the cleanup methods of washing, adsorbent use and skimming operations. Approximately 100 barrels of oil would not be recovered and will be naturally dispersed.

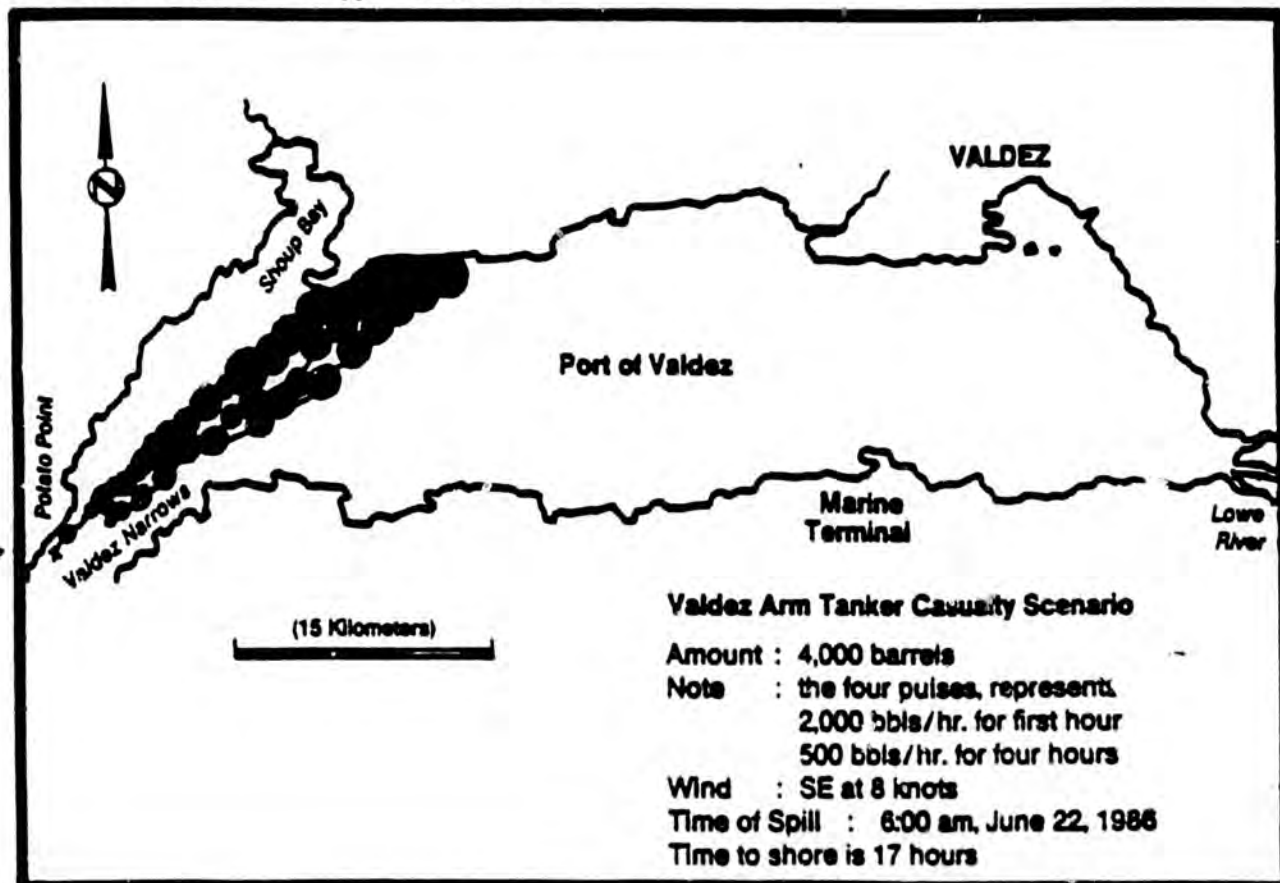
A bird cleaning area would be immediately set up in case there are any significant number of oiled birds affected by the spill. The IBRRC (International Bird Research Rescue Center) would be activated early in the spill to ensure that a facility is available for any oiled birds.

Conclusion

It is anticipated that the cleanup will continue for approximately 2 months. This is primarily to monitor the effects of an extreme high and low tide over a couple of tide changes.

Portions of the cleanup responsibility, for instance, the beach cleanup and/or protection of Sawmill and Shoup Bay, will be given to specific oil spill contractors, so as to release our own personnel back to the operations of the Terminal. Alyeska will supervise the entire cleanup operation. In addition to the above-mentioned resources, members of the Association of Petroleum Industry Co-op managers, a group of West Coast oil spill cooperatives, would be available to provide continuing support in specialized oil spill equipment or supervisory personnel.

The scenario does not address any other aspects of tanker casualties such as fire. It also does not address response during weather conditions which make mechanical recovery impossible. It is presumed a dispersant decision is made soon enough to make application feasible.



VALDEZ ARM OIL SPILL SCENARIO TRAJECTORY

Figure 306-3

Prince William Sound Tanker Casualty: Spill Amount 200,000 Barrels

Alyeska Pipeline Service Company has been requested to respond to a scenario of a 200,000-barrel spill in Prince William Sound. APSC believes it is highly unlikely a spill of this magnitude would occur. Catastrophic events of this nature are further reduced because the majority of tankers calling on Port Valdez are of American registry and all of these are piloted by licensed masters or pilots. Nonetheless, should such an incident occur, the following is our overview of the initial response to that scenario. Attached is an oil spill trajectory of the oil movement. A spill of this magnitude would require considerable resources and logistical operations, the minute details of which are not included in this scenario because the details are not useful in long-term response planning. This scenario will not address the circumstances responsible for the loss of cargo or of the fate of the tanker. Once a tanker is immobilized, the U.S. Coast Guard will determine future movement of the vessel.

Assumptions

The following assumptions are made in presenting the response to the scenario: The sea state and weather conditions are in and remain in a state conducive to oil containment and cleanup. For example, winds less than 15 knots, sea state less than 5 feet, currents less than 1.6 knots, waves less than 2 feet, visibility equal to or greater than 2 miles.

The spill incident occurs through some failure of the tanker crude tanks and does not discuss other disaster possibilities such as collision or fire.

Conditions

In addition to the above assumptions on sea state, the weather is assumed to be conducive to oil spill cleanup and remains in this mode for the response actions. For this particular scenario and trajectory input, the date of June 22 at 6:00 a.m. was chosen for the spill incident with winds from the east at 5 knots. The location is 60° 30' 5" North, and 147° 2' 0" West longitude. The tanker has a cargo amount of 550,000 barrels. The trajectories show two possibilities—one is an instantaneous spill of 200,000 barrels and a second is a 10,000 barrel per hour spill that continues for 20 hours. Figure 306-6 shows the trajectory oil spill movement. It is approximately 30 miles to the site from the Valdez Terminal; an average speed of 12 knots is used to determine the travel time to the area for the Crowley tugs. An approximate speed of 8 knots is used for towed equipment and 20 knots for the workboats without tows. Figure 306-4 is a summary of equipment capacity and response times. Figure 306-5 is a table of equipment in the first response effort.

Immediate Response Actions

On notification of the pollution incident, the following response actions would be simultaneously initiated. The closest empty or light loaded tanker will be directed to the spill site with an estimated maximum arrival time of 12 hours. The initial response would include moving containment booms, skimmer equipment, support equipment and personnel to the site. Additional backup personnel and equipment from the pump stations along the line would be mobilized. Private commercial vessels from the Valdez small boat harbor would be employed to assist in booming and logistical support. Aircraft in Valdez would be employed to assist in the response with overflights, communication or logistics. This would immediately be backed up with air support from our eleven on-call flight services contractors. APSC would request U.S. Coast Guard Pacific Strike Team assistance through the Valdez U.S. Coast Guard office. In addition, all oil spill contractors in the state of Alaska would be asked to mobilize and move to the site as soon as possible to respond to the spill. Also, a request to the local cooperatives, CIRO and Alaska Clean Seas, would be made for any additional equipment that they could supply to this area. See Figure 607-1 for a summary of air transport response times and Figure 607-2 for vessel response times. A request would be made to the Association of Petroleum Industry Co-op Managers to respond with available equipment and personnel that can be located in the West Coast area. The International Bird Rescue Research Organization would be immediately requested to mobilize and prepare for movement to Prince William Sound. A request would be made immediately to the OSC to apply dispersants to the oil slicks. Biegart Aviation and other dispersant contractors would be requested to mobilize in Valdez and be prepared to apply dispersants. A request to open-burn slicks on the ocean and debris and oil on the shoreline would also be made immediately to the OSC.

to open-burn slicks on the ocean and debris and oil on the shoreline would also be made immediately to the OSC.

It is expected the agencies response actions would include the following: The regional response team would be immediately mobilized. The decision process on dispersant application would be begun immediately. There would be a joint meeting between the U.S. Coast Guard, EPA, Alyeska, Alaska Department of Environmental Conservation, U.S. Fish and Wildlife Service and possibly other government entities, to keep all affected parties apprised of the situation and, hopefully, to facilitate the decision making on the response alternatives.

As a result of the initial coordination meeting, it was decided certain response priorities would have to be made as this would be a long-term impact and cleanup situation.

The trajectories indicate that oil will threaten Eleanor Island, Naked Island, Lone Island, Perry Island and the Pigot Bay area, Culross Island and the Main Bay area shorelines. Although it is unlikely oil will reach Main Bay, as a precaution the fish hatchery will be boomed immediately. Some of the exclusion area numbers 79 through 92 may be impacted by the oil movement. The first areas of consideration would likely be exclusion areas 81, 82 and 83.

Second considerations would include areas 79, 80, 89, 90, 91 & 92, and third consideration would likely be sites 84 through 88. These sites are considered sensitive, primarily because they are salmon spawning areas. Additional sites or other areas may have a higher priority, depending on the oil movement and other additional information that may become available. The oil spill trajectory indicates the above priorities are likely to be the most significant. This information is listed in Section 300. One of the oil spill response contractors would be directed to Whittier with the sole task of providing exclusion booming in these areas with the above-listed priority, unless other priorities were agreed to among the agencies and Alyeska at the coordination meeting.

PRINCE WILLIAM SOUND SCENARIO RESPONSE TIMES

Vessel	Storage Cap. (bbls)	Recovery Rate (bbls/hr)	Vessel Speed/Prep Time		Travel to Spill with Prep Time (hrs)
			(knts)	(hrs)	
Tugs	N/A	N/A	12	0	2.5
2 Mooring Launches	N/A	N/A	8	0.5	3
Towing:					
Marco Class V	40	428			
Marco Class VII	80	428			
2 Vikoma Seapacks	w/ 1500' boom each				
2-21' Monarks	N/A	N/A	20	0	1.5
1-26' Monark	N/A	N/A	20	0	1.5
1-26' Monark	N/A	N/A	8	0.25	2.75
Towing:					
1 Vikoma Seapack	w/ 1500' boom				
Tug & Contingency					
Barge with/	4700	N/A	8	2.5	5.0
Sea Skimmer	N/A	536			
Equipment	1976 (bladders)				
Towing:					
2 Vikomas	w/ 1500' boom each				

PRINCE WILLIAM SOUND SCENARIO RESPONSE TIMES

Figure 308-4

Distribution of Oil

It is estimated that approximately 50% of the oil will be recovered at sea, either directly after the spill or at a later time by being washed off of the rocks, contained and skimmed off of the water. Approximately 15 percent of the spill will evaporate during the time it is moving toward the shoreline and prior to removal. Of the oil that remains approximately 15 percent of the oil will be recovered from the shore, primarily by washing the oil off of the rocks and recovering it on the water. Fifteen percent of the oil will naturally disperse and approximately 5 percent will remain in the environment.

Environmental Considerations

Along with the salmon spawning areas and the sea bird colony areas there are some purse seine and drift gill net areas around Esther Island in the Port Wells area. There is also some ground fish activity on the west side of Naked Island, Eleanor Island, Ingot Island and the Port Wells area.

Section 600 of the Prince William Sound Contingency Plan gives us the Sea Bird colony areas that would likely be impacted by a spill of this nature. The Naked Island group, Eleanor Island, Bald Head Criss Island, Dutch group, Perry Island, Fool Island, Egg Rock, and Esther Rock are likely impact areas of the sea bird colonies. There is a possibility that Smith Island and Little Smith Island sea bird colonies may also be impacted with a slight wind change. The most likely effective protection of the sea bird colonies is to prevent the oil from impacting the shore lines at all. This can be done of course only by dispersing the oil at sea, or allowing an open burn of the oil at sea. Since the timely application of dispersants is so important it is necessary that the decision process for allowing dispersant application be approved prior to an incident such as this. It will allow the oil industry to stockpile the necessary dispersants and application means so that resources such as the sea bird colonies can be protected in the most reasonable manner.

This has been a brief initial response to the spill scenario of a 200,000 barrel catastrophic event. There would, of course, be a long term cleanup of the spill on the various beaches of Prince William Sound. In reviewing the aspects of this size spill it becomes very apparent how important it is to have dispersants approved so that they can be used very effectively to prevent the continuing input of oil into the small bays and shorelines in Prince William Sound. Burning also has to be looked at as a very good alternative to the cleanup in Prince William Sound on the various inlets and bays in which oil may accumulate.

PRINCE WILLIAM SOUND SCENARIO INITIAL EQUIPMENT

Initial Equipment to Prince William Sound Oil Spill:

2 Terminal Tugs and Two Mooring Launches

Contingency Barge B&R 126-1 with the following:

- Vikoma seaskimmer and power unit
- Marco power block
- Life raft
- Inflated fenders
- 2 Stop systems (Tanker Lightering Systems)
- 3,000 feet containment boom
- 1,000 feet sorbent boom
- 20 bales sorbent pads
- 1 50,000 gallon bladder
- 1 20,000 gallon bladder
- 1 10,000 gallon bladder
- 1 3,000 gallon bladder
- 2 3" diesel pumps (Komara skimmer pumps) & 100 feet 3" hose

2 21' Monark workboats

2 26' Monark workboats

Towed: { Marco Class V skimmer
Marco Class VII skimmer
5 Vikoma seapacks (7500' of boom)

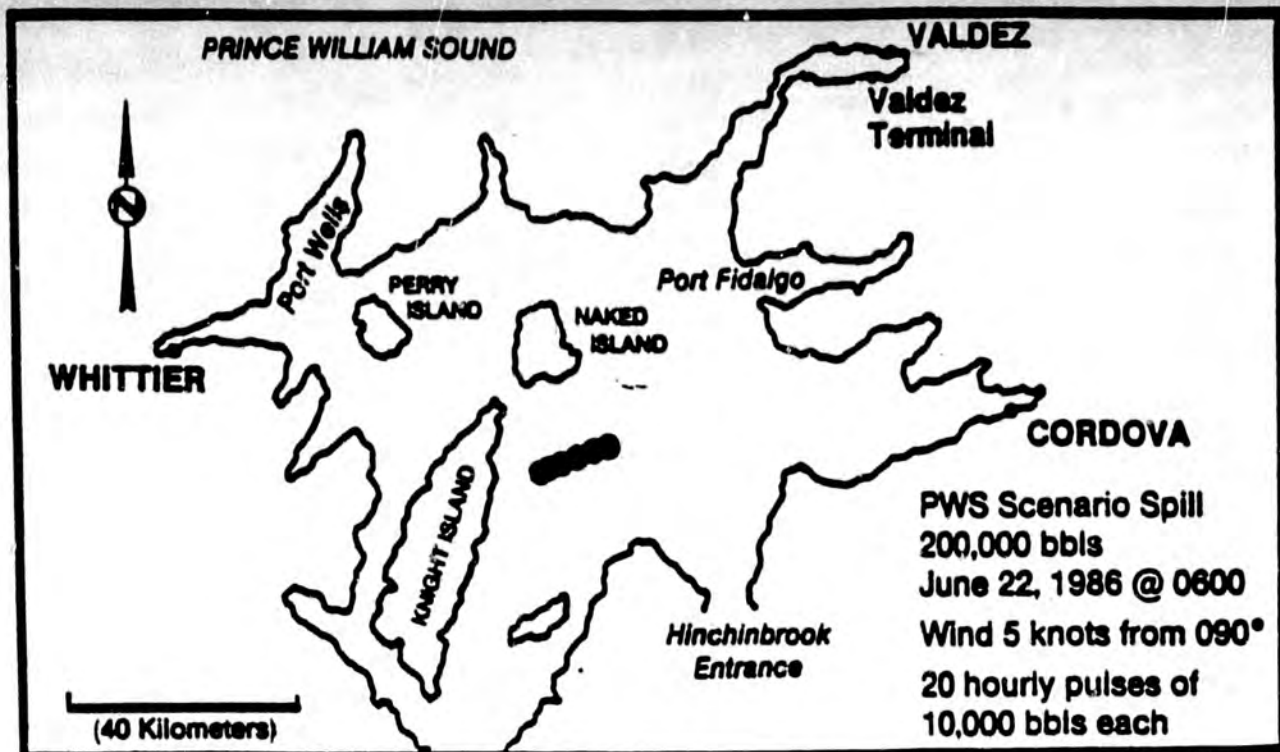
Initial Manpower: 15 minimum and tug crews

Supplies:

- Radios
- Fuel and oil
- Anchors and line
- Life lines
- Life jackets
- Rubber gloves
- Rain suits
- Rubber boots
- Plastic bags
- Cleanup tools
- Batteries

PRINCE WILLIAM SOUND SCENARIO
INITIAL EQUIPMENT

Figure 306-6



PRINCE WILLIAM SOUND OIL SPILL SCENARIO

Figure 306-6

EXHIBIT B

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19 -
ent.

A M E N D M E N T

TO: HCR WO 7-LS1314/A Cook 4/29/91

Page 2, lines 2-4, delete existing language and insert:

Whereas the Senate special committee has issued a report raising a number of concerns regarding the proposed settlement; and

Whereas the House special committee has suggested that certain provisions of the proposed settlement be altered; and

Whereas an extension of the time for withdrawal from the proposed settlement would enable the parties to deliberate without undue haste concerning how best to respond to the actions of the federal district court and the Senate and House special committees; now, therefore:

Page 2, line 8: change "must" to "may"

Page 2, line 9, after "until", insert "at least"

Page 2, lines 12-13, delete existing language and insert language directing that copies of the resolution be sent to the Governor, Honorable H. Russel Holland (United States District Court, 222 West 7th Avenue #54), Richard Stewart (Assistant Attorney General, Environment and Natural Resources Division, Department of Justice) and Jack G. Clarke (Sr. Vice President, Exxon Corporation).

7-LS1314A-
Cook
4/29/91

HOUSE CONCURRENT RESOLUTION NO.
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE SPECIAL COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT

Introduced:

Referred:

A RESOLUTION

1 Relating to the proposed Exxon Valdez oil spill claims settlement.

2 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 WHEREAS the Attorney General has negotiated a proposed settlement of most of the state's
4 claims arising from the Exxon Valdez oil spill; and

5 WHEREAS, under the terms of the proposed settlement, the legislature has been granted an
6 opportunity to review the settlement and to express its approval or disapproval of it, but the period
7 within which the legislature must act on the matter will expire May 3, 1991; and

8 WHEREAS the House of Representatives and the Senate have established special committees
9 to consider the proposal and the committees have worked diligently on the issue; and

10 WHEREAS the proposed settlement of state claims arising from the Exxon Valdez oil spill has
11 been further complicated by the court's recent rejection of the plea agreement entered into by the parties
12 in United States of America v. Exxon Corporation and Exxon Shipping Company, No. A90-015 Cr.; and

13 WHEREAS, under the terms of the proposed agreement, any of the parties, including Exxon,
14 can terminate the proposed settlement on or before May 4, 1991, due to the court's rejection of the plea
15 agreement; and

16 WHEREAS, by letter dated April 25, 1991, Charles Cole, Attorney General, stated that he
17 believes action by the legislature to approve the proposal is not appropriate until Exxon decides whether

1 to terminate it; and

2 **WHEREAS** the legislature needs more time within which to consider the implications of the
3 rejection of the plea agreement and the possible effect of the proposed settlement on the state in light
4 of this rejection.

5 **BE IT RESOLVED** that the Alaska State Legislature requests the parties to the proposed
6 Agreement and Consent Decree signed March 12, 1991, relating to the settlement of State v. Exxon
7 Corporation, et al., United States District Court, District of Alaska, No. A91-083 Civ., to extend the date
8 by which the state and federal governments must withdraw from the agreement on the basis of the
9 legislature's disapproval until May 13, 1991; and be it

10 **FURTHER RESOLVED** that, unless an extension is granted to the legislature to consider the
11 proposed settlement, the Alaska State Legislature disapproves the proposed settlement; and be it

12 **FURTHER RESOLVED** that the Governor is respectfully requested to make copies of this
13 resolution available to the parties to the proposed settlement.

7-LS1324A

Cook

5/1/91

HOUSE CONCURRENT RESOLUTION NO.
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE SPECIAL COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT

Introduced:

Referred:

A RESOLUTION

1 Disapproving the proposed Exxon Valdez oil spill claims settlement.

2 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 WHEREAS the Attorney General has negotiated a proposed settlement of most of the state's
4 claims arising from the Exxon Valdez oil spill; and

5 WHEREAS under the terms of the proposed settlement the legislature has been granted an
6 opportunity to review the settlement and to express its approval or disapproval of it; and

7 WHEREAS the Attorney General has stated in a public meeting that if the legislature fails to
8 approve the proposed settlement the state will take action to terminate the proposal;

9 BE IT RESOLVED by the Alaska State Legislature that it disapproves the Agreement and
10 Consent Decree signed March 12, 1991, relating to the settlement of State v. Exxon Corporation, et al.,
11 United States District Court, District of Alaska, Civil Action No. A91-083; and be it

12 FURTHER RESOLVED that the Governor is respectfully requested to inform the United States
13 Department of Justice that the legislature has disapproved the proposed settlement.

¹ Civil Plaintiffs continue to ask the Court, as they did in their motion dated March 21, 1991, to enter an Order to Impound or Otherwise Preserve All Grand Jury Documents, Subpoenae and Transcripts. Civil Plaintiffs also support the assertions and positions set forth in the letter of U.S. Representative George Miller addressed to this Honorable Court

SONOSKY, CHANDERS, SACHSE & MILLER
900 WEST 5TH AVENUE
SUITE 700
ANCHORAGE, ALASKA 99501
(907) 250-6377

accepting the Plea Agreement, pursuant to Rule 11(e)(2), F.R.Crim.P., until such time as a complete record is before the Court on the impact of the offenses committed by Defendants and their history of violations of the environmental laws.

The Proposed Sentence Cannot Be Properly And Adequately Assessed By The Court Without (1) Full Disclosure Of The Scientific Data and Analyses Accumulated But Withheld By The United States; And (2) After Such Disclosure, Providing An Opportunity For Non-Government Experts to Comment On The Sentence In Light Of The Data.

The Sentencing Reform Act of 1984, as amended, 18 U.S.C. §3553(a), mandates that the Court consider before sentencing: "(1) the nature and circumstances of the offense,..."; and "(2) the need for the sentence imposed- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense...." To make these determinations in this case the Court will need an extensive assessment by the scientific community of the nature, circumstances, and seriousness of the effects of the oil spill at issue.

That inquiry is not possible now because the government has failed to provide the scientific community, the Civil Plaintiffs who are victims of defendants' offenses, and the public in general with the significant and relevant data and analyses which the government has had in its possession for months. The import of the granite barrier to scrutiny that has been maintained by the government, despite persistent requests for disclosure, is described in detail in the Affidavits of eminent scientists Drs. Capuzzo, McElroy, and Teal, and Bruce W. Tripp, whose affidavits were submitted to the Discovery Master, the Honorable David B. Ruskin, as Appendices F through I to "Plaintiffs' Memorandum in Support of Motion for Disclosure of All Scientific Data on the Impact of the Oil Spill on Natural Resources" in Case No. 3AN-89-2533 in the Superior Court for the State of Alaska, Third Judicial District of Anchorage. Because of this barrier, experts

and dated April 8, 1991.

SONOSKY, CHANDERS, SACHSE & MILLER
900 WEST 5TH AVENUE
SUITE 700
ANCHORAGE, ALASKA 99501
(907) 258-6377

outside the government have been unable to provide a full assessment to the Court on the nature, circumstances, and seriousness of the effects of the oil spill at issue. The Court should clearly desire to have such expert opinions in light of the gravity of the offenses, the victims' right to provide comments, and the fact that the government is not acting solely as the enforcer of the law, free of non-prosecutorial bias, but rather is also pursuing this Plea Agreement as part of an overall settlement in which it is a settling defendant.

Perhaps recognizing that this Court could not perform its duties in this criminal proceeding without such information, the U.S. Justice Department, only three days before these comments were due, lodged an 18-page *summary* of 58 scientific studies (reportedly costing \$70 million) with this Court in Civil Action A91-002. This Court should require the government to disclose the complete scientific record, and not just a purported summary. Accordingly, the Court should defer sentencing until: (1) the United States makes available to the Court, the Civil Plaintiffs, and the public the *complete* scientific record needed to appraise "the nature and circumstances of the offenses" involved and "the need for the sentence imposed to reflect the seriousness of the offense...and to provide just punishment for the offense;" and (2) the Court affords the opportunity for comment on the sentence in light of that record. In any event, the Court should defer sentencing until the victims of the offense and experts provide comments in response to whatever the government has released and whatever it and Exxon submit on April 16.

The Fine Agreed To Is Insufficient To Serve The Needs Of Deterrence.

In deciding on the adequacy of the sentence, the Court must decide on the impact of that fine. 18 U.S.C. §3553. Here, the impact of the proposed fine on Exxon will be minimal and few if any purposes of the sentencing statute will be met.

Numerous statements have already been made by Exxon officials observing that the criminal fine (indeed the overall settlement) will have no appreciable effect on the Company's earnings. See, *The New York Times*, Thursday, March 14, 1991, page A16. With the relatively small size of this penalty, the sentence is unlikely to "afford adequate deterrence to [Exxon's] criminal conduct" or "to protect the public from further crimes of the defendant." 18 U.S.C. §3553(a) (2)(B) and (C).² This point is reinforced by the fact that the proposed penalty pales in comparison to the maximum penalty under the proposed Sentencing Guidelines. Under those Guidelines, Exxon's sentence could have been four times the overall loss to the victims of the spill.³ At a minimum, the Justice Department's conservative figure of \$600 million (2 times the victim loss as repeated by the defendants) would have been a much more appropriate penalty. Accordingly, the Court should reject this plea agreement.

**Exxon's History of Offenses Must Be Evaluated
Before The Court Rules On This Plea Agreement.**

The history of defendants' offenses must be evaluated in deciding the appropriateness of the sentence and the Plea Agreement. Civil Plaintiffs urge the Court to obtain a full report on the defendants' history of violations of environmental laws given the considerable record of offenses that is already known:

- A. Destruction of Wetlands in Arthur Kill Waterway Caused By Criminally Negligent Pipeline Rupture

On January 1, 1990, an underwater pipeline ruptured from Exxon's Bayway Refinery near Newark, New Jersey, causing approximately 570,000 gallons of refined oil to pollute

² It is noteworthy that the cost of the government's scientific studies, reported as \$70 million, constitutes 70% of the total fine, \$100 million, stipulated in the Plea Agreement.

³ Indeed, if the sentences on all five charges were to be imposed consecutively, the aggregate statutory maximum for each defendant would be \$3 billion, not \$600 million, again without considering the damages in excess of the \$300 million paid by Exxon to date.

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900 WEST 5TH AVENUE
SUITE 700
ANCHORAGE, ALASKA 99501
(907) 258-6377

miles of shoreline and kill hundreds of birds. A guilty plea to criminally negligent discharge of oil under the Clean Water Act was entered on March 20, 1991 and a criminal fine of \$5 million (including \$4.8 million restitution) was imposed. Exxon admitted that it was negligent in training its employees and maintaining the pipeline.

B. *Exxon Corp. v. Yarema*, 516 A.2d 990 (Md. Ct. Spec. App. 1986)

A punitive damage award was upheld based upon the negligent discharge of gasoline from underground storage tanks.

C. *In the Matter of Exxon Corp.*, No. 84-0914AG (Tennessee Dept. of Health and Environment)

Exxon was adjudged to have violated solid waste regulations through improper storage of hazardous wastes.

D. *Exxon Co., U.S.A., v. State of Texas*, 646 S.W. 2d 536 (Tex. Ct. App. 1982)

Exxon was found to be criminally liable for the discharge of catalytic dust from its refinery.

E. *Exxon Co. U.S.A. v. Dunn*, 474 So. 2d 1269 (Fla. Dist. Ct. App. 1985)

Exxon was found liable for personal and property damage caused by sulphurous gas emission and vibrations.

Once a full record on defendants' history of environmental violations is developed, the Court will be in a position to examine the extent to which the violations evidence a pattern of corporate indifference toward environmental issues. Only by engaging in such an inquiry will the purpose of 18 U.S.C. § 3553 be served.

DATED at Anchorage, Alaska this 11th day of April, 1991.

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON

By: 

Lloyd Benton Miller
Plaintiffs' Liaison Counsel

SONOSKY, CHAMBERS, SACHSE & MILLER

900 WEST 5TH AVENUE

SUITE 700

ANCHORAGE, ALASKA 99501

(907) 258-6377

COHEN, MILSTEIN, HAUSFELD & TOLL

DAVIS, WRIGHT & TREMAINE

STOLL, STOLL, BERNE & LOKTING

WILLIAMS, TRINE, GREENSTEIN & GRIFFITH

CASEY, GERRY, CASEY, WESTBROOK,
REID & HUGHES

DICKSTEIN, SHAPIRO & MORIN

SONOSKY, CHAMBERS, SACHSE & MILLER

Macon Cowles
TRIAL LAWYERS FOR PUBLIC JUSTICE

ON THE BRIEF:

H. Laddie Montague, Jr.

Janice Siegel

BERGER & MONTAGUE, P.C.

Charles S. Crandall
MILBERG, WEISS, BERSHAD, SPECTHRIE
& LERACH

CRIMINAL DOCKET - U.S. District Court

U.S.

(LAST, FIRST, MIDDLE)

Case Filed

Docket No.

Def.

 PO ☐ 97X 3 7X08 (R)
 Misd. ☐
 Felony ☒ District: Off Judge/Magistr.

☐ WRIT
☐ JUVENILE
☐ ALIAS

EXXON CORPORATION

02/27/90

A90-015

 No of
 Del's 2 U.S. MAG.
 CASE NO.

U.S. TITLE/SECTION

OFFENSES CHARGED

ORIGINAL COUNTS

DISM NG GUILTY

 33:1311(a), 1319(c) (1)
 33:407,411
 16:703,707(a)
 33:1232(b) (1)

 CLEAN WATER ACT, CT I
 REFUSE ACT, CT II
 MIGRATORY BIRD TREATY ACT, CT III
 PORTS AND WATERWAYS SAFETY ACT,
 CT IV

 1
 1
 1
 1

☐
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46: 3718(b)

DANGEROUS CARGO ACT, CT V

1

☐

SUPERSEDING INDICTMENT SAME AS ABOVE

☐☐☐TRIAL
TO
OLLAND.

II. KEY DATE

INTERVAL ONE

END ONE AND/OR BEGIN TWO (OR RESTART PERIOD TO TRIAL)

END INTERVAL TWO

KEY DATE

arrest

sum'ns

custody

appears on

complaint

EARLIEST OF

KEY DATE

2/27/90

APPLICABLE

☒ Indictment
☐ filed/unsealed
☐ consent to Magr.
☐ trial on complaint
☐ Information
☐ Felony W/waiver

KEY DATE

 a) ☐ 1st appears on pend-
 ing charge /R40
 b) ☐ Receive file R20/21
 c) ☐ Supsdg: ☐ Ind ☐ Inf
 d) ☐ Order New trial
 e) ☐ Remand f) ☐ G/P Withdrawn

KEY DATE

Dismissal

Pled

guilty

Nolo

After N

After no

Trial (voir dire) began

Jury

N.J.

APPLICABLE

1st appears with or

waives counsel

ARRAIGNMENT

1st Trial Ended

RE-

TRIAL

2nd Trial Began

DISPOSITION DATE

SENTENCE DATE

PTD

Nolo

Pros

FINAL CHARGES DISMISSED

on S.T.

grounds

W.P.

WOP

on de

moti

on g

moti

III. MAGISTRATE

Search Warrant	Issued	DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME
	Return			PRELIMINARY EXAMINATION		
Summons	Issued			OR		
	Served			REMOVAL		
Arrest Warrant Issued				HEARING		
COMPLAINT				WAIVED	NOT WAIVED	Tape Number
Date of Arrest				INTERVENING INDICTMENT		

Show last names and suffix numbers of other defendants on same indictment/information:

D-2 EXXON SHIPPING COMPANY

ATTORNEYS

U.S. Attorney or Asst.

Peter Gamache (AUSA), 271-5071

Mark Davis

Defense: 1 ☐ CJA. 2 ☒ Ret. 3 ☐ Waived 4 ☐ Self. 5 ☐ Non / Other 6 ☐ PD. 7 ☐ CD

D-1:

~~William M. Bankston~~ w/d#34~~BANKSTON & McCOLLUM~~~~550 W. 7th Avenue, Suite 1800~~~~Anchorage AK 99501~~~~(907) 276-1711~~

Non-Resident for D-1:

Patrick Lynch/Warren Christopher

O'MELVENY & MYERS

400 South Hope Street

Los Angeles, CA 90071

and

Charles W. Matthews

Exxon Company, U.S.A.

1839 Exxon Building

800 Bell Street

Houston, TX 77002-4266

D-2:

Robert C. Bundy

Douglas J. Serdahely

BOGLE & GATES

1031 W. 4th Avenue, Suite 600

Anchorage AK 99501

(907) 276-4557

D-1: John F. Clough, III

CLOUGH & ASSOCIATES

431 Franklin Street, Suite 202

Juneau AK 99801 (907) 586-5777

***Charles W. Bender

FINE AND RESTITUTION PAYMENTS

Docket Entries Begin On Reverse Side

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

APPEALS FEE PAYMENTS

IV. NAMES & ADDRESSES OF ATTORNEYS, SURETIES, ETC.

RULE

20 21 40 In C

BAIL • RELEASE

PRE INDICTMENT

Release Date

Bail

Denied

Fugitive

Pers. Re

AMOUNT SET

PSA

Conditions

Date Set

10% Dep

Surety Br

Bail Not Made

Collatera

Date Bond Made

3rd Prty

Other

POST INDICTMENT

Release Date

Bail

Denied

Fugitive

Pers. Re

AMOUNT SET

PSA

Conditions

Date Set

10% Dep

Surety B

Bail Not Made

Collatera

Date Bond Made

3rd Prty

Other

CRIMINAL DOCKET U.S. District Court

U.S.

(LAST, FIRST, MIDDLE)

Case Filed	Docket No.	Def
Mo. Day Yr.		
02 27 90	A90-00015	
No. of Def's	U.S. MAG. CASE NO.	
2		

PO	Assigned	WRIT
097X 3 7-08 (R)		
Misd.	Disp./Sentence	JUVENILE
Felony	Judge/Magistr.	ALIAS

VS.	EXXON SHIPPING COMPANY
OFFENSE ON INDEX CARD	

I. CHARGES	U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS	DISM. NG	GUILTY NOLO
	33:1311(a), 1319(c)(1)	CLEAN WATER ACT, CT. I	1		
	33:407, 411	REFUSE ACT, CT. II	1		
	16:703, 707(a)	MIGRATORY BIRD TREATY ACT, CT. III	1		
	33:1232(b)(1)	PORTS AND WATERWAYS SAFETY ACT, CT. IV	1		
	46:3718(b)	DANGEROUS CARGO ACT, CT. V	1		
	SUPERSEDING INDICTMENT SAME AS ABOVE				

TRIAL
TO
HOLLAND

II. KEY DATE	INTERVAL ONE	END ONE AND/OR BEGIN TWO (OR RESTART PERIOD TO TRIAL)	SUPERSEDING COUNTS	END INTERVAL TWO
KEY DATE	arrest sum'ns custody appears-on complaint	KEY DATE 2-27-90 APPLICABLE	KEY DATE	KEY DATE
EARLIEST OF				
1st appears with or waives counsel	ARRAIGNMENT	1st Trial Ended	RE-TRIAL	2nd Trial Began

III. MAGISTRATE			
Search Warrant	Issued Return	DATE	INITIAL/NO.
Summons	Issued Served		
Arrest Warrant Issued			
COMPLAINT			
Date of Arrest	OFFENSE (In Complaint)		
		INITIAL APPEARANCE DATE	INITIAL/NO.
		PRELIMINARY EXAMINATION OR REMOVAL HEARING	
		DATE Scheduled	
		DATE Held	
		WAIVED NOT WAIVED	
		INTERVENING INDICTMENT	
		Tape Number	
		OUTCOME:	
		DISMISSED	
		HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT	
		HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW	

Show last names and suffix numbers of other defendants on same indictment/information:

D-1: EXXON CORPORATION

ATTORNEYS
U. S. Attorney or Asst.Peter Gamae (AUSA), 271-5071
Mark DavisDefense: 1 ☐ CJA. 2 ☒ Ret. 3 ☐ Waived. 4 ☐ Self. 5 ☐ Non / Other. 6 ☐ PD 7 ☐ CDRobert C. Bundy
Douglas J. Serdahely
BOGLE & GATES
1031 W. 4th Avenue, Suite 600
Anchorage AK 99501
(907) 276-4557

Non-Resident: D-2:

James F. Neal
James F. Sanders
NEAL & HARWELL
2000 One Nashville Place
150 Fourth Avenue North
Nashville, TN 37219
(615) 244-1713

Jan 1 1990

FINE AND RESTITUTION PAYMENTS

Docket Entries Begin On Reverse Side

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

APPEALS FEE PAYMENTS

IV. NAMES & ADDRESSES OF ATTORNEYS, SURETIES, ETC.

DATE DOCUMENT NO.		Docket No. Del		MASTER DOCKET - MULTIPLE DEFENDANT CASE PROCEEDINGS DOCKET FOR SINGLE DEFENDANT		PAGE OF		VI EXCLUDABLE DELAY			LIT Code	Total Days	LIT Code	
		A90-015 CR						Start Date End Date	Lit Code					
1990		(OPTIONAL) Show last names of defendants		V. PROCEEDINGS										
Feb 27	1	Fld INDICTMENT.												
27	2	Fld GRAND JURY MINS re: D-1. No bail set. Summons to be issued.												
27	3	Fld GRAND JURY MINS re: D-2. No bail set. Summons to be issued.												
27	4	Fld MAG MO, re: arraignment as to D-1 is SET for 3/21/90, 9:30 a.m. cc: USA, USM, PO, J. Neal, MAG R.												
27	5	Fld MAG MO, re: arraignment as to D-2 is SET for 3/21/90, 10:00 a.m. cc: USA, USM, PO, J. Neal, MAG R.												
27	--	ISSUED summons as to D-1. WITHDRAWN												
27	--	ISSUED summons as to D-2. WITHDRAWN												
28	6	Fld MAG MO re: arraignment as to both defts is VACATED and RESET for 4/9/90 at 2:30 pm for D-1 and 4/9/90 3:15 pm. for D-2. Status conference SET for both defts for 4/9/90 at 4:30 pm before Judge Holland. cc: USA, J. Neal, C. Mathews, USM, PO, Judge Holland Magistrate Roberts, TR & RW.												
Mar 1	--	REISSUED summons as to D-1.												
1	--	REISSUED summons as to D-2.												
14	7	RETURN exec summons to Exxon Shipping Co - 3-7-90.												
14	8	Fld D-1's entry of appearance - William M. Bankston.												
14	9	Fld D-2's entry of appearance - Robert C. Bundy/Douglas Serdahely.												
14	10	Fld D-2's appli of non-res attys - James F. Neal & James F. Sanders.												
19	11	Fld MAG ORDER allowing non-res attys J. Neal & J. Sanders to practice in Dist of AK. Cy P. Gamache, Bankston, Bundy/Serdahely, J. Neal & J. Sanders.												
19	12	Fld D-1's appli of non-res atty Patrick Lynch.												
19	13	Fld D-1's appli of non-res atty Charles W. Matthews.												
22	14	Fld MAG ORDER allowing non-res atty C. Matthews to practice in Dist of AK. Cy P. Gamache, W. Bankston, C. Matthews & R. Bundy.												
22	15	Fld MAG ORDER allowing non-res atty P. Lynch to practice in Dist of AK. Cy P. Gamache, P. Lynch, W. Bankston & R. Bundy.												
26	16	RETURN exec summons to Exxon Corp - 3-8-90.												
27	17	Fld SUPERSEDING INDICTMENT.												

CONTINUED TO PAGE

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. 13

D-1: EXXON CORPORATION
D-2: EXXON SHIPPING COMPANY

A90-015CR

AO 256A

Yr. | Docket No. | Def.

DATE

PROCEEDINGS (continued)

V. EXCLUDABLE DELAY

(Document No.)

(a) (b) (c) (d)

1990

Mar 27

(18) Fld GRAND JURY MINS re SI as to D-1. Bail N/A, summons to be issued.

27

(19) Fld GRAND JURY MINS re SI as to D-2. Bail N/A, summons to be issued.

28

(--) Issued summons to D-1 & D-2.

27

(20) Fld D-1's appli of non-res attys W. Christopher & C. W. Bender.

30

(21) Fld MAG ORDER allowing non-res atty W. Christopher to practice in Dist of AK for D-1. Cy P. Gamache, W. Bankston, W. Christopher & R. Bundy.

30

(22) Fld MAG ORDER allowing non-res atty Charles W. Bender to practice in Dist of AK for D-1. Cy P. Gamache, W. Bankston, C. Bender & R. Bundy.

Apr 09

(23) Fld MAG CRT MINS re arrgnment on SI as to D-1. Pled NG, status conf @4:30 Judge H's chambers.

09

(24) Fld MAG CRT MINS re arrgnment on SI as to D-2. Pled NG, status conf @4:30 Judge H's chambers.

09

(--) Sent notices to Judge Holland re ST deadlines as to D-1 & D-2. Cy TR.

11

(25) Fld MO setting TBJ as to both defts for Mon, 6-18-90 @9:00 a.m. Deadlines set. Cy P. Gamache, W. Bankston, Bundy/Serdahely, Mag R, Jury Clerk, USM & PO.

11

(26) RETURN exec summons on SI to D-1 - 3-29-90.

11

(27) RETURN exec summons on SI to D-2 - 3-30-90.

20

(28) Fld D-1's mot to declare case complex litigation w/atch exhibit.

20

(29) Fld D-2's mot for cont & to declare case complex litigation w/atch auth & afdvt.

25

(30) Fld ORDER re pretrial proceedings. Deadlines set. Pretrial mots w/d from Mag. Cy Mag R, P. Gamache, W. Bankston, Bundy/Serdahely.

26

(31) Fld pltf's mot to permit defense inspec of GJ testimony w/mot on shorten time. (FILED UNDER SEAL).

27

(31) Fld ORDER granting pltf's mot to permit def inspection of GJ testimony (FILED UNDER SEAL).

Cy P. Gamache

Interval (per Section II) | Start Date | End Date | Ltr. Code | Total Days

TRIAL
TO
HOLLAND.

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

AO 258A

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
1990	(Document No.)				
Apr 27	(32) Fld pltf's resp to defts' mots for cont & to declare case complex litig.				
May 02	(33) Fld ORDER re complex case determination, further proceedings. TBJ cont to date to be deter later. Deadlines set. Cy P. Gamache, W. Bankston, R. Bundy/D. Serdahely, Jury Clerk, USM, PO & TR.	4-20-90		T2	ALL PR MOTION: JUDGE !
07	(34) Fld D-1's notice of w/d by firm of Bankston, McCollum & sub by Clough & Assoc.				
08	(35) Fld D-1's mot for bill of part w/atch memo & declaration.				
09	(34) Fld ORDER allowing firm of Bankston, McCollum to w/d & firm of Clough & Assoc. to sub as cnsl for D-1. Cy P. Gamache, W. Bankston, R. Bundy/D. Serdahely, J. Clough.				
10	(36) Fld D-1's errata w/atch exhibits not included w/#35.				
30	(37) Fld pltf's opp to D-1's mot for bill of part.				
Jun 08	(38) Fld parties joint prop for filing/briefing of mots.				
11	(39) Fld D-1's reply brief in spt of mot for bill of part w/atch exhibits.				
22	(40) Fld ORDER re sched & trial set. Oral argu on D-1's mot for bill of part on 7-20-90 @8:30 a.m. Decision will be entered 7-20-90. Deadlines for all mots. Oral argu on mots to dismiss 10-19-90 @8:30 am. Decision on/about 10-26-90. If req, hearing on pending mots set for 1-25-91 @8:30 am. Pretrial conf 1-25-91 @8:30 am, cr follow hearing, if held on pending mots. Trial 4-10-91 @9:00am. Cy P. Gamache, Bundy/Serdahely, J. Clough, Jury Clerk, USM, PO & TR.	4-20-90 6-22-90 8-22-90 4-10-91		E T	64 231
28	(41) Fld defts' acceptance of sched & waiver of ST rights.				
Jul 20	(42) Fld ORDER granting D-1's mot for bill of part. Deadline set. Cy P. Gamache & R. Bundy.	5-8-90 7-20-90		E	75
23	(43) Fld CRT MINS dtd 7-20-90 re oral argu on D-1's mot for bill of part. Mot granted.				
24	(44) Fld ORDER granting/denying D-1's mot for bill of part w/cy of req for parts w/deletions marked. Cy M. Davis, Bundy/Serdahely & J. Clough				

UNITED STATES DISTRICT COURT
 CRIMINAL DOCKET

U. S. vs

 D-1: EXXON CORPORATION
 D-2: EXXON SHIPPING COMPANY

A90-015CR

AO 256A @

Yr. | Docket No. | Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
<u>1990</u>	(Document No.)				
Jul 31	(45) Fld pltf's bill of part.				
31	(46) Fld stip to permit filing of bill of part on 7-31-90.				
Aug 01	(46) Fld ORDER granting stip re filing of bill of part. Cy M..Davis, Bundy/Serdahely & J. Clough				
13	(47) Fld D-2 application of E. Edward Bruce to appear and part and consent.				
16	(48) Fld ORDER re: GRANTING app to appear and part in 47. cc: M. Davis, R. Bundy, J. Clough.				DKT #
20	(49) Fld D-1's afdvt of svcs re mot to dismiss.				
20	(50) Fld D-1's afdvt of svcs re mot to dismiss ct 1.				
20	(51) Fld D-1's afdvt of svcs re mot to dismiss ct 2.				
20	(52) Fld D-1's afdvt of svcs re mot to dismiss ct 3.				
20	(53) Fld D-1's afdvt of svcs re mot to dismiss ct 4.				
20	(54) Fld D-1's afdvt of svcs re mot to dismiss ct 5.				
20	(55) Fld D-2's mot to dismiss ct 1 for failure to charge an offense w/atch memo.				
20	(56) Fld D-2's mot to dismiss ct 1 for lack of fair notice w/atch memo& exhibit.				
20	(57) Fld D-2's mot to dismiss ct 2 for failure to charge an offense w/atch memo & exhibits.				
20	(58) Fld D-2's mot to dismiss ct 3 for failure to charge an offense w/atch memo.				
20	(59) Fld D-2's mot to dismiss ct 4 for failure to charge an offense w/atch memo & exhibits.				
20	(60) Fld D-2's mot to dismiss or req an election due to dupl nature of ct 4 w/atch memo & exhibits.				
20	(61) Fld D-1's mot to adopt D-2's mot to dismiss ct 1 w/atch memo.				
20	(62) Fld D-1's mot to adopt D-2's mot to dismiss ct 2 w/atch memo.				
20	(63) Fld D-1's mot to adopt D-2's mot to dismiss ct 3 w/atch memo.				

Interval (per Section 11) | Start Date | End Date | Ltr. Total Code Days

D-1: EXXON CORPORATION
D-2: EXXON SHIPPING COMPANY

UNITED STATES DISTRICT COURT
CRIMINAL

AO 256A

A90-015CR

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
1990	(Document No.)				
Aug 20	(64) Fld D-1's mot to adopt D-2's mot to dismiss ct 4 or req election w/atch memo.				
20	(65) Fld D-1's mot dismiss ct 5 for fail to charge a viol of the Dangerous Cargoes Act w/atch memo.				
20	(66) Fld D-1's mot to dismiss based on vicarious liability w/atch memo & exhibits. (MOTION IN RED FOLDER BEHIND CASE FILE)				
21	(67) Fld pltf's mot for ext of time to resp to D-2's mot to dismiss and for discvy.				
21	(67) Fld D-1's errata of memo in spt of mot to dismiss all counts based on vicarious liability (docket# 66).				
22	(68) Fld D-1's afdvt of service re# 67.				
Sep 20	(69) Fld pltf's resp in opp to D-2's mot to dismiss ct I lack of fair not.				
20	(70) Fld pltf's consolid resp in opp to D-1's mots to dismiss cts I-V.				
20	(71) Fld pltf's resp opp to D-2's mot to dismiss ct for failure to charge offense w/atch memo.	III			
20	(72) Fld pltf's resp opp to D-2's mot to dismiss ct or req an election due to its dupl nature.	IV			
20	(73) Fld pltf's resp opp to D-2's mot to dismiss ct for failure to charge an offense.	II			
20	(74) Fld pltf's resp opp to D-2's mot to dismiss ct for failure to charge an offense.	IV			
20	(75) Fld pltf's resp opp to D-2's mot to dismiss ct I for failure to charge an offense w/atch memo.	I			
20	(76) Fld pltf's resp opp to D-1's mot to dismiss all cts insofar as they attempt to charge offense based on vicarious liability.	cts			
26	(77) Fld pltf's not of errata for #76 as to D-1.				
26	(78) Fld pltf's resp opp to D-1's mot to dismiss all cts insofar they attempt charge offens based on vicarious liability w/atch memo.				
Oct 5	(79) Fld D-2's reply to pltf's resp in opp to D-2's mot to dismiss Ct I for failure to charge offense.				

Interval
(per Section II)

Start Date
End Date

Ltr. Total
Code Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

D-1: EXXON CORPORATION
D-2: EXXON SHIPPING COMPANY

A90-015CR

AO 256A @

Yr. | Docket No. | Def.

DATE	PROCEEDINGS (continued)		V. EXCLUDABLE DELAY			
			(a)	(b)	(c)	(d)
<u>1990</u>	(Document No.)					
Oct 5	(80) Fld D-2's reply to pltf's resp in opp to D-2's mot to dismiss Ct I for lack of fair notice.					
5	(81) Fld D-2's reply to pltf's resp in opp to D-2's mot to dismiss Ct IV or require election due its duplicitous nature.					
5	(82) Fld D-2's reply to pltf's resp in opp to D-2's mot to dismiss Ct II for failure to chrg offense.					
5	(83) Fld D-2's reply to pltf's resp in opp to D-2's mot ti dismiss Ct IV for failure to chrg offense.					
5	(84) Fld D-2's reply to pltf's resp in opp to D-2's mot to dismiss Ct III for failure to chrg offense.					
5	(85) Fld D-1's reply memo in supp of mot to dismiss all counts as they attempt to charge offense based on vicarious liability.					
5	(86) Fld D-1's reply memo in supp of mot to adopt mots D-2's to dismiss Ct I on additional grounds applicable to this def.					
5	(87) Fld D-1's reply memo in supp of mot to adopt mot of D-2 to dismiss Ct II on additional grounds applicable to this def.					
5	(88) Fld D-1's reply memo in supp of mot to adopt mot of D-2 to dismiss Ct III on additional grounds applicable to this def.					
5	(89) Fld D-1's reply memo in supp of mot to adopt mots of D-2 to dismiss Ct IV or require election on additional grounds applicable to this def.					
5	(90) Fld D-1's reply memo in supp of mot to dismiss Ct V for failure to charge violation of the Dangerous Cargoes Act.					
9	(91) Fld MO setting status conference for Wed, 10-10-90 at 4:30 p.m. Cy M. Davis, J. Clough, R. Bundy, P. Lynch, C. Matthews.					
19	(92) Fld CRT MIN re oral argumnt on def's mot to dismiss; Crt ordered all mots deny, explain re deny to follow w/i 10 days. Cy M. Davis, J. Clough, R. Bundy.					
29	(93) Fld ORDER deny all mots to dismiss, grant D-2's mot to require election in Ct IV (#60). Cy M. Davis, J. Clough, R. Bundy, P. Lynch, C. Matthews.					

Interval (per Section II) | Start Date | End Date | Ltr. Total | Code Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

D-1: Exxon Corp.
D-2: Exxon Shipping

A90-015C

AO 258A

DATE		PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
			(a)	(b)	(c)	(d)
1990		(Document No.)				
Nov	2	(94) Fld Reporter's transcript re oral argument on def's mots to dismiss dated 10-19-90.				
	9	(95) Fld joint submission for minor modificat of crt's schedul order fld 6-22-90.				
	13	(96) Fld pltf's B/P elect basis of D-2's liability under Ct. IV.				
	13	(97) Fld ORDER re scheduling - new deadlines set; PTMs due 12-11-90, PTC set 1-28-91 at 8:30 A.M. Cy M. Davis, P. Lynch, C. Matthews, R. Bundy, J. Clough.				
Dec	11	(98) Fld pltf's mot in limine re post-ground changes in employee substan abuse and alcohol policy w/atch memo.				
	11	(99) Fld pltf's mot in limine to exclude evid & refer to lawful, post-ground kill of migratory birds by govt for scientific purposes w/atch memo.				
	11	(100) Fld pltf's mot in limine to permit govt to use lead questions on direct exam of witnesses I.D. w/adverse party & perclude use of lead questions w/atch memo.				
	11	(101) Fld pltf's mot in limine to exclude out-of-crt statemnts by govt employees w/atch memo.				
	11	(102) Fld pltf's mot for pre-trial ruling re fed pilotage law apply in Price Wm. Sound w/atch memo.				
	11	(103) Fld D-2's Req per Rule 12 for pretrial determine of applicabil of alter fine provision w/atch memo.				
	11	(104) Fld D-1's mot for sever of defs w/atch memo.				
	11	(105) Fld D-2's consolidat mots in limine w/atch memo.				
	11	(106) Fld d-1's consolidat mots in limine w/atch memo.				
	14	(107) Fld pltf's not of errata re #100 w/atch memo.				
1991						
Jan	7	(108) Fld pltf's mot for order short time w/mot - Fld Under Seal.				
	7	(109) Fld pltf's mot to seal - Fld Under Seal.				
	7	(110) Fld pltf's resp to def's mot for Kastigar Hearing Fld Under Seal. (Placed behind File)				
	7	(111) Fld pltf's resp to def's mot for Kastigar hearing w/atch memos and exhibits. (Placed behind file).				

Interval (per Section II) Start Date Ltr. Total
End Date Code Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

D-1: EXXON CORPORATION
D-2: EXXON SHIPPING

(5)

A90-015CR

AO 256A

Yr. Docket No. Def.

DATE	PROCEEDINGS (continued)		V. EXCLUDABLE DELAY			
	(Document No.)		(a)	(b)	(c)	(d)
1991						
2 Jan 7	(112)	Fld D-1's mot to acc briefs of D-2 in opp to pltf's mots in limine.				
13 7	(113)	Fld d-1's opp to pltf's mot in limine re post-grounding changes in employee policy.				
2 7	(114)	Fld D-2's mot to adopt resp of D-1 to pltf's mot in limine re post-ground changes in employee policy.				
4 7	(115)	Fld D-2's resp to pltf's mot in limine to exclude reference to/evid relat to pltf kill migratory birds.				
15 7	(116)	Fld D-2's resp in opp to pltf's mot in limine to exclude out-of-court statements by pltf's employees.				
16 7	(117)	Fld D-2's resp in opp to pltf's mot to use lead questions on direct exam of 14 witness & preclude def's use on cross-exam.				
54 7	(118)	Fld D-2's resp in opp to pltf's mot for pre-trial ruling re applic of fed pilotage law w/atch memo.				
9 7	(119)	Fld pltf's resp in opp to D-2's req for pretrial determination of applic of aternat fine provision.				
17 7	(120)	Fld pltf's resp in opp to D-2's mot to exci proof certain conduct describ in 4/18 B/P.				
15 7	(121)	Fld pltf's opp to D-1's consol mots in limine.				
8 7	(122)	Fld pltf's opp to D-2's mot to exclu evid of Captain's prior convic for DUI.				
11 7	(123)	Fld pltf's resp in opp to D-1's mot for sever of defs.				
10 7	(124)	Fld pltf's opp to D-2's mot in limine for crt to adopt certain proced in jury select process.				
	8 (125)	Fld ORDER grant pltf's mot (filed under Seal).				
	8 (126)	Fld ORDER grant pltf's mot to seal (filed under Seal).				
7 11	(127)	Fld pltf's reply to D-1's opp to pltf's mot in limine re post ground chng in employee policy.				
5 11	(128)	Fld pltf's repl to D-2's opp to mot in limine to exclude statements by govt employees.				
3 11	(129)	Fld pltf's repl to def's opp to mot in limine re exclude evid to lawful post-ground kill of birds.				
6 11	(130)	Fld pltf's repl to def's opp to mot im limine to permit lead quest on direct exam and preclude use on cross exam.				

Interval (per Section 11) Start Date End Date Ltr. Total Code Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

AO 256A

D-1: EXXON CORP.
D-2: EXXON SHIPPING

A90-015CT

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
<u>1991</u>	(Document No.)				
a Jan 11	(131) Fld pltf's repl to D-2's opp to mot for pretrial ruling of fed pilot law in P.W. Sound.				
11	(132) Fld D-2's supple opp to pltf's pilotage mot w/atch memo.				
11	(133) Fld D-2's reply memo in support of mot in limine re jury selection.				
11	(134) Fld D-2's mot to unseal pltf's exhib 11.				
11	(135) Fld D-2's reply memo re mot to excl evid of prior convict of DUI.				
11	(136) Fld D-2's mot to adopt mot of D-1.				
11	(137) Fld D-2's reply memo re pltf's opp to mot in limine to exclu certain conduct in 4-18 B/P.				
11	(138) Fld D-2's reply memo in support of Rule 12(b) req pretrial determine of applic of alter fine provision w/atch memo.				
11	(139) Fld D-1's reply to pltf's opp to D-2's mot for severance.				
11	(140) Fld D-1's reply to pltf's opp to D-1's consolid mots in limine.				
11	(141) Fld D-1's mot to adopt briefs of D-2 in reply to pltf's opp to mots in limine.				
11	(142) Fld D-2's mot to seal reply memo (Memo Filed Under Seal).				
14	(143) Fld D-2's afdvt of service.				
14	(144) Fld D-2's afdvt of service.				
14	(145) Fld D-2's redacted reply memo to pltf's resp to mot for Kastigar hearing w/atch memo.				
14	(146) Fld D-2's mot to seal corrected cy of reply memo.				
14	(147) Fld D-2's not of errata re memo in #142 (Memo Filed Under Seal).				
24	(148) Fld pltf's opp to D-2's mot to unseal exh #11.				
28	(112) Fld ORDER grant D-1's mot to adopt D-2's opp to mots in limine. Cy M. Davis, J. Clough, R. Bundy, P. Lynch, C. Matthews.				
28	(114) Fld ORDER grant D-2's mot to adopt D-1's resp to mot in limine re post-ground. Cy M. Davis, J. Clough, R. Bundy, P. Lynch, C. Matthews.				

Interval
(per Section 11)

Start Date
End Date

Ltr. Total
Code Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

D-1: EXXON CORP.
D-2: EXXON SHIPPING

A90-015CR

AO 256A ©

Yr. | Docket No. | Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
1991	(Document No.)				
Jan 28	(136) Fld ORDER grant D-2's mot to adopt mot of D-1. cy M. Davis, J. Clough, R. Bundy, P. Lynch, C. Matthews.				
28	(141) Fld ORDER grant D-1's mot to adopt briefs of D-2 reply to opp to mots inlimine. Cy M. Davis, J. Clough, R. Bundy, P. Lynch, C. Matthews.				
28	(142) Fld ORDER grant D-2's mot to seal. Cy M. Davis, J. Clough, R. Bundy, P. Lynch, C. Matthews.				
28	(146) Fld ORDER grant D-2's mot to seal correct cy of reply memo. Cy M. Davis, J. Clough, R. Bundy, P. Lynch, C. Matthews.				
29	(149) Fld CRT MIN re oral arg on all pend mot (pretrial conf to follow; mots at dkt #s 112,114,136,141, 142 & 146 granted.				
29	(150) D-2 mot to file Kastigar discovery plead under seal w/atch proposed mot & memo.				
30	(151) D-1 mot to adopt D-2 mot to file Kastigar disc plead under seal & D-1 mot for prod, unsealing & other access to evid materials necessary for Kastigar hrg.				
30	(152) Fld D-1 not of filing redacted mot & memo for prod, unsealing & other access to evid materials necessary for Kastigar hrg.				
30	(153) Fld D-1 redacted mot for prod, unsealing & other access to evid materials necessary for Kastigar hrg.				
30	(154) Fld D-1 exclud delay statement for mot for prod, unsealing & other access to evid materials necessary for Kastigar hrg & redacted mot for prod, unsealing & other access to evid materials necessary for Kastigar hrg.				
Feb 1	(155) Fld MO re defts rule 12(b) mot requesting pretrial determination of applic of alt fine provision granted, deadlines set. cc cnsl.				
01	(156) Fld pltf response to D-2 mot for production, unsealing & other access to evid materials necessary for Kastigar hrg.				
04	(157) Fld D-2 reply brief in support of mot for prod, unsealing & other evid access necessary for Kastigar hrg.				

Interval
(per Section II)Start Date
End DateLtr. Total
Code Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

AO 256A

D-1: EXXON CORP.
D-2: EXXON SHIPPING

A90-015CR

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
1991	(Document No.)				
Feb 05	(158) Fld REPORTERS TRANSCRIPT re oral arg on all pending mot on 1/28/91 @ 8:30am.				
06	(159) Fld ORDER denying govt mot in limine re use of statements of govt employees. cc M. Davis, R. Bundy, J. Clough, P. Lynch, C. Matthews.				
06	(160) Fld ORDER denying govt mot in limine re use of leading questions. cc M. Davis, R. Bundy, J. Clough, P. Lynch, C. Matthews.				
06	(161) Fld ORDER denying D-1 mot for severance of def. cc M. Davis, R. Bundy, J. Clough, P. Lynch, C. Matthews.				
06	(162) Fld ORDER granting govt mot in limine re evid of bird kills. cc M. Davis, R. Bundy, J. Clough, P. Lynch, C. Matthews.				
06	(163) Fld ORDER denying D-1 mot in limine re use of statements of Exxon exec. cc M. Davis, R. Bundy, J. Clough, P. Lynch, C. Matthews.				
06	(164) Fld ORDER granted in part/denied in part D-2 mot in limine re certain conduct described in bill of particulars. cc M. Davis, R. Bundy, J. Clough, P. Lynch, C. Matthews.				
06	(165) Fld ORDER grant D-1 mot/denying govt mot in limine re post-grounding policy changes. cc M. Davis, R. Bundy, J. Clough, P. Lynch, C. Matthews.				
06	(166) Fld ORDER grant govt mot for pre-trial ruling on fed pilotage requirements. cc M. Davis, R. Bundy, J. Clough, P. Lynch, C. Matthews.				
06	(167) Fld ORDER granting D-2 mot in limine re Hazlewood's DUI convictions. cc M. Davis, R. Bundy, J. Clough, P. Lynch, C. Matthews.				
06	(168) Fld ORDER re prelim pre-trial conf. cc M. Davis, R. Bundy, J. Clough, P. Lynch, C. Matthews.				
08	(169) Fld ORDER re D-2 mot for Kastigar-type hrg granted; D-2 mot for prod, unseal & other access to evid materials for Kastigar hrg to be addressed at or after 2/22/91 hrg. cc: USA, R. Bundy, J. Neal.				
13	(170) Fld D2 mot for determination re 18USC3571(d) does not apply w/atch memo & excludable delay statement.				

Interval
(per Section II)

Start Date
End Date

Ltr. Total
Code Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

D-1: EXXON CORP. (7)

D-2: EXXON SHIPPING

A90-015CR

AO 256A

Yr. Docket No. Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
1991	(Document No.)				
Feb 13	(171) Fld D-1 mot to adopt D2 mot for determination that 18USC3571(d) does not apply.				
13 21	(172) Fld pltf's memo of law re admissibil of evid of marine casualty investigat w/atch afdvt.				
22	(173) Fld CRT MIN re Kastigar Hearing.				
8 27	(174) Fld govt's resp in opp to dft's dkt #170.				
28	(175) Fld ORDER re <u>Kastigar</u> hrg. No challenged evid is protected by dft's claim of immunity. Exxon Shipping's mot to unseal govt's exh. 11 denied. cy: cnsl.				
Mar 5	(176) Fld D-2's reply memo in supp of mot that 18:3571(d) not apply w/atch exh.				
12 11	(177) Fld pltf's prop jury instructions w/atch memo.				
45 11	(178) Fld D-1's brief in supp of obj to pltf's prop jury instruc & in supp of def's req instruc.				
112 11	(179) Fld D-2's joint submiss of prop jury instructions.				
30 11	(180) Fld D-2's memo in supp of prop disput jury instruc.				
41 11	(181) Fld D-2's prop disput jury instructions.				
11 11	(182) Fld D-1's prop jury instructions.				
12 13	(183) Fld pltf's plea agreement.				
5 13	(184) Fld pltf's mot to permit fld documents via fax w/atch afdvt re joint not PCOP.				
2 13	(185) Fld D-1's afdvt fo service.				
5 13	(186) Fld D-1's applic of non-res attorney to appear w/atch exhib.				
1 18	(187) Fld ORDER grant D-1's mot for non-res cnsl, E. Lynch. Cy M. Davis, R. Bundy, J. Clough, USM, PTS.				
5 18	(184) Fld ORDER set hearing re PCOP for 3-22-91 at 9:30, TBJ is vacated. Cy M. Davis, R. Bundy, J. Clough, USM, PTS, JC.				
5 22	(188) Fld pltf's stmt of fact basis for def's guilty plea.				
3 22	(189) Fld ORDER re IOS; guilty plea acc, IOS set 4-24-91 at 8:30, w/atch public not re comments. Public has til 4-11-91. Cy M. Davis, R. Bundy, J. Clough, USM, PO.				

Interval Start Date Ltr. Total
(per Section 11) End Date Code Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

AO 256A

D-1: EXXON CORP.
D-2: EXXON SHIPPING

A90-015

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
1991 Mar 22	(190) Fld CRT MIN re COP; D-1 pleas G ct 3, D-2 pleas G cts I-III, IOS set Wed, 4-24-91. Cy M. Davis, R. Bundy, D. Clough, USM, PTS.				
		Interval (per Section II)			
		Start Date End Date		Ltr. Code	Total Days

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

FILED

MAR 27 1990

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By [Signature] Deputy

UNITED STATES OF AMERICA,)
)
Plaintiff)
)
v.)
)
EXXON CORPORATION)
)
and)
)
EXXON SHIPPING COMPANY,)
)
Defendants)

SUPERSEDING
INDICTMENT

Criminal No. A 90-015

Count I: Clean Water Act
Vio. 33 U.S.C. §§ 1311(a),
1319(c)(1)

Count II: Refuse Act
Vio. 33 U.S.C. §§ 407, 411

Count III: Migratory Bird
Treaty Act

Vio. 16 U.S.C. §§ 703,
707(a)

Count IV: Ports and Waterways
Safety Act

Vio. 33 U.S.C. § 1232(b)(1)

Count V: Dangerous Cargo Act
Vio. 46 U.S.C. § 3718(b)

COUNT ONE

The grand jury charges that:

1. Defendant EXXON CORPORATION is a corporation incorporated under the laws of the State of New Jersey.
2. Defendant EXXON SHIPPING COMPANY is a corporation incorporated under the laws of the State of Delaware. At all times pertinent to this indictment, EXXON CORPORATION was the sole shareholder of EXXON SHIPPING COMPANY, and EXXON SHIPPING COMPANY had a single director who reported to Exxon USA, a division of EXXON CORPORATION.
3. EXXON SHIPPING COMPANY was incorporated in 1973.

Superseding
INDICTMENT

In 1982, EXXON SHIPPING COMPANY took over the functions of the Marine Department of Exxon USA, the primary purpose of which was to transport petroleum products for Exxon USA. EXXON CORPORATION or its affiliates were the source of all of EXXON SHIPPING COMPANY's initial assets and personnel, and EXXON CORPORATION continued to be the primary source of capital for EXXON SHIPPING COMPANY at all times pertinent to this indictment.

4. At all times pertinent to this indictment, EXXON SHIPPING COMPANY operated oil tankers for the benefit of EXXON CORPORATION; one such tanker was the Exxon Valdez. EXXON CORPORATION guaranteed the debt issued by EXXON SHIPPING COMPANY to build the Exxon Valdez.

5. At all times pertinent to this indictment, EXXON SHIPPING COMPANY's headquarters were in Houston, Texas, in the same building that housed the headquarters of Exxon Company USA. EXXON CORPORATION provided all of the computer, medical, accounting, administrative, and legal services used by EXXON SHIPPING COMPANY. EXXON CORPORATION set policies for EXXON SHIPPING COMPANY regarding capital expenditures, personnel, employee compensation, alcohol abuse, and contracting.

6. At all times pertinent to this indictment, the president of EXXON SHIPPING COMPANY reported to a vice-president of Exxon Company USA. All major investments by EXXON SHIPPING COMPANY were subject to the approval of EXXON CORPORATION.

7. At all times pertinent to this indictment, EXXON SHIPPING COMPANY was acting for the benefit of EXXON CORPORATION, and within the scope of authority granted it by EXXON

CORPORATION.

8. At all times pertinent to this indictment, EXXON SHIPPING COMPANY employed "able seamen" and officers aboard the Exxon Valdez who were responsible for the operation, direction, and control of the Exxon Valdez.

9. On March 23, 1989, at approximately 9:20 p.m., the Exxon Valdez departed from the Port of Valdez, Alaska carrying 53 million gallons of crude oil owned by EXXON CORPORATION, bound for an EXXON CORPORATION facility in Long Beach, California.

10. On March 23, 1989, shortly before midnight, the Exxon Valdez deviated from the designated shipping lanes in Prince William Sound. These lanes are used by ships entering or leaving the Port of Valdez, Alaska, and establish a route for the passage of ships.

11. After the Exxon Valdez deviated from the designated shipping lanes, the master left the ship's bridge. The ship then proceeded under the direction of an officer who lacked the required Coast Guard certification for pilotage in Prince William Sound, and a helmsman who was known by EXXON SHIPPING COMPANY to be incompetent at performing his assigned duties.

12. On March 24, 1989, shortly after midnight, the Exxon Valdez ran aground on Bligh Reef, a well-known and well-marked navigational hazard, and discharged more than ten million gallons of crude oil into Prince William Sound.

13. From March 24, 1989 through November 9, 1989, crude oil that discharged from the Exxon Valdez migrated more

than 700 miles from Bligh Reef, contaminating the waters and shorelines of Prince William Sound, the Gulf of Alaska, Kenai Fjords National Park, the Katmai National Park and Preserve, the Aniakchak National Monument and Preserve, the Alaska Peninsula National Wildlife Refuge, the Alaska Maritime National Wildlife Refuge, the Becharof National Wildlife Refuge, the Kodiak National Wildlife Refuge, the lower Kenai Peninsula, the Barren Islands, Kodiak Island, Shelikof Strait, and other parts of the Alaska Peninsula, causing the death of more than 36,000 migratory birds, including more than 100 bald eagles, and numerous other varieties of wildlife.

14. On March 24, 1989, in the District of Alaska, and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY did negligently cause pollutants, namely more than ten million gallons of crude oil, to be discharged from a point source, namely the tank vessel Exxon Valdez, into Prince William Sound, a navigable water of the United States, without a permit, all of which is in violation of and contrary to Title 33, United States Code, Sections 1311(a) and 1319(c)(1).

COUNT TWO

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. On March 24, 1989, in the District of Alaska and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY unlawfully did throw, discharge and deposit, and did cause, suffer and procure to be thrown, discharged and deposited, refuse matter, namely more than ten million gallons of crude oil, from a ship, namely the Exxon Valdez, into Prince William Sound, a navigable water of the United States, without a permit, all in violation of and contrary to Title 33, United States Code, Sections 407 and 411.

COUNT THREE

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. From on or about March 24, 1989 to on or about September 25, 1989, in the District of Alaska and elsewhere, the defendants EXXON CORPORATION and EXXON SHIPPING COMPANY, without being permitted to do so as required by law, did kill migratory birds, all in violation of and contrary to Title 16, United States Code, Sections 703 and 707(a) and Title 50, Code of Federal Regulations, Section 21.11.

COUNT FOUR

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. On March 23 and March 24, 1989, in the District of Alaska and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY did willfully and knowingly violate a regulation prescribed under Title 33, United States Code, Chapter 25, in that defendants, being the owners of the tank vessel Exxon Valdez, and the master of the Exxon Valdez, acting as the agent of the defendants, did willfully and knowingly fail to ensure that the wheelhouse of the Exxon Valdez, while underway, was constantly manned by persons who directed and controlled the movement of the vessel, each of whom was competent to perform that duty, all in violation of and contrary to Title 33, United States Code, Section 1232(b)(1), and Title 33, Code of Federal Regulations, Section 164.11(b).

COUNT FIVE

The grand jury further charges:

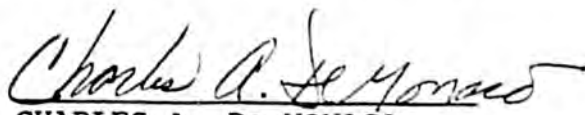
1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. On March 23 and March 24, 1989, in the District of Alaska and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY did willfully and knowingly violate a regulation prescribed under Title 46, United States Code, Chapter 37, in that defendants did employ and cause persons to be engaged on the crew of the tank vessel Exxon Valdez, knowing such persons to be physically and mentally incapable of performing the duties assigned them, all in violation of Title 46, United States Code, Section 3718(b), and Title 46, Code of Federal Regulations, Section 35.05-20.

A true bill,


Foreperson^U


MARK R. DAVIS
Acting United States Attorney


CHARLES A. De MONACO
Assistant Chief
Environmental Crimes Section
U.S. Department of Justice

7-LS1256A

Cook

4/19/91

HOUSE RESOLUTION NO.**IN THE LEGISLATURE OF THE STATE OF ALASKA****SEVENTEENTH LEGISLATURE - FIRST SESSION****BY THE HOUSE SPECIAL COMMITTEE ON THE EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT****Introduced:****Referred:****A RESOLUTION**

- 1 Relating to the rejection of the Proposed Plea Agreement with Exxon Corporation and**
2 Exxon Shipping Company.

3 BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES:

4 WHEREAS, as the elected representatives of the people of Alaska, the House of Representatives
5 has a unique responsibility to assess and articulate the public interest in all matters affecting the welfare
6 of the people and natural resources of this state; and

7 WHEREAS the State of Alaska contains more than 50 percent of the coastline of the United
8 States; and

9 WHEREAS the State of Alaska operates a marine highway system, and the people of the state
10 are highly dependent upon the safe and reliable conduct of maritime operations in international and
11 intracoastal traffic; and

12 WHEREAS the National Transportation Safety Board's investigation into the causes of the
13 Exxon Valdez oil spill established that Exxon Shipping Company "did not adequately monitor the master
14 for alcohol abuse," "did not have a sufficient program to identify, remove from service, if necessary, and
15 provide treatment for employees who had chemical dependency problems," "had manipulated shipboard
16 reporting of crew overtime information that was to be submitted to the Coast Guard," and implemented

1 policies that "do not adequately consider the increase in workload caused by reduced manning," and that
2 "could be conducive to fatigue"; and that a "probable cause of the grounding of the Exxon Valdez was
3 ... the failure of Exxon Shipping Company to provide a fit master and a rested and sufficient crew for
4 the Exxon Valdez"; and

5 **WHEREAS** a successful prosecution of Exxon Shipping Company for violation of the Ports and
6 Waterways Safety Act under the facts of this case would be a significant deterrent to the repetition of
7 the unsafe practices outlawed by that Act; and

8 **WHEREAS** the federal government has the authority and responsibility to ensure that safe
9 practices are followed by vessels operating in Alaska waters; and

10 **WHEREAS** Count IV of the indictment in United States v. Exxon Corporation and Exxon
11 Shipping Company, No. A90-015 Cr., before the United States District Court for the District of Alaska
12 charges Exxon Shipping Company with willfully and knowingly failing to ensure that the wheelhouse
13 of the Exxon Valdez was constantly manned by persons competent to direct and control the movement
14 of the vessel, in violation of 33 U.S.C. 1232(b)(1) and 33 CFR 164.11(b); and

15 **WHEREAS** Count IV charges a felony, punishable by up to five years' imprisonment and a
16 \$50,000 fine, which confirms the serious threat to human life, property, and the environment posed by
17 a failure to operate a vessel safely; and

18 **WHEREAS** the United States' Memorandum in Aid of Sentencing stresses the supervisory
19 misconduct of Exxon Shipping Company and the negligence of its employees to establish a basis for the
20 Plea Agreement under 18 U.S.C. sec. 3553(a)(1); and

21 **WHEREAS** the Proposed Plea Agreement would result in the dismissal of Count IV; and

22 **WHEREAS** the dismissal of Count IV against Exxon Shipping Company will not deter major
23 shippers from engaging in unsafe vessel manning practices; and

24 **WHEREAS** information has recently been made public that indicates a level of culpability on
25 the part of the Exxon Corporation and the Alyeska Pipeline Service Company (Alyeska) that could go
26 well beyond criminal negligence; and

27 **WHEREAS** Alyeska has not been indicted and is not a party to the criminal case, and there is,
28 according to comments previously submitted to the court for its consideration, no precedent for the
29 release of a third party from criminal liability as a part of a plea agreement;

30 **BE IT RESOLVED** that the Alaska House of Representatives respectfully requests the Honorable
31 Russel Holland to reject the Proposed Plea Agreement in this case because it is not in the public interest
32 unless:

1 [(1)] Count IV of the indictment is retained as to Exxon Shipping Company; and
2 (2) the provisions exculpating Alyeska Pipeline Service Company are omitted.

3
4 COPIES of this resolution shall be sent to Joseph G. Block, Chief, Environmental Crimes
5 Section, Environment and Natural Resources Division, United States Department of Justice; Charles A.
6 De Monaco, Assistant Chief, Environmental Crimes Section, Environment and Natural Resources
7 Division, United States Department of Justice; Eric W. Nagle, Trial Attorney, United States Department
8 of Justice; Mark R. Davis, Special Assistant United States Attorney; Mark B. Harmon, Trial Attorney,
9 United States Department of Justice; James F. Neal, Counsel for Exxon Shipping; E. Edward Bruce,
10 Counsel for Exxon Shipping; Robert C. Bundy, Counsel for Exxon Shipping; Edward J. Lynch, Counsel
11 for Exxon Corporation; ^{and to} John F. Clough III, Counsel for Exxon Corporation; ^{and to} the Honorable H.
12 Russel Holland, Chief Judge, United States District Court for the District of Alaska.

[add AK Legal Relegam?]

HOUSE SPECIAL COMMITTEE ON THE
EXXON VALDEZ OIL SPILL CLAIMS SETTLEMENT

EXCERPT FROM APRIL 16, 1991 TESTIMONY OF RICHARD STEWART, ASSISTANT ATTORNEY GENERAL, ENVIRONMENTAL AND NATURAL RESOURCES DIVISION, U.S. DEPARTMENT OF JUSTICE

Gruenberg: Any comment about Congressman Miller's letter?

Stewart: First of all, it contains a fundamental legal error asserting that there would be a prosecution available under the CWA. These reports on the contingency plans were not required to be filed under the CWA. In fact, there is a very substantial legal question whether any jurisdiction to assert a false reporting claim under the general false reporting claims of title 18 of the code with respect to the spill here because the report was to be filed under the lease agreement with the BLM and the contingency plan went with respect to spills out of the sound, not the spills on federal land. So, there is a real legal issue of whether there is a proper basis for federal prosecution under law and there are other substantial litigation risks in the case about whether any falsehood was knowing....(indecipherable).

I would say that the evidence before Congressman Miller did not really address those problems and I find it rather surprising that a responsible official felt this was important information material to the criminal case -- why this wasn't disclosed to us before. We never heard this information.

Gruenberg: Before passing on to this second letter, is it your testimony that you are not certain that there was, assuming the allegations made in that letter were true -- is it your testimony that there is significant question in your mind whether there is federal law that would make that criminal?

Stewart: yes.

Gruenberg: Have you brought that to the attention of Congress and sought curative legislation?

Stewart: No

Gruenberg: Is it your intent to do so.

Stewart: I want to investigate the facts more closely.

Gruenberg: From a legislative point of view, it's less important whether these particular facts were true than that if the hypothetical -- which certainly could occur -- not in Alaska in 1989, then in other places at other points in time. If that is in fact not criminal, ought it not to be?

Stewart: I think it is a substantial question we will pursue.

rupted until the subsequent morning, each 24-hour period would support a separate charge of violation of the Rivers and Harbors Act. Rivers and Harbors Appropriation Act of 1899, § 13, 33 U.S.C.A. § 407.

William B. Cummings, U.S. Atty., Robert W. Jaspen, Asst. U.S. Atty., Dept. of Justice, E.D.Va., Richmond, Va., Bradford F. Whitman, Department of Land and Natural Resources, Pollution Control Section, Washington, D.C., for plaintiff.

Murray J. Janus, Dennis W. Dohnal, Joseph M. Spivey, III, Manning Gasch, Jr., Hunton & Williams, Richmond, Va., for defendants.

MEMORANDUM

MERHIGE, District Judge.

Defendant Allied Chemical Corporation, a corporation organized and existing under the laws of the State of New York, allegedly owning and operating a manufacturing establishment at Hopewell, Virginia, moves to require the United States to elect or consolidate and dismiss Counts 1 through 456 of the indictment brought against them herein.

Counts 1 through 70 allege that Allied on each day of July and August, 1971, each of two days in September, 1971, and each of six days in April, 1972 unlawfully discharged and deposited from its alleged Hopewell establishment industrial wastes from the production of octahydro—1, 2, 4—metheno—2H—cyclobuta [cd] pentalen—2—one [hereinafter Kepone] into Gravelly Run, from which the refuse was washed into the James River, a navigable waterway of the United States. Counts 71 through 269 allege that Allied on each of fifteen days in September, 1971, and each day of October, 1971, November, 1971, December, 1971, January, 1972, February, 1972, and March, 1972, unlawfully discharged and deposited industrial wastes from the production of Tris "2—hydroxyethyl Isocyanurate [hereinafter THEIC] into Gravelly Run, from which the refuse was washed into the James River. Counts 270 through 356 al-

lege that Allied on each of seventeen days of April, 1972, each day of May, 1972, and June, 1972, and each of nine days in July, 1972, unlawfully discharged and deposited from its alleged Hopewell establishment industrial wastes from the production of Kepone and Triallyl Isocyanurate [hereinafter TAIC] into Gravelly Run, from which the refuse was washed into the James River. Counts 357 through 361 allege that Allied on each of five days in July, 1972, unlawfully discharged and deposited from its alleged Hopewell establishment industrial wastes from the production of TAIC into Gravelly Run, from which the wastes were washed into the James River. Counts 362 through 456 allege that Allied on each of seventeen days in July, 1972, each day of August, 1972, and September, 1972, and each of seventeen days in October, 1972, unlawfully discharged and deposited from its alleged Hopewell establishment industrial wastes from the production of TAIC and THEIC into Gravelly Run, from which the wastes were washed into the James River. The aforesaid acts were all charged as violations of the Refuse Act, 33 U.S.C. § 407.

It is Allied's position that the counts are multiplicitous and that the government should be required to elect which of Counts 1 through 456 of the indictment it intends to prosecute or, in the alternative, that all the counts be consolidated into one count, and the contended repetitive counts be dismissed.

[1] The term "multiplicity" refers to the practice of charging the commission of a single offense in several counts. See 8 *Moore's Federal Practice*, ¶ 8.07[1], at 8-47; Wright, *Federal Practice and Procedure*, § 142 (1969 ed.) at 306. "The vice of multiplicity is that it may lead to multiple sentences for the same offense, though for this there are remedies, and that 'the prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes.'" Wright, *supra* at 311, quoting *United States v. Mamber*, 127 F.Supp. 925, 927 (D.Mass.1955). The Federal Rules on Criminal Procedure have, appropriately,

the District Court, court could not determine whether, whether charged a separate which any of three as discharged into multiplicitous.

information = 127

refers to the practice of the commission of a single offense; Federal Rules of Criminal Procedure have been drafted to Fed.Rules Crim. P. 8(a)(1).

Words and Phrases and Instructions and

information = 128

whether several counts of same statute are of legislative intent against turning a multiple offenses. Rule 7(c), 18 U.S.C.A.

= 35

the Act is meant to prevent the discharge of the discharge itself. Appropriation Act of § 407.

information = 128

terminate, until proofs whether indictment the defendant with of the Refuse Act, and for each day on chemical compounds navigable waters, was and Harbors Appropriation Act of § 13, 33 U.S.C.A. Proc. rule 7(c), (c)(1),

= 35

each discharges came down in the evenings and refuse was inter-



U.S. Department of Justice
Office of Legislative Affairs

Office of the Attorney General

Washington, D.C. 20530

April 9, 1991

Honorable Gerry E. Studds
Chairman
Subcommittee on Fisheries and
Wildlife Conservation and
the Environment
Committee on Merchant Marine
and Fisheries
U.S. House of Representatives
Washington, D. C. 20515

Honorable Dennis M. Hartel
Chairman
Subcommittee on Oceanography and
Great Lakes
Committee on Merchant Marine
and Fisheries
U.S. House of Representatives
Washington, D. C. 20515

Dear Chairman Studds and Hartel:

This responds to your letter to the Attorney General, dated March 26, 1991, requesting documents prepared in connection with the pending criminal and civil litigation arising from the Exxon Valdez oil spill. These are United States v. Exxon Corporation, et al. (Nos. A90-015-1CR; A90-015-2CR) and United States v. Exxon Corporation, et al. (No. A-91-082 Civ. D. Alaska).

The Department has endeavored to obtain appropriate criminal penalties and civil remedies for the wrongdoing and injuries related to the oil spill. The court is scheduled to sentence the defendants who have entered pleas in the criminal case during the next month. A proposed settlement and consent decree are pending before the court in the civil case and we expect that the court will rule on them at the end of the current notice and comment period. We believe, based upon the available information, that the proposed settlement is adequate, proper and would serve the best interests of the United States. If, however, the court decides not to accept the pretrial resolution of one or both of these actions, then they could proceed to trial. In that event, the United States would be forced to litigate the criminal and civil claims against Exxon, which litigation would run for years. Also, additional litigation has recently been filed alleging that the United States bore some responsibility for the Valdez spill.

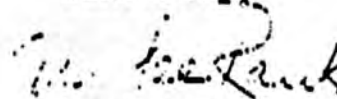
ACE 45994J

We have prepared and filed with the court a summary of our scientific studies relating to natural resource damage from the spill in order to assist the court in evaluating the civil consent decree and the criminal plea. A copy of the summary is enclosed. We also can furnish some of the raw scientific data, which will not have a material effect on our litigation position, gathered by the federal trustee agencies in connection with damage assessment and restoration planning, which will be placed in the Oil Spill Public Information Center (OSPIC) in Anchorage. We believe that these documents, and the extensive materials already on file at the OSPIC, examples of which are listed in the enclosed bibliography, will provide an ample basis for evaluating the proposed plea agreement and civil settlement.

We regret that we cannot provide additional documents which were developed during the course of the pending litigation. Some of these documents, which include information furnished by expert consultants on a confidential basis, have not been disclosed outside of the Department and its federal agency clients. They also include materials that would not be available to an opposing party in the litigation. After careful consideration and despite our appreciation of the interests of your Subcommittees, we have concluded that the production of additional documents at this time would be inappropriate and pose an unacceptable risk to the pending litigation.

We appreciate your understanding of the importance to the United States of these proposed criminal and civil resolutions relating to the Valdez spill and the litigation sensitivity of the considerations that have gone into the proposed resolutions of these matters. We also appreciate your understanding that we must protect the exercise of fiduciary responsibilities by the natural resource trustees, who are among our client agencies, in achieving the best resolution of these claims. At the same time, we appreciate the Committee's oversight role in these matters. Once the litigation is resolved, we would be pleased to discuss the possibility of providing additional information.

Sincerely,



W. Lee Rawls
Assistant Attorney General

Enclosures

UNITED STATES DISTRICT COURT

District of Alaska
222 West 7th Avenue - No. 54
Anchorage, Alaska 99513-7545

H. Russel Holland
Chief Judge

April 12, 1991

The Honorable Max F. Gruenberg, Jr.
House Special Committee on the
Exxon Valdez Oil Spill Claims Settlement
Alaska State Legislature
Post Office Box V
State Capitol, Room 216
Juneau, Alaska 99811

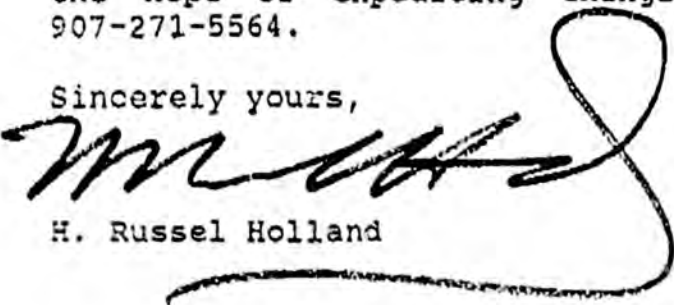
Re: United States v. Exxon Corp.
Case No. A90-015 Criminal

Sir:

I am in receipt of your letter of April 3, 1991. It is apparent that your committee has gone to some pains to accommodate the court and our calendaring of consideration of the plea agreement in the Exxon Valdez criminal litigation. I feel constrained to reciprocate, even though I had very much hoped to have all the materials to be considered in hand by April 11.

As I believe you are aware, we have scheduled consideration of the plea agreement for 8:30 a.m. on April 24, 1991. I do not expect to take the matter under advisement; and, as a consequence, my review of the committee's report will have to take place before the 24th of April. I will appreciate your arranging for delivery of the committee's report to me as early in the day on April 23 as you possibly can. Although we have expressly rejected the idea of permitting the general public to present comments employing our FAX number, I will receive the committee's report in that fashion in the hope of expediting things. The clerk's FAX number is 907-271-5564.

Sincerely yours,



H. Russel Holland

-----via facsimile-----

WALTER B. JONES, NORTH CAROLINA, CHAIRMAN

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 CARROLL HUBBARD, JR., KENTUCKY
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CHIEF COUNSEL
 FORREST S. WELSH

CHIEF CLERK
 BARBARA L. CAVAS

MINORITY STAFF
 DIRECTOR/CHIEF COUNSEL
 GEORGE D. FENCE

U.S. House of Representatives Committee on

Merchant Marine and Fisheries

Room 1334, Longworth House Office Building
 Washington, DC 20515-6230

April 12, 1991

Dear Judge Holland:

We are writing to express our views regarding certain aspects of the proposed settlement of Federal and state civil claims arising from the EXXON VALDEZ oil spill.

These views are based on the ongoing effort of our Subcommittees to monitor the response to the oil spill, particularly by Federal agencies, including the assessment of injury to natural resources and plans for restoring the environment of Prince William Sound. In this capacity, our Subcommittees conducted an oversight hearing on the proposed settlement on March 20, 1991. Prior to that hearing, we asked the Department of Justice to prepare and make public a summary describing and quantifying the scope and severity of injuries caused by the EXXON VALDEZ spill to natural resources. That summary was prepared and submitted to Congress and the Court on April 8th.

Following the hearing, we asked the Justice Department to provide "all documents summarizing or estimating the dollar value of injuries done to natural resources by the spill and the costs of restoring those damages", while offering, if requested, to maintain the confidentiality of those documents. That request was denied in a letter to us on April 9th. A copy of the correspondence is enclosed.

We believe there is a strong general argument to be made in favor of settling the pending Federal and state claims now, thereby avoiding prolonged litigation and making funds immediately available for restoration purposes. But we also believe that no settlement should be accepted unless it serves the public interest and meets the requirements of Federal law. We are unable at this time to determine if the proposed settlement satisfies these criteria. We therefore respectfully recommend that you not approve the proposal unless and until certain fundamental issues are clarified.

April 12, 1991
Page Two

Specifically, we believe that the following three actions should be taken prior to approval of the settlement: 1) disclosure to the court of enough information to permit a fully informed judgment about the monetary sufficiency of the proposed settlement; 2) a commitment by the trustees to release all damage assessment and restoration studies and related documents to the public after the settlement is approved; and 3) clarifications by the trustees concerning the manner in which the recovered funds will be spent and the extent of public participation in the restoration planning and decisionmaking process. Each point is discussed below.

1. THE TRUSTEES HAVE FAILED TO PROVIDE THE INFORMATION NEEDED TO ASSESS THE MERITS OF THE PROPOSED SETTLEMENT.

a. How much will restoration cost?

Section 311 of the Clean Water Act requires the United States to recover from Exxon sufficient funds to cover the costs of replacing or restoring the natural resources under its trusteeship that were damaged or destroyed by the oil spill. At this point, only the trustees--and perhaps not even they--are in a position to judge whether or not the amount of the settlement is sufficient to meet this statutory obligation. This is true because the trustees have not disclosed to the court, and have refused to disclose to Congress and the public, the detailed information necessary to assess the severity of damage and the anticipated costs of restoration or replacement.

Although we do not know how large the settlement should be, we do know that it is not as large as some of its proponents have encouraged the public to believe. Last month, we asked the Congressional Research Service to review the proposed agreement to determine its net value to the Federal and state governments in real terms, taking into account the effects of inflation and Exxon's ability to deduct civil payments from its taxes. That study, a copy of which is enclosed, placed the estimated net value of the settlement at between \$421 million and \$524 million.

The difficulty of judging the adequacy of the settlement is further complicated by the facts that the damage assessment process is, according to the Administration's April 8th summary, still in a "preliminary" stage; the degree of injury to some important species, including salmon, will not be known for years; injuries to several other species are continuing; and specific restoration plans have not been made, nor costs estimated.

April 12, 1991

Page Three

b. Should restoration funds be used to pay cleanup costs?

Today, more than two years after the spill, oil remains trapped in sediments and gravel. More cleanup may occur this summer. Under the proposed agreement, any future cleanup activities (and certain past cleanup costs) will be paid for by the Fund established to finance restoration activities. This will create a direct tension between cleanup funding and restoration funding -- an "either-or" scenario even though the Clean Water Act requires both.

The adequacy of this arrangement depends upon the sufficiency of funds to cover both obligations. Once again, no good conclusion can be made about this aspect of the agreement without better information on projected cleanup costs and restoration costs.

We, like the public, are not able to make a good judgment about the monetary adequacy of the proposed settlement. That is important, but it is far more important that the court have access to all the documents it needs to make that judgment. Those documents must include more than a summary of the injuries to natural resources that have occurred, but also an expert evaluation of the cost of restoring those injuries, acquiring equivalent resources, if necessary, and providing compensation for lost use and other values pending restoration. We urge you to withhold approval of the settlement unless and until that information has been provided to the court.

2. THE PUBLIC'S NEED TO KNOW.

As mentioned above, the trustees have refused to release their evaluations of the scope and severity of the injury to natural resources resulting from the spill. This refusal is based on the claim that disclosure would jeopardize the proposed settlement and is covered by a loosely construed attorney-client privilege.

We agree that the trustees are entitled to maintain the confidentiality of a limited amount of detailed information gathered or prepared specifically to assist the prosecution of a pending case and that would, if publicly revealed, seriously undermine their legal position. That entitlement is an extremely narrow one in our judgment, however, and should never again be interpreted as broadly as it has been by the trustees in the present case.

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The fact is that the trustees in this instance developed a virtual obsession about secrecy. That obsession undermined the effectiveness and coordination of oil spill response and damage assessment efforts and unnecessarily limited public access to information on matters as important as public health. The sharing of scientific data and the dissemination of expert opinions is vital to maintain public confidence and ensure the effectiveness of response actions. In this case, the trustees operated with a degree of secrecy for which there was no practical or legal justification.

It is important to remember that the information available to the Executive branch concerning natural resource injuries in the EXXON VALDEZ case was gathered pursuant to public law, by public personnel and at public expense. The information pertains to resources that are publicly managed, publicly owned and subject to public trusteeship under federal law. Accordingly, we believe that citizens deserve access to the information whether they desire simply to assess the merits of the deal worked out by the trustees or to make a more informed judgment about their own legal options.

Consequently, we urge you to solicit an enforceable commitment from the Federal Government that all information available to it concerning the scope and nature of injuries done to natural resources as a result of the oil spill, including documents that place an estimated dollar value on those injuries and the costs of restoration, will be made public promptly subsequent to approval of any proposed settlement.

3. THE TRUSTEES MUST CLARIFY VAGUE COMMITMENTS ABOUT HOW THE FUNDS WILL BE SPENT.

The proposed settlement and Memorandum of Agreement between the Federal and state trustees provide only a vague and inadequate description of the purposes for which the recovered monies will be spent and the manner in which decisions about spending priorities will be made. We therefore recommend to the court that it seek substantial further clarifications from the trustees on these matters.

The effect of the consensus decisionmaking approach proposed for the Trustee Council will be to allow each Federal and state representative to veto any proposal by any participant. In the event that the obligations of the Federal and state trustees under Federal and state law are not identical, the Trustee Council may be operating under a set of dual and potentially conflicting obligations. Under section 311 of the Clean Water Act, recovered funds must be used solely to restore,

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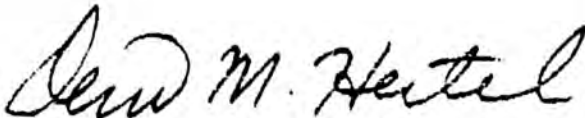
rehabilitate or acquire the equivalent of the damaged natural resources. We encourage the Court to make it clear that this limitation must be strictly adhered to by the trustees. The restoration fund is not to be viewed as a general fund to finance favorite projects or to conduct assessments in perpetuity.

We also urge you to solicit a clearer commitment from the Federal and state trustees for public participation in the natural resource damage restoration process. As you know, the proposed Memorandum of Agreement and Consent Decree provides that the Trustees shall ensure "meaningful public participation", including the "possible" establishment of a public advisory group. We believe a more detailed commitment should be made before the agreement becomes final.

CONCLUSION

We appreciate the opportunity to provide the court with our recommendations on the proposed settlement. While we value and applaud the attempt by the litigants to settle their differences, we believe that certain clarifications are necessary before the proposed settlement is approved. We respectfully urge the court to seek those clarifications prior to taking final action on the agreement.

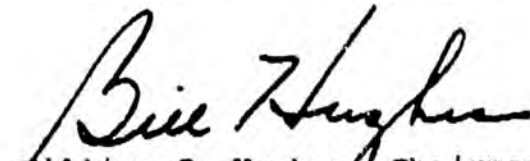
Respectfully Submitted,



Dennis M. Hertel, Chairman
Subcommittee on Oceanography,
Great Lakes and the Outer
Continental Shelf
Committee on Merchant Marine
and Fisheries



Gerry E. Studds, Chairman
Subcommittee on Fisheries and
Wildlife Conservation and the
Environment
Committee on Merchant Marine
and Fisheries



William J. Hughes, Chairman
Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary

The Honorable H. Russel Holland
U.S. District Judge
U.S. District Court
222 West 7th Avenue
Anchorage, Alaska 99513

Enclosures

MORRIS K. JOALL ARIZONA CHAIRMAN
 GEORGE MILLER CALIFORNIA VICE CHAIRMAN
 PHILIP A. SHARP INDIANA
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 PAT WILLIAMS MONTANA
 BEVERLY S. BYRON MARYLAND
 RON DELUGO VIRGIN ISLANDS
 SAM GEJDEINSON CONNECTICUT
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 WAYNE OWENS UTAH
 JOHN LEWIS GEORGIA
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 ENRIQUE FALCONAVEGA AMERICAN SAMOA
 TIM JOHNSON SOUTH DAKOTA
 CHARLES E. SCHUMER NEW YORK
 JIM LONTE INDIANA
 PETER HOAGLAND NEBRASKA
 HARRY JOHNSTON FLORIDA
 LARRY LAROCO IDAHO

U.S. House of Representatives
Committee on
Interior and Insular Affairs
Washington, DC 20515-6230

DON YOUNG ALASKA
 RANKING REPUBLICAN MEMBER
 ROBERT J. LABOWITZ CALIFORNIA
 RON MARSHALL MONTANA
 JAMES V. ANSEN UTAH
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 CRAIG THOMAS WYOMING
 JOHN J. DUNCAN JR. TENNESSEE
 RICHARD T. SCHULZE PENNSYLVANIA
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 JOHN T. DOOLITTLE CALIFORNIA
 WAYNE ALLARD COLORADO

April 8, 1991

DANIEL P. BEARD
 STAFF DIRECTOR
 RICHARD M. TIER
 GENERAL COUNSEL
 DANIEL VALIASH
 REPUBLICAN STAFF DIRECTOR

Honorable H. Russel Holland
 United States District Judge
 U.S. District Court
 222 West 7th Avenue No.4
 Anchorage, Alaska 99513

Honorable Stanley Sporkin
 United States District Judge
 U.S. Court House
 3rd and Constitution, N.W.
 Washington, D.C. 20001

In Re:

United States of America v. Exxon Shipping Company and Exxon Corporation (No. A90-015 CR.)
[Criminal Plea Agreement]

United States of America v. Exxon Corporation, Exxon Shipping Company, and Exxon Pipeline Company,
in personam, and the T/V Exxon Valdez, in rem (A91082 Civil) [Agreement and Consent Decree]

State of Alaska v. Exxon Corporation, Exxon Shipping Company and Exxon Pipeline Company, in
personam, and the T/V Exxon Valdez, in rem (A91083 Civil) [Agreement and Consent Decree]

United States of America v. State of Alaska, and The State of Alaska v. United States of America (A91081
Civil) [Memorandum of Agreement and Consent Decree]

State of Alaska v. Exxon Corporation, et al., (3AN-89-6852 Civil)

The Native Village of Chenega Bay, et al., v. Manuel Lujan, Jr., et al. (91-483 SS Civil) and Chenega
Corporation, et al., v. Manuel Lujan, Jr., et al. (91-484 SS Civil)

Gentlemen:

For purposes of your review of the pending cases cited above and other claims arising from the Exxon Valdez oil spill of March 24, 1989, I want to bring to your attention some significant evidence concerning Exxon Corporation's and the Alyeska Pipeline Service Company's culpability.¹

¹The owner companies of Alyeska Pipeline Service Company ("Alyeska") are B.P. Pipelines Alaska, Inc. (50.01 percent); Exxon Pipeline Company (20.34 percent); Arco

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As Chairman of the Subcommittee on Water, Power and Offshore Energy Resources, I have conducted an investigation of matters related to the Exxon Valdez oil spill, including the cleanup response, damage to natural resources, and operation of the Trans-Alaska Pipeline System.² The Committee on Interior and Insular Affairs was a principal author of the Trans-Alaska Pipeline Authorization Act (P.L. 93-153) and has broad jurisdiction concerning public lands and natural resources in Alaska and a special interest in issues affecting Alaska Natives.

In the course of this investigation, Alyeska has provided me with documents which indicate that Exxon and the other owner companies which control Alyeska: (1) knew that Alyeska could not effectively respond to an oil spill in Prince William Sound; (2) failed to make necessary improvements in Alyeska's oil spill response capabilities; and, (3) secretly decided that Alyeska would not respond to an oil spill in Prince William Sound in the manner prescribed by Alyeska's Oil Spill Contingency Plan.

Alyeska's Promises

Before the Pipeline Was Approved

In 1971, during the consideration of the trans-Alaska pipeline project, Alyeska's pollution control specialist R.L. Benyon promised the public in testimony before the Department of the Interior that:

"The contingency plan which will be drawn up will detail methods for dealing promptly and effectively with any spill which may occur, so that its effect on the environment will be minimal. We have adequate knowledge for dealing with oil spills and improvements in techniques and equipment are continuing to become available through world-wide research. The best equipment, materials and expertise which will be made available as part of

Pipe Line Co. (20.34 percent); Mobil Alaska Pipeline Co. (4.08 percent); Amerada Hess Pipeline Corp. (1.5 percent); Unocal Pipeline Co. (1.36 percent); and Phillips Alaska Pipeline Corp. (1.36 percent).

²"Investigation of the Exxon Valdez Oil Spill, Prince William Sound, Alaska," Oversight Hearings before the Subcommittee on Water, Power and Offshore Energy Resources of the Committee on Interior and Insular Affairs (Serial No. 101-5, Parts I to V) (hereinafter "Investigation of the Exxon Valdez Oil Spill").

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the oil spill contingency plan, will make operations at Port Valdez and in Prince William Sound the safest in the world. [Emphasis added.]"

On April 10, 1973, the President of Alyeska, E.L. Patten, in testimony urging approval of the pipeline project, promised Congress that the very best technology would be in place:

"In safety [sic] superior American tankers the light traffic between Valdez, Alaska, and the west coast involves hazards of less magnitude than any other tanker run of which I have knowledge. The most modern loading equipment and proposed vessel designs will reduce even these modest risks before pipeline authorization begins."³

In the Right-of-Way Agreements

In exchange for the right to build the Trans-Alaska Pipeline System on public lands, Alyeska signed right-of-way agreements with both the United States and the State of Alaska.

In the section on oil spill contingency plans in the right-of-way contract with the United States, Alyeska promised to control and clean up any oil spill:

"It is the policy of the Department of the Interior that there should be no discharge of Oil or other pollutant into or upon lands or waters. Permittees must therefore recognize their prime responsibility for the protection of the public and environment from effects of spillage.... Permittees shall demonstrate their capability and readiness to execute the [contingency] plans....If during any phase of the construction, operation, maintenance or termination of the Pipeline, any Oil or other pollutant should be discharged from the Pipeline System, the control and total removal, disposal and cleaning up of such Oil or other pollutant wherever found, shall be the responsibility of Permittees, regardless of fault. [Emphasis added.]"⁴

³ "Oil and Natural Gas Pipeline Rights-of-Way," Hearings before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs (Serial 93-12) at p.526.

⁴ Stipulation 2.14 to Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline, January 23, 1974, between United States of America and Alyeska owners. As used in Stipulation 2.14, Oil Spill Control is defined as: (1) detection of the spill; (2) location of the spill; (3) confinement of the spill; and (4) cleanup of the spill.

At the time of the Exxon Valdez spill

According to the "purpose" section of Alyeska's Oil Spill Contingency Plan (the "contingency plan") which was in effect on March 23, 1989, Alyeska promised rapid and effective response to any oil spill using state-of-the-art technology:

"The objective of the Alyeska Oil Spill Contingency Plan is to minimize damage to the environment...in the event of an oil spill...the resources of [Alyeska] are organized in a preplanned manner to assure rapid and effective response to any oil spill emergency. This manual outlines the techniques which will be in accordance with state-of-the-art oil spill cleanup technology. [Emphasis added.]"⁵

In section 102 of the contingency plan, Alyeska promised that it is the policy of the owner companies to fully comply with the laws and to take "every reasonable action" to minimize environmental damage from oil spills:

"It is the policy of the eight owner companies, constituting the Permittees under the Federal Right-of-Way Grant and the Lessees under the State Right-of-Way Lease and represented by their agent, Alyeska Pipeline Service Company, to take every reasonable action to prevent oil spills and, if they occur, to minimize environmental damage. Alyeska will comply with the relevant pollution laws for the protection and conservation of environmental resources. [Emphasis added.]"⁶

Alyeska also promised in section 102 of the contingency plan that it will be fully prepared to implement the contingency plan even in the event of a major oil spill:

⁵ Section 101, Alyeska Pipeline Service Company Oil Spill Contingency Plan General Provisions (January, 1987).

⁶ The "relevant pollution laws" according to Alyeska are: "Alaska Statute Title 46, and 18 AAC75, and the National Oil and Hazardous Substances Pollution Contingency Plan, and any revisions thereof, as issued by the Council on Environmental Quality (CEQ) under the authority of the Federal Water Control Act [sic], as amended (Public Law 92-500). Alyeska Policy and these plans are intended to be written and executed so as to comply with the Grant and Agreement of Right-of-Way and the Right-of-Way lease with the United States of America and the State of Alaska, respectfully. Alyeska Pipeline Service Company will ensure that the National Contingency Plan is followed during any spill event." p.1-1

"Regularly scheduled training programs will be conducted....The objectives of this training program are:....To maintain the Plans as fully operable working documents [and] To update the Plans to reflect state-of-the-art capability....Full scale, company-wide field exercises will be held at least once per year to insure overall readiness for response to large scale oil spills.... [Emphasis added.]"

Alyeska further promised in section 102 of the contingency plan that, as agent for the owner companies, it will effectively direct and conduct cleanup operations, including those related to any spill in Prince William Sound:

"[C]leanup operations within the areas of liability and responsibility [imposed by law] will be conducted by Alyeska as Agent for the Owner companies and will be conducted in a manner as not to require assumption of control of such cleanup operations by federal or state officials....Alyeska will direct cleanup operations of spills resulting from...[O]peration, involving tankers carrying or destined to carry crude oil transported though the Trans-Alaska Pipeline System, occurring at Valdez terminal, in Port Valdez, Valdez arm or Prince William Sound. [Emphasis added.]"

Promises Versus Performance

In an addendum to its Oil Spill Contingency Plan in 1982, Alyeska informed the Alaska Department of Environmental Conservation that, in the event of a spill in Prince William Sound, the "[e]stimated time of completion of spill cleanup of a 100,000 barrel spill would be less than 48 hours."⁷

At the urging of the State of Alaska's Department of Environmental Conservation, Alyeska reluctantly included a response scenario for a 200,000 barrel spill in the 1987 Oil Spill Contingency Plan for Prince William Sound. "Alyeska believes it is highly unlikely a spill of this magnitude would occur."⁸

⁷Letter from B.L. Hilliker, manager, environmental protection and government reports, to Alaska Department of Environmental Conservation, dated June 22, 1982, reprinted in "Investigation of the Exxon Valdez Oil Spill," Part I at p. 894.

⁸Oil Spill Contingency Plan Prince William Sound (January 1987), p.3-54. By letter to the Alaska Department of Environmental Conservation dated October 23, 1986, Alyeska predicted that the probability of a 200,000 barrel spill occurring in Prince

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This Prince William Sound response scenario assumed that the spill would occur 30 miles from the Valdez terminal and that weather conditions would be conducive to oil spill cleanup. The contingency plan called for equipment, including a barge, to be in place within 5 hours after the spill.

Alyeska's Prince William Sound contingency plan predicted that 35 percent of the oil would be recovered from the water (70,000 barrels), 30 percent recovered from shoreline cleanup, 30 percent to disperse naturally or evaporate, and only 5 percent to remain in the environment.⁹

Yet when the Exxon Valdez spilled some 260,000 barrels on March 23, 1989 the cumulative total of oil recovered within the first 72 hours was less than 3,000 barrels. As one example of the response failure, the equipment barge which the contingency plan relied upon was damaged and unloaded at the time of the spill. The barge did not reach the spill site for more than 14 hours, even though the contingency plan called for it to be on the scene within five hours. Based on my investigation, there were clearly not sufficient quantities of dispersants or application equipment available to make up for the utter failure of the mechanical recovery effort.¹⁰

Even under extraordinarily good weather conditions for the first three days, Alyeska did not have equipment or resources to contain and collect even a fraction of the amount specified in the contingency plan. The failure of Alyeska's cleanup response in the first 72 hours significantly contributed to the ultimate environmental impacts of the spill, since winds of over 70 miles per hour spread the slick completely out of control (more than 40 miles from Bligh Reef) by the fourth day.

The Exxon Valdez spill would eventually soil over 1,000 miles of Alaska's coastline, inflict one of the worst wildlife disasters in our nation's history, and disrupt the lives of thousands of Alaskans who depend on the natural resources of this region.

William Sound would be once in 241 years. "Investigation of the Exxon Valdez Oil Spill," Part I at p. 834.

⁹Oil Spill Contingency Plan Prince William Sound (January 1987) at p. 3-56.

¹⁰"Investigation of the Exxon Valdez Oil Spill, Prince William Sound, Alaska", Part I at p. 303.

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As the Alaska Oil Spill Commission concluded, "[p]ublic pronouncements by Alyeska and its owners that the company employed the best available technology and committed adequate resources to safety purposes turned out to be false."¹¹

Exxon and the Alyeska Owner Companies Knew That Alyeska Was Not Equipped to Effectively Respond To An Oil Spill in Prince William Sound.

My investigation revealed that Alyeska was on notice in 1984 that its own personnel believed they were incapable of effectively responding to an oil spill in Prince William Sound. James K. Woodle, former commander of the U.S. Coast Guard's Marine Safety Office in Valdez, and marine superintendent at the Valdez terminal, informed Alyeska's President George M. Nelson that:

"Serious doubt exists that Alyeska would be able to contain and clean-up effectively a medium or large size oil spill....Response to any spill beyond the limits of Valdez narrows should not be attempted with present equipment and personnel. [Emphasis added.]"¹²

A series of documents, which I have enclosed, reveal that Alyeska by 1988 -- one year prior to the Exxon Valdez oil spill -- had reached the same conclusion as James K. Woodle: it was seriously unprepared for an oil spill in Prince William Sound.

On April 18, 1988, W.D. Howitt, then Alyeska's Valdez Marine Terminal Superintendent, wrote to the Marine Services Subcommittee -- comprised of representatives of the owner companies, including Harvey Borgan of Exxon Shipping -- to inform them of a meeting in Bellingham, Washington on May 18, 1988. "Oil Spill Response Equipment" was listed on the agenda [Exhibit A].

On April 28, 1988, Howitt wrote to the Marine Services Sub-committee members with additional information for the May 18 meeting [Exhibit B]:

"The first part of the information package contains the T.L. Polasek briefing that was presented to the Operations Subcommittee on April 6-7, 1988, at the quarterly meeting. The briefing is the result of an action item from January's meeting during which a concern was raised by ARCO on

¹¹Final Report of the Alaska Oil Spill Commission (February 1990) at p.135.

¹²Letter from James K. Woodle dated April 15, 1984 concerning operations of the Marine Department, Alyeska Marine Terminal, Valdez, Alaska, reprinted in "Investigation of the Exxon Valdez Oil Spill," Part I at p. 179 and 890.

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Alyeska's capability to respond to oil spills at midpoint of Prince William Sound. [Emphasis added.]¹³

Theo L. Polasek's (Alyeska's Vice President of Operations) briefing on April 6-7 for the Operations Subcommittee was entitled "Oil Spill Issues -- Status of Action Items from January Owners Meeting." [Exhibit C] The topic of "Alyeska's Response Capability to Spills at midpoint of Prince William Sound" is included under the heading "ARCO/Alyeska Response Equipment Discussions." What follows is a comparison of the equipment available to the "Clean Sound" Cooperative in Puget Sound, Washington. According to the document, Clean Sound's spill cleanup methodology is "immediate, fast response to spill, at any location, with boom to contain, exclude, and/or divert oil."

By contrast to the equipment available to Clean Sound, Polasek's briefing on "Present Alyeska Prince William Sound Capability" notes that "no new skimming vessels purchased since 1977." The list of Alyeska equipment is clearly deficient by comparison to Clean Sound.

Polasek's briefing on Alyeska's Prince William Sound cleanup response equipment includes the following indictment of Alyeska's capability to meet its obligations under its own Oil Spill Contingency Plan:

"Immediate, fast response to mid-point of Prince William Sound not possible with present equipment complement." (emphasis added)

Exxon and the Alyeska Owner Companies Failed to Improve Alyeska's Oil Spill Response Capabilities Before the Exxon Valdez Spill on March 23, 1989.

Theo Polasek's briefings to the owner company representatives in April and May 1988 outlined the deficiencies in Alyeska's equipment including the fact that "no new skimming vessels had been purchased since 1977."

¹³Howitt's letter also states that purchases of clean-up equipment for Alyeska, as recommended by Jeff Shaw of Arco, would be discussed at the May 18th meeting. In a document with the heading "Alyeska Equipment Project (for oil spill cleanup)" dated March 22, 1988, Jeff Shaw recommends: 1) a large oceangoing skimmer; 2) a 10,000 barrel barge; 3) an adds pack; 4) fast spill response vessels; 5) a destroil skimmer with power pack; and 6) an additional 5,000 feet of sea quality boom. [Exhibit D] In addition, a separate document indicates that the marine subcommittee members discussed an advanced skimmer recovery system which could operate in open waters, the "Dynamic Inclined Plan Oil Vessel." [Exhibit E]

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When Polasek testified, under oath, at a hearing I chaired in Valdez on May 7, 1989, he acknowledged that: "the equipment in this plan was similar to the plan in 1977. We increased the amount of boom and take [sic] other actions, but essentially that was the same equipment decided upon."¹⁴

Polasek's briefing includes a reference to the planned acquisition of a 10,000 barrel tank barge by late 1988. In fact, this oil spill barge -- the "Berty-K" -- was stored in Washington state for the winter of 1989 and was not available in the Exxon Valdez cleanup.

Moreover, Polasek's briefing refers to a "mobile contingency command center with communications repeaters" which would be installed by "mid 1988." In fact, such a system was not in place at the time of the Exxon Valdez spill.

Exxon and the Alyeska Owner Companies Secretly Decided that Alyeska Would Not Respond to an Oil Spill In Prince William Sound in the Manner Prescribed in the Contingency Plan.

According to a June 30, 1988 telex from Roger A. Gale, Manager, Marine Operations, Sohio Oil (now BP) to Polasek of Alyeska, the Marine Services Subcommittee decided to make five recommendations to the Owners Committee as part of an "acceptable compromise" [Exhibit F]:

First, the "current stockpile of clean up equipment is adequate" for spills at the terminal, but "should be maintained to the highest state of readiness."

Second, for spills in Prince William Sound, additional equipment should be purchased of the "type best suited for near shore and beach operations."

Third, a large barge (50-100,000 barrel capacity) equipped with ocean boom and skimmers was needed.

Fourth, a "study of the best and quickest methods of moving the barge around" including predeployment in Prince William Sound.

Fifth, that Alyeska and the owners "press" state and federal officials for "preapproval to use chemicals on a widespread basis."

¹⁴"Investigation of the Exxon Valdez Oil Spill, Prince William Sound," Part I at p. 155.

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However, on July 6, 1988, Stanley Factor, Vice President, Chartering and Evaluations, Arco Marine, Inc., objected to Roger Gale's recommendations because the owners had already decided that Alyeska would not respond to spills in Prince William Sound in the manner required by the Oil Spill Contingency Plan [Exhibit G]:

"Arco Marine Inc. does not agree with this telex nor do we concur that this represents the thoughts of the subcommittee.

"At the owners committee meeting in Phoenix, it was decided that Alyeska would provide immediate response to oil spills in Valdez Arm and Valdez Narrows only. Further efforts in the Prince William Sound would be limited to the use of dispersants and any additional effort would be the responsibility of the spiller. [Emphasis added.]"¹⁵

Conclusion

At my subcommittee's hearing on May 7, 1989 in Valdez, Theo Polasek testified under oath on Alyeska's behalf that "[w]e fulfilled our promises in that [oil spill contingency] plan. We have not broken our promises to the people of this State."¹⁶

But the evidence I have set forth indicates that Alyeska broke the law as well as its promises to the State of Alaska and the Congress.

For example, section 309(c)(4) of the Clean Water Act (33 U.S.C. section 1319(c)(4)) provides that substantial criminal penalties may be imposed upon any corporation or responsible corporate official that files information with Federal authorities with knowledge that the documents contain material misstatements.¹⁷ In addition, criminal penalties may be imposed on any person who knowingly submits false information to any agency of the United States under 18 U.S.C. section 1001.¹⁸

¹⁵The Chairman of the Owners Committee at the time was Darrell Warner, President of Exxon Pipeline Company.

¹⁶"Investigation of the Exxon Valdez Oil Spill," Part I at p. 169.

¹⁷ A fine of up to \$10,000, or a prison term of up to two years or both may be imposed under this section.

¹⁸A fine of up to \$10,000, or a prison term of up to five years, or both, may be imposed under this section.

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Thus, since Alyeska knew that it could not and would not respond to an oil spill in Prince William Sound as required by its oil spill contingency plans, Alyeska and any responsible officer could be exposed to substantial criminal penalties.

However, the Department of Justice has not even filed any criminal charges against Alyeska or its owner companies other than Exxon. Furthermore, in the proposed Criminal Plea Agreement, the United States would waive its rights not only to pursue any criminal charges against Alyeska and its owner companies, but also waive its rights to pursue civil or administrative penalties against Alyeska and its owner companies.¹⁹

The proposed Agreement and Consent Decree also provides generous protection for Alyeska. The United States and the State of Alaska both waive their rights to raise claims against Alyeska for natural resource damages in Paragraph 20. In addition, should either government recover any amount from Alyeska for claims of any kind, Exxon is entitled to be reimbursed for 20.34 percent of the governments' recovery (this figure represents the percentage ownership by Exxon of Alyeska). Yet Alyeska, including its shareholders and owner companies other than Exxon Pipeline, expressly reserves their rights to sue the United States or the State of Alaska in Paragraph 19 of the proposed settlement agreement.

In my view, the inclusion of Alyeska in the proposed Criminal Plea Agreement and in the proposed settlement Agreement and Consent Decree is contrary to the public interest. Based on the evidence, it is inconceivable that the Department of Justice would waive its rights to pursue criminal claims, and virtually all civil claims, against Alyeska.

In sum, the proposed Exxon settlement fails to hold Alyeska accountable to the public for its wrongdoing and fails to serve as a deterrent for similar conduct in the future.²⁰

¹⁹ Section III.A. of the Plea Agreement states that "[t]he United States agrees not to seek additional criminal charges or any civil or administrative penalties.... against Alyeska Pipeline Service Company or any of its shareholders or owner companies or present or former shareholder representatives, for any violation of federal law arising out of the grounding of the 'EXXON VALDEZ,' the resulting oil spill, the containment or cleanup of that spill, or its or their conduct in connection with the preparation or submission of oil spill contingency plans or related, by Alyeska Pipeline Service Company to the federal or state government...." p.5.

²⁰ Under Alaska law, punitive damages are awarded for the public policy reasons of punishment and deterrent when the defendant's conduct was outrageous, reckless, or malicious. In this instance, there is clear and convincing evidence that Alyeska's conduct merits the award of punitive damages.

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After extensive debate about the environmental risks, the Trans-Alaska Pipeline System was approved in 1973 by only a one-vote margin in the U.S. Senate. In exchange for access to environmentally sensitive public lands, the Congress was assured by Alyeska and the owner companies that the pipeline system would be operated in a safe and environmentally sound manner, using state-of-the-art technology.

The oil industry betrayed its own promises and deceived the Congress with respect to operations of Alyeska and the Exxon Valdez oil spill. Without a commitment by the Department of Justice to prosecute this intentional deception, how is it that Congress and the people of the State of Alaska can rely on such assurances in the future?

Sincerely yours,


GEORGE MILLER
Vice Chairman

cc:

The Honorable Walter J. Hickel, Governor, State of Alaska
The Honorable Ben Grussendorf, Speaker, Alaska House of Representatives
The Honorable Richard Eliason, President, Alaska Senate
The Honorable Senator Ted Stevens
The Honorable Senator Frank Murkowski
The Honorable Representative Don Young
The Honorable Richard L. Thornburgh, Attorney General, U.S. Department of Justice
The Honorable Manuel Lujan Jr., Secretary, U.S. Department of the Interior
The Honorable Samuel K. Skinner, Secretary, U.S. Department of Transportation
The Honorable Edward R. Madigan, Secretary, U.S. Department of Agriculture
The Honorable William K. Reilly, Administrator, U.S. Environmental Protection Agency
The Honorable John A. Knauss, Undersecretary for Oceans and Administrator, National Oceanic and Atmospheric Administration, U.S. Department of Commerce
Members, Committee on Interior and Insular Affairs

MICHAEL K. UDALL, ARIZONA, CHAIRMAN
 GEORGE MILLER, CALIFORNIA, VICE CHAIRMAN
 PHILIP M. BROWNE, INDIANA
 EDWARD J. MARKEY, MASSACHUSETTS
 JUSTIN J. MURPHY, PENNSYLVANIA
 HENRY H. HALL, WEST VIRGINIA
 KNUD P. VENTO, MINNESOTA
 PEE WILSON, MONTANA
 BEVERLY S. BYRON, MARYLAND
 DONALD W. JOHNSON, VIRGIN ISLANDS
 SAMUEL IDENSON, CONNECTICUT
 PETER H. KOSTMAYER, PENNSYLVANIA
 RICHARD H. LEHMAN, CALIFORNIA
 BILL RICHARDSON, NEW MEXICO
 GEORGE (BUDDY) DARDEN, GEORGIA
 PETER J. VISCLOSKEY, INDIANA
 JAMES B. FOSTER, PUERTO RICO
 M. J. LEVINE, CALIFORNIA
 WAYNE OWENS, UTAH
 JOHN LEWIS, GEORGIA
 BEN NICHOLSON, CAMPBELL, COLORADO
 PETER A. DEFAZIO, OREGON
 FRANK H. FALCONE, AMERICAN SAMOA
 TIM JOHNSON, SOUTH DAKOTA
 CHARLES E. SCHUMER, NEW YORK
 JIM JOHNSON, INDIANA
 PETER HOAGLAND, NEBRASKA
 HARRY JOHNSTON, FLORIDA
 ARRY BROCCO, OHIO

U.S. House of Representatives
 Committee on
 Interior and Insular Affairs
 Washington, DC 20515-6230

April 17, 1991

DON YOUNG, ALASKA
 RANKING REPUBLICAN MEMBER
 ROBERT J. LAGOMARSINO, CALIFORNIA
 RON MARCENIE, MONTANA
 JAMES V. HANSEN, UTAH
 BARBARA F. VUCANOVICH, NEW YORK
 BEN BLAZ, GUAM
 JOHN J. RHODES, ARIZONA
 ELTON GALLEGLY, CALIFORNIA
 ROBERT F. SMITH, OREGON
 CRAIG THOMAS, WYOMING
 JOHN J. DUNCAN, JR., TENNESSEE
 RICHARD T. SCHULZE, PENNSYLVANIA
 JOE WELLEY, COLORADO
 CHARLES H. TAYLOR, NORTH CAROLINA
 JOHN T. ODOLITTLE, CALIFORNIA
 WAYNE ALLARD, COLORADO

DANIEL P. BEARD
 STAFF DIRECTOR
 RICHARD HETZLER
 GENERAL COUNSEL
 DANIEL VALKISH
 REPUBLICAN STAFF DIRECTOR

The Honorable H. Russel Holland
 United States District Judge
 U.S. District Court
 222 West 7th Avenue No. 4
 Anchorage, Alaska 99513

Dear Judge Holland:

I have reviewed the U.S. Department of Justice's memorandum supporting the government's criminal plea agreement in United States v. Exxon Corporation and Exxon Shipping Company (No. A90-015-CR) which was filed in your court yesterday (April 16, 1991).

In my view, the Department of Justice's memorandum fails to satisfactorily explain why it is in the public interest to agree not to bring criminal charges or any civil or administrative penalties against Alyeska Pipeline Service Company ("Alyeska") or its owner companies, including British Petroleum and Arco, for their conduct related to the Exxon Valdez oil spill.

In my April 8, 1991, letter, I set forth compelling evidence from company documents that Alyeska and its owner companies were aware long before the Exxon Valdez spill that Alyeska could not effectively respond to an oil spill in Prince William Sound, failed to make recommended improvements in Alyeska oil spill response capabilities, and secretly decided that Alyeska would not respond to an oil spill in the manner prescribed by Alyeska's Oil Spill Contingency Plan.

Despite this evidence, the Department of Justice failed to file any criminal charges or pursue any civil litigation against Alyeska or its owner companies other than Exxon. Yet Alyeska and its owner companies and shareholder representatives are immunized in both the proposed criminal plea agreement and civil settlement with Exxon.

The Department of Justice's memorandum acknowledges that criminal charges could have been brought against Alyeska for false statements in violation of 18 U.S.C. section 1001 (p.21). However, Justice asserts that "it was in the best interests of the public" to

The Honorable H. Russel Holland

April 17, 1991

Page 2

let Alyeska and its owner companies off the hook by including them in the proposed plea agreement with Exxon. However, Justice failed to explain how they weighed the evidence against Alyeska to arrive at this conclusion.

How can it be "in the best interests of the public" when the Department of Justice is not even attempting to recover a single penny in compensation from Alyeska or its owner companies other than Exxon?

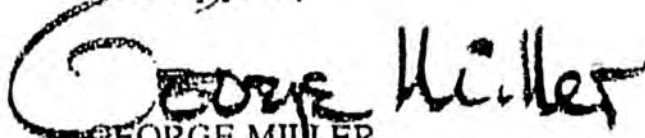
As Justice's memorandum points out, factors to be considered by the court pursuant to 18 U.S.C. section 3553 in reviewing the proposed plea agreement include the need of the sentence to: reflect the seriousness of the offense; promote respect for the law; provide just punishment; afford adequate deterrence; and provide restitution for victims.

It is difficult to understand how granting Alyeska and its owner companies immunity from criminal prosecution can conceivably "promote respect for the law" or meet any of the other sentencing criteria.

In defending the non-prosecution of Alyeska, Justice's memorandum states that the plea agreement "preserves the federal government's right to prosecute any employee of Alyeska for any criminal conduct that may have been associated with the spill plan." Yet this obfuscates the reality that it was the Alyeska owner companies and their representatives on Alyeska's Owners Committee who are most culpable since they decided not to commit the resources necessary for the Alyeska employees to respond effectively to an oil spill in Prince William Sound.

The Department of Justice has failed to meet its burden of proof that providing immunity for Alyeska, its owner companies, and their shareholder representatives, is in the public interest. I urge you to reject the plea agreement as currently written.

Sincerely yours,


GEORGE MILLER
Vice Chairman

cc: The Honorable Richard L. Thornburgh
Attorney General, U.S. Department of Justice

FILED

FEB 27 1990

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff

v.

EXXON CORPORATION

and

EXXON SHIPPING COMPANY,

Defendants

A90-015 CR
INDICTMENT

Criminal No.

Count I: Clean Water Act
Vio. 33 U.S.C. §§ 1311(a),
1319(c)(1)

Count II: Refuse Act

Vio. 33 U.S.C. §§ 407, 411

Count III: Migratory Bird
Treaty Act

Vio. 16 U.S.C. §§ 703, 707(a)

Count IV: Ports and Waterways
Safety Act

Vio. 33 U.S.C. § 1232(b)(1)

Count V: Dangerous Cargo Act
Vio. 46 U.S.C. § 3718(b)

COUNT ONE

The grand jury charges that:

1. Defendant EXXON CORPORATION is a corporation incorporated under the laws of the State of New Jersey.

2. Defendant EXXON SHIPPING COMPANY is a corporation incorporated under the laws of the State of Delaware. At all times pertinent to this indictment, EXXON CORPORATION was the sole shareholder of EXXON SHIPPING COMPANY, and EXXON SHIPPING COMPANY had a single director who reported to Exxon USA, a division of EXXON CORPORATION.

3. EXXON SHIPPING COMPANY was incorporated in 1973. In 1982, EXXON SHIPPING COMPANY took over the functions of the

to transport petroleum products for Exxon USA. EXXON CORPORATION or its affiliates were the source of all of EXXON SHIPPING COMPANY's initial assets and personnel, and EXXON CORPORATION continued to be the primary source of capital for EXXON SHIPPING COMPANY at all times pertinent to this indictment.

4. At all times pertinent to this indictment, EXXON SHIPPING COMPANY operated oil tankers for the benefit of EXXON CORPORATION; one such tanker was the Exxon Valdez. EXXON CORPORATION guaranteed the debt issued by EXXON SHIPPING COMPANY to build the Exxon Valdez.

5. At all times pertinent to this indictment, EXXON SHIPPING COMPANY's headquarters were in Houston, Texas, in the same building that housed the headquarters of Exxon Company USA. EXXON CORPORATION provided all of the computer, medical, accounting, administrative, and legal services used by EXXON SHIPPING COMPANY. EXXON CORPORATION set policies for EXXON SHIPPING COMPANY regarding capital expenditures, personnel, employee compensation, alcohol abuse, and contracting.

6. At all times pertinent to this indictment, the president of EXXON SHIPPING COMPANY reported to a vice-president of Exxon Company USA. All major investments by EXXON SHIPPING COMPANY were subject to the approval of EXXON CORPORATION.

7. At all times pertinent to this indictment, EXXON SHIPPING COMPANY was acting for the benefit of EXXON CORPORATION, and within the scope of authority granted it by EXXON CORPORATION.

8. At all times pertinent to this indictment, EXXON SHIPPING COMPANY employed "able seamen" and officers aboard the Exxon Valdez who were responsible for the operation, direction, and control of the Exxon Valdez.

9. On March 23, 1989, at approximately 9:20 p.m., the Exxon Valdez departed from the Port of Valdez, Alaska carrying 53 million gallons of crude oil owned by EXXON CORPORATION, bound for an EXXON CORPORATION facility in Long Beach, California.

10. On March 23, 1989, shortly before midnight, the Exxon Valdez deviated from the designated shipping lanes in Prince William Sound. These lanes are used by ships entering or leaving the Port of Valdez, Alaska, and establish a route for the passage of ships.

11. After the Exxon Valdez deviated from the designated shipping lanes, the master left the ship's bridge. The ship then proceeded under the direction of an officer who lacked the required Coast Guard certification for pilotage in Prince William Sound, and a helmsman who was known by EXXON SHIPPING COMPANY to be incompetent at performing his assigned duties.

12. On March 24, 1989, shortly after midnight, the Exxon Valdez ran aground on Bligh Reef, a well-known and well-marked navigational hazard, and discharged more than ten million gallons of crude oil into Prince William Sound.

13. From March 24, 1989 through November 9, 1989, crude oil that discharged from the Exxon Valdez migrated more

than 700 miles from Bligh Reef, contaminating the waters and shorelines of Prince William Sound, the Gulf of Alaska, Kenai Fjords National Park, the Katmai National Park and Preserve, the Aniakchak National Monument and Preserve, the Alaska Peninsula National Wildlife Refuge, the Alaska Maritime National Wildlife Refuge, the Becharof National Wildlife Refuge, the Kodiak National Wildlife Refuge, the lower Kenai Peninsula, the Earren Islands, Kodiak Island, Shelikof Strait, and other parts of the Alaska Peninsula, causing the death of more than 36,000 migratory birds, including more than 100 bald eagles, and numerous other varieties of wildlife.

14. On March 24, 1989, in the District of Alaska, and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY did negligently cause pollutants, namely more than ten million gallons of crude oil, to be discharged from a point source, namely the tank vessel Exxon Valdez, into Prince William Sound, a navigable water of the United States, without a permit, all of which is in violation of and contrary to Title 33, United States Code, Sections 1311(a) and 1319(c)(1).

COUNT TWO

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. On March 24, 1989, in the District of Alaska and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY unlawfully did throw, discharge and deposit, and did cause, suffer and procure to be thrown, discharged and deposited, refuse matter, namely more than ten million gallons of crude oil, from a ship, namely the Exxon Valdez, into Prince William Sound, a navigable water of the United States, without a permit, all in violation and contrary to Title 33, United States Code, Sections 407 and 411.

COUNT THREE

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. From on or about March 24, 1989 to on or about September 25, 1989, in the District of Alaska and elsewhere, the defendants EXXON CORPORATION and EXXON SHIPPING COMPANY, without being permitted to do so by regulation as required by law, did kill migratory birds, all in violation and contrary to Title 16, United States Code, Sections 703 and 707(a) and Title 50, Code of Federal Regulations, Section 21.11.

COUNT FOUR

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. On March 23 and March 24, 1989, in the District of Alaska and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY did willfully and knowingly violate a regulation prescribed under Title 33, United States Code, Chapter 25, in that defendants, being the owners of the tank vessel Exxon Valdez, and the master of the Exxon Valdez, acting as the agent of the defendants, did willfully and knowingly fail to ensure that the wheelhouse of the Exxon Valdez, while underway, was constantly manned by persons who directed and controlled the movement of the vessel, each of whom was competent to perform that duty, all in violation of and contrary to Title 33, United States Code, Section 1232(b)(1), and Title 33, Code of Federal Regulations, Section 164.11(b).

COUNT FIVE

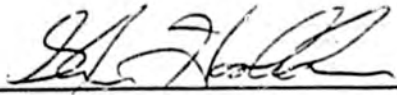
The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. On March 23 and March 24, 1989, in the District of Alaska and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY did willfully and knowingly violate a regulation prescribed under Title 46, United States Code, Chapter 37, in that defendants did employ and cause persons to be engaged on the crew of the tank vessel Exxon Valdez, knowing such persons to be physically and mentally incapable of performing the duties assigned them.

In violation of Title 46, United States Code, Section 3718(b), and Title 46, Code of Federal Regulations, Section 35.05-20.

A true bill,


Foreperson


PETER C. GAMACHE
Assistant U.S. Attorney

For:

MARK R. DAVIS
Acting United States Attorney


CHARLES A. De MONACO
Assistant Chief
Environmental Crimes Section
U.S. Department of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

ASHLAND OIL, INC.

)
)
)
)
)

Criminal No. 88-146

GOVERNMENT'S RESPONSE TO THE DEFENDANT, ASHLAND
OIL, INC.'S MOTION FOR DETERMINATION THAT APPLICATION
OF THE ALTERNATIVE FINES PROVISION, TITLE 18,
UNITED STATES CODE, SECTION 3571, WOULD UNDULY
COMPLICATE OR PROLONG THE SENTENCING PROCESS

Now comes the United States of America by its attorneys, Charles D. Sheehy, Acting United States Attorney, and Charles A. DeMonaco, and Constance M. Bowden, Assistant United States Attorneys, and respectfully requests that this Court deny the defendant, Ashland Oil, Inc.'s Motion to preclude the use of the alternate fines provision, Title 18 United States Code, Section 3571 for the following reasons:

STATEMENT OF FACTS

At approximately 5:00 p.m. on January 2, 1988, at Ashland's Floreffe facility located in Jefferson Borough, a 96,000 barrel tank containing approximately four million gallons of diesel fuel completely ruptured, spewing its contents into the surrounding area, including the Monongahela River. Just minutes before the tank collapsed, John Gajdosek, an Ashland employee, had been on top of the tank.

Shortly after the spill occurred, local police, fire and haz-mat teams responded to the spill. As Chief Don Withers of the Floreffe Fire Department testified at the hearing on the

defendant, Ashland Oil, Inc.'s motion to plead nolo contendere, these response teams were faced with a volatile situation arising from the fact that the Floreffe facility is a storage facility for gasoline as well as diesel fuel. Indeed, because a pipe leading into one of the gasoline storage tanks suffered a leak, it was necessary to evacuate the residents who lived in the neighborhoods bordering on the Floreffe facility. As Withers further testified, the Floreffe facility is located in close proximity to railroad tracks that are used by Conrail on a daily basis, a glass factory, Duquesne Light's Elrama Plant, and a chemical company, which has its own storage tanks: including a tank containing liquid hydrogen. These circumstances made the collapse of a tank at Ashland's Floreffe facility an extremely dangerous occurrence.

Additionally, during the course of the early evening hours, in excess of 500,000 gallons of diesel fuel spilled into the river through a storm drain located on property owned by Duquesne Light Company, through Lobbs Run, a stream which borders the Floreffe facility, and by percolating through the ground. The proximity of the Floreffe facility to the Monongahela River creates a strong likelihood that a total collapse of a tank, like the one involved in this case, will result in oil going into the river. Additionally, because of the topography of the area, and because there are few access roads to the river, it is almost impossible to stop the oil from going downstream once it enters the river. In this case, as the diesel fuel flowed downriver, it

polluted the water supply systems of numerous communities located along the Monongahela and Ohio Rivers, and resulted in many of those communities being without water for a substantial period of time.

It has been determined that the spill resulted in the immediate death of many fish and waterfowl. However, biologists and scientists, lacking adequate pre-spill data, may never be able to determine the total effect of the spill on the ecosystem of the Ohio River Valley. There is some evidence that the spill may have adversely affected the food chain. If so, the spill could adversely affect the Ohio River Valley's ecosystem for years to come.

The spill constitutes one of the largest environmental catastrophes in the Western District of Pennsylvania and is one of the largest inland water spills to have ever occurred anywhere in the world. Subsequent investigations by Batelle Memorial Institute, a private independent research organization contracted by Ashland to conduct an investigation into the cause of the collapse, and the National Bureau of Standards of the United States Department of Commerce, lend credence to the conclusion that Ashland was negligent in its reconstruction, testing and inspection of Tank 1338. A report issued by the Pennsylvania Tank Collapse Task Force characterizes the defendant's conduct as "grossly negligent". As this Court emphasized at the hearing with respect to Ashland's proffer of a plea of nolo contendere,

At approximately 5:00 p.m. on January 2, 1988, Tank 1338 suffered a total collapse. Subsequent failure investigations conducted by Batelle Memorial Institute and the National Bureau of Standards indicated that the collapse was caused by a brittle fracture that initiated at a flaw in the tank shell about eight feet above the base and just below the horizontal weld between the first and second courses of steel. The flaw at which the fracture initiated was determined by Batelle to be present prior to the reconstruction of Tank 1338 at the Floreffe site. Deposits on the surface of the flaw indicate it was formed during a cutting operation. The fracture propagated to complete rupture of the tank shell because the steel lacked sufficient toughness to arrest a propagating fracture at the temperature and with the stresses existing in the tank shell.

Despite the age of the steel used to construct Tank 1338, Ashland failed to conduct the tests required by industry standards and those necessary in the ordinary exercise of due care that would have determined whether the steel used in Tank 1338 was of sufficient toughness to withstand the temperatures and stress to which it would be exposed. The nationally recognized standard for above-ground, atmospheric, welded steel tanks is the American Petroleum Institute Standard 650 (Welded Steel Tanks for Oil Storage, 1984). Although API 650 does not explicitly address the reconstruction of existing tanks, the National Bureau of Standards concluded that API 650 can be used for reconstruction of a tank when documentation is not available for

the steel. Ashland also has acknowledged that it was, at the time, corporate policy to comply with API 650 whether the tank to be erected was new or reconstructed.

Tests conducted by the National Bureau of Standards on the plate material of the tank following its collapse indicate that the steel used to construct the tank did not comply with the toughness requirements of API 650 and was seriously deficient in this respect. In accordance with the standard, according to the National Bureau of Standards, the material used was inappropriate for the climactic conditions of Pittsburgh. Professor Harold W. Paxton, Ph.D., Department of Metallurgical Engineering and Material Science, Carnegie Institute of Technology, Carnegie Mellon University, will testify as an expert witness that the dominant cause of the failure was the pre-existing flaw and the totally inadequate toughness of the material at the service temperature. Consequently, this steel should have never been used in this project.

Industry standards, including API 650, require that butt-welded joints of the shell plate, both vertical and horizontal, be spot-radiographed. The spot radiographs are to be taken as the welding progresses and are intended to determine if a welder is making good quality welds. The acceptance criteria for welds examined by radiography are contained in the ASME Boiler and Pressure Vessel Code and are adopted by reference in API 650.

In this case, the government's proof would have shown that Progress Services, Inc., was hired to conduct radiographic

inspections on only 40 welds. The National Bureau of Standards, concluded that fewer radiographs were taken than required, and the radiographs were not taken during construction but after construction was completed, which is in deviation of industry standards as set forth in API 650.

The government's evidence would also have shown that Progress Services, Inc., found that 22 of 39 welds which it had radiographically inspected were defective. The welds which were defective were old welds which were present in the tank at the time of its reconstruction. Although Progress Services notified a representative of Ashland of the defective welds and provided Ashland with the radiographs, Ashland never took steps to correct the defective welds. Nor did Ashland order radiograph inspection of additional welds. The National Bureau of Standards concluded that, had API 650 been followed, there would have been a radiograph at the location of the flaw that initiated the fracture of the shell that might have revealed the presence of the flaw.

In addition, API requires testing of the tank shell and requires that if water is available, the tank shall be filled with water to the maximum design level or to a level two inches above the weld connection of the roof plate. The National Bureau of Standards concluded that, in accordance with API 650, the tank should have been filled with 46 feet of water and carefully inspected during the filling, before external oil piping was connected.

The Government's evidence would further have shown that despite the availability of sufficient quantities of water from either the West Penn Water Company or the Monongahela River itself, Ashland did not fill the tank to the appropriate level. Instead, it pumped in only five feet of water into the tank. According to the National Bureau of Standards, the tank might have failed during the water test, preventing the severe environmental damage that occurred.

Finally, the Government's evidence would have shown that the project engineer whom Ashland assigned to oversee construction of the tank was wholly unqualified. He had little formal training in engineering, he had no previous experience with reconstruction of such a large tank, and his work was inadequately reviewed by his supervisors. In short, as the Pennsylvania Tank Collapse Task Force Report concludes:

The . . . milestones on the Tank 1338 are joined by a common road. At each step along the way Ashland as an entity failed to take any active or effective role in controlling its contractors or establish any procedures which might lead to a quality job. It was a passive consumer of the worst kind - apathetic as to potential problems, ignorant of actual events, unwilling to take any engaged role. Its employees were both institutionally and often personally unable to respond in any other way. Both the details and big picture equally escaped Ashland's attention. Compared against the applicable standards, its indus-

try peers, or even common-sense, Ashland's conduct and procedures can only be considered grossly negligent. The structural collapse at Floreffe can be directly traced to the supervisory bankruptcy at Ashland.

ARGUMENT

THIS IS AN APPROPRIATE CASE FOR APPLICATION OF THE ALTERNATIVE FINE PROVISION, TITLE 18 UNITED STATES CODE, SECTION 3571(d).

On February 7, 1988, the defendant, Ashland Oil, Inc., entered a plea of nolo contendere to an indictment charging it with unlawfully throwing, discharging and depositing and causing suffering, and procuring to be thrown, discharged and deposited refuse matter including, but not limited to oil, from a storage tank on the shore, into the Monongahela River, a navigable water of the United States without a permit in violation of Title 33 United States Code, Sections 407 and 411, and with negligently discharging and negligently causing to be discharged pollutants, including, but not limited to oil, from a point source, including a storm drain, into the Monongahela River, a navigable water of the United States without a permit in violation of Title 33 United States Code, Sections 1311(a) and 1319(c)(1).

Having entered a plea of nolo contendere to the offenses with which it was charged, Ashland Oil Inc. stands convicted of negligently discharging oil into the Monongahela. It is no longer free for purposes of this proceeding at least to deny that

its conduct was negligent, or that its negligence caused the oil to be discharged into the Monongahela River. see Lott v. United States, 367 U.S. 421, 426-427 (1961) (citations omitted) in which the United States Supreme Court held:

[a]lthough it is said that a plea of nolo contendere means literally 'I do not contest it, '...., and 'is a mere state-ment of unwillingness to contest and no more,'....., it does admit 'every essential element of the offense [that is] well pleaded in the charge.'..Hence, it is tantamount to 'an admission of guilt for purposes of the case,'... and 'nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record,...'

Aside from the admission of negligence inherent in the plea of nolo contendere the facts, as set forth in the statement of facts portion of this response and, as found by the Pennsylvania Tank Collapse Task Force Report, a copy of which is attached hereto , and the Reports issued by the National Bureau of Standards, and Battelle Memorial Institute, copies of which have been previously supplied to this Court, clearly lead to the conclusion that the defendant, Ashland Oil Inc. was negligent, if not "grossly negligent with respect to the relocation, reconstruction, and testing of Tank 1338; that Ashland's negligence led to in excess of 500,000 gallons of diesel fuel being discharged into the Monongahela River, and that the tank collapse, and subsequent discharge of the diesel fuel into the

river posed a grave threat to a major watershed upon which millions of people rely for water and commerce.

Given the above, the government submits that a substantial penalty is warranted in this case. The serious nature of this offense is indicated by the fact that pursuant to the sentencing guidelines, §2Q1.3(a) the severity level of the offenses at issue in this case is a level 29, taking into consideration the fact that the offense involved a discharge, release or emission of a pollutant; the fact that there existed a substantial likelihood of death or serious bodily injury; the fact that the spill resulted in disruption of public utilities and the evacuation of a community, the fact that the cleanup required a substantial expenditure, and because the offense involved a discharge without a permit. With an offense severity level of 29, and assuming no criminal history, the guidelines call for a sentence of imprisonment of 87-108 months.

Since Ashland Oil, Inc. is a Corporation it cannot be sentenced to a term of imprisonment. See Title 18 United States Code, Section 3551 which states that:

An organization found guilty of an offense shall be sentenced, in accordance with the provision of section 3553, to-

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by Subchapter C.

A sentence to pay a fine may be imposed in addition to a sentence to probation....

As such, the only real penalty that can be imposed in this case is a pecuniary one. Pursuant to Title 18 United States Code, Section 3572, this Court, in deciding the amount of the fine to be imposed in this case, is to take into consideration those factors set forth in Title 18 United States Code, Section 3553, which include: 1)"the nature and circumstance of the offense, and characteristics of the defendant," 2)."the need for the sentence imposed- (a) to promote respect for the law, and to provide just punishment for the offense; (b) to afford adequate deterrence to criminal conduct, and (c) to protect the public from further crimes of the defendant,..."

In addition, pursuant to Title 18 United States Code, Section 3572, this Court, in setting a pecuniary penalty, is to take into consideration:

(1) The defendant's income, earning capacity, and financial resources, (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose; (3) any pecuniary loss inflicted upon others as a result of the offense; (4) whether restitution is ordered or made and the amount of such restitution; (5) the need to deprive the defendant of illegally obtained gains from the offense; (6) whether the defendant can pass on to consumers or other persons the expense of the fine; and (7) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the

organization responsible for the offense and to prevent a recurrence of such offense. (b).... If, as a result of a conviction, the defendant has the ability to make restitution to a victim of the offense, the court shall not impose a fine or other monetary penalty to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.

Although we do not intend to discuss these factors at great length, since we intend to file a more comprehensive sentencing memorandum at a later date, we do intend to discuss them to the extent that such a discussion is necessary to establish that a substantial fine is warranted in this case, and that the circumstances of this case justify some expenditure of this Court's time, and resources; assuming such expenditure proves to be necessary in order to establish the basis for imposing such a fine in this case.

Applying the factors set forth in Title 18 United States Code, Sections 3553 and 3572 to the circumstances of this case, the government would submit, as the facts set forth in the factual portion of this response, and as this Court, itself noted during the course of the hearing with respect to the defendant's request to enter a plea of nolo contendere, the charges of which the defendant, Ashland Oil, Inc. has been found guilty of are serious in nature. Although Ashland Oil Inc., is charged with a "negligent" discharge, the acts which caused the collapse, and other actions taken by Ashland Oil, Inc., during the course of relocation, reconstruction and inspection of Tank 1308, including

the decision to reconstruct Tank 1338 from a tank composed of forty year old steel totally inadequate for the climatic conditions of Pittsburgh, the decision not to correct the defective welds, and the decision not to conduct a full hydrostatic test of Tank 1338, were intentional in nature, and could only have been made based on monetary considerations.

Ashland's decision to save money by cutting corners cannot be viewed in isolation, but must be viewed in light of the harm and inconvenience to the public resulting from that decision. As Chief Withers testified at the hearing with respect to Ashland's petition to enter a nolo contendere plea, over 300 local voluntary firemen, policemen, and members of local haz-mat teams responded to the scene of the spill. The spill resulted in the evacuation of local residences; caused nearby businesses, including the Elrama Plant, to shut down; resulted in the Allegheny river being closed to traffic for two days; led in the temporary closing of railroad tracks located behind Ashland's Floreffe facility, and caused a disruption of water service to surrounding communities for a substantial period of time; not only inconveniencing members of the communities, who were without water, but also causing businesses to suffer losses as a result of not being able to keep normal operating hours.

Additionally, although it has been determined that the spill resulted in the immediate death of many fish and waterfowl, biologists and scientists, lacking adequate pre-spill data, may

never be able to determine the total effect of the spill on the ecosystem of the Ohio River Valley. There is some evidence that the spill may have adversely affected the food chain. If so the spill could adversely affect the Ohio River Valley's ecosystem for years to come.

Moreover, although the government has not fully documented the losses resulting from the spill, according to remarks made by John R. Hall, the Chairman and Chief Executive Officer of Ashland Oil inc., at a News Conference held in Pittsburgh, Pennsylvania on May 26, 1988, indicated that Ashland Oil, Inc. had, as of that date, received claims amounting to \$18 million, including the cost of cleanup, and had paid \$7 million in claims-including cleanup costs. The Environmental Protection Agency, alone can document approximately \$700,000 in costs resulting from the federal government's response to the spill.

It is true, as Ashland Oil, inc., contends in its motion that it has reimbursed many of the governmental agencies and individuals, who have suffered a loss as a result of the spill. the legislative history to the Comprehensive Crime Control Act of 1984, indicates although the extent to which the defendant has made reparation is germane to this Court's consideration of whether to impose a fine, as well as the amount of the fine to be imposed, this consideration

is not intended necessarily to result in the court's avoiding imposition of a fine that might otherwise be imposed or reducing a fine by the amount of restitution to be paid. Either of these results might, however, be appropriate

in a particular case, depending upon the effect of payment of restitution upon the defendant's ability to pay a fine and upon the purposes of sentencing to be served by requiring payment of a particular fine. Of course, if the defendant, has, prior to sentencing made reparation or made arrangements to make reparation to the victims of his offense, this will have an effect on his financial resources which should be taken into account in addressing the ability of a defendant to pay a fine, and may also alleviate somewhat the need to impose a high fine for purposes of punishment and deterrence.

Senate Report No. 98-225 at 108, reprinted in, 1984 U.S. Code, Cong. and Admin. News at 3291. .

Thus, while the extent to which Ashland Oil, Inc., had made reparations is relevant this Court's determination in this case, it is not dispositive. We submit that considering the factors set forth in Title 18 United States Code, Section 3553, including the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense; to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant, the fact that Ashland Oil Inc., has made reparations in this case, should be accorded little if no weight.

More specifically, we note that in his remarks of May 26, 1988, John R. Hall, Chairman and Chief Executive Officer of Ashland Oil, Inc., indicated that "the company is fully covered by insurance for any claims for compensation related to the incident, including lawsuits. The company's insurance provides

up to \$400 million in coverage, after a 2.5 million deductible. We do not expect the diesel spill to have a material adverse impact on Ashland's financial condition." Thus, to the extent Ashland Oil, Inc., has made reparations in this case, the reparations have been covered by its insurance; a cost of doing business which is generally passed on to the consumer.

In this respect we note this Court in assessing the amount of fine to be imposed consider the extent to which the cost of the fine can be passed on to the consumer. The legislative history of the Crime Control Act of 1984, also indicates that Congress in increasing the fines that could be imposed in criminal cases, recognized that "[t]he need for such increased penalties is particularly apparent with regard to a corporate defendant which today can often divide the minor burden of payment among its many stockholders, or pass it on to consumers as a cost of doing business, with the result that lesser penalties may not be felt either by the corporation or by its multiple owners." Senate Report No. 98-225 at 106-107, reprinted in 1984 U.S. Code, Cong. and Admin. News at 3289. Thus, not only should this Court not consider the amount of reparations that have already been made in this case, but this Court should impose a fine which is sufficiently high in amount that it cannot be passed on to consumers.

Moreover, while the \$400,000 fine, which this Court could impose without applying the alternative fine provision, see Title 18 United States Code, Section 3571(c)(5) may appear to be

a substantial fine, the adequacy of the fine must be viewed in light of whether Ashland Oil, Inc., would feel the effect of such a fine. We submit that given the size and financial resources of Ashland Oil, Inc., as well as its ability to pass such a fine on to the consumer as a hidden cost, a \$400,000 fine would be an inadequate penalty in this case.

More specifically, the defendant, according to its 1987 annual report, is "one of the largest industrial corporations in America" and is "The nation's largest independent refiner." According to that same report, Ashland Oil, Inc. had net income of 133 million dollars (\$133,000,000), resulting from over seven billion (\$7,189,000,000) in sales and operating revenues for the fiscal year ending September 30, 1987.

As the legislative history to the Comprehensive Crime Control Act of 1984 indicates, "[w]hile it is not intended that a fine for a solvent individual be so high as to force him into a lifetime of poverty, if a defendant is wealthy and the court finds that a high fine is necessary to serve the purposes of sentencing, it should not be reluctant to sentence the defendant to pay a high fine . . ." Senate Report 98-225 at 108, reprinted in 1984 U.S. Code, Cong. and Admin. News at 3290.

Moreover, since Ashland Oil, Inc. is adequately insured, see remarks of John R. Hall, Chairman and Chief Executive Officer, Ashland Oil, Inc., made at a news conference which was held in Pittsburgh, PA on May 26, 1988 in which Mr. Hall indicates that Ashland Oil, Inc. has 400 million dollars

(\$400,000,000) in insurance coverage, the imposition of a large fine in this case will not hinder Ashland Oil, Inc. from making further reparations, to the extent that such reparations are warranted.

Nor will use of the alternative fine provision unduly complicate or prolong the sentencing process. At the outset, because of the claims procedure utilized by Ashland Oil, Inc. in this case, it should be a fairly simple matter to establish the gross loss resulting from the spill. To the extent that Ashland Oil, Inc. has already paid many of the claims, it has no legitimate reason for contesting the validity of these claims in the course of this proceeding. Since Ashland Oil, Inc. has, according to its memorandum filed in support of its motion to preclude use of the alternative fine provision, obtained releases from liability from those individuals and/or organizations whose claims it has paid, it can not be harmed by admitting to the validity of those claims. Given this fact, and the fact that corporations, unlike individuals, do not have a Fifth Amendment right against self-incrimination, see Braswell v. United States, 101 L.Ed 2d 98 106-115 (1988), the government submits that if Ashland Oil, Inc. does not admit to the validity of these claims, for purposes of establishing gross loss in this matter, this Court can take Ashland Oil Inc.'s lack of cooperation into consideration in determining the appropriate penalty to be imposed in this case. See Roberts v. United States, 445 U.S. 552 (1980). Compare United States v. Heubel, No. 88-3548 (3d Cir.

January, 1989). Moreover, to the extent that Ashland Oil, Inc. forces the government to prove such losses, even though it has no basis for contending that such losses are invalid, this Court, pursuant to Title 28 United States Code, Section 1918(b), can impose the costs of the sentencing proceeding on the defendant, Ashland Oil, Inc.

Moreover, even without the cooperation of the defendant, Ashland Oil, Inc., the gross losses attributable to the offense at issue in this case are readily ascertainable and provable. At the outset, contrary to the defendant's assertion in its memorandum, which it filed in support of its motion to preclude use of the alternative fine provision, the government believes that this Court can enter an order pursuant to Rule 17(c), Federal Rules of Criminal Procedure, requiring that Crawford and Company, the firm hired by Ashland Oil, Inc., to adjust the claims submitted as a result of the spill, produce its records before this Court prior to the date of the sentencing hearing, and permitting the government, and its agents to inspect said documents. A motion requesting that such an order be entered, is being filed simultaneously with the filing of this response.

We also submit that the entering of the order to produce, which the government is requesting would not violate Rule 408, Federal Rules of Evidence. That Rule states that:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising

or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

At the outset, pursuant to Rule 1101, Federal Rules of Evidence, the "rules (other than with respect to privileges) do not apply in the following situations: (3) Miscellaneous proceedings. Proceedings for . . . sentencing." Thus, pursuant to Rule 1101, Rule 408 has no applicability to the proceeding at issue here. Cf In Re Special Nov. 1985 Grand Jury, 433 F.Supp. 1094, 1096-1097 (N.D. Ill. 1977), in which the Court held that pursuant to Rule 1101(d)(2), Federal Rules of Evidence, Rule 408, Federal Rules of Evidence is not applicable to grand jury proceedings. See also United States v. Gonzales, 748 F.2d 74, 78 (2d Cir. 1984), in which the Court of Appeals for the Second Circuit held that Rule 408's exclusionary provision does not apply to criminal proceedings. In so holding the Court reasoned that:

In addition, the primary policy justification for Rule 408's exclusion in the civil context does not apply to criminal prosecutions. Rule 408 is premised on the idea that encouraging settlement of civil claims justifies excluding otherwise probative

evidence from civil lawsuits. Fed. R. Evid. 408 advisory committee note. However, encouraging settlement does not justify excluding probative and otherwise admissible evidence in criminal prosecutions. the public interest in the disclosure and prosecution of crime is surely greater than the public interest in the settlement of disputes. It follows that since nothing in the Rule specifically prohibits receiving in evidence the admissions and statements made at a conference to settle claims of private parties, they are admissible in any criminal proceeding.

But see United States v. Meadows, 598 F.2d 984, 988-989 (5th Cir. 1979), in which the Court assumed arguendo that Rule 408 would apply in criminal proceedings.

Moreover, where there is no real dispute over the validity of a claim, Rule 408, even if applicable, would not preclude the government from using the payment of the claim as proof of its validity. See Antilles S.S. Co. v. Members of American Hull Ins., 733 F.2d 195, 200 N.3 (2d Cir. 1984); Dallas v. Aetna Life Ins. Co., 768 F.2d 1303, 1306-1307 (11th Cir. 1985); Deere and Co. v. International Harvester Co., 710 F.2d 1551, 1556 (Fed. Cir. 1983); In Re B.D. Intern. Discount Corp., 701 F.2d 1071, 1074 (2d Cir. 1983).

We also note that Ashland Oil Inc., in its memorandum has put into dispute its good faith efforts to make restitution in this matter. At the time of the hearing on the nolo contendere plea, Ashland Oil Inc., through its counsel, represented to this Court that it had paid 80% of the claims, which have been submitted. (See page 10 of hearing transcript). In the affidavit

of Charner Little, submitted in support of its motion to preclude use of the alternative fine provision, Ashland Oil Inc., represents that one half of the claims submitted have not been settled. Thus, to the extent that Ashland Oil, inc. intends to rely on its willingness to make restitution as a mitigating factor, the extent and nature of the claims made, and those that have been paid are relevant to this Court's determination of the sentence to be imposed in this case, whether the alternative fines provision is to be applied or not, and whether Rule 408, Federal Rules of Evidence applies or not. Pursuant to that Rule, evidence of compromise and or offers to compromise is admissible for any purpose other than to prove the validity of the claim.

Once the government has access to the records of Crawford and Company, proving loss in this case will be a simple matter. Even without the records of Crawford Claims Co., the government believes that it will be able to prove the "gross loss" resulting from the spill in an expeditious manner. Since this is a sentencing proceeding, the Rules of Evidence, including the rules excluding hearsay do not apply. See Rule 1101(d)(3). See also Williams v. Oklahoma, 358 U.S. 576 (1959), Williams v. New York, 337 U.S. 241, 246-247 (1949); United States v. Baylin, 696 F.2d 1030, 1038-1039 (3rd Cir. 1982).

We also note that the Rules and Statutory provisions do not appear to impose a particular burden of proof upon the government. While we believe that out of an abundance of caution, this Court should utilize the preponderance of the

evidence standard, see United States v. Palma, 760 F.2d 475 (3rd Cir 1985) in which the Court of Appeals for the Third Circuit held that for purposes of title 18 United States Code, Section 3579 [Now Title 18 United States Code, Sections 3663 and 3664], the government has the burden of proving the loss suffered by the victim by a preponderance of the evidence, it is arguable that a lesser burden of proof applies. See McMillan v. Pennsylvania, 91 L.ED.2d 67, 75-79 (1986). In McMillan, the Supreme Court in holding that the due process clause did not require that the state prove that the defendant possessed the firearm by clear and convincing evidence, reasoned that:

[we] have little difficulty concluding that, in this case, the preponderance standard satisfies due process. Indeed, it would be extraordinary if the Due Process clause as understood in Patterson plainly sanctioned Pennsylvania's scheme, while the same clause explained in some other line of less clearly relevant cases, imposed more stringent requirements. There is, after all, only one Due Process Clause in the Fourteenth Amendment. Furthermore, petitioners do not and could not claim that a sentencing court may never rely on a particular fact in passing sentence without finding that fact by "clear and convincing evidence." Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all....

See also McMillan v. Pennsylvania, supra, 91 L.Ed.2d at 80 n.8 in which the United States Supreme Court stated that;

Addington v. Texas, 441 U.S. 418 (1979), and Santosky v. Kramer, 455 U.S. 765 (1982), which respectively applied the

of the water shortage caused by the oil spill, and the closing of the river to river traffic. Additionally, the government anticipates having its proof with respect to losses gathered in advance of sentencing, and intends to provide this Court with a sentencing memorandum detailing the extent and nature of gross loss, as well as the proof in support thereof, prior to the date of sentencing. Thus, we believe that gross loss can be established in this case without "unduly complicating or prolonging the sentencing process." To the extent that Ashland Oil, Inc., by its motion to preclude use of the alternative fine provision, and memorandum in support thereof, has indicated an intent to attempt to complicate these matters, we suggest that this Court has the authority to preclude such an attempt by making it clear to Ashland Oil, Inc. that its failure to cooperate in establishing "gross loss" resulting from the spill will weigh heavily in this Court's decision as to what penalty should be imposed. As noted earlier, this Court also has the authority to impose the costs associated with the sentencing proceeding upon Ashland Oil, Inc. See Title 28 United States Code, Section 1918(b).

We also note that contrary to Ashland's contention in its memorandum, permitting the government to establish gross loss in this case will not deprive it of its Seventh Amendment right to a jury trial. This is a criminal sentencing proceeding. It is well established that a defendant has no right to a jury determination with respect to the penalty, which should be

imposed in this case. See Spazziano v. Florida, 468 U.S. 447, 457-465 (1984). See also, United States v. Palma, 760 F.2d 475 479-480 (3d Cir. 1985) in which the Court of Appeals for the Third Circuit held that the Victim Witness Protection Act, Title 18 United States Code, Section 3579 [Now Title 18 United States, Code, Sections 3663 and 3664] did not violate the Seventh Amendment by providing a method pursuant to which restitution is to be made to victims of federal crimes. Moreover, to the extent the government relies on claims already paid by Ashland, Ashland is not likely to be prejudiced since these claims will not give rise to civil proceedings.

CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court deny Ashland Oil Inc.'s motion to preclude the use of the alternative fine provision in this case.

Respectfully submitted,

CHARLES D. SHEEHY

Acting United States Attorney

Charles A. Demonaco
CHARLES A. DEMONACO

Assistant United States Attorney

Constance M. Bowden

CONSTANCE M. BOWDEN

Assistant United States Attorney

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a true and correct copy of the
within Response was served by mail upon:

Thomas A. Donovan, Esquire
Kirkpatrick and Lockhart
1500 Oliver Building
Pittsburgh, PA 15222

Cynthia M. Bowler
Assistant United States Attorney

Dated: February 17 , 1989

CMB:dmb: (2/27/89)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

ASHLAND OIL, INC.,

Criminal No. 88-146

GOVERNMENT'S OFFER OF PROOF
WITH RESPECT TO GROSS LOSS

AND NOW comes the United States of America by Charles D. Sheehy, Acting United States Attorney for the Western District of Pennsylvania, and Constance M. Bowden, Assistant United States Attorney for said district, and Charles A. DeMonaco, Assistant Chief Environmental Crimes Section, Land and Natural Resources Division, and Eric W. Nagle, trial attorney, Environmental Crimes Section, Land and Natural Resources Division, and submits the following offer of proof with respect to gross loss for purposes of the alternative fines provision, Title 18, United States Code, Section 3751:

Initially, the government submits that this case is uncommonly well-suited to application of the alternative sentencing provision of 18 U.S.C. §3571(d). Unlike most criminal cases, a large proportion of the losses caused by the offenses in this case have been thoroughly documented, analyzed, verified, and tallied by a corps of professional claims adjusters. One could hardly ask for a more ideal situation in which to assess the loss caused by a crime.

PROFFER

The United States intends to prove the gross pecuniary loss resulting from the January 2, 1988 oil spill at Ashland's Floreffe facility through the following documentation:

A computer printout produced by Crawford and Company, Ashland's claim adjuster, indicating all claims paid by Ashland to date, and the type of loss upon which each claim is based. Additionally, the government has identified forty (40) entities, including water companies, business, schools, municipalities, and state, local and federal agencies, that suffered a total of \$5,965,189.39 in losses as a result of the spill.

All of these entities have submitted claims to Crawford and Company, the claims adjuster for Ashland Oil, Inc., requesting compensation for pecuniary losses incurred as a result of the spill.

Contrary to Ashland's assertion, the government does not intend to prove gross losses simply by offering evidence of Ashland's settlement of claims. Rather, the government intends to provide the Court with detailed documentation of these losses that the government has obtained from Crawford and Company as well as from the individual entities. This documentation will provide independent proof of the losses suffered and demonstrate that Ashland's claim adjusters analyzed each claim in detail and authorized payment of those claimants' amounts found to be valid.

The government intends to provide this documentation to the Court in the form of a summary pursuant to Rule 1006, Federal Rules of Evidence. The government will also have all of the

documents marked as exhibits and available for the Court's inspection.

In addition, to the extent it is necessary to introduce further proof of the relation of the loss claimed to the offense charged, the government intends to call Special Agent John Aduddell of the Environmental Protection Agency's Office of Criminal Investigation, and Special Agent Joseph Eddins, of the Federal Bureau of Investigation to testify to these matters. The government does not intend to call an individual witness from each entity that suffered a loss.

In the event that Ashland disputes the relationship of the losses incurred to the spill, the government is prepared to offer the testimony of witnesses from several of the entities which suffered the largest losses, if the Court believes that such testimony will be necessary.

The losses the government intends to prove are only a small part of the actual losses suffered by hundreds of individuals, businesses, and government agencies incurred losses as a result of the spill, including lost wages, lost business revenues, property damage, and extraordinary expenses for labor and supplies. In

order to avoid unduly complicating the sentencing process, the government does not intend to attempt to prove these losses.

Respectfully submitted,

CHARLES D. SHEEHY
Acting United States Attorney

By: CONSTANCE M. BOWDEN
Assistant U.S. Attorney

CHARLES A. DeMONACO
ASSISTANT CHIEF ENVIRONMENTAL
CRIMES SECTION LAND AND NATURAL
RESOURCES

ERIC W. NAGLE
ENVIRONMENTAL CRIMES SECTION
LAND AND NATURAL RESOURCES
DIVISION

"clear and convincing evidence" standard where the state sought involuntary commitment to a mental institution and involuntary termination of parental rights, are not to the contrary. Quite unlike the situation in these cases, criminal sentencing takes place only after a defendant has been adjudged guilty beyond a reasonable doubt. Once the reasonable doubt standard had been applied to obtain a valid conviction "the criminal defendant has been constitutionally deprived of his liberty to the extent that the state may confine him".... As noted in text, sentencing courts have always operated without constitutionally imposed burdens of proof; embracing petitioner's suggestion that we apply the clear and convincing standard here would significantly alter criminal sentencing, for we see no way to distinguish the visible possession finding at issue here from a host of other express or implied findings sentencing judges typically make on the way to passing sentence.

We also note that unlike the statutory provisions relating to restitution, see Title 18 United States Code, Section 3664(d), the alternative fines provision does not provide a specific burden of proof where gross loss is disputed.

Thus, the government would anticipate introducing proof of gross loss, through a summary witness. The government also anticipates that it will rely only upon those losses, which are directly related to the offenses at issue in this case; that is those losses which are directly attributable to the discharge of the diesel fuel into the Monongahela River. The government also represents that it intends to prove only those types of losses, the validity of which cannot be disputed, including the losses sustained by the water companies affected by the spill; the response and removal costs of state, local, and federal agencies; and to some extent the losses suffered by businesses as a result

Ashland, by entering a plea of nolo contendere, admitted its negligence at least for the purposes of this proceeding.

More specifically, had the case gone to trial, the government would have proven that Tank 1338, which collapsed, was first placed in operation almost fifty years ago at Whiskey Island which is located near Cleveland, Ohio. It was a welded steel tank with a flat bottom and shallow conical roof. The cylindrical shell was one hundred twenty (120) feet in diameter and forty-eight (48) feet high. It consisted of six (6) shell courses, each approximately eight (8) feet high and thirty-two (32) feet long, which were butt welded.

In 1986, Ashland disassembled the tank and reconstructed it at its facility in Floreffe, Pennsylvania. According to the National Bureau of Standards, Tank 1338 had a nominal capacity of ninety-six thousand (96,000) barrels or four million (4,000,000) gallons. On August 24, 1987, Tank 1338 was placed into service. On January 2, 1988, Tank 1338 was filled to approximate capacity with diesel oil for the first time at the Floreffe facility.

Prior to January 2, 1988, the oil level in the tank had never exceeded 37 feet, and prior to its relocation to Floreffe, it had been used to store number 6 oil, a viscous petroleum product which, according to the National Bureau of Standards, is generally maintained at a temperature of approximately 150 degrees Fahrenheit.

CRIMES AND CRIMINAL PROCEDURE

on.—If the defendant violates a condition of probation or termination of the term of probation, the court shall revoke the sentence of probation and the factors set forth in section 3553(a) to the extent

tion, with or without extending the term or modifying; or

in volume for text of (2)]

tion of this section, if a defendant is found by the court to have violated the condition of probation, the court shall revoke the sentence of probation and the factors set forth in section 3553(a) to the extent

possession of a firearm.—If the defendant is in possession of a firearm, at the time of the initial sentencing, the court shall revoke the sentence of probation and the factors set forth in section 3553(a) to the extent

power of the court to revoke a sentence of probation, and to impose another sentence, the term of probation for any period reasonably matters arising before its expiration if, prior to its expiration, a sentence has been issued on the basis of an allegation of

§ 5214, Title VII, § 7803(a)(2), Nov. 18, 1988, 102 Stat. 3585, Nov. 29, 1990, 104 Stat. 4330.)

Pub.L. 101-647, 1990 U.S. Code Cong. and Adm. News, p. 6472.

Law Review Commentaries

Pub.L. 101-647, 1990 U.S. Code Cong. and Adm. News, p. 6472.

Notes of Decisions

Offenses committed prior to term 1
Sentence 2
Sentencing guidelines 3

1. Offenses committed prior to term

District court had authority to revoke a defendant's probation for offenses committed prior to commencement of his probationary term. U.S. v. Durchslag, N.D.Ill.1990, 735 F.Supp. 298.

2. Sentence

Where probation revocation is not mandatory, district court may consider postsentencing conduct when deciding whether to revoke probation or to continue it, either on the same or different terms; furthermore, after revoking probation, district court has discretion to impose new sentence within the applicable range prescribed by law at time of initial sentencing, and court ought to be able to consider the conduct giving rise to the revocation when deciding what sentence to select within the guidelines range or even whether to

CRIMES AND CRIMINAL PROCEDURE

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depart from the guidelines, provided the conduct justifying departure was brought to the court's attention at initial sentencing hearing. U.S. v. Smith, C.A.11 (Ga.) 1990, 907 F.2d 133.

3. Sentencing guidelines

Statute governing sentencing after revocation of probation requires court to follow sentencing guideline applicable to a defendant's offense of conviction when sentencing defendant after revocation of probation. U.S. v. Von Washington, C.A.8 (Mo.) 1990, 915 F.2d 390.

§ 3566. Implementation of a sentence of probation

Historical and Statutory Notes

Effective Date. Section effective on the first day of first calendar month beginning thirty-six months after Oct. 12, 1984, applicable only to

offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

§ 3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence

Notes of Decisions

50. Receipt of individual at penitentiary, reformatory, or jail

To same effect as second paragraph in main volume, see Flick v. Blevins, C.A.7 (Ind.) 1989, 887 F.2d 778.

§ 3569. Discharge of indigent prisoner

Notes of Decisions

4. Imprisonment until fine paid.

Holding defendant in prison past parole release date until "stand committed" fine of \$60,000 was paid was not unconstitutional where defendant

had substantial equity in \$200,000 home, despite defendant's argument that it was unconstitutional to suspend discretionary parole date while administrative proceedings to determine indigency were held. U.S. v. Ellis, C.A.1 (Mass.) 1990, 907 F.2d 12.

SUBCHAPTER C—FINES

Sec. 3572. Imposition of a sentence of fine and related matters.

Sec. 3573. Petition of the Government for modification or remission.

Historical and Statutory Notes
1987 Amendment. Pub.L. 100-185, § 8(b), Dec. 11, 1987, 101 Stat. 1282, substituted "Peti-

tion of the Government for modification or revision" for "Modification or remission of fine" in item 3573.

§ 3571. Sentence of fine

(a) In general.—A defendant who has been found guilty of an offense may be sentenced to pay a fine.

(b) Fines for individuals.—Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of—

- (1) the amount specified in the law setting forth the offense;
- (2) the applicable amount under subsection (d) of this section;
- (3) for a felony, not more than \$250,000;
- (4) for a misdemeanor resulting in death, not more than \$250,000;
- (5) for a Class A misdemeanor that does not result in death, not more than \$100,000;
- (6) for a Class B or C misdemeanor that does not result in death, not more than \$5,000; or
- (7) for an infraction, not more than \$5,000.

(c) Fines for organizations.—Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined not more than the greatest of—

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- (1) the amount specified in the law setting forth the offense;
- (2) the applicable amount under subsection (d) of this section;
- (3) for a felony, not more than \$500,000;
- (4) for a misdemeanor resulting in death, not more than \$500,000;
- (5) for a Class A misdemeanor that does not result in death, not more than \$200,000;
- (6) for a Class B or C misdemeanor that does not result in death, not more than \$10,000; and
- (7) for an infraction, not more than \$10,000.

(d) **Alternative fine based on gain or loss.**—If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

(e) **Special rule for lower fine specified in substantive provision.**—If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

(As amended Pub.L. 100-185, § 6, Dec. 11, 1987, 101 Stat. 1280.)

Historical and Statutory Notes

1987 Amendment. Subsec. (a). Pub.L. 100-185 reenacted subsec. (a) without change.

Subsec. (b). Pub.L. 100-185 in the heading substituted "Fines for individuals" for "Authorized fines" and in text substituted provision that, except as provided in subsec. (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of the amount specified in the law setting forth the offense, the applicable amount under subsec. (d) of this section, for a felony, not more than \$250,000, for a misdemeanor resulting in death, not more than \$250,000, for a Class A misdemeanor that does not result in death, not more than \$100,000, for a Class B or C misdemeanor that does not result in death, \$5,000, or for an infraction, not more than \$5,000 for provision that, except as otherwise provided in the chapter, the authorized fines are, if the defendant is an individual, for a felony, or for a misdemeanor resulting in the loss of human life, not more than \$250,000, for any other misdemeanor, not more than \$25,000, and for an infraction, not more than \$1,000, and if the defendant is an organization, for a felony, or for a misdemeanor resulting in the loss of human life, not more than \$500,000, for any other misdemeanor, not more than \$100,000, and for an infraction, not more than \$10,000. See subsec. (c) of this section.

§ 3572. Imposition of a sentence of fine and related matters

(a) **Factors to be considered.**—In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)—

- (1) the defendant's income, earning capacity, and financial resources;
- (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

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- (3) any pecuniary loss;
- (4) whether restitution is required;
- (5) the need to deprive the defendant of the means to commit the offense;
- (6) whether the deferment of payment of the fine is in the interest of justice;
- (7) if the defendant is a minor, the measure taken by the court or agent of the organization to prevent the recurrence of such an offense.

(b) **Fine not to impair ability to pay.**—If the defendant has the ability to pay the fine, the court shall impose a fine if the fine or penalty will not impair the defendant's ability to pay.

(c) **Effect of finality of judgment.**—If a defendant pays a fine can subsequently

- (1) modified or remitted;
- (2) corrected under section 3742; or
- (3) appealed and modified.

a judgment that includes such a fine.

(d) **Time, method of payment.**—If a fine or other monetary penalty is imposed, the court, in the interest of justice, the court may order the defendant to pay in equal monthly payments. If the court provides for such payments, it shall establish another schedule of payments, the period provided served by the defendant as a condition of probation.

(e) **Alternative sentence.**—If a fine, the court may not impose a sentence of imprisonment if the fine is not paid.

(f) **Responsibility for payment.**—If a sentence includes a fine (including interest) with re make disbursements for the assets of the organization, shareholder, employee, or directly or indirectly, from such payment is expressly required.

(g) **Security for stayed judgment.**—If a judgment is stayed, absent exceptional circumstances, the court shall

- (1) require the defendant to pay the amount of the fine that is stayed;
- (2) require the defendant to pay the fine; or
- (3) restrain the defendant from committing further offenses.

(h) **Delinquency.**—A fine is delinquent if the defendant fails to pay the fine.

(i) **Default.**—A fine is in default if the defendant fails to pay the fine. When a fine is in default, the court shall notify the defendant of the default.

(j) **Redesignated (i)**

(As amended Pub.L. 100-185, § 3587, Nov. 29, 1990, 104 Stat. 1903.)

Subsec. (c) to (e). Pub.L. 100-185 added subsecs. (c) to (e).

Effective Date. Section effective on the first day of first calendar month beginning thirty-six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

Legislative History. For legislative history and purpose of Pub.L. 100-185, see 1987 U.S. Code Cong. and Adm. News, p. 2137.

Law Review Commentaries

Commanding respect: Criminal sanctions for environmental crimes. Eva M. Fromm, 21 St. Mary's L.J. 821 (1990).

Notes of Decisions

1. Law governing

Although regulation provided that use of forged parking permit was "subject to a fine of not more than \$50," regulation also provided that "nothing in these rules and regulations shall be construed to abrogate any other Federal laws," and such Federal law was provided by statute authorizing fine of up to \$5,000. U.S. v. Pyatt, E.D.Va.1989, 725 F.Supp. 835.

CRIMES AND CRIMINAL PROCEDURE

the law setting forth the offense;
 or subsection (d) of this section;
 or \$500,000;
 or in death, not more than \$500,000;
 or that does not result in death, not more than \$10,000.

or loss.—If any person derives pecuniary gain results in pecuniary loss to a person other than the defendant, the court shall impose a fine not more than the greater of twice the pecuniary gain or the pecuniary loss, less imposition of a fine under this subsection in the sentencing process.

specified in substantive provision.—If a law provides for a fine or a fine that is lower than the fine provided in this section, and such law, by specific reference, exempts the fine otherwise applicable under this section, the amount specified in the law setting

1987, 101 Stat. 1280.)

Subsec. (c) to (e). Pub.L. 100-185 added subsec. (c) to (e).

Effective Date. Section effective on the first day of first calendar month beginning thirty-six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

Legislative History. For legislative history and purpose of Pub.L. 100-185, see 1987 U.S. Code Cong. and Adm. News, p. 2137.

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Commanding respect: Criminal sanctions for environmental crimes. Eva M. Fromm, 21 St. Mary's L.J. 21 (1990).

Notes of Decisions

1. Law governing

Although regulation provided that use of forged parking permit was "subject to a fine of not more than \$50," regulation also provided that "nothing in these rules and regulations shall be construed to abrogate any other Federal law," and such Federal law was provided by statute authorizing fine of up to \$5,000. U.S. v. Pyatt, E.D.Va. 1989, 725 F.Supp. 885.

Fine and related matters

Determining whether to impose a fine, and the amount of payment of a fine, the court shall consider, under section 3553(a)—

the defendant's criminal history, including capacity, and financial resources;
 the harm caused by the offense;
 the need to protect the public, any person who is a victim of the offense, or any other person (including a person who is a victim of the offense) financially from the burden that alternative punishments

CRIMES AND CRIMINAL PROCEDURE

18 § 3572

- (3) any pecuniary loss inflicted upon others as a result of the offense;
- (4) whether restitution is ordered or made and the amount of such restitution;
- (5) the need to deprive the defendant of illegally obtained gains from the offense;
- (6) whether the defendant can pass on to consumers or other persons the expense of the fine; and

(7) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

(b) Fine not to impair ability to make restitution.—If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.

(c) Effect of finality of judgment.—Notwithstanding the fact that a sentence to pay a fine can subsequently be—

- (1) modified or remitted under section 3573;
- (2) corrected under rule 35 of the Federal Rules of Criminal Procedure and section 3742; or
- (3) appealed and modified under section 3742;

a judgment that includes such a sentence is a final judgment for all other purposes.

(d) Time, method of payment, and related items.—A person sentenced to pay a fine or other monetary penalty shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments. If the court provides for payment in installments, the installments shall be in equal monthly payments over the period provided by the court, unless the court establishes another schedule. If the judgment permits other than immediate payment, the period provided for shall not exceed five years, excluding any period served by the defendant as imprisonment for the offense.

(e) Alternative sentence precluded.—At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be carried out if the fine is not paid.

(f) Responsibility for payment of monetary obligation relating to organization.—If a sentence includes a fine, special assessment, or other monetary obligation (including interest) with respect to an organization, each individual authorized to make disbursements for the organization has a duty to pay the obligation from assets of the organization. If such an obligation is imposed on a director, officer, shareholder, employee, or agent of an organization, payments may not be made, directly or indirectly, from assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

(g) Security for stayed fine.—If a sentence imposing a fine is stayed, the court shall, absent exceptional circumstances (as determined by the court)—

- (1) require the defendant to deposit, in the registry of the district court, any amount of the fine that is due;
- (2) require the defendant to provide a bond or other security to ensure payment of the fine; or
- (3) restrain the defendant from transferring or dissipating assets.

(h) Delinquency.—A fine is delinquent if a payment is more than 30 days late.

(i) Default.—A fine is in default if a payment is delinquent for more than 90 days. When a fine is in default, the entire amount of the fine is due within 30 days after notification of the default, notwithstanding any installment schedule.

[(j) Redesignated (i)]

(As amended Pub.L. 100-185, § 7, Dec. 11, 1987, 101 Stat. 1280; Pub.L. 101-647, Title XXXV, § 3587, Nov. 29, 1990, 104 Stat. 4930.)

[VESSEL SAFETY CLAUSES]

WHEREAS, the State of Alaska contains more than 50% of the coastline of the United States; and

WHEREAS, the State of Alaska operates a Marine Highway System, and the people of the state are highly dependent upon the safe and reliable conduct of maritime operations in international and intracoastal traffic; and

WHEREAS, the National Transportation Safety Bureau's investigation into the causes of the Exxon Valdez oil spill established that Exxon Shipping Company had deliberately and knowingly reduced crew levels aboard its vessels in the Alaska oil traffic to an unsafe degree; and

WHEREAS, the federal government has never successfully prosecuted any corporation or individual under the Ports and Waterways Safety Act, such that the threat of criminal prosecution is not a deterrent to unsafe practices outlawed by that Act; and

WHEREAS, in the past ____ years, more than ____ persons have perished as a result of maritime accidents involving vessels operating fisheries subject to the jurisdiction of the State of Alaska; and

WHEREAS, only the federal government has the authority to

April 17, 1991

M E M O R A N D U M

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

FROM: Chip Thoma

SUBJECT: Dropping of Felony Counts

I spoke with Mr. Richard Stewart at the break today about the felony charges. I told him I was disturbed that in the "Government's Memorandum in Aid of Sentencing" that the entire Introduction and Factual Background sections, pps. 1-6, related directly to the felony charges having to do with crew competency and safety violations by Exxon management; yet on P. 22 the government simply states that ". . .the decision (to drop charges). . .is one committed to the discretion of the prosecutors."

I related to him my concern that without the felonies pursued, the ability to reform these serious management flaws that compromise crew safety and competence are lost. He said he fully understood my position. I then related that the state's brief before the NTSB and subsequent testimony by Frank Iarossi regarding the monitoring of Joseph Hazelwood showed that large gaps in monitoring occurred and that paperwork without signatures and dates were produced by Iarossi at the 7/17/89 NTSB hearing. I told him it was the State's and my contention that this paperwork was fabricated to show monitoring, however, when non did occur. He said he was interested in any information along those lines.

His final statement was that ". . .in the course of negotiations, sometimes these things get dropped."

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MEMORANDUM

April 16, 1991

SUBJECT: Criminal Penalties relating to the Exxon Valdez Oil Spill
(Work Order No. 17-LS1044)

TO: Representative Max Grueenberg, Chair
House Special Committee on the Exxon Valdez Settlement

FROM: Pam Finley *Pam Finley*
Assistant Revisor

You have asked us to summarize the federal criminal laws and penalties in the indictment against Exxon and Exxon Pipeline, and possible violations of state criminal laws by Exxon or Exxon Pipeline.

State Law. While there may be other possibilities, AS 46.03.710 seems the most obvious basis for state criminal charges against Exxon. (Note that AS 46.03.742 and 46.03.743, concerning reckless and negligent operation of a tank vessel were not enacted until 1990.) AS 46.03.710 prohibits the pollution of state land or water. The penalties are set forth in AS 46.03.790. A negligent violation is a class B misdemeanor and a knowing violation is a class A misdemeanor. AS 46.03.790(a) and (b), as they read at the time of the oil spill. Each day is a separate offense. AS 46.03.790(c), as it read at the time of the oil spill. Under AS 12.55.035(c), as it read at the time of the oil spill, a defendant that is an organization may be fined the greater of

(a) \$200,000 for the knowing violation or \$25,000 for the negligent violation;

(b) two times the pecuniary gain realized by the defendant as a result of the offense; or

(c) two times the pecuniary damage or loss caused by the defendant to another, or the property of another, as a result of the offense.

"Pecuniary gain" is defined as

...the amount of money or value of property at the time of commission of the offense derived by the defendant from the commission of the

offense, less the amount of money or value of property returned to the victim of the offense or seized by or surrendered to lawful authority before sentence is imposed.

AS 12.55.185(6). "Pecuniary damage or loss" is not defined.

Federal Law. Following is a discussion of each count of the superseding indictment filed March 27, 1990 in federal district court in Anchorage, A-90-015.

Count One. Negligent discharge of a pollutant, carrying a fine of \$2500-\$25,000 per day of violation, or imprisonment for one year, or both. 33 U.S.C. 1311(a), 1319(c)(1).

Count Two. Unlawful discharge of refuse, a misdemeanor carrying a penalty of \$500-\$2500. 33 U.S.C. 407 and 411.

Count Three. Killing of migratory birds, a misdemeanor carrying a penalty of not more than \$500 or six months' imprisonment, or both. 16 U.S.C. 703 and 707(a), 50 CFR 21.11.

Count Four. Vessel owner's willful and knowing failure to ensure that the wheelhouse of the vessel is constantly manned by competent persons, carrying a penalty of not more than \$50,000 or five years' imprisonment, or both. 33 U.S.C. 1232(b)(1), 33 CFR 164.11(b).

Count Five. Willful and knowing employment of crew known to be incompetent to perform the duties assigned to them, carrying a penalty of not more than \$50,000, or five years' imprisonment, or both. 46 U.S.C. 3718(b), 46 CFR 35.05-20.

PLF:pl
91-266.plm

Alaska State Legislature

House of Representatives



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House Special Committee on the Exxon Valdez Oil Spill Claims Settlement

April 22, 1991

Honorable H. Russel Holland
United States District Court
222 West 7th Avenue No. 54
Anchorage, Alaska 99513-7545

Re: United States v. Exxon Corporation
Case No. A90-015 Crim.

Dear Judge Holland:

The Committee appreciates the opportunity you have provided for legislative comment on the plea agreement. We particularly appreciate the courtesy of your April 12 letter.

We recognize the responsibility of all counsel not to make any threat of criminal prosecution to gain advantage in a pending civil case and your concern that the court not be a party to any such conduct.

However the legislature has its own responsibility, and that is to give thorough and thoughtful consideration to the civil agreement as well as to the plea agreement. That responsibility arises directly from, not only the civil agreement itself, but also the legislature's role as elected representatives of the people of Alaska.

In considering these agreements, it has become apparent that the civil agreement and the criminal plea agreement are in fact expressly and inextricably linked. Exxon can withdraw from the civil settlement if the criminal plea is not accepted. It was impossible (and probably inadvisable) for the parties, the public and this committee to consider them separately, without acknowledging their interrelationship. It has therefore not been possible for this committee to comment on the plea agreement alone, as if our judgment as to the public interest in that case had no relation to the civil agreement.

Page 2
April 22, 1991

At this time, we have not reached a final decision regarding either the plea agreement or the civil agreement. We intend to present our report to the House of Representatives later this week. We are therefore unable to comment on the plea agreement at this time. As we have previously stated in House Concurrent Resolution 19, copy enclosed, it is our view that, because these two matters are clearly linked, we would suggest and request that the court defer action on the plea agreement until May 3, when the legislature will have reached a final decision regarding the civil agreement.

x

This letter is being sent by motion of the Committee. Individual members who are so inclined may also submit separate comments.

Cordially,

Rep. Max F. Gruenberg, Jr.
Chairman

Encl.: HCR 19

AMENDMENTS TO HOLLAND LETTER

1. Page 2, first paragraph: after "clearly linked, we" delete "would suggest and"

2. Page 2, after the first paragraph: add this paragraph:

~~While we cannot comment at this time tell you what our final decision will be with respect to either the plea agreement or the civil agreement, we can state that our review of the settlement documents has raised several troubling questions about the proposed plea agreement, however:~~
The committee *concerns*
that we believe warrant a fuller explanation to the court:

Should *be relieved*
(1) ~~Is it in the public interest to relieve Alyeska of all criminal liability, without specifying the conduct or charges at issue?~~ *on* *?*

Should Court IV with respect to
(2) ~~Is it in the public interest to relieve Exxon Shipping Company of felony criminal liability for its conduct of shipping operations, when the National Transportation Safety Board has found that Exxon's failure...to provide a fit master and a rested and sufficient crew" was a probable cause of the grounding?~~ *have been dismissed* *Shipping's*

(3) Is the criminal fine sufficient to deter other *large* corporations from engaging in similar criminal conduct in the future?

and thus recognizing broader discretion in the judge to determine whether a charge bargain with sentencing consequences should be approved.

§ 20.4 Receiving the Defendant's Plea

(a) **Arraignment; Pleading Alternatives.** The word "arraignment" is sometimes used to refer to the defendant's first appearance in court before a magistrate. The defendant will not normally be called upon to plead at that time unless the offense charged is a minor one. The more common use of the word "arraignment" is to refer to a later appearance in the court of trial jurisdiction, when the defendant is advised of the formal charge and called upon to enter a plea. Typically this will occur weeks or even months after the initial appearance, and thus the defendant will have had adequate time to consult with counsel and to reflect on what his plea should be. On occasion, however, a defendant is brought into court after arrest, where he waives all rights and procedures which would delay the proceedings (right to counsel, preliminary hearing, grand jury indictment) and then immediately enters a guilty plea. Some courts have upheld this practice,¹ while others have criticized it.² Certainly the better view is that even a defendant who has waived his other rights should not be called upon to decide on his plea so promptly.³

When the defendant is called upon to enter his plea at arraignment, he may enter a plea of (1) not guilty, (2) guilty, (3) not guilty by reason of insanity (in a few jurisdictions where such a plea is a prerequisite to the presentation of an insanity defense at trial); or (4) *nolo contendere* (in the federal system and about half of the states). A plea of *nolo contendere*—sometimes referred to as a plea of *non vult contendere* or of *non vult*—is simply a device by which the defendant may assert that he does not want to contest the issue of guilt or innocence. Such a plea may not be entered as a matter of right, but only with the consent of the court.⁴ Although the prevailing view is that the consent of the prosecutor is not also required, it is common practice for the court to determine

lates to the dismissal of some of the charges," so that in such circumstances "the decision of the trial court as to sentencing [is] to prevail except in extreme circumstances"

§ 20.4

1. *People v. Mahler*, 329 Mich. 155, 45 N.W.2d 14 (1950) (3 hours from arrest to sentence).

2. *State ex rel. Burnett v. Burke*, 22 Wis.2d 486, 126 N.W.2d 91 (1964).

3. 3 ABA Standards for Criminal Justice § 14-1.3(b) (2d ed. 1980) provides: "A defendant who has properly waived counsel pursuant to these standards should not be called upon to plead until a reasonable time,

set by rule or statute, following the date defendant was held to answer. When a defendant has properly waived counsel and tenders a plea of guilty or *nolo contendere*, the court should not accept the plea unless it is reaffirmed by the defendant after a reasonable time for deliberation, set by rule or statute, following the date the defendant received the advice from the court required in standard 14-1.4."

4. *State v. Fernald*, 248 A.2d 754 (Me. 1968); *State v. Erickson*, 53 Wis.2d 474, 122 N.W.2d 872 (1972). Contra: *Miller v. State*, 617 P.2d 516 (Alaska 1980).

the views of the prosecutor and to give them considerable weight in deciding whether to accept the nolo plea.⁵

Although some minor variations are to be found from jurisdiction to jurisdiction, a plea of nolo contendere usually has the following significance⁶: (1) Unlike a plea of guilty or a conviction following a plea of not guilty, a plea of nolo contendere may not be put into evidence in a subsequent civil action as proof of the fact that the defendant committed the offense to which he entered the plea.⁷ (2) Judgment following entry of a nolo contendere plea is a conviction, and may be admitted as such in other proceedings where the fact of conviction has legal significance (e.g., to apply multiple offender penalty provisions, to deny or revoke a license because of conviction, or to claim double jeopardy in a subsequent prosecution).⁸ (3) When a nolo contendere plea is accepted, it has essentially the same effect in that case as a guilty plea. The procedures for receiving the plea are the same,⁹ the defendant may receive the same sentence,¹⁰ and the nolo plea is like a guilty plea in terms of its finality,¹¹ its effect as a waiver of claims unrelated to the plea,¹² and the circumstances in which withdrawal of the plea would be permitted.¹³

Opinions differ as to whether it is desirable to have the nolo contendere pleading alternative. Some commentators have questioned whether the nolo plea serves any useful function.¹⁴ So the argument goes, there should not be such an "in between" plea, for if a defendant is innocent he

5. Sometimes this is mandated by law. See, e.g., Fed.R.Crim.P. 11(b), providing that a nolo plea "shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice."

6. See also Comment, 13 Am.Crim.L. Rev. 249 (1975); Notes, 10 Memphis St.U.L. Rev. 550 (1980); 44 S.Cal.L.Rev. 737 (1971).

7. United States v. Dorman, 496 F.2d 438 (4th Cir. 1974), certiorari denied 419 U.S. 945, 95 S.Ct. 214, 42 L.Ed.2d 168; State v. Steele, 620 P.2d 1026 (Wyo.1980).

8. Tempo Trucking and Transfer Corp. v. Dickson, 405 F.Supp. 506 (E.D.N.Y.1975); In re Lewis, 389 Mich. 668, 209 N.W.2d 203 (1973).

9. As stated in Cusick v. State, 259 Ark. 720, 536 S.W.2d 119 (1976), the constitutional standards for receipt of a nolo plea are no less than for a guilty plea. As for additional procedures followed for guilty pleas, they are likely to be applicable to nolo pleas also, with the possible exception of the requirement that a factual basis for the plea be established. In some jurisdictions no factual basis for a nolo plea is required, United States v. Prince, 533 F.2d

205 (5th Cir. 1976); State v. Steele, 620 P.2d 1026 (Wyo.1980), while in some other jurisdictions a factual basis is required, Dydek v. State, 400 So.2d 1255 (Fla.App.1981); State v. Sinclair, 301 N.C. 193, 270 S.E.2d 418 (1980). Of course, in a jurisdiction taking the latter approach, the factual basis must be established other than by direct inquiry of the defendant, for his direct admission of guilt would nullify the benefit of the nolo plea. People v. Chilton, 394 Mich. 34, 228 N.W.2d 210 (1975).

10. United States v. Dorman, 496 F.2d 438 (4th Cir. 1974), certiorari denied 419 U.S. 945, 95 S.Ct. 214, 42 L.Ed.2d 168; State v. Sellers, 273 N.C. 641, 161 S.E.2d 15 (1967).

11. United States v. Williams, 642 F.2d 136 (5th Cir. 1981).

12. United States v. Broome, 628 F.2d 403 (5th Cir. 1980); Deal v. State, 626 P.2d 1073 (Alaska 1980); Mooney v. State, 615 S.W.2d 776 (Tex.Cr.App.1981).

13. State v. Tupko, 161 Conn. 20, 282 A.2d 911 (1971); State v. Underwood, 228 Kan. 294, 615 P.2d 153 (1980).

14. Lane-Reticker, Nolo Contendere in North Carolina, 34 N.C.L.Rev. 280, 290-91 (1956); Note, 33 Neb.L.Rev. 428, 433 (1954).

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

April 25, 1991

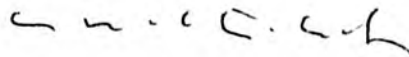
Hon. Max Gruenberg, Chairman
House Special Committee on the
Exxon Valdez Oil Spill Claims Settlement
House of Representatives
P. O. Box V
Juneau, AK 99811

Dear Mr. Chairman:

This will confirm my remarks to you earlier this afternoon that Governor Hickel's position continues to be that the State will terminate the Agreement among the United States, the State of Alaska and Exxon Corporation, et al. if the Alaska Legislature does not approve the Agreement as written.

It will also confirm my view that action by the Legislature to approve the Agreement is inappropriate until Exxon decides whether to terminate it because of Judge Holland's rejection yesterday of the criminal plea agreement.

Very truly yours,



Charles E. Cole
Attorney General

CEC:pml

cc: Hon. Richard I. Eliason, President, Alaska State Senate
Assistant Attorney General Richard Stewart, U.S.
Department of Justice
J. G. Clarke, Senior Vice President, Exxon Corporation

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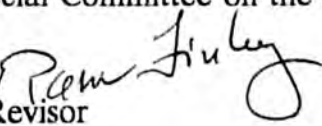
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MEMORANDUM

April 24, 1991

SUBJECT: Criminal Penalties relating to the Exxon Valdez Oil Spill
(Work Order No. 17-LS1044)

TO: Representative Max Gruenberg, Chair
House Special Committee on the Exxon Valdez Settlement

FROM: Pam Finley 
Assistant Revisor

After talking to Andy Hemenway, I realized that my April 19, 1991 memo to you on the referenced subject omitted relevant information, and after rereading it, I realized that it contained an error as well. What follows is a revised summary of the federal criminal laws and penalties in the indictment against Exxon and Exxon Pipeline, and possible violations of state criminal laws by Exxon or Exxon Pipeline.

State Law. While there may be other possibilities, AS 46.03.710 seems the most obvious basis for state criminal charges against Exxon. (Note that AS 46.03.742 and 46.03.743, concerning reckless and negligent operation of a tank vessel were not enacted until 1990.) AS 46.03.710 prohibits the pollution of state land or water. The penalties are set forth in AS 46.03.790. A negligent violation is a class B misdemeanor and a knowing violation is a class A misdemeanor. AS 46.03.790(a) and (b), as they read at the time of the oil spill. Each day is a separate offense. AS 46.03.790(c), as it read at the time of the oil spill. Under AS 12.55.035(c), as it read at the time of the oil spill, a defendant that is an organization may be fined the greater of

(a) \$100,000; or

(b) three times the pecuniary gain realized by the defendant as a result of the offense.

"Pecuniary gain" is defined in AS 12.55.185(6) as

...the amount of money or value of property at the time of commission of the offense derived by the defendant from the commission of the offense, less the amount of money or value of property returned to the

victim of the offense or seized by or surrendered to lawful authority before sentence is imposed.

Federal Law. Following is a discussion of each count of the superseding indictment filed March 27, 1990 in federal district court in Anchorage, A-90-015.

Count One. Negligent discharge of a pollutant, carrying a fine of \$2500-\$25,000 per day of violation, or imprisonment for one year, or both. 33 U.S.C. 1311(a), 1319(c)(1).

Count Two. Unlawful discharge of refuse, a misdemeanor carrying a penalty of \$500-\$2500. 33 U.S.C. 407 and 411.

Count Three. Killing of migratory birds, a misdemeanor carrying a penalty of not more than \$500 or six months' imprisonment, or both. 16 U.S.C. 703 and 707(a), 50 CFR 21.11.

Count Four. Vessel owner's willful and knowing failure to ensure that the wheelhouse of the vessel is constantly manned by competent persons, carrying a penalty of not more than \$50,000 or five years imprisonment, or both. 33 U.S.C. 1232(b)(1), 33 CFR 164.11(b).

Count Five. Willful and knowing employment of crew known to be incompetent to perform the duties assigned to them, carrying a penalty of not more than \$50,000, or five years imprisonment, or both. 46 U.S.C. 3718(b), 46 CFR 35.05-20.

Alternative Fines. As an alternative to the fines stated above, Exxon could be fined up to (1) two times the gross amount Exxon gained from the offense; or (2) two times the gross amount of the damage Exxon caused by the offense unless imposition of that fine would unduly complicate or prolong the sentencing process. 18 U.S.C. 3571(d).

PLF:pl:gc
91-304.plm

Andy
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MEMORANDUM

April 26, 1991

SUBJECT: Oil spill penalties (Work Order No. 7-LS1295)
TO: Representative Fran Ulmer
FROM: John B. Gaguine *JH*
Legislative Counsel

You have asked for a bill to increase the fines that may be imposed for oil spills. In my opinion no bill is necessary, as the 1990 legislature enacted a measure that would clearly authorize huge fines against a corporation in connection with a major spill.

The 1990 legislature rewrote AS 12.55.035(c), regarding fines that may be imposed on an organization (an entity other than a natural person, including a corporation). Paragraph (3) of subsection (c) now authorizes the imposition of a fine of "two times the pecuniary damage of loss caused by the defendant to another, or to the property of another, as a result of the offense." This fine may be imposed if the offense is a felony, a misdemeanor, or a violation. Obviously, in the case of a major catastrophe such as the Exxon Valdez spill, a fine under this paragraph could run into the hundreds of millions, or perhaps even billions, of dollars.

Prior to the 1990 amendment the maximum fine that could be imposed on an organization was \$100,000 or three times the gain that the organization realized as a result of its offense. Obviously Exxon did not realize a gain as a result of the spill. Thus the maximum fine that could be imposed was \$100,000, which would explain the reaction of the attorney general at the time.

Of course, the huge fines discussed above do not apply to individuals; they may not be fined more than \$50,000 for a felony (\$75,000 for a few very serious ones), \$5,000 for a class A misdemeanor, or \$1,000 for a class B misdemeanor. (AS 12.55.035(b)) However, individuals, unlike corporations, may be jailed - up to five years for a class C felony, one year for a class A misdemeanor, and 90 days for a class B misdemeanor. Note too that the 1990 legislature also made it a class C felony to discharge through criminal negligence over 10,000 barrels of oil, or to fail through criminal negligence to comply with an oil spill contingency plan when a spill is in excess of

Representative Fran Ulmer
April 26, 1991
Page 2

10,000 barrels. Thus there is a very real possibility that corporate officers such as you described in your memorandum could be facing up to five years in jail.

Please let me know if you would like a bill drafted in light of the current law, and, if so, what sort of bill you would like.

JBG:pl
91-308.plm

CHARLES E. COLE
ATTORNEY GENERAL
STATE OF ALASKA

March 12, 1991

Mr. Lee Raymond
President
Exxon Corporation
225 East Carpenter Freeway
Irving, Texas 75062-2298

Dear Mr. Raymond:

As a part of the settlement of certain issues covered by the Plea Agreement, the State of Alaska agrees that it will not bring criminal charges or seek any civil or criminal or administrative penalties, except as provided below, against Exxon Corporation, or any of its officers, directors or employees, past or present, or against any of its wholly-owned subsidiaries, their offices, directors of employees, past or present, for any violations of Alaska law arising out of or relating to the grounding of the "EXXON VALDEZ," the resulting oil spill, the containment or cleanup of that spill, the oil spill contingency plans or related documents of Alyeska Pipeline Service Company, including their preparation or submission to the State of Alaska.

Nothing in the foregoing paragraph shall prevent the State of Alaska from seeking criminal charges against Exxon Pipeline Company or Alyeska Pipeline Service Company, or any of their officers, directors, or employees, for any violation of Alaska law based on an allegation of false statements made to any agency of the State of Alaska arising out of its or their conduct in connection with the preparation or submission of oil spill contingency plans and related documents by Alyeska Pipeline Service Company to the State of Alaska.

You may advise Exxon Shipping Company of the contents of this letter and provide each of them with a copy.

Sincerely,

4-16-91 5:41

Charles Cole
Attorney General

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 485-3600

June 21, 1989

Charles DiMonaco, Chief
Lands Division
Environmental Crime Section
Department of Justice
Washington D.C. 20038

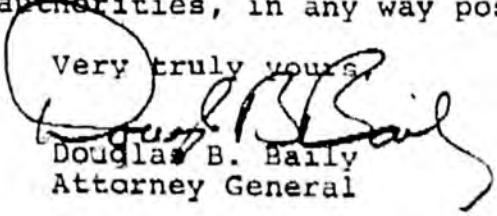
Dear Mr. DiMonaco:

We would like to inform you that the State of Alaska is no longer pursuing a criminal investigation of either Alyeska Pipeline Company or Exxon Shipping Company with respect to the Exxon Valdez oil spill. Based on our initial investigation, we believe that our remedies against these corporations are limited to B misdemeanors. For corporations, the maximum penalty for a B misdemeanor is a fine of \$100,000. In light of the state penalty structure, and the broader range of remedies available under federal law, we would defer any further investigation of the corporations involved in this matter to the Department of Justice.

Of course, if new evidence is developed that indicates additional criminal acts under state law have been committed by either defendant, we would be willing to resume our investigation. However, given our limited resources and limited remedies, we believe the best course of action at this time is to turn primary responsibility for any criminal prosecution of Alyeska and Exxon over to you. Part of the reason for our decision is the excellent cooperation we received from the Department of Justice during the course of our investigation.

As you continue your inquiry, please keep in mind that we will make available to you the information and materials we have developed to date. We will make every effort to cooperate with you, and the other federal authorities, in any way possible.

Very truly yours,


Douglas B. Bailly
Attorney General

cc: Mark Davis, Acting U.S. Attorney

4852444 P.02

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT ANCHORAGE

UNITED STATES OF AMERICA,

Plaintiff,

VS

EXXON CORPORATION and EXXON SHIPPING
COMPANY,

Defendant.

No. A90-015 CRIMINAL

SENTENCING HEARING
APRIL 24, 1991
PAGES 1 THROUGH 11

Before the Honorable Russell Holland
United States District Court Judge



APPEARANCES:

For Plaintiff: Chuck DeMonaco, Esq.
Eric Nagle, Esq.
Mark Harmon, Esq.
Environmental Crimes Section
Department of Justice
601 Pennsylvania Avenue, Room 6211
Washington, D. C. 20004

Mark Davis, Esq.
U. S. Department of Justice
645 G Street, Suite 300
Anchorage, AK 99501
(907) 258-7001

For Defendant: Patrick Lynch, Esq.
Exxon Corp. O'Melveny & Myers
400 South Hope Street
Los Angeles, CA 90071
(213) 669-6000

Edward Lynch, Esq.
Exxon Corporation
225 East John W. Carpenter Freeway
Irving, TX 75062-2298
(214) 444-1000

John Clough
Clough & Associates
431 North Franklin, Suite 202
Juneau, AK 99801
(907) 586-5777

Exxon Shipping Robert Bundy, Esq.
Bogle & Gates
1031 West 4th Avenue, Suite 600
Anchorage, AK 99501
(907) 276-4557

James F. Neal, Esq.
James Sanders, Esq.
Neal & Hartwell
150 4th Avenue No., Suite 2000
Nashville, TN 37219



1 PROCEEDINGS

2 APRIL 24, 1991

3 (Tape: 1)

4 (000)

5 (On record: 8:37 a.m.)

6 THE CLERK: All rise. His Honor The Court, the
7 United States District Court for the district of Alaska
8 is now in session. The Honorable H. Russell Holland
9 presiding. Please be seated.

10 THE COURT: Good morning ladies and gentlemen.
11 We are taking up first this morning case A90-15 Criminal,
12 United States of America vs. Exxon Corporation and Exxon
13 Shipping Company. The matter is set down for imposition
14 of sentence. We have a necessary preliminary to that,
15 which is the question of whether or not I should accept
16 the plea agreement which was negotiated between the
17 government and the defendants.

18 In connection with making that decision, I have,
19 of course, reviewed the sentencing memoranda that have
20 been submitted by counsel. I have received from counsel
21 subsequently summaries of reports of various
22 environmental assessments of the damage which flowed from
23 the grounding of the Exxon Valdez, and I have considered
24 those reports. I have received a considerable number of
25 public comments pursuant to notice which we gave

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U.S.A. vs. EXXON CORPORATION
SENTENCING HEARING - (4/24/91)

1 indicating that we would accept and consider public
2 comment on this sentencing in lieu of a probation service
3 report. As, I think have been reported, those comments
4 ran rather heavily against the settlement agreement for
5 a whole variety of reasons.

6 Finally, I have received a number of
7 communications from the legislature of the state of
8 Alaska, and in particular, a special house committee,
9 which is considering the civil settlement, which has also
10 been negotiated between these same parties. That
11 committee had requested, at the time we took the changes
12 of plea, that we postpone decision on this matter as far
13 as sentencing until after the committee had had an
14 opportunity to complete its work. Subsequently, the
15 committee chair, I believe, indicated to me that he
16 expected that the committee would have completed its work
17 by today -- or, yesterday, at any rate, and would have
18 some input to me by yesterday, which I indicated was
19 quite acceptable.

20 Unfortunately, I heard again from the committee
21 yesterday, as was reported this morning, indicating that
22 the committee had not yet reached a decision, and, again,
23 asking that I delay this proceeding.

24 With respect to that request, and while I have
25 given it serious consideration, the fact is, I have

1 reached a decision on the acceptability of the plea
2 agreement, and I am not, at this time, persuaded that
3 there is any reason why I should delay or defer
4 announcing that decision.

5 With respect to the plea agreement: I am
6 satisfied that the parties worked very hard; that they
7 worked in complete good faith; and that they came up with
8 an agreement which they believed to be good and
9 acceptable, and one that they could justify to the court.

10 In evaluating that agreement, I had indicated
11 early on to counsel that while there were no applicable
12 federal sentencing commission guidelines for use in
13 sentencing corporations, that I would look to the general
14 sentencing factors set out in federal law with respect to
15 sentencing in general, and organizations in particular,
16 in evaluating the plea agreement which had been entered
17 into here.

18 I am satisfied that the pleas which were offered
19 and reflected in the agreement, adequately reflect the
20 seriousness of the underlying conduct. That is not a
21 problem with the agreement.

22 In that regard, and if you will excuse just a
23 little bit of editorializing on my part, I have some
24 difficulty with the concept that we criminalize
25 unintentional environmental accidents. In effect,

1 criminalizing the killing of birds and sea otter, and so
2 forth. Yet, we do not criminalize airline crashes, which
3 result from negligence, and which kill people.

4 Congress, in the sentencing guidelines has told
5 us -- the courts -- that we must do better in avoiding
6 disparity in sentencing. I suggest that Congress has
7 some work of its own to do in getting the disparity out
8 of the criminal laws. For, as I see it, we are affording
9 greater protection to birds and sea otter that aren't
10 even good for food, than we are people. I think that's
11 some pretty serious disparity. However, my job is to
12 enforce the law, as it is on the books at the present
13 time, and I mean to do that.

14 The sentencing factors that I alluded to earlier
15 include such things as the nature and circumstances of
16 the offense, history and characteristics of the
17 defendant; the seriousness of the offense; whether the
18 penalties to be imposed adequately deter others from
19 similar conduct. I am to seek to protect the public from
20 further crimes of the defendant. I am to consider
21 restitution with respect to fines and corporate
22 defendants. I am to consider the defendants income and
23 earning capacity and financial resources. In short, I am
24 to consider the size of the defendant organization.

25 I've used those factors in evaluating this plea

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U.S.A. vs. EXXON CORPORATION
SENTENCING HEARING - (4/24/91)

1 agreement. I have come to the conclusion that the fines
2 which the agreement proposes to be imposed do not
3 adequately achieve deterrence. I am afraid that the
4 fines send the wrong message, suggesting that spills are
5 a cost of business, which can be absorbed. The fines, I
6 think, are also inadequate if, as the law requires at the
7 present time, defendants who commit environmental crimes
8 are to be punished. The fine proposed to me does not
9 appear to me to adequately punish the defendants for the
10 conduct to which guilty pleas were offered.

11 There has been a great deal said in the comments
12 which I received about the unavailability of scientific
13 data. In that regard, it is, of course, quite probable
14 that there is more scientific data available to some of
15 us than there is to the general public. But having said
16 that, I would further observe that the availability of
17 scientific data does not, I think, at this time, stand in
18 the way of making the decision which needs to be made
19 here. Much information is available. There is no
20 question but what the Exxon Valdez oil spill was off the
21 chart as far as other environmental disasters that we
22 have had in this country. It was very large, to say the
23 least.

24 The damage, although we cannot presently
25 quantify it with specificity, was very great.

1 Sufficiently so that I feel very comfortable saying that
2 the fines which were proposed to me were simply not
3 adequate.

4 One final matter which has been the subject of
5 some controversy, and which, in my view, should simply
6 not be a factor in connection with this case, has to do
7 with the role of Alyeska in these proceedings. And it is
8 my perception that Alyeska has no role whatsoever in
9 these proceedings.

10 A certain congressman has written me on the
11 subject. It's interesting to note that his communication
12 to me appeared in the press a day and a half before I
13 read about it in the newspaper. And it appears to me
14 that he was more interested in getting some publicity
15 than he was in informing me. Be that as it may, I do
16 not have any role in the decision of whether Alyeska
17 should or should not be prosecuted for anything. That's
18 an executive decision. It's a Justice Department
19 decision. I take no position on it. I have no role on
20 it. I take no responsibility for the decision that is to
21 be made. And I do not think that is an appropriate
22 provision for a plea agreement in connection with this
23 case.

24 As is obvious from my comments, the plea
25 agreement is rejected.

1 Mr. Neal, Mr. Lynch, at this point the
2 defendants are entitled to withdraw their pleas of guilty
3 pursuant to the plea agreement, if they wish to. Are you
4 gentlemen ready to make that decision now or do you
5 require some time to consider the matter?

6 MR. NEAL: May it please the court. James Neal,
7 representing Exxon Shipping. This is a matter we need
8 some time to consider, and we would ask for some time to
9 reflect on what the court said, and consider our course
10 with the court plea.

11 THE COURT: Thirty days?

12 MR. NEAL: Thirty days will be adequate, Your
13 Honor. Thank you.

14 THE COURT: If a decision is made earlier than
15 that, I would appreciate your letting me know about it.
16 We'll look for an answer no later than Friday the 24th of
17 May. As I say, I have some interest in moving this
18 matter along as quickly as it can and should be, but I
19 realize that this is a decision that is going to take
20 some thinking on your part.

21 Thirty days -- May 24. If you have a decision
22 earlier, I will appreciate it.

23 Will that be sufficient for Exxon Corporation,
24 also?

25 MR. LYNCH: Yes, Your Honor.

1 THE COURT: All right. Same will apply to Exxon
2 Corporation. I will expect a decision as soon as
3 possible and no later than the 24th of May.

4 Upon receiving your decision, I'll do one of two
5 things. We will schedule a status conference of some
6 sort at that point, to do whatever needs to be done in
7 the light of the decision that you make. And we will
8 communicate with you a time and place for that meeting.

9 Anything further we need to do, gentlemen?

10 (No response.)

11 Thank you very much. We'll be in recess subject
12 to call.

13 THE CLERK: This court now stands in recess
14 subject to call.

15 (1224)

16 (Off record - 8:50 a.m.)

17 ***END***
18
19
20
21
22
23
24
25

411L -
Criminal

Andy

Lloyd Benton Miller
SONOSKY, CHAMBERS, SACHSE, MILLER & MUNSON
900 West 5th Avenue, Suite 700
Anchorage, AK 99501
(907) 258-6377

Honorable H. Russell Holland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

EXXON CORPORATION AND
EXXON SHIPPING COMPANY,

Defendants.

NO. A90-015-1CR

NO. A90-015-2CR

CIVIL PLAINTIFFS' COMMENTS ON PROPOSED SENTENCE

All plaintiffs in Case No. A89-095 Civil (Consolidated) before this Court, and all plaintiffs and the classes they represent in Case No. 3AN-89-2533 Civil (Consolidated) in the Superior Court for the State of Alaska, Third Judicial District (hereinafter referred to as "the Civil Plaintiffs"), pursuant to this Court's Order of March 22, 1991, hereby submit their comments on the sentence specified in the Plea Agreement entered into by the United States and Defendants Exxon Corporation and Exxon Shipping Company.¹ Civil Plaintiffs urge the Court to defer

¹ Civil Plaintiffs continue to ask the Court, as they did in their motion dated March 21, 1991, to enter an Order to Impound or Otherwise Preserve All Grand Jury Documents, Subpoenae and Transcripts. Civil Plaintiffs also support the assertions and positions set forth in the letter of U.S. Representative George Miller addressed to this Honorable Court

SONOSKY, CHAMBERS, SACHSE & MILLER
900 WEST 5TH AVENUE
SUITE 700
ANCHORAGE, ALASKA 99501
(907) 258-6377

SONOBY, CHAMBERS, SACHSE & MILLER
930 WEST 5TH AVENUE
SUITE 700
ANCHORAGE, ALASKA 99501
(907) 250-6377

accepting the Plea Agreement, pursuant to Rule 11(e)(2), F.R.Crim.P., until such time as a complete record is before the Court on the impact of the offenses committed by Defendants and their history of violations of the environmental laws.

The Proposed Sentence Cannot Be Properly And Adequately Assessed By The Court Without (1) Full Disclosure Of The Scientific Data and Analyses Accumulated But Withheld By The United States; And (2) After Such Disclosure, Providing An Opportunity For Non-Government Experts to Comment On The Sentence In Light Of The Data.

The Sentencing Reform Act of 1984, as amended, 18 U.S.C. §3553(a), mandates that the Court consider before sentencing: "(1) the nature and circumstances of the offense,..."; and "(2) the need for the sentence imposed- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense...." To make these determinations in this case the Court will need an extensive assessment by the scientific community of the nature, circumstances, and seriousness of the effects of the oil spill at issue.

That inquiry is not possible now because the government has failed to provide the scientific community, the Civil Plaintiffs who are victims of defendants' offenses, and the public in general with the significant and relevant data and analyses which the government has had in its possession for months. The import of the granite barrier to scrutiny that has been maintained by the government, despite persistent requests for disclosure, is described in detail in the Affidavits of eminent scientists Drs. Capuzzo, McElroy, and Teal, and Bruce W. Tripp, whose affidavits were submitted to the Discovery Master, the Honorable David B. Ruskin, as Appendices F through I to "Plaintiffs' Memorandum in Support of Motion for Disclosure of All Scientific Data on the Impact of the Oil Spill on Natural Resources" in Case No. 3AN-89-2533 in the Superior Court for the State of Alaska, Third Judicial District of Anchorage. Because of this barrier, experts

and dated April 8, 1991.

SONOSKY, CHAMBERS, SACHSE & MILLER
900 WEST 5TH AVENUE
SUITE 700
ANCHORAGE, ALASKA 99501
(907) 258-6377

outside the government have been unable to provide a full assessment to the Court on the nature, circumstances, and seriousness of the effects of the oil spill at issue. The Court should clearly desire to have such expert opinions in light of the gravity of the offenses, the victims' right to provide comments, and the fact that the government is not acting solely as the enforcer of the law, free of non-prosecutorial bias, but rather is also pursuing this Plea Agreement as part of an overall settlement in which it is a settling defendant.

Perhaps recognizing that this Court could not perform its duties in this criminal proceeding without such information, the U.S. Justice Department, only three days before these comments were due, lodged an 18-page *summary* of 58 scientific studies (reportedly costing \$70 million) with this Court in Civil Action A91-002. This Court should require the government to disclose the complete scientific record, and not just a purported summary. Accordingly, the Court should defer sentencing until: (1) the United States makes available to the Court, the Civil Plaintiffs, and the public the *complete* scientific record needed to appraise "the nature and circumstances of the offenses" involved and "the need for the sentence imposed to reflect the seriousness of the offense...and to provide just punishment for the offense;" and (2) the Court affords the opportunity for comment on the sentence in light of that record. In any event, the Court should defer sentencing until the victims of the offense and experts provide comments in response to whatever the government has released and whatever it and Exxon submit on April 16.

The Fine Agreed To Is Insufficient To Serve The Needs Of Deterrence.

In deciding on the adequacy of the sentence, the Court must decide on the impact of that fine. 18 U.S.C. §3553. Here, the impact of the proposed fine on Exxon will be minimal and few if any purposes of the sentencing statute will be met.

Numerous statements have already been made by Exxon officials observing that the criminal fine (indeed the overall settlement) will have no appreciable effect on the Company's earnings. See, *The New York Times*, Thursday, March 14, 1991, page A16. With the relatively small size of this penalty, the sentence is unlikely to "afford adequate deterrence to [Exxon's] criminal conduct" or "to protect the public from further crimes of the defendant." 18 U.S.C. §3553(a) (2)(B) and (C).² This point is reinforced by the fact that the proposed penalty pales in comparison to the maximum penalty under the proposed Sentencing Guidelines. Under those Guidelines, Exxon's sentence could have been four times the overall loss to the victims of the spill.³ At a minimum, the Justice Department's conservative figure of \$600 million (2 times the victim loss as repeated by the defendants) would have been a much more appropriate penalty. Accordingly, the Court should reject this plea agreement.

**Exxon's History of Offenses Must Be Evaluated
Before The Court Rules On This Plea Agreement.**

The history of defendants' offenses must be evaluated in deciding the appropriateness of the sentence and the Plea Agreement. Civil Plaintiffs urge the Court to obtain a full report on the defendants' history of violations of environmental laws given the considerable record of offenses that is already known:

- A. Destruction of Wetlands in Arthur Kill Waterway Caused By Criminally Negligent Pipeline Rupture

On January 1, 1990, an underwater pipeline ruptured from Exxon's Bayway Refinery near Newark, New Jersey, causing approximately 570,000 gallons of refined oil to pollute

² It is noteworthy that the cost of the government's scientific studies, reported as \$70 million, constitutes 70% of the total fine, \$100 million, stipulated in the Plea Agreement.

³ Indeed, if the sentences on all five charges were to be imposed consecutively, the aggregate statutory maximum for each defendant would be \$3 billion, not \$600 million, again without considering the damages in excess of the \$300 million paid by Exxon to date.

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SUITE 700
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(907) 258-6377

miles of shoreline and kill hundreds of birds. A guilty plea to criminally negligent discharge of oil under the Clean Water Act was entered on March 20, 1991 and a criminal fine of \$5 million (including \$4.8 million restitution) was imposed. Exxon admitted that it was negligent in training its employees and maintaining the pipeline.

B. *Exxon Corp. v. Yarema*, 516 A.2d 990 (Md. Ct. Spec. App. 1986)

A punitive damage award was upheld based upon the negligent discharge of gasoline from underground storage tanks.

C. *In the Matter of Exxon Corp.*, No. 84-0914AG (Tennessee Dept. of Health and Environment)

Exxon was adjudged to have violated solid waste regulations through improper storage of hazardous wastes.

D. *Exxon Co., U.S.A., v. State of Texas*, 646 S.W. 2d 536 (Tex. Ct. App. 1982)

Exxon was found to be criminally liable for the discharge of catalytic dust from its refinery.

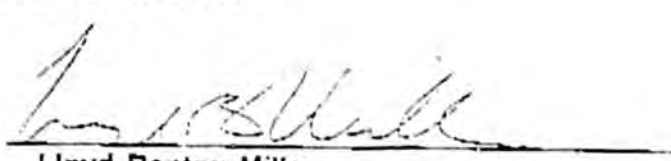
E. *Exxon Co. U.S.A. v. Dunn*, 474 So. 2d 1269 (Fla. Dist. Ct. App. 1985)

Exxon was found liable for personal and property damage caused by sulphurous gas emission and vibrations.

Once a full record on defendants' history of environmental violations is developed, the Court will be in a position to examine the extent to which the violations evidence a pattern of corporate indifference toward environmental issues. Only by engaging in such an inquiry will the purpose of 18 U.S.C. § 3553 be served.

DATED at Anchorage, Alaska this 11th day of April, 1991.

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON

By: 

Lloyd Benton Miller
Plaintiffs' Liaison Counsel

SONOSKY, CHAMBERS, SACHSE & MILLER
500 WEST 5TH AVENUE
SUITE 700
ANCHORAGE, ALASKA 99501
(907) 250-6377

COHEN, MILSTEIN, HAUSFELD & TOLL

DAVIS, WRIGHT & TREMAINE

STOLL, STOLL, BERNE & LOKTING

WILLIAMS, TRINE, GREENSTEIN & GRIFFITH

CASEY, GERRY, CASEY, WESTBROOK,
REID & HUGHES

DICKSTEIN, SHAPIRO & MORIN

SONOSKY, CHAMBERS, SACHSE & MILLER

Macon Cowles
TRIAL LAWYERS FOR PUBLIC JUSTICE

ON THE BRIEF:

H. Laddie Montague, Jr.

Janice Siegel

BERGER & MONTAGUE, P.C.

Charles S. Crandall
MILBERG, WEISS, BERSHAD, SPECTHRIE
& LERACH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA

vs.

EXXON SHIPPING COMPANY, AND EXXON CORP.

No. A90-015 CR.

COMMENTS OF THE NATIONAL WILDLIFE FEDERATION
ON THE PLEA AGREEMENT OF THE
UNITED STATES, EXXON SHIPPING, AND EXXON CORP.

Erik Olson
Douglas Wolf
National Wildlife Federation
1400 16th Street, N.W.
Washington, D.C. 20036
April 11, 1991

ACE 447115

INTRODUCTION

The National Wildlife Federation ("NWF" or "the Federation"), the nation's largest private conservation education organization with 5.6 million members and supporters, welcomes this opportunity to comment on United States of America v. Exxon Shipping Company and Exxon Corporation (No. A90-015 CR.) (the plea bargain)¹. Such public comment is particularly appropriate given the overwhelming public interest in and concern with this oil spill and the important legal and public policy issues this plea bargain raises.

NWF is very concerned that the proposed plea bargain would let Alyeska Pipeline Service Company (Alyeska) off the hook entirely. This deal in Alyeska's favor was struck despite recent evidence of what a Congressional investigation has suggested was criminal behavior by Alyeska. NWF urges that the Court strike all provisions in the plea agreement which shield Alyeska from punishment. In addition, NWF urges the Court to require a magistrate investigation, or to name an independent counsel or special master to investigate the recent allegations of Alyeska's alleged criminal conduct, and recommend to the Court whether the plea agreement's immunization of Alyeska from criminal prosecution is justified and in the public interest.

NWF also urges that this Court order the government and Exxon to release all scientific and economic data documenting the extent of damage caused by the crimes, in order to assure the public and this court that the fines and restitution are appropriate to the offenses committed. These comments will discuss these and other concerns.

ALYESKA SHOULD NOT BE MADE IMMUNE FROM FUTURE PROSECUTION

In a very unusual provision which may be without precedent, paragraph III A of the Plea Agreement specifically waives the United States' right to prosecute a third party, Alyeska, which is not a defendant in this or any related criminal action, for any criminal violation of federal law arising out of the Valdez spill, the cleanup, or its preparations for a cleanup. This unusual promise was made without any plea, fine, restitution, admission, or extraction of any other benefit to the public or to the government from Alyeska. Our research has been unable to

¹ NWF, with the Wildlife Federation of Alaska and the Natural Resources Defense Council, and represented by the Trial Lawyers for Public Justice, has sued Exxon and Alyeska Pipeline in state court in Alaska to seek creation of a trust fund which would help restore the natural resources damaged by this catastrophe. NWF has actively commented on the natural resource damage assessment process in response to the Valdez spill.

document any previous case in which a corporate defendant has been provided a promise of no prosecution for environmental or other crimes as part of a plea bargain with some other legally separate company, particularly when that third party corporation has failed to provide any benefit to the government for such a promise.

This provision is particularly troubling in light of recent evidence of Alyeska's alleged criminal conduct. If Alyeska is not punished, the fundamental retributive, rehabilitative, and deterrent goals of criminal law with respect to Alyeska's alleged criminal behavior will not be served.

Documents recently submitted to this Court by the U.S. House Interior and Insular Affairs Committee Vice Chairman George Miller (collectively, "the Alyeska materials") establishes that eleven months before the Exxon Valdez spill, Alyeska knew that it could not adequately respond to a major spill in Prince William Sound.² In fact, these documents show that Alyeska unilaterally decided that it would only respond to spills in the Valdez Arm and Valdez Narrows and that it would rely on dispersants and cleanup efforts by the spiller to attempt to take care of any other spills³. In other words, Alyeska unilaterally abdicated a large part of its responsibility to protect the environment⁴.

The outrageous nature of this conduct becomes even clearer when one compares these internal statements with those Alyeska made in many public forums⁵ and makes in its Contingency Plan for Prince William Sound. In the Contingency Plan, Alyeska asserts that it can and will respond to all spills, no matter where they occur in the Sound and no matter what size⁶. The Congressional

² T.L. Polasek, [Alyeska] "Oil Spill Issues," (April 6-7, 1988) (filed with this Court with Alyeska materials).

³ See Cable from Stanley Factor, ARCO Marine, to Roger Gale, Sohio (July 6, 1988) (in Alyeska materials). Further, this document indicates that the Alyeska owner companies were unable to agree to even this incredibly low level of commitment.

⁴ In fact, Alyeska didn't even acquire and deploy the additional equipment that the documents indicate they were planning to purchase. Rep. Miller's April 8, 1991 letter to the Court, at 8-9.

⁵ Id. at 2-3 The misstatements made before the pipeline was approved are particularly significant as the pipeline was ultimately approved by only one vote in the United States Senate, with then-Vice-President Spiro Agnew casting the deciding vote.

⁶ Id. at 3-6.

investigators suggest that these were willful misstatements and probably were criminal violations of Alyeska's duty under the Clean Water Act and other laws.

The plea bargain, in section III A, specifically exempts Alyeska from any criminal liability for any acts associated with the grounding of the Exxon Valdez as well as any "conduct in connection with the preparation or submission of oil spill contingency plans or related documents, by Alyeska Pipeline Service Company to the federal or state government." The plea bargain exacts nothing from Alyeska in return for this beneficence. Plea bargains often are described as contracts; Alyeska has been given all of the benefits of such a contract without having provided any consideration.

NWF invites the Court to examine its law books to find a similar example of a third-party, legally separate from the accused, gaining the benefit of the plea bargain without suffering any detriment. The governments appear to have surrendered all criminal charges for Alyeska's incredible conduct because Exxon insisted.⁷ The record before this Court at a minimum suggests that Alyeska likely is an appropriate target of a criminal investigation. The record is completely devoid of any support for the promise not to prosecute Alyeska. This Court, therefore, has insufficient information for it to evaluate, pursuant to its obligations under Federal Rules of Criminal Procedure 11 and 32, whether the plea is in the public interest and whether the sentence fits the crime.⁹ NWF urges the Court to

⁷ The Act makes "[a]ny person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter," such as the Contingency Plan, liable for fines and/or prison. 33 U.S.C. §1319(c)(4). See also 18 U.S.C. §1001 (penalties for knowingly submitting false information to any agency of the United States).

⁸ In public testimony before several of the House Merchant Marine and Fisheries Committee's Subcommittees, which met in joint session on March 20, 1991 to examine the proposed settlement, United States Assistant Attorney General, Richard Stewart, asserted that the negotiators for the governments added Alyeska to the plea bargain and the consent decree between the United States and Alaska governments and Exxon Corp. and Exxon Shipping, simply because Exxon insisted they do so.

⁹ See generally, J.E. Bond, Plea Bargaining and Guilty Pleas § 6 (1983 & Supps.); W. R. LaFave & J.H. Israel, 2 Criminal Procedure: Criminal Practice Series § 20 (outlining rights and duties of court in reviewing plea bargain).

strike these unjust provisions from the plea bargain. Alyeska's cavalier and criminal actions must not go unpunished.

**THE COURT SHOULD APPOINT A MAGISTRATE, SPECIAL MASTER,
OR INDEPENDENT COUNSEL, TO REVIEW ALYESKA'S ACTIONS**

The Court should request that a magistrate, special master, or independent counsel¹⁰ review the allegations of Alyeska misconduct. The results of such an investigation would inform the Court's determination regarding whether the plea's provision exempting Alyeska from criminal prosecution is in the public interest and should be approved.

OTHER CONCERNS

1. Important Scientific Data Must Be Released

The plea agreement requires Exxon Corp. and Exxon Shipping to pay a total of \$100 million in criminal fines and restitution payments. However, there is no way the public or this Court can meaningfully assess the amount of restitution needed or economic impacts of the spill, to measure against this figure. The federal government's scientific study summary released this week regarding the biological impacts of the spill fails to include any estimates of the economic impacts of the spill or of the restoration costs. None of the numerous economic studies conducted by the government have been released, no information on the findings of Exxon's studies has been made available, and the public, independent experts, and this court are in no position to judge the accuracy even of the summary of biological impacts filed by the government since the studies themselves and all underlying data remain secret.¹¹

¹⁰ See, Bond, Plea Bargaining and Guilty Pleas § 6.18(c) (court may name special prosecutor in rejecting plea bargain as contrary to public interest); United States v. Cox, 342 F.2d 167, 179 (5th Cir.) (en banc), cert. denied, 381 U.S. 936 (1965) (Judge Griffin Bell and dissenters in part suggesting that where government decision not to prosecute is in bad faith or "irrational," court may be authorized to appoint counsel to prosecute case); United States v. Cowan, 381 F.Supp. 214, 223 & n. 11 (N.D.Tex. 1974), rev'd on other grounds, 524 F.2d 504 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976) (to same effect).

¹¹ What we do know is that Exxon says it has spent "in excess of \$300 million to claimants allegedly injured by the oil spill," Plea Agreement paragraph III C(3)(c), suggesting that under the Alternative Fines Act, 18 U.S.C. section 3571(d), if Exxon were convicted it could be subject to over \$600 million in fines, in addition to providing restitution. Thus, there is already substantial evidence of widespread injury from Exxon's actions, and there is suggestive evidence that the adequacy of

The Court should require that all these studies -- and not just the vague and conclusory summaries just released by the government -- be revealed by Exxon and the government so that the public can intelligently comment on this aspect of the plea bargain, and so that this Court can meaningfully exercise its duties to evaluate the grounds for and adequacy of this plea bargain, and the associated fines and restitution suggested in it.

3. Court Should Impose Prevention Measures

We hereby join in the comments of other conservation organizations before this court calling for the use of creative probation and other requirements requiring Exxon to take actions to prevent other environmental pollution and disasters.

4. Public Should Be Able to Challenge Use of Money

Paragraph IV B of the Plea Agreement purports to provide that Alaska can spend the restitution money it receives under the agreement "without objection, challenge, or judicial or administrative review." As much as the state and United States governments may want to insulate their actions from judicial or other review provided for under the Administrative Procedure Act and other laws, the governments simply cannot enter into a contract with Exxon that purports to eliminate the statutory and other legal rights of third parties to challenge government actions. Thus, this provision must be struck from the agreement as an ultra vires act that is contrary to law and public policy.

Respectfully Submitted,

Douglas Wolf / *[signature]*
Douglas Wolf, Esq.

Erik D. Olson / *[signature]*
Erik D. Olson, Esq.

the plea bargain can be questioned with respect to Exxon itself. This is particularly true in light of Exxon's widely reported statements in the wake of the settlement's announcements that the deal would have no effect on Exxon's financial position, suggesting the Company's management has no remorse for its actions and that there will be little or no deterrent effect from the fines imposed.

Robert C. Bundy
 Douglas J. Serdahely
 Bogle & Gates
 1031 West 4th Avenue, Suite 600
 Anchorage, Alaska 99501
 (907) 276-4557
 Attorneys for Exxon Shipping Company

John F. Clough, III
 Clough & Associates
 431 North Franklin Street, Suite 202
 Juneau, Alaska 99801
 (907) 586-5777
 Attorneys for Exxon Corporation

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. A90-015 CR
	)	
EXXON CORPORATION and	)	JOINT SENTENCING MEMORANDUM
EXXON SHIPPING COMPANY,	)	OF EXXON CORPORATION AND
	)	EXXON SHIPPING COMPANY
Defendants.	)	

The defendants submit this Joint Sentencing Memorandum addressing the subjects identified in 18 U.S.C. §3553(a) and (c) and §3572(a)(7), including the nature and seriousness of the offense; acceptance of responsibility; discipline of officers and employees responsible; restoration or restitution involved,

including the expenditure of over \$2 billion in cleanup and restoration costs, and payment of over \$300 million in claims; and an analysis of the sentences in other federal environmental crimes cases. Defendants believe the facts and circumstances fully justify this Court's acceptance of the Plea Agreement executed and filed on March 13, 1991.

Defendants' intentions are to summarize succinctly the relevant information and attach certain documents, should the Court desire to consider additional information.

I. ACT OR OMISSION CAUSING THE GROUNDING AND RESULTANT OIL SPILL

Defendant Exxon Shipping has pled guilty to the misdemeanor of negligent discharge of pollutants and to the strict liability misdemeanors of violations of the Refuse Act and the Migratory Bird Treaty Act. Exxon has pled guilty to a violation of the Migratory Bird Treaty Act. Moreover, they have accepted the Government's Factual Basis For The Guilty Pleas of Exxon Shipping as set forth in the document filed with the Court on March 22, 1991 by the Government, and with the factual basis for the plea of Exxon Corporation as set forth in the Plea Agreement.

Other than the above, however, defendants do not agree that any other factual assertions which may be made in the Government's Sentencing Memorandum are accurate.

At 9:12 p.m. on March 23, 1989, the Exxon Valdez left Valdez, Alaska, carrying approximately 53 million gallons of North Slope crude oil. The crude oil was owned by Exxon, and was being transported under contract with Exxon Shipping.

After leaving the Valdez Narrows, Captain Joseph Hazelwood advised the Vessel Traffic Center (VTC) that he was altering course to avoid icebergs and was coming to a course of 200 degrees. Thereafter, the master ordered the vessel to make a course change to 180 degrees, which ultimately took the vessel outside of the traffic lanes.

Captain Hazelwood left the bridge at approximately 11:53 p.m., leaving Gregory Cousins, who possessed a second mate's license but was sailing as third mate, as the sole officer on the bridge. Also on the bridge was Robert Kagan, who possessed a certification from the Coast Guard as an able-bodied seaman, but was sailing as a "step-up" able-bodied seaman. Able-bodied seaman Maureen Jones, who held a third mate's license, was on the starboard wing of the vessel as a lookout. At the time Captain Hazelwood left the bridge, the Valdez was on automatic pilot and the engine was set to accelerate slowly to a sea speed of approximately 16 knots (at the time of the grounding, the vessel was traveling at approximately 11.5 knots).

Before leaving the bridge, the master directed Cousins to commence his turn back into the traffic lanes when the vessel was abeam Busby Island Light. When the master left the bridge,

at approximately 11:53 p.m., the Valdez was approximately three minutes north of Busby Island Light. The vessel did not begin any turn abeam Busby Island Light.

Exxon Shipping, while not denying the existence of a negligent act or omission which contributed to the grounding of the Valdez on a portion of Bligh Reef at approximately 12:09 a.m., March 24, 1989, after extensive investigation, is even now unable to resolve with certainty what happened between 11:53 p.m. and 12:09 a.m. Several things are clear, however. First, the ship's course recorder reflects that the vessel was on a steady course of 180 degrees from well before 11:53 p.m., March 23, 1989, until 12:01:30 a.m., March 24, 1989, when the Valdez began its turn to starboard; second, the turn, when begun, was not pronounced enough to avoid the reef; and third, the master did leave the bridge at approximately 11:53 p.m. and did not return until the vessel was aground on Bligh Reef.

II. COMMITMENT TO SAFETY BEFORE THE GROUNDING

The grounding of the Exxon Valdez and the resultant oil spill in the early morning hours of March 24, 1989, was an accident for which Exxon Shipping took immediate responsibility. Such an event can overshadow years of commitment to, and reputation for, safety.

Exxon Shipping believes it ran one of the safest tanker fleets in the oil industry. Its reputation was developed by affirmative efforts to stress safety over a period of years. Defendant does not believe it is irrelevant to this Memorandum to mention, very briefly, its commitment to safety before the unfortunate event of March 24, 1989.

In the merchant marine as a whole, safety is measured, in part, by the "Jones F. Devlin Personnel Safety Awards," which are sponsored annually by the American Institute of Merchant Shipping and the Marine Section of the National Safety Council. Exxon Shipping received eighteen of the sixty-two awards conferred in 1988 throughout the American shipping industry (not just oil transporters). Fourteen of these eighteen awards went to vessels with at least five years of operation without a disabling injury. In 1987, Exxon Shipping received twenty of the fifty-two awards given that year. These commendations are an empirical, objective reflection of defendant's commitment to safety.

In addition to its safety record, Exxon Shipping would point to its "Navigation & Bridge Organization Manual" as another strong reflection of the priority given to safety within the Company. The Manual, developed many years ago, serves as a guide to the crews of vessels, and they are expected to follow its guidelines. Deck officers are specifically required to certify in writing their familiarity with the Manual's contents, as

periodically amended and revised. The Manual is not mandated by the Coast Guard or any other government entity; its creation was a project that Exxon Shipping took upon itself.

Most significant, for present purposes, is the Manual's statement of its purpose at the very outset: "To assist the Master and deck officers in planning for the safe navigation of their vessel." This statement of purpose is immediately followed by a description of Exxon Shipping's "Navigation Policy," which holds that "the prime objective when navigating company vessels is the safety of personnel, vessel and cargo." The Policy further recognizes the primacy of safety by observing that while "speed and economy" are important, they are "secondary to safety considerations." See Attachment A, Sections 1.1, 1.2.

III. EFFORTS TO PREVENT RECURRENCE OF THE OFFENSE

Since the grounding, a number of initiatives have been undertaken to prevent an oil spill and to enhance capabilities to respond to oil spills.

In an overall sense, the need for safe operations has been emphasized again to all personnel. Exxon has created a new Environmental and Safety Department to review and coordinate the management of environmental and safety concerns. In the United States an Interfunctional Oil Spill Policy Task Force has been formed to conduct broad reviews of ways to prevent oil spills.

Following the grounding, both defendants reviewed their substance abuse policies and revised them to include, among other things, the institution of random and periodic alcohol and drug testing for certain safety-sensitive positions. These measures were put into effect at a time when no such requirements were mandated by law.

Before and after the grounding, Exxon Shipping has required staffing on its vessels beyond that required by the Coast Guard. Although we submit that "manning" played no part in the grounding, effective October 20, 1989, Exxon Shipping created the position of Supplemental Chief Mate in the Port of Valdez to supplement the normal vessel crew complement upon arrival of a vessel at the dock. In addition, since the grounding, it has strengthened its requirements respecting mandatory rest periods and maximum work hours.

Following the grounding, Exxon Shipping extensively reviewed its navigation procedures. One of several revisions that took place was the prescription of only daylight transit when ice of sufficient size and quantity to hinder tanker navigation is reported in or near traffic lanes. The policy further prescribes reduced speed when ice is present, and permits deviation from the traffic lanes only in limited circumstances. In addition, tankers in Prince William Sound are being escorted by tugs.

Exxon Shipping, since the grounding, has instituted a new Bridge Simulator Training Program to incorporate state-of-the-art techniques as a supplement to the simulator training used in the years prior to the grounding.

Exxon Shipping also established a new Environmental Affairs Group, hired two consultants who are former Coast Guard captains with oil spill experience, and established a new Safety, Environmental and Regulatory Department.

IV. DISCIPLINE OF THE OFFICER OR EMPLOYEE RESPONSIBLE FOR THE OFFENSE

Under 18 U.S.C. §3572(a)(7), in imposing a fine on an organization and determining the amount thereof, a sentencing court is required to consider any measure taken by the organization to discipline any officer or employee responsible for the offense.

In the light of this code section and in view of the preceding sections of this Memorandum, Exxon Shipping would point out to the Court that it had in place on the Valdez, and effective on the night of the grounding, its Navigation & Bridge Organization Manual. Each master and each mate was required to have read and studied this Manual and to have represented in writing that he or she was aware of the Manual's provisions.

The Navigation & Bridge Organization Manual required that Captain Hazelwood be on the bridge under the circumstances existing immediately before and during the grounding. Se

Attachment A, Sections 2.1, 8.4 and 8.5. After the grounding, Exxon Shipping disciplined the Captain for violation of Company policy by terminating his employment.¹

V. ANALYSIS OF SENTENCES IN OTHER ENVIRONMENTAL CRIMES CASES

In waiving a presentence report, the Court directed the parties to provide information respecting sentences imposed in other environmental crimes cases.² Defendants believe that the information summarized below responds to the Court's directive. Attachments B and C are enclosed, however, should the Court desire to consider additional information.

In United States v. Ashland Oil Co., Cr. 88-146 (W.D. Pa. 1989), the Court, after accepting a nolo contendere plea, imposed a fine of \$2,225,000, based on the negligent discharge of 500,000 gallons of diesel fuel. No restitution was provided as a part of the sentence. Defendants believe the Ashland Oil fine to be the largest ever imposed in any prosecution involving

¹ Mr. Cousins' license as a mate was suspended by the Coast Guard for nine months. In addition, Exxon Shipping reassigned him to the status of an able-bodied seaman.

² The information provided herein is limited to monetary sanctions, principally criminal fines. In some cases where individuals were prosecuted, additional sanctions were imposed.

negligent discharge of pollutants under the Clean Water Act.' This fine was imposed even after the Court made a finding that the defendant's conduct involved more than simple negligence. See Transcript of Sentencing Proceedings, pp. 45-47, 99. (Counsel will have this substantial transcript available for the Court at the sentencing proceedings.)

According to the November 15, 1990, Department of Justice press release, approximately \$56 million was imposed in criminal fines and restitution in federal environmental cases during fiscal years 1983 through 1990. See Attachment B, page 6. The press release does not contain a breakdown between fines and restitution nor does it indicate whether any of the fines were suspended. In the instant case, the payment of \$50 million in fines by these defendants approaches the total amount of fines and restitution imposed during the entire eight (8) year period, ending with fiscal year 1990.

According to the OVERVIEW OF EPA FEDERAL PENALTY PRACTICES FY 1989, issued April 1990, criminal fines assessed in fiscal year 1989 total \$12.5 million with \$10.2 million unsuspended. See Attachment C, page 1.

² Defendants are not unmindful of the fine imposed on Allied Chemical in the James River Kepone pollution case in which a \$5 million fine was imposed in addition to a required \$8 million contribution to an environmental trust fund. A brief analysis of the facts of that case demonstrates that it is not comparable to the instant situation. See Moore v. Allied Chemical Corp., 480 F. Supp. 364, 367-68 (E.D. Va. 1979); United States v. Allied Chemical Corp., 420 F. Supp. 122 (E.D. Va. 1976).

Defendants submit that this brief summary of sentences in other federal environmental crimes cases clearly justifies acceptance of the Plea Agreement executed March 13, 1991, with the payment of \$50 million in fines and a separate \$50 million compensatory payment to the State of Alaska.

Before leaving this section of the Joint Sentencing Memorandum, Exxon advises the Court that on or about March 20, 1991, it entered a plea of guilty in the United States District Court for the District of New Jersey to a one count misdemeanor violation of the Clean Water Act based on negligence, was fined \$200,000, and agreed to restitutionary payments of approximately \$4.8 million.

VI. THE PLEA AGREEMENT AND ATTENDANT CIRCUMSTANCES ADDRESS THE MATTER OF RESTITUTION

An organization found guilty of an offense shall be sentenced in accordance with the provisions of 18 U.S.C. §3553. (18 U.S.C. §3551(c)). Title 18 U.S.C. §3553, as well as 18 U.S.C. §3572, directs a sentencing court to consider restitution as a part of a criminal sentence. Because the offenses to which these defendants have pled guilty are not Title 18 offenses, however, restitution is not required. (18 U.S.C. §3663(a)). In United States v. Ashland Oil Co., Cr. 88-130 (W.D. Pa. 1989), a prosecution under the Clean Water Act, the Court concluded that restitution was not a necessary part of the sentence. In that

case, the United States acknowledged that the defendant should receive credit for its voluntary restitutionary payments. See also 18 U.S.C. §3663(e).

In the instant case, the defendants have expended over \$2 billion in the cleanup of Prince William Sound and environs, and have paid more than \$300 million in claims to individuals and entities allegedly damaged by the spill. Moreover, the Plea Agreement provides for compensatory payments to the State of Alaska. Civil suits by other individuals and entities are still pending.⁴

In view of all of the above, defendants submit that the Plea Agreement and the attendant circumstances adequately address the matter of restitution.

VII. RESPONSE TO PUBLIC COMMENTS

Defendants believe a few comments on the Plea Agreement justify a brief direct response, in addition to the information otherwise set forth herein.

First, in regard to the questions concerning the availability of information on damage assessment studies, Exxon Corporation is filing in the civil settlement proceedings (and thus available to this Court and public) a Summary Statement and

⁴ In addition, there is pending in this Court a proposed Consent Decree. The terms offered by the defendants in this document is a factor which may be considered by this Court, even though acceptance of this Plea Agreement is not dependent upon approval of the civil settlement.

copies of a number of scientific studies commissioned and published by it. It is important to note that virtually all of these studies have been available to the public for some months.

In addition, the United States Department of Justice filed with this Court on April 8, 1991 its Summary of Damages to Natural Resources in this case. On April 9, 1991, the National Oceanic and Atmospheric Administration (NOAA), the lead trustee for natural resources, held a press conference at which Mr. Campbell, the general counsel, stated that the "settlement" is "adequate to fill our trustee responsibilities as steward for the nation's natural resources." On March 20, 1991, Mr. Campbell testified in Congress that "We (NOAA) took a look at what we thought to be the reasonable damages that were done as a result of the damage assessment process. We looked at it liberally, Mr. Chairman, in order to provide a reasonable margin of error, and we feel -- not just me as the general counsel but the scientists within the NOAA to a man or a -- and woman -- feel that this is a reasonable settlement, that, in fact, the restoration that will need to be done in the future has been adequately provided for."

The second concern expressed in the comments is whether the fines are adequate. This concern has been addressed elsewhere in this memorandum. See Part V, supra. In addition, we would note that a major issue which would be litigated if there were no settlement is whether the Alternative Fines Act, 18 U.S.C. §3571(d), applies to the offenses in the instant indictment. If it does not apply, or if this Court concluded that assessing

pecuniary losses to persons other than the defendants would unduly prolong the sentencing process, then the maximum fines that could be imposed on both defendants for all offenses in the indictment would be less than \$3,000,000. Defendants have agreed to waive this issue for the purposes of this case and accept far greater fines as part of the Plea Agreement.

The third concern is that this event should be debated openly in a public trial and not be the subject of a Plea Agreement. Regardless of one's view of plea bargaining and irrespective of whether the public would be willing to expend the enormous amount of funds necessary to go to trial on every criminal charge, this concern does not fit the facts. The grounding of the Exxon Valdez and the resultant oil spill have been the subject of numerous public discussions and hearings, including congressional hearings, hearings conducted by the National Transportation Safety Board (NTSB) and a trial of the Captain of the vessel that consumed six (6) weeks.

CONCLUSION

As noted previously by the Court, there are as yet no sentencing guidelines in effect applicable to organizations. Defendants submit, however, that the Plea Agreement in this case, standing alone and when viewed in light of the factors set out above, fully addresses and satisfies the sentencing considerations

to be weighed under 18 U.S.C. §3553(a) and (c), including seriousness of the offense, respect for law, just punishment, adequate deterrence, remediation, and restitution.

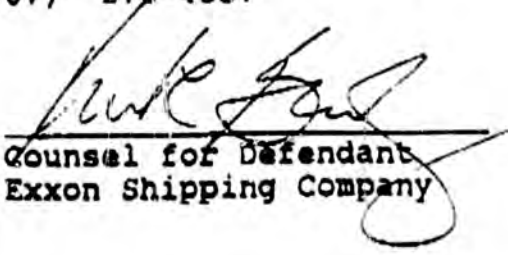
Defendants respectfully request that the Court accept the Plea Agreement and impose sentence according to its terms, and defendants agree with the Government that the Court has the power to impose a \$100 million fine in this case in the light of defendants' waiver of their claims in this case that the Alternatives Fines Act does not apply, and has the power to remit the amounts identified in the Plea Agreement.

DATED this 16th day of April, 1991.

E. Edward Bruce
Douglas R. Williams
Covington & Burling
1201 Pennsylvania Ave., N.W.
P. O. Box 7566
Washington, D. C. 20044
(202) 662-6000

James F. Neal
James F. Sanders
Edmund L. Carey, Jr.
Neal & Harwell
2000 One Nashville Place
150 Fourth Avenue, North
Nashville, TN 37219
(615) 244-1713

Robert C. Bundy
Douglas J. Serdahely
Bogle & Gates
1031 W. 4th Ave., Suite 600
Anchorage, Alaska 99501
(907) 276-4557

By: 
Counsel for Defendant
Exxon Shipping Company

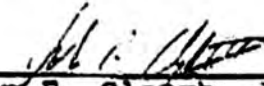
Warren Christopher
Patrick Lynch
O'Melveny & Myers
400 South Hope Street
Los Angeles, CA 90071
(213) 669-6000

Edward J. Lynch
Associate General Counsel
Exxon Corporation
225 E. John W. Carpenter
Freeway
Irving, TX 75062-2298
(214) 444-1000

DATED this 16th day of April, 1991.

JOHN F. CLOUGH, III
CLOUGH & ASSOCIATES

WARREN CHRISTOPHER
PATRICK LYNCH
O'MELVENY & MYERS

By 
John F. Clough, III
Attorneys for Exxon
Corporation

Charles P. Flynn, Esq.
BURR, PEASE & KURTZ
810 N Street
Anchorage, AK 99501
907/276-6100

Ronald L. Olson, Esq.
Allen M. Katz, Esq.
Gregory P. Stone, Esq.
MUNGER, TOLLES & OLSON
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
213/683-9100

Attorneys for ALYESKA PIPELINE SERVICE COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

EXXON CORPORATION; EXXON SHIPPING
COMPANY; ALYESKA PIPELINE SERVICE
COMPANY; AMERADA HESS PIPELINE
CORPORATION; ARCO PIPE LINE
COMPANY; EXXON PIPELINE COMPANY;
MOBIL ALASKA PIPELINE COMPANY;
PHILLIPS ALASKA PIPELINE CORPORA-
TION; BP ALASKA PIPELINES, INC.;
UNOCAL ALASKA PIPELINE COMPANY
and the T/V EXXON VALDEZ, in rem,

Defendants.

Case No. A91-082 Civ.

RESPONSE OF ALYESKA
PIPELINE SERVICE COMPANY
TO PUBLIC COMMENTS OF
CONGRESSMAN GEORGE MILLER

BURR, PEASE
& KURTZ
A PROFESSIONAL CORPORATION
810 N STREET
ANCHORAGE, AK 99501
907/276-6100

ACE 417672

Congressman George Miller has submitted a letter to the Court, we assume as a public comment on the proposed Consent Decree. In it, he makes three principal points: (1) Alyeska Pipeline Service Company ("Alyeska") was aware that it could not prevent environmental damage if a major spill occurred in Prince William Sound, but did not disclose this fact, thereby misleading the State and other regulators; (2) Alyeska did not have the necessary equipment available at the time of the EXXON VALDEZ grounding; and (3) Alyeska had "secretly decided," prior to the EXXON VALDEZ grounding, that it would not respond to an oil spill in Prince William Sound.

We respectfully submit that Congressman Miller is wrong on each count. First, it was clearly stated in Alyeska's 1987 Oil Spill Contingency Plan ("OSCP"), and well known to the State and other regulators, that despite the best efforts of Alyeska and the ship owner, a major oil spill in Prince William Sound would result in significant environmental damage. Second, Alyeska had available all of the equipment identified in the OSCP and responded in accordance with the OSCP. Third, as Alyeska's response to the EXXON VALDEZ grounding demonstrated, there was no decision on Alyeska's part -- secret or otherwise -- not to respond to oil spills in Prince William Sound.

It also is significant that the issues raised by Congressman Miller's letter have previously been aired and fully

BURR. PEASE
& KURTZ
A PROFESSIONAL CORPORATION
810 N STREET
NORWALK, AK 99501
907) 276-8100

considered in public hearings, including hearings conducted by the National Transportation Safety Board ("NTSB"), the Alaska Oil Spill Commission, the General Accounting Office, and Congressman Miller's own Subcommittee on Water, Power and Offshore Resources of the Committee on Interior and Insular Affairs. For example, the NTSB heard testimony by ADEC Commissioner Kelso that he felt the OSCP contemplated a cleanup of the EXXON VALDEZ oil spill within 72 hours, a position quite similar to that espoused by Congressman Miller. Yet, the NTSB flatly rejected this interpretation. The NTSB correctly observed that the OSCP stated that in the event of a major spill in Prince William Sound, a long-term cleanup of the beaches would be required.¹

1. THE LIMITATIONS ON ALYESKA'S RESPONSE CAPABILITY WERE PLAINLY DESCRIBED AND WELL-KNOWN TO THE REGULATORS.

It has long been known that a major oil spill in Prince William Sound could cause substantial impact on the marine environment. In the 1972 Final Environmental Impact Statement for the Proposed Trans-Alaska Pipeline ("EIS"), for example, the Department of the Interior described the consequences of a major marine oil spill as follows:

¹ National Transportation Safety Board Marine Accident Report, PB90-916405, NTSB/MAR-90/04 ("NTSB Report"), at 150.

Present state-of-the-art equipment and techniques for containing and recovering spilled oil can recover less than 20 percent of oil spilled. Thus, unless extraordinary advances in oil containment and recovery techniques occur, almost all of the oil spilled by the tanker system would constitute an adverse impact on the marine ecosystem.

EIS at 224-25.

In the OSCP, Alyeska reiterated that significant environmental effects would result from a major oil spill in Prince William Sound. For example, under conditions assumed to be ideal for cleanup purposes, Alyeska described the anticipated response to and effect of a hypothetical 4,000-barrel spill in Prince William Sound.² OSCP at 3-50 to 3-53. In this hypothetical scenario, 1/60th the size of the EXXON VALDEZ spill, Alyeska suggested that nearly seven miles of beach would be heavily oiled, that only 1,000 barrels of oil would be collected through the use of skimmers and other oil spill containment equipment, and that the cleanup operation would last for approximately two months. Id. Alyeska also indicated that the

² The portion of the OSCP describing the hypothetical 4,000-barrel spill scenario is attached hereto as Exhibit A.

cleanup efforts would require assistance from private commercial vessels, oil spill cooperatives such as Cook Inlet Response Organization ("CIRO") and Alaska Clean Seas, private oil spill response companies, dispersants contractors, and possibly the U. S. Coast Guard Pacific Strike Team. OSCP at 3-51. Alyeska stated that a crucial element of its response to this hypothetical 4,000-barrel spill would be the use of dispersants, which would require approval of the government's on-scene coordinator before application could begin. OSCP at 3-51 to 3-53. As Alyeska noted, this scenario "presumed a dispersant decision is made soon enough to make application feasible." OSCP at 3-53.

Alyeska's OSCP also described the response to a hypothetical 200,000-barrel spill in Prince William Sound.³ OSCP at 3-54 through 3-56. This hypothetical scenario was again premised on ideal conditions for oil containment and cleanup. OSCP at 3-54.⁴ Yet, as Alyeska observed in its

³ The portion of the OSCP describing this hypothetical 200,000-barrel spill is attached as Exhibit B.

⁴ The seas were assumed to be calm, the winds moderate and the weather mild. The spill was assumed to occur at 6:00 a.m. on the longest day of the year, so that maximum daylight would be available during the initial response. OSCP at 3-54. By contrast, the conditions Alyeska encountered in responding to the EXXON VALDEZ spill were much less favorable. The spill occurred in the middle of the night, the days were short, the temperature was cold, and the snow was deep. Moreover, in less than 72 hours, a severe storm struck, forcing the fleet of response vessels to seek shelter.

OSCP, even under these ideal conditions the response would require the use of private commercial vessels and third-party aircraft, and the assistance of the U. S. Coast Guard Pacific Strike Team, all oil spill contractors in the State of Alaska, local oil spill cooperatives such as CIRO and Alaska Clean Seas, the Association of Petroleum Industry Co-op Managers, the International Bird Rescue Research Organization, and others. Id. Furthermore, as Alyeska pointed out, the effectiveness of a response to such a large spill would be largely dependent on the timely and effective application of dispersants. OSCP at 3-54 through 3-56.⁵

Alyeska explained that, even under ideal conditions, all available means of response would not be able to recover most of the oil before it impacted the shorelines. OSCP at 3-56. Alyeska went on to state that a "long-term cleanup of the spill on the various beaches of Prince William Sound" would, of course, be necessary. Id. In sum, the OSCP clearly described that a hypothetical 200,000-barrel spill, even under

⁵ The on-scene coordinator for the EXXON VALDEZ spill withheld approval for the full scale application of dispersants until more than 48 hours after the spill, apparently in response to objections by State officials.

ideal cleanup conditions, would result in significant environmental impact.

Moreover, the State and other regulators were well aware of the limitations of Alyeska's OSCP and understood that a major spill in Prince William Sound would have significant adverse consequences in the marine ecosystem. Although the evidence supporting this conclusion is too voluminous to cite here, one example should suffice to rebut accusation that Alyeska misled the State into believing that it could contain 200,000 barrels within 72 hours and prevent the oil from impacting the beaches.

As part of the Alaska Oil Spill Commission's investigation of the EXXON VALDEZ oil spill, an investigator for the Commission, Allan Adasiak, interviewed Paul O'Brien. From July of 1982 until February of 1989, Mr. O'Brien was the manager in charge of ADEC's oil pollution control program. In that capacity, he was responsible for the review of all contingency plans submitted to the State. Thus, Mr. O'Brien had oversight responsibility for the State's review of Alyeska's 1987 OSCP.

Mr. O'Brien clearly understood that Alyeska's OSCP did not contemplate the capability to eliminate environmental damage from a major oil spill in Prince William Sound as he candidly stated in response to Mr. Adasiak's questions:

. . . Even in hindsight, I think it is important for people to realize that we never required nor did we ever intend to require that Alyeska have the on-site capability to deal with a catastrophic event. That is an EXXON VALDEZ type of spill. We expected them to have the ability to deal with the more common, smaller operational spills: the 10 barrel, the 100 barrel spills, not the tens of hundreds or tens of thousands of barrels.

. . .

I would not require, even now, Alyeska to have that on-site -- and I keep stressing on-site -- hardware capability to deal with a 10 million gallon spill. No, I would not. Not unless it was a decision, a policy decision made above my level. That should be the place. I would say it is a valid policy call to make as to whether you have an Alyeska with that kind of capability, but you don't, under DEC's current regulations at least, there is no requirement that they have on-site capability to deal with the catastrophic event. So, in retrospect, no, I would still not require that unless it was a policy call made at much higher levels.

Quite clearly, then, the State of Alaska understood, and any reader of Alyeska's OSCP should have understood, that Alyeska could not prevent environmental harm from occurring in the event of a major spill in Prince William Sound.

2. ALYESKA'S RESPONSE AND ITS EQUIPMENT
AVAILABLE FOR RESPONSE WERE IN ACCORDANCE
WITH THE OSCP.

The OSCP lists various items of oil spill response equipment that Alyeska would have available in the event of an oil spill. OSCP at 3-57. All of this equipment was available at the time of the EXXON VALDEZ grounding. See, e.g., Testimony of Theo Polasek before the Alaska Oil Spill Commission, Vol. II at 30-46 (August 31, 1989). As Mr. Polasek testified, "We had our equipment deployed, we had our boom out, and we had done what we promised to do." Id. at 41. The contention that Alyeska did not have the required equipment available at the time of the spill is incorrect.

Congressman Miller has also suggested, however, that Alyeska did not deliver its equipment to the scene of the spill as promptly as it suggested it might in one hypothetical scenario. Again, we must respectfully disagree with Congressman Miller.

As noted above, the difference between the actual event and the hypothetical scenario was, literally, the difference between night and day. It is not surprising that the actual delivery of equipment took longer under adverse conditions of winter, cold and darkness than under ideal conditions. Alyeska's performance must be judged in light of the actual circumstances, not against a hypothetical ideal.

Furthermore, in the hypothetical scenario it was [redacted] that there was no risk of the loss of the tanker or [redacted] cargo and that containment would be the first priority. OSCP at 3-54. In the instant case, however, the Coast Guard and others at the scene quickly determined that the EXXON VALDEZ was potentially unstable and its remaining cargo of some 43 million gallons of oil was in jeopardy of spilling. Thus, the first priority became lightering, not containment. See, e.g., Alaska Oil Spill Commission, Vol. II at 34-35 (August 31, 1989); NTSB Report at 145.

In sum, the time required for Alyeska's response equipment to arrive on the scene was reasonable under the circumstances and consistent with the OSCP.

Furthermore, had Alyeska been able to respond more quickly, as Congressman Miller contends it should have, the consequences of the spill would not have been significantly

ameliorated. As the NTSB concluded, "The 10-hour loss [of time] had no material impact on the cleanup because of the size of the spill." NTSB Report at 145.

3. ALYESKA NEVER DECIDED NOT TO RESPOND TO
A MAJOR OIL SPILL IN PRINCE WILLIAM SOUND.

Congressman Miller alleges that Alyeska's owners had secretly decided in advance of the EXXON VALDEZ grounding that Alyeska would not respond to spills in Prince William Sound. This contention is most readily refuted by the fact that Alyeska did respond to the EXXON VALDEZ grounding, which of course took place in Prince William Sound. To the extent, the ARCO Marine telex attached to Congressman Miller's letter, may be read as reporting that Alyeska would not respond to spills in Prince William Sound, it is simply wrong. No such decision was ever made.

During 1988, Alyeska was re-evaluating its oil spill response capabilities in an effort to determine how best to respond -- both immediately and long-term -- to various possible types of oil spills, including a significant spill in Prince William Sound. There were many who thought then, as many think now, that the most effective response to a major spill in open water is the application of dispersants. Another factor considered in these discussions was that it was appropriate to expect the shipper, with the assistance of various

third parties and other oil spill response organizations, to take principal responsibility for the long-term response to a major oil spill. Indeed, both State and federal statutes imposed on the shipper the duty to clean up a spill. Moreover, the responsible State and federal regulators expected the shipper to promptly take responsibility for the long-term cleanup of a major spill, just as they had observed in Alyeska's 1988 "desk-top" drill in which it practiced the transfer of cleanup responsibility to the "spiller."⁶ It is against this setting that the material attached to Congressman Miller's letter should be read.

* * *

In sum, Alyeska's OSCP described, and the State and other regulators were plainly aware that, in the event of a major oil spill in Prince William Sound, substantial quantities of oil would impact the shoreline and environmental damage would occur. It was well understood that the cleanup of such a major incident would take an extended period of time and would require the assistance of numerous third parties and various

⁶ The EXXON VALDEZ Oil Spill -- A Report to the President from Samuel A. Skinner, Secretary, Department of Transportation, and William K. Reilly, Administrator, Environmental Protection Agency, at 13 (May 1989); Testimony of USCG Commander Steven McCall before the NTSB at 1357 (May 20, 1989).

response organizations. It was also understood that the shipper, and not Alyeska, would assume responsibility for the long-term cleanup of the spill.

Alyeska responded to the EXXON VALDEZ oil spill as rapidly and effectively as the situation permitted, and in accordance with the OSCP. Lightering to avoid the possible breakup of the vessel and an even larger spill was the first priority, and containment the second. Within 48 hours the orderly transition of responsibility from Alyeska to Exxon began, and Exxon continued the cleanup efforts initiated by Alyeska.

DATED: April 18, 1991.

BURR, PEASE & KURTZ

MUNGER, TOLLES & OLSON

Ronald L. Olson

Allen M. Katz

Gregory P. Stone

By


Charles P. Flynn

Attorneys for Defendant ALYESKA
PIPELINE SERVICE COMPANY

BURR, PEASE
& KURTZ
A PROFESSIONAL CORPORATION
810 N STREET
ANCHORAGE, AK 99501
'907) 276-6100

306 SCENARIOS

Valdez Arm Tanker Casualty: Spill Amount 4,000 Barrels

Assumptions

For the purposes of this scenario, the following assumptions have been made. The sea state and weather conditions are in and remain in a state conducive to oil containment and cleanup. Sea state is less than 5 feet, currents are less than 1.6 knots, waves are less than 2 feet, and visibility is equal to or greater than 2 miles.

Conditions

The simulated weather is sunny to overcast with some light rain, winds are from the southwest at eight knots, high tide is approximately 6 hours after the incident.

An outbound tanker experiences a steering casualty just prior to commencing a turn in the Valdez Narrows, northwest of Entrance Point. This simulated incident occurs on June 22, 1986, at 6:00 a.m. Within 15 minutes, the tanker goes aground on Potato Point. One wing tank is damaged and the loss of oil is approximately 2,000 barrels per hour for the first hour and 500 barrels for the next four hours. The tanker is able to transfer oil to other tanks to prevent further significant losses of oil. The tanker will move off of the shoal under its own power with tug assist with permission of the U.S. Coast Guard. It will then be moved back to the Valdez Marine Terminal where it will be berthed for offloading and inspection. Figure 306-3 is an oil spill trajectory for this scenario.

The purpose of this scenario is to illustrate how we would respond to this spill of approximately 4,000 barrels in Valdez Arm. Actually, the most likely spill volume for vessels underway in trade with the Valdez Marine Terminal during the expected 30-year operating lifetime of the Marine Terminal is 1,000 barrels. No attempt will be made to describe the circumstances responsible for the mechanical failure or the additional considerations of tanker off-loading, inspection or release from the berth for sailing to the Lower 48.

The majority of the oil impact will be at Potato Point. It will impact an area about 6,000 yards either side of the point of impact of the shoreline and will be approximately 600 yards wide. Within 24 hours, there is a slick in Valdez Arm approximately $\frac{1}{4}$ mile wide and 2.4 miles long.

Immediate Response Action

The ship and shoreline, which is heavily oiled, will be boomed by 0900 hours and skimming operations will begin. The two mooring launches each with a Vikoma seapack and two 21-foot workboats will boom the ship and shoreline area. A reconnaissance helicopter is on site, originally our security helicopter which is relieved by an ERA helicopter with a crew out of Anchorage. A tug is on standby to assist the ship, if necessary. At the same time (0600-0900 hrs.), one 26-foot workboat and one 21-foot workboat are in the process of booming Shoup Bay.

By approximately 1100 hours, the barge has been moved into close proximity to the spill site by one of the tugs. The barge has on it various oil spill equipment including the sea skimmer, containment boom, sorbent boom, pumps, various hoses and various containers, such as barrels, bags or bladders. The sea skimmer is placed into a heavily oiled contained area next to the Vikoma boom and commences skimming oil and pumping it into the barge. The Class V and Class VII are in position to skim oil in the Vikoma seapack area, having been towed to the area by one of the tugs. One 19-foot workboat and 2 Jon boats are working in the proximity of the barge to begin washing down the beaches and picking up appropriate oil debris on the beach. The shoreline cleanup is initiated by using small pumps with approximately 50 to 100 pounds per square inch (PSI) pressure to wash down the gravelly beach and to skim the oil from the water surface. A Komara skimmer, working off of a 26-foot workboat, is picking up the oil as it is washed back into the water. At 1100 hours, the oil stops flowing from the tanker as the ship has transferred oil to prevent further loss of significant amounts of oil. By 1200 hours, Shoup Bay and Sawmill Bay have been boomed.

The appropriate government agencies will be notified immediately of the spill. It is presumed the regional response team will be organized. Alyeska Pipeline Service Company will make a request to apply dispersants to the spill immediately. Request for burring oil and debris along the contaminated areas of the affected shoreline will be made very soon in the response effort to the Alaska Department of Environmental Conservation. See Sections 404, 405 and 901 in the General Provisions for additional information on government relations.

Private commercial vessels from the Valdez small boat harbor would be employed to respond to the oil spill with booming and logistical support. Aircraft from our eleven on-call flight services contractors would be immediately employed to assist in the response with overflights, communication or logistical support. Oil spill cooperatives, such as (CIRO), Look Inlet Response Organization, or Alaska Clean Seas, and private oil spill response companies would be alerted to provide a backup to our initial response. The dispersants contractors would also be alerted to prepare for movement to Valdez. As an additional contingency, we would request the U.S. Coast Guard Pacific Strike Team to prepare for assisting in the spill response.

If oil was moving differently than the predicted impact area, exclusion booming would be extended to Gold Creek or Mineral Creek. Any change to the scenario weather and/or movement of oil would necessitate exclusion booming to other possible sensitive impact areas in Port Valdez.

By approximately 1800 hours, the high tide, along with an assist from a tug, allows the ship to move off of the shoal. The ship, with the assistance of the tug, returns to the Valdez Marine Terminal and is berthed for off-loading and inspection. The ship is followed back to the berth by the Class VII with 50' of boom, assisted by the one 26-foot workboat and one 21-foot workboat to skim any additional loss of oil. At this time, a fresh crew of contractor personnel are on-scene to replace the majority of Alyeska personnel, along with a relief crew of supervisors to continue the cleanup effort throughout the night.

Preparations are being made for Day 2 operation to be continued with rotating contractor personnel, both laborers and supervisors, from oil spill cooperatives and contractors available in the Anchorage and the West Coast area. Additionally, more boats are brought into the cleanup activity to assist logistically by providing support to run supplies and oil debris to and from the Marine Terminal. Efforts continue primarily on the west shoreline to wash down the gravelly beach and to skim the oil from the water. On Day 2, dispersant approval is given to apply dispersant to the 1/4 mile wide and 2.4 mile long slick in Valdez Arm.

Dispersants

Should a large spill occur in a likely dispersant application area, Alyeska would immediately notify our aerial dispersant applicator contractor, Biegert Aviation, Inc., in Chandler, Arizona to move to Valdez and be prepared to apply dispersants. Concurrently, Alyeska would request the on-scene coordinator to approve the use of dispersants. We would also notify Conair Aviation, Ltd., in Abbotsford, British Columbia to determine its availability and earliest arrival time in Valdez. Preference would be given to the contractor who could arrive in Valdez first. If necessary, we would also contact Air Response, Inc., in Mesa, Arizona. Another alternative is the Biegert Aviation ADDS pack, which could be mounted on a Hercules aircraft and used for dispersant spraying. Again, preference is given to that contractor which could respond in the shortest amount of time. If the Valdez Airport was not available, the base of operations would be Anchorage, Alaska. Various other application equipment could be used depending on the spill size and location; see Figure 306-1.

DISPERSANT APPLICATION EQUIPMENT

EQUIPMENT TYPE	SOURCE/LOCATION	REMARKS
Aircraft - Douglas DC-4	Biegert Aviation, Inc., Chandler, Arizona	9-17 hours response time
Aircraft - Douglas DC-6B	Conair Aviation, Ltd., Abbotsford, B.C., Canada	Must go through U.S. Customs
Vessel - 34-foot workboat	CIRO Raider Cook Inlet Response Organization (CIRO), Kenai, Alaska	Hercable, 50' swath
Helo - buckets	Simplex, CIRO, Kenai, Alaska	40' swath, 300 gal. payload
Large boat spraying package	CIRO Kenai, Alaska	40' swath Need large (125-185') vessel

DISPERSANT APPLICATION EQUIPMENT

Figure 306-1

Along with those notifications, a request would be made to Cook Inlet Response Organization and the Alaska Clean Seas Cooperative to move their dispersants to Anchorage or Valdez. We would also alert the following cooperatives, and would request their dispersants, if appropriate: Clean Bay, San Francisco, California; Clean Coastal Waters, Long Beach, California; and Clean Seas, Santa Barbara, California. Depending on the magnitude of the spill, we might also notify Exxon Chemical Americas in Houston, Texas, which produces Corexit 9527, for additional material. See Figure 306-2 for a summary of highway transport times.

DISPERSANT AVAILABILITY AND TRANSPORT BY HIGHWAY			
Location	Amount	Valdez	Anchorage
Valdez	2,475 gal.	0	10 hrs.
Anchorage	8,800 gal.	10 hrs.	0
Kenai	8,840 gal.	15 hrs.	4 hrs.
Deadhorse	550 gal.	28 hrs.	24 hrs.
San Francisco, CA	5,000 gal.	5 days	6 days
Santa Barbara, CA	14,290 gal.	5 days	6 days
Long Beach, CA	4,000 gal.	6 days	7 days
Houston, TX	50,000 gal./day	6 days	7 days

DISPERSANT AVAILABILITY AND
TRANSPORT BY HIGHWAY

Figure 306-2

Assuming that the on-scene coordinator approves dispersant application, Alyeska could have a plane in Valdez prepared to spray dispersants in as little as nine hours. Average response time is estimated to be 17 hours. The variance in time depends upon the contractors' equipment availability at the time of notification. There are 45 drums of Corexit 9527 available in Valdez. It would require approximately 10 hours to transport 160 drums of Corexit 9527 from Anchorage to Valdez, and approximately 15 hours to transport another 160 drums from Kenai to Valdez. We will make the assumption that approximately 1,000 barrels of oil in the Valdez scenario are in position for dispersant spraying. It has spread to an equilibrium thickness of approximately one-tenth of a millimeter (4×10^{-4} inches) and covers approximately 386 acres. This slick would be approximately 2.4 miles long by $\frac{1}{4}$ mile wide. At a dispersant-to-oil ratio (DOR) of 1 to 20 (1:20), 386 acres would require approximately 38 barrels or 2,090 gallons of dispersant. This dispersal could be accomplished by a DC-6 with a swath width of approximately 175 feet, in 8 to 10 passes. Assuming a payload of 3,000 gallons of dispersants, it would require one sortie, with an elapsed time of approximately $1\frac{1}{2}$ hours if based in Valdez, and 2 hours if based in Anchorage. The payload is the amount of dispersant an aircraft can carry depending upon weather, fuel load and the distance the plane must fly to apply the dispersant. The dispersant-to-oil ratio is determined by the thickness of the oil on the water; and, although oil spreads to varied thicknesses, one would use the thickness that is most representative of the oil in the dispersant area.

COMMUNICATION

Communication between Alyeska boats and aircraft will be accomplished by using VHF radios. Communication from the boats to the Valdez Emergency Center will be relayed through the U.S. Coast Guard in Valdez via the Potato Point repeater and telephone. Alyeska will continue to discuss with the USCG the possibility of the Valdez Marine Terminal tying directly into the Coast Guard radio repeater system during emergencies. This will eliminate the need for telephone relay.

Backup communication can be established using an aircraft on station to relay messages from the spill site to the Valdez Marine Terminal using the VHF radios.

A third method is to use a ship positioned near the spill to relay messages from the VHF radios via the satellite ship-to-shore telephone system.

Continuing Cleanup Activity

The beaches of the impacted areas are primarily rocky walls and gravelly-type beaches. These can probably be most efficiently cleaned by low to high pressure washing while containing the oil and recovering it with skimmers in the water. We anticipate approximately 10 percent of the lost oil will be consumed by weathering and evaporation. It is estimated we will conservatively collect approximately 1,000 barrels of oil in the skimmers, which will be returned to the Terminal via the recovered oil tanks. Approximately 1,000 barrels will be dispersed. Approximately 1,600 barrels will be deposited on the beaches with approximately 1,500 barrels of that recovered by the cleanup methods of washing, adsorbent use and skimming operations. Approximately 100 barrels of oil would not be recovered and will be naturally dispersed.

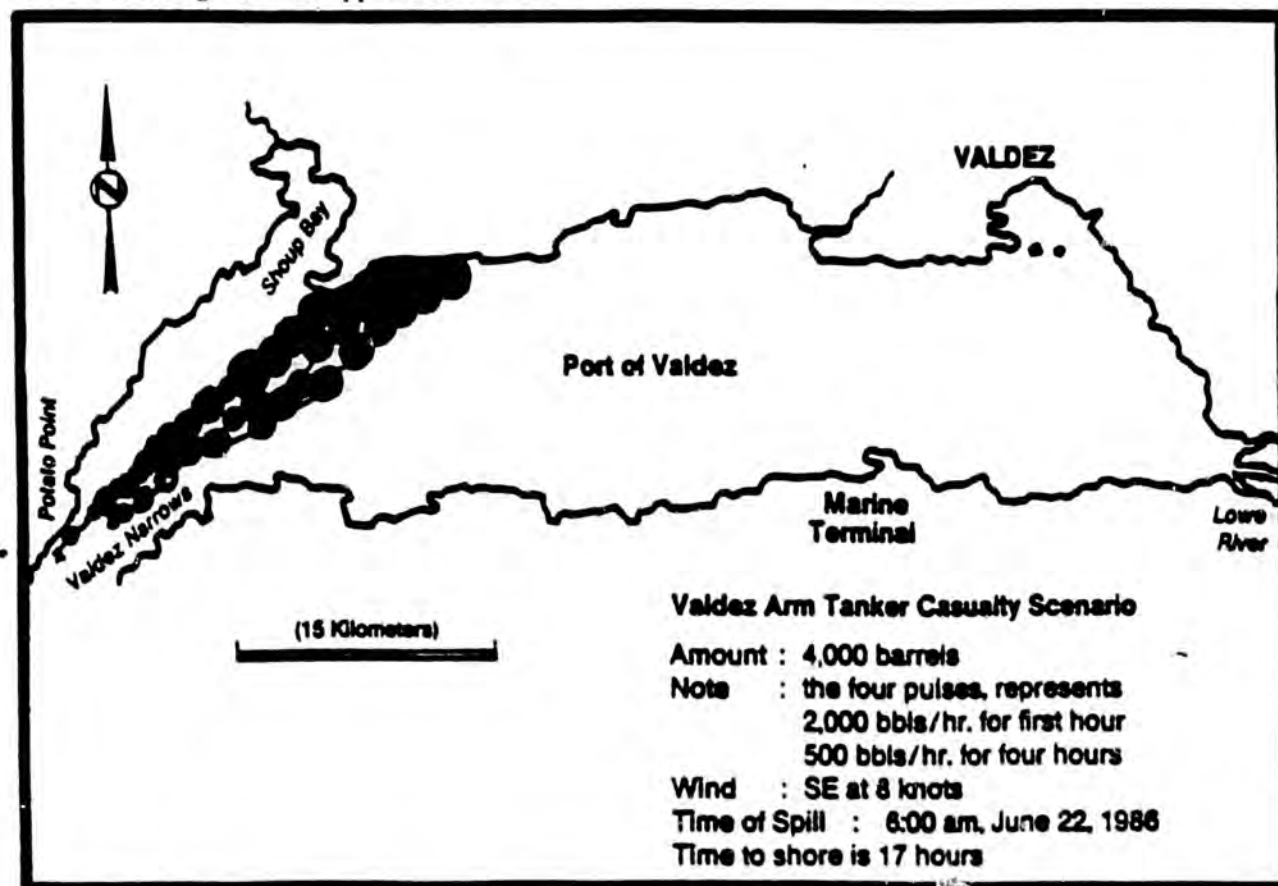
A bird cleaning area would be immediately set up in case there are any significant number of oiled birds affected by the spill. The IBRRC (International Bird Research Rescue Center) would be activated early in the spill to ensure that a facility is available for any oiled birds.

Conclusion

It is anticipated that the cleanup will continue for approximately 2 months. This is primarily to monitor the effects of an extreme high and low tide over a couple of tide changes.

Portions of the cleanup responsibility, for instance, the beach cleanup and/or protection of Sawmill and Shoup Bay, will be given to specific oil spill contractors, so as to release our own personnel back to the operations of the Terminal. Alyeska will supervise the entire cleanup operation. In addition to the above-mentioned resources, members of the Association of Petroleum Industry Co-op managers, a group of West Coast oil spill cooperatives, would be available to provide continuing support in specialized oil spill equipment or supervisory personnel.

The scenario does not address any other aspects of tanker casualties such as fire. It also does not address response during weather conditions which make mechanical recovery impossible. It is presumed a dispersant decision is made soon enough to make application feasible.



VALDEZ ARM OIL SPILL SCENARIO TRAJECTORY

Figure 308-3

Prince William Sound Tanker Casualty: Spill Amount 200,000 Barrels

Alaska Pipeline Service Company has been requested to respond to a scenario of a 200,000-barrel spill in Prince William Sound. APSC believes it is highly unlikely a spill of this magnitude would occur. Catastrophic events of this nature are further reduced because the majority of tankers calling on Port Valdez are of American registry and all of these are piloted by licensed masters or pilots. Nonetheless, should such an incident occur, the following is our overview of the initial response to that scenario. Attached is an oil spill trajectory of the oil movement. A spill of this magnitude would require considerable resources and logistical operations, the minute details of which are not included in this scenario because the details are not useful in long-term response planning. This scenario will not address the circumstances responsible for the loss of cargo or of the fate of the tanker. Once a tanker is immobilized, the U.S. Coast Guard will determine future movement of the vessel.

Assumptions

The following assumptions are made in presenting the response to the scenario: The sea state and weather conditions are in and remain in a state conducive to oil containment and cleanup. For example, winds less than 15 knots, sea state less than 5 feet, currents less than 1.6 knots, waves less than 2 feet, visibility equal to or greater than 2 miles.

The spill incident occurs through some failure of the tanker crude tanks and does not discuss other disaster possibilities such as collision or fire.

Conditions

In addition to the above assumptions on sea state, the weather is assumed to be conducive to oil spill cleanup and remains in this mode for the response actions. For this particular scenario and trajectory input, the date of June 22 at 6:00 a.m. was chosen for the spill incident with winds from the east at 5 knots. The location is 60° 30' 5" North, and 147° 2' 0" West longitude. The tanker has a cargo amount of 550,000 barrels. The trajectories show two possibilities—one is an instantaneous spill of 200,000 barrels and a second is a 10,000 barrel per hour spill that continues for 20 hours. Figure 306-6 shows the trajectory oil spill movement. It is approximately 30 miles to the site from the Valdez Terminal; an average speed of 12 knots is used to determine the travel time to the area for the Crowley tugs. An approximate speed of 8 knots is used for towed equipment and 20 knots for the workboats without tows. Figure 306-4 is a summary of equipment capacity and response times. Figure 306-5 is a table of equipment in the first response effort.

Immediate Response Actions

On notification of the pollution incident, the following response actions would be simultaneously initiated. The closest empty or light loaded tanker will be directed to the spill site with an estimated maximum arrival time of 12 hours. The initial response would include moving containment booms, skimmer equipment, support equipment and personnel to the site. Additional backup personnel and equipment from the pump stations along the line would be mobilized. Private commercial vessels from the Valdez small boat harbor would be employed to assist in booming and logistical support. Aircraft in Valdez would be employed to assist in the response with overflights, communication or logistics. This would immediately be backed up with air support from our eleven on-call flight services contractors. APSC would request U.S. Coast Guard Pacific Strike Team assistance through the Valdez U.S. Coast Guard office. In addition, all oil spill contractors in the state of Alaska would be asked to mobilize and move to the site as soon as possible to respond to the spill. Also, a request to the local cooperatives, CIRO and Alaska Clean Seas, would be made for any additional equipment that they could supply to this area. See Figure 607-1 for a summary of air transport response times and Figure 607-2 for vessel response times. A request would be made to the Association of Petroleum Industry Co-op Managers to respond with available equipment and personnel that can be located in the West Coast area. The International Bird Rescue Research Organization would be immediately requested to mobilize and prepare for movement to Prince William Sound. A request would be made immediately to the OSC to apply dispersants to the oil slicks. Biegart Aviation and other dispersant contractors would be requested to mobilize in Valdez and be prepared to apply dispersants. A request to open-burn slicks on the ocean and debris and oil on the shoreline would also be made immediately to the OSC.

to open-burn slicks on the ocean and debris and oil on the shoreline would also be made immediately to the OSC.

It is expected the agencies response actions would include the following: The regional response team would be immediately mobilized. The decision process on dispersant application would be begun immediately. There would be a joint meeting between the U.S. Coast Guard, EPA, Alyeska, Alaska Department of Environmental Conservation, U.S. Fish and Wildlife Service and possibly other government entities, to keep all affected parties apprised of the situation and, hopefully, to facilitate the decision making on the response alternatives.

As a result of the initial coordination meeting, it was decided certain response priorities would have to be made as this would be a long-term impact and cleanup situation.

The trajectories indicate that oil will threaten Eleanor Island, Naked Island, Lone Island, Perry Island and the Pigot Bay area, Culross Island and the Main Bay area shorelines. Although it is unlikely oil will reach Main Bay, as a precaution the fish hatchery will be boomed immediately. Some of the exclusion area numbers 79 through 92 may be impacted by the oil movement. The first areas of consideration would likely be exclusion areas 81, 82 and 83.

Second considerations would include areas 79, 80, 89, 90, 91 & 92, and third consideration would likely be sites 84 through 88. These sites are considered sensitive, primarily because they are salmon spawning areas. Additional sites or other areas may have a higher priority, depending on the oil movement and other additional information that may become available. The oil spill trajectory indicates the above priorities are likely to be the most significant. This information is listed in Section 300. One of the oil spill response contractors would be directed to Whittier with the sole task of providing exclusion booming in these areas with the above-listed priority, unless other priorities were agreed to among the agencies and Alyeska at the coordination meeting.

PRINCE WILLIAM SOUND SCENARIO RESPONSE TIMES

Vessel	Storage Cap. (bbls)	Recovery Rate (bbls/hr)	Vessel Speed/Prep Time (knts) (hrs)		Travel to Spill with Prep Time (hrs)
Tugs	N/A	N/A	12	0	2.5
2 Mooring Launches	N/A	N/A	8	0.5	3
Towing:					
Marco Class V	40	428			
Marco Class VII	80	428			
2 Vikoma Seapacks	w/ 1500' boom each				
2-21' Monarks	N/A	N/A	20	0	1.5
1-26' Monark	N/A	N/A	20	0	1.5
1-26' Monark	N/A	N/A	8	0.25	2.75
Towing:					
1 Vikoma Seapack	w/ 1500' boom				
Tug & Contingency					
Barge with/	4700	N/A	8	2.5	5.0
Sea Skimmer	N/A	536			
Equipment	1976 (bladders)				
Towing:					
2 Vikomas	w/ 1500' boom each				

PRINCE WILLIAM SOUND SCENARIO
RESPONSE TIMES

Figure 306-4

Distribution of Oil

It is estimated that approximately 50% of the oil will be recovered at sea, either directly after the spill or at a later time by being washed off of the rocks, contained and skimmed off of the water. Approximately 15 percent of the spill will evaporate during the time it is moving toward the shoreline and prior to removal. Of the oil that remains approximately 15 percent of the oil will be recovered from the shore, primarily by washing the oil off of the rocks and recovering it on the water. Fifteen percent of the oil will naturally disperse and approximately 5 percent will remain in the environment.

Environmental Considerations

Along with the salmon spawning areas and the sea bird colony areas there are some purse seine and drift gill net areas around Esther Island in the Port Wells area. There is also some ground fish activity on the west side of Naked Island, Eleanor Island, Ingot Island and the Port Wells area.

Section 600 of the Prince William Sound Contingency Plan gives us the Sea Bird colony areas that would likely be impacted by a spill of this nature. The Naked Island group, Eleanor Island, Bald Head Criss Island, Dutch group, Perry Island, Foci Island, Egg Rock, and Esther Rock are likely impact areas of the sea bird colonies. There is a possibility that Smith Island and Little Smith Island sea bird colonies may also be impacted with a slight wind change. The most likely effective protection of the sea bird colonies is to prevent the oil from impacting the shore lines at all. This can be done of course only by dispersing the oil at sea, or allowing an open burn of the oil at sea. Since the timely application of dispersants is so important it is necessary that the decision process for allowing dispersant application be approved prior to an incident such as this. It will allow the oil industry to stockpile the necessary dispersants and application means so that resources such as the sea bird colonies can be protected in the most reasonable manner.

This has been a brief initial response to the spill scenario of a 200,000 barrel catastrophic event. There would, of course, be a long term cleanup of the spill on the various beaches of Prince William Sound. In reviewing the aspects of this size spill it becomes very apparent how important it is to have dispersants approved so that they can be used very effectively to prevent the continuing input of oil into the small bays and shorelines in Prince William Sound. Burning also has to be looked at as a very good alternative to the cleanup in Prince William Sound on the various inlets and bays in which oil may accumulate.

PRINCE WILLIAM SOUND SCENARIO INITIAL EQUIPMENT

Initial Equipment to Prince William Sound Oil Spill:

2 Terminal Tugs and Two Mooring Launches

Contingency Barge B&R 126-1 with the following:

- Vikoma seaskimmer and power unit
- Marco power block
- Life raft
- Inflated fenders
- 2 Stop systems (Tanker Lightering Systems)
- 3,000 feet containment boom
- 1,000 feet sorbent boom
- 20 bales sorbent pads
- 1 50,000 gallon bladder
- 1 20,000 gallon bladder
- 1 10,000 gallon bladder
- 1 3,000 gallon bladder
- 2 3" diesel pumps (Komara skimmer pumps) & 100 feet 3" hose

2 21' Monark workboats

2 26' Monark workboats

Towed: { Marco Class V skimmer
Marco Class VII skimmer
5 Vikoma seapacks (7500' of boom)

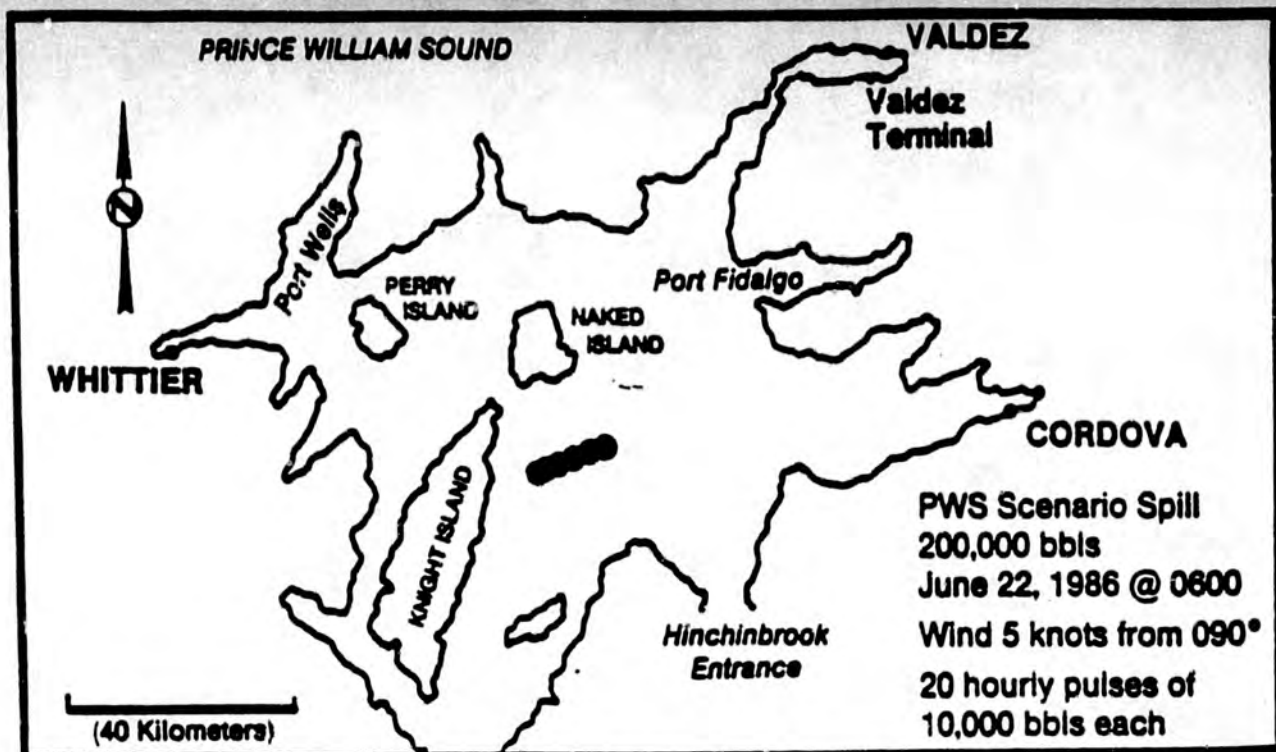
Initial Manpower: 15 minimum and tug crews

Supplies:

- Radios
- Fuel and oil
- Anchors and line
- Life lines
- Life jackets
- Rubber gloves
- Rain suits
- Rubber boots
- Plastic bags
- Cleanup tools
- Batteries

PRINCE WILLIAM SOUND SCENARIO
INITIAL EQUIPMENT

Figure 306-6



PRINCE WILLIAM SOUND OIL SPILL SCENARIO

Figure 306-6

EXHIBIT B

Page 5 of 5 Pages

ACE 417693

FILED

APR 24 1991

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

_____, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EXXON CORPORATION and EXXON
SHIPPING COMPANY,

Defendants.

NO. A90-015 CR

ORDER

(Plea Agreement Rejected)

The court has heretofore taken guilty pleas from the defendants as to certain of the charges pursuant to a plea agreements. The court has now completed its evaluation of that plea agreement and has determined that the same is unacceptable. The plea agreement is rejected for the reasons stated in open court on April 24, 1991.

Under the plea agreement and Rule 11, Federal Rules of Criminal Procedure, defendants are entitled to withdraw their plea of guilty. Counsel for defendants have requested time within which

ORDER (Plea Agreement Rejected)

1 to make that decision. On or before May 24, 1991, counsel for
2 defendants shall orally advise the court of their decision; at that
3 time the court will schedule further proceedings and at the request
4 of any party will schedule a status conference. Defendants shall
5 confirm their oral advice to the court by a formal motion to
6 withdraw pleas or other advice to the court with respect to the
7 status of those pleas.

8 For purposes of the Speedy Trial Act, the court notes that
9 excludable delay has occurred between March 22, 1991, and today,
10 April 24, 1991, during which time the court had under consideration
11 the proposed plea agreement. See 18 U.S.C. § 3161(h)(1)(i). Addi-
12 tional excludable delay will accrue between April 24, 1991, and
13 May 24, 1991, or such sooner date as both defendants shall have
14 filed their motion to withdraw pleas or such other notice with
15 respect to disposition of this case as the defendants may decide
16 upon. This delay has been requested by each of the defendants, and
17 the court finds that such delay is in the interest of justice and
18 is not contrary to the public interest in speedy trials for the
19 reason that this case involves an event of unusually large propor-
20 tions and therefore potentially involves extraordinarily large fines
21 such that more than a normal amount of time for reevaluation of
22 defendants' position is justifiable.

23 DATED at Anchorage, Alaska, this 24 day of April,
24 1991.

25 
United States District Judge

26 cc; M. Davis, R. Bundy, J. Clough, US Marshal, Pretrial Services

ORDER (Plea Agreement Rejected)